

# “ONE IN TEN” BUT WHO’S COUNTING?: LESBIANS, GAY MEN AND EMPLOYMENT EQUITY

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*Any future systematic initiative by the Ontario Provincial government to foster employment equity ought to—if it purports to be comprehensive—include measures to address discrimination against the lesbian and gay male community. The authors argue that the lesbian and gay community is a minority community which suffers from both systemic and direct discrimination in employment. Such discrimination is in many ways unique, owing to the distinctive “invisible” nature of the lesbian and gay experience, but if equity programs are to provide true substantive equality they must accommodate the particularities of disadvantage and remain cognizant of the special needs and differences of the disenfranchised.*

*The authors argue that the subversion of traditional gender roles within the lesbian and gay community challenges patriarchal society, and suppression of public expression of this subversion is necessary for the maintenance of systemic inequality. The adverse consequences of being identified as lesbian or gay result in many employees opting not to disclose their sexual orientation and remaining invisible. This socially imposed silencing*

*Les initiatives systématiques qui seront prises dans l’avenir par le gouvernement provincial de l’Ontario afin de favoriser l’équité en matière d’emploi devront, si elles se veulent complètes, renfermer des mesures pour venir à bout de la discrimination dont est victime la communauté gaie et lesbienne. Les auteurs soutiennent que la communauté gaie et lesbienne est une communauté minoritaire qui souffre de discrimination directe et systémique en matière d’emploi. Cette discrimination est unique à bien des égards, en raison de la nature particulière et « invisible » de l’expérience lesbienne et gaie. Mais si le but des programmes d’équité est de procurer l’égalité véritable, ils doivent tenir compte des particularités des dispositions désavantageuses et demeurer au fait des besoins spéciaux et des différences des personnes exclues.*

*L’auteur soutient que la subversion des rôles sexuels traditionnels au sein de la communauté gaie et lesbienne remet en question la société patriarcale et que la suppression de l’expression publique de cette subversion est nécessaire pour maintenir l’inégalité systémique. Le fait d’être identifié comme gai ou lesbienne entraîne des conséquences négatives, et,*

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*often precludes statistical proof of economic or other disadvantage, but should not be taken as indicative that such disadvantage does not exist. Arguments that lesbians benefit from employment equity for women and that gay men often enjoy white male privilege and thus have no need for employment equity ignore this reality. The difficulty of quantifying discrimination should not be a bar to addressing it. Rather, measures to deal with such discrimination would both tend to lessen invisibility and address broader questions of gender inequality.*

*par conséquent, de nombreux employés ou employées choisissent de ne pas révéler leur orientation sexuelle et de demeurer invisibles. Ce silence imposé par la société empêche souvent de prouver, au moyen de statistiques, l'existence d'un désavantage de nature économique ou autre, mais il ne doit pas être interprété comme un indice de l'inexistence d'un tel désavantage. On fait abstraction de cette réalité lorsqu'on soutient que les lesbiennes et les gais n'ont pas besoin de mesures d'équité en matière d'emploi, parce que les lesbiennes profitent de l'équité en matière d'emploi en tant que femmes et les gais jouissent souvent des privilèges accordés aux hommes blancs. Le fait qu'il soit difficile d'établir le nombre de cas de discrimination ne devrait pas empêcher qu'on aborde ce problème. En adoptant des mesures pour venir à bout de cette discrimination, on atténuerait l'invisibilité et on aborderait des questions touchant l'inégalité des sexes et ayant une plus grande portée.*

## TABLE OF CONTENTS

I.	INTRODUCTION: A LOOK TO THE FUTURE .....	285
II.	EMPLOYMENT EQUITY: A BRIEF HISTORY .....	287
III.	ON GENDER, LESBIANS AND GAY MEN: REFLECTIONS ON HOW PEOPLE 'OUGHT TO BEHAVE' .....	292
IV.	LESBIANS AND GAY MEN IN THE WORKPLACE: THE MEANING OF CONFORMITY .....	297
V.	ON INCLUSION AND THE SOCIAL MEANING OF INVISIBILITY .....	301
VI.	COUNTING HEADS: STATISTICS AND THE MEANING OF ACCOMMODATION .....	304
VII.	CONCLUSION .....	309



## I. INTRODUCTION: A LOOK TO THE FUTURE

*Nor — at the most basic level — is it unaccountable that someone who wanted a job, custody or visiting rights, insurance, protection from violence...from distorting stereotype, from insulting scrutiny, from simple insult...could deliberately choose to remain in or to reenter the closet in some or all segments of their life....[F]or many gay people it is still the fundamental feature of social life; and there can be few gay people, however courageous...in whose lives the closet is not still a shaping presence.<sup>1</sup>*

In 1993 the government of Ontario enacted the *Employment Equity Act*,<sup>2</sup> a legislative initiative aimed at outlining in law the government's perception that "eliminating discrimination in employment and increasing the opportunity of individuals to contribute in the workplace will benefit all people in Ontario".<sup>3</sup> While this recognition, long overdue, is to be applauded, at least to the extent that it represents an attempt to address the at times blatant systemic discrimination faced by "women, Aboriginal persons, racial minorities and persons with disabilities", the government's final decision as to which groups specifically are 'worthy' of non-discrimination represents, at least from the perspective of lesbians<sup>4</sup> and gay men (a group apparently not so worthy), a shameful admission on the part of our legislators that not *all* people are entitled to equal treatment under the law — an admission that while diversity is to be encouraged, the public expression of *some* community difference is best not permitted, let alone encouraged.

In September 1995, the newly elected Premier of Ontario, Mike Harris, arguing that the Act constitutes little more than state imposed 'quota law', initiated measures to repeal the legislation. He has now vowed to introduce an 'equal opportunity plan' — an as yet unwritten and undiscussed legislative scheme aimed at addressing the more 'apparent flaws' in the *Employment Equity Act*.<sup>5</sup> At a time when inequality in employment

<sup>1</sup> E.K. Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990) at 68.

<sup>2</sup> *An Act to provide for Employment Equity for Aboriginal People, People With Disabilities, Members of Racial Minorities and Women*, S.O. 1993, c. 35 [hereinafter *Employment Equity Act* or the *Act*].

<sup>3</sup> See the preamble, *ibid.*

<sup>4</sup> As will be explained later in this paper, although lesbian-identified women obviously identify as 'women' for the purposes of employment equity legislation, the legislation and indeed early/initial government initiatives aimed at implementing equity-type legislation (see e.g. the *Abella Report*, *infra* note 9) make no effort to acknowledge, let alone address, the disparate treatment afforded lesbians as compared to those women who identify or are assumed to be heterosexual. While the argument can and has been made that lesbians 'benefit' from equity legislation, in that the legislation aims to reverse the effects of systemic gender discrimination on all women, this argument ignores the very real consequences of systemic homophobia on those women who are lesbian. (See M. Eaton, "Lesbians and the Law" in S.D. Stone, ed., *Lesbians in Canada* (Toronto: Between the Lines, 1990) 109 and T. Edwards, *Erotics & Politics* (London: Routledge, 1994) c. 2.) It also ignores the role that homophobia plays in maintaining gender inequality. As Rich explains within the context of feminist writing that specifically fails to mention lesbian existence and which, in so doing, implies that all women are essentially heterosexual: "research and theory that contribute to lesbian invisibility or marginality are actually working against the liberation and empowerment of women as a group": A. Rich, "Compulsory Heterosexuality and Lesbian Existence (1980)" in A. Rich, *Blood, Bread, and Poetry: Selected Prose 1979-1985* (New York: Virago Press, 1986) at 50.

<sup>5</sup> D. Hesselback, "Lawyers Will Benefit When Equality Law Dies" *The Toronto Star* (3 September 1995) D1. Although this paper will not address the specifics of the *Employment Equity Act*,

remains a harsh reality, a decision on the part of any government to completely repeal legislation aimed at addressing this inequality is inexcusable. This is particularly so given that those most in need of equality have neither been consulted nor given any indication of how their right to participate in the workforce *will* be guaranteed and promoted.

This paper will not attempt to convince the present government that it should reconsider its decision to repeal the *Employment Equity Act*. Given the apparent political motivations behind its decision to do so, any effort to persuade it to alter its legislative mandate would inevitably prove futile. What this paper will do, however, is look to the future. The Harris government has stated that it aims to offer an 'improved', 'fair' employment scheme. While we remain sceptical, we nonetheless offer this paper in the hope that at some future point, legislative initiatives will be advanced which integrate the broader social policy objectives of the 1993 legislation while recognizing some of its more apparent shortcomings.<sup>6</sup> We do so specifically from the perspective of that community previously denied recognition (that is, the lesbian and gay male community) — a community which must be included in all future employment equity initiatives if systemic equality is an objective worth striving for.

It is our purpose in writing this paper to argue that any effort to address workplace discrimination must recognize that the lesbian and gay community, as a minority community long denied full participation, also suffers disproportionately from systemic and direct discrimination in employment, and that eliminating those barriers central to the maintenance of the homophobic reality in which we live and work is *also* in the best interests of society. We will begin with a review of that definition of employment equity which recognizes equity initiatives as a proactive means of attaining conditions of substantive equality and will argue that the deliberate exclusion of lesbians and gay men

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it is worth noting, and perhaps briefly responding to, the claim that employment equity imposes discriminatory hiring quotas. This argument, relied upon extensively by Mike Harris during the 1995 Ontario provincial election campaign, is in fact inaccurate and plays, rather successfully, on the fears of those who misunderstand and hence oppose the need for equity hiring. As R. Jain explains:

[The] claim employment equity is "wrong" because it sets legal quotas and effectively forces discrimination against white males....

Actually, employment equity speaks of goals and timetables, not quotas. Indeed, the reason it is called employment equity is to distance it from affirmative action in the United States, which is perceived as quota-based. In employment equity, there is not an inflexible number of designated group members that must be met. For instance, if an employer is not hiring or if even after attempts to outreach, no qualified designated group members apply, the employer is not penalized at all.

Today, due to overt and systemic discrimination, white, able-bodied males are disproportionately hired over qualified designated group members. To address this injustice, employment equity expects employers to take steps over time to hire qualified members of each group in the labour force.... This is not adversely discriminating against the white, able-bodied male. Through employment equity, he is not at a disadvantage, but he is no longer at so much of an advantage. (Letter to the Editor, *The [Toronto] Globe and Mail* (2 June 1995) A14).

See also B. Demara "Getting Ready for 'Job Equity'" *The Toronto Star* (25 August 1994) A21.

<sup>6</sup> This paper will not provide an in-depth analysis of the provisions of the *Employment Equity Act* or a review of how the previous government intended to implement and enforce it. Rather, we will focus specifically on alleged 'justifications' for the exclusion of lesbians and gays from the broad parameters of the *Act* and all subsequent legislation.

from these initiatives only serves to reinforce those stereotypes and social prejudices that permit systemic inequality. In particular, if one of the aims of equity legislation is to halt a now recognized history of systemic gender discrimination, the exclusion of lesbians and gay men from this legislation, resulting as this will in the suppression of lesbian and gay male expression, will only support those gender/power hierarchies which permit and are central to systemic inequality.

As long as lesbians and gay men are denied participation in all walks of public life, real equality will never be achieved. To a large extent, forced invisibility is what homophobia is about. It ensures that lesbians and gay men, to the extent that they are perceived as violating those gender norms upon which heterosexual male dominance is based, remain silenced, and hence invisible. Any attempt to bring true equality to the work place will not ultimately prove successful so long as it denies the very real consequences of systemic homophobia on lesbians and gay men and on society as a whole. While it is true that not all inequalities can be addressed simultaneously, it is also true that the many barriers to true substantive equality are inextricably linked.

Discrimination does not exist in a vacuum. To the extent that we identify or are identified as non-heterosexual, our oppression, our reality, will continue to serve an insidious purpose — the maintenance of compulsory heterosexuality as an oppressive institution central to the preservation of heterosexual male dominance and those inequalities which result from gender polarity — and until *that* purpose has been addressed, by *every* means imaginable, real social equality will remain illusory.

## II. EMPLOYMENT EQUITY: A BRIEF HISTORY

It is not our purpose in writing this paper to debate the relative merits of employment equity. Nor do we aim to convince those who oppose equity goals or equality rights generally<sup>7</sup> that they should change their mind. Others have already undertaken this task and have done so convincingly.<sup>8</sup> We do not propose to summarize their arguments in this article. We start with the premise that equity initiatives are an extension of equality rather than an exception to it and are essential if we aim to achieve social equality and the elimination of systemic discrimination. Having said this, however, it is important to

<sup>7</sup> See generally J. Roberts, "Employment Equity — Unfair" in M. Charlton & P. Barker, eds., *Contemporary Political Issues*, 2d ed. (Scarborough: Nelson Canada, 1994) 408; "Employment Equity's True Colours" *The [Toronto] Globe and Mail* (12 November 1993) A26; "Real Employment Equity Requires Careful Deliberation, Not Simple Quotas" *The Ottawa Citizen* (8 December 1993) 7.

<sup>8</sup> See e.g. C.A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (New Haven: Yale University Press, 1979); D. Lepofsky, "Understanding the Concept of Employment Equity: Myths and Misconceptions" (1993) 2 *Canadian Labour Law Journal* 1; Ontario Law Reform Commission, *Litigating the Relationship Between Equity and Equality* (Study Paper) by C. Sheppard (Toronto: Ministry of the Attorney General, 1993); C. Geller, "Equality in Employment for Women: The Role of Affirmative Action" (1990-91) 4 C.J.W.L. 373; B. Feldthusen, "Affirmative Action: Taking Equality Seriously" (1988) 8 Windsor Y.B. Access Just. 292; H.C. Jain, "Racial Minorities and Affirmative Action/Employment Equity Legislation in Canada" (1989) 44 *Relations Industrielles* 593; R. Leon, "W(h)ither Special Measures: How Affirmative Action for Women Can Survive Sex Discrimination Legislation", (1993) 1 *Australian Feminist Law Journal* 89; C. Backhouse, "Women Faculty at the University of Western Ontario: Reflections on the Employment Equity Award", (1990) 4 C.J.W.L. 36; Ontario Human Rights Commission, *Life Together: A Report on Human Rights in Ontario* (Toronto: Ontario Human Rights Commission, 1977); E. Ziemba, "Ontario's Employment Equity Act: A Tool for Change", (1994) 3 *Inroads* 52.

<sup>9</sup> *Report of the Commission on Equality in Employment* (Ottawa: Ministry of Supply and

briefly outline the history of employment equity and what its proponents hope to achieve as this will assist in determining whether any rationale exists for excluding lesbians and gay men from employment equity legislation.

Employment equity is a relatively recent legal concept. First referred to by Judge Rosalie Abella in the 1984 *Report of the Commission on Equality in Employment*,<sup>9</sup> employment equity initiatives can be seen as "second generation" equality provisions — an attempt to improve those equality measures already in place. During the 1960's, Canadians witnessed the introduction of human rights legislation at both the provincial and federal levels of government. While somewhat effective, it was soon apparent that human rights legislation served but a limited, and by no means flawless, role in addressing the very real discrimination faced by women and other socially discriminated-against groups.

Pursuing one's rights via judicial-like, frequently confrontational settings can be a long, painstaking and alienating process. For many, the mere thought of 'standing alone' and confronting the source of one's inequality is enough to discourage any attempt to attain redress. The human rights tribunal process assumes that the person complaining of discrimination already possesses a voice with which to express dissatisfaction. It is a complaints-based system and, as such, can only affect change after the disenfranchised have found the requisite strength to demand it. It thus denies one of the very real consequences of discrimination: the effective silencing of those most in need of expression.<sup>10</sup>

Women and other disenfranchised groups have long argued that equal opportunity in employment cannot be left to the goodwill of those organizations responsible for maintaining our unequal status. Instead it must be legislated for, so as to provide a legal framework within which the goal of equal opportunity can be attained. The human rights commission model provides little incentive for employers to implement non-discriminatory practices.<sup>11</sup> It cannot, for example, rectify the enormous, initial power imbalance between victim and accused. More importantly, however, it will normally only address the specific needs of the *individual* complaining.<sup>12</sup> This does little to assist those not able to complain and it does not effectively protect others from similar

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Services, 1984) (Chair: R.S. Abella) [hereinafter *Abella Report*].

<sup>10</sup> As MacKinnon explains, "the speech of the powerful impresses its view upon the world, concealing the truth of powerlessness under a despairing acquiescence that provides the appearance of consent and makes protest inaudible as well as rare": C.A. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 205. On discrimination as silence, see K.A. Lahey, "On Silences, Screams and Scholarship: An Introduction to Feminist Legal Theory" in R.F. Devlin, *Canadian Perspectives in Legal Theory* (Toronto: Emond Montgomery, 1991) and M.J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320.

<sup>11</sup> C. Wieneke, "Regulating the Equality Agenda" (1992) 35 Aus. Univ. Rev. 30.

<sup>12</sup> Although the human rights commissions in five Canadian jurisdictions can order the implementation of 'affirmative action' programs after they have confirmed the existence of a situation involving discrimination, this remedy has been rarely applied even though the tribunals recognize their right to do so: see *Karumanchiri v. Ontario (Liquor Control Bd.)* (1987), 8 C.H.R.R. D/4076 (Ont. Bd. of Inquiry). See also R.G. Juriansz, "Equality Rights, Affirmative Action" in N.R. Finkelstein & B.M. Rogers, eds., *Charter Issues in Civil Cases* (Toronto: Carswell, 1988) 109. In addition, this remedial power still depends on the filing by *individuals* of *individual* complaints. As such, it does not overcome many of the initial power-based inequalities discussed above.



discriminatory practices in the future.<sup>13</sup> What is required, in addition to<sup>14</sup> a mechanism which is complaints based, is something which is proactive<sup>15</sup> and *systemic* in its approach — something which seeks “to correct the cause of the problem, rather than simply placing a bandaid over the most festering manifestations of it”.<sup>16</sup> The human rights commission model is to be commended for at least signalling to people that redress is available to individuals subjected to deliberate acts of discrimination. Systemic discrimination, however, — discrimination that arises from those institutionalized systems and practices which result in arbitrary and extensive exclusions for persons who, by reasons of their group's affiliation, are systematically denied a full opportunity to demonstrate their individual abilities<sup>17</sup> — requires systemic remedies:

Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified.<sup>18</sup>

It was within this climate of dissatisfaction and recognised need for change that the idea of employment equity first found expression. The immediate result, the *Abella Report*, can now be seen as a catalyst for federal<sup>19</sup> and provincial legislative efforts to

<sup>13</sup> On the inability of human rights commissions to effectively address future discrimination, see “Right to Remedy,” in (1988) 5 *Can. H.R. Advoc.* 1 at 3.

<sup>14</sup> We should not be seen as advocating the complete dismantling of the human rights commission system. Clearly, the system has its problems. See e.g. K. Norman, “Problems in Human Rights Legislation and Administration” in S.L. Martin & K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 391. We believe, quite strongly, that it can and does serve an important role in providing redress for those who are able to adequately express particular incidents of discrimination. What we are saying, however, is that it is now clear that this system alone cannot adequately prevent discrimination from occurring.

<sup>15</sup> A. Sampson, “Affirmative Action: It's Just Common Sense” *Ryldes* (April, 1987) 75.

<sup>16</sup> Lepofsky, *supra* note 8 at 4. As Lepofsky accurately notes by way of a medical comparison, human rights codes seek to provide a cure after a patient has become ill, rather than seeking to prevent the illness from occurring in the first place.

<sup>17</sup> As C. Sheppard, *supra* note 8 at 7 explains:

[S]ystemic discrimination...includes any *institutionalized* practices or policies that disadvantage individuals as members of certain groups. Systemic discrimination is usually associated with adverse effect discrimination because the latter raises most directly the pervasive problem of discrimination embedded within institutional practices and policies. Direct discrimination, however, can also contribute to systemic discrimination if it represents a widespread practice within an institution, if it is not acknowledged as a problem (for example, sexual or racial harassment), and to the extent that some manifestations of direct discrimination are so much a part of the dominant ideology as to be invisible. [*italics in original*].

<sup>18</sup> *Abella Report*, *supra* note 9 at 9.

<sup>19</sup> In response to the *Abella Report*, the federal government enacted the *Employment Equity Act*, R.S.C. 1985 (2d Supp.), c. 23. It requires certain Crown corporations and other federally regulated employers to implement employment equity programs, aimed at eliminating those discriminatory employment barriers and practices that have historically disadvantaged women, native people, visible minorities and disabled persons. C. Sheppard (*supra* note 8 at 15) has argued “[t]he legislation is remarkable for its articulation of four designated groups based on a contextual appreciation of the history and continued realities of group patterns of disadvantaging in Canadian society”. While we agree, we also find it remarkable that the histories and realities of lesbians and gay men have been so readily dismissed. This is particularly so given that the stated purpose of the legislation (as outlined

implement the ideas and agenda outlined in that Report. Some ten years later, in addition to judicial recognition<sup>20</sup> that employment equity is an effective means of "eradicating group patterns of systemic discrimination by changing the institutional climate, policies and practices in the future",<sup>21</sup> what we have witnessed is a concerted legislative commitment to pursuing systemic equality via employment equity schemes.

The previous Ontario government's efforts to effect systemic change by way of the *Employment Equity Act* typifies this effort. Unfortunately, while the legislation adopted some of the more impressive elements of the *Abella Report*, it failed to rectify some of its more glaring omissions. In so doing, it too remained complicit in the preservation of the very sources of inequality its mandate is aimed at eradicating. Although the *Act* will soon be repealed, it nonetheless serves as a starting point for future change, particularly if that change aims (as it must) to address its under-inclusiveness.

The principles of employment equity for the purposes of Ontario's *Employment Equity Act* are outlined in subsection 2(1) of the *Act*:

Every Aboriginal person, every person with a disability, every member of a racial minority and every woman is entitled to be considered for employment, hired, retained, treated and promoted free of barriers, including systemic and deliberate practices and policies, that discriminate against them as an Aboriginal person, as a person with a disability, as a member of a racial minority or as a woman.

Subsection 2(2) — the 'principles' section — is aimed at ensuring that the workforce of every employer covered by the *Act* reflects the representation of Aboriginal persons, persons with disabilities, racial minorities and women in the community in all occupational categories and at all levels of employment.<sup>22</sup> It also addresses the need to eliminate those systemic and deliberate barriers that result in inequality in the workforce,<sup>23</sup> and to create both positive and supportive measures in the recruitment, hiring, retention, treatment and promotion of those four groups specifically recognized as experiencing "more discrimination than other people in finding employment, in retaining employment and in being promoted".<sup>24</sup>

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in s. 2 of the *Act*) is to ensure that, "no person [is] denied employment opportunities or benefits for reasons unrelated to ability", and that it aims to give effect to "the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences" [Emphasis added].

<sup>20</sup> As the Supreme Court of Canada has explained in *Canadian National Railway Co. v. Canada (Canadian Human Rights Tribunal)*, [1987] 1 S.C.R. 1114 at 1143, 40 D.L.R. (4th) 193 at 213:

An employment equity program...is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.

<sup>21</sup> Sheppard, *supra* note 8 at 13.

<sup>22</sup> *Employment Equity Act*, *supra* note 2 at s. 2(2).

<sup>23</sup> *Ibid.* Subsection 2(3) of the *Act* reads:

Every employer shall ensure that its employment policies and practices, including its policies and practices with respect to recruitment, hiring, retention, treatment and promotion, are free of barriers, both systemic and deliberate, that discriminate against Aboriginal people, people with disabilities, members of racial minorities and women.

<sup>24</sup> See the preamble of the *Employment Equity Act*, *supra* note 2.

The *Act* itself offers no explanation as to why those groups identified as historically disadvantaged have been so identified. Indeed, its preamble simply provides that:

The people of Ontario recognize that when objective standards govern employment opportunities, Ontario will have a workforce that is truly representative of its society.

The people of Ontario have recognized in the *Human Rights Code* the inherent dignity and equal and inalienable rights of all members of the human family and have recognized those rights in respect of employment in such statutes as the *Employment Standards Act* and the *Pay Equity Act*. This *Act* extends the principles of those Acts and has as its object the amelioration of conditions in employment for Aboriginal people, people with disabilities, members of racial minorities and women in all workplaces in Ontario and the provision of the opportunity for people in these groups to fulfil their potential in employment.

Having recognized that objective standards have historically not been employed and that human rights protections have already been recognized as essential for vast segments of the population, the *Act* then appears to deny the reality of some segments of that population (specifically, lesbians and gay men) by excluding them from the protections offered in it.

Given that sexual orientation is included as a prohibited ground of discrimination in the *Ontario Human Rights Code*,<sup>25</sup> and given that the *Employment Equity Act* aims to recognize and extend the principles of the *Code*, it is clear that that extension is far from complete.<sup>26</sup> Indeed, from the perspective of any lesbian or gay man who is or has ever been employed or who would like to be employed with the knowledge that her or his sexual orientation will not be viewed negatively, the declared intention of this legislative preamble is suspect. Are we to believe, for example, that objective standards do at present govern the employment opportunities of lesbians and gay men or that lesbians and gay men do *not* experience a significant amount of discrimination in finding and retaining employment and in obtaining promotions? We think not. *Our* reality, a reality defined by intolerance and prejudice — those systemic barriers that employment equity aims to eliminate — has taught us otherwise and it is *our* reality that has again been ignored.

The *Abella Report*, in explaining why it categorizes only four groups as groups in need of redistributive justice explains that:

[E]quality means an effective communications network whereby potential employee and employer can become aware of each other, a commitment on the part of educators, employers and government to revise where necessary those practices that unfairly impede the employment opportunities of women, native people, disabled persons, and

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<sup>25</sup> Section 5 of the *Ontario Human Rights Code*, S.O. 1981, c. 53 was amended in 1986 so as to provide equal treatment with respect to employment without discrimination because of sexual orientation.

<sup>26</sup> As the Coalition for Lesbian and Gay Rights in Ontario [hereinafter CLGRO] explains: Employment equity programs are a proactive attempt to realize the principles outlined in the Ontario Human Rights Code. Current initiatives have focused on five of the groups designated under the Code, but the principles of the Code require that such programmes be extended to include lesbians and gay men explicitly.

(Coalition for Lesbian and Gay Rights in Ontario, *We Count: Lesbians, Gay Men and Employment Equity* (Toronto, 1991) at 1).

visible minorities, and an end to patronizing and stultifying stereotyping....It means *accommodating differences* [Emphasis added].<sup>27</sup>

The *Report* goes on to note that:

By not acting, we unfairly ignore how inherently invalid these exclusionary distinctions are and we signal our acceptance as a society that stereotypical attributes assigned to these four groups are appropriate justifications for their disproportionate disadvantages.<sup>28</sup>

This explanation does little to appease the concerns of lesbians and gay men, — persons whose differences have *not* been accommodated — and is particularly troubling given that subsequent legislative initiatives have relied on the use of the four groups identified in the *Abella Report*. Our task, therefore, must be to ensure that this exclusion is addressed in all subsequent initiatives.

While we recognize that the discrimination experienced by lesbians and gay men is in many ways unique and that this renders any legislative mandate aimed at addressing this inequality more challenging, we also recognize and expect that if equity programs are to provide true substantive equality, they must accommodate the particularities of disadvantage and remain cognizant of the special needs and differences of the disenfranchised. Our legislators must not lose sight of the fact that socially imposed oppressions are in many ways linked and that it is politically myopic to even attempt to address the effect of some forms of discrimination while allowing, by ignoring, others. This is particularly true if we examine what homophobia is, socially, what it does and why every effort should be made to eliminate it.

### III. ON GENDER, LESBIANS AND GAY MEN: REFLECTIONS ON HOW PEOPLE 'OUGHT TO BEHAVE'

The *Abella Report*, in explaining the effect of inequality and pervasive sex discrimination on women, notes that systemic equality will not be realized until we eliminate those barriers that allow people to think, "in terms of how a particular *gender* ought to behave" [Emphasis added].<sup>29</sup> To this, one must also add that true equality will not be realized until we eliminate those barriers which penalize persons who fail to conform to preconceived notions of appropriate gender role behaviour.

A number of academics have argued that the cultural and legal contempt for lesbians and gay men serves primarily to reinforce the social meaning attached to gender.<sup>30</sup> This has led some to argue quite convincingly that homophobia is a "weapon of sexism",<sup>31</sup> designed primarily to ensure that hierarchical gender differences, socially defined,<sup>32</sup> from which only men benefit, are pervasive and central to the maintenance of sex discrimination and those institutions that ensure male power. As Stoltenberg explains, "[t]he system of

<sup>27</sup> *Abella Report*, *supra* note 9 at 5.

<sup>28</sup> *Ibid.* at 5.

<sup>29</sup> *Ibid.* at 32.

<sup>30</sup> Perhaps the most thorough articulation of this theory is provided by D. Majury in her insightful article, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" (1994) 7 C.J.W.L. 286. See also L. Pearlman, "Theorizing Lesbian Oppression and the Politics of Outness in the Case of *Waterman v. National Life Assurance*: A Beginning in Lesbian Human Rights/Equality Jurisprudence" (1994) 7 C.J.W.L. 454; S.A. Law, "Homosexuality and the Social Meaning of Gender" (1988) Wis. L. Rev. 198; G. Chauncey, *Gay New York: Gender, Urban Culture and the Making of the Gay Male World 1890-1940* (New York: Basic Books, 1994). Clearly, the need to reinforce gender

male supremacy requires gender polarity — with real men as different from real women as they can be, and with men's social superiority to women expressed in public and in private in every way imaginable."<sup>33</sup> Lesbian and gay male sexuality has the potential to

roles and in the process maintain sexism is not the only reason for the social rejection of same-sex relationships. As M. Fajer ("Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes and Legal Protections for Lesbians and Gay Men" (1992) 46 U. Miami L. Rev. 511) explains:

[a]lthough most psychological studies of homophobia suggest that the strongest contributing factor is belief in the importance of maintaining gender-role stereotypes, a number of studies identify other factors that may be partially responsible as well. These factors include conservative attitudes about sexual issues in general, religious beliefs, and the belief that homosexuals are dangerous. Notably, however, each of these factors can be attributed in part, or at least correlated to, fear of deviation from gender-role norms.

One should note, however, that not all legal theorists accept the argument that anti-lesbian and anti-gay male discrimination is an issue of sex discrimination. See especially C. Petersen, "Envisioning a Lesbian Equality Jurisprudence" in C. Stychin & D. Henman eds., *Legal Inversions: Lesbians, Gay Men and the Politics of Law* (Philadelphia: Temple University Press, 1995) 118. Petersen argues that the idea that homophobia serves to reinforce male power and essentially amounts to a reprisal for gender insubordination is a theory based predominantly on the experiences of white lesbians and gay men and does little more than privilege gender discrimination while obscuring the many other forms of discrimination faced by lesbians and gay men, particularly those who face race discrimination and discrimination on the basis of disability. We see much merit in Petersen's analysis and believe it deserves more attention than we afford it in this paper. For the purposes of this paper, however, in arguing that homophobia is a form of sex discrimination, we want to make it quite clear that we are not suggesting that gender insubordination is the *only* reason for the discrimination faced by all lesbians and gay men or that gender discrimination is more damaging than other forms of discrimination. We do believe, however, that there is considerable support for the conclusion that homophobia and the discrimination faced by those who express a *sexual* identity that challenges gender male privilege arises because of "anxiety about the boundaries of gender" (Fajer, *ibid.* at 511). We accept the argument outlined by Majury (*ibid.* at 316) that sexual identity oppression finds its source in gender oppression and it is this form of oppression upon which we have chosen to focus this paper. We believe that it is particularly relevant within the context of any equity-type legislation which aims specifically to eliminate sex discrimination but which, in attempting to do so, fails to simultaneously address homophobia and the disparate harms (including gender inequality) that result from the continued suppression of non-heterosexual sexual identities.

<sup>31</sup> S. Pharr, *Homophobia: A Weapon of Sexism* (Little Rock: Chardon Press, 1988). As Pharr explains, at 8, homophobia is central to preserving sexism and ultimately patriarchy:

Patriarchy — an enforced belief in male dominance and control — is the ideology and sexism the system that holds it in place. The catechism goes like this: who do gender roles serve? Men and the women who seek power from them. Who suffers from gender roles? Women mostly and men in part. How are gender roles maintained? By the weapons of sexism: economics, violence, homophobia.

Homophobia works to maintain gender roles because it silences those women and men whose sexual identity and behaviour, it is believed, will, "bring down the entire system of male dominance...."

<sup>32</sup> On gender polarity as a social construct defined by specific behaviours which ultimately result in the categories "male" and "female", rather than a biological determinant, see C.A. MacKinnon, *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987) and T. de Lauretis, *Technologies of Gender: Essays on Theory Film and Fiction* (Bloomington: Indiana University Press, 1987). As MacKinnon explains, at 8, "gender is an inequality of power, a social status based on who is permitted to do what to whom" and, at 14, "[m]ale is a social and political concept, not a biological attribute, having nothing whatever to do with inherency, pre-existence, nature, essence, inevitability, or body as such". It is this social definition of male and female, with defining characteristics for each, which ultimately results in gender inequality.

<sup>33</sup> J. Stoltenberg, "You Can't Fight Homophobia and Protect the Pornographers at the Same Time

subvert gender hierarchies because it does not, *of necessity*,<sup>34</sup> require or rely on the systemic subordination of women. Homophobia is aimed at silencing lesbians and gay men because the public expression of their sexuality is seen as undermining male dominance, for which gender hierarchy is necessary. As “a weapon of sexism”, homophobia — which can be seen as a reaction to the actual or perceived violation of gender norms — reinforces male dominance by maintaining gender male privilege. Many antigay stereotypes are aimed at silencing the public expression of non-heterosexual sexual identities and serve as an enforcement mechanism for appropriate gender-role behaviour,<sup>35</sup> ensuring that women and men do not violate those gender hierarchies central to male power and that all lesbians and gay men are suppressed and punished to the extent that they do. As Pharr explains:

To be a lesbian is to be perceived (labelled) as someone who has stepped out of line, who has moved out of sexual/economic dependence on a male, who is woman-identified. A lesbian is perceived as someone who can live without a man, and who is therefore (however illogically) against men. A lesbian is perceived as being outside the acceptable, routinized order of things. She is seen as someone who has no societal institutions to protect her and who is not privileged to the protection of individual males....A lesbian is perceived as a threat to the nuclear family, to male dominance and control, to the very heart of sexism.<sup>36</sup>

There are numerous examples of the extent to which heterosexual male privilege relies upon and ultimately insists upon the preservation of gender inequality. Perhaps the most obvious example of the role of homophobia in preserving gender, hence social inequality, however, is the extent to which it is used to preserve, “that bastion of patriarchal power, the nuclear family”.<sup>37</sup> Patriarchy is the, “manifestation and

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— An Analysis of What Went Wrong With *Hardwick*” in D. Leidholt & J.G. Raymond, eds., *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon Press, 1990) 184 at 184-85.

<sup>34</sup> With respect to gay male sexuality, our comments should not be interpreted so as to imply that gay men do not *currently* benefit from the social, sexual and economic subordination of women or that some gay men do not *choose* to participate in male privilege. On the contrary, as is explained below at 304, what we are stating is that gay men have a choice and that the choice they must make is that which rejects those behaviour patterns which reinforce male dominance and which are central to both sexism and homophobia. As M. Frye (“Lesbian Feminism and the Gay Rights Movement: Another View of Male Supremacy, Another Separatism” in M. Frye, *The Politics of Reality: Essays in Feminist Theory* (Freedom, CA: The Crossing Press, 1983) 128 at 146, explains:

However a man comes to perceive himself as “different” with respect to his relation to the gender categories, in his sensual desires, in his passions, he comes to perceive himself in a cultural context which offers him the duality masculine/feminine to box himself into. On the one hand, he is “offered” the dominant sexist and heterosexist culture which will label him feminine and castigate him, and on the other hand, he is “offered” a very misogynist and hyper-masculine gay male subculture; he is invited to join a basically masculist gay rights movement. If he has the aesthetic and political good taste to find all of the above repugnant, he can only do what lesbians have been doing: *invent*. He has to move on in previously indescribable directions. He has to invent what maleness is when it is not shaped and hardened into straight masculinity, gay hypermasculinity or effeminacy. For a man even to begin to think such invention is worthwhile is to be disloyal to phallocracy. For a gay man, it is to *be* the traitor to masculinity that the straight man always thought he was.

<sup>35</sup> Fajer, *supra* note 30 at 607.

<sup>36</sup> Pharr, *supra* note 31 at 18. As Majury notes, *supra* note 30 at 311:

Lesbians are discriminated against because they challenge dominant understandings and meanings of gender in our society. And the more, and the more overtly, we challenge gender,

institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general".<sup>38</sup> Lesbian and gay male relationships have the potential<sup>39</sup> to reject hierarchical concepts of gender. They therefore challenge the notion that social traits, such as dominance and subordination, masculinity and femininity, equal and unequal are needed. Because they do so, they are seen as challenging patriarchy and male supremacy derived from it and are subsequently punished for, "not participating fully in...[the]...daily maintenance of women's subordination". As S.A. Law writes:<sup>40</sup>

[W]hen homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender.<sup>41</sup>

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the more, and the more overtly, we are discriminated against. Gender differentiation, premised on the subordination of women, is as essential to heterosexualism as it is to sexism. Lesbian inequalities are sex inequalities because they are rooted in a highly circumscribed definition of gender and gender roles, according to which women are seen only in relation to men.

And as Pharr explains, at 19, gay men are also perceived as a threat to male dominance:

[A]nd the homophobia expressed against them has the same roots in sexism as does homophobia against lesbians. Visible gay men are the objects of extreme hatred and fear by heterosexual men because their breaking ranks with male heterosexual solidarity is seen as a damaging rent in the very fabric of sexism. They are seen as betrayers, as traitors who must be punished and eliminated. In the beating and killing of gay men we see clear evidence of this hatred....Misogyny gets transferred to gay men with a vengeance and increased by the fear that their sexual identity and behaviour will bring down the entire system of male dominance and compulsory heterosexuality.

<sup>37</sup> Pharr, *ibid.* at 17:

The central focus of the right-wing attack against women's liberation is that women's equality, women's self-determination, women's control of our own bodies and lives will damage what they see as the crucial societal institution, the nuclear family. The attack has been led by fundamentalist ministers across the country. The two areas they have focused on most consistently are abortion and homosexuality, and their passion has led them to bomb women's clinics and to recommend deprogramming for homosexuals and to establishing camps and quarantining people with AIDS. To resist marriage and/or compulsory heterosexuality is to risk severe punishment and loss.

<sup>38</sup> G. Lerner, *The Creation of Patriarchy* (New York: Oxford University Press, 1986) at 239. K. Gough in her essay, "The Origin of the Family" in R.R. Reiter, ed., *Toward an Anthropology of Women* (New York: Monthly Review Press, 1975) 11 at 69-70, lists six characteristics of male power historically enforced in family arrangements and through which male supremacy is maintained:

men's ability to deny women sexuality or to force it upon them; to command or exploit their labour to control their produce; to control or rob them of their children; to confine them physically and prevent their movement; to use them as objects in male transactions;...or to withhold from them large areas of the society's knowledge and cultural attainments.

<sup>39</sup> Again, it must be emphasized that while gay men have the potential to undermine patriarchy, to the extent that they rely on their ability to "pass" as men, they merely reinforce it. See, R. Eisler, *Sacred Pleasures: Sex, Myth and the Politics of the Body* (New York: Harper Collins, 1995). See also, *infra* note 71. On the need to reject those values central to male dominance, within the context of lesbian relationships, see e.g. I. Reti, ed., *Unleashing Feminism: Critiquing Lesbian Sadoomasochism in the Gay Nineties* (Santa Cruz, CA: HerBooks, 1993).

<sup>40</sup> B. Ryder, "Straight Talk: Male Heterosexual Privilege" (1991) 16 *Queen's L.J.* 287 at 289.

<sup>41</sup> Law, *supra* note 30 at 218. See also A. Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination" 98 *Yale L.J.* 145 at 159. Koppelman provides further support for the notion that gay male relationships have the potential to undermine gender polarities when he writes:

Lesbian and gay male relationships, because they can undermine that male/female split necessary for socially imposed gender inequality, are thus targeted for abuse. By subverting gender roles, and by choosing instead to build communities and relationships (monogamous or otherwise) premised on equality, reciprocity and caring, lesbians and gay men have considerable potential to undermine the notion that relationships, and by extension society, in order to function, must be divided hierarchically. As Marc Fajer explains, "one of the biggest contributions that gay people can make to society is to demonstrate the weakness of the bipolar model of gender and to attempt to rectify some of the harms it creates".<sup>42</sup>

It is clear that patriarchal society has a vested interest in suppressing lesbian and gay male expression. At the risk of understating the obvious, it can now at least be acknowledged that much time and effort has been directed at silencing the public expression of any lesbian and gay male discourse and reality which challenges patriarchal privilege. Indeed, so pervasive is anti-lesbian and gay male discrimination in our society that the consequences for any who dare to speak and challenge socially imposed definitions of 'normal' are far from appealing or empowering:

To be called a 'homosexual' is to be degraded, denounced, devalued or treated as different. It may well mean shame, ostracism, discrimination, exclusion or physical attack. It may simply mean that one becomes an 'interesting curiosity of permissiveness'. But always, in this culture, the costs of being known as a homosexual must be high.<sup>43</sup>

For lesbians and gay men, the hostility directed at us (manifesting itself as it does in ways far too numerous to discuss within the scope of this paper<sup>44</sup>) ultimately ensures the almost complete suppression of lesbian and gay male public expression, hence visibility — a suppression deemed necessary for the maintenance of systemic inequality and male gender, heterosexual privilege. As Jeffrey Byrne notes, because of the vicious circle of labelling and silencing to which lesbians and gay men are subjected, "the personal costs of coming out in a still largely heterosexist and often violently homophobic society serve to ensure the continued invisibility of lesbians and gay men".<sup>45</sup> And it is this invisibility which is at the heart of homophobia — a socially imposed muzzle aimed at silencing those whose very existence threatens to subvert male power.

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Hostility to homosexuals is linked to other traditional, restrictive attitudes about sex roles. This suggests that Thomas Szasz is right: "[t]he homosexual does not threaten society by his actual behaviour but rather by the symbolic significance of his acts." Homosexuality threatens not the family as such, but a certain traditional ideology of the family. That ideology is one in which men, but not women, belong in the public world of work and are not so much members as owners of their families, while women, but not men, should rear children, manage homes, and obey their husbands.

<sup>42</sup> Fajer, *supra* note 30 at 616.

<sup>43</sup> K. Plummer, *Sexual Stigma: An Interactionist Account* (London: Routledge, 1975) at 175.

<sup>44</sup> See generally, however, G. Kinsman, *The Regulation of Desire: Sexuality in Canada* (Montreal: Black Rose Books, 1987); G.M. Herek & K.T. Berrill, eds., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (London: Sage Publications, 1992); G. Comstock, *Violence Against Lesbians and Gay Men* (New York: Columbia University Press, 1991); R. Robson, *Lesbian Outlaw* (New York: Firebrand Books, 1992); K. Jennings, "Gay and Lesbian Youth: Voices From the Next Generation" in *Becoming Visible* (Boston: Alyson Publications, 1994) 262; M. Duberman, *Cures: A Gay Man's Odyssey* (New York: Dutton, 1991).

<sup>45</sup> J. Byrne, "Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of



#### IV. LESBIANS AND GAY MEN IN THE WORKPLACE: THE MEANING OF CONFORMITY

*Where language and naming are power, silence is oppression, is violence.*<sup>46</sup>

It is not unrealistic to assume that the fear of being labelled, 'outed', identified — given what this represents and results in socially — has adverse consequences in and on any work environment. Because the workplace is central to most people's lives and typically mirrors conditions present in society at large, it is not surprising that societal discrimination against lesbians and gay men manifests itself in the workplace<sup>47</sup> and that the overt hostility directed daily at lesbians and gay men in society generally has a very real impact on the ability of lesbians and gay men to find, retain and secure promotion in employment. To argue otherwise is to ignore the extent to which homophobia aims to suppress the public expression of lesbian and gay male public identity and to understate the effect of socially imposed 'invisibility' on lesbians and gay men, and indeed, society as a whole. The discrimination faced by lesbians and gay men, resulting as it does in silence, hence invisibility, while perhaps unique to lesbians and gay men as a minority population, creates very real barriers. These barriers, sometimes systemic, sometimes deliberate, in one way or another adversely affect the equal participation of lesbians and gay men in the workforce, and ultimately undermine attempts to achieve systemic equality.

To date, little Canadian-based research has been compiled on the employment experiences of lesbians and gay men and the effect that socially imposed silence and invisibility has on their work performance and opportunities for promotion. The information that has been accumulated indicates that in addition to the more blatant discrimination faced by those who do choose to identify as lesbian and gay in the workplace (that is, employment loss, workplace harassment, and so forth), there are incredible psychological costs attached to being 'closeted' or hidden. In a series of interviews conducted in 1992-1993, the "effects of the closet on self confidence, on the perceived (in)ability to reach out to other lesbians and gays in order to develop a support system, on the ability to have and maintain intimate relationships and on productivity", were mentioned in every interview.<sup>48</sup> The results indicate that the reality of those who identify or who are identified as lesbian or gay in our society is a reality very much affected by lost employment opportunities, mistreatment in the workplace and lost promotion in employment — all factors which employment equity legislation aims to address but which have not been addressed within the context of lesbian and gay male experience.

For the lesbian or gay man seeking employment, there are many considerations directly related to her or his sexual orientation. Many will limit applications to employers or workplaces that have a reputation, perceived or otherwise, of being more

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Opportunity and Workforce Diversity" (1993) 11 Yale L. & Pol'y Rev. 47 at 56.

<sup>46</sup> A. Rich, *On Lies, Secrets, and Silence: Selected Prose, 1966-1978* (New York: Norton, 1979) at 18.

<sup>47</sup> Byrne, *supra* note 45 at 56.

<sup>48</sup> The only information we have located which adequately discusses the experiences of lesbians and gays in the workplace is found in an as of yet unpublished paper written by P. Shime, a student at law at the University of Toronto. Entitled "Homophobia in the Law: the Experiences of Lesbians and Gay Men in the Legal Profession", this work, excellent in its scope and content, consists of a series of

accommodating and less homophobic. Many thus forfeit job opportunities for which they are duly qualified simply because an employer is perceived to be homophobic. Others will apply but will tailor their résumés so as to hide any work or community related activity that might reveal their sexual identity. When one has been forced socially to live with the discomfort of not knowing whether or not the public expression of her or his identity will be met with hostility, she or he will tend, quite understandably, to assume a guarded approach in most public contexts. In the employment context, lesbians and gay men find themselves tailoring their résumés to suit the perceived reputation of a potential employer. Indeed, it is not uncommon for lesbians and gay men to have more than one résumé — one 'out' and one 'in' (read 'closeted'). The result is that many 'sell themselves short'. For example, although one might for instance have considerable and invaluable work experience with lesbian and gay community groups, and might have derived strong personal and work related skills from these activities, experience indicates that it might prove detrimental to include this information on a résumé. As a result, the full extent of one's experiences and resulting abilities cannot be appreciated.

If one does ultimately receive an interview, this tension continues throughout the interview process. Unaware if they are going to be met with hostility because of their sexual orientation, many lesbians and gay men will again choose to conceal their sexual orientation. Hence, information regarding valuable work/life experience may again be withheld for fear that information provided will again disclose sexual identity. Relevant credentials will thus not be evaluated and any perceived hesitancy or unwillingness to address topics or interact with the interviewer may leave a negative and ultimately detrimental impression.

Once hired, lesbians and gay men (even if not publicly identified as such) face a full spectrum of discrimination. At the one end, those who do ultimately reveal their sexual orientation risk job loss, hostility and harassment.<sup>49</sup> Sometimes, the discrimination faced will prove more subtle. Other employees, for example, usually assume that their colleagues are heterosexual and will frequently elicit information about one's personal life that will either reinforce or refute this assumption. The lesbian and gay employee who is confronted with questions about her or his personal life is left with the choice of 'coming out' and risking mockery and ostracism, of lying and living a lie or avoiding conversations with one's colleagues entirely. Avoidance, however, often leads to feelings of alienation and can give the impression that one is not friendly or collegial.<sup>50</sup> This, in turn, can create undue stress at work and can ultimately lead to lesbian and gay employees leaving that environment rather than confronting the source of the problem. Confrontation, after all, in this setting, requires identification, and this in turn might prove even more problematic.

The decision, albeit socially enforced, to hide one's sexual orientation, to remain

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interviews, conducted in 1992, with practicing lawyers, articling students and law students seeking articles in the Toronto region. Shime's paper was written in partial fulfilment of the requirements for an LL.B., for the course "Law and Sexuality". A copy of this paper is on file with the authors. For a broad overview of the experiences of employees in the United States, see V. Quade, "The Struggle to be a Gay Lawyer; Discrimination Still Exists Says William Rubenstein, One of the Few Lawyers Specializing in Gay and Lesbian Rights" (Winter 1991) *Barrister Magazine* 28.

<sup>49</sup> National Gay Task Force, "Work and Career: the Results" (Fall 1988) *Out/Look* 94. See also "Employment Discrimination: A Survey of Gay Men and Women" in W.B. Rubenstein, ed., *Lesbians, Gay Men and the Law* (New York: New Press, 1993) 244.

<sup>50</sup> As Shime explains, *supra* note 48 at 13, the desire to "fit in" is one of the explanations most

invisible, also has profound effects on opportunities for job promotion and retention.<sup>51</sup> One may, for example, feel that one's chances of being promoted will be affected by whether or not others, in particular superiors, know that one is gay or is a lesbian. Of course, some do choose to openly identify as lesbian and gay in order to avoid censoring themselves in the workplace. In doing so, in an environment without protective or supportive measures, they risk the more blatant discrimination of job loss and the more subtle effects that result from being labelled 'different', hence not 'appropriate', for other employment opportunities.<sup>52</sup> While more and more people are willing to take this chance and in so doing challenge those institutional practices that have and continue to hinder the participation of lesbians and gay men in the workplace, it is not surprising, given the price that can be paid, that many do not.

Unfortunately, for these persons, for those who quite understandably do not 'come out', there is also a price attached to their silence. Self-confidence is important in any work environment. The effort expended on hiding one's identity for the sake of job protection has the effect of undermining one's self-confidence and; ultimately, undermining work performance. As one lawyer explains:

I was very unhappy. I was drinking far too much and really hating my life. I was not being honest about who I was. I came to realise how internalised my homophobia was, how much I felt inferior because I was gay...I would second guess myself when the partners would ask me what I thought about a case. I would never say what I was thinking. I would think, 'what does he want me to think'. Admittedly, that concern is there for everyone, but it is an extra burden for closeted gays and lesbians because we spend all our time dealing with that pressure....Hiding takes energy on a constant basis. It's stressful—there's always the fear of discovery, slipping up, substituting pronouns,

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cited for the decision to stay in the closet. This decision is a double-edged sword:

if you come out, you won't fit in. But if you stay in the closet, you will avoid social events and contact to a certain extent in order to maintain your secrecy. Unless you are willing to live a lie completely, which many people are, you might well be seen as straight, but standoffish, or cold or unsociable.

As one gay lawyer explains:

the associates and junior partners had families and baby stories and being gay was not part of that. I was reticent to socialize since I didn't want questions asked about my social life. I was ultimately perceived as someone who did not fit in.

<sup>51</sup> *Ibid.* at 14.

<sup>52</sup> As Shime, *ibid.* at 16, again notes, many of the lawyers she interviewed felt that law firms attempt to justify the non-inclusion of 'out' gay lawyers by arguing that while they personally are not homophobic, they are required to think first and foremost about the needs and concerns of their clients. This line of reasoning should not be seen as credible. To begin with, it assumes that all clients are heterosexual and homophobic. More importantly, however, as Shime explains:

what is really going on is that the senior partners' own sense of identity and comfort level about working with someone who sleeps with people of the same sex is emerging. They blame it on the clients, but it is simply homophobia dressed up as if it is someone else's problem.

As CLGRO explains, *supra* note 26 at 14, this excuse is also used to exclude lesbians and gay men from employment opportunities in 'sensitive areas' like teaching, a line of reasoning which is both unfounded and shortsighted:

this myth usually raises its head in the area of teaching and other jobs dealing with youth. This is the old stereotype that lesbians and gay men are child molesters, a prejudice which has long been disproven. In each generation, a certain number of children will grow up gay. If they have role models to make this a less painful experience, it can only be to everyone's

using “my friend”-type language, “sanitising” the nature of events.<sup>53</sup>

Others have argued that the effort spent on concealment affects productivity and this, in turn, affects their opportunity for promotion. Comments from Shime’s research give some sense of this:

I’m hiding something. It occupies time at work, especially when social conversations occur. I fear people will find out. I don’t want to test their policy on sexual orientation.<sup>54</sup>

And:

Being gay and hiding it adds innumerable to the stress of working in a firm. I spent all my time worrying about the impact if people found out. Every word I spoke, on the phone to clients, to other lawyers, to secretaries, I had to be concerned about what I said. I was constantly checking myself and my reactions. Time better spent on doing work is taken up with anxiety about being discovered as gay or lesbian.<sup>55</sup>

Or, put another way:

At some point, the weight of what you’re doing catches up with you. What you do during the day is completely separate from your real life. You’re not yourself and have to make an effort to fit in. Pretending you’re straight is a lot of work. Put yourself in a situation where you won’t allow yourself to respond naturally to anything. You must check everything. Your brain is constantly going — it’s exhausting.<sup>56</sup>

This process of self-censure can also affect the perception others have regarding work performance, even if productivity levels are acceptable or, indeed, exemplary. By being denied the opportunity to express oneself as one would to those from whom one fears no repercussion, one again risks being seen as someone who is not a team-player — as someone who lacks collegiality:

In workplaces where lesbians and gay men have not felt free to talk about our home lives, often we are perceived as withdrawn or secretive, not qualities readily selected as leadership material. Or we are perceived as not joining in the social life of the workplace.... Then management can see us as not adequately identified with our jobs and may pass us over at promotion time.<sup>57</sup>

For lesbians and gay men, in the workplace and elsewhere, our reality is a reality of forced secrecy. The results for lesbians and gay men as a minority community are invisibility and the discriminatory effects that result from invisibility. The result for society, given what homophobia aims to do and what it ultimately accomplishes, is the preservation of yet another tool with which to maintain systemic inequality generally, and heterosexual male privilege specifically. Despite this, there remains considerable reluctance on the part of our legislators to include lesbians and gay men within the scope of those legislative initiatives aimed at addressing systemic inequality. This is particularly true with respect to employment equity legislation. While the government has not

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advantage.

<sup>53</sup> Shime, *supra* note 48 at 18.

<sup>54</sup> *Ibid.* at 19.

<sup>55</sup> *Ibid.* at 20.

<sup>56</sup> *Ibid.* at 22.

specifically provided reasons for not including lesbians and gay men in the *Employment Equity Act*, any arguments advanced against inclusion tend to ignore the consequences of invisibility.

#### V. ON INCLUSION AND THE SOCIAL MEANING OF INVISIBILITY

The need to address what amounts to a socially imposed silencing becomes particularly apparent once one understands the role of homophobia and its effect on lesbians, gay men and society as a whole. Specifically, it seems both half-hearted and futile to implement programs aimed at breaking down those discriminatory stereotypes that result in inequality when these programs deliberately exclude measures aimed at encouraging lesbians and gay men to identify as such. The exclusion of such measures intentionally dissuades the public expression of those attitudes and sexual identities that, once expressed, do much to assist you in breaking down discriminatory stereotypes. Indeed, it is politically myopic to assume that gender equity in the workplace will be achieved if gender inequity in society depends on the continued suppression of those persons whose mere presence challenges gender polarity, hence inequality, and effective measures to alter this fact are not implemented at *all* levels of social interaction.

Admittedly, it might seem logical to argue that lesbians and gay men do not need the protections offered by equity legislation because, unlike other designated groups, they have the option of 'hiding' their minority status — a benefit not afforded other designated groups. Protection may thus be viewed as not required because lesbians, as women, already benefit from equity programs aimed at assisting women as a community, and gay men, as men, already benefit from gender male privilege. It may also seem logical to argue that equity initiatives simply cannot include lesbians and gay men because there is, as of yet, no statistical proof that lesbians and gay men suffer economically as a result of their sexual orientation (that is, that they are under-represented in management positions, and so forth). Without statistical proof, the extent to which lesbians and gay men need to be integrated cannot be adequately determined.

Arguments of this sort, although not discriminatory on their face, are nonetheless simplistic and naive.<sup>57</sup> They also result in discrimination, even if not intended. They ignore the reasons why lesbian and gay male expression is suppressed socially, and why lesbians and gay men must be included in any measures aimed at addressing systemic inequality. They ignore the specificity of lesbian and gay male oppression and the harms resulting from that invisibility. Indeed, as Jeffrey Byrne rightly argues, "[t]hat the form of gay and lesbian inequality and subordination differs from that of traditional affirmative action beneficiary groups ought to obscure neither the seriousness of the discrimination

<sup>57</sup> CLGRO, *supra* note 26 at 8.

<sup>58</sup> We are not arguing here that privilege is *not* reaped by those who do 'hide' their sexual identity or that some lesbians and gay men do not have the ability to do so. The most obvious example of this is seen in the ability of gay men to 'pass' as straight men and hence benefit from heterosexual male privilege (see below) — an option obviously not afforded women: see A. Dworkin, *Pornography: Men Possessing Women* (New York: Penguin Books, 1989) at 61. There is also advantage gained from white skin privilege and from the privilege derived from being able-bodied — a form of social privilege from which not all lesbians and gay men benefit and without which many will continue to face discrimination, regardless of their ability or desire to hide/silence their sexual identity. This is a fact which few can deny. This does not mean, however, that the social pressure to hide and be silent is not harmful both personally and politically and should not also be addressed and eliminated or that measures should not be implemented to ensure that the incentive to hide is rendered obsolete (a point we address below). As Byrne notes, *supra* note 45 at 76, being constantly

nor the equities of including lesbians and gay men in voluntary affirmative action plans".<sup>59</sup> For even if one rejects the idea that lesbians and gay men do not suffer economically (a notion which we reject and which seems illogical given the extent to which those who choose to identify as lesbians and gay men have been and continue to be ostracised),<sup>60</sup> one must not lose sight of the fact that there is more to disadvantage in the work force than mere monetary loss.<sup>61</sup> Indeed, it is clear that hiding, hence denying, one aspect of one's identity, simply because you are told that you can and should do so,

told by straights that there is considerable benefit to be found in being able to conceal one's identity is insulting, since "[r]emaining closeted is itself a grievous form of societal discrimination through which society pressures individuals into denying publicly their true sexual identities and lives." While it is true that not all lesbians and gay men experience discrimination equally, that multiple identities result in disparate types of discrimination and that many do derive advantage from differing forms of social privilege, it is also true that *all* lesbians and gay men are pressured socially to keep their *sexual* identities hidden and are penalized and immediately stripped of the benefits of heterosexual privilege to the extent that they do not. And while some will, in the short run, benefit personally from their ability to hide their sexual identity, given what is at stake in doing so it is clear that this option is of no benefit to gay liberation. It is also clear, given the extent to which homophobia and sex discrimination are linked, that the goal of systemic equality generally will remain unachievable so long as efforts are not made to encourage the public expression of non-heterosexual identities. Hence, while it is true that we have the option of participating in heterosexual privilege, we find it particularly insulting that this fact alone might be used to deny us those protective measures that will enable us *not* to do so and which, in so doing, will go a long way in advancing real social equality.

<sup>59</sup> Byrne, *supra* note 45 at 74.

<sup>60</sup> While little statistical information has been accumulated regarding the economic consequences for those who do identify as lesbian or gay in the workforce, a recent study at the University of Maryland at College Park on the impact of anti-gay job discrimination has found that gay men and lesbians earn less than their non-gay counterparts with similar education, training and occupations. These findings refute the stereotype of gay people as an 'affluent elite' unworthy of equal rights under the law. The study, conducted by M.V.L. Badgett, "The Wage Effects of Sexual Orientation Discrimination" (1995) 48 *Indust. & Labor Relations Rev.* 726, marks the first scientific economic-based research conducted on the issue of job discrimination on the basis of sexual orientation. Those who argue that lesbians and gay men constitute an affluent minority tend to cite data from marketing surveys — surveys which describe lesbians and gay men as an 'affluent elite'. Professor Badgett disputes this stereotype and notes that, far from having any mysterious advantage in the labor market, gay workers face discrimination that actually hits them where it hurts — in their paychecks. Indeed, the study found that gay men earned 11 to 27 per cent less than non-gay counterparts with similar age, education, occupation, marital status and residence (at 737). Lesbians earned 12 to 30 per cent less — although these findings are not consistently statistically significant (at 737):

The stereotype of gay prosperity is based on marketing surveys of gay magazine readers and people attending gay events. Those marketing surveys are biased toward people with higher incomes. Representative data and statistical techniques reveal an economically diverse lesbian and gay community with people who are poor as well as rich. The real economic difference between gay and straight Americans is the daily struggle of lesbians and gay men against the psychological and economic effects of discrimination.

<sup>61</sup> As Byrne notes, *supra* note 45 at 74:

While economic disadvantage may be the most obvious manifestation of pervasive discrimination, it should not and must not be understood as the defining indicator of 'inequality of opportunity'. As a preliminary matter, openly gay and lesbian and gay workers and those suspected of being gay or lesbian do suffer economic disadvantage when sexual orientation discrimination results in employment termination, lost job offers, or lost promotions. More importantly, however, avoidance of economic disadvantage at the price of silent complicity in one's own subordination cannot possibly be understood as an act borne of equality of opportunity.

is also, for many, a "profound form of subordination",<sup>62</sup> given what hiding entails politically and personally.

The argument has been made that gay men do not need employment equity because the only gay men who will benefit from this inclusion are white gay men who already benefit from white, gender male privilege.<sup>63</sup> At one level this argument is correct. White gay men do and always will benefit from white privilege. So, however, do *all* persons who are Caucasian — including men with disabilities and white women. Similarly, it is impossible to deny that all gay men, as men, can and do benefit from gender male privilege. Lesbian women and heterosexual women do not. What this argument overlooks, however, is the extent to which the benefits afforded gay men, as men, are afforded only to the extent that these men choose to support the values central to male dominance and privilege. For gay men, this requires that they either hide their sexual identity — that is, remain silent and ultimately invisible as gay men — or that they adopt a politic which supports and is committed to those values central to their own oppression. In either case, the only people who truly benefit are those who continue to support a social order in which the measure of equality is gender superiority versus alleged inferiority — a social order which silences any gay male expression not wedded to male privilege and which, as such, ultimately results in the subordination of all women and those men who refuse to conform. This is not a choice that we ought to be promoting. Unfortunately, by refusing to provide any incentive for lesbians and gay men to identify as lesbian and gay, and by encouraging them instead to find protections only as members of another designated group or, in the case of white, able-bodied gay men, to rely on the privilege offered white men generally, we do little more than reinforce the idea that lesbians and gay men should be neither seen, nor heard. In so doing, we create a hierarchy of oppressions. We also encourage invisibility and deny the effects of that invisibility.

To argue that gay men do not need employment equity because they already benefit, or can benefit, from male gender privilege, or because non-white, non-able-bodied gay men can already benefit as members of another designated group, is to deny the reality of homophobia, and to encourage all gay men to silence any gay male identity which might undermine male gender privilege. Those gay men who are not immediately penalized for being gay are those gay men whose identities do not threaten male gender privilege. Those who do *not* undermine male gender privilege, however, are those who remain closeted or who simply mimic those who oppress them and who, in so doing, reject any gay male politic not committed to male gender privilege. An examination of what results makes it very clear that any environment which promotes this option and which does not encourage/allow the expression of a gay male politic not committed to male dominance, is an environment which does not take sex equality seriously.

As stated, the purpose of homophobia is to ensure that gay men are bullied into rejecting any public expression of their sexual identity that undermines male gender power. To the extent that male supremacy depends on gender inequality, gay men,

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To this, we would only add that we have little reason to doubt that, with respect to economic loss, those who are silenced also suffer economically, given the potential effects of silencing on one's psyche and resulting work performance.

<sup>62</sup> *Ibid.* at 76.

<sup>63</sup> See e.g. the comments of D. Pepper, administrative assistant to federal Member of Parliament, Svend Robinson, as outlined by D. Smith, "Count Us In" in *OutRights: Second Pan-Canadian Conference on Lesbian and Gay Rights* (Vancouver: Press Gang Printers, 1992) 40 at 42.

because they have the potential to develop relationships that do not depend on a male/female hierarchy, threaten male supremacy. As Pharr explains, "misogyny gets transferred to gay men with a vengeance and is increased by the fear that their sexual identity will bring down the entire system of male dominance and compulsory heterosexuality".<sup>64</sup> Homophobia, which finds expression in gay bashing, employment discrimination, and familial and social ostracization, reminds all men that if they, "break ranks with males through bonding and affection outside the arenas of war and sports", they will be, "perceived as not being 'real men'", that is, as being identified with women, "the weaker sex that must be dominated and that over the years has been the subject of male hatred and abuse".<sup>65</sup> The gay male, socially feminized, internalizes this misogyny and seeks to mimic, because he can, those behaviours and characteristics that will, he hopes, allow him to 'pass' for the 'male' he is supposed to be.

Obviously, this is a politic that all gay men need to reject. For gay men, mimicry and assimilation ensure that those gay men who are 'visible' — those who refuse to be silenced, who refuse to conform — become the victims of greater physical and emotional abuse and discrimination. Because they continue to challenge the 'normality' of gender polarity, and in the process undermine male supremacy, these men will be brutally silenced. Those gay men who choose concealment, on the other hand, and who embrace and encourage that masculinity so central to male dominance, do little more than sexualize their own oppression — making a fetish of that which ultimately silences them. The result is a complete *rejection* of a gay male discourse that is not wedded to male privilege — a politic which ensures that masculinity remains the *only* defining male construct to which public discourse is afforded, and which ensures that *real* equality for gay men and all women remains unattainable — the result being gay male silence, heterosexual male superiority, female inferiority and systemic inequality.

The desire to be male identified and reap the benefits of male privilege is, in a homophobic society, socially appealing. While no one should underestimate the power of homophobia, and the extent to which it literally terrorizes gay men into wanting to pass as 'real' men, a rejection of this construct is nonetheless required. Admittedly, this is an issue that the gay male community itself must address in redefining its goals and the role it will play in the struggle to eliminate all systemic barriers. This task will not be assisted, however, by any government initiative which fails to assure gay men that they do not need to hide their identity or 'pass' in order to participate fully in the workplace, or by those arguments which simply assume that gay men already benefit in the workplace because they are men, and are thus socially privileged, and that lesbians, as women, will benefit from categories already identified. Arguments of this sort are both misleading and counter-productive.

## VI. COUNTING HEADS: STATISTICS AND THE MEANING OF ACCOMMODATION

The argument has also been made that present employment equity initiatives cannot accommodate the concerns of lesbians and gay persons because there are no numbers available with which to 'prove' that lesbians and gay men are under-represented. This reasoning is unjustified, and again ignores the effect of anti-lesbian and anti-gay male discrimination — that is, invisibility. Section 10 of the soon to be defunct *Employment Equity Act* essentially adopts this tactic. Specifically, it requires employers to conduct

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<sup>64</sup> Pharr, *supra* note 31 at 18.

<sup>65</sup> *Ibid.* at 19.



employment equity workforce surveys and collect other information to determine the extent to which members of the designated groups are employed in the workforce. These surveys are aimed at allowing employers to obtain a 'snapshot' of all current employees, with an aim to reviewing present employment policies and practices so as to identify and remove systemic barriers.<sup>66</sup> All information thus obtained will then be integrated into an Employment Equity Plan, which is to provide for the implementation of both positive and supportive measures with respect to the recruitment, hiring, retention, treatment and promotion of designated group members.<sup>67</sup> The Plan is also to provide for the implementation of measures to accommodate members of the designated groups and to include specific goals and timetables for these matters, as well as for the hiring and promotion of the designated group members.<sup>68</sup>

The present government, although quick to criticize surveys, has yet to provide any indication of how it aims to determine the extent of workplace discrimination which now exists, nor has it indicated how it aims to address this discrimination. Suffice it to say that the use of workplace surveys can, on one level, prove effective in uncovering specific under-representations and discriminatory hiring practices. While the actual procedure for collecting workplace data is perhaps problematic (given that it may prove complicated and difficult to implement) — a point which any new legislation must address — the argument that lesbians and gay men cannot be included in any determined procedure simply because statistics 'don't work' with lesbians and gay men carries little weight, and should not be seen as a valid or sufficient justification for absolute exclusion. To some extent this is a problem which the government itself has created. As such, this problem should not be used to exclude lesbians and gay men from legislation specifically aimed at addressing past discrimination:

For governments or employers to argue that lesbians and gay men cannot be included in employment equity programs because lesbians and gay men cannot be counted is the extreme of bad faith, because it is governments and employers who have never asked — and in some cases have refused to ask — questions about sexual orientation.

So it is not possible because they have made it not possible. Governments and employers are therefore not entitled to rely on the fact that there are no statistics about lesbians and gay men.<sup>69</sup>

Admittedly, the argument can be made that lesbians and gay men can never be statistically counted because many are, quite understandably, wary of publicly identifying themselves as lesbian or gay male. This argument is itself discriminatory, however, because it relies on lesbian and gay male invisibility — a characteristic of lesbian and gay male oppression and the result of the type of discrimination we face — to justify further exclusion and discrimination. The net result is the further perpetuation of anti-lesbian and anti-gay male discrimination. Indeed, to rely on invisibility as an excuse for

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<sup>66</sup> Specifically, subsection 11(2) of the *Act* states that, [t]he purpose of the review is to identify and enable the employer to remove barriers to the recruitment, hiring, retention, treatment and promotion of members of the designated groups, including terms and conditions of employment that adversely affect members of the designated groups.

<sup>67</sup> *Employment Equity Act*, *supra* note 2, ss. 12(b), (c).

<sup>68</sup> *Ibid.*, ss. 12(e), (f).

<sup>69</sup> Smith, *supra* note 63 at 42.

inequality is to rely on a measure of lesbian and gay oppression as a roadblock to eliminating that inequality.

Governments must deal with all forms of social oppression, regardless of how that oppression manifests itself. The fact that lesbians and gays 'are hard to count'<sup>70</sup> does not justify full scale exclusion. If protective legislation must be modified in order to accommodate the differing realities of one designated group, then so be it. There is nothing, for example, preventing governments and employers from setting hiring targets for lesbians and gay men based on a rough estimate of how many persons in a given population might be lesbian and gay, regardless of whether these persons publicly identify as such.<sup>71</sup> Jeffrey Byrne offers the following insightful approach:

Although the ideal workforce representation of gay and lesbian people would approach ten percent, an employer should talk to local gay and lesbian organizations and to any openly gay and lesbian employees in order to develop reasonable goals tailored to its particular geographic and workplace situation. Absent helpful input from local sources, I propose a goal of five percent for openly gay and lesbian employees within five years. This target is both significant and more readily attainable...and reflects the reality that many lesbians and gay men remain closeted for reasons that will not be changed by workplace policies.<sup>72</sup>

In any event, regardless of the target set, equity-based legislation should provide flexibility and permit employers to alter the desired target in the event that it simply cannot be met, or is unrealistic given the particular geographic region or workplace in question. This is, in fact, a provision adopted in the *Employment Equity Act* and should, it is submitted, be a provision included in all subsequent measures.

The Coalition for Lesbian and Gay Rights in Ontario (CLGRO) has argued that the use of workplace surveys to determine how many lesbian and gay employees are currently in a particular workplace is also problematic because many lesbians and gays will simply never reveal their sexual orientation, and should not be forced to 'come out' in the workforce in the name of systemic equality:

We feel that lesbians and gay men must be allowed to decide for themselves when the time is right to disclose. We have had considerable experience in staying alive and well in a hostile society. No one should be "forced out of the closet," compelled or manoeuvred into disclosing their sexuality. The results are often disastrous. Coming out is a choice with consequences; we have to bear the consequences — the choice must be ours.<sup>73</sup>

While we strongly agree with CLGRO's position that coming out is a personal choice, we do not agree that workforce surveys used to determine the representation of

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<sup>70</sup> *Ibid.* at 42.

<sup>71</sup> As Byrne notes, *supra* note 45 at 100:

[T]en percent may be an accurate measure of the gay and lesbian population within society, but some may argue that the relevant community for workforce composition comparison is openly gay and lesbian people.... Establishing goals based on the relatively small number of openly gay and lesbian workers already present in the labor force, however, would only seem to validate the status quo of oppression and obfuscate affirmative action's central purpose of helping gay and lesbian people escape our subordinated status through visibility and opportunity.

<sup>72</sup> *Ibid.* at 100.

<sup>73</sup> CLGRO, *supra* note 26 at 6 & 7.

lesbians and gay men in workplaces should not be conducted. While every employee should be required to return a workforce survey questionnaire, it is also clear that responses to questionnaires can and should be made voluntary and can and should be kept confidential. If CLGRO is concerned that the results tabulated will provide an inaccurate rejection of the lesbian and gay population in a particular workforce, it is worth noting that definitions regarding Aboriginal people, people with disabilities and racial minorities also tend to be rather open-ended and broad in scope. While employees can be asked to indicate whether they consider themselves to be a member of a particular group, the very nature of self-definition is such that designated group members may respond inaccurately or may choose not to respond at all, thereby rendering less than accurate results. This does not mean, however, that the process of self-identification is futile. On the contrary, it serves as a useful first step in determining what long term goals need to be implemented in order to accommodate and promote differences.

Similarly, while complete accuracy *per se* may never be achieved, the reluctance of employees to identify as lesbians or gay men is often itself a barometer of workplace discrimination and homophobia. If, for example, as a result of survey related data, it appears that lesbians and gay men are few in number (an indication perhaps that few feel safe identifying as such), we may be able to conclude that we are dealing with a workplace in which anti-gay discrimination is rampant or in which more supportive measures need to be adopted. This in turn will allow the employer to initiate those measures necessary for a more positive work environment for lesbians and gay men.

Obviously, the setting of numerical targets alone will prove insufficient in addressing the concerns of lesbians and gay men as they pertain to employment equity. Indeed, the reality of anti-gay discrimination is such that targets *per se* may prove futile. This does not mean, however, that the goal of achieving lesbian and gay male equity should be completely rejected. Increased visibility is the target and there are many ways to achieve it. Workplace surveys are a base from which to develop strategies and chart progress. In addition, however, other efforts aimed specifically at promoting the safe expression of lesbian and gay male identity should *also* be implemented. If systemic equality is a claimed mandate, and the public expression of lesbian and gay male identity is but one means with which to achieve it, any legislative scheme which fails to tackle the myriad ways in which lesbians and gays are denied expression will fail to achieve its equality objective. As CLGRO explains, what is needed is top-line management support (clearly expressed and publicized), the provision of resources to fight prejudice and well organized educational programs aimed at eliminating those prejudices central to homophobic discrimination:

Employment equity initiatives must acknowledge systemic homophobia and address it through educational efforts like those currently focusing on women, visible minorities, the disabled, Francophones and Aboriginal people.

Non-discriminatory procedures must extend to areas such as recruitment, hiring, benefits, and promotion. Such measures would in themselves have an educational effect. Harassment policies too must acknowledge the existence of homophobia and prohibit harassment on the basis of sexual orientation....<sup>74</sup>

Again, many of these measures are affected by, or impact upon, invisibility and all

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<sup>74</sup> *Ibid.* at 1.

that it entails. For example, if workplace barriers are to be identified, and if positive and supportive measures are to be put in place, consultation with lesbian and gay male employees is essential. If lesbians and gay male employees are unwilling to enter into a set consultation process, however (and this is to be expected given the full extent of institutional discrimination and the fears associated with self-identification in the workplace), it may prove necessary for the employer to consult with lesbian and gay organizations not connected with the employer's workplace — a requirement that is neither unrealistic nor onerous.

Employers must also make efforts to ensure that lesbians and gay men are less reluctant to apply for advertized positions. Much can be gained from job descriptions which clearly indicate that prospective employers encourage applications from all persons historically denied participation, including lesbians and gay men. While specific wording may differ, the desired result must be made clear and it must be inclusive:

In drafting the ad for the job posting, explicit mention should be made that employment equity policies are in effect. An ad which says "all applicants welcome" gives a lukewarm message to anyone. An ad which says "we encourage applications from women and members of minority groups listed in the Ontario Human Rights Code" would be unequivocal. A statement can be added to any ad to the effect that the company has anti-discrimination policies on the following (cited) list of grounds, with the list of groups from the Ontario Human Rights Code.

An ad which specified that same-sex spousal benefits were available would be ideal, making a clear statement about the employer's support of lesbian and gay rights.<sup>75</sup>

An employer's choice of where to place job advertizements is also important,<sup>76</sup> as is the need for community outreach.

Of course, while community contact is an important first step, it alone is insufficient and pointless if the work environment offered lacks support for those lesbians and gay men who do ultimately accept employment, or for those who are already there. What is required is a workplace free from prejudice and discrimination. This requires education — education which informs co-workers, supervisors, etc. of the need to accept and accommodate difference, and of the benefits to be gained from doing so. What is needed are proactive educational initiatives which make it quite clear that we all benefit from equality and that any action or behaviour which hinders the pursuit of equality, which undermines the right of all employees to be treated with the dignity and respect they deserve, is both counter-productive and prohibited. Finally, because reluctance and opposition to change is pervasive — particularly if that change is aimed at achieving lesbian and gay equality — some mechanism must be implemented for dealing with complaints of discrimination or harassment. This requires that those administering this system be educated in issues specific to lesbian and gay discrimination. If lesbians and gay men do not feel that they have institutional support, or that they can trust those to whom complaints must be expressed or to whom confidential data is to be submitted, they are not likely to provide important information or pursue or achieve necessary recourse. They are thus less likely to find or be offered inclusion. Equity, both in employment, and in society generally, will thus remain a fiction.

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<sup>75</sup> *Ibid.* at 7.

<sup>76</sup> As CLGRO explains, *ibid.* at 7:

## VII. CONCLUSION

Despite predictions to the contrary, the issue of and need for equity in employment will not simply cease to merit action.<sup>77</sup> The goal of equality has not yet been met and the need for it remains even more apparent. As governments throughout Canada grapple with what is admittedly a complex, at times socially contentious, issue, past efforts to address employment inequality will and should serve as models for progressive change. It is our hope, however, that their more apparent shortcomings will also be rectified and that the meaning, sources and effects of *all* prejudices will be examined and addressed.

In 1993, the government of Ontario passed the *Employment Equity Act*, legislation aimed at addressing the many workplace disadvantages currently faced by women, Aboriginal people, people with disabilities and racial minorities. In so doing it offered what it believed to be a progressive model for effective social change. In many ways, this effort and others like it do much to undermine the systemic discrimination faced by those individuals and groups historically denied equal participation in the workforce and, indeed, in society at large. In other ways, however, these legislative objectives remain incomplete, under-inclusive and, as such, ineffective. This is particularly evident from the perspective of lesbians and gay men — persons who, although very much the victims of prejudice and ignorance, remain excluded from those initiatives aimed at addressing prejudice, ignorance and the many inequalities that result from systemic discrimination.

Anti-lesbian and anti-gay male discrimination is very much an issue of gender discrimination. Lesbian and gay male identities, and the public expression of these identities, have the potential to question and subvert gender male privilege by rejecting socially imposed gender role behaviours, upon which heterosexual male privilege and patriarchal power depends. Homophobia serves an insidious purpose, the effects of which are felt far beyond the boundaries of the lesbian and gay male community. To the extent that they pose a threat to gender male privilege and the sex inequalities derived from male privilege, lesbians and gay men remain the victims of violence and pervasive discrimination. The result for lesbians and gay men is imposed silence, and hence invisibility — a discriminatory effect, arguably unique, which imposes severe social, economic and personal disadvantage on those whose reality remains one of fear and hiding. The result for society generally is reinforced stereotypes, resulting in the preservation of gendered power hierarchies and systemic inequality.

While it is true that not all inequalities can be addressed simultaneously, it is also true that inequalities do not exist in a vacuum. If, for example, governments are truly committed, as they must be, to eradicating sex discrimination, then a concerted effort must be made to eliminate the many barriers that at present impede gender equality. Employment equity is but one means with which to do so. To implement equity initiatives without first understanding what gender stereotypes do, who they harm and who they benefit, however, is to implement an equality agenda that is, at best, politically

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thought must also be given to the placing of job ads. Recruitment by word of mouth tends to perpetuate the old structure of the organization. Employers have recently given greater attention to placing ads in the ethnic, women's, and feminist publications. Many lesbians read feminist publications, but ads should also be placed in gay publications, or posted in alternative, women's, and gay bookstores.

<sup>77</sup> See generally D. Fischer, "Beijing Pact Might Have Effect in Canada" *The Toronto Star* (16 September 1995) A23.

myopic, and, at worst, responsible for encouraging those discriminatory harms that make homophobia and sex discrimination the oppressive and interconnected constructs that they are and always will be, unless challenged concurrently.