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Gay and Lesbian Legal Issues and HIV/AIDS

A History of Discrimination

This info sheet provides a brief overview of the history of discrimination against gay men and lesbians and the impact of the advent of the HIV/AIDS epidemic.

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A Matter of Justice (Info Sheet 9)

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Patterns of Discrimination and Persecution

Gay men and lesbians in Canada have suffered persistent patterns of discrimination and persecution. They have:

- been treated as mentally ill and subjected to conversion therapies, including electroshock treatment;
- been targeted by discriminatory laws;
- been excluded from certain aspects of public life;
- not been permitted (until recently) to participate openly in the Armed Forces;
- faced discrimination in the private sector, in areas such as employment and housing; and
- been the victims of hate-motivated crimes, anti-gay and anti-lesbian violence, and verbal harassment.

In addition:

- gay men and lesbians have been subject to many damaging stereotypes – gay men have often been characterized as sexual predators and child molesters, while lesbians have been rendered invisible, dismissed as asexual, and depicted as unfit parents;
- same-sex relationships have been devalued and treated as unworthy of recognition and respect;
- gay and lesbian history has been ignored; and
- school systems have failed to provide positive education about gay and lesbian sexuality.

The experience of homophobia and heterosexism is inextricably a part of being gay, lesbian or bisexual in [Canada]. 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.”

— Canadian AIDS Society, 1991

Concealed Identities

Many gay men and lesbians have been forced to conceal their sexual identities because they have had to fear discrimination, harassment, and violence if they come out. This enforced invisibility of gay and lesbian sexualities and relationships has fueled the misconception that heterosexuality is natural and normal whereas lesbianism and male homosexuality are deviant. This in turn has contributed to the oppression of gay men and lesbians – not only because it has fueled social prejudice against them, but also because many of them, particularly youth, have internalized the message that they are not normal. As a result, many have suffered insecurity, anxiety, and shame, and have lacked the role models needed to develop fulfilling relationships.

The Advent of AIDS

In recent years, no disease has created so much anguish and fascination as AIDS, mixing together as it does age-old fears and taboos about epidemics, homosexuality and death.

— Pollak, 1988

When the HIV/AIDS epidemic began in the early 1980s, governments and policymakers were not able to overcome this history of discrimination and to deal with the gay and lesbian communities in an accepting and responsible manner.

The impact of the epidemic on the gay community has been devastating. As of 31 December 1997, between 72 and 76 percent of the cumulative cases of AIDS in Canada were attributed to men who have sex with men. It has been estimated that between 10 and 20 percent of men in Canada who have sex with men are living with HIV.

Persons with HIV/AIDS face double jeopardy: they face death, and while they are fighting for their lives, they often face discrimination.

— Cohen & Wiseberg, 1990

Since the beginning of the HIV/AIDS epidemic, there has been a second epidemic – one of stigma and discrimination directed at those with HIV/AIDS and at those associated in the public mind with HIV/AIDS, including gay men. Stigma and discrimination on the basis of HIV/AIDS have reinforced discrimination on the basis of sexual orientation.

The information in this series of info sheets is taken from *Gay and Lesbian Legal Issues and HIV/AIDS: Final Report*, prepared by John Fisher, Ralf Jürgens, Anne Vassal and Robert Hughes for the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society. Copies of the report and info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged. However, copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). **Ce feuillet d'information est également disponible en français.**

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Gay and
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The Links between HIV/AIDS and Homophobia

This info sheet describes how HIV/AIDS and homophobia are inextricably linked in the public's mind. It reviews the implications of these links for people with HIV and for men who have sex with men.

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Gay – Got AIDS Yet?

— Toilet graffiti, men's bathroom, McGill University, Faculty of Law, 1994

The link in people's minds between homosexuality and AIDS is so firmly established that discrimination against people with HIV/AIDS is inseparable from discrimination on the basis of sexual orientation.

— Canadian AIDS Society, 1991

In the early days of the epidemic in North America, HIV/AIDS mostly affected gay men. As a result, there has been an enduring association between the stigma of HIV/AIDS and the stigma of homosexuality. The predominantly negative attitudes toward homosexuality have influenced people's attitudes and behaviour toward people with HIV in general, and gay and bisexual men in particular.

Stigma Associated with Homosexuality Is Transferred to HIV/AIDS

People with HIV may be discriminated against because they are assumed to be homosexual. The link is so strong that even if gay men stopped getting HIV altogether, homophobic reactions to HIV issues and to people with HIV would endure. This means, in effect, that all people with HIV may encounter homophobic discrimination.

Stigma Associated with HIV/AIDS Is Transferred to Homosexuality

Gay and bisexual men experience discrimination because they are assumed to be HIV-positive ("All gay men have AIDS and are infectious") or to be the cause of the HIV/AIDS epidemic ("Gay men are to blame for AIDS"). From the beginning of the epidemic, HIV/AIDS was associated with gay men; AIDS was called the gay plague, gay cancer, and Gay Related Immune Deficiency (GRID). The epidemic has intensified and extended discrimination against gay men. Apart from discrimination on the basis of their sexual

orientation, gay men now have to fear being discriminated against because of HIV/AIDS, regardless of whether they themselves are HIV-positive.

Men Who Have Acquired HIV through Sex with Other Men Have Been the Objects of Considerable Blame and Little Sympathy

Some people have expressed the view that gay men are to blame for their disease and that gay men with HIV/AIDS should pay for their own health care. Often, people with HIV/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.

Double Disclosure

For gay and bisexual men with HIV, disclosure of HIV status may entail disclosure of their sexual orientation, and the possibility of discrimination on the basis of their sexual orientation as well as their HIV status.

Government (In)action

The association between HIV/AIDS and homosexuality has affected how governments and institutions have reacted (or, more accurately, failed to react promptly, adequately, and consistently) to HIV/AIDS. *(See info sheet 5 for more details.)*

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Gay Men, Lesbians, and the Law - Part I

This is the first of two info sheets providing a brief overview of the treatment of gay men and lesbians by the law. It discusses progress achieved over the last 30 years and shows how, nevertheless, discrimination remains pervasive in the areas of criminal law, censorship, and protection from discrimination.

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Progress

In the last 30 years, there has been substantial progress on gay and lesbian equality issues.

- The first significant breakthrough came in 1969 when the Canadian government passed an omnibus bill removing criminal sanctions against same-sex practices between consenting adults.
- In 1977, Québec became the first province to prohibit discrimination against gay men and lesbians.
- In 1979, prohibitions on the immigration of “homosexualists” were removed from the *Immigration Act*.
- During the 1980s and 1990s, most Canadian provinces amended their human rights acts to extend antidiscrimination protection to gay men and lesbians, and on 9 May 1996, after ten years of unkept promises, the *Canadian Human Rights Act* was also amended. In the context of HIV/AIDS, such protection is seen as a necessary corollary to protection against discrimination on the basis of physical disability, including HIV infection. As stated by the National Advisory Committee on AIDS:

One should not be able to defend discrimination against persons with HIV infection on the grounds that it was in fact discrimination related to a person’s sexual orientation and thus not expressly prohibited.

- While sexual orientation was not included as a prohibited ground of discrimination in the equality rights provision (section 15) of the *Canadian Charter of Rights and Freedoms*, section 15 was left open-ended to enable new grounds to be recognized over time. Courts have now ruled that section 15 of the Charter includes a guarantee of equality on the basis of sexual orientation. Gay men and lesbians are increasingly invoking the assistance of the courts to counter legal discrimination, and have obtained some significant victories for

gay and lesbian rights, particularly in the context of equal relationship recognition.

Discrimination Remains Pervasive

Despite this progress, discrimination remains pervasive in all the following areas: criminal law; censorship; protection from discrimination; benefits; children and parenting; immigration; and incapacity, wills, and estate litigation.

Criminal Law

Until very recently, it was illegal under the *Criminal Code* to have sex with someone of the same sex. Even today, a number of problems remain with the criminal law and the way in which it is applied to gay sexual activity. For example:

- Section 159 of the *Criminal Code* discriminates on the basis of sexual orientation.
- Other *Criminal Code* provisions (such as those dealing with public sex and child pornography) continue to be applied disproportionately against gay men and lesbians.
- In criminal cases, homosexual advances have sometimes been treated as “provocation,” thus justifying a shorter sentence for an assailant, even when a similar heterosexual advance in like circumstances would not be treated in this way.
- Hate crimes directed at gay men and lesbians continue to be widespread.
- Under the *Criminal Code*, it is not illegal to advocate genocide or hatred of gay men, lesbians, or people with HIV/AIDS.

Recommendations

- Section 159 of the Criminal Code should be revised. In particular, there should be a uniform age of consent for anal and vaginal intercourse.

- Police education programs must address discriminatory attitudes that lead to the unequal application of criminal laws.
- Legislation should be introduced to ensure that discriminatory attitudes cannot be used to justify homophobic violence by forming the legal foundation for a “provocation” defence.
- Serious consideration must be given to adding “sexual orientation” to the list of grounds on which the advocacy of genocide is prohibited.

Censorship

Gay and lesbian materials have been systematically censored as a result of the way in which Canada’s customs and obscenity laws have been applied. For many years, Canada Customs has actively suppressed information about the risks of transmission associated with anal sex, as a direct result of homophobia and discomfort about matters of a sexual, particularly homosexual, nature. Recent court decisions have acknowledged that by targeting lesbian and gay bookstores, Canada Customs has discriminated on the basis of sexual orientation.

The link between homophobia and HIV transmission is clear and direct. The active suppression of gay and lesbian materials has inhibited the ability of AIDS educators to speak forthrightly about same-sex sexual practices and to educate about risky behaviour. Had this safer-sex information been available and publicized in a responsible and open fashion, many lives might have been saved and the chances of controlling the spread of the virus in its early years would have been increased.

Recommendations

- Customs legislation and practice regarding the seizure of materials deemed to be obscene should be reviewed.
- Education workshops should be undertaken to ensure that Customs officers recognize their legal and constitutional duty not to discriminate in making decisions about what is or is not “obscene.”
- School boards need to ensure that young people receive a balanced education, including appropriate recognition of the contributions of gay men and lesbians to Canadian society, literature, and history. School curricula should not suppress acknowledgment of the existence of lesbians and gay men, but should recognize the diversity of human relationships and family forms. Age-appropriate information about safer sex should address sexual practices between people of the same sex in a non-judgmental way.

Protection from Discrimination

Gay men, lesbians, and people with HIV/AIDS are all too familiar with the difficulties experienced in the workplace and other spheres of their personal lives as a result of homophobia, AIDSphobia, cruel jokes, and thoughtless comments. Over the years, discrimination has been perpetrated by both the public and private sectors, often at the instigation of government itself.

In 1985, an all-party Parliamentary Committee on Equality Rights held public hearings across Canada. In its report, the Committee stated:

We were shocked by a number of the experiences of unfair treatment related to us by homosexuals in

different parts of the country. We heard about the harassment of and violence committed against homosexuals. We were told in graphic detail about physical abuse and psychological oppression suffered by homosexuals. In several cities, private social clubs serving a homosexual clientele were damaged and the members harassed. Hate propaganda directed at homosexuals has been found in some parts of Canada. We were told of the severe employment and housing problems suffered by homosexuals.

While in recent years the situation has improved, there are ongoing concerns and problems:

- not all jurisdictions have amended their human rights legislation to protect gay men and lesbians from discrimination;
- some jurisdictions restrict protection by defining marital or family status to include only opposite-sex couples;
- open and hidden discrimination in the workplace remain pervasive;
- inadequate provision exists to protect transgendered people from discrimination; and
- generally, discriminatory attitudes persist even where human rights legislation has been passed.

Recommendations

- All provincial and territorial human rights acts need to include protection against discrimination on the ground of sexual orientation.
- Human rights commissions should review all provincial, territorial, or federal legislation and encourage governments to change discriminatory legislation so that it conforms

to the standards required by the Canadian Charter of Rights and Freedoms and human rights statutes.

- Employers and unions should ensure that workplace policies clearly specify that sexual orientation discrimination, prejudicial jokes and comments, and harassment are not permitted in the workplace. Personnel managers should be fully aware of their legal responsibilities, policies should be included in employment manuals, and training workshops should be held in workplaces.
- All human rights legislation should explicitly protect transgendered people from discrimination.
- Human rights protections in legislation must be accompanied by meaningful education programs, including the development of brochures, posters, workplace and public awareness campaigns to ensure that discriminatory attitudes can be redressed over time.

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Gay and
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Gay Men, Lesbians and the Law - Part 2

This info sheet provides a brief overview of the treatment of gay men and lesbians by the law in the areas of same-sex benefits, children and parenting, immigration, and incapacity, wills, and estate litigation.

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The unequal application of the law s treatment of gay men and lesbians creates inconsistencies, with dire consequences for those concerned. Brian Ritchie s HIV-positive partner Joshua Gavel required a number of expensive medical treatments. Mr Gavel s enhanced medical insurance benefits had been covered by the British Columbia Ministry of Social Services. The BC government, however, chose to recognize his relationship and canceled Gavel s benefits on the grounds that his partner, Mr Ritchie, was responsible for his health-care needs. At the same time, however, the federal government refused to recognize the relationship, so that Mr Ritchie was unable to claim the federal tax credit available to heterosexuals who care for a dependent partner. Ritchie and Gavel were caught between the cracks: their relationship was recognized by the province for the purpose of imposing a burden, but ignored by the federal government for the purpose of denying a corresponding benefit.

Same-Sex Benefits

The law dealing with the recognition of same-sex relationships is complex and constantly changing. A large number of benefits and privileges are conferred as a result of status based on a relationship that is recognized by statute. Most of these statutes were drafted at a time when discrimination against gay men and lesbians was viewed by the state as socially acceptable, and legislators could not even countenance the concept of respecting same-sex relationships equally. Indeed, even in the heterosexual context, many statutes are based on archaic presumptions about the subordinate role of women and the supremacy of marriage.

The federal government has identified over 50 statutes that contain “opposite sex” definitions of spouse, and most provinces and territories also

have dozens of laws that explicitly exclude same-sex couples from the rights and responsibilities accorded to heterosexual relationships. The state, both through legislatures and the courts, decides who is “in” and who is “out” of the “family” – not the people who are in family relationships.

Until very recently, heterosexual privilege was the unchallenged cornerstone of the law and the unspoken assumption was that only heterosexual relationships mattered. However, gay men and lesbians have started coming out of the closet as sanctions in the law have started to be removed against them *as individuals*; the next challenge is to achieve recognition of the fact that investing only heterosexual *relationships* with privileges and obligations is also discriminatory.

In 1999, a large number of federal and provincial statutes continue to explicitly or implicitly exclude same-sex couples from the rights and responsibilities accorded to heterosexual relationships.

Recommendation

- Programs that confer rights and/or responsibilities on heterosexual spouses need to be examined in light of their purpose and redrafted to ensure that all those who fit within that purpose are covered, whether the relationship is same-sex or opposite-sex and, in some cases, whether or not a person is in a relationship.

Children and Parenting

The relationships between gay men and lesbians and their children have perhaps inspired more homophobia than almost any other area of law. Gay men and lesbians have been portrayed as depraved child-molesters, and judges have often expressed unfounded fears around lesbian and gay parenting. Prejudices are likely to be even more pronounced where, in addition to being lesbian or gay, a parent is also HIV-positive.

Over time, there has been a positive evolution: lesbians and gay men are increasingly able to obtain equal parenting rights, whether as a result of seeking custody and access, by means of adoption, or through alternative insemination procedures. Nevertheless, there is still a long way to go and problems remain, including the following:

- Parents continue to have reason to be worried that their sexual orientation, HIV-positive status, and/or gender identity will be negatively perceived by a court. As a result, they may accept terms in separation agreements or consent to court orders restricting custody or access to their children that they otherwise would not have been prepared to agree to.
- Thus far only British Columbia has passed legislation to provide for the adoption of a same-sex partner’s biological child. Adoption of a same-sex partner’s child without extinguishing the existing parent–child relationship is important for gay or lesbian parents, particularly if they, or one of them, have HIV/AIDS. Without legal acknowledgment of the relationship between the child and the non-biological parent, the latter may not even be able to take the child out of school to go to the dentist, authorize a field trip, or consent to medical treatment. If a biological parent dies, the non-biological parent has no right to raise “their child.”
- As recently as 1997, the government of Alberta issued a blanket policy to the effect that gay men and lesbians no longer qualify as fit to foster children. One lesbian foster mother was told

that she may continue to foster the children she had, but would not be eligible for any future placements. She had successfully fostered 74 children over 18 years, and no criticism was leveled at her parenting abilities other than the fact that she is lesbian.

Recommendations

- In every province, legislation should be introduced to permit same-sex adoptions. In addition, provisions specifying that a person's sexual orientation, gender identity, or HIV status is irrelevant to his/her parenting abilities should be introduced to help reduce arbitrariness in judicial decision-making.
- Judicial education programs on sexual orientation and homophobia are necessary for all areas of the law, but particularly for child custody and access cases.
- Education programs on sexual orientation and homophobia need to be part of the basic training of social and child-care workers to ensure that their decisions are not influenced by discriminatory attitudes.

Immigration

Until 1976, gay men and lesbians were not allowed to immigrate to Canada. Although this restriction has now been lifted, inequalities remain. One of them would disappear if a proposal to allow for sponsorship of same-sex (and common-law) partners, introduced by Citizen and Immigration Minister Lucienne Robillard on 6 January 1999, was adopted. Currently, while Canadians in heterosexual relationships can sponsor close family members for immigration under the family class, the Immigration Regulations do not allow gay and lesbian Canadians to sponsor their same-sex

partners under this category. Same-sex partners can only apply to be allowed to immigrate to Canada on "humanitarian and compassionate grounds," but this is a discretionary remedy and applications are decided on a case-by-case basis – lesbian and gay partners of Canadians are being allowed into Canada through the back door.

Other issues include the following:

- Applicants for immigration who are found to be HIV-positive are automatically assessed as "medically inadmissible" because it is felt they would cause excessive demands on health or social services.
- In many countries, homophobia and AIDSphobia are severely ingrained in the political and legal institutions of society. This creates concerns that lesbians, gay men, and people with HIV/AIDS may not receive fair treatment if they have to deal with these institutions. In particular, lesbians, gay men, and people with HIV/AIDS who face trial in certain countries may find it impossible to obtain a fair hearing.

Recommendations

- The "family class" must be extended in the Immigration Regulations to permit lesbians and gay men to sponsor a same-sex partner to immigrate to Canada.
- The current system, according to which immigration applicants who are found to be HIV-positive are assessed as "medically inadmissible," should be changed so that people living with HIV or other conditions will not automatically be excluded from immigrating. A new system should take the individual circumstances of each case into account, weigh the costs against the benefits of allowing a particular person to

immigrate, and take humanitarian concerns into account.

- A law needs to be introduced to enable Canadians to be tried in Canada for crimes allegedly committed abroad, whenever it appears that a fair trial could not be obtained in the country in which the crime is alleged to have been committed.

Incapacity, Wills, and Estate Litigation

The failure of the law to recognize gay and lesbian relationships is most keenly felt in times of crisis. At a time when a same-sex partner most needs institutional support, the law, far from facilitating resolution of the crisis, can become yet another insurmountable obstacle. When a heterosexual spouse becomes incapacitated or dies, the law automatically provides recognition and support to an opposite-sex partner. Almost invariably, however, the law treats a same-sex partner in similar circumstances with indifference and exclusion.

Progress in this area has been slow. Lesbians and gay men can protect their positions to some degree by drafting wills and powers of attorney covering their financial affairs and personal care. Some provinces have laws that specifically permit individuals to designate who can make health-care decisions when they become incapacitated, and that allow same-sex partners to be so

designated. Nevertheless, the substantial privileging of biological families over same-sex partners in this area continues to create significant problems for gay men and lesbians.

Recommendations

- All provinces and territories that do not currently have legislation providing for an effective means for the appointment of a representative for health-care decisions should adopt such legislation.
- All provinces and territories should provide that same-sex partners have the same rights (1) of inheritance in cases of intestacy; and (2) to apply for administration of an estate, as heterosexual married spouses.

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Impact of Stigma and Discrimination - Part I

Governmental and Institutional Responses

This info sheet examines the impact of gay- and lesbian-related stigma and discrimination on governmental and institutional responses to HIV/AIDS.

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Historically...

Although HIV/AIDS represents a clear and overwhelming threat to public health, it has received less public attention and a more ambivalent governmental response than any other public emergency of a comparable dimension this century. The public health response was very inconsistent (and in some parts of Canada, non-existent) for many years after the epidemic began. To a large extent, this was due to the association of HIV/AIDS with gay men and other stigmatized "risk groups." It was only after the disease was diagnosed in individuals outside these "risk groups" that media coverage took off and that governments started to invest significant funds.

In the *Final Report* of the Commission on the Blood System in Canada, Justice Horace Krever documents how, in most provinces, senior public health officials were reluctant to give financial assistance to the HIV/AIDS educational efforts of local gay and lesbian organizations, in part because of the sexual orientation of their members.

Governments did not want to acknowledge that a problem existed, much less discuss activities such as anal intercourse, which they viewed as shameful. The stigma surrounding same-sex sexual practices and gay identity represented an enormous obstacle in efforts to reach and inform gay men about HIV.

And Today....

Homophobia continues to have an impact on government and institutional responses to HIV/AIDS. For example:

- **Commitment** – Because HIV/AIDS primarily affects marginalized populations, governments are less committed to fighting the disease. More than fifteen years after the beginning of the epidemic, the general impression is that, if HIV/AIDS has become a lesser political priority, this is mainly because the disease still affects a disproportionate number of gay men, drug users, and members of other minorities.
- **Provincial and federal funding** – The fact that HIV/AIDS primarily affects marginalized populations is having a major impact on the willingness of provincial and federal governments to allocate dedicated and sufficient funding for HIV/AIDS-related activities.
- **Comparison with other diseases** – Inappropriate and misleading comparisons with other diseases, such as cancer, are often used by those who claim that AIDS receives adequate or even too much funding. Closer analysis of these comparisons reveals that they are flawed: often AIDS, a

preventable disease, is compared with non-preventable diseases. In many cases, the total AIDS Strategy funding, which includes funding for prevention efforts, is compared with research-related funding for other diseases, without including funding for prevention efforts for those diseases, which may come out of different budgets.

- **De-gayng of AIDS** – Governments only started to devote significant funding to HIV/AIDS when it began to affect people outside the traditional risk groups. In addition, efforts have been disproportionately directed at other population groups, leaving gay men with still very high numbers of new infections but relatively little funding for prevention efforts. Financing of research and preventive education concerning gay men has never reached an acceptable level in relation to the rate of infection among gay men.
- **School systems** – The refusal of many schools to provide education about gay and lesbian sexuality is a clear example of how homophobia impacts on the ability of young gay men and lesbians to protect themselves from contracting HIV.
- **Prison systems** – The refusal of many provincial (and, until 1992, federal) prisons to make condoms available to prisoners has at least in part been justified by the unwillingness of authorities to “condone homosexual activity.” As a result, prisoners and their partners outside prison are unnecessarily exposed to the risk of contracting HIV.
- **Workplaces** – Because many employers have still not developed and implemented policies explicitly prohibiting discrimination on the basis of HIV status or sexual orientation, gay men are reluctant to disclose their HIV status for fear of being identified as gay and/or HIV-positive.

Spillover to the General Population

Homophobia and discrimination also hamper the prevention of HIV in the general population, where many still see HIV/AIDS as fundamentally a gay disease. This perception has a number of consequences:

- In the public’s mind, HIV/AIDS is linked to the populations most affected by it rather than to the specific risk behaviours that transmit it. As a result, the public may have an erroneous perception of what constitutes risk of HIV transmission.
- Someone who does not consider him/herself a member of one of the “risk groups or at-risk populations” will have a false sense of security.
- The association between HIV/AIDS and homosexuality has hampered the efforts of some non-gay communities to generate their own responses to the epidemic. Because of the stigma associated with homosexuality, it has been difficult for individuals and communities to acknowledge publicly that the HIV epidemic is affecting them. People do not wish to be publicly associated with a disease that, in their own minds or the minds of others, is a “gay” disease.

Recommendations

- The Canadian Strategy on HIV/AIDS (CSHA) must acknowledge the historic and continuing magnitude and impact of the HIV epidemic among gay men, and ensure that funding for programs to respond to this epidemic is commensurate with its magnitude and impact.
- The CSHA should specifically state how it will address the continuing HIV epidemic among gay men in policies and programs relating to: human rights and discrimination; public education; prevention of HIV transmission; community development; care, treatment, and support; epidemiological surveillance; and research.

The information in this series of info sheets is taken from *Gay and Lesbian Legal Issues and HIV/AIDS: Final Report*, prepared by John Fisher, Ralf Jürgens, Anne Vassal and Robert Hughes for the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society. Copies of the report and info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged. However, copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). **Ce feuillet d'information est également disponible en français.**

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6

**Gay and
Lesbian Legal
Issues and
HIV/AIDS**

Impact of Stigma and Discrimination - Part 2

Prevention, Care, and Behavioural Research

This info sheet examines the impact of gay- and lesbian-related stigma and discrimination on HIV/AIDS prevention, on the care of people with HIV, and on HIV/AIDS behavioural research.

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Health
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Health and Social Services

The discrimination that gay men and lesbians face negatively affects their ability to access health and social services.

Accessibility of services implies not only that they be free and available where people live, but also that they be socially and culturally adapted to the particular needs of the various user groups. However, a number of factors – discriminatory attitudes, ignorance about homosexuality, a pathologizing approach to homosexual orientation, and the assumption that patients as a whole are heterosexual – lead gay men and lesbians to use health services less or to fear using them.

Health-care professionals frequently assume that their patients are heterosexual, and neglect to explore areas of health that are specifically relevant to gay and bisexual men or lesbians. When this occurs, opportunities for prevention, testing, and early treatment of HIV infection are missed. Only a minority of physicians routinely take a history of sexually transmitted diseases, and even fewer physicians take a history of sexual orientation or assess the risk of transmitting or acquiring HIV. This situation highlights a failure in medical-school and clinical training. There is a scarcity of courses on gay and lesbian issues in curricula for medical studies, nursing sciences, and the social sciences as a whole, including sexology departments.

Recommendations

- All curricula in medicine, nursing sciences, and the social sciences should include a component on sexuality in general and on homosexuality in particular, and adopt a multidisciplinary approach to health problems.
- All health-care workers should be provided with adequate training to give them the skills to work with gay men, lesbians, bisexuals, and transgendered people.
- All federal and provincial health departments and ministries should adopt a policy of accessibility to care and services for gay men, lesbians, bisexuals, and transgendered people.

Behavioural Research

Research is critical to efforts to prevent HIV transmission. To achieve a sufficient understanding of the HIV epidemic among men who have sex with men and among lesbians, research must be sensitive to diversity in identity and sexual behaviours, and must

investigate risks to health within the social context of sexual identity and sexual activity.

To date, there have been a number of weaknesses in epidemiological and behavioural research on men who have sex with men, due in large measure to avoidance or neglect of the reality of gay and bisexual experience within the general population. These weaknesses include the following:

- Behavioural research on the general population has rarely dealt with sexual orientation because (1) researchers take for granted that the population is heterosexual, and (2) the stigma associated with homosexuality has inhibited or prevented researchers from investigating homosexuality openly in studies and surveys of the general population.
- The purpose of much of the early behavioural research among gay men was to measure changes in behaviour from an epidemiological perspective. In most of this research, the individual was considered independently of his environment; the focus was on isolated actions, without taking underlying factors into account.
- There is a tendency in research to consider that gay men form a homogeneous group whose members are defined solely on the basis of their sexual orientation. However, a number of studies show that some subgroups are particularly vulnerable to HIV infection: youth, the socioeconomically disadvantaged, men who live outside major urban centres, and those who do not self-identify as either homosexual or bisexual. Little information is available on these subgroups.
- Sexual relationships between people of the same sex are usually viewed as behaviours and rarely as social phenomena. Relationships between people of the same sex are often considered strictly from a sexual point of view, neglecting their affective, emotive, and loving aspects, and ignoring the effects of the attitudes of society toward gay men and lesbians. As a result, the research fails to deal adequately with issues such as negotiating the use of

condoms between partners, same-sex domestic violence, and differences in status and power.

- Research often does not take into account discrimination involving gay men and lesbians. Stigma and discrimination may lead individuals not to accept their sexual orientation or to hesitate to affirm it, including when answering research questionnaires. Certain factors relating to the homosexual condition itself – the negative recognition of sexual orientation, rejection by the heterosexual environment, and resulting psychological difficulties – are associated with unsafe sexual practices and should be taken into account more often in behavioural research.
- Too much behavioural research has been developed independently of the individuals concerned and without accessing the expertise of gay organizations.
- Furthermore, the social sciences have almost no history of considering issues related to lesbians in the context of HIV/AIDS.

Recommendations

- A sexual orientation component should be integrated into research on the general population that deals with health and well-being.
- Multidisciplinary research should be undertaken on the social environment of gay and bisexual men and on the importance of self-affirmation and empowerment, to better evaluate and understand the impact of discrimination on the spread of HIV.
- Systematic, two-way transfer of knowledge and skills between health-care networks, the research community, and gay and bisexual men and lesbians, from the development of research protocols to the implementation of concrete measures, needs to be ensured.

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7

Gay and Lesbian Legal Issues and HIV/AIDS

Impact of Stigma and Discrimination - Part 3

People with HIV or at Risk for HIV

This is the first of two info sheets examining the impact of gay- and lesbian-related stigma and discrimination on the mental health and behaviours of people with HIV and people at risk for HIV infection. It discusses the development of social identity among gay and lesbian youth, the coming-out process, and vulnerability to HIV infection.

This is one of a series of nine info sheets on
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If 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 ... 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.

— N Toonen, 1992/1993

Development of Social Identity among Gay and Lesbian Youth

It is very difficult for young gay men and lesbians to be open about their sexuality with their family and friends. Within family and school structures, among peers, and in society in general, references are primarily heterosexual. Few young people reveal their sexual orientation to their parents; when they do so, even fewer benefit from parental support. Most school systems are no more capable than the family of supporting young gay men and lesbians. In our primary and secondary schools, many teachers do not know how to deal with homosexuality, and may exhibit discriminatory and heterosexist attitudes.

In such a hostile environment, gay and lesbian youth often feel that they have to hide their attraction to members of their own sex from their peers, in order to protect themselves against discrimination. As a result, gay and lesbian youth construct their social identity without the benefit of being able to socialize and identify with other gay men and lesbians, and without the freedom to be open in their relationships with their heterosexual peers.

This has inevitable consequences for one's self-esteem. Gay and lesbian youth attempt suicide more often than youth in general. A disproportionate number of gay youth end up on the street, where the risks of drug abuse, sexual abuse, violence, HIV/AIDS and other disease transmission, and suicide increase dramatically.

Recommendations

- Ministries of education, school boards, and school staff should include education about homosexuality in health and sex education at the intermediate and secondary levels, and such education should be

provided in a non-judgmental, respectful and supportive manner.

- Teachers and others involved in schools, centres, and shelters should be educated about homosexuality in order to provide them with the skills needed to offer support to young gay men and lesbians.
- Secondary and post-secondary educational institutions should support the development of support groups for young gay men and lesbians within their institutions.
- Funding should be provided to community organizations in order to develop self-esteem and self-affirmation workshops for gay men and lesbians.

The Coming-Out Process

For many gay men and lesbians, the coming-out process can be very difficult. Bisexual men may find it even more difficult to come out, fearing rejection and discrimination not only from family and workplace colleagues, but also from their sexual partners.

Recommendation

- Research should be supported on the process of coming out and the psychological and social difficulties that it may entail, in order to develop approaches for assisting gay men and lesbians – and particularly gay and lesbian youth – in their coming-out process.

Vulnerability to HIV Infection

Since the beginning of the epidemic, many gay men have changed their behaviour by adopting safer-sex practices. At the same time, a significant proportion of gay and bisexual men (particularly young men) continue to engage in risky sexual behaviour. Decisions around sexual behaviours – and, consequently, the ability to protect oneself – are frequently influenced

by complex social and psychological phenomena related to homophobia. Studies have found that significant numbers of gay and bisexual men have:

- experienced domestic violence;
- experienced gay-bashing;
- experienced sexual abuse;
- seriously considered suicide;
- attempted suicide;
- been diagnosed with a mental disability or mood disorder, most commonly depression; or
- been the victims of non-consensual sex.

Any of the experiences listed above can impact negatively on self-esteem and negotiating skills, which can in turn lead to heightened vulnerability to HIV. For example, men with a history of non-consensual sex are significantly more likely to report unsafe sex.

Many men who have sex with men do not identify with the gay community because of fear of discrimination, psychological or geographical isolation, or other reasons. While a number of prevention programs have been set up in places where gay men socialize, not all men who have sex with men frequent such places or can be reached through these programs.

Recommendations

- The number of new HIV infections among men who have sex with men, particularly young gay men, remains high, but relatively little funding for education, prevention, research, and support is available. Governments and research agencies should ensure that funding is provided at levels that correspond to the historical and continuing HIV epidemic among men who have sex with men.
- Governments and agencies should develop comprehensive programs that integrate access to the means of protecting oneself from HIV infection with information and affirmation of sexual orientation.

The information in this series of info sheets is taken from *Gay and Lesbian Legal Issues and HIV/AIDS: Final Report*, prepared by John Fisher, Ralf Jürgens, Anne Vassal and Robert Hughes for the Canadian HIV/AIDS Legal Network and the Canadian AIDS Society. Copies of the report and info sheets are available on the Network website at www.aidslaw.ca or through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca). Reproduction of this info sheet is encouraged. However, copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source of this information. For further information, contact the Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca). **Ce feuillet d'information est également disponible en français.**

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8

Gay and
Lesbian Legal
Issues and
HIV/AIDS

Impact of Stigma and Discrimination - Part 4

People with HIV or at Risk for HIV

This is the second of two info sheets examining the impact of gay- and lesbian-related stigma and discrimination on the mental health and behaviours of people with HIV and people at risk for HIV infection. It discusses HIV testing, disclosure and concealment of HIV status, and stress, isolation, and social support.

This is one of a series of nine info sheets on
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I have always hidden my homosexual tendencies from my family and friends. To now come out and say I am gay and I have AIDS, it's a double stigma. Unfortunately, the stigma is attached to you at the time you need support, you are afraid of dying, and you are hurting pretty badly. I am better off passing as normal.

— Gay man living in Newfoundland
(from M Laryea, L Glen, *The Impact of HIV-Positive Diagnosis on the Individual*)

HIV Testing

For men who have sex with men, whether or not they identify as gay or bisexual, taking an HIV-antibody test has both personal and social consequences. The decision to take the test may involve overcoming a number of fears, including the fear of:

- being infected with HIV;
- having infected others;
- illness or death resulting from HIV infection;
- disclosure as a gay or bisexual man or as a person with HIV; and
- stigma or discrimination based on HIV status or sexual orientation.

The availability of anonymous testing encourages people to come forward to be tested, particularly those who are at greatest risk for HIV infection. One study conducted in North Carolina, where anonymous testing was discontinued in most of the counties of the state, revealed that gay and bisexual men accounted for 10 percent of all tests in counties that retained anonymous testing, but only four percent of all tests in counties that discontinued anonymous testing. As long as the social environment is hostile to gay and bisexual men, HIV testing programs must take into account the risks – perceived as well as actual – that an HIV test entails for gay and bisexual men.

Recommendations

- Policies and programs for HIV testing should make provision for the fears and risks that men who have sex with men experience in taking an HIV test.
- The HIV testing options available to men who have sex with men should include anonymous testing.

Disclosure and Concealment of HIV Status

For gay and bisexual men, disclosure of HIV status is a double-edged sword. It may open up the opportunity to receive social support, but it may also lead to added stress due to stigmatization, discrimination, and disruption of social relationships.

Gay men with HIV are more likely to disclose their HIV status to their lover or their closest friends, whom they perceive to be more helpful and supportive and less likely to disclose to their family, co-workers, or employer. The reasons for not disclosing include fear of discrimination (particularly at work) and the desire to conceal one's homosexuality.

Disclosure may be particularly problematic for bisexual men or heterosexual men if they are divulging previous same-sex activity for the first time.

Recommendation

- Support programs for people living with HIV should include components addressing the psychosocial aspects of living with HIV/AIDS that are specific to the experience of men who have sex with men, and the complications of secrecy and disclosure in environments that are hostile to homosexuality.

Stress, Isolation, and Social Support

Stigma, and the resulting stress, isolation, and lack of social support, have significant negative impacts on the health of people with HIV. One study on disclosure of HIV status among gay men found that men at every stage of HIV infection reported relatively high levels of anxiety and depression.

There is a significant association between lower levels of depression and anxiety and the perceived helpfulness of friends, lovers, colleagues, and employers. Significant others can provide people with HIV with a wide range of valuable resources, both tangible and emotional (for example, information about treatment options, financial assistance, care, sharing feelings, and reassurance that one is loved and valued). However, before people with HIV decide to disclose their status to others, they must feel assured that the benefits of doing so will outweigh the potential costs.

Stigma and discrimination associated with HIV/AIDS and homosexuality also have an effect on the lovers, families, and caregivers of gay or bisexual men with HIV. Going public as a caregiver can mean harassment, rejection, and the loss of jobs, friends, and housing. In some families and communities, caregivers may go to great lengths to deny the presence of HIV/AIDS and avoid association with AIDS service organizations.

Recommendation

- Education programs on HIV/AIDS should be developed to reduce the stigmas associated with HIV/AIDS and with homosexuality, as well as to create a more supportive environment for gay and bisexual men, their caregivers, and their families of origin.

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A Matter of Justice

This info sheet shows how gay men and lesbians deserve to be treated with equal respect, as a matter of justice, but also because in the context of HIV/AIDS, this would help reduce the spread of HIV and allow us to better care for those with HIV/AIDS.

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A Universal, Concerted Effort

When it comes to preventing transmission of HIV, a universal, concerted effort is required. The relationship between the HIV epidemic among men who have sex with men and discrimination against gay men, bisexuals, and lesbians at the societal, programmatic, and personal levels has made this abundantly clear.

HIV Is Transmitted Because

HIV is transmitted among men who have sex with men not just because of unsafe sex. It is transmitted because homosexual or bisexual identity is not acknowledged, permitted, and supported as a natural development of human personality. It is transmitted because families, communities, and society tolerate or support, implicitly or explicitly, aggression, abuse, and violence against gay men and lesbians. It is transmitted because schools have failed to provide appropriate education and to cultivate supportive environments for gay and bisexual youth. It is transmitted because health-care providers and researchers have failed, because of insufficient awareness and inappropriate assumptions, to ask the right questions. It is transmitted because governments have been slow publicly to support programs directed specifically to men who have sex with men, and because politicians continue to attack the programs that currently exist.

The Importance of Protection

Preventing the transmission of HIV is complex. It is not simply a matter of knowledge, attitudes, and behaviours, important as correct knowledge, sustained motivation and, ultimately, safe behaviours are. Preventing the transmission of HIV is also about creating the environments in which people are free to acknowledge their sexual identity, to seek information and obtain information, to experience the support of peers and role models, to receive services that are appropriate to (rather than exclude) their experiences, to see themselves written into (rather than out of) culture, knowledge, and society. For gay and bisexual men and for lesbians, preventing HIV transmission requires preventing and eliminating discrimination based on sexual orientation, as called for by the International Guidelines on HIV/AIDS and Human Rights:

Anti-discrimination and protective laws should be enacted to reduce human rights violations against men having sex with men, including in the context of HIV/AIDS, in order, *inter alia*, to reduce the vulnerability of men who have sex with men to infection by HIV and to the impact of HIV/AIDS. These measures should include providing penalties for vilification of people who engage in same-sex relationships, giving legal recognition to same-sex marriages and/or relationships and governing such relationships with consistent property, divorce and inheritance provisions. The age of consent to sex and marriage should be consistent for heterosexual and homosexual relationships. Laws and police practices relating to assaults against men who have sex with men should be reviewed to ensure that adequate legal protection is given in these situations.

The Importance of Supportive Environments

In addition, there is a need for education, training, and programming that will change discriminatory attitudes in the community, at school, in the workplace, among professionals, and in research, in order to create environments that will decrease the risks to health, including HIV infection, among people who are not heterosexual, and that will support gay men, bisexuals, and lesbians with HIV/AIDS.

The fight against discrimination and for respect of the dignity of all people needs to be treated as seriously as science, medicine, and public health.

No Quick Fix

There is no quick fix or easy answer to the many problems raised by HIV/AIDS. While the impact on human rights cannot be the only consideration in designing public health policy, the fight against discrimination and for respect of the dignity of all people must be treated “as seriously as science, medicine, and public health,” recognizing that HIV and AIDS have disproportionately affected vulnerable populations, including gay men, at least in part because of their vulnerability and the discrimination they have been subjected to.

Prevention campaigns, public health measures, and the other interventions that have been undertaken to reduce the spread of HIV have been and continue to be important, but they often do not address the underlying problems that cause vulnerability to HIV. We must address these problems. Sometimes, this requires only minor changes in laws. Sometimes, it requires changes in attitudes that can only be achieved in the longer term. In all cases, it requires a commitment to fight HIV/AIDS, rather than the people most affected by it and their behaviours, and to fight bigotry and prejudice in society. It also requires recognition of the fact that discrimination, although it has diminished and although certain rights have been extended to gay men and lesbians, remains pervasive and that gay men and lesbians deserve to be treated with equal respect as a matter of justice and, in the context of HIV/AIDS, because this would help reduce the spread of HIV and allow us to better care for those with HIV/AIDS.

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