Equality For All

REPORT OF THE PARLIAMENTARY
COMMITTEE ON EQUALITY RIGHTS

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CHAPTER 4

Sexual Orientation

"Citizens whose sexual orientation is gay or lesbian ought not to be excluded from the protections afforded to all other citizens through either neglect or the failure of governments to develop the legislation that would provide that protection.

To leave one group of citizens beyond the pale is a dangerous precedent. In a democracy, it is equally dangerous to leave the decision about inclusion or exclusion of any particular group from human rights safeguards to the will of the public at any moment in history."

—Working Unit on Social Issues and Justice, Divison of Mission, United Church of Canada, in a brief submitted to the Committee

Introduction

Section 15 of the *Charter* assures legal equality without discrimination. Some of the characteristics that have been regarded traditionally as objectionable grounds of discrimination are listed in the section; they are race, national or ethnic origin, colour, religion, sex, age, and mental or physical disability. But this catalogue of prohibited grounds of discrimination does not purport to be exhaustive, as we observed at the beginning of this report. Other similar characteristics — that is, those over which an individual has little or no immediate control and that are commonly used to make prejudiced judgments about an individual's particular qualities or capabilities — might also be improper grounds of discrimination. We have weighed the evidence we received with a view to deciding whether homosexuality is such a characteristic in contemporary Canadian society. If it is, the *Charter* can be properly taken to protect against discrimination on the basis of sexual orientation.

Many briefs and submissions to the Committee used a variety of terms to describe the same-sex relationships of men and women. To avoid confusion, we use the term 'homosexuals' to refer to both male and female persons involved in such relationships.

We recognize that many people react to questions involving homosexuality on a visceral level, reflecting longstanding attitudes and values in our society and, indeed, in our laws. We acknowledge this to be a controversial area. We are dealing here, however, with a question of public policy that must be reasoned through and not immediately accepted or rejected on the basis of one's personal response to the situation. Our report reflects what we have been told about present-day Canada. It also reflects the fact that section 15 exists because minorities within our society need a measure of legal protection to put them on an equal footing with others. That the state affords legal protection does not mean endorsement of a particular religion, political belief or personality trait; it means simply that in a free and democratic society, discrimination under our laws on the basis of those differences will not be tolerated.

We have paid particular attention to sexual orientation as a ground of discrimination against which protection might be offered because the subject matter of Bill C-225, sponsored by Svend Robinson, MP (New Democrat), was referred to us for study and consideration. The Bill, which received first reading on March 4, 1985, would amend the *Canadian Human Rights Act* to add sexual orientation as a prohibited ground of discrimination and to treat it on the same basis as any other ground of discrimination for the purposes of the Act.

This is not the first initiative of its kind. When Parliament was considering the *Canadian Human Rights Act* in 1977, an unsuccessful attempt was made to add sexual orientation as a proscribed ground of discrimination. Two private member's bills, Bill C-242 in 1980-81, sponsored by Pat Carney, MP (Progressive Conservative), and Bill C-676 in 1983, sponsored by Svend Robinson, MP, dealing with the same matter as the current Bill C-225, were talked out at the second reading stage.

Other parliamentary committees, such as the 1976 Special Joint Committee on Immigration Policy and the 1980-81 Special Joint Committee on the Constitution, have considered some aspects of the matter, but none heard as many expressions of opinion as we did in the course of our proceedings. Many submissions were directed exclusively to the subject, and many major national and regional groups and coalitions covered it in their submissions as well. We were shocked by a number of the experiences of unfair treatment related to us by homosexuals in different parts of the country. We heard about the harassment of and violence committed against homosexuals. We were told in graphic detail about physical abuse and psychological oppression suffered by homosexuals. In several cities, private social clubs serving a homosexual clientele were damaged and the members harassed. Hate propaganda directed at homosexuals has been found in some parts of Canada. We were told of the severe employment and housing problems suffered by homosexuals. Indeed, several witnesses appearing before us expressed some fear that their appearance before the Committee would jeopardize their jobs. At the same time, it was evident that there is resistance in some quarters to giving homosexuals the same rights as other minorities that traditionally have been protected. This resistance was sometimes explained in moral or religious terms.

Two Views

Opinions about including sexual orientation as a prohibited ground of discrimination tend to divide into two diametrically opposed camps. Those who favour treating sexual orientation as a prohibited ground of discrimination argue that sexual orientation is a personal matter and that, so long as it does not result in harm to others, it should not affect one's access to facilities, services, accommodation or employment.

They maintained that access should be based on capacities or abilities, not one's sexual preference. To continue to allow discrimination on the basis of sexual orientation, they argued, is directly contrary to the values expressed in anti-discrimination legislation and in the *Charter*.

Those who oppose treating sexual orientation as a prohibited ground of discrimination base their position on the moral values they believe are held by many Canadians. They also argue that the presence of homosexuals in many settings has a disruptive effect on those around them. Some suggest that homosexuals attempt to foist their views, and sometimes their practices, on others.

We gave long, careful and serious consideration to all these views. In doing so, we also looked for guidance to the actions taken in Canada and in other jurisdictions to protect homosexuals from discrimination.

Existing Provisions in Canada

The only jurisdiction in Canada where sexual orientation is a prohibited ground of discrimination is Québec. That province adopted its *Charter of Human Rights and Freedoms* in 1975. At that time, a member of the National Assembly tried unsuccessfully to add sexual orientation to the Act. Sexual orientation was eventually incorporated as a prohibited ground of discrimination as part of the 1977 amendments to the Québec *Charter*.

It should be noted that the Québec *Charter* takes precedence over all other legislation unless the other legislation states specifically that it prevails over the *Charter*. The rights guaranteed in the Québec *Charter* are not absolute but are subject to *bona fide* occupational requirements and to reasonable requirements justified by the charitable or religious nature of the institution against which discrimination is alleged.

A review of the Québec Human Rights Commission's annual reports indicates that complaints of discrimination based on sexual orientation have represented only a small proportion of its workload. Between 1978 and 1984, files opened on complaints of discrimination based on sexual orientation varied between one and four per cent of the total number of files opened by the Commission. It should be noted that this figure does not reflect the percentage of complaints *received* by the Commission — many complaints are withdrawn, settled, determined to be unfounded or abandoned because the complainant or respondent is untraceable.

The following situations illustrate the type of cases the Commission has dealt with successfully: the dismissal of several teachers because of their sexual orientation, the refusal of a newspaper to publish a classified ad for a homosexual club, the harassment of several homosexual waiters by a restaurant manager, the lowering of a student's mark because he was homosexual, and the refusal of a Roman Catholic school commission to rent a meeting room to a homosexual rights group.

Although Québec is so far the only jurisdiction in Canada where sexual orientation is a prohibited ground of discrimination, the experience of many human rights commissions has led them to conclude that sexual orientation should be a prohibited ground. The commissions in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia have all proposed that sexual orientation be covered by their respective human rights acts. The Canadian Human Rights Commission has recommended, in every annual report from 1979 to date, that the *Canadian Human Rights Act* be

amended to add sexual orientation as a prohibited ground of discrimination. It reiterated this position in strong terms in its submission to this Committee. None of these recommendations by the federal and provincial human rights commissions has yet made its way into law.

There has also been action at the municipal level. The cities of Toronto, Ottawa, Windsor and Kitchener have policies prohibiting discrimination in employment on the basis of, among other grounds, sexual orientation. The City of Vancouver has applied to the British Columbia government for an amendment to the city's charter to enable it to prohibit discrimination by licence holders on the basis of, among other grounds, sexual orientation.

Other Jurisdictions

In the United States, a series of Supreme Court decisions has indicated that the right to privacy reserves to each individual primary control over such matters as marriage, procreation and contraception. It has yet to consider how the right to privacy doctrine applies to homosexuals. Most lower courts that have considered claims based on the right to privacy by homosexuals have rejected them. The U.S. courts have also found that the prohibition of discrimination based on sex in the *Civil Rights Act* and the 'equal protection' clause of the U.S. Constitution do not protect the rights of homosexuals. Since 1949, the U.S. Department of Defense and the various armed services have had a policy of dismissing homosexuals. Recent court cases have upheld this practice, holding that it does not violate any constitutional rights.

In Europe, the situation is somewhat different. In decisions dealing with the right to privacy guaranteed by section 8 of the European Convention on Human Rights, both the European Commission of Human Rights and the European Court of Human Rights have, in recent years, indicated that the criminalization of private homosexual acts between consenting adults over 21 years of age is unacceptable. The decisions were phrased in such broad terms that their implications will be wide-ranging in future Commission and Court decisions.

The Parliamentary Assembly of the Council of Europe urged member states in 1981 to decriminalize homosexual acts between consenting adults, to apply the same age of consent to both homosexual and heterosexual conduct and to assure equality of treatment to homosexuals. In 1984, the European Parliament made a similar plea but with an emphasis on employment concerns. France, Norway, The Netherlands and Spain have, since the early 1980s, amended their criminal and anti-discrimination legislation in conformity with the recommendation of the Parliamentary Assembly of the Council of Europe and the European Parliament.

In its 1984 report, entitled *Homosexuals and Society*, the Swedish Parliamentary Committee on the Place of Homosexuals in Society disclosed the results of a thorough study of all problems affecting homosexuals. Among other recommendations, it urged that constitutional and anti-discrimination statutes in that country be amended to protect against discrimination on the basis of "sexual preference".

The Committee's View

Developments in other jurisdictions indicate that there is an evolving recognition of the rights of homosexuals but that protection is not yet generally accorded to those

rights. What witnesses told us about the experiences of homosexuals in Ca indicates that they do not enjoy the same basic freedoms as others. Their s orientation is often a basis for unjustifiably different treatment under laws and pc including those at the federal level, and in their dealings with private persons. W therefore concluded that "sexual orientation" should be read into the general ended language of section 15 of the *Charter* as a constitutionally prohibited gro discrimination.

The Canadian Bar Association expressed the view in its brief to the Cor that sexual orientation is one of the more obvious unenumerated grou discrimination prohibited by section 15. Peter Maloney supported this view v told us

> I think, quite frankly, it is there already. It is not there in the sense that the w "sexual orientation" are there...[but] the legislative history is such that se orientation is already included in section 15...

Although we have concluded that "sexual orientation" should be read in 15, we do not believe that this interpretation fully protects homosexuals situations where the equal protection of the law should prevail — as in em accommodation, and access to services. Thus we turn to the *Canadian Hum Act*.

During our travels across the country, we met homosexuals of all a professions, different religions and various socio-economic backgrounds. W their parents and siblings, spouses and former spouses. We found them t common concern about the lack of access to facilities, services and opportunities. These same concerns were frequently expressed as we homosexuals on behalf of homosexuals.

Sexual orientation is no more relevant to a person's fitness to compet job or reside in particular accommodations than sex, race or religion. Be orientation is a personal matter, it should not be a criterion in dete availability of services, facilities, accommodations or employment to Cana organizations recommended to us that homosexuals should be afford protection of the law, the same as that enjoyed by all other Canadians. advocating this approach were the Canadian Human Rights Commission Union of Provincial Government Employees, Human Rights P.E.I., the Rights Coalition (Vancouver Region), the Canadian Association Teachers, the Anglican Church of Canada, Canadian University Press, Teachers' Federation, the United Church of Canada, the National Acti on the Status of Women, and the Manitoba Teachers' Society. We ther that sexual orientation should be a prohibited ground of discrimination i *Human Rights Act*.

If sexual orientation becomes a proscribed ground of discriminat persons alleged to have discriminated on that basis would have the opp on the usual defences provided by the Act — that they had simply imp occupational requirement or, in cases outside the employment field, t *bona fide* justification for their action. By amending the *Canadian Hu* to add sexual orientation as a prohibited ground of discrimination, Par extending the equal protection and equal benefit of the law, whic guaranteed by section 15 of the *Charter*, to homosexuals.

If the *Charter* were left to stand alone, without this complementary amendment to the *Canadian Human Rights Act*, many homosexuals might find it necessary to resort to the courts in the event of discrimination against them. They would be without any effective remedy at all if the discrimination were at the hands of another person and had no basis in federal laws or policies. This suggested amendment to the *Canadian Human Rights Act* would open up an expeditious and inexpensive forum for conciliation and conflict resolution to those alleging they have suffered discrimination, in the federal sector, on the basis of sexual orientation.

We should note further that several examples of how federal law and policy may adversely affect homosexuals were raised in briefs and testimony. The inclusion of sexual orientation as a prohibited ground of discrimination and the addition of a primacy or override clause in the *Canadian Human Rights Act* (which we recommend in Chapter 15) will provide a mechanism for their resolution.

10. We recommend that the *Canadian Human Rights Act* be amended to add sexual orientation as a prohibited ground of discrimination to the other grounds, which are race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability, and conviction for an offence for which a pardon has been granted.

Special Cases

It has been suggested that the Canadian Armed Forces and the Royal Canadian Mounted Police are special cases where discrimination on the basis of sexual orientation may be justified.

The Canadian Armed Forces has a policy of not recruiting homosexuals and dismissing homosexuals, once detected, from the Forces. If a member of the Canadian Armed Forces is suspected of being homosexual, the commanding officer conducts an investigation with the assistance of the Special Investigation Unit. If the suspicion is confirmed, the commanding officer makes a report to that effect to National Defence Headquarters. The member is then asked to resign with the promise of an honourable discharge. All of this is done in accordance with Canadian Forces Administrative Order 19-20. In his appearance before the Committee, the Minister of National Defence gave the following figures for the number of members discharged under C.F.A.O. 19-20 in the last four years: in 1981, 37 members; in 1982, 45 members; in 1983, 44 members; and in 1984, 38 members.

If this route of exit from the Forces, as just described, is not followed, the suspected homosexual member may be charged under the *National Defence Act* with a service offence of conduct in violation of good order or discipline. If the member is alleged to have committed a criminal offence, he or she may be tried by a civilian court or by a court martial.

The Royal Canadian Mounted Police has no formal written policy on homosexual members, although a draft *aide-mémoire* setting out the rationale for not knowingly recruiting and not retaining homosexual members was tabled with the Committee. When a member of the RCMP is discovered to be homosexual, the member is discharged.

We heard the stories of a number of former members of the Canadian Armed Forces, who had served in the Forces for years, apparently without problem, but were

released for only one reason — their sexual orientation. They described the arbitrary, grossly insensitive treatment to which they were subjected as part of the investigation of their personal lives. They were detained in isolated conditions for many hours and subjected to intensive interrogation about their activities and those of others.

The Canadian Armed Forces and the RCMP claim that military and police services involve special circumstances that justify the exclusion or removal of homosexual personnel. They cited several reasons for continuing their present practices with respect to homosexuals:

- members frequently serve in isolated posts in close physical proximity;
- members train and often live in confined quarters;
- homosexual members may be subject to blackmail;
- some countries to which members may be posted make homosexual relations illegal;
- the presence of homosexual members undermines morale and public confidence; and
- homosexual members are excluded for their own protection.

The arguments do not justify the present policies. They are based on the stereotypical view of homosexuals that assumes them to be dangerous people imposing their sexual preference on others. They also give undue weight to the presumed sensitivities of others. Finally, the blackmail argument is a circular one — if sexual orientation were not a factor in employment, the main reason for any such vulnerability of homosexuals would disappear. If a foreign power, or anyone else, wants to subvert a Canadian, they would use whatever blandishments appear most compelling to that particular individual; in this regard, heterosexuals are as vulnerable as homosexuals.

If the Canadian Armed Forces and the RCMP still wish to justify their policies with respect to homosexuals, the place for them to do so is before a Human Rights Tribunal established under the *Canadian Human Rights Act*. It would be up to them to persuade the tribunal that their policy was based on a *bona fide* occupational requirement. However, this Committee has not heard evidence justifying such an exemption from the Act.

11. We recommend that the Canadian Armed Forces and the RCMP bring their employment practices into conformity with the *Canadian Human Rights Act* as amended to prohibit discrimination on the basis of sexual orientation.

Security Clearances

Cabinet Directive 35, adopted in the early 1960s, sets out criteria for granting security clearances. Among the grounds upon which access to confidential information could be denied is a "character defect", such as "illicit sexual behaviour", that may make a person susceptible to blackmail or coercion. The government of Canada currently has Cabinet Directive 35 under active review; it is expected that replacement guidelines on security clearances will be issued shortly. The arguments about blackmail made with respect to members of the Canadian Armed Forces and the RCMP apply equally in this area.

12. We recommend that the federal government security clearance guidelines covering employees and contractors not discriminate on the basis of sexual orientation.

Consensual Sexual Activity

We received a number of representations that the *Criminal Code* be amended to eliminate the discrepancy between the ages at which private consensual sexual conduct does not constitute a criminal offence. (We are *not* referring here to sexual assault or to offences against children or young people.).

The effect of the current Code provisions is to establish 21 as the age of consent for homosexual acts between two consenting adults in private (section 158(1)). Other sections of the Code establish different ages of consent for consensual heterosexual activity. For example, under section 146(2) it is an offence for a male who is 14 years of age or older to engage in consensual sexual intercourse with a 14- or 15-year-old female who is not his wife and who is of previously chaste character. Under section 151, it is an offence for a male age 18 or over to seduce a 16- or 17-year-old female who is of previously chaste character.

The law, as it now stands, thus provides for a lower age of consent for those engaging in sexual intercourse than for those engaging in other forms of sexual activity; it thus discriminates against homosexuals. We believe that the *Criminal Code* should be amended to make uniform the age or ages at which all forms of private consensual sexual activity are lawful. This recommendation does not, we repeat, apply to the present sexual assault offences in the Code.

As to what those uniform ages should be, there are a number of possibilities. The report of the Badgley Committee on Sexual Offences against Children and Youth recommended that since the age of majority in most provinces is 18, that would be an appropriate age. In response to a recommendation of the Parliamentary Assembly of the Council of Europe, France amended its criminal law in 1982 to fix the age of consent for sexual activity by both sexes at 15. We do not ourselves have enough information to specify what the statutory age should be, but we are clearly of the view that the legal equality guarantees of section 15 require a uniform age or ages of consent for private consensual sexual activity.

13. We recommend that the *Criminal Code* be amended to ensure that the minimum age or ages at which private consensual sexual activity is lawful be made uniform without distinction based on sexual orientation. (This recommendation does not pertain to existing sexual assault offences in the *Criminal Code*).

Bill C-225

As noted earlier in this chapter, the subject matter of Bill C-225, tabled by Svend Robinson, MP, was referred to this Committee for study and consideration. The purpose of the Bill is to implement the recommendation of the Canadian Human Rights Commission to add "sexual orientation" as a prohibited ground of discrimination within federal jurisdiction.

14. We recommend support in principle for Bill C-225 and urge the government to enact legislation reflecting the principle of the Bill as outlined in this Committee's recommendations.