

C O N F I D E N T I A L

EQUALITY FOR ALL REPORT AND SEXUAL ORIENTATION

ISSUE

Addition of sexual orientation as a prohibited ground of discrimination to the Canadian Human Rights Act, and bringing of Canadian Armed Forces employment practices into conformity with the Act, as recommended in the Equality for All Report.

BACKGROUND/STATUS

1. Recommendations 10 and 11 of the Equality for All Report provide as follows:
 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.
 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.
2. While there is controversy over the provision of protection against discrimination on the basis of sexual orientation, there is some evidence that a majority of Canadians may support such protection. A Toronto Star survey on June 29, 1977 determined that 52% of the respondents agreed that sexual orientation should be included in human rights legislation. A 1979 survey by the Canadian Human Rights Commission found that 68% of the respondents believed that professional qualifications should take precedence over sexual orientation in employer hiring policies. The views of the majority may not be determinative, however, when one is dealing with the concept of equality rights guarantees, whether under the Constitution or human rights legislation, which are concerned in many cases with protecting minorities from the untrammelled exercise of the majority will. The question is whether a particular minority will qualify as

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- one that should be protected under human rights legislation or the Constitution.
3. Canadian and American jurisprudence indicate that there are a number of tests that might be applied in determining whether a group or class should be protected under equality rights guarantees:
- (1) Stigma - Some characteristic possessed by a group carries with it a social stigma not attached to others outside the group.
 - (2) Unequal treatment - There is evidence of unequal treatment now and historically on the basis of the stigmatized characteristic.
 - (3) Immutability - This test is not always applied as religion is protected even though it is not immutable in the way race is. At the same time, a group might qualify for protection if the characteristic in question is difficult to change.
 - (4) Discrete and insular minority - A minority which is separable from others and identifiable by the group characteristic.
 - (5) Relevancy - The historic pattern of discrimination focusses on a generalization of character traits attributed to the group and does not judge each individual on his or her merits.
4. It was the view of the Equality Rights Committee that homosexuals in Canada do form a distinct minority which have historically been subjected to unequal treatment on the basis of stereotypes rather than on their own merits. On this view, homosexuals may qualify as a group deserving of protection under human rights legislation.
5. So far the only jurisdiction in Canada that prohibits discrimination on the basis of sexual orientation is Quebec, which has done so since 1977. However, the Human Rights Commissions in Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, as well as the Canadian Human Rights Commission, have recommended that sexual orientation be a prohibited ground of discrimination in their respective human rights statutes. In other western nations, there have

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- been some steps taken to protect homosexuals against discrimination. In 1981, the Parliamentary Assembly of the Council of Europe urged member states to assure equality of treatment to homosexuals in employment, particularly in the public sector. In response, Norway amended its criminal laws to prohibit discrimination against homosexuals and Spain removed homosexual acts from its code of military offences. In addition, the Netherlands added sexual orientation as a prohibited ground of discrimination in its human rights legislation.
6. In the United States only Wisconsin and about 40 municipalities, including New York, Washington and Los Angeles, have acted to prohibit discrimination on the basis of sexual orientation. Discrimination on the basis of sexual orientation is not prohibited by the federal Civil Rights Act, and apparently is subject only to minimal scrutiny under the equal protection guarantees of the Bill of Rights. However, the case-law and federal public service policy indicate that an employee cannot be discharged from employment in the federal public service solely on the ground of homosexuality. However, homosexuality plus certain other factors may constitute legitimate grounds for exclusion or dismissal from government employment. Such added factors may include: flaunting one's homosexuality; conviction of a sex crime; or involvement with a co-employee. So far as United States military policy is concerned, it would appear that the courts accord considerable deference to the views of the military. In two recent cases in the United States, the courts have upheld a blanket prohibition of homosexuals by the Navy.
 7. The Equality Rights Committee stated that if the Canadian Armed Forces wish to justify their policies on homosexuals, they should do so before a Human Rights Tribunal established under the Canadian Human Rights Act, although the Committee also said that it "has not heard evidence justifying such an exception from the Act". In the case of Ontario Human Rights Commission v. The Borough of Etobicoke, the Supreme Court of Canada considered the meaning of bona fide occupational requirement under the Ontario Human Rights Code. The Court said that a bona fide occupational requirement is a requirement that is applied in good faith and which is reasonably necessary for the safe, efficient and economical performance of the job. If sexual orientation were covered by the Canadian Human Rights Act,

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the Canadian Armed Forces would have to show that restrictions on homosexuals meet these standards. While the specific question has not been addressed by the courts, the defence of a bona fide occupational requirement is arguably broad enough to take into account valid security concerns. In addition, the experience in the United States, although it has not involved anti-discrimination legislation as such, suggests that it may be possible to justify some distinctions on the basis of sexual orientation as bona fide occupational requirements, should sexual orientation be added as a prohibited ground of discrimination under the Canadian Human Rights Act. While there is uncertainty over whether restrictions on homosexuals in the Canadian Armed Forces will be upheld as bona fide occupational requirements, it would appear that the government may at least have an arguable case.

8. If sexual orientation were covered by the Canadian Human Rights Act, the alternative to defending the policies of the Canadian Armed Forces as bona fide occupational requirements would be to create legislative exceptions, in the Act or in other legislation, to the prohibition against discrimination on the basis of sexual orientation. As a matter of policy, such exceptions should be contemplated reluctantly, as derogating from the principles of equal opportunity which underlie human rights legislation. While we have recognized that exceptions for specific mandatory retirement policies might be necessary in certain circumstances, there is a historic basis for such exceptions which appears to be more acceptable both on social and moral grounds. This approach is consistent with that of the Equality Rights Committee which acknowledged that there may have to be some classes of exceptions to the general abolition of mandatory retirement.

Conclusion

9. Protection against discrimination on the basis of sexual orientation would be consistent with the principle, as expressed in section 2 of the Canadian Human Rights Act, "that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour...". By offering such protection the

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government would not be condoning homosexuality, but would be ensuring that persons are not excluded from employment opportunities for reasons which are irrelevant to their capacity and ability to do the job. At the same time, legitimate concerns about security and efficiency and related matters can arguably be addressed through the bona fide occupational requirement defence. In the alternative, such concerns could be dealt with through exceptions to the Canadian Human Rights Act, but these would be undesirable as a matter of policy.

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