
Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Contents

Volume 1 Number 4

International News

Euthanasia

Upcoming Events

Top of this page

Return to Home Page

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Focus on Gay Issues: Discrimination Impedes the Fight Against AIDS

This issue of the *Newsletter* contains summaries and commentaries on a number of court cases that concern the rights of gay men and lesbians in Canada. Although some of these cases do not deal directly with HIV/AIDS, the editors decided to include them and devote a major section of this issue of the *Newsletter* to gay and lesbian legal issues. We did this because of the clear link between discrimination against gays and the spread of HIV. How Canadian courts and governments react to the claims of gay men and lesbians for equality and for recognition of their intimate relationships has a significant impact on Canada's ability to fight the HIV/AIDS epidemic.

What does homophobia have to do with AIDS?

"Everything," as emphasized in the May 1995 newsletter of the Canadian AIDS Society's 1995 National AIDS Awareness Campaign.[1] This year, the Campaign will address the issue of AIDS and homophobia, in an effort "to encourage a more compassionate, humane response to gay people and all people living with HIV/AIDS in Canada." According to the newsletter, "[h]omophobia and AIDS are so firmly linked in the minds of many Canadians that their response to a person with AIDS is often inseparable from their response to homosexuality." The newsletter continues by saying that "[t]hese negative perceptions and attitudes about the gay community have been identified as the biggest barrier to a coordinated, compassionate response to AIDS in Canada." Brian Huskins, Chair of the Canadian AIDS Society, added that "[i]n the minds of many Canadians, AIDS equals gay, and gay equals AIDS - the two continue to be intrinsically linked."

The linking of AIDS with homosexuality has created serious barriers to prevention and education initiatives since the beginning of the HIV/AIDS epidemic. The newsletter mentions two examples: (1) It has falsely led many Canadians to believe that if they are not gay, they are not at risk of contracting HIV: "For example, recent statistics show more and more women are becoming infected with HIV. However, due to the myth of AIDS as a gay man's disease, many more women will continue to put themselves at risk." (2) Homophobia has had a negative impact on the quality of care received by a person living with HIV/AIDS: "It is the reason why many gay men living with HIV have been denied

care, services and fair treatment."

Gay and Lesbian Legal Issues Considered "Top Priority"

In phase 1 of the joint Canadian HIV/AIDS Legal Network / Canadian AIDS Society project on legal and ethical issues raised by HIV/AIDS,[2] gay and lesbian legal issues were identified as one of the eight "top priority" legal and ethical issues raised by HIV/AIDS. Most individuals and groups consulted expressed concern about the link between discrimination against gays and their higher susceptibility to contracting HIV. In particular, they expressed concern about the refusal of school systems to provide positive education about homosexuality and gay and lesbian sexuality; the reluctance to legally recognize the existence of relationships between two men or women; the lack of self-esteem often observed among lesbians and gay men; the higher age of consent for anal intercourse; and problems of access to same-sex partners in hospitals. Some people pointed out that legal recognition of same-sex relationships would likely not benefit persons living with HIV/AIDS, many of whom rely on income assistance and may actually fare better under the current laws. However, others pointed out that in some cases same-sex couples are already being asked to assume equal burdens, although they are not given equal rights.

Gays and HIV/AIDS: A Literature Review

A literature review undertaken as part of phase 1 of the Network / CAS joint project found numerous references in the literature to discrimination against gay men and lesbians and its impact on the spread of HIV/AIDS. In particular, the literature shows that:

(1) Gay men and lesbians have traditionally faced extensive prejudice and discrimination. In Canada, it has been said that "[t]he experience of homophobia and heterosexism is inextricably a part of being gay, lesbian or bisexual in this country. To be gay, lesbian or bisexual is to be discriminated against, both by other individuals and by institutions. To be gay or lesbian is to be defined as 'other,' 'sick,' 'deviant,' 'abnormal,' 'criminal'."[3]

(2) The HIV/AIDS epidemic has intensified and extended discrimination against gay men, usually on assumptions like "*All gay men have AIDS and are infectious*," or "*Gay men are to blame for AIDS.*"[4]

(3) Gay men with AIDS attract considerable blame and little sympathy. In a study undertaken in Australia, the view was expressed that gay men were to blame for their disease and that gay men with HIV/AIDS should pay for their own health care.[5] Generally, there has been a dominant undercurrent of hostility toward many people with HIV disease, as if they are somehow to blame. People with HIV infection or AIDS have been divided into two categories - the "guilty majority" of gay men and injection drug users, and the "innocent minority" of hemophiliacs or transfusion cases.[6]

(4) A number of very specific links between homophobia and HIV can be drawn. The most basic link is

established "by the fact that gay men, in fact many gay men, have AIDS."[7] This link has been interpreted politically in many different ways "including 'AIDS is a gay disease' and 'AIDS is not a gay disease'."[8]

In most western industrialized countries the response to HIV/AIDS has oscillated between periods when policy has been, officially or implicitly, to recognize gay men as the most affected population, and periods when the threat of HIV/AIDS to the general population has been emphasized. In many ways, gay men have found themselves in a no-win situation. Initially, they had to argue that AIDS was not a gay disease, so that governments would take the disease seriously and allocate funding to research and prevention efforts. They feared even greater discrimination and coercive measures directed against them if AIDS continued to be perceived as a gay disease. In recent years, gay men have had to "reclaim" AIDS, because efforts were being increasingly and disproportionally directed at other groups of the population, leaving them with still by far the highest number of new infections, but relatively little funding for prevention efforts. AIDS has never been a gay disease, but one that in Canada has affected gay men more than any other group of the population, and continues to do so.

While some HIV discrimination is based solely on an irrational fear of transmission, there are clear links with homophobia: "People with HIV are often discriminated against because of their assumed homosexuality, whether they are gay or not. Further, the historic and very real links between gay men and HIV have generalised some aspects of homophobia to HIV, so that even if gay men stopped getting HIV altogether, homophobic reactions to HIV issues and to people living with HIV would stay in the public mind for a long time. So in effect all people with HIV ... encounter homophobia and homophobic discrimination."[9]

Homophobia also has a severe impact on prevention and education efforts:

> [I]f I live in a world that is homophobic and heterosexist, which does its very best to isolate me from my peers and keep me from any knowledge or acknowledgment that my gayness is valid, or even exists outside of my head and heart, then of course I am going to feel worthless and have low self esteem. I will believe that I am fundamentally flawed or bad or wrong, and alas too often become involved in self destructive behaviour ranging from isolating myself from people, through to drug and alcohol abuse, and suicide. ...
>
> One of the strongest examples of homophobia impacting on the lives of gay men, including HIV prevention, is the lack of basic information about gay issues, gay identity, gay sex, and gay community in schools, including a lack of information about HIV and safer sex issues relevant to gay youth.[10]

The loss of focus on men who have sex with men with respect to prevention priorities in the last years may also have been a result of homophobia, which acts as a barrier to objective and effective policy, resource allocation, and other decision-making by government and community bodies. Dejowski, talking about the situation in the US, has pointed out how legislation to prevent the transmission of AIDS in the

US has sometimes become enmeshed in the political agendas and personal moral philosophies of legislators. According to him, the result has been the shaping of a prevention strategy that is at odds with the findings of health behaviour research, and that forces the implementation of programs that are likely to have minimal effect on the population most at risk of contracting the disease - gay men.[11]

Conclusion

It is important to address the issue of homophobia in the context of HIV/AIDS: preventing discrimination against gays will help prevent the spread of HIV. However, homophobia should also be addressed in its own right. Otherwise, it has been argued, a subtle but strong message could be sent that gay identity, sexuality, and sex are not important issues in their own right, and that only gay men's identity as potential "AIDS victims" has relevance.[12] This is a challenge for any project addressing the issue of discrimination against gay men in the context of HIV/AIDS. While in Canada and in many other Western industrialized countries HIV/AIDS has become inseparable from gay life, there are many other reasons why discrimination against gay men and lesbians should end, regardless of HIV/AIDS. For example, it would be a mistake to argue that, because of HIV/AIDS, the *Canadian Human Rights Act* should be amended to explicitly include protection against discrimination on the ground of sexual orientation. AIDS just adds one more, although significant, reason why this should be done.

- *Ralf Jürgens*

Top of this page

Return to Table of Contents

Return to Home Page

ENDNOTES

[1]*Aware!* A newsletter for the Canadian AIDS Society's National AIDS Awareness Campaign. Ottawa: CAS, 1995.

[2]See the description in this issue of the *Newsletter* (R Jürgens. Work on Priority Legal and Ethical Issues Raised by HIV/AIDS Started).

[3]Canadian AIDS Society. *Homophobia, Heterosexism and AIDS. Creating a More Effective Response to AIDS*. Ottawa: The Society, 1991.

[4] New South Wales Anti-Discrimination Board. *Discrimination - The Other Epidemic. Report of the Inquiry into HIV and AIDS Related Discrimination.* The Board, 1992.

[5]Ibid.

[6]D Altmann, K Humphry. Breaking Boundaries: AIDS and Social Justice in Australia. *Social Justice* 1989; 16 (3): 158-166, at 163.

[7]N Toonen. Homophobia and HIV. [Australian] *National AIDS Bulletin* December 1992/January 1993: 35-37.

[8]Ibid.

[9]Ibid.

[10]Ibid.

[11]EF Dejowski. Federal Restrictions on AIDS Prevention Efforts for Gay Men. *Saint Louis University Public Law Review* 1989; 8: 275-298.

[12]Toonen.

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Bleach and Anonymous HIV Testing in Federal Prisons

Bleach and anonymous HIV testing programs will soon be available in all federal correctional institutions in Canada.

Background

In March 1994 the Expert Committee on AIDS and Prisons (ECAP) released its Final Report. Among many other things, ECAP recommended that bleach be made available to inmates in Canadian federal prisons, and that access to testing for HIV in prisons be increased by introducing non-nominal and anonymous testing.

At the time, these recommendations were rejected, and the Correctional Service of Canada (CSC) agreed only to pilot test an anonymous HIV testing and a bleach distribution program in one institution. Recently, this decision was reversed and the Commissioner of the Correctional Service, with approval from the Solicitor General, instructed CSC to initiate the implementation of anonymous HIV testing and bleach distribution in all institutions.

National Bleach Distribution and Anonymous HIV Testing Working Group Established

This group met for the first time in Ottawa on 20-21 June 1995. Its mandate is to establish successful bleach distribution and anonymous HIV testing programs, and to develop national guidelines that will ensure equal implementation of both programs across Canada. The core Working Group consists of one representative from each region of the CSC, but will be extended to include representation from national and regional stakeholders, including the unions, whenever necessary.

On 21 June, the Commissioner of the Correctional Service, Mr John Edwards, briefly attended the Group's meeting to express his "full support" for the work of the group. The Commissioner pointed out that the reported cases of HIV/AIDS in Canadian federal prisons have been rising steadily. During the

month of April 1995, 139 inmates were known to be living with HIV or AIDS in federal prisons in Canada. This represents a substantial increase from the 109 inmates with HIV or AIDS who were known to be living in federal prisons as of the month of April 1994. It means that at least one percent of inmates are living with HIV/AIDS. The Commissioner emphasized that offenders are human beings and deserve to be protected. "We do believe in respecting offenders' needs," he stated, and added that there "is no doubt in my mind that we have a duty to protect offenders, staff and the public." The Commissioner pointed out that CSC has a public health responsibility to the communities to which offenders return: "Whatever concerns we have [about making bleach available to inmates] are superseded by public health concerns." He continued by emphasizing that making bleach available is not in conflict with CSC's Drug Strategy. "We need to do both well," he concluded, "protect the health of inmates, staff, and the public, as well as continue CSC's efforts to reduce drug use in prisons."

The Bleach Distribution Pilot

At the Working Group's meeting, Trudy Nichol, the Project Coordinator of the pilot bleach distribution program at Matsqui institution in British Columbia, gave a presentation on some of the initial findings of this pilot, which also serves as a demonstration project. The purpose of the pilot, as stated in the 1994-1995 Annual Report of CSC's National AIDS Program, is to:

- provide CSC with a model of how best to distribute bleach (strength, amount, filtering and packaging);
- track participation and the use bleach is put to;
- measure the impact on needle cleaning behaviour; and
- document security problems.

Since her appointment in December 1994, the Project Coordinator has:

- developed a communication strategy for all institutional staff that included a one-day information fair in the institution to ensure their support for the pilot;
- devised a way to distribute bleach to inmates easily and discreetly;
- elaborated, with support from the British Columbia Centre for Excellence in HIV/AIDS, a questionnaire to track participation, use, and impact on needle cleaning behaviour; and
- started bleach distribution on 5 June 1995.

At the meeting, Nichol was able to present a preliminary analysis of the questionnaire data. The survey results cannot be generalized to all inmates at Matsqui institution since only 182 of 423 inmates (43%) responded to the questionnaire. Results are nevertheless significant in many ways:

- Fifty-four percent of respondents admitted having received tattoos in prison;
- 21% had had piercing done while in prison;
- 71% reported having used IV drugs (of these, 12% reported drug use only in prison, 20% only on the street, and 68% reported having used drugs both inside and outside prison).

- 89% of respondents admitted having shared a needle at least once, with 19% reporting having shared on the street, 23% in prison, and 47% percent both in prison and outside. Most respondents reported having cleaned their equipment before sharing it, whether they shared it inside or outside prison.

Support for the bleach distribution program among inmates was overwhelming: 99% of respondents felt that having bleach available to inmates is "very important," with only one inmate saying it is "not important at all." Equally significant is that the vast majority of respondents said that they would use bleach if it was given to them in prison. Of injection drug users responding to the survey, only one responded that he would not use the bleach.

Although analysis of this data is not yet completed, the data provides evidence of both the necessity of easy access to bleach for prisoners, as well as the support for such a program from prisoners, particularly those most at risk of contracting HIV.

Bleach Distribution in other Prison Systems

Bleach is already made available to inmates in many prison systems. As reported by Harding and Schaller, 16 of 52 systems surveyed late in 1991 made bleach available to prisoners, often accompanied by instructions on how to clean needles.[1] For example, in Spain a bottle of bleach is included in the sanitary kit that inmates receive at entry into the prison system and monthly thereafter, "and more is provided whenever needed." In Switzerland, "first-aid kits" containing small bottles of bleach have been given to inmates since June 1991. Bleach is also available in some prison systems in Germany, France and Australia, in prisons in Belgium, Luxembourg and the Netherlands, and in some African and at least one Central American prison system.[2]

In some prisons systems, bleach has always been available as a general cleaning agent and prison authorities have tolerated that it be used also for the purpose of cleaning injection equipment. In others, it has been made available specifically for the purpose of cleaning injection equipment, and various ways have been devised to make it available.

There are no reported incidents of any negative consequences of making bleach available. This is consistent with the Canadian experience. Bleach had been available in Canadian institutions for a long time without any suggestion of it being a threat to institutional security, until it became associated with the sterilization of injection equipment. Further, in some institutions it is still informally available, and there is no evidence that this has created any problems.

The British Columbia provincial prison system issued a policy directing that bleach be made available to inmates in 1992. As stated by Jim Cairns, BC Ministry of Solicitor General, Corrections Branch, "[t]here have been no incidents of misuse presenting security breaches, no known damage to septic fields, or any evidence to indicate an increase in needle use" as a result of this policy.[3] On 21 April 1995, a revised policy was approved in BC, according to which "all adult correctional centres shall ensure that filtered

household bleach is available and accessible for inmate use." The policy contains detailed guidelines for the distribution of bleach. It requires that bleach be distributed to inmates in 30 ml bottles, be freely available, readily accessible, and distributed in a way that ensures anonymity and minimizes risk of injury.

Anonymous HIV Testing

In its report, ECAP recommended that:

- testing be readily accessible to all inmates in federal correctional institutions at their own request;
- that it always be voluntary and accompanied by counselling and education before and following testing;
- that all inmates have access to HIV testing from CSC health-care personnel as well as from primary-care or community clinic personnel who are independent of CSC; and, finally,
- that all inmates have access to anonymous HIV testing.

ECAP felt that making anonymous testing available to inmates would be important because currently many inmates do not seek testing in prison for fear that their test results will immediately become known to everyone in the institution.

In some provincial prisons in Canada and in some prisons outside Canada, anonymous testing is already made available to prisoners. One model was presented to the National Bleach Distribution and Anonymous HIV Testing Working Group by Alison McConnell, who has been carrying out an anonymous HIV testing program in a provincial prison in Saskatchewan for some years. Although recognizing the importance of offering anonymous testing to prisoners, the Working Group identified a number of issues that need further discussion and analysis, such as the costs of such a program, and the feasibility of undertaking anonymous testing in institutions located in provinces where such testing is not available outside prison. In particular, the Group felt that making anonymous testing available should be accompanied by efforts to increase the quality and accessibility of testing and counseling undertaken by prison medical staff.

Other Issues: Condoms and Clean Needles

Participants at the meeting stressed that the lessons learned from implementing condom distribution should be taken into account in implementing distribution of bleach. In particular, it was emphasized that, due to the lack of national guidelines, condom distribution is still uneven across Canada and that, in some institutions, condoms are not easily and discreetly available, as recommended by ECAP and promised by CSC in its response to the Committee's report.

Finally, some participants, while congratulating CSC on its decision to make bleach available in all institutions, asked why CSC was not also considering making sterile needles available, at least in some institutions, as a pilot project. This is already being done in some institutions in Switzerland,[4] and has

been widely recommended by national and international organizations, including the Prisoners with AIDS/HIV Support Action Network (PASAN), ECAP, and the World Health Organization.[5] Recently, this recommendation was repeated in an Australian report of a study on bleach availability and risk behaviours in prison in New South Wales.[6] The study was the first in the world to allow the independent monitoring of a bleach distribution program for prisoners. It was undertaken in 1993 and investigated the access of prisoners in New South Wales to disinfectants for syringe decontamination and the prevalence of injection drug use, syringe sharing, tattooing and sexual activity in prison. It found that three years after the distribution of disinfectants began, 62% of inmates still found it difficult to gain access to them. It concluded that "[e]ven if an acceptable and effective form of disinfectant was identified, operational problems may still compromise the effectiveness of a syringe cleaning program for prisoners ..." The study pointed out other shortcomings of a syringe disinfecting program, such as uncertainty about whether other blood borne viruses such as hepatitis B and C can be effectively and rapidly decontaminated from injecting equipment using bleach. It concluded that other prevention measures need to be explored, and that one such measure which requires consideration is piloting a syringe exchange program in prison.

Conclusion

CSC should be congratulated on its decision to make bleach and anonymous testing available in prisons. This represents a significant step forward in the fight against the spread of HIV in federal penitentiaries. CSC is acknowledging that it has a responsibility to protect the health of inmates, staff, and the public; that measures to prevent the spread of HIV, such as making bleach available, do not conflict with its drug strategy; and that making bleach available does not mean condoning drug use. CSC is starting to take some of the steps that are necessary to reduce the spread of HIV. Much remains to be done, but the first steps have been taken.

- Ralf Jürgens

Top of this page

Return to Table of Contents

Return to Home Page

ENDNOTES

[1] TW Harding, G Schaller. HIV/AIDS Policy for Prisons or for Prisoners? In: JM Mann, DJM Tarantola, TW Netter (eds). *AIDS in the World.* Cambridge, MA: Harvard University Press, 1992, 761-769.

[2]*HIV/AIDS in Prisons: Final Report of the Expert Committee on AIDS and Prisons.* Ottawa: Minister of Supply and Services Canada, 1994 at 69, with many references.

[3]*AIDS in Prisons: Background Materials*. Ottawa: Minister of Supply and Services Canada, 1994 at 171.

[4] See R Jürgens. HIV Prevention Taken Seriously: Provision of Syringes in a Swiss Prison. *Canadian HIV/AIDS Policy & Law Newsletter* vol 1 no 1 (October 1994) at 1, and the Update on Needle and Syringe Exchange in Swiss Prison in this issue.

[5] See *HIV/AIDS in Prisons: Final Report of the Expert Committee on AIDS and Prisons.* Ottawa: Minister of Supply and Services Canada, 1994 at 70-72.

[6]K Dolan, W Hall, A Wodak. Bleach Availability and Risk Behaviours in New South Wales. Technical Report No 22, Sydney: National Drug and Alcohol Research Centre, 1994.

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Update on Needle and Syringe Exchange in Swiss Prison

Several Swiss prisons are considering the introduction of needle exchange programs following trials which appear to be working well.[1]

The *Newsletter* first reported on a pilot project to provide sterile needles to inmates in its October 1994 issue.[2] According to Dr Margaret Rihs-Middel, Co-ordinator of Drug Research and Evaluation at the Swiss Office of Public Health in Bern, "a clash of values occurred when prison officers and managers considered the possibility of providing needles and syringes in prisons. Yet needle exchange now occurs at both the men's and women's prisons and a research project is studying the effects of introducing the program."

According to information provided by Dr Rihs-Middel, at the men's prison needle exchange is carried out by the Prisons' Health Service, which provides packages of condoms, syringes and needles. Exchange is one provided for one returned, in an attempt to avoid increasing the number of needles and syringes in the prison. Prisoners can exchange up to five, so that they can exchange on behalf of others, but each prisoner can only keep one syringe. To ensure that prison officers are in less danger of accidental needlestick when searching prisoners' cells, prisoners are allowed to keep one syringe in a glass in a cupboard near a toilet. About ten percent of men at the prison participate in the program.

As reported in the October 1994 issue of the *Newsletter*, a needle and syringe vending machine has been installed at a women's prison on a trial basis. The machine is located in a storage area for cleaning materials and is easily accessible by prisoners. A syringe must be put into the machine to allow a clean needle and syringe to be accessed. Women prisoners are also allowed to keep one syringe in a toilet cabinet. About 25 percent of women at the prison participate in the program.

Dr Rihs-Middel emphasized that evaluation of these programs is still ongoing, but initial results pointed to very few problems resulting from needle exchange in prisons. One of the major potential obstacles to the success of the programs had been the attitudes of prison staff. In the case of the men's prison, prison

officers were fully involved in the decision to trial the needle exchange while officers at the women's prison were less involved and more hostile to the program. In both cases, attitudes to needle exchange in prison became more positive over time.

The "clash of values" was minimised by ensuring that needle exchange was established as a health activity carried out by the prisons' health service rather than an activity carried out by custodial staff. The involvement of staff in the decision to proceed was very important to the success of the program, as were rules about where needles can be kept to increase safety for custodial staff.

Comment

In Canada as elsewhere, providing sterile needles to inmates has been widely recommended as a health measure necessary to reduce the spread of HIV in prisons. In its *Final Report*, the Expert Committee on AIDS in Prisons (ECAP) stated that "making injection equipment available in prisons will be inevitable." The Committee recommended that "research be undertaken that will identify ways and develop measures, including access to sterile injection equipment, that will further reduce the risk of HIV transmission and other harms from injection drug use in federal correctional institutions." According to ECAP's recommendation, "[t]his research should be carried out with the active involvement of Health Canada and by individuals independent of but in collaboration with CSC," and "should be preceded by consultation with inmates, staff, community groups and independent experts." Further, "[i]t should include one or more scientifically valid pilot projects, and should be accompanied by planning, communication and education that will expedite making sterile injection equipment available in the institutions." In its response to ECAP's report, the Correctional Service of Canada (CSC) rejected this recommendation, a decision for which it was heavily criticized.

The results of the Swiss pilot project, although preliminary, are important because they demonstrate that sterile needles can be made available in prisons safely, and that prison staff can be brought to accept and even support needle exchange programs. In a survey undertaken by ECAP two years ago, 15% of correctional officers and 31% of health-care staff responded that they were in favour of making a needle exchange program available to prisoners.[3] Staff in favour of a needle exchange program felt that "it would be better if they [prisoners] used a good clean needle than a make-shift or a dirty one. If they have a needle (syringe) to exchange, this would mean that they are already using one. The issue of staff safety is already there: the inmate has a needle now, but it's dirty, old and possibly infected by more than one individual." It would seem that staff's support, as expressed in such a statement, would doubtless increase if, as was done in Switzerland, staff's safety concerns were taken into account and they were involved in the planning and implementation of the programs. The main obstacle on the way to needle exchanges in Canadian prisons would seem to be lack of political will, rather than safety concerns or opposition from staff. As in Switzerland, we in Canada need to clearly spell out that making needles available in prison does not mean condoning drug use, but is a pragmatic and necessary health measure that will better protect prisoners, staff, and the public.

- *Ralf Jürgens*

Top of this page

Return to Table of Contents

Return to Home Page

ENDNOTES

[1] As reported in the [Australian] *National HIV/AIDS Legal Link*, vol 6, no 1 (March 1995) at 14. The information in this note is taken from an article by Dave Burrows on "Needle and Syringe Exchange in Swiss Prisons" in that publication.

[2] R Jürgens. HIV Prevention Taken Seriously: Provision of Syringes in a Swiss Prison. *Canadian HIV/AIDS Policy & Law Newsletter*, vol 1, no 1 (October 1994) at 1-3.

[3] *HIV/AIDS in Prisons: Background Materials.* Ottawa: Minister of Supply and Services Canada, 1994 at 94.

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Anal Sex Law Ruled Discriminatory

Both the Federal Court and the Ontario Court of Appeal have ruled unconstitutional section 159 of the Criminal Code, which provides for jail sentences for unmarried people who engage in anal intercourse while one is under 18 years. In both cases the Federal Crown (*Halm v Canada* [1]) and the provincial Crown (*R v Carmen M* [2]) had argued that the provision was necessary, in part, to prevent the spread of HIV infection.

The decisions may be seen as affirming the right to freedom of sexual expression, particularly of gay men. However, the decision to prosecute, the decision to appeal, and the arguments presented by the prosecution raise serious questions about the lack of awareness and sensitivity of the prosecutors in these cases regarding HIV and AIDS, which has implications for the use of the criminal law in other HIV-related cases.

In *Halm* Justice Reed considered an application to set aside a conditional order for deportation against Henry Halm, a non-Canadian. To obtain the deportation order the Crown had to show that Halm had been convicted of an offence which carries a penalty of 10 years or more imprisonment if committed in Canada. Halm had been convicted in New York State of sodomy offenses involving anal intercourse with boys aged between 14 and 18. He argued that the crimes had no equivalent in Canada because section 159 of the Canadian *Criminal Code*, which would otherwise apply, was unconstitutional.

Reed J first suggested that section 159 might conflict with section 7 of the Charter of Rights and Freedoms, which protects the right to life, liberty and the security of the person. She also held that the provision conflicted with section 15 of the Charter, which prohibits discrimination, *inter alia*, on the grounds of age and, analogously, sexual orientation.

The Crown vigorously disputed these arguments, except the argument relating to age discrimination. Further, the Crown argued that section 1 of the Charter, which provides that freedoms can be limited "to such reasonable limits as can be demonstrably justified in a free and democratic society" overrode the

rights otherwise protected. Specifically, the Crown characterized the purposes of the law as being: (i) to reinforce moral precepts; (ii) to protect young persons from engaging in "non-usual sexual activities"; and (iii) to protect young persons from increased risk of HIV transmission.

Reed J dismissed the first 'purpose' as beyond the scope of the criminal law and the second as unconstitutional. Regarding the third, she noted "while anal sex may be riskier, as a potential conduit for HIV transmission, in both cases it is unprotected sex which is the cause, not the activity itself." She noted that the section of the *Criminal Code* which made the transmission of sexually transmitted diseases an offence was repealed in 1985, because it was regarded as ineffective and counterproductive.

Reed J set aside the conditional deportation order. The Federal Department of Justice has appealed the decision. The applicant was represented *pro bono* by Paul Slansky, a Toronto solicitor [tel: (416) 596 8192].

The second case to consider the issue, *Carmen M.,* concerned consensual acts of anal intercourse in Ontario performed on a girl aged between 14 and 18 years old. Again, the defendant was charged under section 159 of the *Criminal Code,* which makes such acts an offence (whether heterosexual or homosexual).

The trial judge, Corbett J, held that section 159 was in breach of section 7 of the Charter and, again, unjustifiable under section 1. Evidence was given that there were "no guidelines or directives to Crown Attorneys relating to prosecutions under s.159... (and) no Attorney General or senior official of the Ministry has issued any formal instruction regarding prosecutions for the offense of anal intercourse."

On appeal the Crown argued principally that the need to protect young people from engaging in anal intercourse for HIV-related health reasons overrode the Charter section 15 guarantee against discrimination. In a detailed and scathing review of the Crown's arguments, Justice Abella based her analysis on section 15 and the grounds of age, marital status, and sexual orientation. She noted, "[h]ealth risks ought to be dealt with by the health care system. Ironically, one of the bizarre effects of a provision criminalizing consensual anal intercourse for adolescents is that the health education they should be receiving to protect them from avoidable harm may be curtailed, since it may be interpreted as counselling young people about a form of sexual conduct the law prohibits them from participating in... There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse... There is no proportionality between the articulated health objectives and the draconian criminal means chosen to achieve them." Justices Goodman and Catzman concurred with the finding that section 159 was unconstitutional, but chose to restrict the section 15 analysis to the grounds of age.

The Canadian AIDS Society intervened at the appeal with the Coalition for Lesbian and Gay Rights in Ontario and the Canadian Foundation for Children, Youth and the Law. The Society argued that the appropriate response was by means of open, non-judgmental and factual information and that criminal prohibitions only increase the opportunities for HIV transmission.

"We're very pleased with the ruling in the *Carmen M*. case," commented Russell Armstrong for the Society. "The Crown's argument that the section helped protect young people from HIV was false and basically homophobic. We're glad to see their position was so strongly condemned by the Court. The decision also shows that dealing with preventing HIV transmission through the Criminal Code is clearly the wrong way to go."

Yet why did the Crown argue in the above cases that the criminal law was necessary to prevent the transmission of HIV, in the face of evidence from agencies working at the forefront of HIV prevention? Why is the Federal Department of Justice appealing the decision in *Halm*, given the definitive ruling by the Ontario Court of Appeal in *Carmen M?* The arguments of the prosecuting lawyers, and the decision to appeal in *Halm*, raise serious concerns about the coordination of the response to the epidemic at the federal and provincial levels. Similar concerns may arise relating to injecting drug use, sex work, and the sexual transmission of HIV infection. Short of law reform in these areas, it may be that prosecutorial guidelines on HIV/AIDS, written in consultation with experts in the field, could provide an interim solution.

On the one hand governments are funding safe sex campaigns that target youth, on the other the same governments are launching expensive, counter-productive and ultimately pointless prosecutions and appeals that inhibit these campaigns. We need leadership at the federal and provincial levels to ensure sensitive and coordinated legal and policy responses. Laws that would imprison gay teenagers or those working to educate them should have no place in our national HIV/AIDS strategy.

Top of this page

Return to Table of Contents

Return to Home Page

ENDNOTES

[1]*Halm v Canada (Minister of Employment and Immigration)* [1995] FCJ no 303 (24 February 1995)

[2]*R v Carmen M* (1992), 75 CCC (3d) 556; 15 CR (4th) 368 (Ont Ct Gen Div), Ont Ct App (25 May 1995) (unreported).

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Supreme Court Rules on Same-Sex Benefits

Jim Egan and John Nesbit, who have been in a committed same-sex relationship for 47 years, applied for the spouse's allowance under the *Old Age Security Act* (RSC, 1985, c.0-9). They were denied access to this benefit on the ground that the definition of "spouse" in the *Act* is restricted to persons "of the opposite sex."

Egan and Nesbit challenged the constitutional validity of this decision, arguing that the "opposite sex" definition of "spouse" violated their right to equality, and that the *Charter of Rights and Freedoms* required that the definition of "spouse" be extended to include same-sex couples.

This was the first Charter case dealing with same-sex relationship recognition to come before the Supreme Court of Canada, which released its decision on 25 May 1995 ([1995] SCJ no 43). "Sexual orientation" is not one of the protected grounds set out in section 15 of the *Charter*. However, all the judges held that "sexual orientation" must be read into the *Charter* as a ground of discrimination analogous to existing grounds such as race, sex, religion etc.

Five of the Supreme Court judges (Cory, Sopinka, Iacobucci, MacLachlan, & L'Heureux-Dubé JJ) ruled that the refusal to recognize same-sex relationships constitutes discrimination against lesbians and gays contrary to section 15 of the *Charter*.

However, Sopinka J ruled that although the Government's failure to recognize such relationships is discriminatory, this *particular* piece of legislation can be justified since the Government is entitled to some degree of deference in making difficult policy choices, and to take time to bring its laws incrementally into conformity with the *Charter*.

The four other judges (Lamer CJ, Major, La Forest, & Gonthier JJ) ruled that the section 15 protection against discrimination on the ground of sexual orientation does not extend to same-sex relationships.

Comment

Although the Appellants in this case were not successful, the decision nevertheless represents a substantial step forward for gays and lesbians. For the first time, the Supreme Court has ruled that lesbians and gay men are protected by the equality guarantees of the *Charter*. Further, the majority ruled that the refusal to recognize same-sex relationships is discriminatory. This means that every Canadian statute that fails to recognize such relationships as equal is subject to constitutional challenge: The Supreme Court has truly opened the door to a new era of litigation. Federal and provincial governments must accept that every law that creates inequalities between heterosexual and same-sex relationships is discriminatory. And both public and private employers refusing to extend same-sex benefits will have to demonstrate compelling reasons for the distinction if they are to avoid legal liability under human rights codes.

- *John Fisher*

Top of this page

Return to Table of Contents

Return to Home Page

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Ontario Court Rules on Same-Sex Adoptions

Four lesbian couples challenged the constitutional validity of the *Child and Family Services Act of Ontario*. On 9 May 1995, Nevins J. of the Ontario Court of Justice rendered an oral judgment invalidating the provision that prevented four lesbians from legally adopting their partner's children.

Comprehensive and detailed written reasons were released on 24 May 1995[1].

The *Child and Family Services Act* permits the presentation of an application for the adoption of a child by either an individual or, jointly, by two individuals who are "spouses". There are no restrictions with respect to the sex or sexual orientation of an individual applicant. However, since 1984 the definition of "spouse", which is found in the *Ontario Human Rigths Code* provides that the partners, whether married or unmarried, be members of the opposite sex.

In this case, all of the children involved were conceived through artificial insemination during the course of the four lesbian couples' relationships. The facts indicate "that in all respects the couples' relationships might be termed conjugal, in that they had all of the usual characteristics of a relationship formalized by marriage". The issue before the court was thus whether there was a constitutionally valid reason why an application for adoption by a homosexual couple, one of whom being the biological mother of the child, living in a conjugal relationship, should not be accepted as being in the best interest of the child.

Best Interest of the Child

Nevins was of the opinion that the best interests of children are served when parents provide an adequate, but not necessarily perfect, level of care. "Should there be evidence that homosexual parents do not have the ability to parent children in a manner that is considered adequate or acceptable by community standards", then the homosexuality of the parents may be seen to be by itself a criteria to prevent adoption. The same would be true if "the fact of being raised and cared for by homosexual

parents would likely lead to physical, emotional, sexual, psychological or social problems in children to a significantly greater degree or frequency that are present in the children in the general population".

In reviewing a considerable amount of expert evidence, Nevins J. concluded that there is no such evidence available at this time. "The traditional family model of two middle class, heterosexual parents in which the woman is a housewife and the man has full-time paid employment is now a minority and no longer, as it has been for so long, assumed to be the structure most favourable to healthy child development". Nevins was of the opinion that several varieties of non-traditional families now exist and that "the sexual orientation of the parents can be considered along with race, household composition and maternal employment as only one in a number of ways in which families do in fact vary from the traditional model".

The children of gay or lesbian parents should also not be expected to differ significantly from the children of heterosexual parents. Nevins J. stated that "the most significant factors on the healthy and emotional development of a child are more related to conflicts in spousal relations than family type or structure". There was also, despite stereotypical beliefs to the contrary, "no evidence to indicate that gay men and lesbians have unstable or dysfunctional relationships or that their children will necessarily grow up to be homosexuals". The children are finally not expected to be exposed to possible stigma or harassment that would be "necessarily worse than other possible forms of racial or ethnic stigma".

The Court's Analysis Under Section 15

Nevins J. then reviewed the plaintiffs' claim with respect to the three step analysis under s 15, the anti-dicrimination disposition of the Canadian *Charter*. As proposed by the Supreme Court of Canada in *Andrews*, step 1 asks whether there is a distinction in the context of sec. 15, step 2 is a determination of whether the distinction is discriminatory and step 3 whether that distinction is justified[2].

In the present case, there is a distinction in the context of sec. 15 since the effect of the definition of "spouse" is to prevent homosexual individuals from applying as a couple to adopt children. "That is a substantial benefit which is being denied on the basis of a purely personal characteristic". Since Nevins J. considered that it is now a well-settled issue that sexual orientation, while not one of the enumerated categories of rights in sec. 15, is an analogous category deserving of protection, he then moved on to step two of the analysis.

The distinction was found to be discriminatory since it denies the applicants the benefits, advantages and special privileges inherent in adoption. Reviewing the unique legal nature of adoption and the substantial benefits which are attached to it, and the fact that the applicants are denied the right to have their applications reviewed on the merits simply because they are homosexuals, Nevins J. concluded that he could not imagine a more blatant example of discrimination.

Is this discrimination justifiable? Nevins J. concluded that it was not. The legislative objective pursued by the adoption provisions focuses on protecting the best interest of chidren. Would permitting same-sex

adoption frustrate the government's objectives? This is by far the most crucial aspect of the case; whether permitting same-sex adoptions would run contrary to what is in the best interest of children.

According to Nevins J, the best interest of the children are served by being raised in a loving and secure family. In his opinion, the *Act* already recognizes that the best interest of children are not only served by so-called traditional families since it allows for adoptions by common law heterosexual partners, as well as by single individuals.

No evidence was presented to indicate that homosexual couples could not provide a warm, secure and loving environment for the children. Nevins J. emphasized that the case "must not be settled on speculations, unfounded prejudice and fears, or on a reaction to the vociferous comments of an isolated and uniformed segment of the community":

> "When one reflects on the seemingly limitless parade of neglected abandoned and abused children who appear before our courts in protection cases daily, all of whom have been in the care of heterosexual parents in a "traditional" family structure, the suggestion that it might not ever be in the best interests of these children to be raised by loving, caring and committed parents, who might happen to be lesbian or gay, is nothing short of ludicrous."

Nevins J. concluded by stating that the "line drawn by the legislation is irrational, not based on any compelling social interest, and is a completely unwarranted infringement of specifically protected Charter rights". Homosexual couples are completely denied the right to adopt chilren while there would be a multitude of mechanisms available to review their adoption applications on the merits of each case. Such a complete denial is thus not be justifiable.

Nevins J. finally decided that all four adoption applications should be reviewed on their merits. Furthermore, he ruled that the definition of spouse was now to be read as if enacted to allow for the application by individuals living in a conjugal relationship with a partner of the same-sex.

- *Bruno Guillot-Hurtubise*

Top of this page

Return to Table of Contents

Return to Home Page

ENDNOTES

[1] *In the matter of the Child and Family Services Act*, R.S.O. 1990, c. C-11, Sections 136(1) and 146(2), [1995] O.J. No 1425;

[2] *Andrews v. Law Society of British Columbia*, (1989) 1 S.C.R. 143,

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Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

HUMAN RIGHTS

Human Rights Linked to Prevention and Care at HIV 95

Why is it that successful pilot projects on HIV/AIDS prevention and care are not being replicated? Why does it appear that, globally, political commitment to HIV/AIDS has plateaued or declined despite the expanding epidemic? What is missing? What is the pandemic really about? What is, therefore, to be done?

At the 2nd International Conference on Home and Community Care for People Living with HIV and AIDS in Montréal, 24-27 May 1995, Jonathan Mann of the François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health in Boston, and David Roy of the Centre for Bioethics at the Clinical Research Institute in Montréal, provided conference participants with important insights and inspiration to help them address these issues.

In a powerful keynote address which set the mood for the conference, Mann examined 'with tenderness and respect' the experiences of the last ten years of the epidemic. He first outlined the initial response to the epidemic - applying a public health paradigm focusing on individual behaviour - and noted that it was recognized very early on that fear of discrimination led those most likely to be infected to avoid contact with government agencies, health clinics and other services. The articulation of the 'public health rationale' for the prevention of discrimination against those living with HIV and AIDS was thus an original concept that emerged from practical experience, rather than a capitulation to human rights activists or an ideological commitment to human rights within public health.

Mann reflected that, today, no one who is knowledgable about AIDS believes that by doing simply more of what has been done will bring the pandemic under control. "In each society, those people who before AIDS arrived were marginalised, stigmatised and discriminated against, become over time those at highest risk of HIV infection... This relationship between how society and governments treat people and the risk of HIV infection or inadequate HIV and AIDS care is something we have known for a long

time."

Yet, suggested Mann, we have until now lacked a common vocabulary to compare disparate experiences, and have been afraid that others would misuse our observations to argue that the epidemic no longer threatened the general public.

He advanced the language of modern human rights - a powerful force and reality in the modern world - as a tool to enable us to articulate how rights influence vulnerability. Citing the failure of condoms and education alone to slow the rate of infection among women, Mann emphasized that the central issue is the inferior role and status of women.

He noted that in Kigali, of HIV infected women one in five had only a single lifetime sexual partner. In Morocco, 45% of HIV infected women were infected by their husbands. For many women, having multiple partners may be necessary for survival: sexual partnerships may be the only route of access to resources for school, finance, credit or jobs. In marriage the pervasive threat of physical violence or divorce, without legal recourse or legal rights to property, may totally disempower a women, even if she knows her husband is HIV-infected.

Thus, suggested Mann, these personal and global experiences have shown us the real societal dimension that is missing from the current approach to AIDS: it does not address the societal issues that frame and define vulnerability to HIV. The major determinants of health are societal. We cannot ignore this central reality. The right to health goes far beyond the right to access to medical care, to ensure the conditions under which people can remain healthy.

The new public health sees society and disease as inextricably linked. Without a commitment to changing the societal conditions that constrain health, the positive impact of public health work will be inadequate.

For Mann, it is now clearer why the powerful allow pilot project results to be presented at international conferences, but block and will not support their implementation at home. Promoting human rights and dignity is threatening to those in power - this is the inner meaning of AIDS: "That human rights and dignity define to a remarkable extend who shall be ill and who will die, at what age, and under what conditions and circumstances."

David Roy focused on the poor, the privileged and HIV justice. He protested against "an ethic of exclusion that is working its way through our world", and against an emerging set of new world leaders who dominate resources, money and the economy.

This ethic of exclusion reduces people to their least and most undesirable quality, magnifies differences, blinds us to the common core within each of us, stigmatises people with difference, and allows us to marginalize, and ultimately excommunicate, them.

For Roy, the key to overcoming HIV and AIDS is transcendant compassion. He evoked the now-infamous image of the child in the Sudan crawling towards a feeding station while being watched by a vulture; he told of an HIV-positive female sex worker fighting to escape heroin addiction while being watched by 'male vultures', and of a gay man dying with AIDS, abandoned, 'excommunicated' by family, friends and his lover, in a Montréal hospital.

Roy made a plea for a global ethic of complexity that respects the differences between people. "The day will come when we will move beyond the governing image of human beings as maximisers of their own personal and consumer interests, towards an ethos of global solidarity, where the bonds between people do not require the suppression of their individual differences."

Jonathan Mann gave us the theory and David Roy the fire and the passion for change, but what practical steps can we take to move towards this new global ethic? In a workshop entitled "Promoting Policy and Legal Responses that Reflect Human Rights" participants heard of two initiatives, one in Canada and the other in Sri Lanka, in which practical issues of human rights, ethics, policy and law that directly affect HIV prevention and care are addressed. These two examples of strategic NGO networking by community-based organizations offered models for practical action. Dr Malika Rani Ganasinghe spoke of the work of the Colombo-based Community Front for the Prevention of AIDS in negotiating for sex workers and poor youth. Participants also heard of the work of the Canadian HIV/AIDS Legal Network.

The commonality among the groups at risk is poverty, powerlessness and lack of dignity. David Roy urged us to reach out and break bread with the marginalized, to bring them back into the circle. In Jonathan Mann's words, we are now discovering what the pandemic is really about; we know what is missing, and, therefore, what needs to be done.

- *David Patterson*

Top of this page

Return to Table of Contents

Return to Home Page

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

CANADIAN NEWS

Joint Project Identifies Priority Legal and Ethical Issues Raised by HIV/AIDS

The *Newsletter* first reported about the joint Canadian HIV/AIDS Legal Network and Canadian AIDS Society project on legal and ethical issues raised by HIV/AIDS in its January and April 1995 issues. Since then, the first phase of the project has been completed and work has started on the first of the eight priority issues identified by the project.

Project Background

> "We must fully exploit the potential of the law to promote and buttress other HIV/AIDS strategies and, where necessary, to change the traditions and values that place people at risk of HIV infection."[1]

The importance of legal research for the development of effective responses to HIV/AIDS was understood early in the HIV/AIDS epidemic. Further, it is now well-accepted that violations of human rights have health impacts and that the promotion and protection of human rights and the protection of health are fundamentally linked:

- The HIV/AIDS epidemic has shown a consistent pattern through which discrimination, marginalization, stigmatization and, more generally, a lack of respect for the human rights and dignity of individuals and groups heightens their vulnerability to becoming exposed to HIV.

- For people living with HIV/AIDS, a supportive legal and ethical policy context is a key factor in improving their quality of life.

• For the community-based network of people and organizations caring for those infected and affected, a supportive legal and ethical policy context is essential to their efforts.

The importance of developing legal and ethical responses to HIV/AIDS that respect human rights was emphasized by Jonathan Mann as follows:

> AIDS is the crisis in which the inextricable linkage between health and human rights has become visible to many: through AIDS we discovered the parallelism of health and human rights: we discovered that human rights abuses inevitably have health consequences and that serious discussion of health issues must involve consideration of human rights.

According to Mann, there are at least four reasons why, as part of efforts to prevent HIV infection and to provide better care and treatment for those affected by the disease, human rights must be protected:

> First, because it is right to do so; second, because preventing discrimination helps ensure a more effective HIV prevention program; third, because marginalization intensifies the risk of HIV infection; and fourth, because a community can only respond effectively to HIV/AIDS by expressing the basic right of people to participate in decisions which affect them.

It is therefore "essential and inevitable that we look to the insights and guidance of human rights, ethical and humanitarian values as we consider ... how to move ahead and advance in policy and program [on HIV/AIDS] in the 1990s."[2]

Results of Phase 1 of the Project

In recognition of the importance of legal and ethical issues raised by HIV/AIDS, the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society, funded by the AIDS Care and Treatment Unit, Health Canada, undertook a joint five-month development initiative to lay the groundwork for the production of much-needed resource documents on legal and ethical issues raised by HIV/AIDS in Canada. In particular, the following activities and initiatives were undertaken:

• Existing resources addressing legal and ethical issues raised by HIV/AIDS both nationally and internationally have been researched and documented. These resources have been evaluated and are listed in an annotated bibliography.

• Key legal and ethical issues raised by HIV/AIDS in Canada have been assessed and prioritized. After extensive meetings with persons living with HIV/AIDS, representatives from community-based organizations, lawyers, academics and government policy analysts active in the HIV/AIDS area, a list of eight topics identified as immediate priorities by the persons and organizations consulted was drawn up.

• A detailed plan for the realization of resource documents on legal and ethical issues raised by HIV/AIDS has been developed, including a full project design, a detailed project method, a project evaluation framework and a national project management structure.

• The Project Coordinator identified key people living with HIV/AIDS, representatives from community-based organizations, lawyers, academics and government policy analysts active in the HIV/AIDS field who would be potential participants in the preparation of the set of resource documents. He met with them and consulted with them as to the feasibility of the proposed plan for the development of a comprehensive set of resources.

• The Project Coordinator contacted and met with a wide variety of non-governmental organizations, institutions and professional associations, as well as with representatives of Justice Canada, to seek partnership support for the Project.

• A literature review and annotated bibliography has been prepared. Due to the short duration of phase 1 of the project and the sheer volume of existing literature on legal and ethical issues raised by HIV/AIDS, the attempt was not made to be comprehensive. However, it is hoped that the 150-page document will be helpful to persons in Canada and abroad with an interest in legal and ethical issues raised by HIV/AIDS, and that it will serve as a groundwork for the production of the resource documents on legal and ethical issues raised by HIV/AIDS.

The Eight Priority Issues

Each of the over 60 individuals consulted by the Project Coordinator were asked to identify which, in their view, are the priority legal and ethical issues that a second phase of the Project should address. The following eight "top priority" issues were identified according to a set of criteria including the frequency with which they were mentioned as a priority, the priority given by the individuals consulted, the availability and accessibility or lack of resources on a particular issue, and the degree to which issues were already taken care of by other existing projects, in order to avoid duplication of efforts.

• **Testing and Confidentiality:** Although many documents were produced about testing and confidentiality issues in Canada in the late 1980s and early 1990s, many of the issues are still unresolved or need to be re-examined: in particular, there is a sense that, more and more often, testing for HIV is being undertaken without consent. People, whether they test positive or negative, often do not receive adequate counselling. Issues regarding access to anonymous testing and, especially for women, to testing in general, are also far from being resolved. Calls for mandatory or compulsory testing of certain groups have been frequent.

• **Discrimination:** Persons living with HIV/AIDS and those affected by the disease are

still suffering from unjustified discrimination in many areas of their lives, including employment, housing, access to services, etc. This is not reflected in the number of complaints received by human rights commissions across Canada, because it seems that such commissions are considered by many to be ineffective and inefficient. Persons living with HIV/AIDS also often lack information about how to access the justice system and seek redress for injustices suffered.

• **Access to Care and Treatment for Persons Living with HIV/AIDS:** The problems faced by persons living with HIV/AIDS in obtaining access to quality care and treatment are multiple and range from simple refusal of treatment to inaccessibility of treatment in certain regions of Canada, to limited access to clinical trials for certain groups of the population.

• **Gay and Lesbian Legal Issues:** The link between discrimination against gays and lesbians and their higher susceptibility to contracting HIV is uncontested, and it is in this context that the refusal of school systems to provide positive education about homosexuality and gay and lesbian sex is particularly troublesome, as is the reluctance to legally recognize the existence of relationships between two men or women, with all the benefits and burdens attached to them.

• **Criminalization of HIV Transmission:** Federal Minister of Justice Allan Rock announced in January 1995 that he was considering amending the *Criminal Code* to criminalize HIV transmission. It is generally agreed that this issue needs to be examined urgently, in order to develop a coherent and informed approach to the behaviour of persons who knowingly put others at risk of contracting HIV.

• **Legal Issues Raised by HIV/AIDS in Prisons:** see infra.

• **Drug Laws and HIV/AIDS**: HIV-infection rates among injection drug users are increasing steadily, and many fear that they will reach levels as high as those observed in some centres in the US and Europe. In order to avoid this, many are suggesting changes to current drug laws and policies, which need to be examined in detail.

• **Laws and Policies Regulating Prostitution and HIV/AIDS:** Proposals to change existing policies and laws on prostitution have not received much attention in Canada, and generally women and men working in the sex trade have been considered as vectors of transmission rather than as persons who for many, including legal reasons, are vulnerable to contracting HIV.

The Second Phase of the Project

Work on the second phase of the project started in June 1995 thanks to funding obtained from the AIDS

Care and Treatment Unit, Health Canada. During phase 2, each of the identified priority issues will be dealt with extensively, and resource documents on legal and ethical issues raised by HIV/AIDS will be created as a result of a community development process. This process will include the following steps:

Discussion Papers

Selected individuals will be contracted to write initial discussion papers on the identified priority issues. They will be provided with detailed terms of reference and will be asked to write a comprehensive paper identifying all the main legal and ethical issues raised by the particular topic.

Soliciting Comments

Selected individuals from a variety of backgrounds will be asked to provide written comments on the discussion papers. The discussion papers will also be sent out for broader comment.

Workshops

Finally, a series of national workshops will be organized to address the key legal and ethical issues. The participants will be representative of the groups and individuals interested in and/or affected by the legal and ethical issues the Project will address. Among others, people living with HIV/AIDS, representatives of community-based AIDS organizations (especially those involved in the provision of legal services), academics, lawyers practising in the field of HIV/AIDS law, and government policy analysts and advisors will be involved. Each workshop will focus on one or a combination of the eight priority legal and ethical issues identified during the development initiative.

At the workshops, participants will be asked to provide critical input and comments on the discussion papers and the comments received from the key commentators and other individuals and organizations. The workshops are intended to bring together persons and organizations from different backgrounds to discuss the issues, exchange their views, and, where possible, develop a consensus on how to deal with a particular legal and ethical issue raised by HIV/AIDS. The goal of the workshops will be to advance knowledge and thinking about these issues, and to come up with solutions that will enable Canada to better prevent HIV transmission and to care for those affected.

Publication of Resource Materials

The final product of this process will be a bilingual resource document addressing in detail key legal and ethical issues raised by HIV/AIDS. This document will represent the range of views on the issues selected, with detailed reference lists, and is intended to be a critical tool for use in legal advocacy and law and policy decisions at all levels.

Legal Issues Raised by HIV/AIDS in Prisons

Over the summer, the project will focus on legal issues raised by HIV/AIDS in prisons.

Issues raised by HIV/AIDS in prisons have been extensively studied in Canada, in particular by the Expert Committee on AIDS in Prisons (ECAP). However, individuals and organizations consulted by the Project Coordinator consistently identified legal and ethical issues raised by HIV/AIDS in prisons as a priority for various reasons. Among the reasons mentioned were: the reluctance of the Correctional Service of Canada to implement some of the major recommendations of the Expert Committee, in particular, the recommendation to undertake a pilot study of needle distribution in at least one prison;[3] the fact that ECAP did not deal with some of the legal issues, such as the potential liability of prison systems for transmission of HIV in prisons; the recent outbreak of HIV transmission in a prison in Scotland; and studies showing alarmingly high rates of hepatitis C infection among prisoners in Canada and elsewhere. Because of the extensive research already done on HIV/AIDS in prisons, this part of the Project will, however, be limited to the examination of legal and ethical questions related to transmission of HIV in prisons, an issue that has not been extensively studied to date.

For More Information ...

If you are interested in this project or would like to receive further information, please contact the Project Coordinator, Ralf Jürgens. Phone: (450) 451-5457 Fax: (450) 451-5134 E-mail: info@aidslaw.ca. Copies of the full project report, which contains a detailed description of the project, and of the literature review and annotated bibliography can be obtained at the same numbers.

Top of this page

Return to Table of Contents

Return to Home Page

ENDNOTES

[1]Hamblin J. The Role of the Law in HIV/AIDS Policy. *AIDS* 1991; 5(Suppl 2): S239-S243.

[2]Mann JM. Human Rights and Priorities for HIV/AIDS Prevention and Care in the 1990s. In: Rights and Humanity. *Global Expert Meeting. AIDS: A Question of Rights and Humanity*. Participants' Presentations & Background Papers. The Hague, 21-24 May 1991.

[3]See R Jürgens. A War on Drugs, But Not on AIDS: CSC's Response to ECAP's Report. *Canadian HIV/AIDS Policy & Law Newsletter*, vol 1, no 1 (October 1994).

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

Free Legal Advice and Representation for People Living with HIV/AIDS

People living with HIV/AIDS in the Ottawa-Carleton region can receive free legal advice and representation. In 1989, the University of Ottawa Community Legal Clinic and the AIDS Committee of Ottawa recognized the need in the region for accessible legal services for people living with HIV/AIDS. They worked together in order to develop a program to fill this need in the community. HIV Legal Services was the result of this cooperative effort.

Organization of HIV Legal Services

HIV Legal Services is one of seven divisions operated by the University of Ottawa Community Legal Clinic. It is staffed by students of the Common Law Section of the University of Ottawa's law faculty under the supervision of a lawyer who works at the clinic. HIV Legal Services operates an office at the AIDS Committee of Ottawa, in order to improve access, and to maintain the confidentiality of the clients' health status. The students who are chosen to work in the division are screened in order to ensure awareness and sensitivity to HIV/AIDS issues.

Since HIV Legal Services is staffed by law students, there are restrictions placed on the types of cases that the division can handle. Therefore, a referral list of lawyers in Ottawa-Carleton who specialize in certain areas of the law and who demonstrate awareness and sensitivity to HIV/AIDS issues is maintained. Nevertheless, HIV Legal Services is able to represent and advise approximately thirty to fifty clients every year.

Discrimination Issues: Dealing with Human Rights Commissions

Over the past few years, the division has gained expertise with certain problems that affect people living with HIV/AIDS. Because of the high level of ignorance and fear in the community about HIV and AIDS, discrimination against people living with HIV/AIDS is still a serious problem. Consequently, a significant proportion of the division's work consists of helping clients draft complaints to the Ontario

and the Canadian Human Rights Commissions. HIV Legal Services is also able to advocate on behalf of clients during the complaint investigation process. This is important because, although both the Ontario and the Canadian commissions have fast-track policies when dealing with complainants living with HIV/AIDS, this policy is often ignored by the commissions. Serious delays in processing complaints often occur. HIV Legal Services has taken an active role in trying to make the commissions aware of the consequences of delays in the processing of a complaint by a person living with HIV/AIDS. The division also ensures that their clients' complaints are processed as quickly as possible.

Employment Issues

HIV Legal Services has represented clients who have initiated human rights complaints against banks, the armed forces, and other employers. These respondents terminated the employment of their HIV-positive employee. We have noticed that employers are becoming much more sophisticated and subtle in their discriminatory practises. Consequently, complainants without legal representation are often at a disadvantage since it is easier for the over-worked commissions to dismiss a complaint in the preliminary stages where the discriminatory practice is subtle.

Discrimination in the Provision of Services

Aside from discrimination in employment, HIV Legal Services has also represented many clients who suffered discrimination while seeking services. A particular problem of many people living with HIV/AIDS in Ottawa is that they receive unequal treatment from their doctors or dentists.

Many **doctors** still seem to be under the impression that it is their duty to screen potential carriers of HIV. Therefore, some doctors test their patients without their consent if they are members of so-called "high-risk groups". HIV Legal Services argues that this treatment is discriminatory since a patient's membership in such a group does not void their right to decide what happens to their body. In one case involving a doctor, the division is arguing that the change in the treatment given by a doctor to his patient once the client's HIV-status was determined was discriminatory. The doctor unilaterally decided to modify important transplant surgery without obtaining his client's consent.

Some **dentists** have also acted in a discriminatory manner towards their HIV-positive clients. In one case, HIV Legal Services represented a client who was refused treatment by his dentist, once the dentist learned of the client's HIV-status. The division was able to negotiate a settlement of $5000.00 with the dentist with compensation for the client's hurt feelings. In another case, presently before the Ontario Human Rights Commission, a dentist wore over-protective clothing while treating a person living with HIV. She wore a face shield, glasses, gloves, two surgical gowns, leggings, and paper booties in order to treat the patient. Along with the human rights complaint, a complaint was also initiated with the Royal College of Dental Surgeons of Ontario. Though the College found the evidence regarding the face shield glasses, gloves, leggings, and paper booties was not conclusive, it did find that she had worn two surgical gowns. On this basis, the College's Complaints Committee found that the dentist had treated the patient in a discriminatory manner. This is a very significant decision since the Complaints Committee

put much weight on the relatively insignificant wearing of two gowns (that is, insignificant when considered with the much more flagrant face-shield, leggings and booties). The Complaints Committee decided that the dentist should be reprimanded for her actions in ignoring the universal precautions recommended by the Royal College of Dental Surgeons.

HIV Legal Services is also representing the Living Room, a drop-in centre for people living with HIV, in their human rights complaint against a linen service. The linen service entered into a written contract with the Living Room to clean laundry for the drop-in centre. The centre uses sheets and pillow cases for a massage therapy cot. The linen service terminated the contract when their employees refused to clean "contaminated laundry". HIV Legal Services is arguing that employers have a duty to educate their workers and not to give in to their employees' irrational fears and prejudice.

Limitation Periods

HIV Legal Services is currently looking into the consequences of strict enforcement of limitation periods were human rights complaints are initiated by people just diagnosed as HIV-positive. Section 34 (1)(d) of the Ontario *Human Rights Code* has a 6 month limitation period unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. The Commission has a new policy of strict enforcement of this provision unless exceptional circumstances exist. People who are diagnosed as having HIV are often in shock for a long period after the diagnosis. They may not be in a position to react to a human rights violation for a considerable period of time. In some cases, the limitation period has expired before the person has overcome his or her shock and denial. If the commissions do not allow for accommodation with respect to limitation periods, this may in itself constitute discrimination against people living with HIV/AIDS.

Income Maintenance and Other Issues

HIV Legal Services has also gained expertise in a variety of other areas. **Income maintenance** is a very important issue for people living with HIV. As the disease progresses, a person's income often declines. Social assistance often becomes a necessity. However, at a time of limited resources and fiscal restraint, the authorities are increasingly reluctant to grant benefits to a group comprised of so many young people. HIV Legal Services has successfully argued in front of the Social Assistance Review Board for a declaration of eligibility to Family Benefits Allowance in a case where the Director of Income Maintenance had refused to grant a benefit to a young man living with HIV. An increasing number of clients require assistance with income maintenance problems.

Furthermore, the division has also successfully argued **civil cases** in small claim's court on behalf of people living with HIV. In one case, it argued successfully that the defendant's conduct caused the client undue stress that aggravated his HIV condition. Consequently, punitive damages were awarded.

Members of the division have also helped clients with **landlord and tenant problems**. For instance, in one case, a client living with HIV was living in an apartment infested with cockroaches. Furthermore, a

radiator was leaking and was causing the floor to rot. The division argued successfully that these conditions posed an additional risk for a person living with HIV and a retro-active abatement of rent was obtained. Currently, we are active in preventing evictions by the Aids Housing Group of Ottawa. We intend to argue that the consequences of being evicted for someone living with HIV/AIDS are more serious than for other members of the general public. In particular the consequences of being homeless and living in shelters could expose persons living with HIV/AIDS to numerous opportunistic diseases which have the potential of killing them.

Sexual Orientation Issues

We also provide assistance to lawyers with cases that will seriously impact on our clients but are not directly related to the client's HIV status. When we first started the clinic we realized the additional burden that discrimination on the basis of sexual orientation placed on our clients. We were therefore actively involved in two "gay rights" court cases: we helped to have Gay Pride Day proclaimed in Ottawa, and worked towards the inclusion of sexual orientation in the Canadian *Human Rights Code* in the case of *Haig and Birch*.[1] One of our students did some background for the Canadian Human Rights Commission lawyer in *Thwaites*.[2]

Law Reform Issues

We also are involved in law reform issues. This has included a submission to the CRTC on how hate messages impact on people with HIV. More significantly we were involved in providing support to the Aids Committee of Ottawa in having Section 22 Orders under the *Health Protection and Promotion Act* dealt with differently (under s 22, ...)

Community Legal Education

Apart from case work, members of HIV Legal Services also play an important role in community legal education. The division gives presentations on the subject of HIV and the law to community groups. Members also prepare pamphlets on different topics of importance to people living with HIV/AIDS. Finally, the division recently organised a well-attended conference (HIV: Our Lives, Our Rights) for people living with HIV and their service providers.

Conclusion

The work done by HIV Legal Services is important. Without this service, many people living with HIV/AIDS would not be able to get legal advice or representation. Students working in the division, the Review Counsel at the clinic, and the staff of the AIDS Committee of Ottawa are a dedicated group of people committed to the task of providing essential services to the seropositive community of Ottawa-Carleton.

- *David Bennett, Marc Chénier, and Jane Northey*[3]

Top of this page

Return to Table of Contents

Return to Home Page

ENDNOTES

[1] CITATION

[2] CITATION

[3]The authors would like to give a special note of appreciation to the following students who have through their leadership and enthusiasm successfully developed the clinic: Patti Strong, Bruce Steadman, Ruth Carey, Peter Douglas, Karen Bastow, Marc Chénier

Jane Northey. Michael Smith, formerly of the Aids Committee of Ottawa, also deserves special credit for his assistance and patience in the early development of the clinic.

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

INTERNATIONAL NEWS

Asia/Pacific Regional Training Workshops on HIV Law and Law Reform

In the first half of 1995, the United Nations Development Programme Regional Bureau for Asia and the Pacific hosted three workshops on HIV law and law reform in the region.

The workshops were held in Colombo, Sri Lanka; Beijing, China; and Suva, Fiji. They aimed to bring together representatives of national AIDS programmes, the legal profession and the non-governmental AIDS movement to discuss the role of the law in HIV/AIDS prevention and care.

HIV/AIDS Networks for Eastern and Central Europe

The World Health Organization Regional Office for Europe is also sponsoring workshops on HIV, law, ethics and human rights.

Workshops were held in Latvia and Moldova in April and May 1995, and a third is planned for Kazakhstan in October. The legislation inherited from the former régimes in central and eastern European countries does not, in many respects, take account of the requirements for the control of HIV/AIDS. The workshops aim to increase awareness among policy makers of the relevance of the law and human rights in HIV and AIDS policy, and to encourage the development of country networks to work on such issues.

Top of this page

Return to Table of Contents

Return to Home Page

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

United Nations Training in Law, Ethics, Human Rights and HIV

In April 1995 the HIV and Development Programme of the United Nations Development Programme held a workshop in New York to train participants from the non-government sector to promote community and national responses that will enable their communities to best survive the HIV epidemic.

The focus was on legal and ethical responses, and the emphasis was on networking. Rather than address the substantive issues the workshop emphasised the *process* of change, and the role of the participants as agents of change, both within their own societies and in the region.

The key to this process was identified as the enhancement of national capacity through the creation of national networks on ethics, law, human rights and HIV. Ideally, these networks are non-hierarchical, flexible and inclusive groups of people from a variety of backgrounds and disciplines. The involvement, as equal partners, of people living with HIV/AIDS and the groups most affected was identified as essential.

Participants were drawn mostly from the African, Asia/Pacific and Latin American/Caribbean regions. Eastern Europe (Poland) was also represented. In focusing on the process of change, rather than on specific laws and policies, the workshop bridged the chasm separating theory and practice and inspired those who attended with an achievable means of putting in place legal and ethical responses that respect human rights.

- *David Patterson*

Top of this page

Return to Table of Contents

Return to Home Page

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

EUTHANASIA

Position Statement on Assisted Suicide Approved

The AIDS Committee of Toronto (ACT) approved a position statement on assisted suicide on 18 May 1995.

We reprint the statement in unedited form. For more information, contact Joan Anderson at ACT, 399 Church Street, 4th Floor, Toronto, M5B 2J6.

The Aids Committe of Toronto (ACT), a community-based, non-profit organization, provides support, education and advocacy for people living with HIV\AIDS and those affected by HIV\AIDS.

ACT is committed to providing direct services to men and women living with HIV\AIDS in a manner that enhances independence and dignity. Building on a health promotion model, ACT also promotes the health and well-being of all people living with HIV\AIDS.

Section 241 of the Canadian Criminal code prohibits the giving of assistance to commit suicide. Anyone who counsels a person to commit suicide, or aids and abets a person to commit suicide, whether a suicide ensues or not, is liable for a prison term of up to fourteen years. ACT is fully committed to complying with all the requirements of Canadian law and does so in the provision of al its services. However, ACT is also committed to advocacy for peole living with HIV\AIDS,and as part of its advocacy role, ACT believes that s. 241 of the Criminal code should be amended.

Through the provision of adequate services and medical treatment, people with HIV\AIDS are living healthy, productive lives. With adequate support, even those who are ill are still able to maintain a reasonable quality of life. ACT believes that all people living with HIV\AIDS are entitled to have accces to all the necessary resources to maintain a good quality of life.

ACT also believes in the fundamental right of self-determination for peolple with HIV\AIDS, including the right to consent to or refuse treatment, and the right to die with dignity. ACT also recognizes that with adequate services, and appropriate pain management, most peole with AIDS will not choose assisted suicide. However, ACT also believes that if a person with AIDS, in sound mind and of free will, chooses assisted suicide, this option should be available and the current law that prohibits assisted suicide should be modified.

Top of this page

Return to Table of Contents

Return to Home Page

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

UPCOMING EVENTS

9th Annual British Columbia HIV/AIDS Conference: "HIV in Canada Today: Focus on Drug Users" (Vancouver, 5-7 November 1995)

The Division of Interprofessional Continuing Education at the University of British Columbia hosts a major conference on AIDS for health-care professionals each fall in Vancouver. This event brings together resource people from across North America to exchange the latest information on the spread of AIDS, its prevention, and counselling and treatment for those at risk of AIDS and their families. The conference is co-chaired by Irene Goldstone, Director, Prefessional Education and Care Evaluation, BC Centre for Excellence in HIV/AIDS, and Rick Marchand, Executive Director of AIDS Vancouver.

This year's conference will focus on drug use and HIV/AIDS.

Many presenters will address the issues raised by drug use in the context of HIV, including the impact of drug laws on the spread of HIV.

One of the workshops at the conference will be entirely devoted to legal and ethical issues raised by HIV/AIDS. The workshop will provide an update on, and an opportunity for discussion of, priority legal and ethical issues raised by HIV/AIDS in Canada in the second half of the 1990's. In particular, it will address issues relating to access to care and treatment, discrimination, and criminalization of HIV transmission.

For further information, please contact Continuing Education in the Health Sciences, University of British Columbia. Tel: (604) 822-2626 (in BC 1-800-663-0348); fax: (604) 822-4835.

Top of this page

Return to Table of Contents

Return to Home Page

Canadian HIV/AIDS Policy & Law Newsletter

Volume 1 Number 4 - July 1995

First National HIV/AIDS and Prisons Workshop

The First National HIV/AIDS and Prisons Workshop will take place in Kingston from 18-20 August. It is organized by the Toronto-based Prisoners with AIDS/HIV Support Action Network (PASAN) and made possible with contributions from Health Canada and the Correctional Service of Canada.

The goals of the workshop are to:

- identify issues relating to HIV/AIDS in prisons and prison-affected populations;
- structure responses to these issues and develop clear action plans;
- reduce the risk of HIV transmission in prisons, and
- ensure a safer transition of those infected back into the community upon release.

People from across Canada living with or affected by HIV/AIDS who are, or have been, under the supervision of the Correctional Service of Canada are invited to participate. Individuals and organizations who provide service to or work with these populations are also encouraged to attend.

One of the plenaries and many of the working groups at the Workshop will be devoted to an analysis of some of the legal issues raised by HIV/AIDS in prison. In particular, the plenary on "Prison Policy and Politics" will present a harm-reduction approach to drug use and sex in prisons. It will critically review Canadian drug policy and its impact on the spread of HIV in prison, and address questions of access to condoms, bleach, clean needles, and methadone in prisons: Do prisoners have a right to the means that would allow them to protect themselves against contracting HIV and other diseases in prisons? Can prison systems be forced to provide condoms, bleach, and needles? Can and should the law be used to achieve changes in policies? Some of the working groups will address issues such as the legality of drug testing in prison, testing for HIV and confidentiality, and compassionate and early release of prisoners living with AIDS.

For more information, contact Lesli Gaynor, conference coordinator, at (416) 920-9087.

Top of this page

Return to Table of Contents

Return to Home Page
