

**AMNESTY INTERNATIONAL BRIEF ON BILL C-250**

*“The fear, loathing, hatred and ignorance culminating in these bombings is a warning to society and the world as a whole that racism, prejudice, homophobia and a fear of difference is out there and we should all challenge it at every opportunity.”*

- Gary Reid, a survivor of a nail-bomb explosion at a gay pub in central London, England in April 1999.

Amnesty International Canada  
English-speaking branch  
312 Laurier Avenue East  
Ottawa, Ontario  
K1N 1H9

[www.amnesty.ca](http://www.amnesty.ca)



## **INTRODUCTION**

Amnesty International (AI) is an independent and impartial worldwide movement of people who campaign for human rights. We seek to promote observance of the full range of human rights as outlined in the *Universal Declaration of Human Rights* and other international standards through campaigning, public awareness, as well as advocating the implementation of legal safeguards to protect human rights.

As far back as 1979, AI recognized that the persecution of people based on their sexual orientation is a violation of their fundamental rights. In the early 1990's, AI began to campaign intensively against this type of persecution. In 1993 at the World Conference on Human Rights, AI affirmed that "vulnerable groups which require greater attention within the human rights program include children, indigenous peoples, the disabled, religious, ethnic, sexual and linguistic minorities and those afflicted by HIV and AIDS". In August 2001 AI delivered a statement on identity-based discrimination to the UN Sub-Commission on Human Rights in which we spelled out our concerns that torture feeds off discrimination and that people are targeted on grounds such as race, gender or sexual orientation. Also in 2001, we released a report entitled *Crimes of hate, conspiracy of silence*, in which we reported on the worldwide torture and ill-treatment of people based on sexual identity, and proposed a ten point plan for governments to follow in order to fulfill their obligations to end human rights abuses on this basis.<sup>1</sup> These recommendations included strengthening legal safeguards to end impunity and combat discrimination.

For several years AI has worked with other organizations to get its concerns about the abuse of people based on their sexual orientation on the agenda of various UN mechanisms and other international forums. In doing this work, AI is increasingly entering into a public discussion at the national and international level regarding the ways in which the human rights of lesbians and gay men can be better protected. The views expressed in this submission in support of Bill C-250 are part of that effort.

## **THE ABUSE OF PEOPLE BASED UPON THEIR REAL OR PERCEIVED SEXUAL ORIENTATION**

While government agents are quite frequently the perpetrators of human rights violations against sexual minorities, AI has found that torture and ill-treatment by state officials is only the tip of the iceberg of violence on the basis of sexual orientation internationally. For many, the most common experience of violence will be in their homes, schools, places of work, or on the street. The abuse ranges from murder to violence to psychological torture. Examples of individuals subjected to this treatment can be found in all continents and cultures:

- Matthew Shepard, the gay American student who was murdered in 1998. His violent death was celebrated by a Kansas minister who used his website to praise God for the incident;

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<sup>1</sup> The report made the following recommendation to governments around the world: "Incitement to discrimination, hostility or violence against LGBT people should be prohibited, in accordance with the international standards prohibiting advocacy of hatred and anti-discrimination standards."

- Edson Neris da Silva, who was beaten to death in Sao Paulo, Brazil by skinheads during a homophobic attack in February, 2000;
- A lesbian woman from Zimbabwe whose parents ordered her to be raped until she became pregnant in order “correct” her sexual orientation;
- Irina, a Russian lesbian woman who was threatened with forced psychiatric treatment to “cure” her if she did not give up custody of her son;
- Three people killed and dozens injured when a gay pub was nail-bombed in central London, England on April 30, 1999.

Canada is no exception to such examples. The national equality rights organization EGALE has identified numerous incidents of ill-treatment and harassment on the basis of sexual orientation in its submission on Bill C-250.

Homophobic abuses are no different from violence perpetrated due to one’s colour, race, religion, or ethnic origin: all rely upon hatred, and the dehumanization inherent in hatred, in order to thrive. All forms of abuse also target an individual or group on the basis of an immutable personal characteristic.<sup>2</sup> The denial of a person’s basic humanity is the first and inevitable step towards inhuman, cruel and degrading treatment. History has shown how the language of dehumanisation paves the way for atrocities against stigmatised groups in society. Differences of race, ethnicity, religious affiliation and sexual orientation become boundaries drawn to exclude certain people from citizenship and even from membership in the human family.

This interrelationship between sexual orientation and other immutable factors as a basis for perpetrating abuses was illustrated at the trial of the man responsible for nail-bombings in the black, Asian and gay communities in London, England in 1999. “First of all it was gonna be the blacks, then the Asians, then queers”, said the perpetrator, a neo-Nazi sympathizer.

AI has also noted a rise in homophobic abuse related to a “backlash” effect. In Canada and throughout the world, the claims of people to equality regardless of sexual orientation are assuming an unprecedented visibility. This struggle is the struggle for human rights – the right of people to be who they are, free from violence, harassment and discrimination. But AI has observed that as fast as change is happening, so is the reaction. Increased visibility often leads to increased hostility and ill-treatment. Governments must ensure that the pursuit of safety and justice by sexual minorities does not result in increased repression designed to frighten equality seekers into silence, submission, and invisibility.<sup>3</sup>

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<sup>2</sup> *Ward v. Canada* [1993] 2 S.C.R. 689. In *Egan v. Canada* [1995] 2S.C.R. 513, the Supreme Court of Canada determined that sexual orientation is “a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost.”

<sup>3</sup> In September 2001 the Committee of Ministers of the Council of Europe stated: “Homosexuality can still give rise to powerful cultural reactions in some societies or sectors thereof, but this is not a valid reason for governments or parliaments to remain passive. On the contrary, this fact only underlines the need to promote greater tolerance in

While the perpetrators, settings, and motivations may vary, all forms of homophobic violence rely upon impunity for survival. AI has long held that there should be no impunity for perpetrators of human rights abuses. Doing so is both just and acts as a deterrent against future abuses of human rights.

At present, the specifically homophobic nature of violence and harassment experienced by sexual minorities is unaddressed in Canadian criminal law. As a result, perpetrators will commit such abuse on the assumption that they will only be lightly punished or not be punished at all. Sexual minorities will also be less likely to assert their rights to protection from abuses because they will assume that such claims will not be taken seriously. Most people who experience homophobic violence find it difficult if not impossible to find access to legal redress and reparation, due to factors such as bias against non-heterosexual forms of sexuality in the court system, failure to define abuses as criminal offences, and legal loopholes which hamper criminal prosecution. AI supports Bill C-250 as an important step toward lifting the veil of silence and indifference that too frequently surrounds homophobic violence.

### **INTERNATIONAL STANDARDS & ABUSES BASED ON SEXUAL ORIENTATION**

AI believes that, if enacted, Bill C-250 would be a crucial step toward complying with Canada's responsibilities under international law to ensure that individuals are protected from abuses based on their sexual orientation.

AI considers that acts of violence against sexual minorities in the home or community constitute torture for which governments are accountable when they are of the nature and severity envisaged by the concept of torture in international standards and the state has failed to fulfil its obligation to provide effective protection.<sup>4</sup>

Like all states, Canada has an obligation under international law to exercise due diligence in preventing homophobic attacks, investigating them when they occur and ensuring that the perpetrators are brought to justice.<sup>5</sup> A state cannot avoid responsibility for the ill-treatment of sexual

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matters of sexual orientation.”

4 The UN Convention against Torture defines torture in Article 1: “For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

5 The term “due diligence” describes a threshold of efforts which a state must undertake to fulfill its responsibility to protect individuals from abuses of their rights. The UN Special Rapporteur on violence against women has held that a “state can be held complicit where it fails systematically to provide protection from private actors who deprive any person of his/her human rights.”

minorities by arguing that the abuse was perpetrated by private citizens, or that it was justified by social, cultural or religious practises. Due diligence includes taking effective steps to prevent such abuses, to investigate them when they occur, to prosecute the alleged perpetrators and bring them to justice through fair proceedings, and to provide adequate compensation and other forms of redress. It also means that justice is dispensed without discrimination of any kind.<sup>6</sup>

Moreover, efforts to combat abuses directed at people because of their real or perceived sexual orientation is part of a growing global effort to incorporate issues of sexuality into the broader human rights movement.

Both the U.N. Human Rights Committee and the U.N. Committee on Economic Social and Cultural Rights have long recognized "sexual orientation" as a prohibited ground of discrimination under the two International Covenants. Both treaty-monitoring bodies have for years called on governments to end violations based on sexual orientation, from criminalization of homosexuality to discrimination in employment.

Violations based on sexual orientation and gender identity have also been increasingly documented by independent experts appointed by the U.N. Commission on Human Rights, including the Special Rapporteurs on Violence against Women, Extrajudicial Executions, Torture, the Right to Education and the Right to Health, as well as the Special Representative on Human Rights Defenders. The Working Group on Arbitrary Detention has also addressed the case of the recent arrests of gay men in Egypt.

The United Nations High Commissioner for Refugees has affirmed that homosexuals may be defined as a 'particular social group' under 1951 Refugee Convention. At least a dozen countries around the world have legislation or jurisprudence making it possible for persons facing persecution in their home countries due to their sexual orientation to be recognized as refugees.

Internationally, Canada has a strong history on sexual orientation issues, including:

- Supporting the accreditation of the International Lesbian and Gay Association (ILGA) at the United Nations;
- Supporting the wording on lesbians' human rights at the Fourth World Conference on Women, held in Beijing in 1995;
- Supporting lesbian and gay human rights in meetings of the Organization for Security and

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<sup>6</sup> The standard of due diligence was articulated by the Inter-American Court of Human Rights which stated: "An illegal act which violates human rights and which is initially not directly imputable to the State (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention." [*Velasquez-Rodriguez*, (ser. C) No. 4, Judgment of 29 July 1988, para. 172). The Court also stated: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim receives adequate compensation." (para. 174)

- Cooperation in Europe;
- Defending the participation of the non-governmental organization International Gay and Lesbian Human Rights Commission in a roundtable at the UN General Assembly's Special Session on HIV/AIDS;
  - Supporting the accreditation of ILGA to the World Conference on Racism in 2001;
  - Co-sponsoring a ground-breaking draft resolution on human rights and sexual orientation at the UN Commission on Human Rights in April, 2003, which will be further considered at the Commission's session in 2004.

Canada must now back up its international positions with domestic action. Bill C-250 is an important step toward ending violence based on sexual orientation in Canadian society.

### **UNIVERSALITY OF HUMAN RIGHTS AND THE BALANCE BETWEEN RIGHTS**

Measures to protect human rights are occasionally challenged on the basis that such measures will infringe other rights. For example, some suggest that legislation such as Bill C-250 could infringe human rights to freedom of religion, belief and expression.

AI is a staunch defender of free expression, including conscientiously held religious belief. In our view, nothing in Bill C-250 compromises the internationally guaranteed human rights to freedom of religion, belief and expression. The restrictions on the application of the legislation, combined with the array of defences available to an accused, mean that a conviction will result in only the clearest cases and most egregious circumstances.<sup>7</sup> Moreover, Bill C-250 would not prevent people from believing what they wish, whether in the form of religious or secular belief.

As for the expression of those beliefs, a democratic society with a fundamental commitment to human rights should not cloak attacks motivated by hatred in the protective mantle of "freedom of expression". International law makes it clear that those rights cannot be exercised in ways that lead to violations of the rights of others. Moreover, under international law, there are no exceptions to the right to be free from torture and ill-treatment; the prohibition is absolute and cannot be justified on the basis of custom, social norms or religion. The right to be free from mental and physical abuse is guaranteed in the widest possible terms, and Bill C-250 is an important step in making that protection effective in Canada. Allowing hate crimes based on a victim's perceived or actual sexual orientation to qualify as "free expression" would be inconsistent with Canada's international human rights obligations.

### **CONCLUSION**

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<sup>7</sup> For example, section 319(2) of the Bill provides a defence for an opinion or argument on a religious subject expressed in good faith.

Canada is undoubtedly responsible under international law for protecting its lesbian and gay citizens from violence. One of the most important steps in eradicating such abuses is to eliminate the impunity enjoyed by perpetrators. In this regard, Amnesty International believes that Bill C-250 is an important step in preventing homophobic attacks. By providing specific, targeted safeguards for those at risk on the basis of their sexual orientation, Bill C-250 does much to end the silence surrounding the violations of the human rights of lesbians and gays.