

# THE JUST SOCIETY REPORT

## GROSSLY INDECENT

Confronting the Legacy of State  
Sponsored Discrimination Against  
Canada's LGBTQ2SI Communities

# EXECUTIVE SUMMARY

Canada has a tragic history of state sponsored homophobia, bi-phobia and transphobia dating back to Contact and the suppression of the Two-Spirit traditions among First Nations. The criminal law has been, and continues to be, a cornerstone of that oppression. Egale is calling for the federal government to acknowledge the wrongs done to our community and commit to a process to make it right.

This social problem has been centuries in the making, and a comprehensive resolution will be complex. We are advocating that Canada emulate the process recently undertaken by the German federal government to rehabilitate the victims of their criminal laws.

Central to this process is a mediated negotiation between community stakeholders and organizations led by Egale and the Government, facilitated by the Honourable Frank Iacobucci.

We have identified some items that merit consideration during the mediation process that we have envisioned. Without limiting the generality of the foregoing, these items include:

- 1. AN APOLOGY FOR CANADA'S HISTORY OF LGBTIQ2S PERSECUTION**
- 2. REFORM OF THE CRIMINAL CODE'S ANTI-LGBTIQ2S PROVISIONS, INCLUDING**
  - a. Repealing the Ban on Anal Intercourse (s. 159)
  - b. Repealing the Bawdy House Laws (ss. 210, 211)
  - c. Amending Sex Work Laws
- 3. REFORM OF PROSECUTORIAL PRACTICES INCLUDING**
  - a. Restricting historic prosecutions of Gross Indecency to ensure parity between Sexual Orientations
  - b. Restricting the prosecution of HIV Non-Disclosure cases under Aggravated Sexual Assault
- 4. EXPUNGEMENT OF UNJUST CONVICTIONS**
  - a. Considering the British and Australian Precedents
  - b. Removal of every single record in every through an expungement act
- 5. COMPENSATION FOR UNJUST GOVERNMENT ACTION**
  - a. Considering the German Precedent
  - b. Including the Restoration of Military and Bureacratic Pensions
  - c. Including compensation for unjust Criminal prosecutions and convictions.
- 6. RECOGNIZING AND MEMORIALIZING LGBTIQ2S INJUSTICE, INCLUDING**
  - a. Rehabilitating indigenous Two Spirit culture.
  - b. Working with provincial governments to ensure queer inclusion, as appropriate, at all levels of the K-12 educational curriculum
  - c. Police, prosecutor and judicial training regarding LGBTIQ2S+ issues and culture generally

# NEXT STEPS

## 1. Accept Our Report in Principle

This month is Pride Month. Our communities were deeply moved to see our Prime Minister raise the rainbow flag on Parliament Hill for the first time. As he did with the Truth and Rehabilitation Report of Senator Sinclair, we respectfully request that Prime Minister Justin Trudeau accept this Report in principle and to agree to move to phase 2 of implementations on or before July 3, 2016.

## 2. Negotiate the Mandate for a Mediator and Identify Immediate Action Items

We believe that the issues arising out of the Just Society Report are too complex and too multi-faceted to be resolved quickly if they are to be resolved comprehensively and thoroughly. At the same time, we are conscious of the fact that many of the victims of these state-sponsored persecutions are quite elderly and many continue to live in poverty. There may be simple solutions that do not need to await a lengthy process that should be implemented immediately, such as restoring veterans' pensions to those wrongfully discharged on grounds of homosexuality.

We propose Hon. Frank Iacobucci be appointed mediator to resolve the many issues between our communities and the Federal Government. Within 30 days of acceptance in principle, the federal Government should negotiate the terms of Mr. Iacobucci's mandate and identify the most urgent matters requiring immediate redress.

## 3. Mediator's Report Within 12 Months

The federal Government should bear all reasonable costs of the mediation process. Particular attention should be paid to the German precedent and the Truth and Rehabilitation process in guiding this process. Mr. Iacobucci should deliver his report to the Government within 12 months of his appointment. LGBTQI2S organizations and communities should be empowered to engage in extensive community consultation, and to commission expert opinions and necessary primary research as required.

## ACKNOWLEDGMENTS

This Report is submitted to the Government of Canada on behalf of the Egale Human Rights Trust.

Egale wishes to thank the volunteer members of the Klippert Committee, the student researchers who assisted them so brilliantly, as well as Ryan Dyck and Kat Horne for providing key administrative support. Thanks also to our team of outside experts and the members of Egale's Legal Issues Committee who provided feedback on drafts. There were many persons who worked hard to make this report a reality both within and outside of Egale. As is typical of this struggle, most did so without any compensation. Many persons offered helpful advice, as well as useful legal and historical information and images. We appreciate your invaluable encouragement along the way.

Egale would like to acknowledge and thank the following persons and organizations, in addition to our outside reviewers mentioned in the appendices: Prof. Irving Abella, Omar Alghabra MP, Kevin Allen, Prof. Constance Backhouse, Cons. Danielle Bottineau, Prof. Dr. Martin Burgi, Brian Crane Q.C., Calgary Gay History Project,, Canadian Lesbian and Gay Archives, Ajay Chopra, Justice David Corbett, Rev. Tom Decker, Michelle Douglas, Michelle Dubarry, Russell Alldread, Embassy of the Federal Republic of Germany (Ottawa), Andrew Faith, Dr. Scott Fairley, Phil Fontaine, Dr. Petra Frantzioch, Randall Garrison MP, André Goh, Dr. Neil Guthrie, Hon. Bill Graham, Dr. Helmut Graupner, Rev. Dr. Brent Hawkes, Human Dignity Trust, Hon. Frank Iacobucci, John Ibbitson, Kapil Gupta, Marc Kealey, Hon. Michael Kirby, Dean Robert Leckey, Chris MacLeod, Frances Mahon, Robert Milkovich, Nicole Nussbaum, Rob Oliphant MP, Joanna Radbord, Prof. David Rayside, Svend Robinson, Todd Ross, Clayton Ruby, Rt. Hon. John Turner, Dr. Paul Vout, We Demand Network, Daniel Wolff, Eddie Ing, Chris K., Joan Kasozi, and Daniel Everton Bennett.

Special thanks to Kathy Griebel, niece of Everett George Klippert, Dr. Rick Klippert, nephew of Everett Klippert, and Sarah Griebel, grand-niece of Everett Klippert, for sharing with us and for supporting this project We also extend our thanks to the entire Klippert family for their love and support of Everett through his ordeal. We wish all members of our communities would know the family love you showed him during his lifetime.

## REFERENCES & CITATIONS

This policy report is based on the text of an academic article containing full references and citations in the style of the McGill Guide 8th edition. Most citations have been omitted from this version due to their depth and breadth. A copy of the academic report will be available for those wishing to consult our works cited.

# TABLE OF CONTENTS

- i. Dedication*
- ii. Acknowledgments*
- iii. Executive Summary*

## Introduction: Starting the Conversation

### I. History

#### A. Beginnings: Aboriginal and Western Experiences Pre-Contact

- i. Turtle Island: First Nations and "Two Spirits"*
- ii. Europe: Roots of Discrimination*
- iii. England: Roots of Criminalization*

#### B. Colonial Canada: First Contact

#### C. 19th and Early 20th Century Canada

- i. 19th Century Gay Life*
- ii. Early Criminal Law*
- iii. War*

#### D. 1949 - 1969 Social Change and Discrimination

- i. First Legal Reform: 1953*
- ii. The Regulation of Gay Life*
- iii. Discrimination by Military (discussed further in Part IV)*
- iv. Two Major Steps Forward: Kinsey and Wolfenden Report*
- v. Changing Canadian Norms*
- vi. Second Legal Reform: 1969 Decriminalization*

### II. The Criminal Code

Introduction: "We Demand"

- I. Private Sexual Offences (ie. anal intercourse)
- II. Public Morality Offences (ie. obscenity, indecency)
- III. Sex Workers' Rights

### III. Police and Prosecutors

Framing the Problem

- I. Inclusion Within the System for Marginalized Communities
- II. Trans, Intersex, and Two Spirited Prisoners
- III. Historical Offences
- IV. HIV Non-Disclosure

### IV. Military and Bureaucracy

Homophobia in the Military and Bureaucracy: A Short Summary

15

35

57

70

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<b>V. International Law</b>	<b>75</b>
A. LGBTIQ Oppression in the Commonwealth	
i. Reinforcement of British Anti-Sodomy Laws	
ii. The Effects of Continued Criminalization	
iii. Recent Efforts to Repeal Anti-Sodomy Laws	
B. How Canada Can Defend and Promote Fundamental Human Rights	
<b>VI. Charter Challenges and Other Actors</b>	<b>81</b>
A. Charter Challenges	
i. Paradise Lost	
ii. Paradise Found	
B. Other Responsible Actors	
<b>VII. Making it Right</b>	<b>87</b>
An Inclusive and Principled Basis for Action	
i. Dignity Deprivation, Dignity Restoration	
ii. International Legal Obligations	
iii. International Precedent for Action	
A Framework for the Federal Government	
Part I. Apology	
Part II. Negotiation	
Matters at Issue	
a. Government Expungement Act	
b. Compensation	
c. Memorialization	
d. Criminal Law	
<b>Conclusion</b>	
<b>Glossary</b>	
<b>Appendices</b>	
Appendix A: Terms of Reference	
Appendix B: Members of the Just Society Committee	
Appendix C: External Expert Reviewers	
Criminal Law	
Appendix D: Relevant Provisions of the Criminal Code	
Police and Prosecutors Material	
Appendix E: Letters to AG's and Police	
Appendix F: Chart of Responses	
Appendix G: Substantive Responses	
Military and Bureaucracy	
Appendix H: We Demand an Apology Network Executive Summary	
Comparative Law of the British Commonwealth	
Appendix I: Dignity Initiative Call to Action	
Expungement	
Appendix J: British "Disregarding" Legislative Scheme	
Appendix K: Victorian "Expungement" Legislative Scheme	

## TOWARD A MORE JUST SOCIETY

*"THE JUST SOCIETY WILL BE ONE IN WHICH THE RIGHTS OF MINORITIES WILL BE SAFE FROM THE WHIMS OF INTOLERANT MAJORITIES.*

The Just Society will be one in which those regions and groups which have not fully shared in the country's affluence will be given a better opportunity. The Just Society will be one where such urban problems as housing and pollution will be attacked through the application of new knowledge and new techniques. The Just Society will be one in which our Indian and Inuit populations will be encouraged to assume the full rights of citizenship through policies which will give them both greater responsibility for their own future and more meaningful equality of opportunity. The Just Society will be a united Canada, united because all of its citizens will be actively involved in the development of a country where equality of opportunity is ensured and individuals are permitted to fulfill themselves in the fashion they judge best."

- PRIME MINISTER PIERRE ELLIOTT TRUDEAU

JUNE 10, 1968

## ABOUT EGALE HUMAN RIGHTS TRUST

Founded in 1995, EGALE Human Rights Trust is Canada's only national charity promoting lesbian, gay, bisexual and trans (LGBTIQ2S) human rights. Our vision is a Canada, and ultimately a world, without homophobia, biphobia, transphobia and all other forms of oppression so that every can achieve their full potential, free from hatred and bias.

## METHODOLOGY

This is not a Commission of Inquiry Report. It is a Report produced with the hard work of a talented group of experts, almost all of whom worked without compensation. We worked under a compressed time frame for a variety of reasons, not least our desire to assist the Government with a process we knew had begun when triggered by John Ibbitson's superb articles on Everett Kilppert. Although initially Egale's focus lay in ending the differential age of consent under section 159, the project has expanded considerably beyond that issue in scope. Developments in Australia and Germany had a profound impact. Our work began in earnest in February and was completed in June of 2016. Our research began with a thorough examination of relevant statutory provisions, Canadian and some international jurisprudence, archival materials, and secondary sources. Researchers and committee members also conducted interviews with several academic authorities, victims of queer injustice, sitting and retired politicians and other informants. In drafting this report, Egale has faced considerable challenges. No official inquiries have investigated the full scope of queer injustice, and there is a paucity of publicly available information on arrests and criminal conviction in relation to the queer community. Enforced invisibility and state sponsored social erasure have deeply impacted on our communities in general, and particularly the Two Spirit, trans and intersex communities. To collect information on current practices, Egale corresponded directly with police forces, Attorneys General and Directors of Public Prosecution across the country. Regrettably, due to a confluence of factors, many officials did not respond to our inquiries. For those who did respond, the quality of feedback varied. Many officials also directed our researchers to follow the procedures set out in the Access to Information Act, and were unwilling to provide information outside strict bureaucratic process. A comprehensive fact finding effort is central to the truth and rehabilitation process that should be pursued in connection with this Report. Egale recommends a concerted follow up effort to maximize the available data on current practices, policies and procedures. While Egale drew on an incomplete set of information, the authors remain confident the main conclusions and recommendations can serve as the basis for further research.

## ABOUT THE AUTHORS

**R. Douglas Elliott, LSM** is a partner at Cambridge LLP. Douglas received his B.A. from the University of Western Ontario in 1979, his LL.B. from the University of Toronto in 1982, and he was called to the Bar in 1984. The Law Society certified him a Specialist in Civil Litigation in 2003, and awarded him the Law Society Medal in 2010. Mr. Elliott is well known for his work on landmark constitutional cases such as same sex marriage. He has acted for Egale in its own right and as part of coalitions in cases such as Marc Hall. Mr. Elliott won a class action brought by a group of gay and lesbian Canadians seeking CPP survivor's pensions against the federal government in *Hislop v Canada*, the last successful section 15 case in the Supreme Court

of Canada. He was co-founder of the Sexual Orientation and General Identity Conference (SOGIC) of the Canadian Bar Association. Mr. Elliott has won many awards for his community service, including the SOGIC Hero Award and the Dianne Martin Medal for Social Justice through Law. He is a member of the Honourary Advisory Board to Egale, and Chair of the Just Society Committee.

**Daniel Hershkop, H. Ba., J.D. ('18)** is entering his second year of the J.D. program at University of Toronto Law School. A graduate of Queen's University in Economics, Daniel has worked with the European Centre for Development and Policy Management on Corporate Social Responsibility initiatives. He is a member of U of T's Out in Law group, a volunteer with Downtown Legal Services, and a researcher with the LGBTQ Parenting Network.

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**Maurice Tomlinson, B.A., M.B.A., LL.B., LL.M.,** is a Jamaican attorney and human rights activist currently with the Canadian HIV/AIDS Legal Network. As part of his activism, he acts as counsel and/or claimant in cases challenging anti-gay laws before the most senior tribunals in the Caribbean, authors reports to regional and UN agencies on the human rights situation for LGBTI people in this region, conducts judicial and police LGBTI and HIV-sensitization trainings, and facilitates human rights documentation and advocacy capacity-building exercises. Previously, Maurice was a lecturer of law at the University of Technology in Jamaica and at the University of Ontario Institute of Technology. He has also worked as a corporate lawyer. In 2012, Maurice received the inaugural David Kato Vision and Voice Award, which recognizes individuals who defend human rights and the dignity of LGBTI people around the world.

**Tom Hooper, M.A.** is a PhD Candidate ('17) and contract lecturer in the History Department at York University. His dissertation, to be defended Fall 2016, is entitled, "The Right to Privacy Committee and Bathhouse Raids in Toronto, 1978-83." Tom has given public lectures and published on the topic of moral regulation, sexuality, criminal law, and Canadian LGBT political movements. In his work on the infamous 1981 Toronto bathhouse raids, Tom interviewed more than two dozen gay men affected by the Canadian bawdy house laws. Tom offers a 1000-level course at York University on the history of vice, deviance, and bad behaviour in North America since European colonization.

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## **TOWARD A MORE JUST SOCIETY**

**HONOUR THE TRUTH AND MAKE IT RIGHT.**

**RESTORE QUEER DIGNITY.**

**REPAIR QUEER INJUSTICE.**

**REHABILITATE AND DIGNIFY.**

**FIGHT FOR LGBTQ2S JUSTICE AND EQUALITY GLOBALLY.**

### **Dedication**

This Report is dedicated to the countless thousands of Canadians like him, who have suffered state persecution because of who they are and who they loved.

### **Our Community Mourns after a Global Tragedy and must Band Firmly Together**

We are deeply saddened by the deplorable hate crime that was committed in Orlando yesterday morning. Our thoughts and sympathies go out to the victims of the Pulse Nightclub massacre, their loved ones, and any others affected by this senseless tragedy. When a violent act targeting members of the LGBTQ2S community becomes the worst mass-shooting in US history, the sense of hurt and loss resonates globally.

As further details surrounding these events come to light, it is imperative that we find solace in solidarity with each other, and not reflect the hatred that was demonstrated this morning. While the LGBTQ2S community in North America has enjoyed considerable progress in the last decade, today is a reminder that many continue to wish violence and death upon those who identify and love as they please. We must honour the victims of this tragedy by continuing to embrace inclusivity in the face of adversity, and demonstrate that hatred and violence accomplish nothing of value or merit.

We will remember the victims of Orlando as we continue to fight for a world free of prejudice, violence, and oppression towards its LGBTQ2S citizens.

# Starting the Conversation

## An Introduction

**C**anadian Prime Minister Justin Trudeau's recent promise to pardon Everett George

Klippert started an important, and long overdue, national conversation about the redress of queer injustice. Canada has a checkered history of homosexual, bisexual, transgender and intersex regulation, driven by the enforcement of sexual and gender norms, as well as unjust discrimination supported by the criminal law. The queer community's calls for redress have long gone unheeded by successive federal governments. Observing recent developments in Germany and Australia, we began this project with the hope of taking part in a global awakening of LGBTI2SQ equality. With the tragic events that transpired in Orlando Florida on Sunday June 12th, more than ever our community must unite against hatred.

As outlined in our report, many of our recent battles for equality have ended in the courtroom. The massacre in Orlando has forever changed the landscape of queer injustice. Now it is clear the war on our community has entered a new theatre. Our movement must come together, and move forward with the robust and inclusive action plan Egale has put forward.

In addition to outlining an action plan for addressing historical injustice, our *Just Society Report* also shines a light on much-needed global context. Advocating for LGBTI2SQ rights through the Commonwealth, in light of recent events,

is just one action item proposed to the government in our report.

Addressing historical injustice and the need for legislative reform in Canada was our initial purpose when given a mandate by the Attorney General of Canada. Making it right is the starting point as Canada strives toward a more just society.

What is the appropriate scope for the government's acknowledgment of the harms done and the redress needed toward the queer community? Is it just about correcting the Criminal Code, or should state-authorized action, through Canadian ministries and state agents—administering residential schools, enforcing institutional discrimination in the military and public service, and enforced with heavy-handed police tactics—factor into the conversation?

Since the Prime Minister's prompt and positive reaction to a stellar investigative story by award winning journalist John Ibbitson, Canada's good intentions have been outstripped by actions taken by some of our important allies. Germany has accepted the sweeping recommendations for redress by its Anti-Discrimination Agency and is negotiating a comprehensive package of redress for victims of the infamous Paragraph 175. Premier Daniel Andrews of the Australian State of Victoria has delivered a heartfelt apology to that state's LGBTIQI communities, and a process of eliminating the criminal records of those affected has been underway for two years.

The Canadian Government's expressed desire to pardon Everett George Klippert is a step toward historical redress and truth recognition. Without more comprehensive and inclusive action, however, the act of goodwill and dignity restoration would be incomplete. The time is ripe for the Government of Canada to confront the full historical truth about queer injustice and to make it right.

**T**o move forward, Egale is recommending two things. **First, an official government apology. Second, an inclusive consultative process and negotiation with all stakeholders mediated by Hon. Frank Iacobucci.**

The history of gender and sexual regulation in Canada points to numerous examples where the law and state-authorized action targeted men and women, both cis and trans, of every race and class, beginning with First Nations. Viewed comprehensively, there was a coherent policy aimed at oppressing and criminalizing same-sex conduct through heteronormalization. Gender conformity was strictly enforced. European colonizers persecuted First Nations for failing to conform to their gender norms, including matriarchal structures and gender non-conforming behavior. Same sex relations were suppressed as evidence of a "savage" sexuality through the twin instruments of official state churches and the criminal law, Canada continued this project

## GROSSLY INDECENT

of cultural genocide through a policy of indigenous assimilation. Canadian policy toward indigenous populations in residential schools, for example, suppressed the two-spirit spiritual identity and the associated rituals and traditions in indigenous culture.

Throughout the twentieth century, police forces also targeted public parks and urban areas, which were often the only places available for same-sex encounters in a society that enforced heteronormativity in the public and private spheres. Regulating sexual and gender deviance entailed a century-long campaign of police control in urban space. White men were conspicuous in print coverage particularly in the 1950s, although media records reveal lesbians and persons of colour were targeted under the gross indecency charge as well. It is noteworthy that even in the 1950s, an era of moral panic and hysterical homosexual intolerance, Anglo-Canadian cases evince judicial concern over the ethics of police enforcement tactics. Often, police were party to the offence as agents provocateurs.

Although Canada decriminalized private consensual anal intercourse in 1969, urban police forces gradually refocused their campaigns of enforcement to queer social establishments and gay bathhouses—often the only safe public space for queers to convene in the city. The charge of gross indecency persisted in police enforcement, and it was not struck from the Criminal Code until it was amended in 1983. The current matter involving Reverend Brent Hawkes poignantly illustrates that there are still criminal cases tried under historical provisions. Moreover, there is robust historical evidence that lesbians were the subject of police prosecution, raids and discrimination in the military. Understanding the extent of state-authorized discrimination and the eradication of queers from the public labour force will require effort equal to that deployed in displacing those innocent victims from their jobs.

Long after the hysteria of the McCarthy era had subsided, bureaucratic machinations were directed toward procuring a list of 9000 suspected queer civil servants, many of whom were driven out of their jobs. The Department of Defence, Canadian Security Intelligence Service, the Royal Canadian Mounted Police and other branches of the public service are implicated. Up until the 1980s, alongside the bathhouse raids in the City of Toronto,



there are numerous reports of discrimination in the federal public service and military. It was not until Michelle Douglas' case against the Department of National Defence in 1990, which challenged anti-homosexual policy, that formal institutional discrimination was ended. While Prime Minister Brian Mulroney condemned national security campaigns against LGBTQ2SI in Parliament, no apology was forthcoming during his government. Nor has one been made since. Substantive equality is impossible without honouring the full truth of historical queer injustice.

The absence of a government apology is an impediment to the healing and reconciliation sought by the LGBTQ2SI communities. Canada is a diverse and pluralistic society, and all queer Canadians deserve truth and reconciliation for the historical misuses of state power that eroded their human dignity. Focusing exclusively on men convicted

for sexual crimes before 1969 would be strikingly under-inclusive. Moreover, such a restrictive apology would amount to a missed opportunity for substantive truth and reconciliation. Embracing the feminist framework of intersectionality, together with a postcolonial perspective, would elevate the government's initiative above a mere symbolism. Intersectionality provides a basis for broadening the scope of an apology to a more comprehensive and meaningful declaration. In fact, Egale argues that conceptualizing sexual and gender discrimination vis-a-vis the LGBTQ2SI population through the prism of intersectionality is necessary for the restoration of queer dignity through official state recognition.

As Justice Minister, Pierre Elliott Trudeau pointedly asserted that the state had no place in the bedrooms of the nation. Yet despite the decriminalization of private and consensual same-sex contact, the implementation





# History

## Beginnings: Aboriginal and Western Experiences Pre-Contact

**T**he appropriate starting point for a consideration of the social problem of state sponsored homophobia, biphobia and transphobia in Canada is not Jewish and Christian religious teachings, or European law. Rather, we should begin by considering the circumstances of what has been sometimes characterized as “sexual minorities” in that portion of our continent we now call Canada, and what was known to First Nations as “Turtle Island”. A consideration of this history reveals that what we would now classify as homophobia, biphobia and transphobia were clearly introduced by European settlers, founded in and encouraged by the state-sanctioned Christian religion and enforced through the criminal laws of the state.

The introduction and flourishing of what we now characterize as homophobia, biphobia and transphobia can be directly related to the systematic dismantling of Aboriginal culture by European colonizers and Canada that has been appropriately characterized as “cultural genocide.”

The notion that such gender and sexual non-conforming behaviour was sinful, criminal or symptomatic of disease was entirely unknown among Aboriginal Peoples prior to Contact. Prior to Contact, the region of North America now known as Canada was relatively free of these destructive negative social attitudes.

### Turtle Island: The First Nations and Two Spirits

Both oral traditions and the records of European settlers portray a widespread acceptance of sexual and gender diversity among First Nations, with a considerable diversity among those First Nations. As discussed later in this report, those traditions were systematically suppressed following Contact but began to be revived in the 1970's. An abundance of over 168 terms and conceptions of gender identity and gender expression were used in various First Nations languages, such as “ogokwe” in Ojibwe. Unlike modern Western conceptions of sexuality, which mostly emerged later in the 19th and early 20th centuries, many First Nations accepted diverse sexualities, gender identities and gender expressions, as integral to their spirituality. It was believed that some persons, despite their outward gender presentation, were blessed with both a male and female spirit. It was also a very different context for gender formation with often more than two genders – this altered the terrain of sexual practice as well.

Some First Nations conceptually viewed such persons as a third, fourth or intermediate gender, a theory advanced by some later in 19th century Europe. Many First Nations also had rituals for ascertaining whether a particular adolescent had two spirits. If they were determined to be Two Spirited, they would be raised

in a particular manner, which might include wearing the dress of the opposite gender to the one assigned to them at birth. Sexual activities were permitted between Two Spirit men and other males, and between two-spirited women other females. Same sex marriages were also accepted.

Two Spirited people were not just accepted among First Nations, they were honoured and revered. They often considered to be blessed with special powers including healing. They were assigned special roles including caring for orphans, mediation, interpreting dreams and ritual roles within their Nations. They were accepted, understood and appreciated as important members of their Nations.

Although the concept of Two Spirited persons is an ancient one, the term Two Spirit itself is a neologism that was formally adopted at an international conference of gay and lesbian activists in Winnipeg, Manitoba in the summer of 1990. It is an exact translation of the traditional Ojibwe term *niizh manidoowag*. The term was born out of a demonstrated need to replace the commonly used yet inappropriate term *berdache*, with a more culturally appropriate and applicable label. Two-Spirit, while using the English language, aims to encompass the myriad of third and fourth gender and sexual identities prevalent in a multitude of indigenous societies. Sue Ellen Jacobs and Wesley Thomas assert that “two-spirit is an indigenously defined pan-Native North

American term that bridges native concepts of gender diversity and sexualities with those of Western cultures.”

The term *berdache* was commonly used up until that time, to the chagrin of many gender-variant indigenous people. *Berdache* is rooted in the Persian

and Arab *bardaj*, and evolved to the Latin based *bardasso* in Italian, *berdache* in French, and *bardaja* or *bardaxa* in Spanish. *Berdache*, while colloquially known by anthropologists and those within indigenous communities to unofficially encompass meanings of gender

diversity, and sexual identity variance, has a direct translation of “slave”, “kept boy”, or “male prostitute.” It was in response to this denigrating label that the Two-Spirit indigenous community and its allies felt urged to redefine this identifier in 1990.

## Europe: Roots of Discrimination

**C**anadian criminal law is based on English criminal law. There can be no doubt that the foundation of all the problematic laws affecting queer communities in Canada is the British buggery law. British buggery laws are based on ecclesiastical prohibitions established by what is now known as the Roman Catholic Church. The Canadian anal intercourse prohibition can truly be said to be “trempe de foi.” Although not in the noble sense that expression is used in our national anthem.

Many scholarly works have been written on the interpretation of the biblical texts that are relied upon to support the characterization of members of our communities as sexual or gender sinners. A discussion of the laws that have impacted our communities would lack historical and social context if we ignored their religious roots. Moreover, in the movement for equality in Canada and elsewhere, these religious arguments have been and continue to be deployed against us as means to deny important rights, freedoms, and the opportunity for truth and rehabilitation.

Christianity is based on Judaism, and arguably began initially as a sect of Judaism. Interestingly, the foundation of Jewish law, the Ten Commandments, says nothing about same-sex relations. The only sexual sin that is condemned is adultery. Whatever their own practices, the ancient Jews lived adjacent to or under occupation from societies like the Greeks and Romans that openly permitted same-sex relations and gender diverse behaviour.

One of the two original sources of the Jewish prohibition on homosexuality is the “Holiness Code” contained in Leviticus. It proscribes a great many activities including such superficially mundane

matters as cutting down fruit trees and wearing cloth made from mixed fabrics. The Holiness Code frequently characterizes many of these acts as “abominations” and worthy of death. One of the prohibitions is that “a man shall not lie with another man as with a woman.” Despite the apparent seriousness of this sin, unlike violating the Sabbath, there is no recorded instance in the Jewish scriptures where someone was actually put to death for violating this injunction. How strictly this prohibition was enforced or its precise scope is unclear.

The other source is the story of Sodom and Gomorrah and the “Cities of the Plain” that so offended God that he destroyed them. The tale of destruction is marked by a preliminary incident where angels visiting the city are threatened with rape by an angry crowd of men, who are then struck blind by God. Boswell argues that the original text suggests that the reason for the cities’ destruction was selfishness and greed, and not homosexuality.

By the early Middle Ages, however, some Jewish scholars were interpreting the texts to mean that anal intercourse was prohibited for Jews and the sin that became known as “sodomy” was the reason for the destruction of the Cities of the Plain.

Christianity is based on Judaism, however, it soon departed from it in several important respects. There was no requirement for Christians to observe all the Jewish laws, for example, circumcision of boys was not mandatory and “keeping kosher” food was also not required. Jesus is not recorded as saying anything on the topic of same-sex relations or gender diverse behaviour, although he would have been aware of both in the Roman era he lived in. His follower St. Paul does

appear to have condemned both male and female homosexual acts in a few passages. He also had negative things to say about women and lawyers.

What is clear from the historical record is that in the late Middle Ages Christian thinkers such as St. Augustine became increasingly preoccupied with sex and sexual matters. The teachings of these medieval Christian scholars would have an enduring effect on what is now known as the Roman Catholic Church. The Church’s teaching would go on to substantively inform and influence English criminal laws regarding lawful sexual practices.

The perspective of this philosophy was a fundamental abhorrence of all sex as innately sinful, which has been cast as the “original sin.” The holiest state for a Christian was to be a virgin, and the next best state was for a non-virgin to commit to a lifetime of celibacy. Clearly if all Christians were virgins, they would become extinct. Accordingly, St. Augustine allowed for an exception: vaginal intercourse was the only permitted sexual act, and that was only legitimate within marriage and when carried out for the purposes of procreation. For a man to have sexual intercourse with his wife purely for pleasure was considered a mortal sin. It is in this context that many sexual acts became condemned as sinful, including homosexual acts, oral sex, and masturbation. This sex-negative tradition still informs public thinking and legislation on what constitutes lawful (and moral) sexuality to this very day.

## England: Roots of Criminalization

**T**he criminalization of same-sex conduct traces to two major shifts in the balance of power between Church and State. The first, two hundred years after Constantine the Great adopted Christianity, came in 528 AD when Emperor Justinian issued an edict banning sodomy throughout the Roman Empire. Centuries later, the second shift resulted from King Henry V's tumultuous relationship with the Catholic Church, which precipitated a political and ecclesiastical schism with Rome. When Henry V nationalized the Church of England, he precipitated a constitutional crisis. The enactment of the Buggery Act 1533 coincided with a campaign of monastic expropriation. Based on the available evidence, historians concur that the prohibition of sodomy successfully wrested influence from the Church and supported the King's political designs.

The medieval Church was not allowed to engage in violence in theory, although

there are many documented and extreme exceptions to this "principle" that they are too numerous to mention. In extreme cases, sinners could be condemned to death in the "flames of purification." However, in such cases although the sentence was passed by an ecclesiastical court, the sentence was actually carried out by the State.

For reasons that are not entirely clear, as the Middle Ages progressed into Tudor times, the sin known as "buggery" became particularly detested. It is important to remember that there was no concept of sexual orientation known to medieval England. Homosexual acts were seen as a vice, a bad habit that deviant straight people indulged in due to a lack of self-control like drunkenness or tobacco smoking. Despite being despised, it was thought to be quite contagious and that the uneducated and the young were thought to be particularly vulnerable to its sinful "attractions."

"Buggery" was often tainted with racism and religious discrimination. Jews and "Saracens" (Muslims) were said to be prone to this "vice". Indeed, the expression "bugger" comes from the French word "bougre." It is believed that this is a corruption of "Bulgar", a people that the medieval French apparently thought was the source of this kind of sexual misconduct.

This sin among all other sexual sins became so distasteful that gentlemen expressed their distaste at even mentioning it, let alone describing it. This sin became known as "peccatum illud horribile inter Christianos no nominadum": that horrible sin not to be named among Christians. Centuries later at his trial for gross indecency, Oscar Wilde would rephrase this poetically as "the love that dare not speak its name."

## Colonial Canada: First Contact

The Europeans who first made contact with indigenous peoples in the initial stages of colonization viewed Two Spirit persons and same sex relations as evidence of the uncivilized and sinful condition of the indigenous people, and as evidence of a dangerous "savage" sexuality. The reaction could be violent. For example, in 1513, the explorer Balboa "learned that they were sodomites and threw the king and forty others to be eaten by his dogs, a fine action of an honorable and Catholic Spaniard." George Catlin said that the Two Spirit tradition must "be extinguished before it can be more fully recorded."

Alexander Henry gives this account of a man named Ozawwendib, or Yellow Head. He was the son of an Ojibwe chief at what is now Leech Lake in Minnesota, but was then British territory as part of the Hudson Bay Company:

Berdash, a son of Sucrie [Sucre, Sweet, or Wiscoup] arrived from the Assiniboine, where he had been with a young man to carry tobacco concerning the war. This person is a curious

compound of man and woman. He is a man both as to his members and his courage, but pretends to be womanish, and dresses as such. His walk and mode of sitting, his manners, occupations, and language are those of a woman.

Henry goes on to praise the "Sodomite's" courage and speed, but also portrays him as wild and drunk.

Another explorer – the Northwest Company's David Thompson – described a Two Spirit person he encountered in what is now Washington State, but whom he had met previously in British Columbia. He described this person, Kaúxuma Núpika, as:

...apparently a young man, well dressed in leather, carrying a Bow and Arrows, with his Wife, a young woman in good clothing, [who] came to my door and requested me to give them my protection; somewhat at a loss what answer to give, on looking at them, in the Man I recognised the Woman who three years ago was the wife of Boiverd, a Canadian and my servant; her

conduct then was so loose that I had requested her to send him away to her friends, but the Kootenae were also displeased with her; she left them, and found her way from Tribe to Tribe to the Sea. She became a prophetess, declared her sex changed, that she was now a Man, dressed and armed herself as such, and also took a young woman to Wife, of whom she pretended to be very jealous: when with the Chinooks, as a prophetess, she predicted diseases to them, which made some of them threaten her life, and she found it necessary to endeavour to return to her own country at the head of this river.

In the early 1800s, these kind of descriptions were common from Europeans who lived among First Nations people in eastern Canada. Another Northwest Company official — Charles Mackenzie — wrote that the men of the Crow Nation were "much addicted to an abominable crime, the crime of sodomy." James Mackenzie said that that

## GROSSLY INDECENT

Naskapi Innu people of what's now northern Quebec and Labrador "are libidinous and accused of sodomy."

Unfortunately, as discussed below, due to the legacy of colonization, the roles of Two Spirit people have been diminished among Aboriginal Peoples and erased from Canada's history.

Descriptions of Two Spirit people began to fade in the second half of the 1800s, at least in Canada. By the end of the 1800s, the Two Spirit tradition had largely disappeared completely from view, to the point where the missionary Adrien Morice claimed that he thought it was strange that the Dakelh people of what's now central British Columbia had a myth about sodomy, as "They know the crime in neither name nor deed."

The Canadian government had begun plans to assimilate Aboriginal Peoples as early as 1857. Throughout the late 1800s – and especially after the 1876 Indian Act – numerous laws were passed to control different Aboriginal cultural practices. The outlawing of Aboriginal cultural practices had an impact on Two-Spirit traditions.

Judging by the disappearance of Two Spirit people from the missionary and explorer records by halfway through the 1800s, ceremonies honouring Two Spirited people had begun to vanish in Canada by the second half of the 19th century. It must be acknowledged that many First Nations, such as the Mi'kmaq of Atlantic Canada had seen their numbers decimated by this time.

The state also supported Christian missionaries in their efforts to introduce negative attitudes toward same sex relations and gender non-conformity. These behaviours were viewed by these missionaries as emblematic of a "savage" nature, "uncivilized" culture and "heathen" spirituality. These efforts at inculcating the discriminatory biases of traditional Christianity have worked all too well. Two Spirited people now often face serious discrimination in communities whose ancestors once honoured them, in addition to the racism they encounter in non-Aboriginal Canadian society.

As part of the enforcement of European norms, the Indian Act 1876 excluded recognition of same sex marriage, imposed patriarchy on many matriarchal societies and stripped women and children of their rights.

Despite the systematic efforts to eradicate their traditions, some Aboriginal



TOP Totem pole [Clint Lalonde, Flickr, Creative Commons License.]



TOP A totem pole up close on Vancouver Island. [Seán Ó Domhnaill, Flickr, Creative Commons License.]



TOP Flag representing 2 Spirits people of the 1st Nations. Image: © Art Zoccole, 2-Spirited People of the 1st Nations, www.2spirits.com



Peoples carried on their traditions long after residential schools had begun their terrible work. Williams records the following:

The Canadian government also made attempts to wipe out the berdache tradition. A Kwakiutl chief in British Columbia remembered what happened when his berdache lover was forced to take a man's role about 1900 : "The Indian agent wrote to Victoria [the provincial government], telling the officials what she was doing [dressing as a female]. She was taken to Victoria, and the policeman took her clothes off and found she was a man, so they gave him a suit of clothes and cut off his hair and sent him back home. When I saw him again, he was a man. He was no more my sweetheart. (emphasis added)"

It is difficult to parse the impact of law from impact of religion, especially as both the French and the English had an Established Church with a monopoly on religion and coercive laws compelling adherence. Although Canada itself never had an Established Church, traditional Christianity permeated our laws and culture, especially laws regulating gender and sexuality. The Two-Spirit people not only represented a challenge to criminal law and established gender norms, they reflected an indigenous spirituality that defied traditional Christianity. The Indian Act and residential schools, created and sustained by the Federal Government provided institutional mechanisms for continuing the project of cultural genocide that included efforts to eradicate the Two Spirit Tradition.

The tradition concept was barely kept alive in secret in some First Nations by the elders, who passed on his knowledge in whispers. An Ojibwe-Cree Elder, Ma-Nee Chacaby relates how her kokum (granny) had preserved the knowledge of the Two-Spirit traditions and shared it with her young granddaughter when she was struggling with her identity

Little girl, you have nizhin ojjaak (two spirits) living inside of you."...My grandmother told me that two-spirit, same-sex couples used to play an important role in Anishnaabe communities, because they adopted children who had lost their parents. Sometimes, she said, individual with two sprits had other special duties, like keeping fire, healing people, or leading ceremonies. My kokum explained that two-spirit people were once loved and respected within our communities, but times had changed and they were no longer understood or valued in the same way ...



TOP A female First Nations woman depicted in a Catholic Church's stained glass.

Two-spirit groups emerged in various Canadian cities with large indigenous populations beginning in the 1990's. Many emerged in response to the devastation of the HIV epidemic. Rebuilding Two-Spirit traditions has involved some First Nations borrowing from others, and to creative modern re-imagining by Two-Spirit persons today.

Thus, the phenomena we now know as homophobia, biphobia and transphobia were not "traditional" in Canada. They were alien concepts, introduced through the law and state sanctioned religion of European colonizers. The Federal Crown is the successor to the British Crown and is responsible for that harm that engages the Honour of the Crown.. Moreover, the Federal Crown was directly responsible for key aspects of this effort to extinguish Two-Spirit traditions that are now largely hidden from Canadian history.



## RECOMMENDATION

### HONOUR THE TRUTH AND MAKE IT RIGHT

As part of a comprehensive process of acknowledging and repairing the harm done to LGBTQ2SI communities in Canada, Canada should apologize for the harm done to Two Spirit people, memorialize that harm for all Canadians, and make efforts to work with First Nations, Two Spirit people and Egale to restore the Two Spirit traditions.

## 19th and Early 20th Century Canada

Convictions languished under the historic sodomy prohibition because the common law developed more robust legal and evidentiary standards. The case of *Rex v Wiseman* narrowed the test for sodomy, holding that the charge only applied to acts with anal penetration and ejaculation. Proving both elements under this standard required self-incrimination, and logically, there were few volunteers. British authorities began recording statistics on sexual offences in the nineteenth century, and there are few recorded convictions under the Tudor sodomy law. Amendments to the Offences Against the Person Act in 1828 and 1861 then abolished the death penalty for sodomy. Sodomy transformed from a capital crime to a lesser criminal offence.

The Industrial revolution transformed prevailing sexual morality in Britain. While Tudor laws had “originated in harnessing ancient superstitions for purposes in power politics,” in the Victorian era, anti-gay law reflected changing social mores and class conflict. Victorian morality had entailed the conservative regulation of sexual practices. Britain’s upper class installed norms governing family life, which in turn functioned to support the legal regulation of capital. Feminist historians attribute parliamentary legislation to the growth of wealth. Sexual regulation, moreover, served to mediate geographical conflict in the context of rapid urbanization. The wealthy elite feared the depravity of the inner city slums, supporting criminal regulation of sexuality to stymie moral decay.

*Per jus ad iniustitiam*  
 (“Through the law, injustice.”)

Member of Parliament Henry Labouchere introduced an amendment to Section 11 of Britain’s criminal law in 1885 to broaden the scope of police discretion and increase the prospects of conviction. Responding to the evidentiary difficulties attending a sodomy conviction after *Rex v Wiseman*, from the outset, the “act of gross indecency” was left purposefully vague.

London of the 19th century was the world’s great metropolis and the seat of the British Empire of which Canada was a loyal part. There were many scandals in Victorian London that both intrigued and shocked the Empire. The most enduringly notorious of these scandals was doubtless the “Jack the Ripper” murders.

However, some scandals that have been largely forgotten today were equally shocking in the era of the ruthlessly conventional official sexual morality of the 19th century British Empire. A particularly pertinent one in this case was the Cleveland Street Scandal. Police discovered that male brothel in London serving an elite clientele that was rumoured to include a member of the royal family.

## 19th Century Gay Life

**A**mong the earliest recorded examples of anti-gay prosecution in Upper Canada illustrates the conflation of racial subordination with sexual regulation. In 1777, a black man named Prince was convicted of sodomy and sentenced to 39 lashes. Meanwhile the co-accused, a white soldier, was found not guilty. In 1838, Upper Canada was embroiled in one of its first homosexual scandals. The case of George Herchmer Markland proceeded after Markland's housekeeper was discovered that he was bringing young men home under suspicious circumstances. An inquiry was then launched, and Markland was then forced to resign from his post of Inspector-General. In 1842, ranking soldiers Sam Moore and Patrick Kelly were convicted of sodomy and sentenced to death, but their sentences were commuted to life imprisonment. In small communities without extensive law enforcement, community pressure regulated sexual non-conformists, who were mostly women, through exclusion and mass outpourings of disapproval. In bush camps in the West, sex among males was a "socially tolerated and accepted fact of life."

### The Social Purity Movement

English (and Canadian) social purity movement arose out of feminist efforts against the sexual double standard and the victimization of prostitutes. However, the movement ended up moving in a repressive and anti-feminist direction. It advocated for many of the antiquated Criminal Code provisions stigmatizing female sex-linked

activities. In their moral crusade, homosexuality was barely distinguished from prostitution as products of men's lust and violence. Their language was often peppered with references to vague "perversion" and "immorality." The Chicago Vice Commission produced a report on sexual immorality in their city that also reflected the concerns of the Canadian social purity movement. Under "Sexual Perversion" the report noted an increase in "colonies of men who are sex perverts" who adopt the "carriage, mannerisms, and speech of women." The report also singled out "female impersonators" as men who dressed as women. Despite the Social Purity movement's focus on licentious men, the regulations they advocated put the criminal burden on women. A 1918 provision read: "No woman suffering from Venereal Disease shall have sexual intercourse with any member of His Majesty's forces."

Reflecting the historical conflation of same-sex conduct and religious intolerance, the charge was "that which is not to be named." Reflecting the dominant social purity movement spawned by Victorian morality, the majority Canadian parliamentarians supported the wholesale import of English criminal law. Ironically, due to the charge's vagueness, few Canadian legislators understood the true constitution of the crime being enacted. Opponents also noted that "these offences against morality have crept into the common law from earlier ecclesiastical law, and they were rather sins that crimes."

NB. DR. GARY KINSMAN

**The authors wish to acknowledge a significant debt to the eminent scholar on queer historical injustice in Canada, Dr. Gary Kinsman. Many parts of this project are drawn from his rigorous research, and in addition from interviews. The fully cited academic companion to this policy report lists pinpoint citations and original references to his magisterial academic works.**

Below: A Female Transvestite Who Reported Discrimination at a gay bar [Toronto Public Library, Toronto Star Digital Archives, copyright expired].



## Early Criminal Law

### Buggery

**Once what is now Canada fell under British rule, the British buggery law was applicable in the British North American colonies.** There is not much evidence of enforcement, although there are some recorded gay scandals such as that of the notorious colonial magistrate Alexander Wood.

The first recorded Canadian statute to outlaw “buggery” with person or animal was enacted in 1859. Upon consolidation into the Criminal Code in 1892, it was placed beside another statute sanctioning attempts to commit “Sodomy.” According to Terry Chapman, this linguistic

ambiguity meant that it was “virtually impossible” to determine whether these provisions meant anal intercourse without consulting a legal expert. This ambiguity was carried over from the English common law. Great British legal scholars such as Blackstone and Coke writers had escribed “buggery is that which is not to be named.”

Buggery was initially punishable by death, but there are no records of it every being used as such in Canada. On its addition to the 1892 Criminal Code punishment was reduced to life imprisonment.

Although buggery was considered a horrible crime, in practice it was very difficult to secure a conviction. The actus reus of the offence was proof of anal penetration and ejaculation. The testimony of a participant in the act was inadmissible to prove the offence. Accordingly, in the absence of a confession, proving the crime beyond a reasonable doubt was for all practical purposes impossible. However, the social impact of the crime’s existence as well as a dominant social culture steeped in a traditional Christian world view allowed homophobia, biphobia and transphobia to flourish.

### Gross Indecency

The offence of “Acts of Gross Indecency”, a deliberately vague crime, was created in English criminal law in 1885. It was specifically designed to outlaw a broad spectrum of male homosexual behavior. Its chief proponent, MP Henry Labouchere, ran tabloid magazines that were neurotic over the moral degeneration of London. It was used most famously in the trial of the great playwright Oscar Wilde, who was jailed and whose life was ruined.

Along with most of English Criminal law, this provision was imported wholesale into Canadian criminal law in 1890, and compiled in the original 1892

consolidated Criminal Code. It applied to anyone

who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person

D.A. Watt, a prominent activist within the social purity movement, loudly advocated for importing English sexual law. Justice Minister John Thompson was receptive, and became Parliament’s main proponent of importing gross indecency from England. But his description was so utterly vague that most MPs probably had

no idea what behavior they were being asked to make criminal. Given its similarity to the English code and the famous Oscar Wilde case, Thompson expected law enforcement officials to know what the provision meant. Some opposed, like Mr. Mills (Bothwell) noted that “these offences against morality have crept into the common law from earlier ecclesiastical law, and they were rather sins than crimes.” With the consolidation of the Criminal Code in 1892, all homosexual acts between men were made illegal.



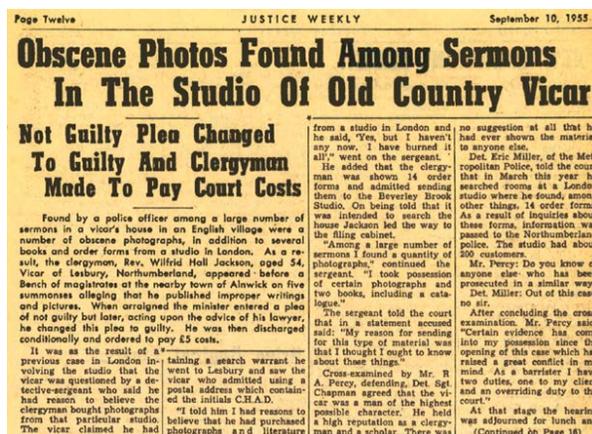
## Same-Sex Conduct Between Females

It is also noteworthy that the criminal law excluded female sexual morality. Historians point out that English sodomy laws were a rare instance where the state exerted control over men but not women. At the time, women were not perceived as sexual beings. Nonetheless, there was an attempt in 1921 to introduce an offence of gross indecency between females into

English law, and it was only due to fears of the provision being used for blackmail and a view that there was no 'widespread practice of this kind of vice' that the proposed amendment was shelved. Subsequent amendments to the Canadian criminal law in the mid-twentieth century, however, neutralized the gendered application of the gross indecency standard.

## Criminal Enforcement

Canada's rapidly urbanizing public spaces were the principal theatre of oppression, although there are records of enforcement in the Western provinces. Parks and restrooms were the site of male same-sex conduct, and between 1880 and 1930, there were 313 report cases of sexual offences between men in Ontario. Kinsman also recounts several convictions of gross indecency in 1890's Western provinces and territories. Police enforcement of Buggery and Gross Indecency laws was sparing until an upswing in the 1910's and 20's. Enforcing the law was highly invasive, requiring unethical policing practices to yield arrests. Anglo-Canadian case law observed many instances where officers were party to the offence itself, acting as agents provocateur to procure the crime. Acquaintances and concerned social activists often lodged successful petitions for leniency. For example, in a climate associating sexual immorality and perversion with Jews, Jewish community members petitioned for leniency on one man's 1917 gross indecency charge.



Above: Source: Canadian Gay and Lesbian Archives.

## War

There can be no doubt that people within our communitiesThe WWII war effort drafted millions of Canadians, but excluded a select minority. Under the category of "psychopathic personality," the military discharged hundreds of young soldiers simply for being attracted to the same sex. Sidney Katz wrote that most soldiers had seen one platoon mate or another suddenly discharged for having gay tendencies. In "psychopathic personality", same-sex attraction was lumped in with addicts and chronic delinquents as irresponsible, inconsiderate and impulsive.

On the other hand, it has been well documented by modern historians such as Allan Berubé that the Second World War had a profound impact on the formation of an LBTQ2SI community in North America. The War brought our communities out of the countryside and into contact with each other, and with the more concentrated communities that existed in urban environments and in places that might otherwise never have been seen, Farm boys were suddenly exposed to exotic locales where there was a greater atmosphere of tolerance such as Amsterdam. In his memoirs, pioneering gay activist Jim Egan describes how he first explored gay life during the War on his own on shore

leave from the merchant marine in places such as San Diego. He was not alone.

Despite this unintended positive social effect, the War had a distinctly shameful chapter in which Canada was complicit. Homosexual men were among the many groups who were victims of Nazi persecution. Some were arrested and convicted under paragraph 175, others were simply rounded up and sent directly to concentration camps where they were labelled with the pink triangle. The death toll was very high. The ones who survived often did so by offering their sexual services to guards of kapos (inmates who worked as camp supervisors.),

Canada's modern commitment to human rights took inspiration from the Nazi horrors to which it bore witness. Sadly, there is a stain on that proud legacy. Homosexual men, like other prisoners, were liberated by Canada and its Allies from the horrific Nazi camps – initially. Homosexuals were in a vulnerable position compared to other who were liberated, however. Canada, like all of the Allies, had an anti-sodomy law not dissimilar to Germany's paragraph 175.



**TOP** The Toronto Bath House Raids. Victims pictured in "Trudeau is right to pardon Everett Klippert, Canada's iconic gay offender: Editorial" (1 March 2016) Toronto Star.

Following its defeat, Germany operated under the direction of the victorious Allies. The Allies determined that it had been an error to liberate the homosexuals, men they viewed as ordinary criminals, not victims of Nazi persecution. The pink triangle men were re-arrested, sentenced by German courts, and sent to prison to serve their sentences. Their time in the terrible conditions of the Nazi camps did not count in reduction of the time they were ordered to serve. In Canada's eyes, unlike the Jews, Communist, gypsies and other groups incarcerated by the Nazis, these men not only deserved the treatment they had received at the hands of the Nazis, they deserved further punishment.

In a history of shameful treatment of the LGBTQ2S! communities by Canada, this episode is one of the most shocking. It was not until 2002 that Germany itself recognized that this decision was wrong, and steps were taken to make things right for the men of the pink triangle. To our great shame, neither Canada nor any of its Allies have joined Germany in acknowledging the wrong that was done to these men by offering so much as an apology.

## Social Change and Decriminalization

1949 to 1969

**T**wo criminal code reforms bookended mid-century Canada. The first represented both a lost opportunity and a period of oppression by the justice system. The second represented liberation from the heavy hand of the criminal law. The two decades between were marked by rapid progress in society's tolerance of queers, and gay organization and advocacy. While a changing understanding of homosexuality was ultimately beneficial, we were still considered "pathological", worthy of something between disgust and pity. The adversity and opportunity allowed gay communities to emerge.

### First Legal Reform: 1953

In the late 1940's, politicians and legal critics began agitating for the consolidation and revision of the Criminal Code. Despite two previous prunings in 1906 and 1927, the Code continued its reckless, weed-like expansion. Tory MP John Deifenbaker claimed the code was antiquated, unappreciative of "penological, psychological and physiological advances" which made it harder for jurists to reach proper conclusions. The 1949 Royal Commission on the Revision of the Criminal Code was created to "eliminate inconsistencies, legal anomalies or defects."



It was clear that the Buggery and Gross Indecency provisions regulating homosexual acts were unhelpfully vague. However, the commission's report did not recommend substantial reform regarding sexual matters. It clarified that buggery applied to only acts between humans, separate from bestiality. It also reduced the punishment for gross indecency to 14 years imprisonment, and expanded the definition to cover 'gross indecencies' committed by all genders, not just between males. The subsequent 1953 act was described by legal scholar Alan Mewett as "an opportunity... lost."

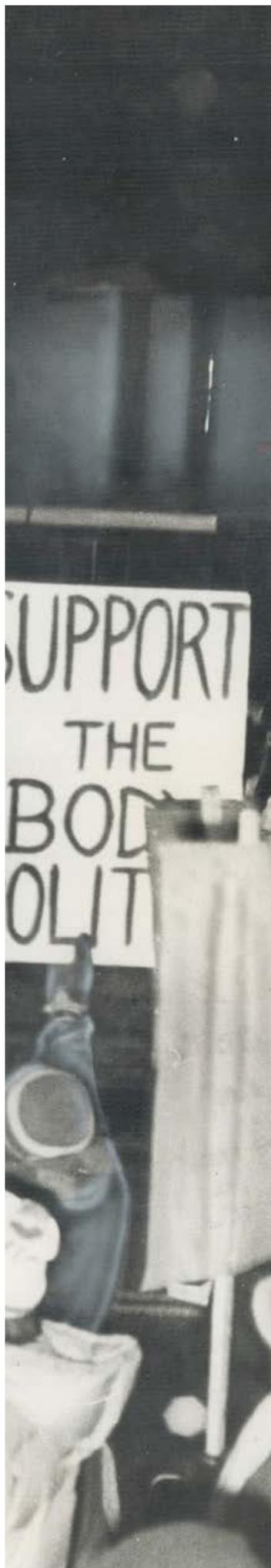
The 1953 act also revised recent "Criminal Sexual Psychopath" legislation added in 1948. It added Gross Indecency and Buggery to a list of triggering offences that already included Indecent Assault on a Male. Courts could sentence offenders to prison indefinitely if the courts believed they "evidenced a lack of power to control [their] sexual impulses and who as a result [are] likely to attack or otherwise inflict injury, loss, pain or other evil on any person." Following the Royal Commission on Criminal Sexual Psychopaths, in 1961 the section was renamed "Dangerous Sexual Offender," and reworded. Broadening its scope, Justice Minister Dave Fulton added that a DSO may simply be "likely to commit a further sexual offence."

## The Regulation of Gay Life

Stronger gay social networks took shape in the 1950's. "The Homosexual in Urban Society" was a 1954 thesis by Maurice Leznoff, who describes the intricate gay male community in Montreal. Unfortunately, his thesis may have led police to a park heavily used for cruising, resulting in several arrests. Gay males found meeting places in bars and steam baths. Every Friday and Saturday night in the 1960's there were drag shows at the Music Room in Toronto. In 1950's Toronto, the lesbian community often came together at the Continental hotel in Chinatown. Both communities had members who covertly concealed their sexuality day-to-day and those who were overt with showing it off.

These locations contributed to gay and lesbian visibility, and thus attracted significant police attention. Patrice Corriveau recounts that the first true revision in Gross Indecency since its adoption led to a renewed interest in policing the crime. In a festering climate of moral indignation, Jean Drapeau was elected Mayor of Montreal in 1954 promising to fight the scourge of homosexuality. Arrests for Gross Indecency subsequently increased from 65 in 1953 to 311 in 1954. A number of arrests were also made for Indecent Acts, which had lighter penalties. Many of the accused took the penalties rather than stand trial and face publicity. Despite the de-gendered provision, homosexuals continued to make up the majority of convictions. In 1961, for example, only 4 of the 68 people convicted of gross indecency in Toronto were heterosexual. 40 were consenting adult males and 5 were under 21 years old. Convictions under the Buggery laws may have also increased Canada-wide. For example, in Quebec the annual average of 39.5 convictions in the 1930's rose to around 129 convictions in the 1960's.

In 1958, Chief Constable John Chisholm of the Toronto Police Force was quoted that "homosexuality is a constant problem for the Police of large cities." He worried that lax policing will lead to "city parks, intended for the relaxation of women and children... will become rendezvous for homosexuals." He lamented that "homosexuals corrupt others and are constantly recruiting youths into their fraternity." And he chided



## VICTIM IMPACT STATEMENT

*With a dream of a career serving my country I volunteered for the Canadian Armed Forces. Two and a half years later, after an 18 month investigation and admitting on a polygraph that I was gay, I was given an honourable discharge. At 21, my dreams were crushed. I felt ashamed, isolated, hurt and betrayed. I received a paper that said 'honourable discharge' but I did not feel any honour. **Todd Ross.***

homosexuals for requiring police attention, “as he is often the victim of gang beating, or robbery with violence, and is easy prey for extortionists and blackmailers.” As Jim Egan opined – yes, what a burden that gays require police protection! The 50’s and 60’s saw police regulating gay gathering spaces with a heavy hand. Police raided movie theatres, patrolled parks, and secretly observed bathrooms. They lured gays into committing what they determined was “gross indecency” or indecent acts, barging in and charging them on the spot.

Kinsman relates several of the many mid-century incidents of police harassment and charges. In 1965, two men dancing together were arrested in the Melody Room and charged with gross

indecency. An article in Two noted the ambiguity surrounding gross indecency and the ‘suspicion’ that police were targeting homosexuals with it. Bawdy-house charges were laid at the International steam bath, and the names of those found there were printed in the papers. Montreal police embarked on a series of raids in the early ‘60s. Police would arbitrarily pick pairs and accuse them of committing indecent acts together. They would later fill in the blanks with contrived accounts of sexual touching. Police picked up eight men in a Vancouver washroom on charges of gross indecency, and printed their names in local newspapers. As a result, one man hung himself in a jail cell. One activist recounted “if you were a homosexual, you were harassed.”

## The Canadian War on Homosexuals: Discrimination by Military and Bureaucracy

During the Second World War, people suspected of homosexuality were discharged from the military because they were viewed as psychopathic personalities. Military prohibitions evolved into a more robust and encompassing campaign following the Allied victory. The We Demand and Apology Network has marshalled robust historical evidence

that gays and lesbians were the subject of police prosecution, raids and discrimination in the military. The highest echelons of the Canadian public service, military forces and the Royal Canadian Mounted Police organized a national security purge campaign directed against LGBT people in Canada.



**TOP** Todd Ross, who provided Egale with a victim impact statement, is photographed above.

The campaign of surveillance targeted thousands of homosexual Canadians from the 1950s through to the 1990s. Bureaucratic machinations in the RCMP, for example, were procured a list of more than 9000 suspected homosexuals. Identification as part of this list, known colloquially as the “Fruit Machine”,

entailed the loss of a job and the deprivation of homosexual dignity. This was an attempt to develop a ‘scientific’ detection technology funded by the Canadian state – it was developed by the Carleton Psychology Department. In the military, many victims of discriminatory treatment or purge elected to leave. Those who

remained were given dishonourable discharges. Official discriminatory treatment was sustained until 1992, following the federal court challenge brought forward by Michelle Douglas.

## Two Major Steps Forward

Two major steps forward in the U.S. and Britain helped shape Canadian society’s norms towards homosexuals.

### Kinsey

Breakthroughs in psychology and mainstream medicine shifted the popular conception of homosexuality. In his infamous “Letter to an American Mother,” contrary to political consensus, Sigmund Freud wrote that homosexuality was neither a sin nor disease, but his work was often used to portray us as psychologically immature. The “Kinsey Earthquake” began in 1948 and 1953,

when Alfred Kinsey published *Sexual Behaviour in the Human Male* and *Sexual Behaviour in the Human Female*. Kinsey had undertaken vast and detailed studies of U.S. citizens and their sexual habits. He discovered a significant portion of Americans have homosexual predilections take part in same sex sexual conduct. By framing homosexuality as a continuum of natural attraction and conduct, Kinsey

revolutionized a population that once believed homosexuality was simply a matter of moral choice. From understanding homosexuals as gender inverters, it became natural to speak of sexual orientation. It was a primary reference point for social policy after the war, and legitimized popular discussion. and legitimized popular discussion.

### Wolfenden Report

The Wolfenden Report became controversial the moment of its release in 1957 England. It was commissioned by the Home Secretary in response to amplified moral outrage over sexual vice and prostitution. Its terms of reference directed it to consider “the law and practice relating homosexual offences” and “in connection with prostitution.” It heard from “police chiefs, medical associations, and government departments, doctors and psychologists.” Using a framework of “public” and “private” spaces, it recommended abolishing criminal law regulating private homosexual conduct. “There must be a realm of private morality

and immorality that is in brief and crude terms not the law’s business.” In many ways the report has the usual antiquated homophobic beliefs of the time: it suggests that a “happy family life” can curtail a homosexual “propensity.” It recommends that private homosexual acts should be dealt with as a sickness via medical and social work, outside the purview of the criminal law.

The report’s distinction between the private and public lit the way forward to the successful law reform efforts in the 1960’s. It also instigated one of the most famous debates in legal

philosophy between jurists H.L.A. Hart and Lord Devlin.

These two revolutions in thinking articulated a new approach to homosexuals. The reports suggested that whatever normative judgments one can make on homosexuals, criminal prosecution is unnecessary and unjust. These reports advocated a certain kind of regressive cultural tolerance for ‘natural’ homosexuals committing ‘private’ acts. They still remained a major step forward, with repercussions throughout the mid 20th century.

## Changing Canadian Norms

Favourable accounts of homosexuality were few and far between in mainstream magazines in newspapers. It was not uncommon to see gay men described as “fairies” and “perverts” in reputable papers like *Le Matin* and the *Toronto Telegram* well into the 60’s. More favourable treatments began to emerge in the mid-1960’s. Sidney Katz wrote two landmark articles for *Maclean’s* where he advocated Wolfenden style legal reform given the “harsh facts of life in the gay world.” The *Globe and Mail*, *Vancouver Sun* and the *Toronto Daily Star* all wrote editorials against laws regulating sexual behavior.

Activists and the first “homophile” advocacy groups created in the ‘60s pushed on society’s prejudices. Canada’s first gay activist was probably Jim Egan. Beginning in 1949, he embarked on a frequent and consistent letter writing campaign to gay magazines, mainstream newspapers, and governmental committees. He criticized homophobic articles and defended the humanity of homosexuals. In 1964 the first gay rights organization was established in Vancouver to promote public awareness of alternative sexual practices. The group chose a non-threatening name: the Association for Social Knowledge (ASK). ASK was active throughout the 60’s, founding community centres and sponsoring panel discussions, including one where Anglican minister William Nicholls called for the decriminalization of private and consensual sex. In 1964 The Committee on Homophile Reform (CHR), established the same year, sent the Ministry of Health and Welfare a research brief recommending the abolishment of criminal sanctions and voicing concern that homosexuals were conflated with pedophiles, masochists and sadists. New gay magazines *Gay* and *Two* began publishing in 1964, and included news items and longer articles of interest to the gay community. The gay community gained platforms and organizations that helped it organize and advocate on its own behalf.



Mayor John Sewell addresses pro-homosexual rally, albeit carefully. “I am a lawyer, you know,” he reminded crowd.  
**It’s not illegal to be gay, Sewell tells rally**





During war-time the military discharged homosexuals based on their “psychopathic personalities,” identified with the assistance of psychiatrists. The profession’s interest in sexual deviance and homosexuality only grew after the war. Kinsey’s statistics suggested that only a small proportion of people with homosexual experience were exclusively so. If they reached out to people with mixed experiences, psychiatrists believed that their habits of non-exclusive might be changed. It was said that “skillful treatment at the hands of a psychiatrist” was where “the majority can be assisted to control the drive.” Aversion therapy, in which subjects were hurt or induced to vomit when aroused, were practiced by Toronto psychiatrists. Between 1960 and 1962, 40 percent of “sexual deviation” cases at the Forensic Clinic of the Toronto Psychiatric Hospital — the largest single group — were homosexual men. Homosexuality began to be understood by Canadians as a matter of illness rather than immoral conduct. This led to doubts about whether the criminal justice system was the appropriate answer. In May 1962, CMAJ profiled a young man “living with homosexuality” who urged for more research and advocated for leniency from the Criminal Code.

VICTIM IMPACT STATEMENT

*I was so proud of my service to Canada as a member of the Armed Forces. I gave it everything I had. I was acknowledged for my leadership and skills. But it wasn't enough. I was fired for being 'Not Advantageously Employable Due to Homosexuality'. That was devastating.*

—MICHELLE DOUGLAS

Second Legal Reform: 1969

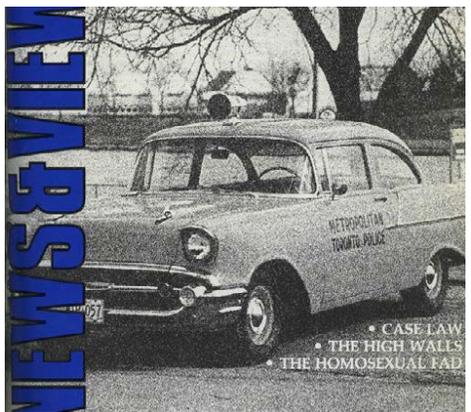
The Klippert Case

Everett George Klippert was a mechanic and gay man living in the Northwest Territories. In an unrelated investigation into arson, Everett Klippert offered to investigators that he had consensual sex in private with four men. Police charged him with Gross Indecency and he was given a three year sentence. This was not the first time he had been convicted of that charge: five years earlier, he had been sentenced to three years in a Calgary prison. Six months into the latest prison term, the Territorial Court declared Klippert a dangerous sexual offender and sentenced him to indefinite preventative detention. Klippert appealed the ruling, which had gained some notoriety, all the



Crowd at City Hall council chamber listening to speakers denounce racism and bigotry voiced in a police magazine article

Givens says racist comments no cause for firing policemen



**WE CAN'T DO IT WITHOUT YOU.**

"To Serve and Protect" is no advertising slogan. It's our sworn duty. But we can't do it without the support and respect of the people of Toronto.

"We believe that most Torontonians are proud of their police officers and we believe that we've earned that respect."

After all, this city is a safe place to live. In fact, we have less violent crime here than any other major North American city.

That's because of you. It's because you won't stand for anything less than real security for yourselves and your children. It's because you've always given your police men and women the vote of confidence they need to deal with crime on a professional level.

Now, being a cop in Toronto isn't what it used to be. But then, neither is Toronto. These days, the criminals throw more than



way to the Supreme Court. The court, in denying Klippert's appeal, wrote that Klippert is "likely to commit further sexual offences of the same kind, though, he never did cause injury pain or other evil to any person." In a dissent by two out of the five sitting judges, Chief Justice J.R. Cartwright was concerned that two consenting adults who repeatedly commit acts of "gross indecency" together must now be incarcerated for life. By the majority ruling, all sexually active homosexuals were dangerous sexual offenders.

One day after the ruling, Liberal MP R.J., Orange (Northwest Territories) denounced it and called for Criminal Code amendments "dealing with this affliction so that Canadians will not be subjected to preventive detention because they are victims of an unfortunate social disease." The Globe and Mail wholeheartedly supported the dissenting judges. There was a "sense of public outrage" arising from the Klippert case that was recognized at a December 5 1967 Liberal cabinet meeting, and soon translated into real action.

### Bill C-150 and Decriminalization

**T**he state has no business in the bedrooms of the nation." With these famous words, Pierre Trudeau began his effort to liberalize laws against contraceptives, abortion, and homosexuality. On 21 December 1967 Justice Minister Trudeau introduced omnibus Bill C-195. The bill to reform the Criminal Code of Canada contained proposals to decriminalize abortion, permit lotteries, ban publication of evidence at preliminary hearings at the request of the accused, legalize contraception, outlaw harassing phone-calls, mandate breathalyser tests, and legalize homosexual acts committed in private by consenting adults. It was inspired partly by the Sexual Offences Act passed in British parliament in July 1967, that incorporated the Wolfenden Report and legalized consensual homosexual acts by adults. It was heralded by The Globe and Mail as a "bold new program that touches us all."

The progress of the bill was waylaid by PM Pearson's resignation and subsequent election where Trudeau was elected Prime Minister. Trudeau's election campaign was idealistic. It was a campaign for a "Just Society," where individual liberty was protected and not "bound up by standard of morality which have nothing to do with law and order, but which have to do with prejudice and religious superstition." The new Justice Minister John Turner reintroduced the omnibus Criminal Code Reform Act, C-150. The bill created "Exceptions" to the Buggery and Gross



Indecency provisions, which legalized consensual acts carried out two persons over 21 years old and married couples.

Despite fairly widespread approval of legalization in Canadian society, there remained strong opposition from the Progressive Conservative and Quebecois Cr ditiste parties, and within the Liberal and NDP caucuses. Debates in Parliament revealed MPs espousing classic tropes of homosexuals being pedophiles, exhibitionists, and out to ‘convert’ the next generation of sexual deviants.

**Walter C Carter (Progressive Conservative, St. Johns West, New Brunswick) 11 February 1969:**

One of the salient features about homosexuality and the real reason for its being anti-social is the compulsion to convert, to induce others into its practise. In those nations where homosexuality has raged unchecked conversion has been a major characteristic, to the point where generations of those unable to make a free choice have been compelled into unnatural practices.

**Rene Matte (Ralliement Cr ditiste: Champlain, Quebec) 21 April 1969:**

Less than 1% of homosexuals are truly sick while the rest are nothing more nor less than vicious people. The younger ones are corrupted and raped by older ones.

**Lionel Beaudoin (Ralliement Cr ditiste, Richmond, Quebec) 17 April 1969:**

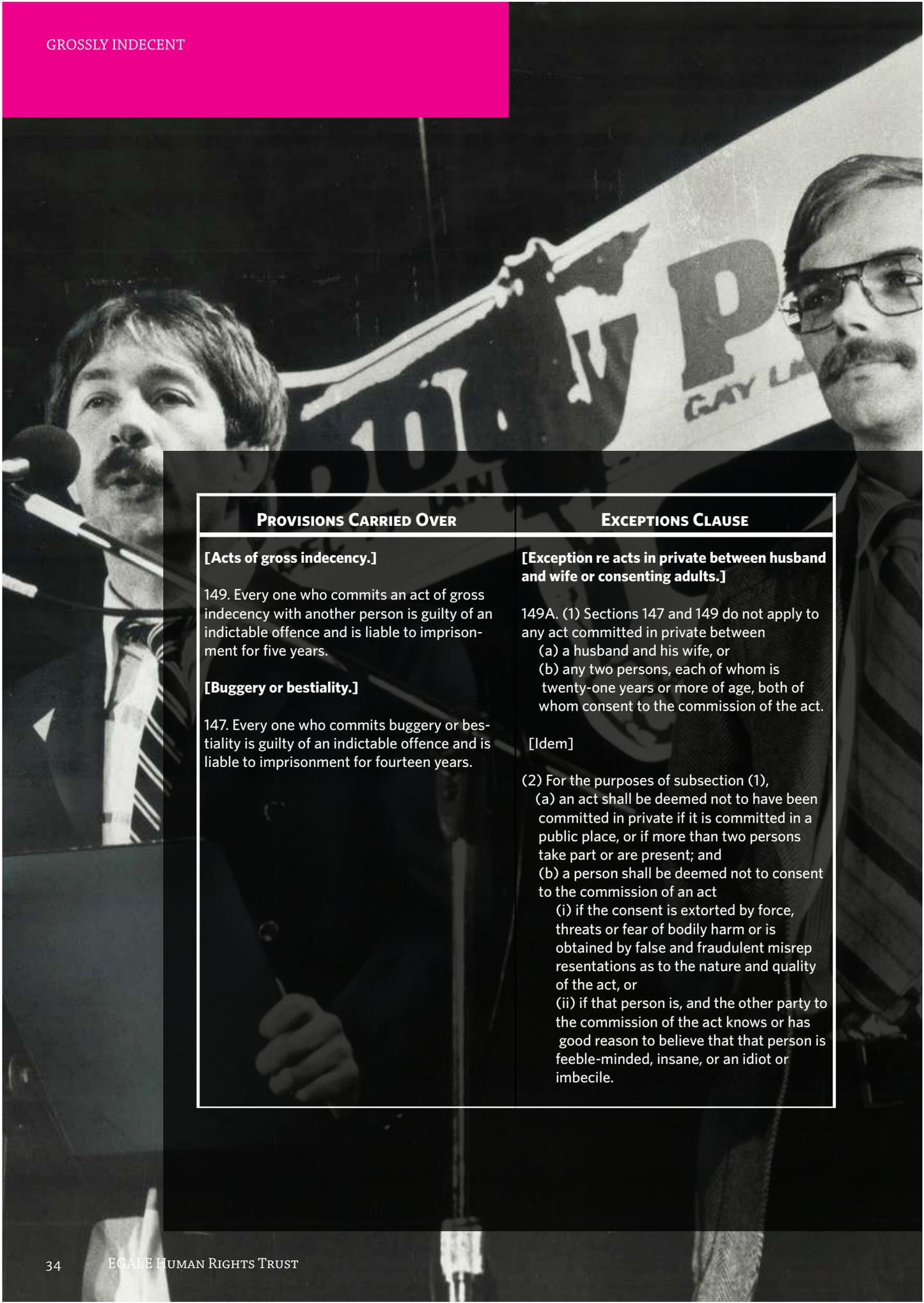
Just like the previous speaker I feel that homosexuals are sick people and that sometimes they are unable to control their sexual impulse not only towards adults but also towards adolescents.

**Mr. Georges-J Valade (Liberal: Sainte-Marie, Quebec) 17 April 1969:**

To legalize homosexuality between adults means to popularize it wilfully.

Proponents of the bill made sure to emphasize that decriminalization did not mean support or moral acceptance of the activity. John Turner emphasized that the Section 149A did not imply ‘moral approval,’ but that homosexuality was a ‘cause for medical attention or psychiatric’ treatment. In fact, he testified that Section 149A did not ‘legalize homosexuality,’ but only ‘lifted the stigma of the criminal law from a certain type of conduct which we consider to be private.’ Liberal Robert Kaplan, after describing homosexuality as ‘a form of sexual perversion’ eliciting ‘horror in most normal people,’ went on to argue that homosexuality did not ‘threaten our social order.’ Because ‘redirection of a person’s sexual preference [was] possible,’ it was preferable that the matter be ‘taken away from judges and jailers and given to doctors and psychologists.’

Canadian history is forever marked by capricious and homophobic behaviour by our elected officials and law enforcement officers. Each police charge and conviction has cost somebody a livelihood and a future. Each moment politicians squandered was a moment too late for the ‘grossly indecent.’ However, the decriminalization of a wide swathe of homosexual activity in 1969 is something to be lauded. On account of the persistence of a forward looking Justice Minister, Canada became one of the first Commonwealth countries to do so. Despite deeply ingrained societal homophobia that would last well beyond ‘decriminalization,’ these first steps had wide repercussions.



PROVISIONS CARRIED OVER	EXCEPTIONS CLAUSE
<p><b>[Acts of gross indecency.]</b></p> <p>149. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.</p> <p><b>[Buggery or bestiality.]</b></p> <p>147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.</p>	<p><b>[Exception re acts in private between husband and wife or consenting adults.]</b></p> <p>149A. (1) Sections 147 and 149 do not apply to any act committed in private between</p> <ul style="list-style-type: none"> <li>(a) a husband and his wife, or</li> <li>(b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act.</li> </ul> <p>[Idem]</p> <p>(2) For the purposes of subsection (1),</p> <ul style="list-style-type: none"> <li>(a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and</li> <li>(b) a person shall be deemed not to consent to the commission of an act             <ul style="list-style-type: none"> <li>(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or</li> <li>(ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or imbecile.</li> </ul> </li> </ul>

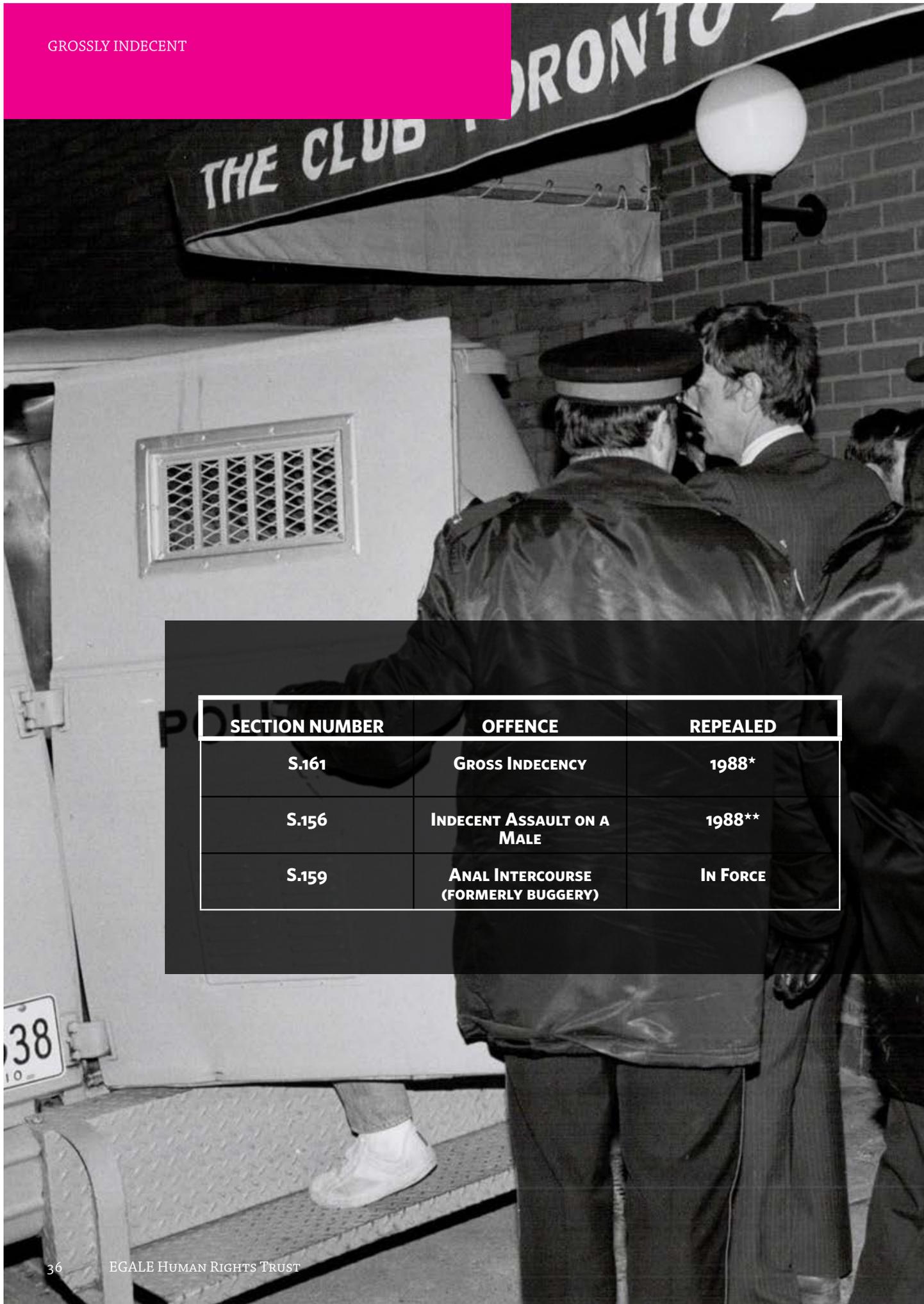
# The Criminal Law

## *The Criminal Code*

### **Introduction: We Demand**

**B**ill C-150 and the partial decriminalization of homosexual relations was but one step on the road to gay equality in the criminal law for Canada's fledgling gay communities. On August 28, 1971, homosexual men and women rallied in the pouring rain on Parliament Hill in Ottawa. They stood there in support of a recent brief, prepared by Toronto Gay Action delivered to the Federal Government exactly one week prior. Of the 10 demands collected in "We Demand," three dealt exclusively with the criminal law. We demanded the removal of Gross Indecency and Indecent Acts from the Criminal Code. We noted that Gross Indecency and Indecent Acts, while stripped of their explicitly homosexual content, remained incredibly vague and indeterminate. This left their enforcement open to interpretation by police and prosecutors, who by and large carried heavy prejudice against the gay community. We quite reasonably requested 'indecent' be replaced with a determinate list of actions. We demanded that Gross Indecency and Indecent Acts be left off of related Sexual Offender provisions. And we demanded an equal age of consent for all homosexual and heterosexual acts.

It is now 2016, and the Criminal Law remains vague and discriminatory. Since the 70's continuous and repeated activism has pointed out these problems. Successive governments have made great strides almost always accompanied by lost opportunities, foiled by capricious parliamentarians. History has repeatedly shown that vague criminal provisions left on the books, to the point of being unconstitutional, continue to be abused by police and prosecutors. Today, the criminal code still contains bawdy house laws that are used to oppress homosexual spaces. It still contains nearly 30 other mentions of 'indecent.' And it still places a higher age of consent on anal intercourse, which has been declared unconstitutional by five provincial appeals courts.



SECTION NUMBER	OFFENCE	REPEALED
S.161	GROSS INDECENCY	1988*
S.156	INDECENT ASSAULT ON A MALE	1988**
S.159	ANAL INTERCOURSE (FORMERLY BUGGERY)	IN FORCE

## Private Sexual Offences



**TOP** The late Rt. Hon. Joseph Philippe Pierre Yves Elliott Trudeau PC CC CH QC FRSCM, who first served his country as 15th Prime Minister. Mr. Trudeau also served as Prime Minister for a second term from 1980 to 1984. Mr. Trudeau started the formal legal process of queer redress in 1969 through decriminalization of consensual same-sex conduct.

### 1969 to 1988: A Subsequent History of Gross Indecency, Buggery, and Indecent Assault on a Male

**A**s recounted earlier in this report, Gross Indecency was the Criminal Code provision that outlawed homosexuality in both Britain and Canada. The concept of gross indecency came to Canada from Britain, which created the crime under the Criminal Law Amendment Act of 1885. Although Canada's definition later expanded to include heterosexual acts, the regulation of homosexual sexuality remained the main goal of the provision. This had changed very little from its creation in Canada in 1892.

In 1969 Trudeau's government did not repeal the law. It added "exceptions" to Gross Indecency and Buggery, that permitted gay sex between two consenting adults 21 years or older. "Indecent Assault on a Male" was kept on the books, a provision that criminalized "every male person who assaults another person with intent to commit buggery."

As Tom Hooper writes: "Gay sex was still grossly indecent, but the state could make an exception provided it was kept out of the public eye and resembled the

normative, monogamous sexual behaviour of heterosexuals." While legalizing certain sexual relationships, the criminal code continued to perpetuate a hierarchy of love. Homosexuals remained grossly indecent.

#### Enforcement of Discriminatory Law

Despite shielding a large segment of homosexual conduct from the criminal law, the charges of Gross Indecency and Indecent Assault were used frequently over the next two decades to prosecute homosexual behaviour that today would not attract attention from the criminal law. Data collected by the Right to Privacy between July 1982 and October 1983 show the disproportionate focus on LGBTIQ2S people by Toronto police. Gay people were the recipients of 92 charges of Gross Indecency, out of 399 total; out of 1094 charges of indecent acts, more than half (577) were served to gays.

Gross Indecency was consistently interpreted to primarily refer to homosexual acts. While there were many heterosexual prosecutions, including a pair charged with consensual cunnilingus, it was clear to judges that the purpose of the provision was to restrict homosexual activity.

The fact that the exceptions introduced in 1969 excluded multiple partner homosexual acts did not go unnoticed. In *R v. Mason* in 1981, the police charged Mervyn Lawrence Mason with operating a bawdy-house, due to his regular group sex parties. He was acquitted, the court stating that while gay group sex was a criminal act, straight sex with multiple partners was perfectly legal.

#### 1980s Efforts at Repeal

To open his second session as Prime Minister, Pierre Trudeau noted that the work did not end with 1969's Bill C-150, stating: "we intend to ensure that the

TEXT BOX HEADLINE

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*It was a sickening revelation that they made to the police officer and which he, in turn, related to the court. But it was the presence of these two ordinary-looking men which so consternated the spectators. Outwardly, they did not appear, not act, like the usual pervert. Yet there was no doubt that they were addicted to their sex inversion. They had confessed to the crime. "CITY COPS NAB PAIR OF SORDID SEX PERVERTS: 'WAS DRUNK' IS PLEA BUT COURT FINES DUO" (MARCH 5, 1959) FLASH*

laws Parliament passes are worthy of respect." Efforts began almost immediately to revise and repeal criminal law. Yet as outlined below, homophobic attitudes prevailed among Members of Parliament for nearly twenty years before the final repeal of Gross Indecency and Indecent Assault on a Male.

**The Failed Bill C-53**

In 1978, the government initiated a process of reform of sexual offences beginning with the release of a Law Reform Commission of Canada Working Paper. It recommended the abolishment of the Gross Indecency as an offence, though not as a response to gay activists, but rather because "it felt the concept of gross indecency as a criminal offence was outmoded and unnecessary." The aim of the Commission was to clarify the Code by removing anachronistic and euphemistic expressions, yet they wrote paper under the organizing principle of safeguarding "public decency."

This paper became the basis for 1981's Bill C-53. Advice from the first openly gay MP Sven Robinson of the New Democratic Party (NDP) as well as Progressive Conservative (PC) MP Pat Carney led the Trudeau government of the time to recommend revising the age of consent, lowering it from 21 to 18 years of age and to allowing multiple partners.

The bill failed to pass the House of Commons due in large part to homophobic attitudes. The various police associations and the few provincial Attorneys General who submitted briefs to the committee all opposed this move for equality. Parliamentarians both Liberal and Conservative did not have fond opinions of homosexuals, or 'non-traditional' sexual arrangements. Liberal MP Ken Robinson (Etobicoke-Lakeshore) pointedly asked then Justice Minister Jean Chretien:

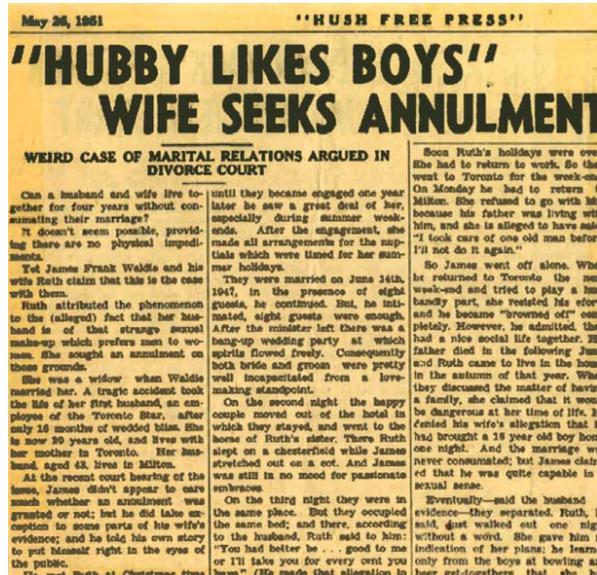
**Robinson:** I would like to know from you, Mr. Minister, who is demanding this kind of thing? Is it a group of homosexuals?

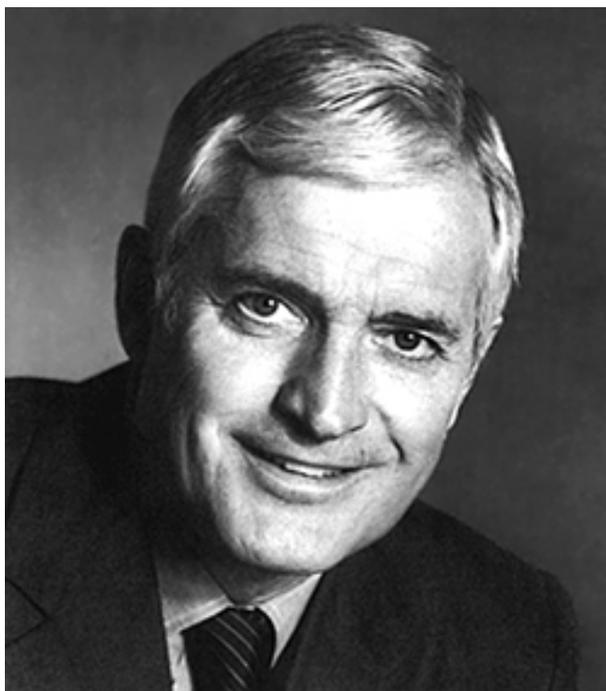
**Chrétien:** It was suggested by the Law Reform Commission in their report four years ago.

**Robinson:** Maybe that is the group of homosexuals.

**Chrétien:** Pardon?

Despite incredible internal and external opposition, the government slowly made progress. A package of Criminal Code reform provisions in 1983 were designed to modernize sexual assault law, including the repeal of the offence of Indecent Assault on a Male. This provision included a charge addressing situations in which





every male person who assaults another person with intent to commit buggery.

The homophobic and sexist nature of this law is clear on the face of it; it is underscored by the fact that the related offence of Indecent Assault on a Female always attracted a lower maximum penalty.

## The Badgley and Fraser Reports lead to Repeal

In February 1981, the Liberals commissioned the “Committee on Sexual Offences Against Children and Youths,” commonly referred to as the Badgley Committee. They published their report in August 1984, before the election that brought Mulroney to power. They recommended removing gross indecency from the code and reducing the age of consent for buggery. “A person who is deemed an adult for many important social and legal purposes should be able to have consensual sex with another adult without fear of incurring a criminal sanction.” However, they would not go as far as recommending a uniform age of consent, “in the absence of persuasive evidence that such a reduction would pose no risk to developing sexual behavior.” In other words, the risk of turning kids gay.

**TOP** John Napier Wyndham Turner, PC, CC, QC is an English born Canadian lawyer and politician, who served as the 17th Prime Minister of Canada from June 30 to September 17, 1984. The Rt. Hon. Mr. Turner was Attorney General under The Rt. Hon. Pierre Elliott Trudeau, and he was instrumental in the decriminalization of consensual and private same-sex intercourse. In an interview for the report, Mr. Turner revealed that he brought together a coalition of religious groups. Mr. Turner also opined that a similar process would be necessary for further government action to redress queer injustice.

In 1983, the Department of Justice commissioned a special 7-member group of non-partisans the called the Fraser Committee. They published the “Report of the Special Committee on Pornography and Prostitution” in 1985. Recommendations 62 and 91 of that report suggest that Buggery be revised to not apply to consenting adults 18 or over, and that Gross Indecency and the exceptions provision be completely repealed. The Committee also recommended dropping “the practice of acts of indecency” from the bawdy house law (recommendation 61). In addition, one of the unanimous recommendations of the Special Committee on Equality Rights 1985 was a uniform age of consent for sexual activity.

The Fraser and Badgley Reports did not sit and collect dust. On Oct. 29, 1986, Justice Minister Ramon Hnatyshyn introduced Bill C-15, which incorporated the recommendations of both reports with specific regard to child abuse. This included complete repeal of gross indecency provisions, the separation of buggery and bestiality, and the reduction of buggery’s age of consent to 18, a fact that was buried in the highlights of the bill. Svend Robinson successfully advocated for buggery to be renamed anal intercourse. But he was unsuccessful at producing a uniform age of consent. In a response to Mr. Robinson’s requests, Hnatyshyn testified before the committee, saying:

Medical evidence does indicate different kinds of psychological or physical harm may attach to different types of intercourse for young persons. Medical experts are not certain at what age sexual preference is established, and many argue that the age is fixed only in the later teen years. Also the question here is the heightened danger of contracting Acquired Immune Deficiency Syndrome or other sexually transmitted disease from penetration.

To him, these reasons were “quite unrelated to any question of discrimination at all.” But they are evidence of a pattern of homophobia, of a concern that children might “turn” gay, and that turning gay is a bad thing. Svend Robinson put it simply at the time: “By retaining the offense of buggery and applying an age of consent of 18 to it, the Government continues to discriminate against young gays.”

The *Act to amend the Criminal Code and the Canada Evidence Act* S.C. 1987 c.24 was given royal assent June 30, 1987. On New Year’s Day 1988, the offense of Gross Indecency was removed from our criminal code. A blanket ban on “anal intercourse” remained in the Criminal Code as Section 159, and as before was subject to two broad exceptions. The code allowed for consensual anal sex between no more than two people aged 18 or older, or between a “husband and wife.” This is exactly how it remains today. As before, the gays are the exception, mainly due to capricious worrying about children ‘turning gay.’

# Current Issues

## A. Repeal the Ban on Anal Intercourse (S.159)

### 1. It is Unconstitutional

After the Charter's equality provisions came into effect in 1985, courts across the country soon recognized the discriminatory nature of s. 159. Ontario was proudly the first provincial appeals court to strike down s. 159, proclaiming that the law violated s.15 of the Charter by discriminating based on age. In a separate concurrence, Justice struck down the law by appealing directly to gay persons' constitutionally guaranteed equality rights. She pilloried the "draconian" criminal sanctions that were placed on young people.

Anal intercourse is a basic form of sexual expression for gay men... Unmarried, heterosexual adolescents fourteen or over can participate in consensual intercourse without criminal penalties; gay adolescents cannot. It perpetuates rather than narrows the gap for an historically disadvantaged group – gay men.

Federal, Quebec, Alberta, B.C. and Nova Scotia appellate courts have all ruled that section 159 breaches equality rights relating to age, marital status, and sexual orientation and is thus unconstitutional. In Alberta's *R v. Roth*, the Crown charged the accused with violating s.159, on account of there being three people present at the time of anal penetration. The court drew directly upon previously decided cases to declare s.159 unconstitutional.

### 2. It is Still Applied

Anal intercourse remains in the Criminal Code and is in effect in five provinces and three territories. The pernicious effects of the law should concern all Canadians. To this day, there remains considerable confusion about its application. As usual, police have taken advantage of ambiguity in the law. Even after Ontario struck down the law in 1995, police continued to charge people with anal intercourse. Between 2008 and 2014 in Ontario, 22 people were charged with anal intercourse under Section 159. Two of those were youth. More than half of those charged in Quebec were youth.

### 3. It Affects Sexual Education

In addition, there are concerns that sexual education suffers because of the confusion surrounding anal sex. Justice Abella considered this way back in 1995

Ironically, one of the bizarre effects of a provision criminalizing consensual anal intercourse for adolescents is that the health education they should be receiving to protect them from avoidable harm may be curtailed, since it may be interpreted as counselling young people about a form of sexual conduct the law prohibits them from participating in (emphasis added).

This concern is justified by the facts. The federal government's age of consent FAQ page does not offer any information about anal intercourse. A local Ontario council's health website still defines anal sex as "illegal" when under 18 years old. The confusing state of our criminal law has had significant effects on prosecutorial behaviour and sexual health.

## 4. It is Unjust Under Binding International Law and Jurisprudence

Our discriminatory age of consent laws violate the International Covenant on Civil and Political Rights (ICCPR), which we ratified in 1976. By keeping the law on the books, we violate rights to equality before the law and non-discrimination guaranteed by the treaty. In *Toonen v. Australia*, the United Nations Human Rights Committee (UNHRC) found that anti-sodomy laws violate discrimination on the grounds of sex, as well as the right to privacy. The UNHCR has consistently held that differences in treatment based on sexual orientation are discriminatory.

Unequal age of consent laws have been held to violate the European Convention on Human Rights, in particular, the fundamental right to non-discrimination (Article 14) in conjunction with the right to privacy (Article 8). For example, in 1997 the age of consent issue was addressed in *Sutherland v United Kingdom* by the European Commission of Human Rights which found the continued variation in ages of consent between homosexual and heterosexual

people to be discriminatory as well a breach of privacy. Sexual Offences (Amendment) Act 2000 lowered the age of consent for homosexual sexual conduct to 16 years in line with heterosexuals. Similar decisions were reached in numerous other cases.

Unequal age of consent laws have also been found to violate the rights to privacy, non-discrimination and equality enshrined in national constitutions. These cases include *Leung v Secretary of Justice* [2006] 4 HKLRD 211, Hong Kong Special Administrative Region Court of Appeal, 20 September 2006 and *Geldenhuis v National Director of Public Prosecutions* [2008] ZACC 21, South African Constitutional Court, 26 November 2008.

Only weeks ago, Queensland announced plans to become the last Australian province to repeal discriminatory anal intercourse provisions in favour of a uniform age of consent.

## 5. We have lost too many opportunities

In 2008, the Harper Government raised the age of consent for the first time since 1890. Yet they refrained from tackling s 159, despite its clear unconstitutionality. Gay rights activists were mortified. Hilary Cook, spokeswoman for Egale Canada, suggested that the legislation must be an attempt to score partisan points: “If it was a matter of fairness

and protection of youth, why wouldn’t they repeal section 159?” A private member’s bill was introduced by Joe Comartin to the House in response to the legislation. It did not pass. As it stands today, two 17 year olds engaging in consensual intercourse remain vulnerable to arrest and prosecution.

## B. Revise the Sex Offenders Registry with regard to Gross Indecency and Indecent Assault

### 1. It captures a broad swathe of legal homosexual relationships

Gross Indecency and Indecent Assault on a Male remain listed three times in the Criminal Code: with regard to the collection of DNA evidence, Child Assault related prohibition orders, and the Sex Offenders Registry.

Those convicted of a “designated offence” as defined in s 490.011(1) are typically placed on the Sex Offenders Registry. Designated Offences are divided into four categories. First are offences with an element that includes some overt sexual aspect. The second consists of offences that may have been

committed with the intention of an offence in the first category. The third and fourth categories consist of offences which have an overt sexual component but are no longer part of the Criminal Code, such as Indecent Assault on a Male/Female and Gross Indecency. Subsections 490.011(1)(e) and (f) deal with attempts and conspiracy to commit one of the above offences.

If an offender is convicted of and sentenced under overtly sexual offences in the first, third or fourth category, a court must order the offender to comply with the requirements of the Sex Offender Registration Act (s 490.012(1)).

Today, an historical conviction of Gross Indecency will land the convicted on the Sex Offender list, regardless of whether the victim was 16, 18 or 20. A person convicted of Grossly Indecent behavior that would be legal if it occurred today will automatically be placed onto the Federal Sex Offenders Registry. If they are a resident of Ontario, they will also be placed on the Ontario's provincial Sex Offender Registry, enacted as "Christopher's Law" in 2001. They may appeal the sentence to a higher court for a termination order under 490.016 if the order is "grossly disproportionate to the public interest," but jurisprudence has not considered being registered as a sex offender a deprivation of liberty under s 7 of the Charter.

## 2. There are terrible consequences to being listed

The consequences are horrible for those listed on the registry. For many individuals, personal relationships will suffer. Employment opportunities will disappear. Registry information is shared between provinces and nations. In essence, this information will follow and haunt an individual for the rest of their life.

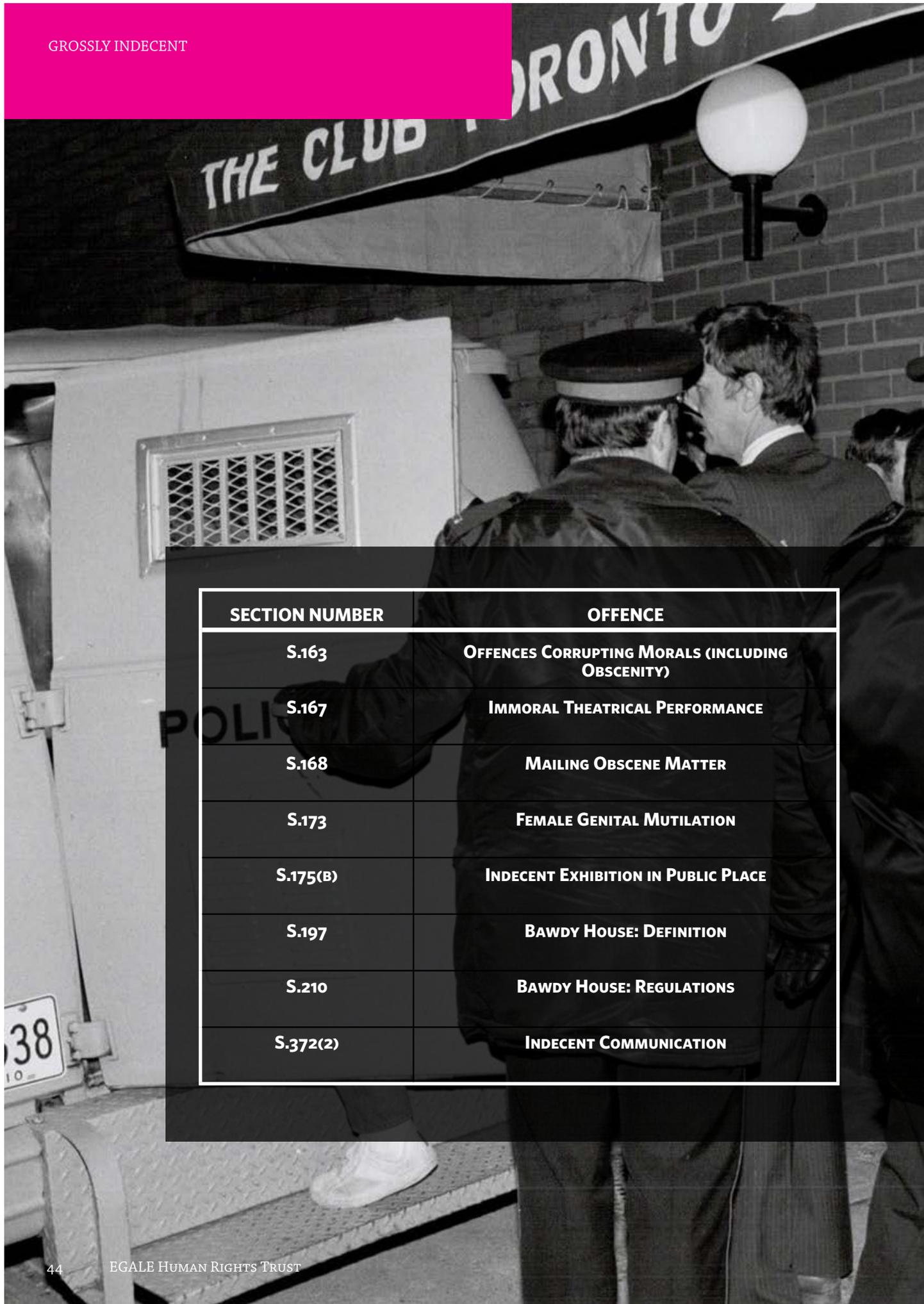
## RECOMMENDATIONS

### TOWARD CONSENSUAL PARITY

**1. Repeal the ban on anal intercourse and institute a uniform age of consent.**

**2. Add new provisions to S.490.012 that provide:**

- Judges must consider the consent and relative age of victim and accused when issuing an order.
- Judges must not issue an order if the conduct clearly falls within the legal standards of heterosexual sexual conduct at the time.



SECTION NUMBER	OFFENCE
S.163	OFFENCES CORRUPTING MORALS (INCLUDING OBSCENITY)
S.167	IMMORAL THEATRICAL PERFORMANCE
S.168	MAILING OBSCENE MATTER
S.173	FEMALE GENITAL MUTILATION
S.175(B)	INDECENT EXHIBITION IN PUBLIC PLACE
S.197	BAWDY HOUSE: DEFINITION
S.210	BAWDY HOUSE: REGULATIONS
S.372(2)	INDECENT COMMUNICATION

## Public Morality Offences

### The Law before *Labaye*

The line between public and private spheres of regulation has been blurriest regarding Canadian legislation against indecency and obscenity. Since 1868, their interpretation by the courts has remained vague and unclear, despite the fundamental principles of clarity and notice in the Criminal Code. Criminal provisions were written such that homosexuals were disproportionately on the wrong side of the law. This has resulted in the targeting and oppression of expression important to LGBTQ communities by police and administrative officials. The maintenance of public decency and morality was often simply a coded silencing directed at LGBTQ people on the margins. Whatever indecent conduct was unacceptable for the straight folks, it was even less acceptable for homosexuals.

### Jurisprudence before *Labaye*

Obscenity and indecency been euphemistic references to moral values for a long period of time. Until the late 20th century, uncertain and vague jurisprudence regarding their definitions resulted in heteronormative applications of the law, justifying homophobic police work.

#### Phase One: Hicklin Era

In 1868, the court proposed an obscenity test in *R v Hicklin*. Lord Cockburn was worried that exposure to certain material would corrupt the morally vulnerable: the lower classes, women the young, and the uneducated. A publication is obscene when “the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands the publication of this sort may fall.” Courts in this era often depended on the idiosyncratic views of judges rather than objective criteria on what might deprave or corrupt.

#### Phase Two: “Community Standards” Era

Phase Two: “Community Standards” Era

In 1959 Canadian parliament passed what is now s 163(8) of the Criminal Code. The legislation defined “Obscenity” as:

any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence

The criminal prosecution of *Lady Chatterley’s Lover* in *R v. Brodie* became the Court’s opportunity to apply the Hicklin test to this new legislation. The majority decided that the test for obscenity was now whether “the undue exploitation of sex is a dominant characteristic.” To determine a work’s dominant purpose it must be read as a whole and “[t]he court must consider whether the author had a serious literary purpose or whether the purpose was merely exploitation.” “Community standards” of decency were relevant in deciphering what “undue” meant. The court in *R v. Dominion* clarified that community standards rested between the most base and most puritan tastes. However, it was difficult to apply this test in a consistent, objective fashion.

In 1985 Dickson C.J.C, speaking for the court in *R. v. Towne Cinema Theatres Ltd.* emphasized the objectivity of the standard. “The test was concerned not with what Canadians would tolerate being exposed to themselves, but with what they would tolerate other Canadians seeing.” This served to place a gloss of objectivity on the test, but Dickson accepted a judge might infer Canadian attitudes from only their personal knowledge. The likelihood of a judge saying ‘I view this conduct as indecent but I set that view aside because it is intolerant’ were incredibly remote. According to Cossman the community

RIGHT Toronto Pride in 1989, Toronto Public Library Digital Archives.

standard of tolerance test consistently served to reinforce heteronormativity.

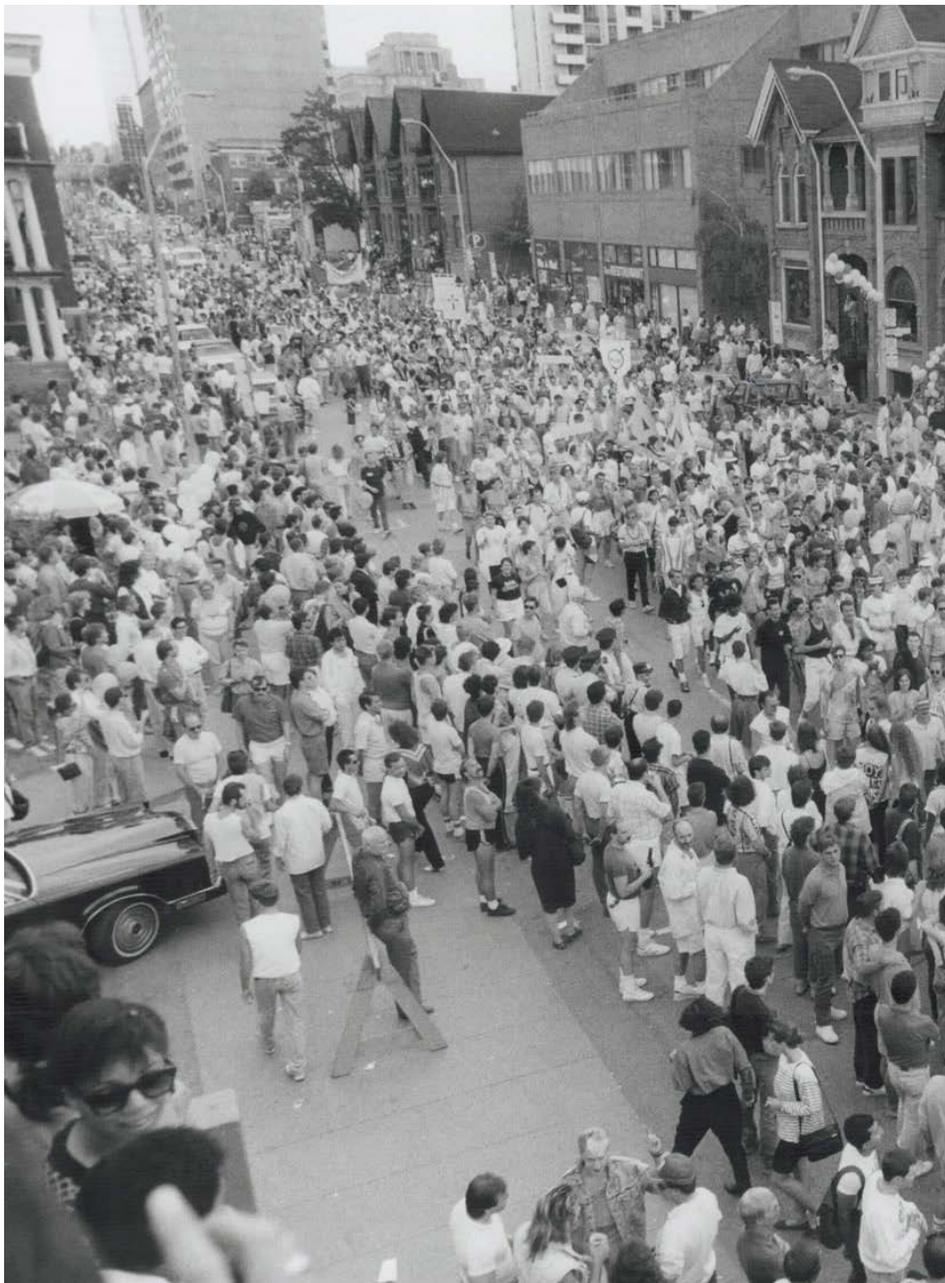
### Phase Three: Community Standards of Tolerance for Harm Era

In *Butler*, the court developed a definition of ‘obscenity’ that could hold up under Charter scrutiny. The Canadian community’s determination of the risk of harm to the proper functioning of society would determine whether something was ‘obscene.’

The Court set out a three tier framework to apply this principle in practice. The first tier contained explicit sex with violence, which would always be considered obscene. The court believed that obscenely violent materials foment negative attitudes towards sexual partners. The second tier was explicit sex without violence, but which subjected people to treatment that was degrading and dehumanizing. This would be considered obscene if the “risk of harm was substantial” to “the proper functioning of society.” The last tier concerned explicit sex without violence that was neither degrading nor dehumanizing and did not involve children. This was not harmful to society, and not considered obscene.

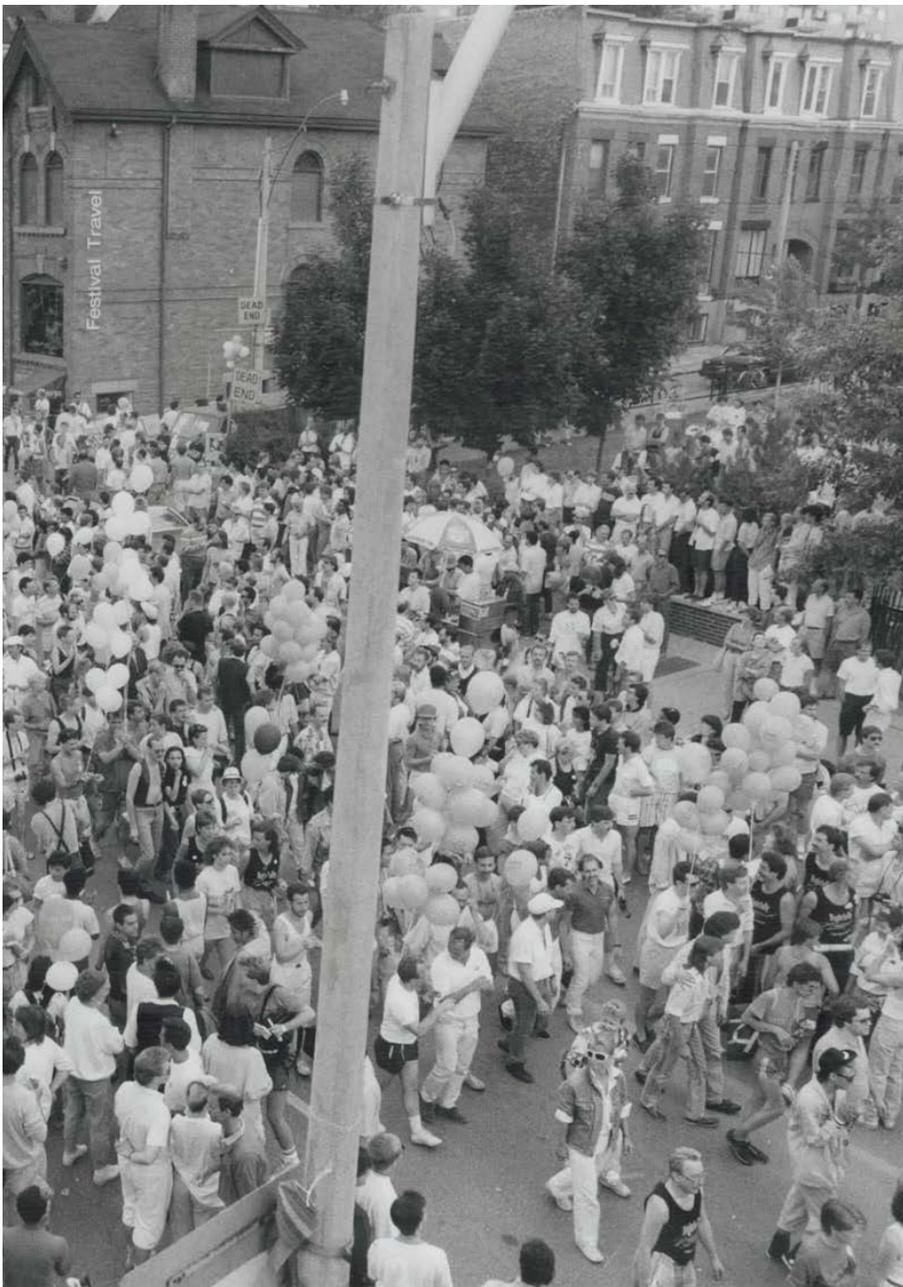
In *Little Sisters*, it was argued that the Butler standard of obscenity should not apply to “degrading”, “dehumanizing” or violent same-sex erotica. Since gays and lesbians are defined by their sexuality, pornography takes on a more wholesome purpose. For isolated and rejected homosexuals, consuming erotica can be positive and liberating. This argument was rejected by Binnie J., who noted that depictions of violence in same-sex erotica were no less harmful. The courts were not prepared to acknowledge homosexual people’s disproportionate interest in certain forms of sexual activity.

The Supreme Court confirmed the use of a community standards test for defining indecency in 1997’s *R. v Mara*. The case involved payment for consensual sexual contact between patrons and dancers at Cheaters Tavern. The appellant was charged with indecency under Immoral Theatrical Performance under s 167: “A



performance is indecent if the social harm engendered by the performance, having reference to the circumstances in which it took place, is such that the community would not tolerate it taking place.” The Court dismissed the appeal. The “public nature” of commercialized sexual conduct portrayed the dancers in what they described as a “servile and humiliating manner.” This was deemed sufficiently harmful to society, and worthy of criminal sanction.

However, the risk of harm to the dancers themselves was considered irrelevant: “The potential harm to the performers themselves, while obviously regrettable, is not a central consideration under s. 167.” The ‘exploitative’ nature of sex work was part of the reasoning behind the



proclamation of ‘indecent’. The Court was prepared to regulate expression to reduce unproven incidence of ‘harm’, but unprepared to consider the very real danger and harm that sex workers experienced daily under Canadian law.

## Enforcement before *Labaye*

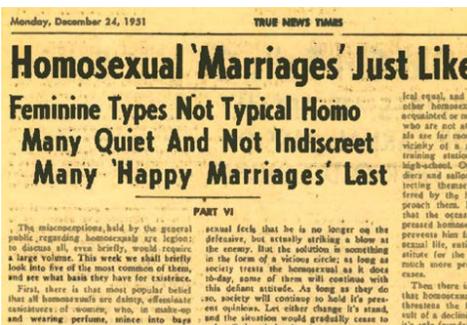
### Bawdy House Laws

#### Origin

The Bawdy House laws were created specifically to regulate brothels. In the midst of the first World War, brothels visited by male soldiers flourished in Toronto and Montreal. It was common practice to describe the brothels as “massage parlours.” Police were befuddled by brothels claiming to charge clients for only a massage. Parliament was disturbed by this growing phenomenon, and expanded the definition of “bawdy house” to include “a place of any kind kept... for the practices of indecency.” Their intention was to allow police to crack down on brothels without definitive proof of money payment for sex.

#### Definition

A common bawdy house means “a place that is kept or occupied or resorted to by one or more persons... for the practice of acts of indecency” Subsection 210(1) prohibits anyone from keeping a bawdy house. Subsection (2) prohibits anyone from being found-in a bawdy house “without a lawful excuse.” A person’s mere presence can be grounds for criminal prosecution, regardless of their actual conduct.



## First Enforcement

The use of the Bawdy-House Laws to oppress the LGBTIQ2S community began in earnest in the 1970's. In the wake of decriminalization, police forces used these laws to harass and intimidate gay patrons of clubs and bathhouses across the country. Corrupt police forces in Montreal figured that the provision could be used against gay bathhouses that were not making their payments. Once the first gay club had been convicted under the Bawdy-House Laws, police quickly understood that they had another tool to oppress gay sexuality. Police forces and prosecutors were led by the intense environment of fear and hostility bred by the HIV/AIDS epidemic, and turned their disapproving eyes to gay sex.

Most famously, in February 1981, Toronto Police initiated "Operation Soap." Using the Bawdy-House Laws as a pretext, over the course of the February 1981, 306 men were charged in surprise raids, including George Hislop. At its climax of the raids, on the night of February 5th police raided four gay bathhouses simultaneously.

## Call for Repeal

In the wake of country-wide bawdy-house raids, academics and activists identified Criminal Code reform as a key source of homosexual oppression. Activist and academic George Smith later wrote that "the work of the police in raiding the steam baths ... was an iteration of a course of action coordinated by the language of the Criminal Code." (Smith 2006, 67) The Right to Privacy Committee (RTPC) was a group founded in 1978 in response to police raids on bathhouses in Toronto. On June 2, 1982, the RTPC published a full-page advertisement in *The Globe and Mail* calling for the repeal of Canada's bawdy-house law (RTPC 1982, 12) containing hundreds of signatories. This call included repealing the restrictions on both indecent acts and sex work.

Until the Bedford ruling by the Supreme Court in 2014, the bawdy-house laws were also Canada's primary method of regulating prostitution. Their importance was how politicians excused their reluctance to repeal or alter the provisions. The Law Reform Commission, after acknowledging that reform of the law would be ideal, felt the given its broad scope, it would be better dealt with by a separate initiative. The RTPC were greatly concerned with that assessment.

The Bawdy-House Laws were the means the police had used to "circumvent the will of Parliament in the 1969 Amendments to the Criminal Code." They argued that the language of those criminal reforms still portrayed gay sex as indecent, making bawdy-houses out of private homes. This was not simply conjecture. In 1979, after advertising for sexual partners in a local magazine, a gay man named David Franco was charged with keeping a bawdy-house in his home. In April 1981, the *Body Politic* called the bawdy-house law "the state's key to the bedroom door." (1981, 13)

In 1984, the Fraser report recommended removing "the practice of acts of indecency" from the definition of bawdy house. "The effect would be to leave such acts or practices by consenting adults outside the reach of the criminal law." They recommended repealing the "found in" language, and the repeal of what is now s 211 "Transporting a person to a bawdy house" due its indeterminate breadth and infrequent use by prosecutors.

## Continued Enforcement

However, the provisions were never changed, and bawdy-house raids and arrests continued. In March of 1996, Toronto police raided gay strip club Remingtons and arrested 19 men on public indecency and bawdy-house charges. In December 2002, Calgary police raided gay bathhouse Goliath's and charged 13 patrons with being "found in a bawdy-house." In May 2003, Montreal police raided gay strip club Taboo and arrested 34 people on public indecency and bawdy-house charges. In August 2004, Hamilton law enforcement officials raided a gay bathhouse and arrested two patrons for acts of indecency.

In September 2000, Toronto police raided the Pussy Palace, a well-known local woman-only event on liquor license charges. The all-male police contingent caught plenty of women naked or nearly so. The courts understood this to entail a strip search that was unconstitutional under s 7 of the Charter. As part of the ruling, Toronto Police were required to undergo sensitivity and inclusion training with regard to LGBTIQ2S communities.

## Obscenity Laws

This section of the Criminal Code reflects "the rather old-fashioned idea that looking at images of sex and sexuality was morally corrosive." Yet it has been

the opposite of toothless. Charges under the act sometimes bring convictions, but always bring major financial hardship.

## Definition

Sections 163 to 172 inclusive fall under the heading "Offences tending to Corrupt Morals." While such a description typically indicates antiquated and rarely used provisions, the section includes controversial obscenity laws that are often used for the purpose of LGBTIQ2S oppression.

Subsection 163(8) defines obscenity as anything with, "a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence." Section 163(1) creates a variety of offences related to publishing and distributing "obscene written matter." Section 163(2) creates offences that concern possessing, exposing, or selling obscene media. Section 168 makes it an offence to mail anything that is "obscene, indecent, immoral, or scurrilous."

## Enforcement

Historically, much of the censorship has taken place at the border. In the 1950's, American gay magazine *One* reported that copies of the digest and its affiliated magazines were being held up at the border on obscenity charges. (KINSMAN SOURCE) Gay and lesbian material began to earn particular scrutiny in the late 1970s. A revised 1987 Customs Act prohibited "obscene" material, and introduced a set of notorious Customs guidelines that prohibited "depictions or descriptions of anal penetration." Sex toys and sex aids would also be considered obscene.

## Body Politic

Plenty of censorship occurred directly through the criminal law. Major Canadian gay magazine *The Body Politic* was twice charged with obscenity in the late 1970s and early 1980s. The charges involved three different trials and a rejected appeal to the Supreme Court. It became clear the magazine was targeted due to its homosexual content. Mainstream figures, including the Mayor of Toronto, came to its defense. *The Body Politic* was acquitted on each count, but these legal affairs were time consuming and incredibly costly.

## Glad Day Book Store

Customs officials had seized books on their way to Toronto's Glad Day Bookstore since the 1970s. Appealing the seizures in 1992, the Ontario Court upheld each and every one of them under the Butler test. It was never properly clear why the materials consisted of the 'undue exploitation of sex.' Spartan's Quest, for example, was a "sexual encounter without any real human relationship."

But it was not until April 1992, six weeks after the Supreme Court ruling in Butler, that Glad Day was convicted of criminal obscenity. Their crime was stocking Bad Attitude, a lesbian erotic fiction magazine. The Court found their depictions of lesbian sadomasochist sex to be obscene. Despite the Court's insistence to the contrary, it was clear that "heterosexual pornography was rarely if ever criminally prosecuted." In 2004, Glad Day was finally vindicated after appealing a charge under the Theatres Act. It cost more than \$100 000 and exhausted the bookstore's reserves.

## Labaye (2005)

The latest stage in evolution occurred in 2005, when the Supreme Court in Labaye revised what was previously known as the "community standards of tolerance" test for indecency and obscenity. Labaye operated L'Orage, a members-only sex club in Montreal. He was charged under the 'indecent acts' definition of the Bawdy-House Law for operating a bawdy house. Under a revised two-prong harm-based test for indecency and obscenity, the Supreme Court ruled that sex occurring in an exclusive sex club was not "indecent," and could not be prosecuted under the bawdy-house laws. The revised test is as follows:

First, the conduct/expression must cause harm or present a significant risk of harm. The 'harm' must be a type of harm formally recognized by the Court in the past. The Court divides that into three categories:

**1. Conduct that confronts members of the public in ways that that undermine their autonomy and liberty.** This mainly encompasses sex acts in public spaces, where they are unavoidable and explicit to passers-by. "People's autonomy and enjoyment of life can be deeply affected by being un-avoidably confronted with

## Little Sisters Book Store

In 2000 the Supreme Court heard the case of Little Sisters Bookshop in Vancouver. Customs agents, determining the material was 'obscene,' had been consistently blocking shipments of LGBTIQ2S themed books and items. A neighbouring bookstore verified their capriciousness by successfully importing the same items. A wide variety of advocacy organizations intervened in support of the constitutional challenge, including Egale, the Women's Legal Education and Action Fund, PEN Canada, the Canadian Civil Liberties Association. The Supreme Court reprimanded border authorities for acting discriminatorily towards LGBTQ communities. However, the Court did not believe that s 163(8) was problematically discriminatory in defining obscenity. Little Sisters was told to just trust Canada Customs to properly handle obscene material in the future. Only 2 years later, Little Sisters attempted to file another case against Canada Customs, which they could not go through with for lack of money.

debased public sexual displays." But this should not include commercial establishments that exclude people who do not want to see the conduct.

**2. Conduct that predisposes others to antisocial behaviour.** The court bans conduct that "perpetuates negative and demeaning images of humanity is likely to undermine respect for members of the targeted groups." Though it is not clear what indecent conduct falls under this category, sexually explicit material that includes violence has long been held to be obscene due to its negative impact on sexual relationships.

**3. Conduct that physically or psychologically harms participants.** The court here alludes to activities performed without consent, although it also says that sometimes consent may be "more apparent than real."

According to the Court "this list is not closed." Other types of harm may be added to this list in the future.

Second, the harm must be serious enough to be incompatible with the proper functioning of society. "The

## Immoral Theatrical Performance

Additional offences in this section include s 167, which creates offences related to "immoral, indecent or obscene" performances. Any operator or performer in a public theatre can be charged. The Supreme Court used the provision in R v Mara to convict the owner of Toronto's Cheaters Tavern of having performers give "lap-dances." Section 163(2) makes publicly exhibiting "a disgusting object or an indecent show" a crime, though it has been pronounced unconstitutional.

Sections 175 and 177 (Indecent Acts and Indecent Exhibition) both concern public sexual behavior. While their intent appears uncontroversial to some, they have been used by police forces to target LGBTIQ2S communities. Police would often act as agents provocateurs and entice folks to commit sexual acts in locked bathroom stalls or secluded parks. It became a useful charge in addition to the bawdy-house provisions during the Bathhouse Raids.

threshold is high," and must be judged using contemporary standards. According to University of Toronto Law Professor Brenda Cossman, the court is fairly unclear on what that means, though it apparently should require objective evidence rather than the subjective values of the judge. Chief Justice McLachlin writes, "the causal link between images of sexuality and anti-social behavior cannot be assumed."

The court found that no evidence had been raised to suggest that harm was created under any of the three categories. The autonomy and liberty of the public was not in question, as those in attendance were already pre-disposed to watch. There was no anti-social demeaning behavior portraying people as sexual objects, and everything was consensual. Risk of STDs was not relevant evidence of physical or psychological harm. In the case that there was some harm not shown by the evidence, the court says it will fail under the second prong. "Consensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society.

# Current Issues

## A. Replace "Indecency" With Clear Language

Many LGBTIQ2S activists rejoiced in the aftermath of Labaye. Professor Cossman wrote in Xtra that “The court has simply taken a very outdated and thoroughly discredited legal test and brought it up to date.”

Still, Labaye’s future repercussions are unclear. The decision confirms that sex in a private place is not indecent, but the definition of “private” may still be up for interpretation. Gary Kinsman remains concerned that concealed private sex occurring in a state-defined public place is criminalized. Richard Jochelson and Kirsten Kramar, writing just before the Bedford decision, had grave concerns over the misuse of the “indecent” component. A harm-based calculus encompasses a wide variety of potential harms. While one judge might see harm to passers-by, another might see harm to people’s bodily integrity.

The Supreme Court in Labaye was concerned with the vague nature of indecency, as crimes “should be defined in a way that affords citizens, police, and the courts a clear idea of which acts are prohibited.” Still, the concept of indecency remains vague and prone to abuse.

## B. Repeal the Bawdy-House Laws (ss 197, 210, 211) and Immoral Theatrical Performance (s 167)

The law is vague. First, it does not provide fair notice to persons of what is prohibited. Second, it does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement. Lastly, the Harper Government’s refusal to change shows the necessity of immediate political action.

### Fair Notice

Cases since Labaye have mostly validated its changes to the definition of “indecent act” within the context of Bawdy-House Laws. In *R v Ponarev*, the judge determined that a massage parlour offering masturbation was not committing “indecent acts” under the definition of a bawdy-house.

Yet, it remains unclear how Labaye would apply to a less private venue than Labaye’s L’Orage, which had a discrete membership and code-locked doors to surround it. What kind of acts of indecency will be appropriate in a location not under lock and key? Could consensual sex take place in a venue that had a weekly guest list? What kind of indecent acts could take place in a club with a large sign and a cover fee? In addition, what kind of immoral, indecent, or obscene performances does Chief Justice McLachlin believe are still covered by “Immoral Theatrical Performance”?

If we accept that “indecent acts do not encompass consensual sexual intercourse behind closed doors, what use do we have for keeping the bawdy-house laws? Martin’s Criminal Code insists that indecent acts do not apply exclusively to sexual behavior.

Non-consensual indecent acts are covered under, for example, assault law. Public sexual activity is covered under “Indecent Acts.” But it’s unclear what kind of “indecent acts” are taking place in a private location among consensual participants.

### **Arbitrary Police Enforcement**

Soon after *Labaye*, an article in Xtra documented the careful flourishing of sex clubs in Toronto. Goodhandy’s opened its doors five months after the decision. As the owner recounts, “We didn’t even start planning until after [the ruling].” Interactions with police were respectful and constructive. When an OPP officer on routine liquor license check was notified of the sex club operating in the back, she said “Oh, cool, no problem. I don’t even need to see it.” Since this time, there have been no reported cases of sex clubs or bathhouses, gay or straight, going to trial under the bawdy-house laws.

The positive response from the police force in Toronto is not because they are enforcing the law “properly.” It is because they are not enforcing the law at all. It is complete evidence of the lack of clarity surrounding the law, as described above. History proves that when police are given vague laws, they are eventually broadly misapplied. In order to safeguard LGBTIQ2S communities from further arbitrary policing, the law must be scrapped.

### **Lost Opportunities**

The Harper Government, blindsided by the Supreme Court ruling that gutted the Bawdy-House Laws of content restricting prostitution, had to repeal and replace those laws. Rather than abandoning the Bawdy-House laws wholesale, the provisions were amended to remove all references to prostitution, leaving the horribly misused law to apply to indecent acts. We cannot let this necessary reform wait for another change in government.

## **C. Revise Obscenity Laws**

There had been a halt in the use of obscenity laws as the legal system moved on to other, more serious, issues of exploitation. However, a rash of obscenity charges laid in 2013 brought the provision back to center stage. Professor Cossman was surprised. She told Xtra that the use of that section of the Criminal Code essentially stopped in the past decade. Her first reaction was, “Oh my god, I have to put my obscenity hat back on?”

Mark Marek, the owner of BestGore and distributor of Luka Magnotta’s video of a gruesome homicide, was charged with obscenity under s 163(1). Several trans and homosexual individuals have been held up at the border carrying “obscene” pornography. In two cases, Canadian Border Service Agency (CBSA) officials held entrants to Canadian LGBTIQ2S film festivals. The CBSA releases quarterly lists of all title confiscated at the border, most of them LGBTIQ2S themed pornography.

The law continues to disproportionately affect LGBTQ2S sexual expression.

## RECOMMENDATIONS

### MAKE IT RIGHT

- 1. Replace “Indecency” with clear language referring to nudity or sexual acts where appropriate.**
- 2. In order to institute a consensual, sex-positive Criminal Code, we must finally implement the recommendations of 1984’s Fraser Report and do away with the Bawdy-House laws once and for all.**
- 3. Ensure that obscenity regulations are applied fairly and equitably to gay expression by:**
  - Providing inclusivity training for enforcement officials (police, border)
  - Acknowledging and countering the disproportionate impact of obscenity on LGBTIQ2S expression.

Above: Terri-Jean Bedford, pictured in Tonda MacCharles “Supreme Court of Canada Strikes Down Federal Prostitution Laws” (20 December 2013) *The Toronto Star*.

## Sex Worker Rights

There is substantial overlap between sex workers and LGBT communities. Many sex workers are members of LGBT communities, and the venues and spaces of these two communities have often also been shared. There is a long, shared history of both sex workers and LGBT communities facing criminalization motivated by similar moral judgments and prejudice, with both prostitution-related and indecency laws used to target both communities and their spaces. Indeed, before the Supreme Court's ruling in Bedford, the definition of "common bawdy-house" included places "kept or resorted to" for "prostitution" or "acts of indecency." Following the decision, which removed the reference to prostitution in the definition (Criminal Code s. 197), the bawdy-house law now largely targets places such as bathhouses.

In a landmark December 2013 decision, *Canada (Attorney General) v. Bedford*, the Supreme Court unanimously declared that several of the provisions in Canada's Criminal Code dealing with prostitution were unconstitutional because they unjustifiably violate the rights of sex workers under section 7 of the Charter by undermining their health and safety. Specifically, the Court ruled unconstitutional the following provisions of the Code:

- the prohibition on keeping or being in a "common bawdy-house," under s. 210;
- the prohibition on "living on the avails" of prostitution, under s. 212(1)(j); and
- the prohibition on communicating in a public place for the purposes of prostitution, under s. 213(1)(c)

The Supreme Court suspended its declaration of invalidity for one year, until December 2014. In response, in November 2014, the majority Conservative government enacted Bill C-36, the so-called Protection of Communities and Exploited Persons Act. The Act created a new legal framework that criminalizes many aspects of adult sex work, including the purchase of sexual services, the advertisement of sexual services, and communication for the purpose of prostitution (including by sex workers)

Strictly speaking, the sale of sexual services remains un-criminalized in Canada – as was the case before Bedford and the new PCEPA. However, as was also the case previously, as a result of PCEPA, a web of criminal offences surrounding sex work means de facto that it is difficult for a sex worker to work without running afoul of the law – and sex workers clients are now criminalized absolutely and across the board. The legislation has been widely criticized by sex worker organizations, other human rights organizations, and members of the legal profession, as replicating many of the same harms as the previous laws, not only through effectively re-introducing much of the substance of many of the provisions already found to be unconstitutional but by also introducing new, sweeping criminal prohibitions (e.g., the ban on advertising). Those concerns exist for a wide range of sex workers operating in different ways and from different locations within the sex industry, however, sex workers have identified a concern about a disproportionately harmful effect in particular on street-based sex workers and on migrant workers, both of which groups also disproportionately include racialized women. A brief overview of

some key provisions illustrates the need for repeal of criminal laws specific to sex work, which should involve meaningful consultation with sex workers.

The PCEPA introduced a new absolute prohibition on purchasing sexual services. It also re-introduced much of the earlier, unconstitutional "communicating" offence: the PCEPA contains a prohibition of communication for the purpose of obtaining sexual services by clients anywhere, and by sex workers in a public place that is "next to" a school ground, playground, or day care centre. These laws, which make sex workers' clients guilty of a crime for any communication to obtain their services, have the same effect as the previous laws, and are particularly harmful for street-based sex workers, who are among the most marginalized people in the industry and were among those overwhelmingly targeted for prosecution under the former "communicating" provision that was struck down in Bedford. The available evidence demonstrates that prohibiting communicating contributes to the following adverse effects:

- Sex workers who work on the street experience greater displacement and isolation.
- "Sex work on the street often occurs in isolated areas where there is a reasonable expectation that anyone under the age of 18 will not be present, as well as law enforcement.
- Sex workers who work on the street experience continued fear of, and antagonism from and towards, police.
- Both street-based sex workers and indoor sex workers experience

reduced ability to negotiate clear terms of services with clients. Pressure from clients concerned about arrest to proceed as quickly as possible means less opportunity for sex workers to screen or negotiate with their clients.

- The communicating law effectively undermines sex workers' legal right to give full consent by not allowing clear and direct communication about services with clients.
- Both street-based sex workers and indoor sex workers face barriers to accessing police protection because of fear of being criminalized or subject to surveillance. Clients and sex workers are less willing to contact police about bad working conditions, exploitation or trafficking.

As a result, while criminalizing the purchase of sexual services (and communicating to that end) is said to be aimed at protecting sex workers, this type of criminal prohibition has the same effect as the former laws, and subjects sex workers to greater risks to their safety.

The law also prohibits the advertising of sexual services. While an individual sex worker does not face prosecution for advertising their own services, the provision can be interpreted as prohibiting any other party (e.g. a newspaper, website, etc.)

from publishing any prostitution-related advertising due to the laws restricting receipt of material benefit. The practical effect is to make it very difficult for sex workers to find a way to advertise, which will significantly limit sex workers' ability to work safely indoors because they will be unable to promote their services. The prohibition on advertising contributes to the following:

- Third parties who run newspapers or websites have placed restrictions on the ways that sex workers advertised, with a return to "code language" which reduces the capacity for sex workers to clearly communicate which services they offer and which they do not. This can increase misunderstandings and frustrations with clients.
- Migrant sex workers rely on third parties to advertise because of language barriers and lack of papers. Because most third parties are framed as exploiters, sex workers have less options to advertise and obtain assistance in advertising.
- Prohibiting advertising means sex workers are seeking clients in other ways – sometimes on the street – which creates significant barriers to working indoors, which research demonstrates is safer than working on the street.
- Forum boards where sex workers advertise are also targeted by this

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*It was a sickening revelation that they made to the police officer and which he, in turn, related to the court. But it was the presence of these two ordinary-looking men which so consternated the spectators. Outwardly, they did not appear, not act, like the usual pervert. Yet there was no doubt that they were addicted to their sex inversion. They had confessed to the crime.*

*"CITY COPS NAB PAIR OF SORDID SEX PERVERTS: 'WAS DRUNK' IS PLEA BUT COURT FINES DUO" (MARCH 5, 1959) FLASH*

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law. These forums are vital to sharing information with other workers that could improve security.

- Framing all third parties as exploitative reduce the opportunities for actual cases of abuse to be identified as the industry moves underground.
- 

The PCEPA also created a new offence of “receiving a material benefit,” which criminalizes all third parties who receive a financial or other material benefit from someone else’s sex work. This provision is excessively vague and complicated, making it difficult to determine who is at risk of prosecution. However, it is clear that the provision will prevent sex workers from creating professional relationships that provide ongoing, secure working conditions. In this regard, the provision creates the same harms as its predecessor, the “living on the avails of prostitution” law. The same reasons give rise to concern about the enforcement of the procuring provisions, which undermine sex workers from legally establishing non-exploitive safety-enhancing relationships. The provisions of PCEPA targeting “material benefit” contribute to the following harms:

- Sex workers have decreased ability to access the services of third parties that could increase their safety and security.
- Sex workers’ personal and professional relationships are criminalized if they cannot be proved to be “legitimate living arrangements.”
- Sex workers are unable to benefit from health and safety regulations, labour laws and human rights protection.
- Sex workers experience increased social and professional isolation.
- Sex workers’ options regarding where and how they engage in sex work are restricted even though research has established that working indoor is safer than working on the street.
- Sex workers who are migrants rely on third parties, and they often get caught up in detention and deportation sweeps when there are anti-trafficking raids—a huge incentive not to report exploitative working conditions.

In addition, the material benefit and procuring provisions are unnecessary, because other provisions of the Criminal Code already capture the forms of exploitation and abuse that it seeks to prevent.

A wide range of civil society organizations, domestically and internationally, have called for the decriminalization of sex work – meaning removing all laws and policies that make it a criminal offence to sell, solicit, purchase or facilitate sex work or to live off the proceeds of sex work. Most significantly, a large number of sex worker organizations and networks, including the Global Network of Sex Work Projects, support the decriminalization of sex work as a means to realize sex workers’ human rights, articulated most widely in a global consensus statement. Canadian sex worker organizations have also called for instead for the development of a made-in-Canada model that is informed by (and improves upon) the New Zealand model, which is founded

in safety for sex workers rather than criminal regulation, and in which sex worker organizations had a substantial role. Calls for decriminalization have also come from, among others, UNAIDS, the Global Commission on HIV and the Law, Open Society Foundations, the Global Alliance Against the Traffic in Women (GAATW), the UN Special Rapporteur on the right to health, Human Rights Watch and Amnesty International.

## Requests and Recommendations

Canada is at a critical juncture. Sex workers continue to experience human rights violations. We have an opportunity to create a legal framework that ensures safe working conditions for sex workers and respects the rights of all Canadians by taking the following steps:

- As a matter of urgency, the federal government should repeal all sex work-specific laws introduced through the Protection of Communities and Exploited Persons Act (formerly Bill C-36 in the previous Parliament).
- 
- Until such time as the PCEPA is repealed, provincial Attorneys-General should create a policy directing Crown counsel that it is not in the public interest to charge or prosecute individuals who are alleged to have violated the following provisions of the Criminal Code:
  1. the prohibition on the purchase of sexual services (section 286.1(1));
  2. the ban on communication for the purposes of prostitution (sections 213 and 286.1(1));
  3. the amended procuring provision and the prohibition on materially benefitting from another person’s sex work (section 286.2(1), (3), (4), (5), and (6) and section 286.3(1)); and
  4. the ban on advertising (section 286.4).
- In consultation and collaboration with sex workers, federal, provincial and territorial governments should create new legislative frameworks for sex work in Canada which address meaningful protections against violence and exploitative working conditions, and to ensure safe working conditions for sex workers. Consultation should include mechanisms – both financial and social to allow for anonymity – for sex workers living and working in more marginalized contexts to participate.
- Removing criminal laws is a necessary but not sufficient step towards respecting and protecting sex workers’ rights. It needs to be accompanied by investing in social programs that prioritize youth and adults in poverty, access to education, homelessness, and economic empowerment. It also needs to prioritize policies that are founded in sex workers’ well-being rather than criminal intervention.



# Police and Prosecutors

When Pierre Elliott Trudeau uttered his famous phrase, “the state has no place in the bedrooms of the nation”, our communities dared to dream that state-sponsored persecution under the criminal law would end. While Mr. Trudeau launched our communities on a trajectory toward equality, subsequent events illustrate that his pioneering amendments to the Criminal Code were

not nearly enough. Our community’s painful legacy of persecution has been centuries in the making.

The administration of the Criminal Code and other federal laws, notably the Customs Act, was still executed in a manner that was contrary to Mr. Trudeau’s stated intentions. In fact, prosecutions for buggery increased in Canada after

his reforms. The institutions responsible for law enforcement have been slow and at times reluctant to embrace equality. Conscious and unconscious homophobia, biphobia and transphobia have tainted the enforcement of both laws that target our communities and laws that are apparently neutral but whose enforcement has adversely impacted our communities.

## Framework for Our Analysis

### 1. Jurisdiction

The situation is complicated by jurisdictional issues. Although the federal government has jurisdiction over the Criminal Code, the administration of justice lies primarily within the provincial ambit. Moreover, in Canada’s larger urban centres, where our communities tended to concentrate, municipal police services are responsible for arresting suspects and laying charges.

Nonetheless, the federal government has an important role to play. The Criminal Code can place restrictions on the powers of police and prosecutors. The RCMP is under federal control and is the largest police service in Canada. Some important federal statutes, such as the Customs Act, are enforced by federal public servants. The federal government also appoints justices of the superior courts. Furthermore, the federal government is in control of military justice for Canada’s armed forces and operates correctional facilities containing the largest number of detainees.

Most importantly, the Government of Canada is duty bound to protecting the Charter rights of all Canadians.

### 2. Freedom of Information and Access to Information

In creating this report, Egale has faced considerable challenges. Few official inquiries have investigated the full scope into this phenomenon as it affects our communities. The Deschamps Report is a notable exception, providing official insight to the phenomenon of sexual abuse and discrimination within the military.

Our research has examined statutory provisions, jurisprudence, archival materials, and secondary sources. Researchers also conducted interviews with a number of academic authorities. Given the paucity of information about current practices, Egale has corresponded with police forces across the country, provincial Attorneys General, and Directors of Public Prosecution, soliciting information to inform our findings. The form of letter is set out as an appendix to this report. Regrettably, our expedited time frame did not allow these officials much time to respond.

Responses varied. Some failed to even acknowledge receipt of our letter. Others

acknowledged receipt but did not provide any information by the time we had to finalize our Report. Several responded indicating that we would be required to follow the procedures set out in the Access to Information Act, something that our schedule could not accommodate. Some provided us with detailed responses. A chart setting out the requests made and responses received is set out as Appendix X to this Report.

A comprehensive fact finding effort is central to the truth and rehabilitation process. The information we received is incomplete. In connection with this report, Egale recommends a concerted effort to maximize the available data on current practices, policies, and procedures. This is especially important where a given Police Service has not failed to cooperate, but has simply insisted on the following of formal processes.

Notwithstanding the incomplete information, we believe some conclusions can be drawn legitimately based on available information at this juncture, and recommendations can be made for further action.

### 3. Marginalized Communities and Intersectionality

Despite efforts at progress, officials responsible for the administration of justice have faced many challenges in upholding our Canadian values of equality and fairness.

Egale embraces the feminist framework of intersectionality. We recognize that multiple facets of individual identity overlap and intersect within lived experience, producing qualitatively distinct experiences of social oppression. For example, a Two Spirited sex worker in conflict with the law in Vancouver's Downtown Eastside cannot parse the oppression she faces based on her class, indigenous status, sexual orientation, gender identity or gender expression.

Our communities, however, present a unique challenge for those responsible for the administration of justice. We are the only marginalized community that, as a group, were historically classed as criminals. The deep seated impact that this has had on our legal system and its culture cannot be overstated.

## Inclusion Within the System for Marginalized Communities

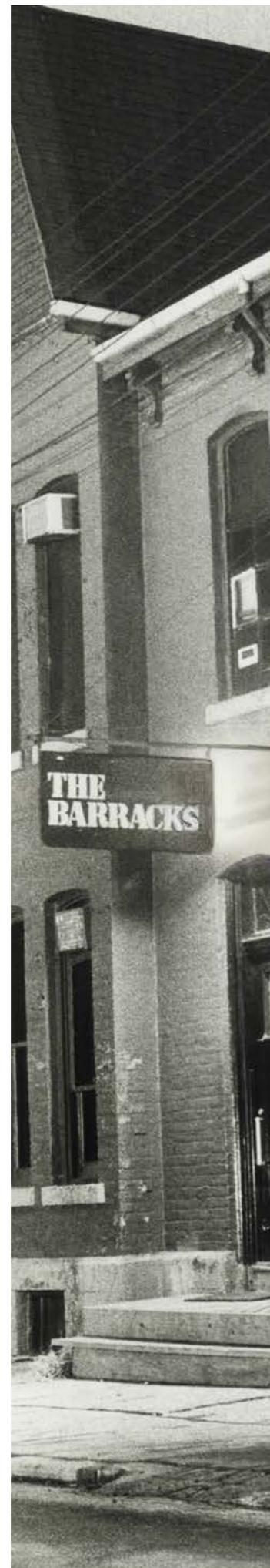
It is common for both our communities and those working within the administration of justice to see the relationship as “us” and “them”. In fact, our communities have always played a role in the administration of justice. However, for many years, we were forced to be invisible.

### Progress

In recent years, progress has been made toward developing inclusive public policy. Canada now has its first sitting trans judge. There are several openly gay or lesbian judges. Unlike Australia, however, not one person who publicly identifies as a member of the LGBTIQ2S communities has ever been appointed to the Supreme Court of Canada, nor held the office of Chief Justice in any province. The legacy of historic barriers cannot be overstated. More work is needed to make judicial appointments more diverse and inclusive.

Several Attorneys General and police services have reported to us that they have policies encouraging recruitment and respect for the dignity of our communities. Some police services have LGBTIQ2S liaison officer and liaison committees. We note that the Toronto Police Service in particular has played a leadership role, and that the Ontario Association of Chiefs of Police has developed an admirable standard policy document. It is not clear the extent to which this policy has been adopted within Ontario, still less whether it has been shared outside Ontario.

The Quebec Government has been more ambitious still. It has issued two provincial action plans on combatting homophobia, with significant dedicated financial resources. We salute Quebec for once again showing leadership as it did in banning sexual orientation discrimination back in 1977. Once again, however, we do not see any evidence that other provinces have been made aware of this excellent initiative in Quebec. Certainly none appear to have followed them, despite the fact that two Premiers of other provinces are members of our communities. This problem is more likely to do with the classic Canadian “silo” problem than any reluctance, judging by the general positive response in principle our inquires received from all jurisdictions.



One does not need to be operating in a large environment to show leadership, however. One of the most challenging current issues for law enforcement is the handling of trans prisoners. We were pleasantly surprised to learn that Yukon already has a policy in place in this regard, even though they have yet to encounter a self-identified trans prisoner.

Yukon and other jurisdictions have engaged with Egale in conducting training and sensitivity programs. The response has been encouraging. We applaud these initiatives and encourage their further development.

## Problems

Despite efforts at reform, some problems persist and further work is needed. Special problems have already been identified within the armed services by the Deschamps Report that call for a shift in military culture. In addition, similar problems appear to exist at the RCMP. As Canada's national police service, the RCMP must lead by example.

We concur with the Ontario Human Rights Commission (OHRC)'s recent report that human rights training should be mandatory for all police officers. In fact, it should be mandatory for all working in the administration of justice. We would perhaps go further than the OHRC, in that we would want officials responsible for the administration of justice to be specifically trained in the problematic nature of the laws identified in this report and the negative impact they have had on our communities. Specialized training will need to be included regarding the question of our communities as a historic "criminal class."

The fundamental law of our land is our constitution, including the right to equality set out in s 15(1) of the Charter. Any person working in the administration of justice should be familiar with the requirements of that law.

### Example: *Little Sisters*

We note that in *Little Sisters Bookstore v Canada* (*Little Sisters # 1*) that the federal Government avoided the harsher remedy that the minority of justices would have imposed by pleading poor training of Customs officials and undertaking to be of good behaviour in future. That case is unique, as by the time it reached our country's highest court, the federal Government conceded that there had been deliberate unlawful discrimination against that important community institution in Vancouver.

We have uncovered no evidence that appropriate human rights training was in fact ever implemented for these Customs officials, although Egale has worked with the RCMP.

Having engaged in a lengthy and expensive battle all the way to the Supreme Court, the bookstore felt it had evidence that Customs had not lived up to the undertaking it had given to the Supreme Court.

Its resources having been grossly depleted by the actions of the Customs officers and the first legal battle, the bookstore sought an award of advance costs so that it could afford to try to establish that Customs officials were not living up to their promise to change their ways. In its decision in *Little Sisters Bookstore v Canada* (*Little Sisters #2*), to its everlasting shame, the Supreme Court refused to grant an advance costs award. Despite an interesting mea culpa dissent by Justice Binnie who had written for the majority in *Little Sisters # 1*, *Little Sisters # 2* must join a trilogy of notoriously unjust rulings by the Supreme Court of Canada affecting our community, including the *Klippert* and *Gay Tide* cases.





Above: 1. Participant at the Pride March in Toronto, 2012. Image: CC flickr/Stephen Wepler. 2. Eddie George Ing.

It is noteworthy that the Crown pleaded financial concerns in objecting to the advance costs award sought in *Little Sisters # 2*, and yet seemingly had no compunction about spending countless millions of dollars engaging in and defending deliberate discrimination targeting that community institution. Human rights training is long overdue for Customs officers. The lack of training at this point should not be a defence, as it was in *Little Sisters # 1*, but a reason for imposing harsher remedies on the federal Government.

## *Trans, Intersex and 2S Prisoners*

Like all Canadians, member of our communities sometimes find themselves in conflict with the law. However, like all Canadians, members of our communities are entitled to be treated respectfully while in custody of the state. Moreover, while in detention, the health and safety of detainees are the responsibility of the state.

Given that crimes were created that historically targeted our communities, there is a higher risk that members of our communities will be in conflict with the law. Since Two Spirited people are indigenous and given the well-recognized problem of over representation of our indigenous persons in criminal detention, Two Spirited people face special challenges in this area.

It is not well known that one of the earliest cases respecting the dignity of gays and lesbians involved prisoners. In *Veysey v Canada*, Chief Justice Iacobucci of the Federal Court of Canada (as he then was) held that prisoners were entitled to conjugal visits with their same-sex spouses on the same basis as prisoners with opposite sex spouses.

Although there are a number of problems facing Canada's prisons, the concerns for our communities focus on trans, intersex and Two Spirited people. Although there have been a number of human rights complaints and the like involving trans, intersex and Two Spirit people, there has been no legal precedent clarifying their rights equivalent to *Veysey*.

There is as much ignorance about trans, intersex and two spirited people as exists in the general population of Canada. However, the detention context provides an environment

### **COMMUNITY LEADER EDDIE GEORGE ING**

*Being born with Klinefelters syndrome and growing up intersex was both difficult at times, with many medical and psychological exams and high anxiety for both myself personally and for my siblings and parents. Fortunately, I have a loving wife, an unconditionally loving and devoted family and friends. Like many intersex people, my status is invisible to strangers and that eases the challenges in one way. However, it also means that we intersex people have trouble connecting with each other, being understood by others or getting our society to recognize that we even exist.*

—EDDIE GEORGE ING (JUNE 6, 2016)

structured in a manner that is likely to cause problems. Strip searches are a common feature of the detention process. A loss of privacy is inherent in the detention environment. Our system was designed based on a premise that everyone is cis-gendered, that gender is binary in nature, and that it is appropriate to create facilities and procedures premised on that male-female.

The reality of the lived lives of trans, intersex and two spirited people is qualitatively unique and intersectional. For them, gender identity often exists along a spectrum, and can be fluid. They are also among the most marginalized members of our communities, and are at high risk for violence. The stress of dealing with a world that is so hostile toward them makes them more apt to have mental health challenges. The tragic plight of inadequate services for all persons with mental health challenges in the detention environment has an especially adverse impact upon them.

Recently in Ontario, a human rights complaint brought by prominent trans activist Boyd Kodak, elevated these issues into the fore. On June 2nd, 2016, Kodak, the Government of Ontario, and Toronto police, agreed on a settlement which will see parties “set out terms to, within 18 months, develop and revise policies, procedures and training for ‘interaction with trans people,’ from searches to detention, in conjunction with the Ontario Human Rights Commission and the trans community.” Kodak initiated his complaint after, subsequent to being arrested by York Region police and transferred to Toronto police, he had his penile prosthesis confiscated and was placed in a women’s holding area, in spite of the fact that he identifies as a male, a fact which was reflected in his personal documents. While Kodak did articulate that he was content with the settlement, he also noted that “[he] will never forget the humiliation” and that he is “still suffering from post-traumatic stress disorder and depression.”

The Government of Canada can and must play a leadership role in this area. It has the largest number of detainees in its care. It also operates the country’s largest police service, the RCMP. In addition, the federal government is responsible for our system of military justice. There is an urgent need for the Government of Canada to develop policies and procedures that ensure the safety and the dignity of trans, intersex and Two Spirit Canadians.

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## *Historic Offences*

Elsewhere in this Report we have described the historic offences that targeted our community. We also describe a number of current crimes that affect our community that should be repealed. Unfortunately, simply repealing these offences will not guarantee that they will not be used against members of our community in future.

This is because of the well-established concept under Canadian law that a person may be charged with a crime that no longer exists, provided that the conduct complained of occurred at a time when the crime was still on the books. We begin with analyzing why prosecuting certain historical provisions such as Gross Indecency is inconsistent with fundamental principles of legality and morality that are apparent in our justice system.

New law does not apply retroactively. The law to be applied in court is the law that was in place at the times the incidents were alleged to have occurred. This is why charges and convictions under historical claims of Gross Indecency remain common.

Gross Indecency was defined in case law as “a very marked departure from the decent conduct expected of the average Canadian in the circumstances.” The surrounding circumstances must be taken into account, including the relative ages of the participants, the nature of their relationship, and whether there was consent. This is an objective test, defined using the community standard of tolerance for that particular conduct.

Therefore, there are two elements of the offense that must be proven before any historical conviction. First, what was considered “decent conduct” at the time of the incident? And second, what would have been a “marked departure” from that conduct?

There are three reasons why convictions under Gross Indecency must be restricted.

1. The law was discriminatory against homosexuals
2. The law is increasingly vague and challenging to apply as time passes.
3. The law has been unsuccessfully challenged through the Courts.

## 1. They Discriminate Against Homosexuals and Have an Adverse Impact

The community standard of tolerance in determining what constitutes “indecent” was a consistently homophobic standard. The stigma that faced homosexuals actually justified harsher treatment than heterosexuals.

The community standard of tolerance, until at least 1985’s *R v Towne Cinemas*, gauged the average person’s opinion of what consisted of decent conduct for average Canadians. In doing so, the standard necessarily considered the average Canadian’s stigma towards same sex love. It would in fact be inappropriate to not take widely-held prejudiced opinions into account.

In 1983, in the Ontario District Court case of *R v Delguidice and Smith*, a 27 year old and 18 year old were convicted of Gross Indecency after a consensual act of fellatio in a locked bathroom stall. In order to determine an objective standard of indecency, the presiding judge heard expert evidence from the Chief Psychologist at the Toronto General Hospital, Dr. Julius Goldsmith, who felt that the act of fellatio, in a place where it is practically impossible for any member of the public to view the act, did not represent a marked departure from decent conduct. He suggested that gay people might seek anonymity in places like washrooms because of the great deal of stigma associated with being known as a homosexual, stating “[t]here may be concern about loss of job, loss of spouse, loss of friends, status and so forth”. A parent who discovers their child engaging in homosexual behavior would react with “horror”, but people “may very well be prepared to tolerate something they don’t really like.”

The presiding judge noted that fellatio does not itself constitute an act of Gross Indecency. However, the stigma towards homosexuality noted in the above expert evidence, and the “real disapprobation in our society attached to homosexuality”, proved that an act of fellatio between two men would be grossly indecent. Horrifically, the prejudice and stigma that trailed homosexuals in the 20th century aggravated the likelihood that the accused would be punished.

This reasoning was very clear to the presiding judge in 1981’s *R v. Mason*. The case involved a charge under the bawdy-house laws for hosting an orgy in the accused’s private home. He stated:

“...no one would seriously contend that a sexual act, between consenting adults of the opposite sex, in a private home, could be considered grossly indecent. An act of gross indecency, as contemplated by the Code, includes an act between homosexuals whether done in private or in public.”

The differential application of the provision was clear to Manning and Mewett, who wrote in their influential Criminal Law text that:

“...it is not difficult to put a meaning to the concept of gross indecency between two males or between two females... [but] a difficult question arises as to what is gross indecency when committed between one male and one female.”

The community standards of tolerance test failed homosexuals. Discrimination was not a flaw, but a feature. The idea of relying on the majority’s standard of what sexual acts are “abnormal or perverted” was antithetical to the reasoning behind the 1969 Criminal Code reforms – to remove personal perspectives of morality and sin from the oppressive reach of the law.

### Section 15(1) of the Charter of Rights and Freedoms reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.

If the Charter applied retroactively, gross indecency provisions would clearly violate Section 15(1) by discriminating against homosexual sex, in intent and in practice.

## 2. They are Vague

Two principles of legality state that laws must be sufficiently clear and precise. As Joseph Raz puts it, the rule of law prescribes that the “law must be capable of guiding the behaviour of its subjects.” A law must be clear enough to be understood, and otherwise it should not be a valid law. This principle is codified in s 7 of the Charter of Rights and Freedoms. In criminal contexts, “a vague law prevents the citizen from realizing when he or she

is entering an area of risk for criminal sanction”.

The law is vague. It was purposefully created vague. “Gross Indecency” was never defined. Yet in 1988, when the Ontario Court of Appeal assessed a contemporary charge of Gross Indecency for vagueness, and found it sufficiently clear – for homosexuals.

We believe that in the context of historical convictions, the law can no longer said to be clear. It should not be possible for judges to apply the law appropriately.

In a recent Ontario Superior Court Case, *R v LaPage*, the presiding judge noted that she must determine the “decent conduct” expected of an average Canadian in 1970. The “community standards test” determined decent conduct by looking at Canadian society’s average social and sexual mores. “The question that immediately arises is: How am I supposed to know that?” She reflected that it would be inappropriate to rely on her subjective personal experience as a 17 year old in a Catholic high school. For the community standard to be applied 44 years in the past, expert evidence must be required to determine average opinion.

Yet this approach remains problematic. McLachlin in *Labaye* calls out the “community standards test” indecency used before 1985. It is not just inconclusive, but almost impossible to determine, even in the face of expert evidence:

“On its face, the test was objective, requiring the trier of fact to determine what the community would tolerate. Yet once again, in practice it proved difficult to apply in an objective fashion. How does one determine what the “community” would tolerate were it aware of the conduct or material? In a diverse, pluralistic society whose members hold divergent views, who is the “community”? And how can one objectively determine what the community, if one could define it, would tolerate, in the absence of evidence that community knew of and considered the conduct at issue? In practice, once again, the test tended to function as a proxy for the personal views of expert witnesses, judges and jurors. In the end, the question often came down to what they, as individual members of the community, would tolerate.”

In 1974, in the Gross Indecency case of *R v. St. Pierre*, the presiding judge notes that “[a]ttitudes relating to sexual behaviour are constantly changing.” Attitudes towards sexual behavior and the definition of community were in constant flux. To rely on a flawed community standard of tolerance with evidence from 30 years ago is discriminatory.

### 3. The Courts have not Assisted

The jurisprudence places members of our community in a predicament.

It is nigh impossible to challenge historical convictions on Charter grounds. In *R v Stevens*, the Supreme Court confirmed that the Charter cannot be given retrospective application. Since Gross Indecency was only on the books until 1988, the equality provisions of the Charter only applied for three years.

Given the reasoning in the numerous cases that have struck down s 159 as violating s 15(1), there can be no doubt that the charges of gross indecency and indecent assault on a male would not have survived Charter scrutiny. It is fair to say that at the time, while some heterosexual acts might be considered “grossly indecent”, all homosexual acts would be considered grossly indecent (including lesbian sexual activities, of course). Accordingly, the law applies a double standard.

The Court in *Bastien* was met with a recurring argument that the charge of “Gross Indecency” is vague, discloses no objective test, and places the defence at a considerable disadvantage. Of course, Mr. Labouchere designed it intentionally in that manner to make it easier to convict “deviants”, that is homosexual and bisexual men. The Court had none of the context, but found that what would be considered ‘grossly indecent’ “would be determined by social standards that existed at the time the offence occurred.”

Mr. Labouchere’s “stacked deck” continues to have currency decades after Parliament saw fit to repeal the offence. Yet in addition to applying a homophobic social lens in assessing the conduct, the Court ruled that a modern prosecution using this patently discriminatory law did not involve a violation of the Charter. Why? Because to do so would involve ‘retroactive’ application of the Charter!

Could a defence counsel argue that a prosecution today using these unsound charges involve a violation of section 15(1) that could give rise to a remedy under section 24, such as a stay of prosecution? The answer to us appears to be clearly yes. However, oddly enough, we have been able to find only one reported decision where this argument was advanced and it was quickly rejected.

The Bill of Rights (SOURCE) was active prior to the Charter, but is quite ineffective at ruling legislation inoperative. In 2016, in *R v. Bastien*, the Ontario Superior Court of Justice heard a constitutional challenge of the Gross Indecency law under both the Charter and the Bill of Rights. In addition to holding that the Charter was inapplicable, the Court laid out a selection of jurisprudence holding that Gross Indecency was not rendered inoperative by the Bill of Rights.

*Bastien* involved allegations of serial pedophilia, and what lawyers euphemistically call, “bad facts”. It may be that our jurisprudence has evolved in a way the is prejudicial to member of the LGBTIQ2S communities because so often such bad facts have been present. It may also be that police, prosecutors, defence lawyers, and judges are unaware of the disturbing historical context of these offences. Certainly, with the exception of the issue of the implications of HIV disclosure in cases of sexual assault, we have uncovered no evidence that anyone in the criminal justice system is being educated about the problematic nature of these historic offences.

As a result, members of our community facing these historic charges find themselves stuck in a time warp, facing charges that have been repealed, being judged by bygone homophobic social standards, and being deprived of their hard-won Charter rights. Historically the Criminal Code has been replete with homophobic, bi-phobic, and transphobic crimes. It would be unconscionable for such charges to be laid 40 years hence. If s 159 were repealed this year, a police officer in 2047 could charge a gay man for having violated s 159 in 2015. This is unjust, and completely unacceptable. Simply repealing the offending provisions does not adequately protect our communities from persecution using the Criminal Code.

We have recommended a number of offensive laws be repealed. We cannot

countenance a situation where they continue to haunt our communities for decades into the future. It is nothing short of disgraceful.

## Recent Examples

Many in our communities were shocked earlier this year when the Rev. Dr. Brent Hawkes CM was charged with Gross Indecency and Indecent Assault on a Male. The charges relate to an incident or incidents that allegedly transpired 40 years ago in Nova Scotia. The charges were laid by the RCMP in Kentville, Nova Scotia. The case is being prosecuted by a senior Crown Attorney in Kentville. Under Nova Scotia's Public Prosecutions Act, he acts under the ultimate direction of the Director of Public Prosecutions and the Attorney General for Nova Scotia.

There were three principle reasons for the shock arising in connection with the Hawkes case. First, Rev. Dr. Hawkes is an eminent member of our community. He performed the first legal same sex marriages in Canada, and was the first openly gay man to receive the Order of Canada. Second, over 40 years have passed since the incident allegedly occurred. Third, the two charges at issue were repealed over 30 years ago.

# Laying out a Response

## Statute of Limitations is not an Appropriate Response

Regarding the passage of time, unlike certain American states, Canada has no statute of limitations for criminal offences. We recognize the difficulties faced by a prosecutor in proving a stale case and an accused person in defending themselves after a lengthy passage of time. We also recognize, however, that there are many reasons for which victims of Sexual Assault may delay speaking out. Male victims of Sexual Assault by other males may be deterred in speaking out because of the stigma associate with gay sex. Canada has faced many historic cases of historic Sexual Abuse, often by repeat offenders and sometimes in a systemic way as with residential schools. We do not suggest that a statute of limitations is an appropriate response. It is not likely to be acceptable to Canadians as it would impact a range of crimes, such as war crimes.

### Training

We have found no evidence that any training takes place regarding the offensive history of these impugned provisions. There have been no policies or procedures guiding the actions of police and prosecutors.

While such training, policies, and procedures may be desirable, given the diversity of Canada's prosecutors and police and the need for immediate change, we do not think this is a complete or effective solution. We believe that what is required is statutory protection from prosecution under these archaic and discriminatory laws.

In doing so, we also are sensitive to the reality that sexual assault was wrongly downplayed or even tolerated in the past in Canada. True cases of sexual assault, involving an act of violence or a child, should be a crime. If all prosecutions were barred under all of the offending provisions, there would remain no legislative tools with which to punish such wrongful historic misconduct.

We call for a principled approach to this issue. In principle, the laws that targeted or adversely impacted our communities should be permanently banned. The only exception should be the law that most closely reflects our current values in connection with sexual assault, namely that the crime is seen as an act of violence and not one of sexual deviance.

### Age of Consent Parity

We wish to be very clear up front: Egale does not condone pedophilia. Historically, the general age of consent has been 14 years of age. We agree that allegations of historic same sex sexual activities with persons under 14 years of age should be prosecuted. We are concerned that no double standard be applied, namely that the age of consent not be higher for incidents involving two persons of the same sex.

For the same reasons of principle, we agree that the general rules regarding actual consent should apply equally to same sex behaviour as opposite sex behaviour.

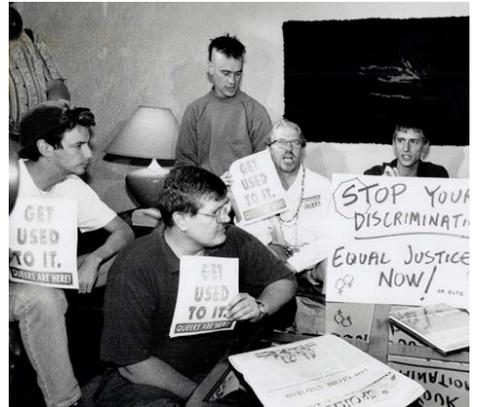
Canada now operates under a nuanced regime where the appropriate age of consent varies from 12 to 18, depending on the circumstances. It is clear that the philosophy behind the current rules involves three general principles: (a) the ordinary age of consent should be sixteen, (b) persons between 12 and 16 should not have their consensual sexual behaviour criminalized if their sexual partners are of a similar age, and (c) to protect teenagers from abuse by persons in positions of authority, in those special circumstances, an increased age of consent of 18 is appropriate. Provided these rules are applied equally to opposite

sex behaviour and same sex behaviour, Egale does not quarrel with these principles and rules.

A dilemma is presented by the fact that the age of consent was increased for sexual acts between members of the opposite sex from 14 to 16 in 2008. In creating an exception for historic crimes, should we apply the test of what would be lawful for opposite sex activity then, or what would be lawful for same sex activity today?

As discussed elsewhere in this Report, this issue also arises in connection with the question of pardons. The exceptions to be created from mass programs of pardon, or “expungement” as it is called in Australia, sought to except from the general amnesty, those who engaged in conduct that is today seen as sufficiently morally blameworthy to deny the convicted person the benefit of relief. As we will see, slightly different approaches have been taken in different jurisdictions.

We believe that the correct approach is the one taken in jurisdictions like Austria. The test should be whether the conduct would have been a crime at the time the offence is alleged to have been committed if the conduct involved persons of the opposite sex. We say this for several reasons. First, it is a well-established general principle of our criminal law that the accused person can benefit from subsequent changes to the law but cannot be penalized by changes to the law. Second, as this crime clearly violates the Charter and we are carving out and an exception from our important general principle of banishing these crimes to the history books, the exception should be as narrow as reasonably possible. Finally, to do otherwise would be to effectively perpetuate a discriminatory difference in the age of consent.





## RECOMMENDATIONS FROM HISTORICAL OFFENCES HONOUR THE TRUTH AND MAKE IT RIGHT

**Accordingly we recommend that a provision be added to the *Criminal Code* as follows:**

1. In recognition of the fact that the following crimes were bad laws that should never have been enacted by previous Parliaments and that these crimes are inconsistent with the Charter of Rights and Freedoms, from the date this amendments comes into force no prosecutions can be initiated or continued for the following crimes: anal intercourse, gross indecency, bawdy-house, etc.
2. In recognition that sexual assault has been and should be a crime characterized by violence rather than sexual deviance, while also recognizing that such have been framed in terms that are sexist and homophobic, prosecutions for the crime of indecent assault on a male may be initiated or continued with the approval of the Attorney General of the province or territory. In considering whether or not to allow the prosecution to be initiated or continued, in addition to the normal test applied in deciding whether to proceed with or continue a prosecution, the Attorney General shall consider the following factors: (i) the age of the alleged victim, (ii) whether the allegation involves repeated sexual assaults or multiple victims, and (iii) whether the benefits of specific deterrence outweigh the adverse impacts the charges may have on vulnerable communities.

## HIV Non-Disclosure

Homophobia marked the response to HIV from the outset when the first cases of the illness were reported in 1981 – and at first labelled “gay-related immune deficiency” (GRID). The LGBT community played, and continues to play, a key role in mobilizing the social and political response to what remains one of the world’s greatest public health challenges. This includes resistance to the stigma, discrimination, and unhelpfully punitive laws that impede effective responses to the epidemic by undermining HIV prevention efforts, access to testing, and access to care, treatment, and support. In addition, gay men (and other men who have sex with men) remain the single largest “key population” represented among those living with HIV in Canada and among new HIV infections each year, according to the epidemiological data reported by the Public Health Agency of Canada. The overly broad criminalization of HIV non-disclosure is one of the most pressing issues for people living with HIV in Canada – and therefore a pressing issue for the LGBT community, even though, in absolute numbers, to date the number of apparently heterosexual persons criminally prosecuted in Canada for alleged non-disclosure of their HIV-positive status is higher than the number of gay men thus prosecuted.

As of today, more than 180 people have been charged for alleged non-disclosure of their HIV positive status to their sexual partners. Canada has the dubious distinction of being one of the world leaders in criminalizing people living with HIV, after the US and Russia. People

are usually charged with the offence of Aggravated Sexual Assault, even in cases where no transmission occurs or the risks of transmission are zero or close to zero. Aggravated Sexual Assault is one of the most serious criminal offences in the Criminal Code. It is a charge traditionally used for violent rape. It carries a maximum penalty of life imprisonment and a registration as a sexual offender (presumptively for a lifetime, but for a minimum of 20 years before an application can be made to void the designation).

While most of the people who have been charged for non-disclosure in Canada are men who have sex with women, an increasing number of cases are against gay men or other men who have sex with men. In 2015, half of known new prosecutions were against gay men living with HIV.

All legal and policy responses to HIV should be based on the best available evidence, the objectives of HIV prevention, care, treatment and support, and respect for human rights. There is no evidence that criminalizing HIV non-disclosure has prevention benefits. But there are serious concerns that the trend towards criminalization is causing considerable harm by increasing stigma and discrimination against people living with HIV, spreading misinformation about HIV, undermining public health messaging about prevention, affecting the trust between HIV patients and their physicians and counsellors, and resulting in injustices and human rights violations. As a result, organizations such as the

Canadian HIV/AIDS Legal Network – and many other HIV organizations across Canada and internationally -- oppose criminal charges for non-disclosure in cases of otherwise consensual sex, except in limited circumstances (such as when people are aware of their status and act with malicious intent to infect others).

In fact, the numerous human rights and public health concerns associated with the criminalization of HIV non-disclosure, exposure or transmission have led not only HIV organizations, but also the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Development Programme (UNDP), the UN Special Rapporteur on the right to health, the Global Commission on HIV and the Law, respected jurists, and women’s rights advocates (including leading feminist legal academics), among others, to urge governments to limit the use of the criminal law to cases of intentional transmission of HIV (i.e., where a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it). In 2013, UNAIDS developed a guidance note providing critical scientific, medical, and legal considerations in support of ending or mitigating the overly broad criminalization of HIV non-disclosure, exposure or transmission. This document contains explicit recommendations against prosecutions in cases where a condom was used consistently, where other forms of safer sex were practiced (including oral sex and non-penetrative sex), or where the person living with HIV was on effective HIV treatment or had a low viral load.

## GROSSLY INDECENT

However, based on the 2012 Supreme Court of Canada decisions of *R v Mabior* and *R v D.C.*, a person living with HIV in Canada is at risk of prosecution for non-disclosure even if there was no transmission, the person had no intention to harm their sexual partner, and the person used a condom or had an undetectable viral load. This broad sweep of the criminal law goes far beyond any limited use of the law as recommended by UNAIDS and the other international bodies noted above. It has attracted widespread criticism from civil society groups, including, but not limited to, HIV organizations that work on the front-lines doing critical HIV prevention and support work. It has moved nearly 80 of the country's leading HIV clinicians and scientific experts to issue a consensus statement in 2014 that clarifies the risks of HIV transmission associated with various acts, and in doing so, to state their concern about the way in which the criminal justice system has lost its way in its understanding of the scientific evidence available. It has also provoked judicial criticism by other judges in Canada.

In an effort to minimize the misuse and over-extension of the criminal law in relation to HIV transmission or exposure, guidelines for police and prosecutors have been developed in some other jurisdictions – most notably England & Wales, and Scotland – through collaboration between HIV organizations, scientific experts, human rights advocates, and prosecutorial and police services. However, sadly, even though significant consultations have been undertaken, and detailed proposals for reasoned guidelines have been developed for consideration by civil society groups, to date, such bodies in Canada have refused to adopt guidelines that would curtail the overbreadth of the criminal law. In fact, in some instances, they continue to pursue charges aggressively, even in situations of zero or exceedingly minimal risk of HIV transmission.

The wild over-reach of Canadian criminal law in dealing with alleged HIV non-disclosure, both in its definitional scope and its interpretation and application by prosecutors and judges, must be restricted, in the interests of both human rights and public health.



TOP Source: Totem pole [Shawn Kent, Flickr. Creative Commons License.]



TOP Source: Canadian Gay and Lesbian Archives.



## RECOMMENDATIONS ON HIV DISCLOSURE LAW MAKE IT RIGHT

We exhort federal and provincial Attorneys General to take action to limit the scope and application of the criminal law, in keeping with best practice, and international, evidence-based recommendations, as follows:

- Limit the use of the criminal law to intentional transmission of HIV.
- At a minimum, in no circumstances should the criminal law be used against people living with HIV who use a condom, practice oral sex, or have condom-less sex with a low or undetectable viral load for not disclosing their status to sexual partner(s).
- Ensure that the offence of Sexual Assault is not applied to HIV non-disclosure as it constitutes a stigmatizing misuse of this offence.



TOP A female First Nations woman depicted in a Catholic Church's stained glass.

## RECOMMENDATIONS

### HONOUR THE TRUTH AND MAKE IT RIGHT

**The “We Demand an Apology Network” has drafted a series of demands in an attempt to bring some justice to these affected LGBT individuals. In their submission, the Network demands the following:**

1. An apology, pardon, and redress for all of those affected by the Canadian national security campaign against LGBT members of the armed forces and civil service
2. A process of implementing an apology, pardon, and redress that directly includes LGBT individuals who were affected by these policies
3. The apology and redress process should be broadly-defined so as to include all of those who were detrimentally affected by the purge campaigns
4. The process of apology, pardon, and redress be expedited while many of those affected are still alive
5. That the review for apology, pardon, and redress include all of those who were convicted of consensual homosexual activities after 1969 under Criminal Code provisions covering gross indecency, buggery, acts of indecency, and the bawdy house laws

# Military and Bureaucracy

## We Demand

From the 1950s to the 1990s, thousands of LGBT workers in the Canadian military and civil service were terminated from their careers. The Canadian government was directly responsible for implementing a “national security” purge campaign, which defined LGBT people as a threat. This part of Canadian Cold War history is not popularly known, especially in comparison to the McCarthy-era red scare purges in the United States, which targeted LGBT people and communists alike. As scholar Gary Kinsman has argued, “unlike the United States, where the campaigns against queer people in the military, for example, were very public, in Canada it was kept very secret.” In June 2015, a group of those affected by these state policies, called the “We Demand an Apology Network,” declared that the Canadian government must take responsibility for these “historical wrongs.” In their statement in June 2016, the “We Demand an Apology Network” has called for an apology, pardon, as well as redress. They demand that those affected by these policies should have a central role in the developing the redress process.

These policies aimed at implementing a purge in the military and civil service stem from a broader history of sexual and gender colonization. Prior to the arrival of Europeans, some cultures in North America had specific gender roles for Two-Spirited people. Cultural approaches varied, but in general the

Two-Spirit identity cannot be understood within the cis binary. Two-Spirited individuals were often expected to perform community service roles, including nurses, spiritual guides, and cultural mediators. Service and social responsibility form a central component of Two-Spirit identity and history. The policies of the Canadian government served to silence this cultural identity, and instead constructed as a threat anyone who did not adhere to the rigid European heteronormative definitions of gender and sexuality.

Attitudes toward service members who had homosexual sex wavered in the Canadian military during World War II. According to historian Paul Jackson, “there was no simple, consistent way that homosexuality could be understood. Any one homosexual action could be interpreted in different ways, depending on who was judging whom.” Though inconsistent in the application of discipline, LGBT service members were affected by policies aimed at regulating sexuality in the military. Many of those who were suspected of committing homosexual acts during the war were discharged. These military discharges established the early national security regulations that emerged in the postwar period. According to Kinsman, “the military came to be increasingly organized through forms of textually mediated discourse that mandates courses of action in military procedure and discipline.” LGBT service members were

defined as having a “psychopathic personality,” these regulations were expanded in the 1950s and beyond.

The Canadian government conducted its purge campaign in the military and civil service during the post-war period. Gary Kinsman and Patrizia Gentile argued that the national security campaign through the Cold War “was directed against differing forms of political, social, sexual, and cultural subversion.” Sociologist Mary Louise Adams characterized the Cold War as a time in which “particular forms of heterosexuality were constructed as normal, and therefore socially desirable.” Starting in 1946, a panel consisting of the National Defense, External Affairs, and the RCMP began conducting background checks on civil servants who were believed to be security risks. According to Adams, most of those identified by the RCMP were due to “moral failings” or “character weaknesses,” including “homosexuals, and the parents of illegitimate children, among others.” National security agents constructed LGBT workers as a threat because of a perceived “tendency to compromise” with Communists. These Cold War anxieties were combined with the disruption to gender relations as a result of the mass mobilization of women into the workforce during World War II. Kinsman and Gentile argued that “women, including lesbians, and gay men destabilized patriarchal work relations in

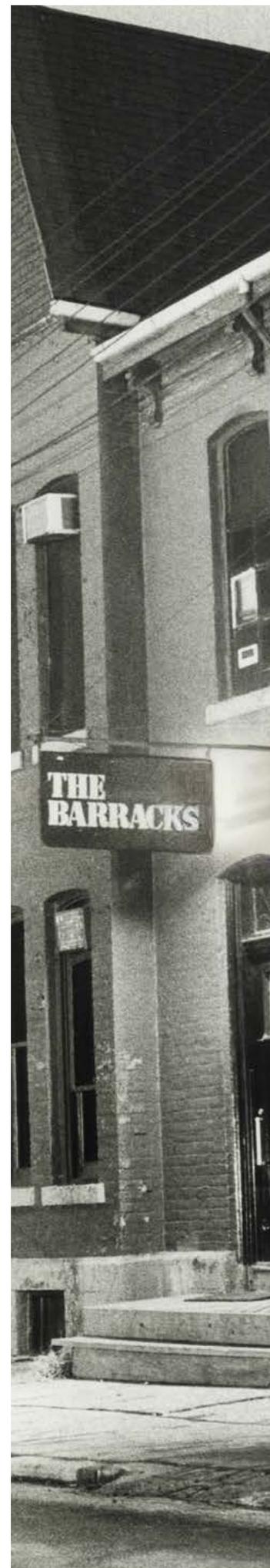
which civil servants were expected to dedicate their lives to the service of state and nation.”

The Canadian civil service underwent vast expansion in the postwar period, and with it the elaboration of a national security regime aimed at LGBT civil servants and service members. Kinsman and Gentile argued that there was an “expansion of the production, communication, and classification of documents relating to national security.” According to Daniel J. Robinson and David Kimmel, “by the late 1960s the total number of RCMP files concerning homosexuals reached roughly 9000.” As part of these investigations was a project coordinated by Carleton University professor Robert Wake, infamously dubbed “the Fruit Machine.” Most of the individuals suspected of homosexuality by the security panel could not be confirmed with any reliability. Dr. Wake’s task was to invent a device that could objectively measure an individual’s sexuality. His “fruit machine” measured the pupil response, heart rate, and perspiration rate when a subject was shown hetero and homo erotic images. In spite of attempts to make the fruit machine work, the project was abandoned in 1967. The technology of the test was limited in that it was difficult to adjust for height, pupil size, and the distance between the eyes. Furthermore, the security panel had difficulty attracting “suitable subjects for testing purposes”; RCMP officers and other members of the civil service refused to be volunteers as “normal” in the experiment, lest they be revealed as “fruits.” The end of the fruit machine project did not signify the end of the national security purge aimed against LGBT service members and civil servants.

This campaign to identify and purge LGBT workers in the civil service was most active in the 1960s. According to the “We Demand an Apology Network,” the purge in the Canadian civil service extended to the Department of Finance, the Post Office, Central Mortgage and Housing, Health and Welfare, Public Works, the Ministry of State for Science and Technology, the Department of Industry, Unemployment Insurance, the National Film Board, and the Canadian Broadcast Corporation. LGBT workers affected by this purge faced various sanctions, including dismissal, transfer, demotion, denial of opportunities for promotion, being forced to live a double-life, and other forms of systemic discrimination. The national security campaign against LGBT members of the civil service waned by the mid-1980s.

LGBT members of the Canadian military continued to endure injustice through the 1970s, 1980s, and 1990s. While much of the focus on this issue has been placed on male soldiers, women were targeted, especially starting in the 1970s. In his study on LGBT political movements, Tom Warner detailed the investigation of two lesbians in the Canadian Armed Forces in 1977. Pte. Barbara Thornborrow faced an involuntary discharge after an investigation was launched into her personal life. According to Warner, “she acknowledged being a lesbian whereupon she was given the choice of being expelled after signing a document admitting her sexual orientation, or accepting psychiatric treatment.” The same year, Barbara Cameron and eight other lesbian service members in Newfoundland were purged. These two incidents were protested by early LGBT activist groups, including the Lesbians of Ottawa Now and Gays of Ottawa. While they forced the Department of “National Defense to explain its actions,” this did not lead to a change in policy. The “We Demand an Apology Network” submission of June 2016 states that investigations in the 1970s and 1980s had a particular focus on lesbians. Their report states that “five women were arrested at gunpoint and dismissed from the Canadian Armed Forces Base in Shelburne, Nova Scotia in 1984 as ‘hard-core lesbians.’”

LGBT service members were directly affected by these repressive policies, investigations, and outcomes. These members of the armed forces were subject to surveillance. In some cases, RCMP officers contacted an individual’s family and friends, subjecting



them to intense personal questions. They were often demoted in their security clearances, which “outed” the service member on the military base. Beyond these investigations, the We Demand an Apology Network lists several examples of the ways in which service members were affected by the purge. Those who were “confirmed” as being lesbian, gay or bisexual faced numerous consequences. In addition to some members being dishonorably discharged, others were honorably discharged, had notes on their service records, were denied benefits, severance, and pensions, and lost opportunities for promotions and pay increases.

Beyond the financial, professional, and social consequences of the Canadian government’s national security campaign, LGBT members of the armed forces and the civil service faced intense psychological trauma. Todd Ross volunteered to join the Canadian Armed Forces in 1987, and served on the HMCS Saskatchewan as a Naval Combat Information Officer. While serving, he was brought under investigation by the Special Investigation Unit of the Military Police. The 18-month investigation into Ross ended with him admitting his sexuality while attached to a polygraph machine:

Near the end of the week, I was picked up and taken for the polygraph exam. At this time, I was exhausted by the investigation and wanted to see the end. I broke down and told the investigator that yes – I was gay. This was incredibly hard for me as I was still in denial. I was then asked to repeat the statement under polygraph exam.

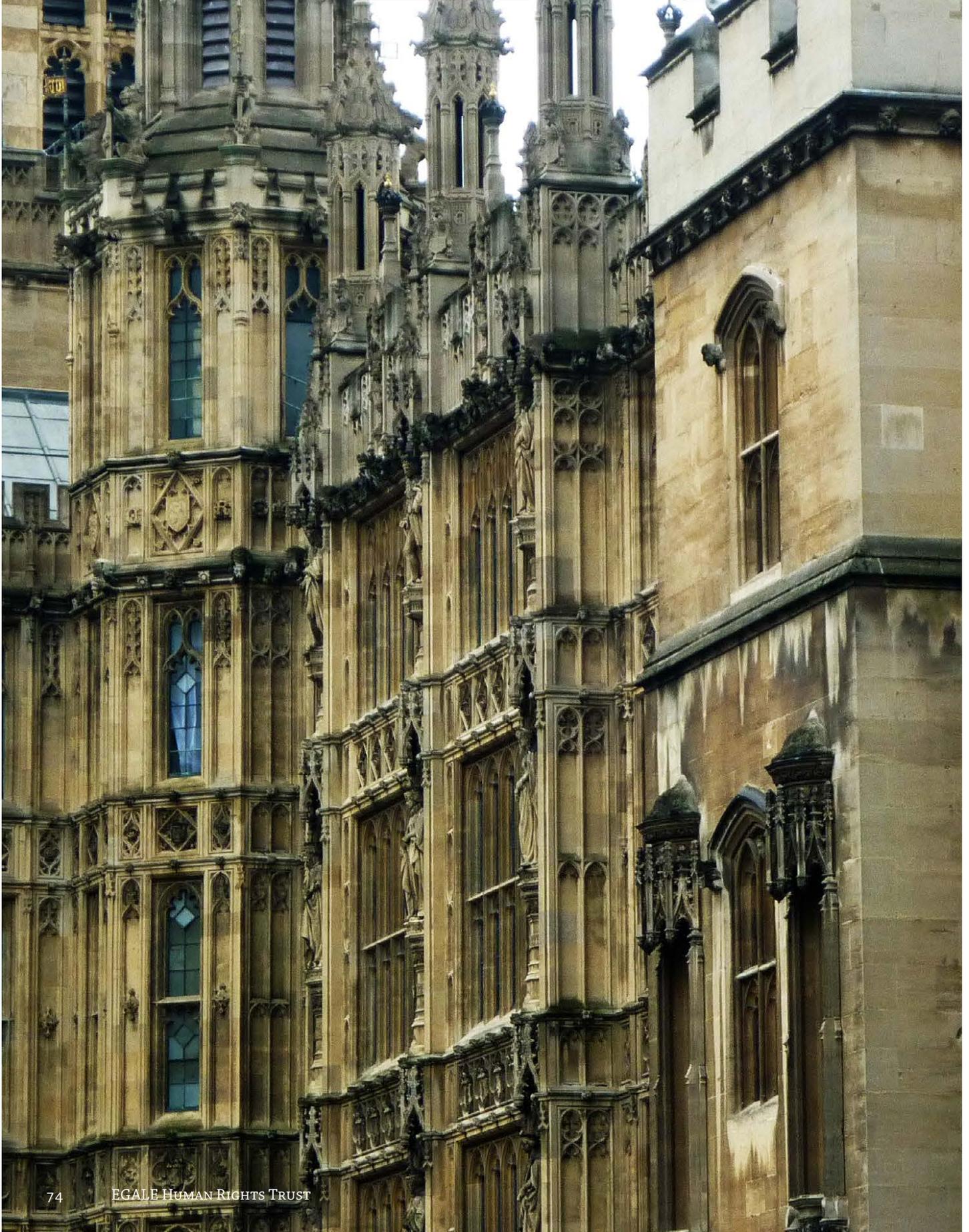
As I sat in a chair in front of this stranger from Ottawa – hooked up on a polygraph machine – with a recording device on and facing a two-way mirror – I tearfully admitted that I was gay.

At that moment I felt like an empty shell and that I had no future. That this admission would stay with me forever as part of my record [meant that] my dreams had ended.

Ross was given an ultimatum: accept an honourable discharge, or spend the remainder of his naval career performing “general duties,” with no hope for promotion or advancement. Ross opted to accept the discharge, but the damage had been done: he could not speak to his family out of shame, his friends out of fear of rejection, he became suicidal, and he felt that he betrayed his country. The We Demand an Apology Network has documented more of these personal stories from LGBT members of the armed forces and civil service.

The Canadian military was forced to end its exclusionary policies in 1992 as a result of a court action launched by Michelle Douglas, an Operations Officer with the central detachment of the Special Investigations Unit. Shortly after her assignment, she was questioned over her sexuality, in which she admitted to being a lesbian. In January 1990, Douglas commenced a lawsuit alleging \$550,000 in damages and violations to her Charter rights. Prior to the case reaching trial, the Canadian Forces agreed to a settlement, and they ceased their exclusionary policies against LGBT service members.





# International Law

## LGBTIQ Oppression in the Commonwealth

### A. Commonwealth Countries and the Reinforcement of British Anti-Sodomy Laws

Depending on the interpretation used, 75 countries in the world criminalize same-gender intimacy in one form or another. The vast majority of those countries are members of the Commonwealth of Nations and these laws were initially imposed during the period of British colonization. Therefore, the statutes did not, at least at the outset, reflect local cultural values or morals. However, it is important to note that some of these laws have subsequently been updated by the now independent nations and while a few have been repealed, the majority of criminalizing states have opted to retain and in some case enhance the penalties for same-gender love.

Post-colonial support for these pieces of legislation led the former Special Rapporteur on LGBTI Human Rights at the Inter-American Commission on Human Rights (IACHR), Jamaican Tracy Robinson, to opine that much of the Commonwealth is now “in love” with anti-sodomy laws. The statutes are ironically seen by some leaders as representative of local values and it is homosexuality which is rejected as being a “western imposition.” A recent discussion with a Jamaican diplomat in Canada supports Ms. Robinson’s findings. When

it was suggested to him that the country’s 1864 British colonially imposed anti-sodomy law was in fact an “alien legacy” he pointed out that Jamaica has been independent for well over 50 years and so could have repealed the law had it wished to do so. Instead, the Parliament deliberately tried to insulate this statute from judicial review in the 2011 Charter of Fundamental Rights and Freedoms. Further, the recently enacted Sexual Offences Act enhanced the consequences for those convicted of consensual private same-sex activities by requiring, inter alia, that such persons must be registered as sex-offenders and always carry a pass, or face up to twelve months imprisonment and a \$1million fine for each offence.

In many respects the colonizing project is now complete as the formerly colonized nations are now espousing values once central to the imperial power, even when the metropole has expunged itself of these discriminatory edicts. To paraphrase Jamaican national hero, the Right Excellent Marcus Garvey and echoed decades later by the legendary reggae artiste, the Right Honourable Robert (Bob) Marley, those former British territories who embrace anti-sodomy laws must emancipate themselves from mental slavery and none but themselves can free their minds. This is important to bear in mind when considering what Canada’s role could or should be in the process

of decriminalizing sodomy across the Commonwealth and globally.

### B. The Effects of Continued Criminalization in the Commonwealth

A comprehensive review of the criminalisation of homosexuality across the Commonwealth was prepared by the Human Dignity Trust in 2015. This report outlines the extent to which British colonial laws, similar to those that were imported into Canada, continue to put at risk the lives and human rights of sexual minorities in over three quarters of Commonwealth countries. The impacts range from arrest and prosecution to harassment, humiliation and discrimination to physical violence, rape, torture and murder.

The specific impacts of criminalization on lesbian and bisexual women were further analysed in the Human Dignity Trust’s 2016 report *Breaking the Silence: Criminalisation of Lesbians and Bisexual Women and its Impacts*. This report highlights the increasing extent to which lesbian and bisexual women are criminalized globally and the unique human rights violations and vulnerabilities that they face as a result of the intersection between their gender and sexual orientation, even in countries that technically

## OUR ALIEN LEGACY

*These laws invade privacy and create inequality. They relegate people to inferior status because of how they look or who they love. They degrade people's dignity by declaring their most intimate feelings "unnatural" or illegal. They can be used to discredit enemies and destroy careers and lives. They promote violence and give it impunity. They hand police and others the power to arrest, blackmail, and abuse. They drive people underground to live in invisibility and fear.*

—Excerpted from Human Rights Watch "Our Alien Legacy" (2012)

only criminalise male conduct. These issues have been recognised as a vastly under-addressed dimension of LGBT persecution, which need to be mainstreamed into both the LGBTQ human rights movement and the women's human rights movement. In both of these movements, lesbian and bisexual women tend to fall through the cracks despite their unique and horrific experiences of State-sanctioned homophobia, many of which occur in the private sphere and are therefore seemingly invisible.

### Violence

The existence of these laws have provided licence for anti-gay attacks. In its 2012 report on the human rights situation in Jamaica the IACHR found that the country's continued criminalization of same-gender love contributed to anti-gay assaults including the murder of gays with impunity. Jamaica's most respected newspaper, the Jamaica Gleaner reported that in the early morning of May 24, 2016 gunmen sprayed the house of Michael Lorne and his partner with bullets while the lovers slept in Montego Bay, Jamaica. Their bodies were discovered afterwards but community members that witnessed the execution indicated that they were not sorry to see the men die because they did not want any "fish" (a derogatory term for gays) in their area. In a previous incident where the home of some homosexuals was invaded in the capital Kingston, community members expressed outrage when police arrived to assist the men to leave. In the words of one mob member who was interviewed, the police was wrong to prevent the people from doing the work of the law .

In Uganda the number of homophobic assaults spiked when the government passed the Anti-Homosexuality Act. Much the same situation was reported when the Indian Supreme Court upheld the anti-sodomy law. As reported by the UK-based NGO Human Dignity Trust:

According to Pehchan, a healthcare charity in India, there has been an increase in persecution after the Supreme Court's judgment upholding Section 377: 'Across the country we are getting many more reports about threats, intimidation, police harassment, rapes and especially cases of blackmail and extortion,' The organization has reportedly recorded 2,064 cases of violence against LGBT in one year after the Supreme Court judgment.



In The Gambia the laws have been the basis for hate-speech by the President who suggested that gays should have their throats slit. In Nigeria men are routinely rounded up and charged under the country's enhanced anti-gay laws. In Kenya homosexuals have been subjected to pointless and dehumanizing anal exams to determine if they have been involved in anal intercourse.

The UN Special Rapporteur on Torture has found that anti-sodomy laws also contribute to various other forms of torture.

#### **Blackmail**

The nature of the anti-sodomy laws, especially the very imprecise formulation of "gross indecency" found in several jurisdictions has quite appropriately been called "the blackmailers charter." The UN Global Commission on HIV and the Law has confirmed that wherever such laws exist they serve to drive gay men underground, away from effective prevention, treatment, care and support intervention. The result is that on average countries with anti-sodomy laws have higher rates of HIV infection among men who have sex with men (MSM) than countries that have repealed or never had such statutes.

#### **Harm to Children**

Far from protecting children as claimed by some modern supporters of these laws, there is actually evidence that juveniles could and do suffer harm as a result of anti-sodomy laws. For example, the Australian state of Queensland recently decided to equalize the age of consent based on scientific evidence of the harm to the health of children. Children below the age of 18 are inhibited from accessing proper information about anal health despite the fact that unprotected anal intercourse with an infectious partner is the most effective way to transmit both HIV. Further, children between 16 and 18 who engage in anal intercourse with each other are liable for conviction. No

such criminal sanction threatens heterosexual teenagers.

### **C. Some recent efforts to repeal anti-sodomy laws in the Commonwealth**

Civil Society groups across the Commonwealth have been working to repeal anti-gay laws through various means, including legal challenges and political pressure. International agencies have also been assisting in the work to end anti-sodomy laws.

Within the Commonwealth constitutional claims are ongoing and/or decisions are pending in the following countries: Belize, India, Malawi, Jamaica, Cameroon, and Kenya.

#### **The Indian Challenge**

In 2009 the High Court of Delhi found s. 377 of the Indian Penal Code to be unconstitutional in so far as it criminalized the private consensual acts of adults. The government of India did not appeal this decision but a coalition of conservative religious groups was granted leave to appeal to the Supreme Court. In a puzzling reversal the Supreme Court upheld the impugned law on the basis that, it concerned a social policy which was within the sole purview of the Parliament of India. An attempt to have the Indian Parliament repeal the law failed. Fortunately the Indian Constitution contains a unique provision that allows for the Supreme Court to review its own decision in the same matter. Therefore, the respondent in the appeal and the group that had initially challenged the law was successful in re-opening the matter. In 2015 the Supreme Court indicated that the case was of such societal significance that it would allow a review. There is hope that the law will finally be overturned by the court because a contemporaneous

decision had granted equality rights to transgender Indians.

#### **Belize**

In 2011 Belizean LGBTI activist Caleb Orozco brought a constitutional challenge to section 53 of that country's criminal code, which criminalizes all forms of same-gender intimacy. The case attracted widespread attention from the other 10 other former British colonies in the Caribbean that retain similar provisions. It is expected that the decision will be persuasive in these other jurisdictions. However, fully three years after the final hearing of the matter the court has not rendered its judgment. Lawyers for Mr. Orozco have written multiple letters to the court seeking an update but they have been unsuccessful in securing a verdict at the time of writing.

Additionally, Jamaican LGBTI activist and attorney, Maurice Tomlinson filed a case challenging the laws of Belize and Trinidad and Tobago that ban the entry of homosexuals. These laws were imposed during British colonization and are the only remaining prohibitions on gay travel in the western hemisphere. Mr. Tomlinson alleged that as a national of the fifteen nation Caribbean Community (CARICOM) he is guaranteed the right of hassle-free travel across the region according to Community law. However, the statutes in Belize and Trinidad are in direct violation of that right. During the trial held in 2015 representatives of the governments of Belize and Trinidad stated that the state had no intention to enforce these laws, however there was no commitment to repeal them. The Caribbean Court of Justice, which is the only body that can pronounce on CARICOM treaty interpretation, has reserved its judgment, and it will be delivered on June 10, 2016.

#### **Jamaica**

In 2011 and 2012 two petitions were filed before the Inter-American Commission on Human Rights challenging the Jamaican anti-sodomy law. The

petitioners alleged that the statute violates rights found in the American Convention on Human Rights to which Jamaica is a state party. After several exchanges with the government of Jamaica and the petitioners the matters have not yet been granted a hearing and there is some doubt when this will actually take place. The IACHR recently announced that a financial crisis was forcing the suspension of all hearings and country visits.

On World Human Rights Day 2015 Jamaican lawyer and LGBTI activist, Maurice Tomlinson, launched a constitutional challenge to the Jamaican anti-sodomy law with the support of the Canadian HIV/AIDS Legal Network and AIDS-Free World. Maurice was the lawyer on a previous challenge to the same law but that matter was withdrawn when the claimant expressed fear for his life and that of his family. Maurice therefore decided to become the claimant in a new challenge. Nine religious groups have applied to be interested parties in this case and they are being supported by the government of Jamaica. Among other things, they argue that the law reflects Jamaican values and must be maintained. Maurice temporarily fled Jamaica for Canada after his marriage to a Canadian man was made public and he received multiple death threats. He now lives in Canada but returns to Jamaica regularly to engage in anti-homophobia work.

#### **Cameroon**

A domestic challenge to s. 347bis of the Penal Code, which criminalises “sexual relations with a person of the same sex” with six months to five years imprisonment plus a fine of 20,000 to 200,000 francs, was launched in December 2014 in the case of *Roger Jean-Claude Mbede v. Ministère Public et al.* Mr. Mbede was arrested, prosecuted, convicted and sentenced to three years of imprisonment after sending a text message to an adult male expressing his affection. He spent over a year in prison, where he was abused and suffered health issues, before being released on bail to obtain medical attention. His conviction was upheld on appeal. While he was still at large and while his final appeal to the Supreme Court was in progress, he died, age 32, as a result of family sequestration, neglect and lack of medical attention. His appeal to the Supreme Court is still awaiting a government reply and a court date. It challenges the constitutionality of s. 347bis both on procedural and human rights grounds, as well as the improper evidential basis of Mr Mbede’s conviction. Several gay, lesbian and trans people have been arrested, prosecuted and incarcerated for consensual same-sex sexual conduct in Cameroon.

#### **Malawi**

In a series of criminal cases involving non-consensual same-sex sexual conduct, the High Court on 11 September 2013 requested submissions and interventions on the constitutionality of s. 153(a) of the Penal Code which criminalises ‘carnal knowledge against the order of nature’, under which the convictions were handed down. Local NGOs and the Malawi Law Society entered amici curiae briefs arguing that the provision is unconstitutional only to the extent that it captures consensual same-sex conduct in addition to (properly criminalised) non-consensual conduct. The carnal knowledge provision is used to prosecute non-consensual sexual conduct involving males because the rape provisions in the Penal Code only apply to female victims. This means that consenting adults are treated the same way as perpetrators of male rape, and that male and female victims of rape are treated differently with different maximum penalties for their assailants. The Attorney-General filed a procedural objection to the manner in which the Court assigned the constitutional question to a 7-judge bench. That objection was over-ruled and the AG appealed. That appeal is still outstanding, and

the merits of the matter cannot proceed until the issue is resolved.

#### Kenya

A constitutional challenge to ss. 162(a) and (c) and 165 of the Penal Code,

criminalising ‘carnal knowledge against the order of nature’ and ‘gross indecency between males’, was launched on 15 April 2016 in the case of *Eric Gitari v Attorney General*. Mr Gitari is an LGBT human rights defender bringing the case in his personal capacity and in the public

interest. As of 2 June 2016, the case is still awaiting a reply by the Attorney General.

## D. How Canada Can Defend and Promote Fundamental Human Rights

For many of the countries in the Commonwealth, anti-sodomy laws are now seen as indispensable to national and cultural identity. Public support for these laws is very high in many states and it is unlikely that government officials, however liberal, would be willing and/or able to buck popular opinion and accomplish a unilateral repeal. Further, any strong signals by foreign governments for the repeal of these laws would likely meet with claims of neo-colonialism.

Despite Canada’s own history with internal colonization, and its export of segregation techniques such as First Nations reservations that were the model for the Apartheid system in South Africa, the country still has the “benefit” of never having had overseas colonies. This fact minimizes the likelihood of neo-colonial claims being raised in objection to its attempts at encouraging legal reform in the global south. Further, Canada shares a common-law tradition with many countries that still retain anti-sodomy laws and Canadian legislation and judicial precedents have been adopted across many of these states. Therefore, Canada can serve as a model for these countries on how to repeal anti-gay laws.

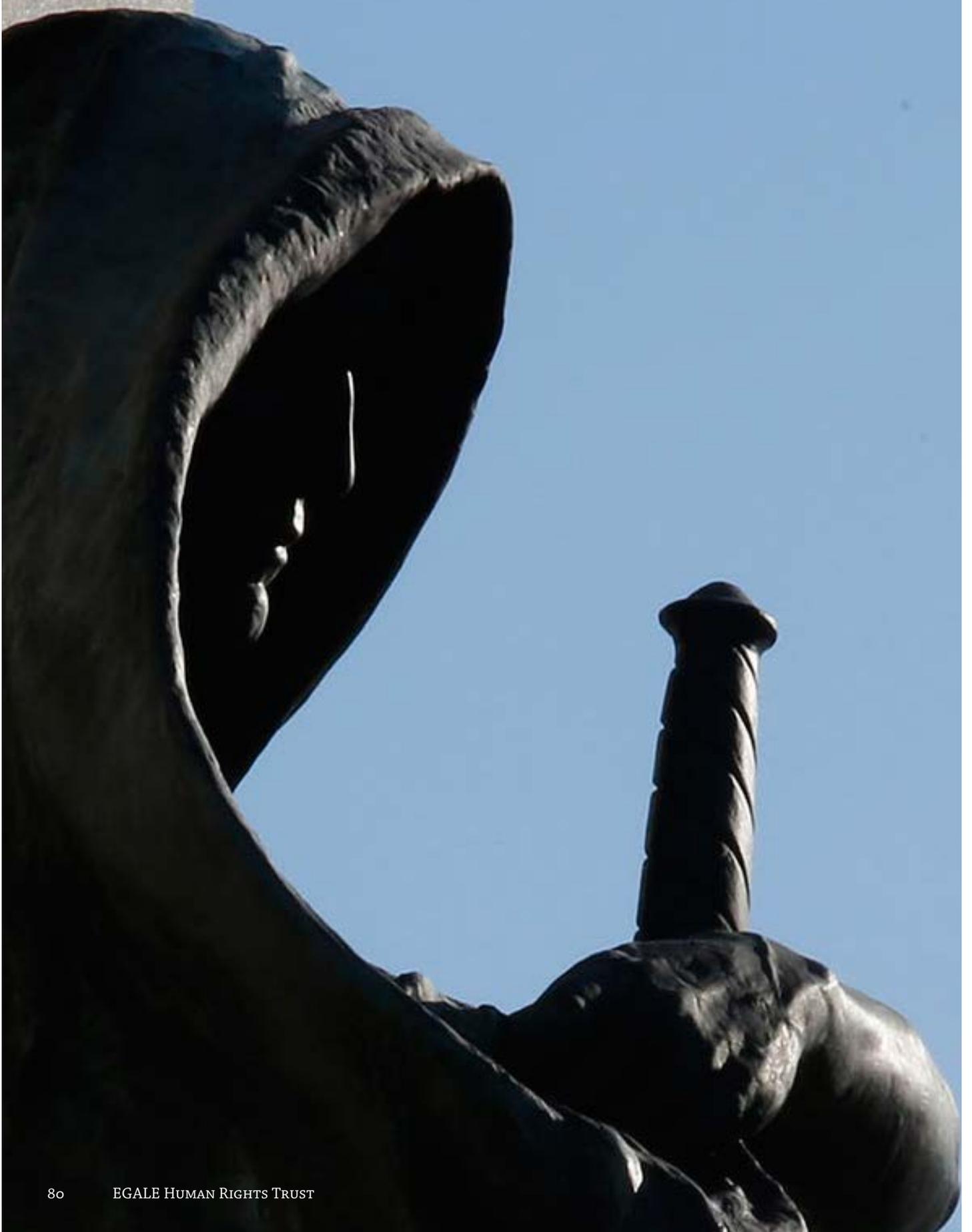
However, in doing so, Canada should be careful not to play into the hands of homophobic nationalists. For example, in 2012 the Foreign Minister of Canada used the opportunity of an Inter-Parliamentary Union meeting in Montreal to challenge

the Ugandan delegation about its treatment of LGBTI people. The Speaker of the Ugandan Parliament who headed the delegation was upset by this and claimed that the country was being dictated to by Canada on a matter that must be settled by Ugandans. Mrs. Kadaga was met with a hero’s welcome upon her return to Uganda and she soon thereafter ushered in the passage of the extreme anti-homosexuality bill, which included a provision the jailing of gays for life. Although the Act was subsequently declared unconstitutional, Mrs. Kadaga has promised a return of this odious bill.

It is therefore proposed that the Canadian government adopt the recommendations of the group called Dignity Initiative that has consulted widely with local and international partners on the best way for Canada to support global LGBTI human rights (See Appendix I).

The Dignity Initiative’s recommendations are summarized as follows:

1. **REACH OUT to LGBTI activists and human rights defenders in countries where such rights are denied or violated, and actively participate in regional and global initiatives that work to amplify the voices of LGBTI activists around the world.**
2. **ENHANCE FUNDING to support organizations around the world and in Canada working to defend and promote human rights, including of LGBTI people.**
3. **UTILIZE DIPLOMACY to clearly and publicly define a commitment to the human rights of LGBTI people in Canada’s broader foreign policy, including with respect to international development. Use all available diplomatic channels to advance and support human rights of LGBTI people around the world.**
4. **SUPPORT REFUGEES and facilitate asylum in Canada for LGBTI people fleeing persecution because of their sexual orientation, gender identity or expression, in the case of both those seeking asylum from within Canada and those seeking assistance abroad.**



# A Short History of Charter Challenges

## Paradise Lost

Pierre Elliott Trudeau, who had been educated at Harvard and in France, was an admirer of the notion of a constitutional entrenched Bill of Rights. He was determined that Canada would have an equality guarantee modeled on such precedents as John Adams' Article One from the Massachusetts Declaration of Rights of 1780. Canada's section 15 featured a list of prohibited grounds of discrimination, similar to the familiar antidiscrimination statutes in existence throughout the country.

Efforts by George Hislop and others to persuade governments to add sexual orientation to the list of grounds failed. However, in a compromise advocated by Svend Robinson, M.P., section 15(1) was left open-ended, creating the possibility of "analogous grounds" to the listed grounds.

Section 15(1) reads: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. The rights created under section 15(1) did not come into effect until April 17, 1985, by

virtue of section 32(2). A simple statute can override section 15 guarantees by using section 33.

The rights are, in any event, subject to the limits set out in section 1, which reads as follows: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

There was natural concern among gay and lesbian Canadians that the Charter would not fulfill its promise. Those doubts were soon erased. The House of Commons committee, known as the Boyer Committee, charged with examining Canada's laws for compliance with section 15(1), found that sexual orientation was an analogous ground. The Attorney General of Canada agreed, and pledged to end discrimination on the basis of sexual orientation at the federal level. Sadly, the government failed to honor that commitment and discrimination continued, while Parliament engaged in years of empty promises, foot-dragging and debates larded with homophobic comments.

## Paradise Found

Despite their traditional role in enforcing the criminal law against gays and lesbians, and the lack of any legal tradition of restraint on parliamentary supremacy, the courts proved to be more reliable guardians of equality. Legal recognition has been increasingly extended to homosexual common law relationships, first through court decisions beginning with *Veysey v. Canada*. The Courts ventured where legislatures were fearful to tread, for example, ordering an end to the ban on gays in the military.

### Advocacy

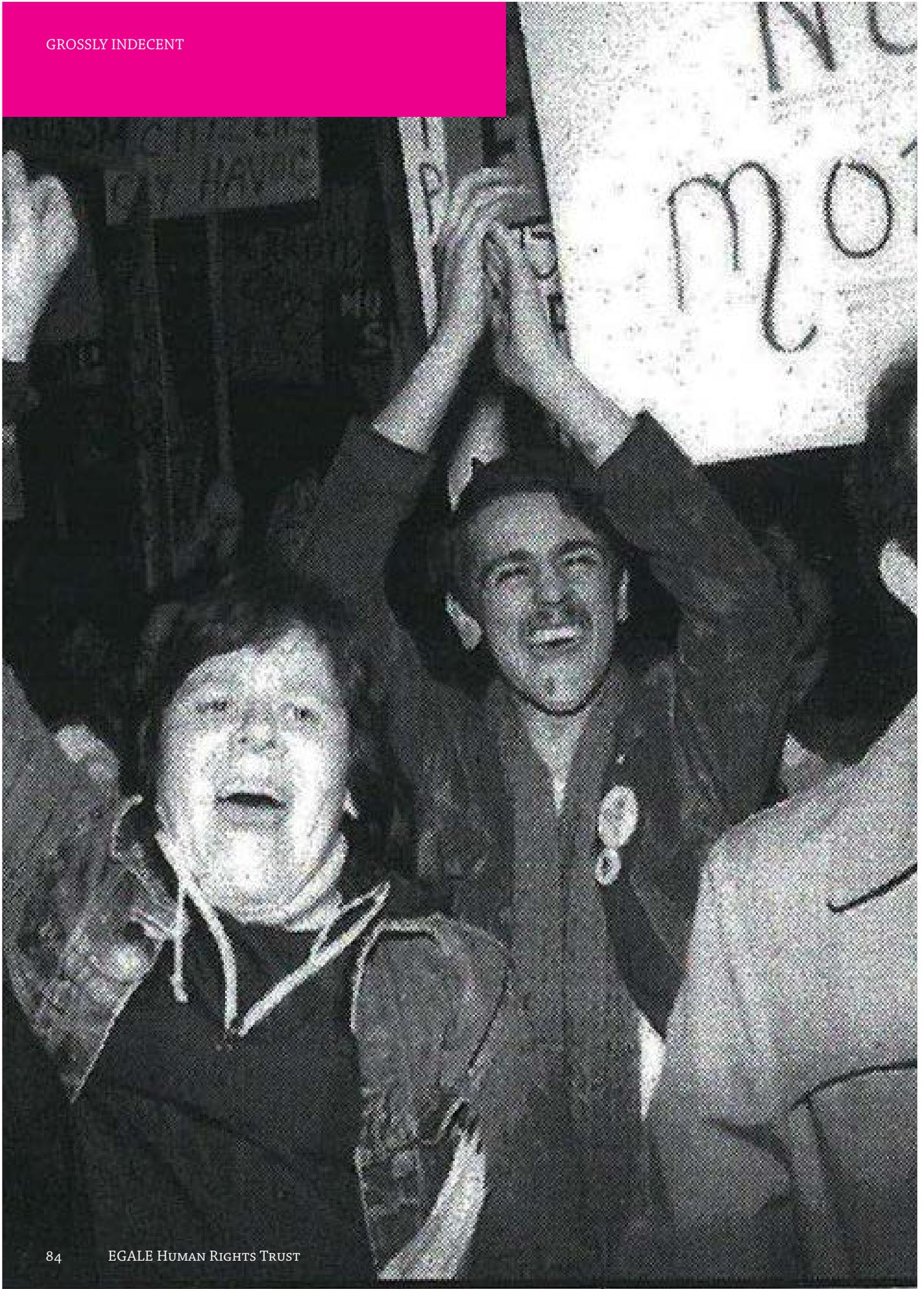
Sexual orientation was recognized as an “analogous ground” of protection under section 15(1) of the Charter from the outset. However, the fate of future legal challenges in Canada’s traditionally conservative courts was not certain. There was disappointment when all recommendations by a Parliamentary Committee about ending discrimination against gays and lesbians were given lip service, and then promptly shelved. The lesbian and gay community was not in much of a position to fight back. Although a Canadian lesbian and gay political movement had existed for some years, it had no national voice until EGALE was formed in 1986. Even then, this organization was under-resourced and struggled for years to establish its legitimacy with politicians and the lesbian and gay community. The pace of reform was initially slowed as Canada’s gay community was ravaged by the AIDS epidemic. Responding to the social and legal concerns arising out of this crisis both galvanized and drained the limited resources of the community. Individual gays and lesbians began to test their rights in the courts. From the beginning, there were cases seeking relationship recognition. The early cases failed, with the Courts relying on section one of the new Charter, the section that allows government to impose limits on rights that are “demonstrably justified in a free and democratic society.” Strangely enough, one of the first successful cases involved equal conjugal visits for federal prisoners! A second marriage challenge was mounted in the early 1990’s. It was also unsuccessful at the lower court level. Many leaders in the gay community at the time thought it was premature. For many years, Canada had extended some legal recognition to opposite sex common law couples. Many thought it was important to establish equality with common law couples before tackling marriage, with its religious connotations. Pressure was brought to bear, and the case advanced no further. The jurisprudence began to consistently favor equal treatment of same-sex couples.

### Charter Dialogue: Jurisprudence

Three cases were to create a firm foundation for Canadian jurisprudence in this area at the Supreme Court level. Jim Egan and his partner Jack Nesbitt lost their case under section 1, but they advanced the jurisprudence. *Egan v. The Queen* confirmed that sexual orientation was an analogous ground under section 15(1). The Court also ruled that discrimination against same-sex couples was an infringement of section 15 that governments would have to try to justify under section 1.

Delwin Vriend was fired from a conservative Christian college in Canada's most conservative province because he was gay. Alberta did not provide anti-discrimination protection for gays and lesbians at the time. He took his case to the Supreme Court and won, the first clear victory of its kind at that level. Justice Sopinka, the swing vote in *Egan*, heard argument in the case but died before the decision was rendered. The eight judges' rulings were unanimous on all issues except remedy, where one judge advocated a different approach. Several of the judges changed their positions from the earlier ruling in *Egan*, notably the Chief Justice of Canada. *Vriend v. Alberta* established that gays and lesbians had a right to protection from discrimination, and that the Courts would step in where government failed to act.

Finally, the question of equality with heterosexual common law couples reached the Supreme Court in *M. v. H.* This important decision found that it was constitutionally imperative under the Canadian Charter for laws to provide equal treatment of same-sex common law couples and opposite sex common law couples. In all of these cases, conservative Christian groups intervened in opposition to lesbian and gay equality. Despite the fact that unmarried heterosexual relationships are also supposedly sinful and are clearly far more common than same-sex relationships, these self-declared proponents of traditional marriage and the family have been remarkable by their absence from court cases involving legal recognition of unmarried heterosexual relationships. Apparently, some sins are hated more than others. The recent move to legally recognize same-sex marriage has attracted the most aggressive traditional Christian opposition to any equality measure to date.



# Other Responsible Actors

## Toward a More Just Society

Egale's Report is directed to the Federal Government. Although the Crown and the federal Government played critical roles in the oppression and suppression of LGBTQ2SI communities in Canada, they did not operate alone. There were many social actors who have had a hand and play a continuing role in this social problem and human tragedy.

Should the Federal Government embrace our proposals for a process of "truth and rehabilitation" we may expect to see an apology from our Prime Minister along the lines of the moving apology offered by Premier Andrews of Victoria and his colleagues in the parliament at Melbourne. This important symbolic step acknowledges the central and foundational role the state has played in creating a culture of hostility toward our communities and for creating opportunities for state power to be unleashed against us.

The state has not been the only social actor who has contributed to this tragedy.

Organized religion, especially traditional Christianity has played a key role often with the express backing of the state. Nowhere is this brought into sharper relief than in the sorry history of residential schools, where indigenous spirituality was demeaned and indigenous cultural traditions including the Two-Spirit tradition were stamped out with ruthless determination as "barbaric".

We now recognize it was the residential school system that was barbaric.

Regarding the role of churches, we note the interesting work of Australia's Professor Danielle Celermajer. She has pointed out that while the political apology has recent origins in response to the Holocaust, its roots lie much deeper in Jewish and Christian tradition. It would be appropriate for our churches to recall both the healing power of forgiveness, and that the prerequisites for forgiveness are confession, contrition and penance.

The evidence shows that in the era of criminalization, a homophobic culture became deep-seated in our police services. Even after "de-criminalization", police services used the remaining tools at their disposal to raid the "Pussy Palace" in Toronto and Goliath's bath house in Calgary. Trans and intersex people in conflict with the law continue to have to fight to be accorded basic human dignity and respect.

We applaud the work of the Carleton University students who are seeking an apology from their institution for its role in the creation of the infamous "Fruit machine" that destroyed the lives of many.

Premier Wynne of Ontario showed great leadership recently when she offered an apology to indigenous people on behalf of the people of Ontario. She

was not content to rest on the laurels of Prime Minister Harper's historic apology for residential schools.

There is no shortage of blame to be shared in creating this tapestry of human suffering. The legal professions, the medical profession, and many others should examine their histories and consider what obligation they have to acknowledge past transgressions against our communities and to take their own action to make amends. There is no need for any police chief or premier, bishop or mayor to wait until the Prime Minister makes the first move.

Egale is a Canada wide organization and it should not take on this challenge alone. There are many allied organizations, including unions, student groups, AIDS Service Organizations, First Nations groups and others who should be mobilized to work together on this great social project of truth and rehabilitation. As we expect the federal government to lead by example, so should we acknowledge our own shortcomings in caring for the marginalized within our own communities.



# Making it Right

**T**he federal government's reticence to issue an apology has been an impediment to the healing and reconciliation long sought by Canada's LGBTQI2S communities

Calls for action have been disregarded by the federal government for over four decades, and an admission of the full truth is overdue. The queer community deserves recognition of the harm

inflicted due to systematic and historical dignity-taking, through the criminal law, state action, national security campaigns, police conspiracy and bureaucratic machinations. The purge of homosexuals from the civil service, as outlined in this report, implicates the highest echelons of the Royal Canadian Mounted Police, the Canadian Armed Forces, and the Canadian Security and Intelligence

Services. Metropolitan police across the country are also implicated.

Prime Minister Trudeau's government must seize this historic opportunity to issue an apology with adequate scope and meaningfulness. In a world where 80 countries still criminalize homosexuality, Canada's apology would send a powerful and progressive message about LGBTQI2S equality and human rights.

## An Inclusive and Principled Basis for Action

### Dignity Deprivation, Dignity Restoration

Professor Bernadette Atuahene's study of property restitution in South Africa provides a principled basis for redressing queer oppression through Canadian law and the state's agents. Atuahene criticizes the private law paradigm dominated by concepts of restitution and damages. "Under circumstances, the state has done more than confiscate property---it has also denied the dispossessed of their dignity." Atuahene then develops a useful concept of restorative justice based on dignity takings that can be usefully applied to queer injustice by analogy.

I have coined the term dignity takings to describe this phenomenon. Dignity takings are where a state directly or indirectly destroys or confiscates

property rights from owners or occupiers whom it deems to be sub persons without paying just compensation or without a legitimate public purpose. I argue that a comprehensive remedy for dignity takings entails what I call dignity restoration---concepts that address both the economic harms and dignity deprivations involved.<sup>1</sup>

To be sure, the experience of South African apartheid was qualitatively distinct from the history motivating a government apology to the queer community. Queers, like the First Nations in Canada, were assimilated in society

through a systematic and multi-faceted process of normalization. Outward sexual and gender deviance was regulated by various forms of state-authorized dignity deprivation. By contrast, South African apartheid was characterized by a project of racial subordination, dispossession, separation and dignity erosion.

Nevertheless, Atuahene's theory of restorative justice can be usefully applied to the current inquiry. In South Africa, the legally sanctioned conversion of property eroded dignity. Throughout Canadian history, a similar deprivation was visited through criminal sanction. A similar solution applies.

It is incumbent upon the Government of Canada to address both the economic harm and dignity deprivation

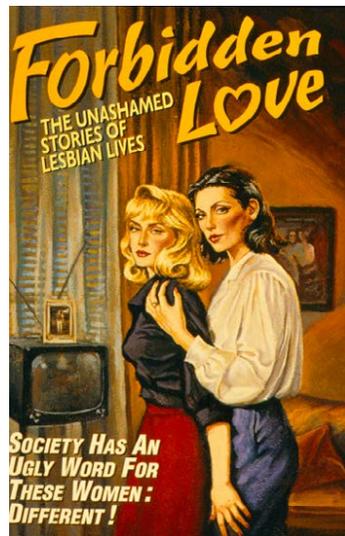
<sup>1</sup> Bernadette Atuahene *We Want What's Ours: Learning from South Africa's Land Restitution Program* (Croydon, UK: Oxford University Press, 2014).

contemplated by Atuahene's model of dignity restoration. In fact, dignity restoration closely follows the approach employed in the truth and reconciliation process surrounding residential schools. The implications for redressing queer injustice are clear. First, the Government of Canada must restore queer dignity through a comprehensive honouring of the truth, followed by necessary amendments to the criminal law. Second, the Government of Canada must negotiate material reparations. These actions are mandated by Canada's international legal obligations, the Charter, and are wholly consistent with legal change in the Commonwealth and continental Europe.

## Canada's International Legal Obligations

In Canada, every facet of sexual and gender regulation entailed a coherent pattern of social subordination and dignity-taking. By retaining discriminatory criminal law, Canada is violating the constitutional principle of equality before the law in addition to our treaty commitments involving non-discrimination on the basis of sexuality. On the question of criminal regulation of same-sex conduct, international law is clear. Our discriminatory age of consent laws violate the International Covenant on Civil and Political Rights (ICCPR), ratified in 1976.

The UN Human Rights Committee's decision in *Toonen v Australia* stands for the proposition that laws forbidding consensual homosexual conduct offends human rights on the grounds of discrimination on the grounds of sex, as well as the right to privacy. The European Commission of Human Rights also addressed the age of consent in *Sutherland v United Kingdom* which found the continued variation in ages of consent between homosexual and heterosexual people to be discriminatory as well as a breach of privacy. Sexual Offences (Amendment) Act 2000 lowered the age of consent for homosexual sexual conduct to 16 years in line with heterosexuals.



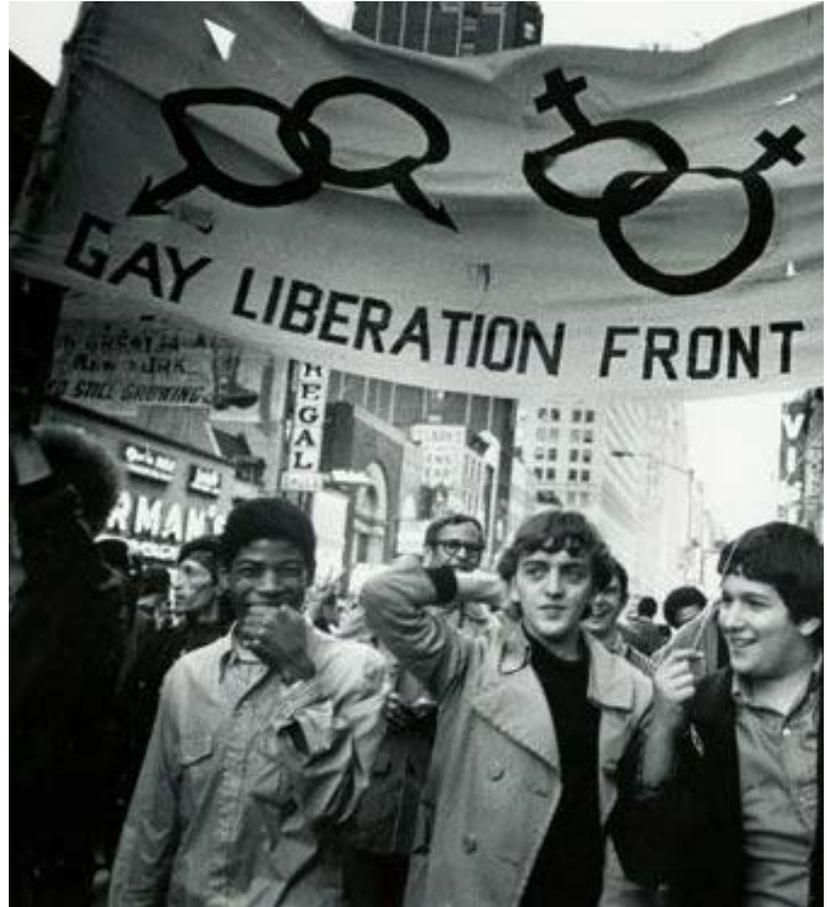
TOP Source: Canadian Gay and Lesbian Archives.

# International Precedent for Action

## British Origins

There are several global precedents for queer redress, and political action is increasingly grounded in principle. Starting in 2009, the United Kingdom's Prime Minister Gordon Brown apologized posthumously to Alan Turing, inventor of the enigma machine. Turing's invention contributed materially to Allied victory ending the Second World War. Like Everett Klippert, Turing was convicted of gross indecency under British criminal law. Unlike Klippert, who was labelled a dangerous offender and remanded to custody for an indefinite term, Turing underwent chemical castration in lieu of prison time. Tragically, Turing committed suicide two years later, reflecting the devastating impact of queer dignity deprivation.

Despite Turing's war hero status, calls for a pardon were initially rejected by Brown's government before and after his apology in parliament. It was not until 2013, four years after Brown's formal apology in parliament, that Her Majesty the Queen issued a pardon through royal prerogative. Section 748 of Canada's Criminal Code contains the same Royal Prerogative, which is administered by the Parole Board of Canada and officiated by the Governor General acting as the representative of Her Majesty the Queen. The Royal Prerogative of Mercy is a discretionary power tracing its origins to an ancient right of the British monarch. Comparison with the UK experience in 2009-13 is instructive because it illuminates the conservative approach traditionally taken by lawmakers, along with the restrictive principles governing the administration of free pardons. Pardons are seldom granted in cases where the person convicted was indeed guilty of



## VICTIM IMPACT STATEMENT

*In 1985, my career ended abruptly as a result of systematic discrimination and my being identified as a homosexual by the RCMP. The discrimination from which I suffered took many insidious forms [...] a hostile work environment was created, which included unreasonably bad evaluations and physical and social exclusion such as having my office situated at a great distance from the team I supported.*

— Paul-Emile  
(Canadian Economist)  
We Demand an  
Apology Network

*They tried to coerce me to name names of womyn I might even suspect of being Lesbian ... I was in total shock ... that day I lost my home, my career, my lover and my family in one full sweep. Being victimized is corrosive.* DARL (CANADIAN MILITARY)  
WE DEMAND AN APOLOGY NETWORK

the crime they committed according to the law at the time. Nevertheless, Section 749 of the Criminal Code makes it clear that nothing in the Act limits or affects Her Majesty's Royal Prerogative of Mercy. In principle, the Prime Minister's right to recommend use of a free pardon by Her Majesty is unfettered.

Available statistical evidence highlights significant challenges with implementing comprehensive pardons. The Parole Board of Canada's administrative requirements are restrictive and onerous. As it stands, they foreclose any prospect of exoneration for many classes of persons affected by anti-gay criminal law. Statistics acquired by the Parole Board, moreover, illustrate the conservative application of governing principles. Between 2010 and 2014, only 14 clemency requests were granted, while 4 were denied and 111 were discontinued. The rate of discontinuation testifies to the significant administrative hurdles and material disincentives involved with the process. Most importantly, pardons cannot be granted posthumously. This is particularly troubling respecting the infamous and deeply symbolic case of Everett George Klippert.

The United Kingdom's legislative approach to disregarding past sexual offences provides a useful template for Canadian action. In 2012, the UK government enacted the Protection of Freedoms Act, which mandated the disregarding

of certain convictions for the historical offence of buggery. It is noteworthy that S.96 of the Act provides that the provisions do not derogate the right of Her Majesty to issue a Royal prerogative or otherwise. A similar provision would similarly provide an opportunity for the issuance of pardons where it is deemed necessary and appropriate. Cognizant of the operational difficulties, however, similar legislation would have the added benefit of affecting broader and more comprehensive redress. To this end, Britain's legislative approach has been influential in comparable Commonwealth jurisdictions, and should inform Canada's approach.

## The Australian Model: A Good Start

In the Commonwealth of Australia, unlike Canada, authority over the criminal law is squarely within the domain of its states and territories. Nevertheless, Australia's federal government has played an instrumental role in harmonizing the Australia's approach to queer redress through legislative enactment, as it did earlier in ensuring that Tasmania abided by the UNHRC ruling in Toonen. In November 2012, the Australian Senate passed a resolution calling on its states and territories to purge convictions for homosexual conduct. Expungement legislation has since been enacted in New





South Wales, Victoria, South Australia, and the Capital Territory. In 2015, the Government of the State of Queensland also announced its intention to consider expunging convictions for consensual sexual activity between males under a criminal offence that was repealed in 1991. In line with other states and territories, Queensland also announced plans to repeal discriminatory anal intercourse provisions in favour of a uniform age of consent.

The Australian case study provides further support for an inclusive and comprehensive government apology to honour the full truth of queer injustice. Addressing Parliament House in Melbourne, opposition leader Hon. Matthew Guy's MP comments on Victoria's official apology



reflect a rare moment of consensus in the legislative body. Joining with other parties, he stated

While an apology is words of remorse, regret and sorrow [...] let today's apology also be one of positivity and inclusion, that we go forth from today as a parliament, having decriminalized homosexuality in 1980, expunged homosexual related convictions in 2014 and apologized to our gay communities today, to be part of a Victoria where sexuality, gender, race, ethnicity does not matter; where the only test of a person is, as it should be and should have been, their personal merit.

Observing that Australian model, therefore, is a useful starting point for framing Government of Canada's approach to queer redress.

While it is a good start, there are troubling limitations with the Australian model, however. The state of Victoria is a good example.

The apologies given By Premier Andrews and Mr. Guy in their Parliament are among the most profound and moving one could imagine. However, the old saying that "talk is cheap" has some application in this context. The Victorian legislation creates an absolute bar to any state compensation for the horrors described by Mr. Andrews and Mr. Guy with such evidently sincere emotion.

The Victorian legislation provides for the expungement of criminal convictions subject to certain understandable restrictions to ensure that, for example, violent offenders are not cleared. However, the difficulty is that this puts the onus on the affected persons to apply. The Victorian scheme does provide for compensation for legal services, and we are informed that some Australian lawyers in the best traditions of the legal profession have agreed to handle these applications pro bono.

Despite this, the Victorian system creates two barriers to redemption.

The first is that affected persons actually need to be aware that they have a right to apply. This is not an insurmountable problem. We do not know if any special measures have been put in place by the Victorian Government to publicize this process, but it appears to have generated a fair



amount of media attention locally. In the Canadian context, a comprehensive and effective notification scheme was put in place in the Hislop pension case pursuant to the notification requirement of the Ontario Class Proceedings Act.

The additional barrier is more difficult to overcome.

Based on the speeches made in the Victorian Parliament, it does not appear that a large number of applications have been processed to date. It is difficult to know whether this reflects a low number of surviving persons eligible or the effect of these barriers noted.

Canada and Australia share the common law system, and both are members of the Commonwealth. While the administration of the criminal law is shared between federal and provincial authorities in Canada, the

type of legislation enacted in Victoria is properly a matter of federal concern in Canada.

The Government of Canada has an opportunity to surpass the implementation challenges, such as the time lag in intra-state harmonization, seen in the Australian case study. Observing developments in continental Europe, moreover, provides a comprehensive basis for government action.

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## The German Model: A Template for Robust Action

Continental European countries are adopting more expansive approaches to queer redress. The Government of Sweden, for example, recently apologized to trans persons who were forcibly sterilized, paying them compensation after fighting a class-action lawsuit. To this day, many European Union member states are accused of human rights violations due to their forced sterilization and mandatory divorce laws governing gender transition. Canada has legal precedent for compensating those who were sterilized in connection with provincial eugenics programs (*Muir v Alberta*)

The most pertinent example for our purposes is the recent process undertaken by the Federal Government in Germany. It has not received the attention it deserves in the English speaking world, largely because most of the relevant documents are only available at present in the German language.

In order to understand the genesis of the recent German announcement, it is important to consider some of the unique aspects of German history in this regard. There is a tragic Canadian connection to this history.

**Germany history prior to the Nazi Era**

Prior to 1871, Germany was a collection of independent states, each with their own criminal law system. Prussia was the largest and most powerful of these states, and was the driving force behind the German unification process that led to the creation of the German Empire.

As part of Germany’s constitution making process, it was agreed that like Canada the criminal law power would be transferred to the new central government. With respect to sodomy, an issue of harmonization arose. Many German states had fallen under Napoleonic rule at one time, and as a result had not had a crime of sodomy for many years. However, Prussia’s paragraph 175 prohibited buggery. A brave German lawyer, Karl-Heinrich Ulrichs outed himself in the ensuing debate, arguing that it was morally wrong to punish people like him for being themselves. He lost that argument and spent his remaining days in exile in Italy, living in poverty.

It was about this time that the term “homosexual” was coined. The 19th century obsession with science did not ignore sexual and gender diversity. The eminent Austrian Dr. Sigmund Freud is generally credited with creating the medical model of homosexuality. Arguing that sexual minorities were deserving of compassion rather than condemnation as sinners or criminals was a step forward, but created problems of its own.

The first sustained effort to argue for repeal of paragraph 175 was launched by the remarkable Dr. Magnus Hirschfeld in Berlin. He was a German born Jewish medical doctor, a socialist, a reformer – and a gay man. Known as the ‘Einstein of sex’, He became world famous for his Scientific –Humanitarian Committee, and his later Institute for Sexual Research. He became the first great international champion of LGBTQ2SI rights.

Para.175 and 175a were defined as the following after the amendment to the Criminal Code of June 28, 1935:

- Para.175:  
 1. A man who fornicates with another man, or allows himself



Above: Pride Week in Toronto in 1973. Source: Jearld Moldenhauer, Canadian Encyclopedia.



Above: Pride Week in Winnipeg in 2013. Source: Image: CC flickr/Plonq



TOP 1. The Trans\* March at Pride Toronto, 2011. CC flickr/postbear eater of world's photostream.



to be so abused by another man, shall be punished by imprisonment.

2. An involved party who is not yet 21 years of age at the time of the offense may receive a light sentence from the Court.

Para.175a:

The following shall be imprisoned up to 10 years; by extenuating circumstances, imprisonment no less than three months:

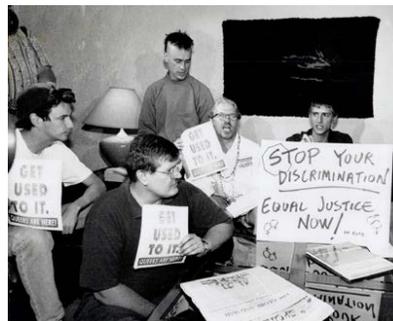
1. A man who forces or threatens another man with danger to life or limb to fornicate with him, or who allows himself to be so abused;
2. A man who uses service, employment or subordination<inferior status> to compel another man to fornicate or allow himself to be fornicated;
3. A man over 21 years of age who seduces a male person under 21 years of age to fornicate or allow himself to be fornicated;
4. A man who fornicates with men commercially or who allows himself to be misused for fornication or who offers himself for it.

The Nazi “legislators” decided to replace “sodomy” with “fornicate” so that from then on, not only would “unnatural” acts be punished, but also “indecent”. Criminal sentences of imprisonment up to five years (ss.16 RStGB) could be handed down. Those who were sentenced to three months’ imprisonment could instead pay fines. Furthermore, the underlying fact assumptions of the revised para.175 were supplemented by para.175a and included the case of “gross indecency between men”. In these cases, a punishment of up to 10 years in prison would be given, or not less than three months in milder circumstances.

The association of having the same punishment for “unnatural indecency” between men and that between man and beast would be gotten rid of and “bestiality” would get its own definition in para.175. The resulting stricter penalties resulting from this separation came from removing the word “unnatural” from the revised para.175. Consequently, any “unnatural activity” was punishable under the “objective of a healthy moral perspective for the German people, that modesty in sexual relations could be injured and subjected to lustful, libidinous intentions.”

The Supreme Court took the changes to the Criminal Code brought in by the Nazis and changed its earlier interpretation after the changes were announced, but before the enactment of the law. It demanded that the definition of fornication be expanded from the concept of a man simply entering another man’s body to one to include the perpetrator seeking to use another man’s body for lustful purposes or to derive gratification or pleasure for oneself even if penetration did not take place. As a consequence of this declaration, a warm embrace, mutual masturbation or other actions in which physical contact took place between two men became punishable.

So-called qualified cases of homosexuality were considered to include the use of force (§ 175a Nr. 1 RStGB), a relationship of subordination (§ 175a Nr. 2 bzw. § 175 in coincidence with § 174 RStGB), presence of minors under 21 years of age (§ 175a Nr. 3 bzw. § 175 in coincidence with § 176 RStGB), or commercial activities (§ 175a Nr. 4 RStGB).

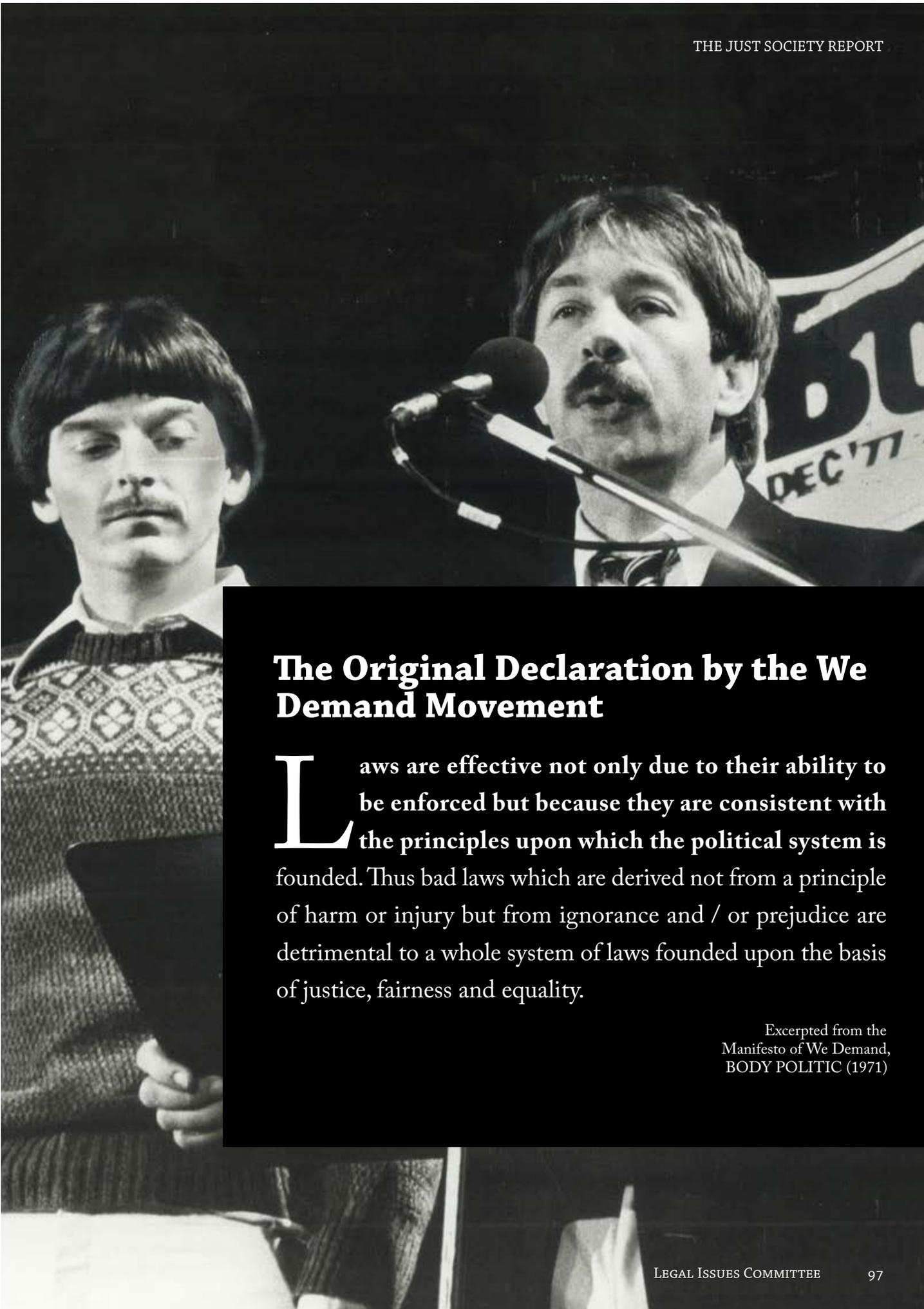


TOP Activists in Ontario Attorney General's Office following the Toronto Bathhouse raids in 1981.

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*In 2011, I was walking home outside the gay village in Toronto when a group of young men yelling “fucking faggots” broke a glass bottle over my friend’s head. It is not the physical scars from that night that have stayed with me ... it is the memory of fear, and concern for the Queer community that these attitudes still exist in our ‘tolerant’ society.*

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## The Original Declaration by the We Demand Movement

**L**aws are effective not only due to their ability to be enforced but because they are consistent with the principles upon which the political system is founded. Thus bad laws which are derived not from a principle of harm or injury but from ignorance and / or prejudice are detrimental to a whole system of laws founded upon the basis of justice, fairness and equality.

Excerpted from the  
Manifesto of We Demand,  
BODY POLITIC (1971)

## RECOMMENDATIONS

### HONOUR THE TRUTH AND MAKE IT RIGHT

- **1. The Government must prepare an open-textured and inclusive apology for Canada's history of oppression.**
- **2. The Government and LGBTIQ2S community representatives enter a year-long mediated negotiation. The negotiation may cover a postponed apology, and should cover.**

# A Framework for the Federal Government

Canada has a proud history of honouring the truth of historical injustice. In 1988, Prime Minister Brian Mulroney apologized to Japanese-Canadians for their internment during the Second World War. In 2012, the British of Columbia also apologized for its treatment of the Japanese, reflecting shared intra-provincial sentiments. Prime Minister Stephen Harper also apologized to the victims of the Air India terrorist attack in 2010, marking the 25th anniversary of the tragedy. Public Safety Canada then paid a one-time ex gratia payment of \$24,500 to aggrieved family members. To compensate victim of Agent Orange testing in new Brunswick during 1966 and 1967, Veterans Canada has historically made a similar one-time ex gratia payment of \$20,000.

The Government of Canada's most expansive fact finding report supporting a program of redress is found in the Truth and Reconciliation Commission's recent report on residential schools. The approach adopted in that report are used to develop the recommendations of Egale's submission to the government.

## Our Proposal

1. That the Government prepare an open-textured and inclusive apology for Canada's history of oppression.
2. That the Government and LGBTIQ2S community representatives enter a year-long mediated negotiation. The negotiation may cover a postponed apology, and should cover:

## Potential Issues for Discussion

Observing the foregoing international and domestic precedents, Egale recommends

1. Criminal Law Reform
2. Enacting Expungement Legislation for Criminal Convictions and Military Discharges
3. Financial Compensation for Government Action
4. Memorialization of LGBTIQ2S Injustice

# PART I. APOLOGY

## The Content of an Apology Must Embrace Feminism and Intersectionality

Accounting for the diversity of LGBTIQ2S oppression via the state and the law throughout Canadian history is a complex task. The history of heteronormativity and homosexual governance in Canada is a chorus of narratives, reflecting intersectional experiences of oppression that transcend the unitary categories of gender, race and socioeconomic background or aboriginal status.

To begin, an apology must be inclusive of all identity-based characteristic within Section 15(1) of the Charter, including race, national or ethnic origin, colour, sex, age, or mental or physical disability. Comprehensive acknowledgment of the truth is vital to the restoration of LGBTIQ2S dignity and rehabilitation.

### Definition of Intersectionality

**The interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage: through an awareness of intersectionality, we can better acknowledge and ground the differences among us.**

The second element requires the adoption of intersectionality and an open

textured construction, similar to the interpretation of Section 15(1) making way for analogous grounds that were not enumerated in the original Charter. The approach is tantamount to recognizing that every marginalized person within the LGBTIQ2S community has a qualitatively unique experience of oppression. Vindicating this approach, empirical analysis of police-reported hate crimes have confirmed that race, religion, sexual orientation and multi-bias are the principal motivations for the commission of such offences. Women within the LGBTIQ2S community will inevitably experience double discrimination on the basis of the gender and sexual orientation, and the unique vulnerabilities and harms they face are often less visible and therefore given less attention. As a basis for historical research and policy development, therefore, intersectionality considers the “way in which ethnicity, patriarchy, class oppression and other systems of discrimination create inequalities that structure the relative situation of marginalized groups.” Approaching LGBTIQ2S rights through the lens of intersectionality embeds the consideration of women, children, ethnic minorities and others at the core of the analysis.

The Oxford Dictionary defines “open texture” as “the inability of certain concepts to be fully or precisely defined or [sic] to be exhaustive and leave no room for interpretation.” Contemplating the

diversity of LGBTIQ2S experience under anti-gay law and policy, an open-textured apology is clearly necessary. An open textured apology must also be animated by constitutional principles of freedom, pluralism and equality. It should specifically enumerate identifiable classes of victims of unjust discrimination through the law. Recognizing that intersectional experiences of sexual and gender discrimination are inherently subjective and qualitative, however, the text of an apology should not foreclose the potential ameliorative scope of the government’s goodwill declaration.

The means that one uses to advance equality for any historically disadvantaged group must be closely connected with the nature of the discrimination and social context. Mainstream sexual orientation and gender identity activism often fails to consider the qualitative and contextual experience of LGBTIQ2S oppression. The theory of intersectionality addresses this gap. Intersectionality is an analytical framework which recognizes that multiple facets of identity—including race, class, disability, aboriginal status, gender and sexuality—overlap and intersect within subjective social experience. Someone who is black and gay, or another who is trans and aboriginal, logically experiences different forms of social oppression when compared to white gay cis men.

## The Charter is the Principled Basis for an Apology

Our ideas are not novel. Canada’s constitutional jurisprudence has been open-textured and intersectional. Section 15 jurisprudence provides one example of how our courts explicitly recognized protections for marginalized groups originally only implicitly protected. Designing constitutionally sound policy must account for both the core and the penumbra of equality jurisprudence, contemplating the

frontiers of possibility and the functional limitations of doctrinal innovation.

Prime Minister Pierre Elliott Trudeau developed a vision for a constitutionally-entrenched Bill of Rights in Canada, similar to the equality-guaranteed model contained in Article One of the Massachusetts Declaration of Rights of 1870. Enacted in 1982, and entering into

force in 1985, Section 15 of the Canadian Charter of Rights and Freedoms accomplished Trudeau’s vision for rights-based constitutionalism—for most.

Despite sustained advocacy by activist George Hislop and others to persuade the government to add sexual orientation to the list of enumerated grounds in Section 15, their efforts ultimately failed. To this

*“The Government of Canada apologizes to the queer community for the wrongs suffered through the application of historical Criminal Code provisions regulating sexuality, gender identity and gender expression...”*

*“The Government of Canada also apologizes for the prosecutorial use of repealed provisions, and commits to take action to prevent the furtherance of these laws through legislative action...”*

*“The Government of Canada also apologizes for the history of sexual regulation through the criminal law, European interactions with First Nations, and policy towards two-spirited expression in residential schools*

*“The Government of Canada wishes to recognize the overlapping nature of social oppression and marginalization uniquely impacting the LGBTQ2SI community, recognizing the particular vulnerability of racialized persons, women, and young children suffering sexual orientation or gender identity/expression-based discrimination ...*

*“The Government of Canada recognizes the ongoing challenge of queer marginalization, and is committed to defending equality and justice ...*

## SAMPLE CONTENT OF AN APOLOGY

It is incumbent upon the Government of Canada to specifically identify individuals and classes of individuals affected by anti-queer criminal law, including but not limited to:

### 1. Enumerated and Identifiable Groups

- Public Sexual Offences: Persons convicted under the following Criminal Code provisions below.
- Private Sexual Offences: Persons convicted under the following Criminal Code provisions below.
- Prosecutorial use of repealed provisions and government policy and practice.

### 2. Comprehensive, Open Textured, Inclusive

It is incumbent upon the Government of Canada to construct the text so that it is open-ended, and inclusive of intersectional experience of social oppression.

- Two-spirited First Nations
- Members of the public service and armed forces targeted by discrimination because of their sexuality, gender identity or gender expression, during and after state-authorized campaigns of eradication from the labour force.
- Men and women, cis and trans, of every race, socioeconomic background, color, age, ability or disability and aboriginal status, who have been victims of state-authorized discrimination in Canada based on their sexual orientation, gender identity or gender expression.

day, the text of Section 15(1) of the Charter fails to enumerate sexual orientation as grounds for an equality claim. Saved by then-Member of Parliament Svend Robinson's negotiations, however, the framers of the equality provision carefully constructed the Charter so it was open-ended, and capable of evolving as a "living tree." Prefacing the list of equality grounds with the word "in particular" was intended to give courts sufficient latitude for constitutional interpretation in context. The record of Canadian equality jurisprudence post-1985, therefore, is the appropriate locus of inquiry and basis for government policy.

### Enumerated Equality Rights Under S.15(1)

**S.15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability [...]**

### Definition of Open Texture(d)

chiefly Philosophy

The inability of certain concepts to be fully or precisely defined or of regulations to be exhaustive and leave no room for interpretation.

To give effect to LGBTQ2S rights, the Supreme Court adopted an open textured approach to the Charter's textual provisions. In *Andrews*, for instance, the Supreme Court held that the equality provisions under section 15(1) of the Charter also protect against distinctions based on analogous grounds.

Following the landmark decisions in *Egan*, the Supreme Court held that sexual orientation was an analogous ground, although the claimants were defeated due to Sopinka J's fiscal conservatism. *Egan* established sexual orientation as a prohibited basis of discrimination. However, it was not until the decision in *Vriend* that the court held that sexual orientation is an immutable characteristic that falls within the scope of Charter protection.

Two decisions provide principled and constitutionally sound support for the operationalization of intersectionality in reparations, an apology and pardons. In *Turpin*, the Supreme Court rejected provincial residency as an analogous ground under Section 15. However, the Court created a new analogous ground in *Corbiere* that incorporated residency into an existing analogous ground in the context of a discrimination case brought forward by aboriginal claimants against the Minister of Indian and Northern Affairs. Members of a band living off reserve challenged the constitutionality of being prohibited from voting under Section 77(1) of the Indian Act, triumphing over the government. The Supreme Court then clarified that analogous grounds are personal characteristics that are immutable or changeable only at an unacceptable cost to personal identity.

Doctrinally, *Corbiere* stands for the proposition that the court is capable of recognizing an embedded analogous ground, making it possible to have meaningful consideration of intra-group discrimination. Canadian Supreme Court jurisprudence provides a principled basis for adopting intersectionality in actionable government policy.

The foregoing enumerated and open-textured apology aligns with the Government of Canada's progressive legislative agenda, consensus in the legal community, and Commonwealth precedent. By introducing a bill to include "gender identity and gender expression" as a prohibited ground of discrimination under the Canadian Human Rights Act, and placing it within the ambit of identifiable groups under the hate crimes provisions of the Criminal Code, historic protections will be created for the trans community. The stage is set for a new era for sexual and gender equality before the law.

# Understanding Government Liability for an Apology

A government apology will not entail a “powder keg” of liability. On the contrary, honouring the complex and deeply embedded legacy of queer injustice would address long-standing grievances. Existing provincial and territorial legislative schema also negative civil liability stemming from a government declaration, like the one proposed by EGALE. With the exception of Quebec, New Brunswick and the Yukon Territory, all Canadian provinces and territories have enacted legislation negating the liability for an apology. Consistent across jurisdictions, an apology “means an expression of sympathy or regret” and “a statement ... or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability ... in connection with the matter.” Given how recently apology legislation has been implemented, there is scant case law that considers liability for an apology. In the civil context, however, an Alberta court unequivocally confirmed that an apology does not in and of itself constitute an admission of liability, in accordance with governing legislation. The chief benefit of an open-textured approach, moreover, is that it does not disclose factual grounds for an apology that could give rise to legal liability. A generally enumerated and open-textured apology acknowledges the scope of anti-LGBT oppression in the broadest and most comprehensive terms without foreclosing generality.

## Civil Liability

Recent tort law developments involving public authorities should not raise fiscal concerns among federal policy-makers. It goes without saying that the Supreme Court decision in *Hill v Hamilton-Wentworth Police Services* recognized the new tort of negligent police investigation, opening a new tier of liability for law enforcement. Indeed, the court endorsed the position that police are not immune from liability under negligence

law. Yet, the application to queer injustice is not legally sound. Advancing a cause of action using this tort would be vulnerable to doctrinal limitations, evidentiary hurdles and limitations periods. Similar to the Royal Prerogative of Mercy and free pardons, the tort of negligent investigation contemplates redress for exonerates, and would not apply retroactively. Also related to the tort of negligent investigation is the tort of malicious prosecution, which is even less likely to disclose a reasonable cause of action in provincial court. In particular, the requirement that a case was terminated in favour of the plaintiff would limit successful application of the tort to an extremely narrow class of potentially aggrieved litigants, and even less likelihood of success. Doctrinal constraints are further compounded by the apparent evidentiary difficulties and the issue of statutory limitations periods. Class actions seeking civil redress would face similar legal burdens, and are a costly and unlikely path forward, particularly if a comprehensive government apology is forthcoming.

## Federal Law and Charter Damages

Although provincial and territorial apology legislation immunizes civil claims, it does not apply to the criminal law or constitutional matters because they are squarely within the federal realm. Nevertheless, the prospect of seeking Charter damages is another unlikely legal avenue for aggrieved parties. The basis of a monetary constitutional remedy is founded on Section 24 of the Charter, which provides for damages in relation to the injury of a right or freedom. Similar to civil claims, there is a significant evidentiary burden and prohibitive costs associated with this kind of action.

The breach of rights under Sections 7, 9 and 15 are prime candidates vis-à-vis queer injustice. The 2015 decision in *Henry v BC*, moreover, illustrates the

viability of tortious Charter claims. In *Henry*, the Supreme Court only interfered in the *Miazga* reasoning by holding that S.24 claims do not require malice. *Henry v BC* concerned the non-disclosure of evidence in a prosecution leading a wrongful conviction. Similar analysis does not apply to police conspiracy and prosecution, and a Charter claim of this nature is unlikely. Crucially, since gross indecency was decriminalized in 1983, prior to the application of the Charter, the enforcement of the provision in public spaces and bathhouses is disbarred. The Canadian Human Rights Commission and courts *certis paribus* are likely to deny claims against the ministries of the Canadian government.

Analyzing the foregoing causes of action, it is clear there are few juristic remedies available to materially repair queer injustice at law. It is incumbent on the Government of Canada to act, and express the conciliatory moral sentiments necessary to remedy historical injustice. A goodwill gesture, moreover, is not likely to attract liability.

## A Mediated Settlement

International law supports the provision a one-time *ex gratia* payment to honour the legacy of queer injustice in Canada. Article 14(6) of the International Covenant on Civil and Political Rights, which Canada ratified in 1976, articulates the reasoning for a reparations payment in the case of exoneration or unjust conviction.

# PART II. NEGOTIATIONS

## WE DEMAND AN APOLOGY NETWORK

*In early 1970, I was called to the offices of the Military Police at CFB Halifax and told that enough evidence had gathered to indicate that I was homosexual. In fact, based on questions asked of me, it became apparent that I had been under investigation and observation for about one year.*

— Frank (Canadian Navy)  
We Demand an Apology Network

*The investigation was awful, the first time I was taken to CFB Halifax and met by two SIU officers. For at least three days, I was interrogated in an undisclosed area for hours at a time.*

— Diane (Canadian Military)  
We Demand an Apology Network

## Negotiations

The Government should enter a mediated negotiation between community stakeholders and organizations led by Egale. Particular attention should be paid to the German precedent and the Truth and Reconciliation process in guiding this process. LGBTIQ2S organizations and communities should be empowered to engage in extensive community consultation, and to commission expert opinions and necessary primary research as required.

### Inclusivity

Taking into consideration intersectional concerns, Egale will ensure that all the appropriate stakeholders and communities are represented. The process will include both individual stakeholders, and representative organizations.

### Format

#### Timeline

Within 30 days of acceptance in principle, the federal Government should negotiate the terms of Mr. Iacobucci's mandate and identify the most urgent matters requiring immediate redress. Mr. Iacobucci should deliver his report to the Government within 12 months of his appointment.

## Content of Negotiations

We believe that the issues arising out of our Report are too complex and too multi-faceted to be resolved quickly if they are to be resolved comprehensively and thoroughly. At the same time, we are conscious of the fact that many of the victims of this state-sponsored persecutions are quite elderly and many continue to live in poverty. There may be simple solutions that do not end to await a lengthy process that should be implemented immediately, such as restoring veterans' pension to those wrongfully discharged on grounds of homosexuality.

We propose that the Hon. Frank Iacobucci be appointed mediator to resolve the many issues between our communities and the Federal Government.

#### Costs

The federal Government should bear all reasonable costs of the mediation process. Particular attention should be paid to the German precedent and the Truth and Reconciliation process in guiding this process.

#### Timeline

Within 30 days of acceptance in principle, the federal Government should negotiate the terms of Mr. Iacobucci's mandate and identify the most urgent matters requiring immediate redress. Mr. Iacobucci should deliver his report to the Government within 12 months of his appointment.

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TOP Justin Trudeau poses for the official photos of Toronto Pride.



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TOP Rainbow colored Gay Pride Flags and Canadian Flags flutter in the wind in Vancouver, British Columbia. Photo taken on: August 05th, 2012



## A. HISTORICAL MATTERS AT ISSUE

### Government Expungement Act

Egale does not support a mass pardon. It is an insufficient solution for a vast problem. A pardon implies: “You did something wrong. The Queen forgives you.” An expungement means: “The Queen did something wrong. Will you forgive her?” We call for a made in Canada solution based on contemporary Commonwealth Expungement Schemes.

#### *Pardon*

The Governor General acting as the representative of Her Majesty the Queen in Canada may issue clemency under the Royal Perogative of Mercy. Section 748 of Canada’s Criminal Code contains that Royal Prerogative. It also contains provision for statutory pardons administered by the Parole Board of Canada and officiated by the Governor-in-Council (Federal Cabinet). Unlike the Governor General, the Governor-in-Council can only grant certain types of pardons. These include “free pardons,” which is a formal recognition that a person was erroneously convicted of an offence. While the conviction is not itself overturned, all records of the conviction are erased from all official data banks.

However, the Parole Board of Canada’s standards for recommending a free pardon are extremely stiff. This includes requiring the subject to have appealed to the highest court possible, and to have offered up new evidence. In general, their administrative requirements are restrictive and onerous. As it stands, they foreclose any prospect of exoneration for many classes of persons affected by anti-gay criminal law. Pardons are seldom granted in cases where the person convicted was indeed guilty of the crime they committed according to the law at the time. Statistics acquired by the Parole Board, moreover, illustrate the conservative application of governing principles. Between 2010 and 2014, only 14 clemency requests were granted, while 4 were denied and 111 were discontinued. The rate of discontinuation testifies to the significant administrative hurdles and material disincentives involved with the process. Most importantly, pardons are not granted posthumously. This is particularly troubling respecting the infamous and deeply symbolic case of Everett George Klippert.

That may not mean that they are impossible. Section 749 of the Criminal Code makes it clear that nothing in the Act limits or affects Her Majesty’s Royal Prerogative of Mercy. In principle, the Prime Minister’s right to recommend use of a free pardon by Her Majesty is unfettered. Viola Desmond was an African Canadian wrongfully jailed and fined under 1946 Nova Scotia law for sitting in the white peoples’ section of a Nova Scotia movie theatre. In 2010, she was given a posthumous free

pardon by the Lieutenant Governor of Nova Scotia, upon the recommendation of the Provincial Cabinet. This was the first posthumous pardon in Canada. However, it is worth noting that pardons under the Royal Perogative of Mercy are typically restricted to very exceptional and truly deserving cases, and to cases in which there has been error under the law. A mass pardon has no precedent under Canadian law. It is a constitutionally risky path.

#### *Expungement*

Expungement and disregarding schemes in other commonwealth jurisdictions are an appropriate basis for a made in Canada solution. As a novel approach developed by British Parliament, it is a constitutional solution with a track record in comparable jurisdictions.

The existing pardoning system is insufficient. It is meant to be used under special circumstances, and rarely. It does not remove the conviction itself. It is not flexible enough to apply to the variety of convictions and situations we want to address immediately.

The aim of an expungement scheme is to restore a person’s dignity so that they are treated in law as if the conviction had never been imposed. In other words, it erases all record of a conviction. Queensland’s Law Reform Commission Consultation Paper identifies several considerations for a newly imposed expungement scheme.

A Canadian scheme should not designate specific offences. Rather, it should apply the Victorian legislation, an open-textured solution which allows for applications under nearly any provision able to prosecute the behavior of LGBTIQ2S communities.

Canadian legislation should set out two criteria that any application has to meet.

1. **Targeting:** The convicted person would not have been charged with the offence but for the fact that the person was suspected of engaging in the conduct for the purposes of, or in connection with, sexual activity of a homosexual nature
2. **Parity Across Time:** The conduct would not have constituted an offence under Canadian law at the time of the offense if the subject (and their partner) had been participating in heterosexual activity. Consent and age must be considered.

For example, by designating only private sexual offences [Part 2(a)], we exclude the female, trans, two spirited and many male individuals convicted under the Bawdy House Laws.

A Canadian scheme should apply to both charges and convictions, and both statutes and regulations. Many of Canada's most famous cases of discrimination came from border officials operating under flawed regulations (Little Sisters), or police operating under vague laws (bawdy house raids). It would be unfair to leave a whole section of oppressive law untouched.

Government expungement legislation must also encompass dishonourable military discharges. The UK example provides a useful template for operationalization in Canadian legislation. The Protection of Freedoms Act 2012 makes reference to criminal offences by civilians, and in the navy, air force, and army. Criminal expungement legislation must also be sensitive to the age and consent criteria.

The scheme must enact a comprehensive erasing of all criminal records, and all possible applications of criminal records. We should follow the English scheme and delete all electronic records in all relevant databases under public authority. We must request records be removed from international databases. We

must ensure that expunged convictions to not have to be disclosed in any context, including judicial proceedings.

A Canadian scheme should be available to those both dead and alive. Applications should be allowed from appropriate representatives, such as a close family member. A pardon is not practically available in Canada, as there has been only one recorded posthumous pardon in Canadian history. An expungement would be the only alternative.

The scheme should be as efficient as possible. Affected people are aging and deserve justice. Some jurisdictions are considering automatic expungements, which apply broadly to some easily identifiable criteria. Most jurisdictions do it case-by-case. We believe that in order to make the process as quick and simple as possible, and to ensure that the widest array of individuals apply, the Government of Canada should:

- a) Devote funding to publicizing the scheme
- b) Create a simple application process
- c) Devote funding for legal assistance and support for affected persons

## Compensation

We are in agreement with the recommendations “We Demand an Apology Network” compensatory redress to bring some justice to affected LGBTIQ2S individuals. The Network demands the following:

1. Redress for all of those affected by the Canadian national security campaign against LGBT members of the armed forces and civil service
2. Redress for all of those who were convicted of consensual homosexual activities after 1969 under Criminal Code provisions covering laws identified above.
3. A process of implementing redress that directly includes LGBT individuals who were affected by these policies
4. The redress process should be broadly-defined so as to include all of those who were detrimentally affected by the purge campaigns
5. The process be expedited while many of those affected are still alive

## Memorialization

“We cannot simply end with a government apology and a change to our laws. It is the opening of hearts and minds that will ultimately change our country and set an example to the world.” Our society must memorialize the historical injustice perpetrated towards lesbian, gay, trans, intersex, queer, questioning, and two spirited people. We must pay homage to the past while we look to the future.

Our public and post-secondary schools must explicitly recognize the historical injustices perpetrated onto LGBTIQ2S communities. This would involve age-appropriate integration of historical material into the curriculum at all levels. The recent Ontario changes to the public school sexual education curriculum are a step in the right direction. We must also rehabilitate the two spirit tradition oppressed by colonizing forces in coordination with aboriginal stakeholders. Lastly, we embark on an initiative to record personal stories of injustice for posterity.

# B. CRIMINAL LAW MATTERS AT ISSUE

**Government action must result from negotiation and settlement with all aggrieved parties.**

## CRIMINAL LAW AMENDMENTS

### *Private Sexual Offences*

PROVISIONS	RECOMMENDATION
<b>DIFFERENTIAL AGE OF CONSENT ANAL INTERCOURSE (S.159)</b>	Recommendation: Repeal  The Government of Canada should repeal the existing provision governing the age of consent to anal intercourse to bring it in line with provision governing heterosexual conduct under the Criminal Code.
<b>GROSS INDECENCY AND THE SEXUAL ASSAULT REGISTRY (S.490.011(1)(D) (IV))</b>	Recommendation: Repeal  The Government of Canada should repeal the existing provision governing the age of consent to anal intercourse to bring it in line with provision governing heterosexual conduct under the Criminal Code.

### *Public Morality Offences*

PROVISIONS	RECOMMENDATION
<b>"INDECENCY" THROUGHOUT THE CRIMINAL CODE)</b>	Recommendation: Define  Indecency should be defined in a way that affords citizens, police, and the courts a clear idea of which acts are prohibited. Add clear language referring to nudity or sexual acts where appropriate.
<b>BAWDY HOUSE LAWS (SS 197, 210, 211) AND IMMORAL THEATRICAL PERFORMANCE (S 167)</b>	Recommendation: Repeal  After Bedford, and In order to institute a consensual, sex-positive Criminal Code, we must do away with the Bawdy-House laws once and for all.
<b>OBSCENITY DEFINITION (S 163(8))</b>	Recommendation: Restrict  Ensure that obscenity legislation is being applied equitably to the LGBTIQ2S communities.

## SEX WORKERS

PROVISIONS	RECOMMENDATION
<b>PROTECTION OF COMMUNITIES AND EXPLOITED PERSONS ACT (FORMERLY BILL C-36 IN THE PREVIOUS PARLIAMENT).</b>	<p>Recommendation: Repeal</p> <p>Sex workers continue to experience human rights violations. We have an opportunity to create a legal framework that ensures safe working conditions for sex workers and respects the rights of all Canadians</p>
<b>ENFORCEMENT UNDER SS. 213; 286.1(1); 286.2(1), (3), (4), (5), AND (6); SECTION 286.4</b>	<p>Recommendation: Restrict</p> <p>Until such time as the PCEPA is repealed, provincial Attorneys-General should create a policy directing Crown counsel that it is not in the public interest to charge or prosecute individuals who are alleged to have violated these provisions</p>

## POLICE AND PROSECUTORIAL PRACTICE

PROVISIONS/PRACTICES	RECOMMENDATION
<b>INCLUSION WITHIN THE SYSTEM</b>	<p>Recommendation: Update Policies</p> <p>Police and Prosecutors should update their policies to be inclusive to LGBTIQ2S employees.</p>
<b>HISTORICAL OFFENCES (GROSS INDECENCY AND INDECENT ASSAULT)</b>	<p>Recommendation: Restrict Prosecutions</p> <ol style="list-style-type: none"> <li>1. Add provision to the Criminal Code ending prosecutions under repealed anti-gay criminal laws</li> <li>2. Restrict historical prosecutions of homosexuals under Indecent Assault to cases that would have been contemporaneously illegal for heterosexuals.</li> </ol>
<b>HIV NON-DISCLOSURE UNDER SEXUAL ASSAULT LAW</b>	<p>Recommendation: Restrict Prosecutions</p> <ol style="list-style-type: none"> <li>1. Limit assault prosecutions to intentional transmission of HIV</li> <li>2. No prosecutions of individuals who take the necessary precautions under current research.</li> </ol>
<b>TRANS AND TWO SPIRITED PRISONERS</b>	<p>Recommendation: Develop Policies</p> <p>The Government of Canada must develop policies and procedures that ensure the safety and the dignity of trans, intersex and Two Spirit Canadians.</p>



Above: Hon. Frank Iacobucci, pictured in Wendy Gillis, “Details of Iacobucci Report Implemented” (16 September 2015) Toronto Star.

# Conclusion

## The Truth About Stories

**I**n *The Truth About Stories*, aboriginal novelist and distinguished Massey Lecturer Thomas King encourages Canadians to think about the importance of social narratives and how they construct social reality. Acknowledging the colonial origins of anti-homosexual law is a vital element of the truth and rehabilitation process. Honouring the history of LGBTQ2S injustice is a vital step toward reconstructing the narrative of LGBTQ2S oppression—within Canada, and throughout the world. The Commonwealth is replete with anti-gay law resulting from European conquest. Today, half of the world’s 80 countries with anti-homosexual criminal laws are the legacy of British imperialism. In 2012, then-Foreign Minister John Baird exhorted the Council on Foreign Relations to “stand up to the violent mobs that seek to criminalize homosexuality” citing “draconian punishment and unspeakable violence [sic] inflicted upon people simply for whom they love and for who they are.” Nevertheless, successive Canadian governments have failed to affect meaningful change within the Commonwealth.

The absence of a formal government apology is an impediment to the healing of the aggrieved LGBTQ2S community. Together, we can take the first step towards historical acknowledgment and future reconciliation.

An open-textured apology, moreover, would send a positive and exemplary message to the international community and states that still criminalize homosexuality. When the Ontario Court of Appeal ordered the province’s registrar to accept and register the marriage of two same-sex couples in 2002, it set of a “Canadian earthquake” in international politics, culminating in ongoing global marriage equality reforms. Comprehensive apologies and inclusive pardons would cement Canada’s leadership in international human rights, and revive the golden age of Canadian diplomacy led by Prime Minister Lester B. Pearson, recipient of the Nobel Peace Prize in 1957. We can look to Premier Andrews of Victoria for inspiration.

A central task of the truth and rehabilitation process is the restoration of LGBTQ2S dignity. The available remedies at law are simply incapable of rectifying the social, psychological, economic and moral harm visited upon the LGBTQ2S communities. Given the comprehensive scope of homophobic, bi-phobic and transphobic laws, their profound negative legacy and enduring scarring effect on the Canadian people

The piecemeal or patchwork approach is no longer acceptable. For Canada to move forward and take its rightful place again as a world leader in human rights, we should embrace the German model.

As we are doing with First Nations, we should embark on a process of truth and rehabilitation to begin to both acknowledge and undo centuries of harm and to finally make it right. y aggrieved men. Twice in Canadian history, Klippert’s conviction has promoted government action. This time, broadening the scope to all men and women, cis and trans, and two-spirited aboriginals, is a truly principled approach. Honouring the truth and extent of LGBTQ2S injustice would be an act of moral courage and international leadership. It is incumbent on the current Government of Canada to address the LGBTQ2S community’s call for an apology.

The absence of a formal government apology is an impediment to the healing of the aggrieved LGBTQ2S community. Together, we can take the first step towards historical acknowledgment and future rehabilitation.

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## Next Steps

### **1. Accept our Report in Principle**

This month is Pride Month. Our communities were deeply moved to see our Prime Minister raise the rainbow flag on Parliament Hill for the first time. As he did with the Truth and Reconciliation Report of Senator Sinclair, we respectfully request that Prime Minister Justin Trudeau accept this Report in principle and to agree to move to phase 2 of implementations on or before July 3, 2016.

### **2. Negotiate the Mandate for a Mediator and Identify Immediate Action Items**

As noted above, we believe that the issues arising out of our Report are too complex and too multi-faceted to be resolved quickly if they are to be resolved comprehensively and thoroughly. At the same time, we are conscious of the fact that many of the victims of this state-sponsored persecutions quite elderly and many live in poverty. There may be simple solutions that do not need to await a lengthy process that should be implemented immediately, such as restoring veterans' pension to those wrongfully discharged on grounds of homosexuality.

Egale Human Rights trust proposes that Hon. Frank Iacobucci be appointed mediator to resolve the many issues between our communities and the Federal Government. Within 30 days of acceptance in principle, Egale proposes that it negotiate with the federal Government as to the terms of Mr. Iacobucci's mandate and to identify the matters requiring immediate redress.

### **3. Mediator's Report Within 12 Months**

The federal Government should bear all reasonable costs of the mediation process. Particular attention should be paid to the German precedent and the Truth and Reconciliation process in guiding this process. Mr. Iacobucci should deliver his report to the Government within 12 months of his appointment. Egale should be empowered to engage in extensive community consultation, and to commission expert opinions and necessary primary research as required.

**TOWARD A  
MORE JUST SOCIETY**

**HONOUR THE TRUTH AND  
MAKE IT RIGHT.**

**RESTORE QUEER DIGNITY.**

**REPAIR QUEER INJUSTICE.**

**REHABILITATE AND  
DIGNIFY.**

**FIGHT FOR LGBTIQ2S  
JUSTICE AND EQUALITY  
GLOBALLY.**

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# Appendix A

## Terms of Reference

### Background

In February 2016, a spokesperson for Prime Minister Justin Trudeau indicated that the federal government plans to review cases where gay men were convicted of charges of “gross indecency” and “buggery” before the late 1960s when Canada decriminalized homosexual acts between consenting adults. The intent of the review will be to determine if a pardon is warranted for any of the men who were convicted.<sup>1</sup> Further, the Prime Minister’s mandate letter to the Minister of Justice provides the following instructions:<sup>2</sup>

- Conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade with a mandate to assess the changes, ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system. Outcomes of this process should include increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians, and implementation of recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness.
- Introduce government legislation to add gender identity as a prohibited ground for discrimination under the *Canadian Human Rights Act*, and to the list of distinguishing characteristics of “identifiable group” protected by the hate speech provisions of the *Criminal Code*.

Egale Canada Human Rights Trust (Egale) views this as an opportunity to encourage and provide input on a more comprehensive and systemic review of Canada’s criminal law as it pertains to lesbian, gay, bisexual, trans, queer, Two Spirit, and intersex (LGBTQ2SI) people. As such, Egale has struck the “Klippert Committee” (“the Committee”) to lead this review.

### Mandate

Named for Everett George Klippert, the last person in Canada known to have been imprisoned for engaging in consensual sex with another man, the Klippert Committee is

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<sup>1</sup> “Liberals Urge Pardon for Gay Man Convicted under Defunct Laws,” *The Toronto Star*, February 29, 2016, <http://www.thestar.com/news/canada/2016/02/29/liberals-urge-pardon-for-gay-man.html>.

<sup>2</sup> Justin Trudeau, “Minister of Justice and Attorney General of Canada Mandate Letter,” Ministerial Mandate Letter, (November 12, 2015), <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>.

tasked with conducting a review of Canada's criminal justice system in order to identify and provide recommendations regarding provisions that have a discriminatory effect on LGBTQ2SI people in Canada. In particular, this is to include those sections of the *Criminal Code*—both current and historical—pertaining to hate-motivated crimes, bawdy-houses, gross indecency, buggery, and the unequal age of consent for anal sex. The Committee is further instructed as follows:

- The Committee must work collaboratively with others in the field, in particular, those working on issues relating to sex work and HIV and AIDS, in order to ensure that the review is broadly inclusive of diversity within LGBTQ2SI communities, avoids duplication, and maximizes political impact.
- The review must be sensitive to the ways in which the criminal law uniquely affects trans, intersex, and Indigenous peoples.
- While the review should include recommendations regarding the inclusion of gender identity within *Criminal Code* provisions relating to hate-motivated crimes, the Committee should be cautious of the impact of expanding the reach of the criminal law and its impact on freedom of speech and expression.
- The working group will prepare a draft for review and approval by Egale's Legal Issues Committee.

## **Governance**

The Committee is formed as a working group of Egale's Legal Issue Committee (LIC). As such, it reports and is accountable to the LIC.

The LIC, as a standing committee of Egale, reports and is accountable to the Executive Director, via a staff liaison, the Director of Research, Policy and Development. The Director will also serve as liaison / staff support to the Klippert Committee.

In accordance with Egale's commitment to anti-racist / anti-oppressive (ARAO) practice, and to approaching all activities from an intersectional perspective, membership of the Committee is to reflect the diversity of Canada's LGBTQ2SI communities as broadly as possible. In particular, Committee membership is to reflect regional diversity and be inclusive of those who identify as trans, Two Spirit, and Intersex.

# Appendix B

## Members of The Just Society Committee

### **Helen Kennedy**

Helen Kennedy, became Egale's Executive Director in 2007. She is the first woman to hold the position. She joined the organization with 22 years of experience in politics both as an elected city councillor and a political staffer. She is a founding member of Canadians for Equal Marriage, widely regarded as the most influential public policy lobbying campaign in Canadian history – which ultimately resulted in Canada being one of the first countries in the world to legalize same-sex marriage. Helen's work includes the Climate Survey on Homophobia and Transphobia in Canadian Schools, the first national survey of its kind in Canada, and provides critical findings on bullying to schools, educators and governments. She has delivered training to Immigration Refugee Adjudicators and police services across Canada and the Balkans. At the invitation of the US Department of Defence, Helen consulted with senior Pentagon officials in Washington on the US military's "Don't Ask, Don't Tell" policy. She is Co-Secretary General of the International Gay, Lesbian, Trans and Intersex Association (ILGA). ILGA is a worldwide federation of 1100 member organisations from 110 countries campaigning for LGBTI rights since 1978. Helen is also a member of the Ontario Premiers Roundtable on Violence against Women. The roundtable advises the government on emerging issues of gendered violence.

### **Tuma Young**

Tuma Young is a Mi'kmaq, who grew up in a traditional manner on the Malagawatch First Nation. He has a Bachelor of Arts in Mi'kmaq Studies from the University College of Cape Breton; a Bachelor of Laws from the University of British Columbia; a Master of Laws in Indigenous Peoples Law and Policy from the University of Arizona; and is presently enrolled in the JSD program at the University of Arizona. Tuma was called to the Bar in June 2001, becoming the first Mi'kmaq speaking lawyer in Nova Scotia. One of Tuma's research areas is gathering information to document the lives of Two-Spirited (gay/ lesbian/ bisexual/ transgendered) Indigenous Peoples in Atlantic Canada.

### **Kyle Kirkup**

Kyle Kirkup is a lawyer, academic, and writer. In July 2016, he will be joining the University of Ottawa Faculty of Law (Common Law Section) as an Assistant Professor. He is currently a doctoral candidate at the University of Toronto Faculty of Law, where he is a 2013 Trudeau Scholar and a SSHRC Canada Graduate Scholar. Before coming to the University of Toronto, Kyle completed graduate studies at Yale Law School (LLM, 2012). Kyle is a frequent media contributor, most recently publishing editorials in *The Globe and Mail*, the

*National Post*, and *TVO* on same-sex marriage, solitary confinement, trans people in Canadian prisons, judicial complaints, sex work and HIV non-disclosure. Kyle has also appeared before the House of Commons Standing Committee on Justice and Human Rights as an expert witness. He also served as the principal investigator and author of *Best Practices in Policing and LGBTQ Communities in Ontario*.

### **Daniel Girlando**

Daniel Girlando practises civil litigation, with a focus on defending hospitals and hospital staff in medical malpractice and other civil lawsuits. He is an associate in the Health Law Group at the Toronto office of Borden Ladner Gervais LLP. Daniel was called to the bar in both Ontario and Quebec. During his law studies at McGill University, Daniel was heavily involved in the McGill Human Rights Working Group's Access to Medicines Campaign. He also attended the National Law School of India University in Bangalore during a semester abroad, and interned for the UN Special Rapporteur on the Right to Health in Mumbai. Prior to law school, Daniel worked for two years at AIDS Community Care Montreal (ACCM). He is fluently bilingual in English and French.

### **Frank Durnford**

Frank Durnford serves as in-house counsel to Enbridge Inc. in Calgary. He is a member of Prism Energy, Enbridge's employee resource group for LGBTQ2S employees and their allies. Frank is also the founding chair of the Canadian Bar Association's Alberta Sexual Orientation and Gender Identity Conference (SOGIC) and the current Vice-Chair of the National SOGIC executive. Through his work with Prism and SOGIC, Frank has facilitated panel discussions for the benefit of the practicing bar in Calgary and Enbridge employees on a variety of topics including gender identity and expression, bullying, and the prosecution of hate crimes.

### **Adrienne Smith**

Adrienne is an Associate in the Immigration Department at Jordan Battista LLP. Adrienne received her law degree (J.D.) from the University of Ottawa, a Master of Arts (M.A.) in Immigration and Settlement Studies from Ryerson University and a Bachelor of Arts (B.A.) from McGill University. Adrienne represented Avery Edison, a transgendered woman who was detained in a male correctional facility. This case received national and international media attention in February 2014. She was also involved in the Federal Court challenge to the cuts to the Interim Federal Health Program (IFHP) for refugee health care and the Federal Court challenge to Citizenship and Immigration Canada's decision to terminate over 200,000 Federal Skilled Worker applications.

### **Catherine J. Wong**

Catherine J. Wong is a Vancouver based criminal defence and family law lawyer. A large part of her practice focuses on servicing clients from the LGBTQ2S+ communities in British Columbia. Prior to opening her own law practice, she held positions as a Federal Crown prosecutor and completed her articles at the British Columbia Civil Liberties Association. She currently serves as Vice-Chair of the Vancouver Queer Film and Video Society which runs the Vancouver Queer Film Festival and Out in Schools, a groundbreaking anti-homophobia and anti-transphobia education program presented in schools throughout British Columbia. Catherine obtained her undergraduate degree from the University of Western Ontario. She holds a LL.B. from the University of British Columbia and completed her Masters in Human Rights from the London School of Economics.

### **Téa Braun**

Téa Braun is the Legal Director of the Human Dignity Trust, a legal charity based in London, England that provides *pro bono* technical legal assistance to local actors seeking to challenge laws that criminalise homosexuality, wherever they exist in the world. She has previously held inter-governmental appointments as Gender Equality Advisor to the Secretariat of the Pacific Community and Human Rights Advisor to the Commonwealth Secretariat. Téa holds an LL.B. from the University of British Columbia (Canada), qualified as a barrister and solicitor in Canada in 1996 and completed an LL.M. in International Human Rights Law in 2005 as a Chevening Scholar at the University of Essex (England) where she was named Alumna of the Year 2014 for services to human rights. She is a member of the Executive Committee of the Commonwealth Lawyers Association and a former member of the Editorial Board of the Commonwealth Human Rights Law Digest.

# Appendix C

## Expert Reviewers

### **Constance Backhouse**

Constance Backhouse holds the positions of Distinguished University Professor and University Research Chair at the Faculty of Law, University of Ottawa. She is internationally known for her feminist research and publications on sex discrimination and the legal history of gender and race in Canada. A legal scholar who uses a narrative style of writing, her most recent books and articles profile the fascinating ways in which women and racialized communities have struggled to obtain justice within the legal system.

### **Brenda Cossman**

Brenda Cossman is Professor of Law and the Director of the Bonham Centre for Sexual Diversity Studies at the University of Toronto. She joined the Faculty of Law in 1999, and became a full professor in 2000. She holds degrees in law from Harvard and the University of Toronto, and an undergraduate degree from Queen's. Prior to joining the University of Toronto, she was Associate Professor at Osgoode Hall Law School of York University. In 2012, Professor Cossman was elected as a Fellow of the Royal Society of Canada. In 2009, she was awarded the Mundell Medal for contributions to letters and law. In 2002 and 2003, she was a Visiting Professor of Law at Harvard Law School.

### **Simon Stern**

B.A. (Yale), Ph.D., English (UC Berkeley), J.D. (Yale), member of the Washington, D.C. Bar. While in law school he was Editor-in-Chief of the *Yale Journal of Law & the Humanities*. After law school he clerked for Ronald M. Gould on the U.S. Court of Appeals for the Ninth Circuit, practiced litigation at Shea & Gardner (now Goodwin Procter) in Washington, D.C., and then served as a Climenko Fellow and Lecturer on Law at Harvard Law School. Prof. Stern teaches and researches in the areas of civil procedure, law and literature, legal history, and criminal law. His research focuses on the evolution of legal doctrines and methods in relation to literary and intellectual history.

### **Andrew Faith**

Andrew Faith is a partner at Polley Faith LLP and has particular experience both prosecuting and defending allegations of civil, regulatory and criminal wrongdoing. Andrew is regularly chosen by nationally-recognized corporations, institutions and individuals to assist in complex commercial, regulatory and white-

collar criminal litigation and appeals. He has acted as external prosecutor to the Ontario Securities Commission's Joint Special Offences Team, is general counsel to a national police service, has been appointed Independent Supervising Solicitor in white-collar fraud cases, and serves as external counsel to a professional regulatory body. In 2010, Andrew was awarded the Excelsior Award for excellence by the Ministry of the Attorney General.

**Dennis Theman**

**[To be confirmed in electronic copy]**

**Clayton Ruby**

Clayton C. Ruby is one of Canada's leading lawyers, an outspoken proponent of freedom of the press, and a prominent member of the environmental community. Mr. Ruby obtained his undergraduate degree from York University and is currently a Member of the York University Founders' Society. He received his LL.B. from the University of Toronto and his LL.M. from the University of California (Berkeley). Mr. Ruby, who specializes in criminal, constitutional, administrative and civil rights law, has devoted his professional career to ensuring that those who are underprivileged and those who face discrimination are given equal access to the legal system of this country.

**James Lockyer**

James Lockyer is a founding director of the Association in Defence of the Wrongly Convicted (AIDWYC), an organization that advocates for the wrongly convicted. He has been involved in exposing several wrongful convictions in Canada, including three homicide cases in which post-conviction DNA testing resulted in exonerations. One of these cases, the exoneration of Guy Paul Morin in 1995, led to a Public Inquiry in Ontario in 1997. The Report of Mr. Justice Kaufman made numerous recommendations for avoiding wrongful convictions in the future, and exposing wrongful convictions of the past. Since 1992, Mr. Lockyer's practice has been primarily in the field of wrongful convictions.

**Gary Kinsman**

Gary Kinsman is a long-time queer liberation, anti-poverty, and anti-capitalist activist living on indigenous land. He is currently involved in the WE DEMAND AN APOLOGY NETWORK, the AIDS Activist History Project and with Queer Trans Community Defence and is the author of *The Regulation of Desire*, co-author (with Patrizia Gentile) of *The Canadian War on Queers*, and editor of *Whose National Security?* and *Sociology for Changing the World*. He currently shares his time between Toronto and Sudbury, where he is a professor emeritus at Laurentian University.

**Kristopher Wells**

Dr. Kristopher Wells is an Assistant Professor and iSMSS Faculty Director, Institute for Sexual Minority Studies and Services, University of Alberta. With Dr. Andre P. Grace he is the Co-Founder of Camp fYrefly, which is Canada's only national leadership retreat for sexual and gender minority youth. Kris is the author of the Alberta Government's new homophobic and transphobic bullying and gay-straight alliance resources.

### **Marlys Edwardh**

Marlys Edwardh, C.M. practices criminal law at Goldblatt Partners LLP. Marlys has been counsel in many leading constitutional cases and high-profile criminal matters. She appears regularly before all levels of court in Ontario, the Federal Court and Federal Court of Appeal, and the Supreme Court of Canada. Marlys' commitment to social justice and her contributions to the profession have been widely recognized. She has received numerous awards and honours, including the Law Society of Upper Canada Medal, the Criminal Lawyers' Association G. Arthur Martin Criminal Justice Award, the Vox Libera award from Canadian Journalists for Free Expression, the Women's Law Association President's Award, the Toronto Lawyers' Association Award of Distinction, Professional Recognition Awards from the Midwifery Education Programme and the Canadian Muslim Network, and the inaugural Dianne Martin Medal for Social Justice Through Law. Marlys is a Fellow of the American College of Trial Lawyers and in 2010 was appointed a Member of the Order of Canada.

### **Frances Mahon**

Frances Mahon is an associate in the criminal law group at Goldblatt Partners LLP. She is dedicated to advancing the cause of justice, whether in the courtroom or through grassroots advocacy. Frances graduated from Osgoode Hall Law School in 2013. She recently appeared as a witness before the Standing Senate Committee on Legal and Constitutional Affairs of Canada on Bill C-36, the *Protection of Communities and Exploited Persons Act*. Frances is a member of the Criminal Lawyers' Association, The Advocates' Society and the Canadian Bar Association. She also sits on the Board of Directors for the Community One Foundation, which provides grants to organizations for projects that enhance the development of the LGBTQ communities in the Greater Toronto Area.

### **Robert Leckey**

Robert Leckey is a full professor at the McGill University Faculty of Law, where he teaches constitutional law and family law. He became Director of the Paul-André Crépeau Centre for Private and Comparative Law in August 2014. From 2002 to 2003, he served as law clerk for Justice Michel Bastarache of the Supreme Court of Canada. From 2003 to 2006, he undertook doctoral studies in law at the University of Toronto as a Trudeau scholar. His dissertation, which received the Alan Marks Medal for best graduate thesis in 2006, was published as *Contextual Subjects: Family, State, and Relational Theory*, by University of

Toronto Press in 2008. Robert has been a member of the Law Society of Upper Canada since 2003 and serves on the editorial boards for *Les Ateliers de l'éthique*, the *Canadian Journal of Law and Society*, and the *Review of Constitutional Studies*. From 2008-2011, he chaired the McGill Equity Subcommittee on Queer People.

### **Robert Wintemute**

Robert Wintemute is a Professor of Human Rights Law. He joined the Dickson Poon School of Law in 1991 after practising as an Associate in the Bankruptcy Department at Milbank, Tweed, Hadley & McCloy LLP in New York, 1982-87. In 1978, Professor Wintemute completed his BA in Economics at the University of Alberta (which included a year at Université Laval). In 1982, he earned his LLB (common law) and BCL (Québec civil law) in the National Programme at McGill University. In 1993, he was awarded his DPhil by the University of Oxford.

### **Lorraine Weinrib**

Lorraine E. Weinrib was appointed to the Faculty of Law and the Department of Political Science at the University of Toronto in 1988. Previously, she worked in the Crown Law Office - Civil, Ministry of the Attorney General (Ontario), holding the position of Deputy Director of Constitutional Law and Policy at the time of her departure. Her work included legal advice and policy development on constitutional issues, as well as extensive litigation, frequently in the Supreme Court of Canada. She holds law degrees from Yale and Toronto, and an undergraduate degree from York University. Her writing, in which she advocates the institutional coherence of the *Charter*, includes articles on the interpretation of sections 1 and 33, the theoretical dimension of the Supreme Court of Canada's *Charter* jurisprudence, the process leading up to the 1982 amendments to the Constitution, and studies of leading cases.

# Appendix D

## Criminal Code Provisions

### I. Historical Offences Repealed Before 1988

<b>Gross Indecency</b>			
Year	Act	Section	Definition
1892	<i>The Criminal Code, 1892, S.C. 1892, c. 29, s. 178.</i>	178	[Acts of gross indecency.] 178. Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person. 53 V., c. 37, s. 5.
1906	<i>Criminal Code, R.S.C. 1906, c. 146, s. 206.</i>	206	[Acts of gross indecency.] 206. Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person. 55-56 V., c. 29, s. 178.
1927	<i>Criminal Code, R.S.C. 1927, c. 36, s. 206.</i>	206	[Acts of gross indecency.] 206. Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any acts of gross indecency with another male person. R.S., c. 146, s. 206.
1954	<i>Criminal Code, S.C. 1953-54, c. 51, s. 149.</i>	149	[Acts of gross indecency.] 149. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.
1969	<i>Criminal Law Amendment Act, 1968-69, S.C. 1968-69, c. 38, s. 7.</i>	149	[Acts of gross indecency.] 149. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.
1985	<i>Criminal Code, R.S.C. 1985, c. C-46, s. 161.</i>	161	[Acts of gross indecency] 161. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 157.
1988	<i>An Act to amend the Criminal Code and the Canada Evidence Act,</i>	REPEALED	REPEALED

	<i>R.S.C. 1985 (3d Supp.), c. 19, s. 4.</i>		
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<b>Buggery</b>			
Year	Act	Section	Definition
1892	<i>The Criminal Code, 1892, S.C. 1892, c. 29.</i>	174, 175	[Unnatural offence.] 174. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. R.S.C., c. 157, s. 1. [Attempt to commit sodomy.] 175. Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the next preceding section. R.S.C., c. 157, s. 1.
1906	<i>Criminal Code, R.S.C. 1906, c. 146.</i>	202, 203	[Buggery.] 202. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. 55-56 V., c. 29, s. 174. [Attempt to commit.] 203. Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the last preceding section. 55-56 V., c. 29, s. 175.
1954	<i>Criminal Code, S.C. 1953-54, c. 51.</i>	147	[Buggery or bestiality.] 147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.
1969	<i>Criminal Law Amendment Act, 1968-69, S.C. 1968-69, c. 38, s. 7.</i>	147	[Buggery or bestiality.] 147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.
1970	<i>Criminal Code, R.S.C. 1970, c. C-34, s. 155.</i>	155	[Buggery or bestiality] 155. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years. 1953-54, c. 51, s. 147.
1985	<i>Criminal Code, R.S.C. 1985, c. c-46, s. 160.</i>	160	[Buggery or bestiality] 160. Every one who commits buggery or bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 155.
1988	<i>An Act to amend the Criminal Code and the</i>	154 (Combined with Exception re Acts)	[Anal intercourse] 154. (1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten

	<p><i>Canada Evidence Act, S.C. 1987, c. 24, s. 3.</i></p>		<p>years or is guilty of an offence punishable on summary conviction.</p> <p>(2) Subsection (1) does not apply to any act engaged in, in private, between</p> <p>(a) husband and wife, or</p> <p>(b) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.</p> <p>(3) For the purposes of subsection (2),</p> <p>(a) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and</p> <p>(b) a person shall be deemed not to consent to an act</p> <p>(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or</p> <p>(ii) if the court is satisfied beyond a reasonable doubt that that person could not have consented to the act by reason of mental disability.</p>
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<b>Exception to Buggery and Gross Indecency</b>			
Year	Act	Section	Definition
1969	<p><i>Criminal Law Amendment Act, 1968-69, S.C. 1968-69, c. 38, s. 7.</i></p>	149A	<p>[Exception re acts in private between husband and wife or consenting adults.]</p> <p>149A. (1) Sections 147 and 149 do not apply to any act committed in private between</p> <p>(a) a husband and his wife, or</p> <p>(b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act.</p> <p>[Idem]</p> <p>(2) For the purposes of subsection (1),</p> <p>(a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and</p> <p>(b) a person shall be deemed not to consent to the commission of an act</p> <p>(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or</p> <p>(ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or imbecile.</p>
1970	<p><i>Criminal Code, R.S.C. 1970, c. C-34, s. 158.</i></p>	158	<p>[Exception re acts in private between husband and wife or consenting adults]</p> <p>158. (1) Sections 155 and 157 do not apply to any act committed in private between</p> <p>(a) a husband and his wife, or</p> <p>(b) any two persons, each of whom is twenty-one years or more of age,</p>

			<p>both of whom consent to the commission of the act. [s. 155: Buggery or bestiality s. 157: Acts of gross indecency] [Idem] (2) For the purposes of subsection (1), (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and (b) a person shall be deemed not to consent to the commission of an act (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or (ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or imbecile. 1968-69, c. 38, s. 7.</p>
1985	<p><i>Criminal Code, R.S.C. 1985, c. c-46, s. 160.</i></p>	162	<p>[Exception re acts in private between husband and wife or consenting adults] 162. (1) Sections 160 and 161 do not apply to any act committed in private between (a) a husband and his wife, or (b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act. [Idem] (2) For the purposes of subsection (1), (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and (b) a person shall be deemed not to consent to the commission of an act (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations respecting the nature and quality of the act, or (ii) if that person is, and other party to the commission of the act knows or has good reason to believe that that person is, feeble-minded, insane or an idiot or imbecile. R.S., c. C-34, s. 158.</p>
1988	<p><i>An Act to amend the Criminal Code and the Canada Evidence Act, S.C. 1987, c. 24, s. 3.</i></p>	154 (Combined with Buggery)	<p>[Anal intercourse] 154. (1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction. (2) Subsection (1) does not apply to any act engaged in, in private, between (a) husband and wife, or (b) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act. (3) For the purposes of subsection (2),</p>

			<p>(a) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and</p> <p>(b) a person shall be deemed not to consent to an act</p> <p>(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or</p> <p>(ii) if the court is satisfied beyond a reasonable doubt that that person could not have consented to the act by reason of mental disability.</p>
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<b>Indecent Assault on a Male</b>			
Year	Act	Section	Definition
1892	<i>The Criminal Code, 1892, S.C. 1892, c. 29, s. 260.</i>	260	[Indecent assaults on males.] 260. Every one is guilty of an indictable offence and liable to seven years' imprisonment and to be whipped who assaults any person with attempt to commit sodomy, or who, being a male, indecently assaults any other male person. R.S.C., c. 157, s. 2.
An Act to amend the Criminal Code, 1892, S.C. 1893, c. 32, s. 1.	<i>An Act to amend the Criminal Code, 1892, S.C. 1893, c. 32, s. 1.</i>	260	[Indecent assaults on males.] 260. Every one is guilty of an indictable offence and liable to ten years' imprisonment and to be whipped who assaults any person with intent to commit sodomy, or who, being a male, indecently assaults any other male person. R.S.C., c. 157, s. 2.
1906	<i>Criminal Code, R.S.C. 1906, c. 146, s. 293.</i>	293	[Indecent assault on males.] 293. Every one is guilty of an indictable offence and liable to ten years' imprisonment, and to be whipped, who assaults any person with intent to commit sodomy or who, being a male, indecently assaults any other male person. 55-56 V., c. 29, s. 260; 56 V., c. 32, s. 1.
1927	<i>Criminal Code, R.S.C. 1927, c. 36, s. 293.</i>	293	[Indecent assault on males] 293. Every one is guilty of an indictable offence and liable to ten years' imprisonment, and to be whipped, who assaults any person with intent to commit sodomy or who, being a male, indecently assaults any other male person. R.S., c. 146, s. 293.
1954		148	[Indecent assault on male.] 148. Every male person who assaults another person with intent to commit buggery or who indecently assaults

			another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped.
	<i>Criminal Code, R.S.C. 1970, c. C-34, s. 156.</i>	156	[Indecent assault on male] 156. Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped. 1953-54, c. 51, s. 148.
1983	<i>An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, s. 9.</i>	REPEALED	REPEALED

## II. Private Sexual Offences

<b>Anal Intercourse</b>	
Section	Definition
	<p>[Anal intercourse]</p> <p>159. (1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.</p> <p>(2) Subsection (1) does not apply to any act engaged in, in private, between</p> <p>(a) husband and wife, or</p> <p>(b) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.</p> <p>(3) For the purposes of subsection (2),</p> <p>(a) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and</p> <p>(b) a person shall be deemed not to consent to an act</p> <p>(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or</p> <p>(ii) if the court is satisfied beyond a reasonable doubt that that person could not have consented to the act by reason of mental disability.</p>
159	R.S., 1985, c. C-46, s. 159; R.S., 1985, c. 19 (3rd Supp.), s. 3.

<b>Sex Offender Registry</b>	
Section	Definition
	<p><b>Definitions</b></p> <p>490.011 (1) The following definitions apply in this section and in sections 490.012 to 490.032.</p> <p>designated offence means</p> <p>(c) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983:</p> <p>(iii) section 149 (indecent assault on female),</p> <p>(iv) section 156 (indecent assault on male), and</p> <p>(d) an offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 1, 1988:</p>
490.011	(iv) section 157 (gross indecency),
	<p><b>Order</b></p> <p>490.012 (1) When a court imposes a sentence on a person for an offence referred to in paragraph (a), (c), (c.1), (d), (d.1) or (e) of the definition designated offence in subsection 490.011(1) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall make an order in Form 52 requiring the person to comply with the Sex Offender Information Registration Act for the applicable period specified in section 490.013.</p>
490.012	Order — if intent established

	<p>(2) When a court imposes a sentence on a person for an offence referred to in paragraph (b) or (f) of the definition designated offence in subsection 490.011(1), it shall, on application of the prosecutor, make an order in Form 52 requiring the person to comply with the Sex Offender Information Registration Act for the applicable period specified in section 490.013 if the prosecutor establishes beyond a reasonable doubt that the person committed the offence with the intent to commit an offence referred to in paragraph (a), (c), (c.1), (d), (d.1) or (e) of that definition.</p> <p>Order — if previous offence established</p> <p>(3) When a court imposes a sentence on a person for a designated offence in connection with which an order may be made under subsection (1) or (2) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall, on application of the prosecutor, make an order in Form 52 requiring the person to comply with the Sex Offender Information Registration Act for the applicable period specified in section 490.013 if the prosecutor establishes that</p> <p>(a) the person was, before or after the coming into force of this paragraph, previously convicted of, or found not criminally responsible on account of mental disorder for, an offence referred to in paragraph (a), (c), (c.1), (d), (d.1) or (e) of the definition designated offence in subsection 490.011(1) or in paragraph (a) or (c) of the definition designated offence in section 227 of the National Defence Act;</p> <p>(b) the person was not served with a notice under section 490.021 or 490.02903 or under section 227.08 of the National Defence Act in connection with that offence; and</p> <p>(c) no order was made under subsection (1) or under subsection 227.01(1) of the National Defence Act in connection with that offence.</p> <p>Failure to make order</p> <p>(4) If the court does not consider the matter under subsection (1) or (3) at that time, the court</p> <p>(a) shall, within 90 days after the day on which it imposes the sentence or renders the verdict, set a date for a hearing to do so;</p> <p>(b) retains jurisdiction over the matter; and</p> <p>(c) may require the person to appear by closed-circuit television or any other means that allows the court and the person to engage in simultaneous visual and oral communication, as long as the person is given the opportunity to communicate privately with counsel if they are represented by counsel.</p> <p>2004, c. 10, s. 20; 2007, c. 5, s. 13; 2010, c. 17, s. 5; 2014, c. 25, s. 26.</p>
490.014	<p>Appeal</p> <p>490.014 The prosecutor, or a person who is subject to an order under subsection 490.012(2), may appeal from a decision of the court under that subsection on any ground of appeal that raises a question of law or of mixed law and fact. The appeal court may dismiss the appeal, or allow it and order a new hearing, quash the order or make an order that may be made under that subsection.</p> <p>2004, c. 10, s. 20; 2010, c. 17, s. 7.</p>

## Public Morality Offences

<b>Corrupting Morals (Obscenity)</b>	
Section	Definition
163(1)	<p>[Corrupting morals]</p> <p>163 (1) Every one commits an offence who</p> <p>(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or</p> <p>(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.</p>
163(2)	<p>[Idem]</p> <p>(2) Every one commits an offence who knowingly, without lawful justification or excuse,</p> <p>(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;</p> <p>(b) publicly exhibits a disgusting object or an indecent show;</p> <p>(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or</p> <p>(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.</p>
163(3)	<p>[Defence of public good]</p> <p>(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.</p>
163(4)	<p>[Question of law and question of fact]</p> <p>(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.</p>
163(5)	<p>[Motives irrelevant]</p> <p>(5) For the purposes of this section, the motives of an accused are irrelevant.</p>
163(6)	<p>(6) [Repealed, 1993, c. 46, s. 1]</p>
163(7)	<p>(7) In this section, crime comic means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially</p>

	<p>(a) the commission of crimes, real or fictitious; or</p> <p>(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.</p>
	<p>Obscene publication</p> <p>(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.</p>
163(8)	R.S., 1985, c. C-46, s. 163; 1993, c. 46, s. 1.

<b>Immoral Theatrical Performance</b>	
Section	Definition
	<p>[Immoral theatrical performance]</p> <p>167 (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.</p> <p>[Person taking part]</p> <p>(2) Every one commits an offence who takes part or appears as an actor, a performer or an assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.</p>
167	R.S., c. C-34, s. 163.

<b>Mailing Obscene Matter</b>	
Section	Definition
	<p>[Mailing obscene matter]</p> <p>168 (1) Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous.</p> <p>[Exceptions]</p> <p>(2) Subsection (1) does not apply to a person who</p> <p>(a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;</p> <p>(b) prints or publishes a notice or report under the direction of a court; or</p> <p>(c) prints or publishes any matter</p> <p>(i) in a volume or part of a genuine series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or</p>
168	(ii) in a publication of a technical character that is intended, in good faith, for circulation among

	members of the legal or medical profession. R.S., 1985, c. C-46, s. 168; 1999, c. 5, s. 2.
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<b>Indecent Acts</b>	
Section	Definition
	<p>[Indecent acts]</p> <p>173 (1) Everyone who wilfully does an indecent act in a public place in the presence of one or more persons, or in any place with intent to insult or offend any person,</p> <p>(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years; or</p> <p>(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months.</p> <p>[Exposure]</p> <p>(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of 16 years</p> <p>(a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than two years and to a minimum punishment of imprisonment for a term of 90 days; or</p> <p>(b) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than six months and to a minimum punishment of imprisonment for a term of 30 days.</p> <p>R.S., 1985, c. C-46, s. 173; R.S., 1985, c. 19 (3rd Supp.), s. 7; 2008, c. 6, s. 54; 2010, c. 17, s. 2; 2012, c. 1, s. 23.</p>
173	

<b>Indecent Exhibition</b>	
Section	Definition
	<p>[Causing disturbance, indecent exhibition, loitering, etc.]</p> <p>175 (1) Every one who</p> <p>(a) not being in a dwelling-house, causes a disturbance in or near a public place,</p> <p>(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,</p> <p>(ii) by being drunk, or</p> <p>(iii) by impeding or molesting other persons,</p> <p>(b) openly exposes or exhibits an indecent exhibition in a public place,</p> <p>(c) loiters in a public place and in any way obstructs persons who are in that place, or</p>
175	(d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or

	<p>by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling-houses comprised in the building or structure have access as of right or by invitation, express or implied,</p> <p>is guilty of an offence punishable on summary conviction.</p> <p>[Evidence of peace officer]</p> <p>(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a) or (d) or an obstruction described in paragraph (1)(c) was caused or occurred.</p> <p>R.S., 1985, c. C-46, s. 175; 1997, c. 18, s. 6.</p>
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<b>Bawdy House – Definition History</b>			
Year	Act	Section	Definition
1892	<i>Criminal Code, 1892, c. 29</i>	95	Common bawdy-house defined — A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.
1907	<i>Criminal Code Amendment Act, S.C. 1907, c. 8</i>	225	225. A common bawdy house is a house, room, set of rooms or place of any kind kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes.
1917	<i>An Act to amend the Criminal Code and the Canada Evidence Act, S.C. 1917, c. 14</i>	225	225. A common bawdy house is a house, room, set of rooms or place of any kind kept for purposes of prostitution or for the practice of acts of indecency, or occupied or resorted to by one or more persons for such purposes.
1954	<i>Criminal Code, S.C. 1953-54, c. 51</i>	168	168 (1) In this Part, (b) "Common bawdy-house" — "common bawdy-house" means a place that is (i) kept or occupied, or (ii) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency;
1970	<i>Criminal Code, R.S.C. 1970, c. C-34</i>	179	179 (1) In this Part, "common bawdy-house" means a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency;
1985	<i>Criminal Code, R.S.C. 1985, c. C-46</i>	197	197 (1) In this Part, "common bawdy-house" means a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency;
2014 <b>(Today)</b>	<i>2014, c. 25, s. 12.</i>	197	197 (1) In this Part, common bawdy-house means, for the practice of acts of

			indecenty, a place that is kept or occupied or resorted to by one or more persons; (maison de débauche)
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<b>Bawdy House - Offences</b>	
Section	Definition
	<p>[Keeping common bawdy-house]</p> <p>210 (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.</p> <p>[Landlord, inmate, etc.]</p> <p>(2) Every one who</p> <p>(a) is an inmate of a common bawdy-house,</p> <p>(b) is found, without lawful excuse, in a common bawdy-house, or</p> <p>(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,</p> <p>is guilty of an offence punishable on summary conviction.</p> <p>[Notice of conviction to be served on owner]</p> <p>(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.</p> <p>[Duty of landlord on notice]</p> <p>(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.</p>
210	R.S., c. C-34, s. 193.
	<p>[Transporting person to bawdy-house]</p> <p>211 Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.</p>
211	

### III. Sex Work

Communicating and Paying for Sex Work	
Section	Definition
	<p>[Stopping or impeding traffic]</p> <p>213 (1) Everyone is guilty of an offence punishable on summary conviction who, in a public place or in any place open to public view, for the purpose of offering, providing or obtaining sexual services for consideration,</p> <p>(a) stops or attempts to stop any motor vehicle; or</p> <p>(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.</p> <p>(c) [Repealed, 2014, c. 25, s. 15]</p> <p>[Communicating to provide sexual services for consideration]</p> <p>(1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.</p> <p>(2) In this section, public place includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.</p>
213	R.S., 1985, c. C-46, s. 213; R.S., 1985, c. 51 (1st Supp.), s. 1; 2014, c. 25, s. 15.
	<p>286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of</p> <p>(a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,</p> <p>(i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,</p> <p>(A) for a first offence, a fine of \$2,000, and</p> <p>(B) for each subsequent offence, a fine of \$4,000, or</p> <p>(ii) in any other case,</p> <p>(A) for a first offence, a fine of \$1,000, and</p> <p>(B) for each subsequent offence, a fine of \$2,000; or</p>
286.1(1)	

	<p>(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months and a minimum punishment of,</p> <p>(i) in the case referred to in subparagraph (a)(i),</p> <p>(A) for a first offence, a fine of \$1,000, and</p> <p>(B) for each subsequent offence, a fine of \$2,000, or</p> <p>(ii) in any other case,</p> <p>(A) for a first offence, a fine of \$500, and</p> <p>(B) for each subsequent offence, a fine of \$1,000.</p> <p>2014, c. 25, s. 20.</p>
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<b>Procuring and Materially Benefitting from Sex Work</b>	
Section	Definition
	<p>[Material benefit from sexual services]</p> <p>286.2 (1) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.</p> <p>[Presumption]</p> <p>(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.</p> <p>[Exception]</p> <p>(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit</p> <p>(a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;</p> <p>(b) as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;</p> <p>(c) in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or</p> <p>(d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.</p>
286.2	[No exception]

	<p>(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person</p> <p>(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;</p> <p>(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;</p> <p>(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;</p> <p>(d) engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or</p> <p>(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.</p> <p>[Aggravating factor]</p> <p>(6) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that that person received the benefit in the context of a commercial enterprise that offers sexual services for consideration.</p> <p>2014, c. 25, s. 20.</p>
286.3	<p>[Procuring]</p> <p>286.3 (1) Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.</p> <p>2014, c. 25, s. 20.</p>

<b>Ban on Advertising Sex Work</b>	
Section	Definition
286.4	<p>Advertising sexual services</p> <p>286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of</p> <p>(a) an indictable offence and liable to imprisonment for a term of not more than five years; or</p> <p>(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months.</p> <p>2014, c. 25, s. 20.</p>

#### IV. Pardons

<b>Pardons</b>	
Section	Definition
	<p>[To whom pardon may be granted]</p> <p>748 (1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament, even if the person is imprisoned for failure to pay money to another person.</p> <p>[Free or conditional pardon]</p> <p>(2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.</p> <p>[Effect of free pardon]</p> <p>(3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.</p> <p>[Punishment for subsequent offence not affected]</p> <p>(4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted.</p>
748	R.S., 1985, c. C-46, s. 748; 1992, c. 22, s. 12; 1995, c. 22, s. 6.
	<p>Remission by Governor in Council</p> <p>748.1 (1) The Governor in Council may order the remission, in whole or in part, of a fine or forfeiture imposed under an Act of Parliament, whoever the person may be to whom it is payable or however it may be recoverable.</p> <p>Terms of remission</p> <p>(2) An order for remission under subsection (1) may include the remission of costs incurred in the proceedings, but no costs to which a private prosecutor is entitled shall be remitted.</p>
748.1	1995, c. 22, s. 6.
	<p>[Royal prerogative]</p> <p>749 Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy.</p>
749	R.S., 1985, c. C-46, s. 749; 1995, c. 22, s. 6.

# Appendix F

## Sample Letters to AG's, Police, and Enforcement Officials

www.egale.ca  
185, rue Carlton Street  
Toronto, ON  
M5A 2K7  
1-888-204-7777



Monday, 18 April, 2016

Dear Chief Federal Prosecutor

As you may know, the Minister of Justice has been asked by the Prime Minister to conduct a comprehensive review of the Criminal Code of Canada (the "Code"). I am the Chair of the Klippert Committee, a working group of Egale Canada Human Rights Trust conducting research and preparing a report in connection with this review from the perspective of LGBTIQ2S communities in Canada.

In addition to considering the text of the current provisions of the Code, we are interested in how both current and historical provisions are actually being enforced in Canada today. We would appreciate you providing us with the following information:

1. What measures has your ministry taken to encourage understanding and respect for LGBTIQ2S communities, such as recruitment, training, policies, liaison committees and participation in Pride or other community events?
2. Does your ministry have training, policies or guidelines with respect to the repealed historic sexual offences of gross indecency and indecent assault on a male? Does your force keep any statistics on prosecutions under these sections?
3. The Code prohibition on anal intercourse (s. 159) has a higher age of consent than for vaginal intercourse. This section has been declared unconstitutional by several Canadian courts. Does your ministry have any training, guidelines or policies in effect with respect to enforcement of this section? Does your ministry keep any statistics on the charges laid under this section?
4. Section 210 of the Code regarding so-called "bawdy houses" has been used to target bath houses frequented by gay men and lesbians in the past. Does your ministry have training, policies or guidelines with respect to this section? Does your ministry keep any statistics on the prosecutions under this section?
5. The Supreme Court of Canada clarified the requirements of HIV disclosure in connection with sexual assault in its ruling in *R v Mabior* [2012] 2 SCR 584. Does your ministry have training, policies or guidelines with respect to the issue of HIV disclosure in connection with allegations of sexual assault? Does your ministry keep any statistics on prosecutions for sexual assault pursued as a result of non-disclosure of HIV status?

Egale Canada Human Rights Trust is Canada's only national charity promoting LGBT human rights through research, education and community engagement.

Le Fonds Égale Canada pour les droits de la personne est le seul organisme de bienfaisance canadien voué à la promotion des droits des personnes lesbiennes, gais, bisexuelles et trans grâce à la recherche, à l'éducation et à la mobilisation communautaire.

# Appendix H

## We Demand an Apology Network Executive Summary

The “We Demand an Apology Network” demands an apology for the historical wrongs committed by the Canadian government against LGBT people. The “We Demand an Apology Network” demands an apology for the historical wrongs committed by the Canadian government against LGBT people. We bring together people who were directly affected by the national security campaigns to purge ‘homosexuals’ from the public service, the RCMP and the military, and supporters and researchers who believe an injustice was done.

At the same time as the Canadian government claims to be firm supporter of LGBT rights on a world- scale, it has still not come to terms with the anti-LGBT national security purge campaign directed against LGBT people in Canada that it was directly responsible for. This campaign led to surveillance on thousands of people and the destruction of the careers and livelihood of hundreds (perhaps thousands) of LGBT people from the 1950s until the 1990s. For example, in the 1960s the RCMP created a list of more than 9,000 suspected homosexuals in the Ottawa area. They attempted to develop a ‘fruit machine’ to identify ‘homosexuals’ using federal research moneys in the 1960s. Identification as a ‘confirmed’ homosexual meant the loss of employment and denial of security clearances. People were watched, followed, interrogated and purged from their jobs. Research indicates that the historical campaign against ‘homosexuals’ also resulted in deaths (Gouliquer, Poulin & Hobson, 2012). In a large longitudinal study examining the experiences of lesbian and gay soldiers of the Canadian military, Drs. Poulin and Gouliquer interviewed over 160 lesbian and gay soldiers. Part of the study focussed on those who had been forced to leave the military. They lost their careers and health but some of those soldiers also committed suicide as the quote by Fiona (a pseudo-name) a participant in Poulin & Gouliquer’s study exemplifies. Fiona, the sister of a discharged soldier discusses her brother’s suicide:

“He was traumatized... They [Canadian military] made him believe that he was a pervert.... That he could never be trusted with anything or anyone.... He said [in his note] that he’d ruined our mother’s life, his life, everyone’s life, and he could no longer live with that.” (Fiona).

There has never been an apology from the government for the injustice and harm caused by this campaign. We demand an apology and the commitment that such a campaign will never happen again.

Authorized at the highest levels the Canadian government organized through its national security institutions, including the Security Panel, the Royal Canadian Mounted Police (RCMP), the Canadian Security and Intelligence Service (CSIS), and the Canadian Armed Forces (CF) an official campaign against thousands of people. 'Homosexuals' were defined as suffering from a 'character weakness' that supposedly led them to be open to blackmail by 'enemy' agents. Research has shown that those people who were interrogated and followed by the RCMP, CSIS or the CF, felt that the only people who tried to blackmail them were the Canadian security officers, themselves. They tried to force them to reveal the names of gay and lesbian armed forces members, and public servants. These security campaigns were vicious incidents of tracking, humiliating, interrogating, threatening, hounding, and in addition, discharging or firing individuals. Research has shown that as a result some people were forced to flee Ottawa, or even the country, and some people simply stopped having sex. These campaigns forced many LGBT people into the closet and into living a 'double-life.'

The Canadian military: During WWII people suspected of homosexuality were discharged from the military for being "psychopathic personalities with abnormal sexuality." Later this evolved into prohibitions against 'sexual deviates,' those with 'sexual abnormalities' and 'homosexuals' (see Canadian Forces Administrative Order 19-20). Military security was directed to enforce both national security regulations against LGBT people and military regulations prohibiting homosexuals from being in the military for both national security and disciplinary reasons. In the 1960s the first focus was on the Navy. Investigations also had a particular focus on lesbians in the 1970s and 1980s. For instance, five women were dismissed from the Canadian Armed Forces Base in Shelburne, Nova Scotia in 1984 as "hard-core lesbians." For the women and men in the military, this often included grilling by male military police officers about the sexual practices in which they engaged. In the late 1980s, military members suspected of 'homosexuality' would have their security clearance suspended and were transferred to very low level employment positions on military bases, which in practice 'outed' this person to other people on the base.

The Public Service: In the very early years a major focus was on External Affairs. In 1960, the RCMP identified 59 suspected homosexuals in External Affairs. Research has shown that External Affairs was hit hard with the transfer of John Holmes, and the dismissal and resignation of many others. In 1960, 363 confirmed and suspected homosexuals were identified by the RCMP in government work. In 1961 this went up to 460 and in 1962 850 were identified. In the public service this campaign was extended into many areas having little to do with national security including: the Post Office, Central Mortgage and Housing, Health and Welfare, Public Works, Unemployment Insurance, and to the NFB and CBC. LGBT public servants faced systemic discrimination during these years.

People outside the military and public service: The RCMP security police would approach LGBT people outside the public service and military to get them to inform on LGBT members in these institutions. They often threatened to lay criminal charges against these individuals unless they gave

the names and identities of their LGBT acquaintances and friends. They were able to do this given the complete criminalization of homosexual practices until 1969 and the continuing criminalization of consensual homosexual sexualities that existed for decades after that. In the 1970s because gay and lesbian movement organizations challenged these national security policies in the military and public service many of these organizations were also subjected to RCMP surveillance and were spied on.

While these national security campaigns began to weaken in the public service by the mid-1980s they continued at a very high level of intensity in the RCMP, CSIS and the military. Indeed, the purge campaign continued despite the McDonald Commission report into the RCMP violations of people's rights in 1981, the Charter of Rights and Freedoms in 1982, and the Equality Rights Section of the Charter in 1985.

In the military the purge campaign officially continued until 1992. Many people identified as suspected homosexuals in the military chose to resign, or accept dismissal on other grounds. Many were released as "not advantageously employable" which created problems in finding other employment. But directly under CFAO 19-20, it is reported that even in the 1980s hundreds of military members were discharged. For example, reports indicate that 45 people were dismissed in 1982, 44 in 1983 and 38 in 1984. But another source has 100 people being dismissed in 1982 alone. Other sources report that discharged armed forces members were calculated as: 18 people in 1985, 13 in 1986, 7 in 1987, 10 in 1989, 4 in 1990, and 2 in 1991-92. However, because of national security restrictions, information deleted from Access to Information requests, and inconsistent recording, the numbers officially discharged has never been able to be confirmed. This is why more information withheld on the grounds of 'national security' needs to be released. Violence and abuse against those identified and outed as gay or lesbian in the Canadian military was tolerated -- if not encouraged -- by the military hierarchy during these years.

The military hierarchy very actively fought the ending of its exclusionary policies until it was forced to officially end these practices in the Michelle Douglas Supreme Court decision in 1992. Michelle Douglas and four others engaged in legal battles with the Canadian military in 1992 are the only people in Canada who have ever been recognized and redressed for these attempts to destroy their careers. There remain major problems within the Canadian military regarding sexual assault and abuse against women and hostility towards LGBT members. A fuller public picture of the national security campaigns against LGBT people in the public service and military became visible as a result of journalist Dean Beeby's articles in newspapers in 1992, based on Access to Information Requests. In response to a question based on these reports by NDP MP Svend Robinson then Prime Minister Brian Mulroney stated that the purge campaigns reported in these articles would "appear to be one of the great outrages and violations of fundamental human liberty that one would have seen for an extended period of time." He went on: "[I do not] know much beyond what I have read ... but I have instructed the Clerk of the Privy Council to bring forward for consideration ways that we might examine this more carefully because on its face it would appear to be a fundamental violation of the rights of Canadians and, if it is as it has been reported, a most regrettable incident." (See Canada, House of Commons Debates, (April 27, 1992), 9713-14; and "PM

Denounced 1960s Purge of Homosexual Civil Servants," Globe and Mail, April 28, 1992). However he did not call for an inquiry or offer an apology and nothing ever came of this.

When calls for an official apology were made by researchers and activists in 1998 the Liberal government produced briefing notes for government officials stating that if they were asked about this they should respond by arguing that this was already investigated by the McDonald Commission into RCMP wrongdoing in 1981. However the McDonald Commission did not significantly investigate the national security campaigns against gay men and lesbians; these campaigns continued long after 1981 in the public service and the military; and no apology for these practices was included in the Commission report.

It is now way past time for an official apology by the Canadian government to the hundreds, if not thousands, of people whose lives and careers were destroyed and harmed by these national security campaigns. This is why we welcome and strongly support the NDP motions M-517 and M-521 calling for the revising of the service records of all those discharged from the Canadian Forces on the basis of sexual orientation or gender identity and for an official government apology to all members of the public service and military who were harmed by the purges, and discharged on the basis of their sexual orientation or gender identity. We also support Bill C-600 which calls for suspending the criminal records for homosexual activities that are no longer illegal. It was the use of these offences as a threat to get people to provide information on their gay and lesbian friends and acquaintances that produced some of the 'evidence' identifying people as homosexuals to be discharged from the public service and the military.

We demand that the Canadian government apologise to all who were directly affected by these national security purge campaigns and indicate that the Canadian state will not allow anything like this to happen again. This is an important step in opening the door for recognition and support for the hundreds, and perhaps thousands of people, whose lives and careers were harmed by these government policies.

www.egale.ca  
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Toronto, ON  
M5A 2K7  
1-888-204-7777



6. Does your ministry have training, policies or guidelines with respect to hate crimes or use of the sentencing provisions under section 718.2(a)(i) against LGBTIQ2S people? Does your ministry maintain any statistics on the charges laid in this regard?

We would appreciate a response by April 30 if possible.

Thank you in advance for your cooperation and I look forward to your response.

A handwritten signature in blue ink, appearing to read "R. Douglas Elliott", is written over a horizontal line.

R. Douglas Elliott LSM

Egale Canada Human Rights Trust is Canada's only national charity promoting LGBT human rights through research, education and community engagement.

Le Fonds Égale Canada pour les droits de la personne est le seul organisme de bienfaisance canadien voué à la promotion des droits des personnes lesbiennes, gaies, bisexuelles et trans grâce à la recherche, à l'éducation et à la mobilisation communautaire.

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185, rue Carlton Street  
Toronto, ON  
M5A 2K7  
1-888-204-7777



Monday, 18 April, 2016

Dear Minister

As you may know, the Minister of Justice has been asked by the Prime Minister to conduct a comprehensive review of the Criminal Code of Canada (the "Code"). I am the Chair of the Klippert Committee, a working group of Egale Canada Human Rights Trust conducting research and preparing a report in connection with this review from the perspective of LGBTIQ2S communities in Canada.

In addition to considering the text of the current provisions of the Code, we are interested in how both current and historical provisions are actually being enforced in Canada today. We would appreciate you providing us with the following information:

1. What measures has your ministry taken to encourage understanding and respect for LGBTIQ2S communities, such as recruitment, training, policies, liaison committees and participation in Pride or other community events?
2. Does your ministry have training, policies or guidelines with respect to the repealed historic sexual offences of gross indecency and indecent assault on a male? Does your force keep any statistics on prosecutions under these sections?
3. The Code prohibition on anal intercourse (s. 159) has a higher age of consent than for vaginal intercourse. This section has been declared unconstitutional by several Canadian courts. Does your ministry have any training, guidelines or policies in effect with respect to enforcement of this section? Does your ministry keep any statistics on the charges laid under this section?
4. Section 210 of the Code regarding so-called "bawdy houses" has been used to target bath houses frequented by gay men and lesbians in the past. Does your ministry have training, policies or guidelines with respect to this section? Does your ministry keep any statistics on the prosecutions under this section?
5. The Supreme Court of Canada clarified the requirements of HIV disclosure in connection with sexual assault in its ruling in *R v Mabior* [2012] 2 SCR 584. Does your ministry have training, policies or guidelines with respect to the issue of HIV disclosure in connection with allegations of sexual assault? Does your ministry keep any statistics on prosecutions for sexual assault pursued as a result of non-disclosure of HIV status?

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We would appreciate a response by April 30 if possible.

Thank you in advance for your cooperation and I look forward to your response.

  
R. Douglas Elliott LSM

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Monday, 18 April, 2016

Dear Chief [REDACTED] :

As you may know, the Minister of Justice has been asked by the Prime Minister to conduct a comprehensive review of the Criminal Code of Canada (the "Code"). I am the Chair of the Klippert Committee, a working group of Egale Canada Human Rights Trust conducting research and preparing a report in connection with this review from the perspective of LGBTIQ2S communities in Canada.

In addition to considering the text of the current provisions of the Code, we are interested in how both current and historical provisions are actually being enforced in Canada today. We would appreciate you providing us with the following information:

1. What measures has your police service taken to encourage understanding and respect for LGBTIQ2S communities, such as recruitment, training, policies, liaison committees and participation in Pride or other community events?
2. Does your police service have training, policies or guidelines with respect to the repealed historic sexual offences of gross indecency and indecent assault on a male? Does your service keep any statistics on the charges laid under these sections?
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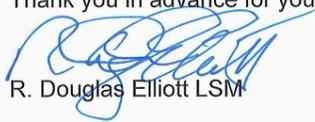
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6. Does your police service have training, policies or guidelines with respect to hate crimes against LGBTIQ2S people? Does your service maintain any statistics on the charges laid in this regard?

We would appreciate a response by April 30 if possible. I have spoken with Andre Goh, Manager for Diversity and Inclusion at the Toronto Police Service, and he has indicated his interest in participating in this review.

Thank you in advance for your cooperation and I look forward to your response.



R. Douglas Elliott LSM

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# Appendix G

## Table of Police and Prosecutor Responses

<b>Ministers of Justice / Attorneys General</b>				
Region	First Name	Last Name	Response Date	Response Type
Alberta	Kathleen	Ganley	-	-
British Columbia	Suzanne	Anton	5/11/2016	Reviewing Request
Manitoba	Gord	Mackintosh	5/17/2016	Full Response
New Brunswick	Serge	Rousselle	-	-
Newfoundland	Andrew	Parsons	5/12/2016	Full Response
Northwest Territories	Louis	Sebert	5/17/2016	Full Response
Nova Scotia	Diana	Whalen	-	-
Nunavut	Keith	Peterson	-	-
Ontario	Madeleine	Meilleur	-	-
Prince Edward Island	Wade	MacLauchlan	-	-
Quebec	Stéphanie	Vallée	-	-
Saskatchewan	Gordon	Wyant	5/20/2016	Partial Response - Reviewing
Yukon	Brad	Cathers	5/31/2016	Full Response
<b>Chief Federal Prosecutors</b>				
Region	First Name	Last Name	Response Date	Response Type
Alberta	Wes	Smart, QC	-	-
Atlantic	Barry	Nordin	-	-
British Columbia	Robert	Prior	-	-
Manitoba	Ian	Mahon	-	-
National Capital Region	Tom	Raganold	-	-
Northwest Territories	Sandra	Aitken	-	-
Nunavut	John P.	Solski	-	-
Ontario	Morris	Pistyner	-	-
Quebec	André A.	Morin Ad. E.	-	-
Saskatchewan	Christine	Haynes	-	-

Yukon	John	Phelps	-	-
<b>Directors of Public Prosecutions</b>				
Location	First Name	Last Name	Response Date	Reponse Type
Nova Scotia	Martin	Herschorn	5/2/2016	Full Response
Ottawa	Brian	Saunders	-	-
<b>Chiefs of Police</b>				
Region	First Name	Last Name	Response Date	Response Type
Calgary, AB	Roger	Chaffin	-	-
Camrose, AB	Darrell	Kambeitz	-	-
Charlottetown, PEI	Paul	Smith	-	-
Edmonton, AB	Rod	Knecht	5/5/2016	FOI Request Required
Fredericton, NB	Leanne	Fitch	5/17/2016	FOI Request Required
Halifax, NS	Jean-Michel	Blais	-	-
Lakeshore, AB	Dale	Cox	-	-
Medicine Hat, AB	Andy	McGrogan	-	-
Montreal, QB	Richard	Deschenes	-	-
Saskatoon, SK	Clive	Weighill	-	-
St. John's, NL	William J.	Janes	5/12/2016	Full Response
Toronto, ON	Mark	Saunders	5/17/2016	FOI Request Required
Victoria, BC	Adam	Palmer	-	-
Winnipeg, MT	Devon	Clunies	-	-
Toronto, ON (LGBTQ Liason Officer)	Danielle	Botineau	6/8/2016	Full Response
<b>RCMP Commissioner and Commanding Officers</b>				
Division	First Name	Last Name	Response Date	Response Type
Commissioner	Bob	Paulson	-	-
B	Tracy	Hardy	-	-
D	Kevin	Brosseau	-	-
E	Craig	Callens	-	-

F	Brenda	Butterworth-Carr	-	-
G	Ron	Smith	-	-
H	Brian	Brennan	-	-
J	Roger L.	Brown	-	-
K	Marianne	Ryan	-	-
L	Joanne	Crampton	-	-
M	Peter	Clark	-	-
O	Jennifer	Strachan	-	-
V	Michael	Jeffrey	-	-

# Appendix H

## Substantive Responses

### *Prosecutors*

- 1) Manitoba Department of Justice: Assistant Deputy Attorney General Michael Mahon



Justice  
Manitoba Prosecution Service  
Suite 510 – 405 Broadway, Winnipeg, Manitoba R3C 3L6  
T (204) 945-2852 F (204) 945-1260  
[www.manitoba.ca](http://www.manitoba.ca)

May 17, 2016

Mr. R. Douglas Elliott, LSM  
Egale Canada Human Rights Trust  
185, rue Carlton Street  
Toronto, Ontario  
M5A 2K7

Dear Mr. Elliott:

Your letter of April 18, 2016 to the Minister of Justice has been referred to my office to respond to your inquiry.

The Department of Justice in Manitoba does not keep the kind of statistics you have asked about in the six questions you posed. I cannot provide you with specifics concerning the numbers of any of the types of prosecutions within the narrow categories you have set out. Accordingly, I will attempt to answer your questions in a general way.

The Department of Justice is not a political organization, and as such, does not participate in any "Pride or other community" or social/political events. We do not have specific policies in place regarding "bawdy house" prosecutions, or indeed, in relation to any of the other specific sections you identified.

The Department takes on all criminal cases that meet our standards for prosecution, on a case-by-case basis, employing unbiased and even-handed procedures. The specific testimonial needs of all victims and witnesses are considerations that are taken into account in all cases. We do not allow considerations of a victim's (or accused's) status as a member of any identifiable community to negatively influence the way in which we conduct our prosecutions.

The Department does maintain an ongoing legal education and training component throughout the year, including, not only advisories about case law and procedures, but also Crown Conferences at least two times per year. While topics as targeted and specific as the ones you have asked about have not been directly focused on, the underlying principles behind each of them has been covered on many occasions. Sentencing concerns, for example, as set out in Sec. 718.2(a)(i) of the Criminal Code have been reviewed and discussed at conferences as well as other educational situations and I believe are very well known provisions by Crown Attorneys in Manitoba.

The Department is made up of a number of units. In addition to the general prosecutions unit, we maintain a number of specialized units, including amongst others, a domestic violence unit, a criminal organizations unit, a youth unit and a high risk offender unit. The Crown Attorneys making up these units have extensive knowledge on the kinds of issues you have raised in your enquiry, and to the extent that the context of an individual prosecution results in it being conducted by one of the members of those units, they would receive that additional attention.

*R. v. Mabior [2012] 2 SCR 584* is a case which is well known to members of our Department as it was a Manitoba case in origin, and was argued at the Supreme Court level by two of our most highly regarded Crown Attorneys.

I thank you for your letter and hope that you find this information to be helpful.

Yours truly,



Michael Mahon  
Assistant Deputy Attorney General

cc Julie Frederickson, Deputy Minister of Justice and Deputy Attorney General

## 2) Director of Public Prosecutions Martin Herschorn

May 2, 2016

HO 16-0163

Mr. R. Douglas Elliott LSM  
Egale Canada Human Rights Trust  
185, rue Carlton Street  
Toronto, ON  
M5A 2K7

Dear Mr. Elliott:

**Re: Egale Canada Human Rights Trust**  
**- Review of the Criminal Code of Canada (the "Code") from the**  
**Perspective of the LGBTIQ2S Communities**

I am in receipt of your letter dated April 18, 2016, addressed to myself with the same-dated correspondence to Minister of Justice, Diana Whalen. I have been asked by Minister Whalen to respond on her behalf as well.

In Nova Scotia, all government departments and agencies, including the Public Prosecution Service, fall under the auspices of the Public Service Commission of Nova Scotia and are governed by their policies as they relate to recruitment and selection, diversity, and non-discrimination. The government of Nova Scotia has a Diversity and Inclusion strategy, and an LGBTI Network, among other initiatives. For more information, I would refer you to the website for the Public Service Commission <http://novascotia.ca/psc/>

With respect to your questions numbered two through six, I can advise that criminal prosecutions are conducted by the independent Public Prosecution Service. I can advise that there are no statistics, training, policies or guidelines particular to the subject matters you reference. In any case where a criminal charge is laid, or where police seek pre-charge advice from a Crown Attorney, the Crown Attorney determines if there is a realistic prospect of conviction and if there is a public interest in prosecuting. Such an assessment considers, among other things, the statutory validity of any proposed charges and the application of case law to the unique facts of each case. For greater elaboration, I attach a copy of the Public Prosecution Service's policy on "The Decision to Prosecute".

Yours very truly,



Martin E. Herschorn, QC  
Director of Public Prosecutions

MEH/sbb  
Attach.

c. The Hon. Diana Whalen, Minister of Justice, NS Department of Justice

### 3) Northwest Territories Deputy Minister of Justice Sylvia Haener



Government of Northwest Territories / Gouvernement des Territoires du Nord-Ouest

MAY 17 2016

Mr. R. Douglas Elliott, LSM  
Chair, Klippert Committee  
Egale Canada Human Rights Trust  
185 CARLTON ROAD  
TORONTO ON M5A 2K7

Dear Mr. Elliott:

#### **Criminal Code of Canada and LGBTIQ2S Communities**

Thank you for your letter dated April 18, 2016, in which you ask a number of questions focused on enforcement of current and historical provisions of the *Criminal Code* related to LGBTIQ2S individuals. I hope you find the attached information helpful in your research efforts.

We are mindful that the conviction and incarceration of Mr. Everett George Klippert of Pine Point in the Northwest Territories – not so very long ago – led to reform of the criminal law of Canada. His sacrifice and role as catalyst for change was acknowledged in our Legislative Assembly on February 29, 2016, following the Government of Canada’s decision to posthumously pardon him.

I would like to thank you for Egale’s continuing efforts to address human rights issues in Canada.

Sincerely,

Sylvia Haener  
Deputy Minister  
Department of Justice

Attachment

c Honourable Louis Sebert  
Minister of Justice

## **Response to Egale - Current and Historical Provisions of the *Criminal Code***

1. Measures to encourage understanding and respect for LGBTIQ2S communities

Egale has questions about training, policies or guidelines that have been undertaken by the Government of the Northwest Territories (GNWT) Department of Justice, to encourage understanding and respect for LGBTIQ2S communities. The GNWT has implemented a Harassment Free and Respectful Workplace Policy. This policy recognizes the diversity of the NWT public service, and makes it clear that harassment in any form is unacceptable behaviour that will not be tolerated. The policy references the prohibited grounds of discrimination listed in the NWT *Human Rights Act*, which include harassment related to a person's sexual orientation and gender identity. When the *Human Rights Act* was proclaimed in 2004, the NWT became the first jurisdiction in Canada to recognize gender identity as prohibited grounds of discrimination.

Training is also provided to the officers of the RCMP "G" Division that serves all communities in the Northwest Territories. All RCMP officers must complete two mandatory training courses on "Bias Awareness for Employees" and "Respectful Workplace" that promote respect and understanding for all, including LGBTIQ2S colleagues and members of the public. A police officer with the RCMP "G" Division sits on the RCMP LGBT National Advisory Committee. In August 2015, she represented the RCMP at the NWT Pride BBQ held in Yellowknife.

2. Repealed historic sexual offences of gross indecency and indecent assault on a male provisions of *Criminal Code*

Egale has questions about training, policies or guidelines, as well as statistics on prosecutions under these repealed sections. RCMP training, policies and guidelines pertain to current sections of the *Criminal Code*, and do not address the repealed historic sexual offences of gross indecency and indecent assault on a male.

The Public Prosecution Service of Canada (PPSC) prosecutes offences under federal legislation, including *Criminal Code* offences in the territories, and that Service is the appropriate source for historical statistical information pertaining to prosecutions in the NWT. I understand that you have been in contact with PPSC headquarters directly, and that you will receive a response to your inquiries at that level.

In 2005, RCMP "G" Division established its Police Reporting Occurrence System, which tracks charges laid. There have been no charges laid under either of the repealed offenses since the system has been in place.

3. *Criminal Code* (s. 159) - age of consent for anal intercourse

Egale has questions about training, policies or guidelines, as well as statistics on prosecutions under this section of the *Criminal Code*. Again, PPSC would be the appropriate source for statistical information about prosecutions in the NWT. The RCMP tracks charges laid under Section 159 of the *Criminal Code*. Since 2005, there have been several charges of "anal intercourse" under Section 159, but in each case the charge was laid in conjunction with a charge of sexual assault under Section 271 of the *Criminal Code*.

4. *Criminal Code* (s. 210) - "bawdy houses"

Egale has questions about training, policies or guidelines, as well as statistics on prosecutions under this section of the *Criminal Code*. Again, PPSC would be the appropriate source for statistical information about prosecutions in the NWT. Since their tracking system was put in place in 2005, the RCMP have not laid any charges under section 210 relating to "bawdy houses" in the NWT.

5. Non-disclosure of HIV status

Egale has questions about training, policies or guidelines, as well as statistics on prosecutions for sexual assault pursued as a result of non-disclosure of HIV status. Again, PPSC would be the appropriate source for statistical information about prosecutions in the NWT. RCMP "G" Division does not track charges laid for sexual assault related to the non-disclosure of HIV status.

### 3) Québec Ministre de la Justice: Conseillère Politique Kim Beaudoin



Gouvernement du Québec  
Le cabinet de la ministre de la Justice et Procureure générale,  
ministre responsable de la région de l'Outaouais

Le 31 mai 2016

Monsieur R. Douglas Elliot  
Égale Canada Human Rights Trust  
185, rue Carleton  
Toronto (Ontario) M5A 2K7

Monsieur,

J'ai lu avec grande attention votre correspondance du 18 avril dernier, adressée à madame Stéphanie Vallée, ministre de la Justice et responsable de la lutte contre l'homophobie. Celle-ci m'a été transmise pour réponse.

Le gouvernement du Québec accorde une grande importance au mieux-être des personnes de minorités sexuelles. Il s'agit d'un dossier auquel le gouvernement accorde une haute priorité.

À ce titre, le Québec s'est doté en décembre 2009 d'une politique de lutte contre l'homophobie, puis, en mai 2011, du Plan d'action gouvernemental de lutte contre l'homophobie 2011-2016, incluant 60 mesures et assorti d'un budget additionnel de 7,1 M\$.

L'une de ces mesures est la publication et la diffusion annuelle, par le ministère de la Sécurité publique, des données statistiques du Programme de déclaration uniforme de la criminalité en matière de crimes haineux, incluant celles sur les crimes motivés par l'orientation sexuelle.

De plus, le gouvernement a récemment prolongé d'un an l'actuel Plan d'action. Des investissements totalisant 925 000 \$ sont prévus afin d'assurer la continuité des services offerts ainsi que le financement qui y est associé, jusqu'à la sortie du prochain plan d'action prévu en 2017.

Au Directeur des poursuites criminelles et pénales, il existe des directives enjoignant aux procureurs de rencontrer les victimes avant d'autoriser des poursuites en matière d'agression sexuelle et également de les informer des négociations avant de conclure une entente pour un plaidoyer de culpabilité.

... 2

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Télécopieur : 418 646-0027  
ministre@justice.gouv.qc.ca

Nous tenons également à souligner que l'article 718.2a)(i) du Code criminel consacre le caractère aggravant des infractions motivées en tout ou en partie par des préjugés ou de la haine fondée sur le sexe et l'orientation sexuelle. Cette disposition est plaidée par les procureurs aux poursuites criminelles et pénales lors de l'imposition des sentences pour de tels crimes.

Vous souhaitant tout le succès possible dans la poursuite de vos recherches, je vous prie d'agréer, Monsieur, l'expression de mes sentiments les meilleurs.



Kim Beaudoin  
Conseillère politique

4) Yukon Deputy Minister of Justice Thomas E. Ulyett



Justice  
Box 2703, Whitehorse, Yukon Y1A 2C6  
May 31, 2016

R. Douglas Elliott, LSM  
Egale Canada Human Rights Trust  
185 rue Carleton Street  
Toronto, Ontario M5A 2K7

Dear R. Douglas Elliott,

**RE: CRIMINAL CODE CHANGES CONCERNING LGBTIQ2S COMMUNITIES**

---

Thank you for your letter of April 18, 2016, regarding the comprehensive review of the Criminal Code of Canada (the Code).

In response to your questions regarding what our government is doing to support the LGBTIQ2S community in Yukon, I can report that we have an active interdepartmental committee to look at issues effecting this community, with a particular focus on transgender rights and how our government is responding to their needs across departments.

With respect to prosecutions under the Code, and our view on changes to the Code, you should be aware that the government of Yukon has not yet devolved this responsibility from the federal government. As such, your questions regarding how criminal prosecutions are handled in Yukon are best addressed to the Public Prosecution Service of Canada. Our Department does not maintain prosecution statistics; however, we do have court statistics which are reported to Statistics Canada and are publicly available through that source. Other types of statistics of reported crime are compiled by the RCMP, who have responsibility for policing in the territory, and are reported annually in the Police Reported Crime Statistics every July.

Our Department does have one policy in place specifically for dealing with transgender inmates at the Whitehorse Correctional Centre, which is modelled on other jurisdictions' policies. We have not yet had a transgender person in the Whitehorse Correctional Centre that we are aware of. We do support changes to policy and programs to support persons from the LGBTIQ2S community which strengthens our overall community.

Yours truly,

A handwritten signature in blue ink, consisting of several overlapping loops and lines, positioned above the typed name.

Thomas E. Ulyett  
Deputy Minister

## 5) Saskatchewan Minister of Justice Gordon S. Wyant

Minister of Justice  
and Attorney General



SASKATCHEWAN

Legislative Building  
Regina, Saskatchewan S4S 0B3

MAY 20 2016

Mr. R. Douglas Elliott LSM  
Egale Canada Human Rights Trust  
185, rue Carlton Street  
TORONTO ON M5A 2K7

Dear Mr. Elliott:

Thank you for your letter of April 18, 2016 seeking information on a number of issues concerning your organization.

In regards to your first question, I am pleased to advise the Government of Saskatchewan recently endorsed the LGBT+ Network. The Network is made up of employees from across government, including Ministry of Justice employees. In partnership with government, the Network has held training and educational sessions aimed at creating a workplace that is inclusive of LGBT persons. These measures will also help improve service to Saskatchewan citizens.

In regards to your other questions, I forwarded your request to Public Prosecutions officials within my Ministry. They advise me that they do not have policies in place respecting the issues you have raised. They deal with these matters, if and when they arise by considering the evidence, the relevant case law and sections of the *Criminal Code*. These will guide their decisions on a case by case basis. The Ministry does not keep statistics on the issues you have identified.

Yours very truly,

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Gordon S. Wyant, Q.C.

# Police

## 1) Toronto Police Services: Constable Danielle Botineau; LGBTQ Outreach Coordinator

### KLIPPERT COMMITTEE

**1. What measures has your police service taken to encourage understanding and respect for the LGBTIQ2S communities, such as recruitment, training, policies, liaison committees and participation in Pride or other community events?**

**Recruitment:** LGBTQ Recruitment Sessions in the Church Wellesley Village, Employment Booth at the Annual Pride Parade

**Training:** Since 2001 all new recruits have been given LGBTQ training at Toronto Police College, as well as the Plainclothes Investigators course. LGBTQ training also included on Domestic Violence Investigators Course, Frontline Supervisors Course, Advanced Supervisors Course, Court Officers Recruits Classes as well as annual training day for all court officers. LGBTQ training to call takers (dispatchers) during 13 week in service training. 2 Day training for School Resource Officers and Community School Liaison Officers. On-line training also offered.

Training delivered by LGBTQ Liaison officer, in partnership with LGBTQ Internal Support Network members as well as community members.

**Policies:** Lodging and Searching of Trans members.

**Liaison Committee:** LGBTQ Community Consultative Committee since 2002

**Community Events:** Pride Parade Participation, Chief's Pride Reception held at headquarters, Coffee with Cops, LGBTQ Youth Bursary (given Annually), RHVP Program/Two-Spirit One-Voice programs in partnership with Egale Canada, Among Friends – Newcomers Program at the 519 Community Centre, Various Workshops in TDSB working with Gay Straight Alliances, International Day of Pink in partnership with TDSB.

LGBTQ officer organize several of the events and is supported by LGBTQ Internal Support Network. The purpose of an ISN is to: Provide support, coaching and networking, Provide forums for members to meet, Raise awareness + understanding of issues faced by LGBT members, Assist with recruitment, orientation, retention, promotion and career development.

**2. Does your service have training, policies or guidelines with respect to the repealed historic sexual offences of gross indecency and indecent assault on a male? Does your service keep statistics on the charges laid under these sections?**

**3. The Code prohibition on anal intercourse (s.159) has a higher age of consent than for vaginal intercourse. This section has been declared unconstitutional by several Canadian courts. Does your police service have any training, guidelines or policies in effect with to enforcement of this section? Does your service keep any statistics on the charges laid under this section?**

Anal Intercourse – Declared unconstitutional and we do not lay it.

**4. Section 210 of the Code regarding so-called “bawdy houses” has been used to target bath houses frequented by gay men and lesbians in the past. Does your police service have any training, guidelines or policies with respect to this section? Does your service keep any statistics on the charges laid under this section?**

Bawdy House – Declared unconstitutional – we do no lay it

**5. The Supreme Court of Canada clarified the requirements of HIV disclosure in connections with sexual assault in its ruling in R v Mabior (2012) 2SCR 584. Does your police service have training, policies or guidelines with respect to the issue of HIV disclosure in connection with allegations of sexual assault? Does your service keep any statistics on the charges of sexual assault laid as a result of the non-disclosure of HIV status?**

The Sexual Assault Investigators (SAIC) Course at the Toronto Police College has an entire period on HIV training from Canada’s leading defence counsel and crown attorney. They teach one full period on HIV prosecutions and another on the law itself – so one half day training. There is also a full period on the Sexual Assault/Child Abuse update course.

These broader issues are addressed on the Recruit, General Investigators Course and the Child Abuse Investigators Course. Also addressed during interview and investigation lecture.

**6. Does your police service have training, policies or guidelines with respect to hate crimes against LGBTIQ2S people? Does your service maintain any statistics on the charges laid in this regard?**

We have the Report Homophobic Violence Period Program that we deliver in partnership with Egale Canada to both police services as well community organizations.

We collect statistics annually and release an “Annual Hate/Bias Crime Statistical Report” every year. LGBTQ community are generally amongst the top 3 targeted communities in Toronto. In 2015 The LGBTQ community was second most victimized community behind the Jewish community. The LGBTQ community was the most victimized community for assault occurrence in 2015. Hate Crimes against the LGBTQ community accounted for 20% of the Hate Crimes in Toronto. Further information can be found in the, Toronto Police Service 2015 Annual Hate/Bias Crime Statistical Report, put out by our Intelligence Services, Hate Crime Unit.

Resources

<http://www.oacp.on.ca/Userfiles/Files/NewAndEvents/OACP%20LGBTQ%20final%20Nov2013.pdf>

This resource was produced by the Ontario Association of Chiefs of Police, “Best Practices in Policing & LGBTQ Communities in Ontario”, in 2013 and is a working document.

## 2) Royal Newfoundland Constabulary Chief of Police William J. Janes



**Royal Newfoundland Constabulary**  
*Safer Communities through Policing Excellence*

May 12, 2016

R. Douglas Elliott LSM  
Egale Canada Human Rights Trust  
185, rue Carlton Street  
Toronto, ON  
M5A 2K7

Dear Sir:

In relation to your correspondence dated Monday, April 18, 2016, I wish to address the following points:

In 2014 the RNC established a LGBT committee comprised of officers from all areas within the organization. We quickly identified a Police liaison officer for the LGBT community who would make contact with PRIDE and evaluate our relationship with the LGBT community. Meetings were held with PRIDE officials to gauge their satisfaction with the RNC and to see what has been working and what if anything needed to be addressed. These meetings were very positive and we received no negative comments. We proceeded to partner with PRIDE during PRIDE week activities of 2014 in several ways.

Members along with the Chief of Police attended PRIDE flag raising ceremonies at Confederation building. The RNC LGBT committee hosted "Coffee with Cops" event at a local coffee house that was well received.

The RNC Mounted Unit along with other officers took part in the PRIDE parade. Members attended the PRIDE social after this parade with a RNC booth dedicated to recruitment for the RNC.

Through this committee we produced the video "If You Can Serve You Can Serve" which is a recruiting video for the RNC. This video speaks to the openness, diversity, and inclusiveness of the RNC. We received tremendous positive feedback on this approach. This committee has tasked itself with identifying training needs for the organization as it pertains to the LGBT community. We have reviewed several training models and will develop one in consultation with the RNC

Training Division that addresses the needs of the LGBT membership and community.

The RNC continued its involvement with PRIDE activities in 2015 by taking part in the parade and events throughout the week. This is a relationship that I see continuing and growing in its successfulness.

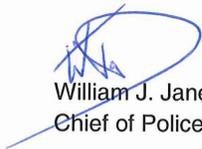
This spring the RNC partnered with Corner Brook Regional High School in "Standout 2". This is a project that addresses inclusiveness within the school system on many levels. Members from the RNC Corner Brook Region volunteered at this weekend long event participating in a recruiting/information booth for careers within the RNC.

In relation to the various points dealing with Criminal Code offences that have been repealed or that deal with HIV disclosure as it relates to allegations of sexual assault these sorts of matters would be investigated by a specialized unit, CASA, within the Criminal Investigation division. When these situations arise guidance and advice would be sought from Legal services within the RNC.

In relation to Section 210 of the Criminal Code I am not aware of specific policy in place relating to this matter. However if this situation was to ever arise guidance would be sought from legal services.

Training has been provided to officers in relation to Hate crimes as well policy is in place giving direction to how these offences will be investigated and by which unit within the organization. The RNC captures statistical information in accordance to the Uniform Crime Reporting policies and procedures. Criminal Code offences are matched to a Classification and data is released in this format. If we require specific information regarding specific charges we at times referred to Provincial Court.

Respectfully submitted,

  
William J. Janes  
Chief of Police

# Appendix I

The recommendations of Dignity Initiative are contained in its Call to Action<sup>1</sup> are as follows:

## **HOW CANADA CAN DEFEND AND PROMOTE FUNDAMENTAL HUMAN RIGHTS FOR LGBTI PEOPLE AROUND THE WORLD**

We call upon the Government of Canada to act, individually and in concert with other like-minded governments, to defend the fundamental human rights of LGBTI people around the world. In particular, **we call upon Canada to take the following actions**, widely supported by Canadian civil society and reflecting appeals for support from LGBTI advocates around the world facing hostility, criminalization, violence and discrimination:

- ❖ **REACH OUT** to LGBTI activists and human rights defenders in countries where such rights are denied or violated, and actively participate in regional and global initiatives that work to amplify the voices of LGBTI activists around the world.
  - Speak out publicly in support of governments that take positive actions in support of human rights for LGBTI people. Follow the advice of local LGBTI activists regarding whether, when and how to speak out publicly and/or privately against the adoption of anti-LGBTI laws and against violence or other hate crimes targeting LGBTI people.
  - Work with respected jurists and faith leaders, as well as other human rights defenders and community leaders, both in Canada and in countries where LGBTI people face criminalization, discrimination and violence, to support a wide and diverse array of voices speaking up for the human rights of LGBTI people.
  - Intervene when human rights defenders are detained, including by having diplomatic personnel raise objections and monitor trials of human rights defenders and others targeted under anti-LGBTI laws. When deemed appropriate by local LGBTI advocates, speak out publicly when LGBTI people or their allies are charged under discriminatory laws criminalizing them or their defense of human rights.
  
- ❖ **ENHANCE FUNDING** to support organizations around the world and in Canada working to defend and promote human rights, including of LGBTI people.
  - Strengthen the capacity of both LGBTI and non-LGBTI human rights organizations to defend basic human rights, including for LGBTI people. Provide

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<sup>1</sup> <http://www.dignityinitiative.ca/call-to-action/>

support for building the capacity of lawyers, law enforcement personnel, national human rights institutions and judicial systems to respect and defend human rights, including the rights of LGBTI people. Examples include providing support for non-governmental organizations challenging discriminatory anti-LGBTI legislation in courts, or funding security and safety measures for human rights defenders facing threats of violence.

- Beyond simply responding to urgent situations of attacks on human rights, provide financial support for LGBTI movement-building around the world, including core and program support to organizations working in areas such as health, community development, and engagement of religious leaders and institutions, so as to assist in mobilizing key constituencies speaking out in support of human rights for LGBTI people.
  - Ensure that official development assistance (ODA) does not go to non-governmental organizations that promote or support legislation criminalizing LGBTI people or that encourage hatred or violence against LGBTI people. Examine options for redirecting any such funding within a country, while taking care to preserve essential health and social services, so as to support service providers that are inclusive and address the needs of LGBTI people, and to support community advocacy efforts to protect the human rights of LGBTI people.
  - Mainstream LGBTI rights into development funding policies and processes, such that monitoring and evaluation mechanisms oblige organizations, where appropriate, to report on the extent to which projects have worked with LGBTI populations to protect and advance their well-being and rights.
  - Ensure that LGBTI rights are systematically integrated into other intersecting international development and human rights funding programs, such as those to alleviate poverty, protect against discrimination, promote civil liberties, address gender-based violence, and/or promote health (i.e., including HIV prevention and care, and sexual and reproductive health more broadly).
- ❖ **UTILIZE DIPLOMACY** to clearly and publicly define a commitment to the human rights of LGBTI people in Canada's broader foreign policy, including with respect to international development. **Use all available diplomatic channels** to advance and support human rights of LGBTI people around the world.
- Use bilateral diplomatic engagement and dialogue with countries to pursue the repeal of anti-LGBTI laws and to discourage countries from adopting such legislation. Engage in a dialogue about the benefits realized from moving beyond such persecution and instead fostering more inclusive societies based on the principle that fundamental human rights are to be universally enjoyed.
  - In countries where there have been significant violations of human rights of LGBTI people, or adoption of new anti-LGBTI laws, Canada should instruct its diplomatic representatives to consult with local human rights defenders on how best to engage governments in making the case for compliance with international and regional human rights standards. Informed by those discussions with local advocates, Canada's diplomatic representatives in-country should consult with

the Minister and senior staff regarding appropriate actions to take that can best support efforts to defend and promote human rights in the specific country context.

- Provide specific tools and additional resources to support the work of Canadian diplomats in advancing LGBTI rights as a clear foreign policy objective. Develop guidance, such as a manual, for use by Canadian embassies and high commissions in supporting local LGBTI human rights movements, including the allocation of support from the Canada Fund for Local Initiatives.
  - Introduce a federal interdepartmental task force bringing together the Department of Foreign Affairs, Trade and Development (DFATD) and other relevant departments to pursue and implement a coordinated strategy to advance the human rights of LGBTI people globally.
  - Enhance the human rights capacity of DFATD, including through the provision of additional resources to human rights policy and legal divisions, to support a more comprehensive and consistent approach to the promotion of human rights, including those of LGBTI people.
  - Monitor and comprehensively report on the human rights situation for LGBTI people globally, including the state of legislation in other countries that criminalizes or otherwise persecutes LGBTI people.
  - Work with other like-minded countries to support LGBTI human rights and oppose anti-LGBTI measures or statements in international and regional forums. Join and support the existing LGBT Core Group at the United Nations on Ending Violence and Discrimination to coordinate efforts to support LGBTI human rights movements and defenders.
  - Support the work of UN and regional human rights mechanisms in documenting and addressing LGBTI human rights violations around the world. Such mechanisms can be used to hold states accountable for such violations and to build a body of internationally-recognized norms protecting and promoting the universal human rights of LGBTI people, consistent with the Yogyakarta Principles (on the application of international human rights law in relation to sexual orientation and gender identity).
- ❖ **SUPPORT REFUGEES and** facilitate asylum in Canada for LGBTI people fleeing persecution because of their sexual orientation, gender identity or expression, in the case of both those seeking asylum from within Canada and those seeking assistance abroad.
- Expand and make permanent the government's Rainbow Refugee Assistance Program to support LGBTI refugees in need of protection.
  - Recognize the need for priority processing of LGBTI people who are "at risk" or in need of protection under the "Urgent Protection Program" and reduce wait times for private sponsorship applications (for all refugee applicants, including LGBTI asylum-seekers).
  - LGBTI refugees coming to Canada, like all refugees, should be eligible for the Interim Federal Health Plan, for which funding should be fully restored.

- Broaden the private sponsorship program to include countries with high levels of LGBTI persecution.  
Offer asylum to LGBTI human rights defenders and other LGBTI people who are unwillingly “outed” by media outlets or political leaders in countries where LGBTI people are criminalized, or where such outing is intended, or can reasonably be expected to incite violence, criminal prosecution or other persecution against them.

# Appendix A

## Victoria Expungement Scheme

### Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014

No. 81 of 2014

#### TABLE OF PROVISIONS

<i>Section</i>		<i>Page</i>
<b>PART 1—PRELIMINARY</b>		
1	Purpose	1
2	Commencement	2
<b>PART 2—AMENDMENT OF SENTENCING ACT 1991</b>		
3	New Part 8 inserted	3
<b>PART 8—HISTORICAL HOMOSEXUAL CONVICTIONS</b>		
105	Definitions	3
105A	Part to bind the Crown	9
105B	Application to Secretary for convictions for historical homosexual offences to be expunged	10
105C	Submission of further information etc.	13
105D	Consideration of application	13
105E	Response to enquiries or requests for information	15
105F	Appointment of advisors	16
105G	Mandatory tests	16
105H	Withdrawal of application	18
105I	Determination of application	18
105J	Effect of expungement of conviction	19
105K	Obligations in relation to official records	21
105L	Jurisdiction of VCAT	23
105M	Restriction on right to re-apply	23
105N	Delegation	24
105O	Confidentiality	24
105P	Giving of notices	25
105Q	Evidentiary provisions	25
105R	Immunity	26
105S	No entitlement to compensation	26
4	New section 157 inserted	27
157	Transitional provision— <b>Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014</b>	27

<i>Section</i>	<i>Page</i>
<b>PART 3—AMENDMENT OF OTHER ACTS</b>	<b>29</b>
<b>Division 1—Amendment of Victorian Civil and Administrative Tribunal Act 1998</b>	<b>29</b>
5 New Part 18 inserted in Schedule 1	29
<b>PART 18—SENTENCING ACT 1991</b>	<b>29</b>
78 Application of Part	29
79 Constitution of Tribunal	29
80 Confidentiality of proceeding	29
81 Effect of original decision pending review	30
82 Tribunal file not open for inspection	31
<b>Division 2—Amendment of Equal Opportunity Act 2010</b>	<b>31</b>
6 Definitions	31
7 Attributes	31
<b>PART 4—REPEAL OF AMENDING ACT</b>	<b>32</b>
8 Repeal of amending Act	32
<hr style="border-top: 3px double #000;"/>	
<b>ENDNOTES</b>	<b>33</b>



Victoria

# **Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014<sup>†</sup>**

**No. 81 of 2014**

[Assented to 21 October 2014]

**The Parliament of Victoria enacts:**

## **PART 1—PRELIMINARY**

### **1 Purpose**

The purpose of this Act is to amend the **Sentencing Act 1991** to establish a scheme under which convictions for certain offences related to conduct engaged in for the purposes of, or in connection with, sexual activity of a homosexual nature may be expunged on the basis that it is generally accepted that consensual sex of a

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homosexual nature between adults should never  
have been a crime.

**2 Commencement**

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
  - (2) If a provision of this Act does not come into operation before 1 September 2015, it comes into operation on that day.
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**PART 2—AMENDMENT OF SENTENCING ACT 1991**

**3 New Part 8 inserted**

After Part 7 of the **Sentencing Act 1991** insert—

**"PART 8—HISTORICAL HOMOSEXUAL  
CONVICTIONS**

**105 Definitions**

(1) In this Part—

*agreement* includes arrangement;

*applicant* means—

- (a) a person referred to in section 105B(1) who may make an application under that subsection; or
- (b) if a person referred to in section 105B(1) is unable to make an application under that subsection because of a disability within the meaning of the **Equal Opportunity Act 2010**, the person's litigation guardian or guardian with the meaning of the **Guardianship and Administration Act 1986**; or
- (c) a person referred to in section 105B(2) who may make an application under that subsection in respect of an entitled person who is deceased;

*application* means application under section 105B;

*appropriate representative*, of a person who was convicted of a historical homosexual offence and is deceased, means—

See:  
Act No.  
49/1991.  
Reprint No. 16  
as at  
1 July 2014  
and  
amending  
Act Nos  
32/2013,  
77/2013,  
15/2014,  
17/2014,  
37/2014,  
47/2014,  
52/2014,  
55/2014,  
61/2014 and  
63/2014.  
LawToday:  
www.  
legislation.  
vic.gov.au

- (a) if the person, immediately before death had a spouse or domestic partner—the spouse or domestic partner of the person; or
- (b) if the person immediately before death did not have a spouse or domestic partner or if the spouse or domestic partner is not available—a son or daughter of the person of or over the age of 18 years; or
- (c) if a spouse, domestic partner, son or daughter is not available—a parent of the person; or
- (d) if a spouse, domestic partner, son, daughter or parent is not available—a sibling of the person of or over the age of 18 years;
- (e) if a spouse, domestic partner, son, daughter, parent or sibling is not available—a person named in the will of the person as an executor; or
- (f) if a spouse, domestic partner, son, daughter, parent, sibling or executor is not available—a person who, immediately before the death, was a personal representative of the person;
- (g) if a spouse, domestic partner, son, daughter, parent, sibling, executor or personal representative is not available—a person determined to be the appropriate representative under subsection (3);

---

**conviction** includes a finding of guilt made by a court, whether or not a conviction is recorded;

**Crim Trac** means the Crim Trac Agency established under section 65 of the Public Service Act 1999 of the Commonwealth;

**data controller**, in relation to official records held by—

- (a) a court, means the Court Chief Executive Officer for the court appointed under section 30 of the **Court Services Victoria Act 2014**; or
- (b) VCAT, means the Court Chief Executive Officer for VCAT appointed under section 30 of the **Court Services Victoria Act 2014**; or
- (c) Victoria Police, means the Chief Commissioner of Police; or
- (d) the Office of Public Prosecutions, means the Solicitor for Public Prosecutions appointed under section 42 of the **Public Prosecutions Act 1994**;

**domestic partner**, of an entitled person who is deceased, means—

- (a) a person who was at the date of death of the entitled person in a registered domestic relationship with the entitled person; or
- (b) an adult person to whom the entitled person was not married but with whom the entitled person

was in a relationship as a couple where one or each of them provided personal or financial commitment and support of a domestic nature for the material benefit of the other, irrespective of their genders and whether or not they were living under the same roof, but does not include a person who provided domestic support and personal care to the entitled person—

- (i) for fee or reward; or
- (ii) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation);

***entitled person*** means—

- (a) a person referred to in section 105B(1); or
- (b) a person who was convicted of a historical homosexual offence and is deceased;

***expunged conviction*** means a conviction that has become an expunged conviction by force of section 105I;

***historical homosexual offence*** means—

- (a) a sexual offence or a public morality offence; or
- (b) an offence of attempting to commit a sexual offence or a public morality offence; or

- (c) an offence of being involved (within the meaning given by section 323(1)(a) or (b) of the **Crimes Act 1958**) in the commission of a sexual offence or a public morality offence; or
- (d) an offence of inciting or conspiring to commit a sexual offence or a public morality offence;

***legal proceeding*** has the same meaning as in the **Evidence (Miscellaneous Proceedings) Act 1958**;

***official records*** means records containing information about convictions held by any court, VCAT, Victoria Police or the Office of Public Prosecutions;

***public morality offence*** means an offence, other than a sexual offence, as in force at any time—

- (a) the essence of which is the maintenance of public decency or morality; and
- (b) by which homosexual behaviour could be punished;

**Example**

Behaving in an indecent or offensive manner contrary to section 17(1)(d) of the **Summary Offences Act 1966**.

***registered medical practitioner*** means a person registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student);

***relevant authorisation***, in relation to an Act, means a licence, permit, approval, consent, accreditation, exemption or other authorisation under that Act;

***secondary record*** means an official record that is a copy, duplicate or reproduction of, or extract from, another existing official record, irrespective of whether those records are held by the same entity or by different entities;

***sexual offence*** means an offence as in force at any time by which any form of homosexual conduct, whether consensual or non-consensual or penetrative or non-penetrative, could be punished, whether or not heterosexual conduct could also be punished by the offence;

**Example**

Buggery contrary to section 68(2) of the **Crimes Act 1958** (as in force immediately before the commencement of the **Crimes (Sexual Offences) Act 1980**) or indecent assault on a male person contrary to section 65(3) of the **Crimes Act 1928**.

***Victoria Police*** has the same meaning as in the **Victoria Police Act 2013**.

- (2) For the purposes of the definition of ***domestic partner*** in subsection (1)—
- (a) ***registered domestic relationship*** has the same meaning as in the **Relationships Act 2008**; and
  - (b) in determining whether persons who were not in a registered domestic relationship were domestic partners of each other, all the circumstances of their relationship are to be taken into
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account, including any one or more of the matters referred to in section 35(2) of the **Relationships Act 2008** as may be relevant in a particular case; and

- (c) a person was not a domestic partner of another person only because they were co-tenants.
- (3) For the purposes of paragraph (g) of the definition of *appropriate representative*, a person is the appropriate representative if the Secretary determines that the person should be taken to be the appropriate representative of the deceased person because of the closeness of the person's relationship with the deceased person immediately before his or her death.
- (4) In this Part, a reference to an expunged conviction includes a reference to—
- (a) the charge to which the expunged conviction relates; and
  - (b) any investigation or legal process associated with that charge or the conviction.

**105A Part to bind the Crown**

- (1) This Part binds the Crown, not only in right of the State of Victoria, but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.
- (2) Nothing in this section affects any other provision of this Act.

**105B Application to Secretary for convictions for historical homosexual offences to be expunged**

- (1) A person who has been convicted of a historical homosexual offence is entitled to apply to the Secretary for the conviction to be expunged.
- (2) In addition, an appropriate representative of a person who was convicted of a historical homosexual offence and is deceased may apply to the Secretary for the person's conviction to be expunged.
- (3) An application must—
  - (a) be in the form approved by the Secretary; and
  - (b) be—
    - (i) signed by the applicant; or
    - (ii) if the applicant is an entitled person who is not deceased but is not able to sign the application because of a disability within the meaning of the **Equal Opportunity Act 2010**, accompanied by a statement from a registered medical practitioner certifying—
      - (A) that the person suffers from such a disability; and
      - (B) that the person is not able to sign the application because of that disability; and
  - (c) include any identifying information of a kind approved by the Secretary.

- 
- (4) The approved form must provide for the supplying of the following information—
- (a) the full name of the entitled person and any other names by which the entitled person is or has been known; and
  - (b) the residential address and telephone number of the applicant; and
  - (c) the date and place of birth of the entitled person; and
  - (d) the gender of the entitled person; and
  - (e) an address to which notices or other documents addressed to the applicant may be sent, which may be a residential or business address, a post office box or an email address; and
  - (f) the residential address of the entitled person at the time of the offence and of the conviction; and
  - (g) in relation to the historical homosexual offence to which the application relates, so far as known to the applicant—
    - (i) the name and location of the court by which the entitled person was convicted; and
    - (ii) the date of the conviction; and
    - (iii) the name of the offence; and
    - (iv) details of the offence and the offending conduct.

- (5) The approved form must include provision for the applicant to—
  - (a) authorise the conduct of a police record check on the entitled person in relation to the conviction to which the application relates; and
  - (b) consent to the disclosure to the Secretary of any official records relating to that conviction created by a court, VCAT, Victoria Police or the Office of Public Prosecutions, whether held by that entity or by any other entity.
- (6) An application may include, or be accompanied by, statements by the applicant or written evidence given by any other person (including a person involved in the conduct constituting the offence) about the matters about which the Secretary must be satisfied under section 105G(1).
- (7) The Secretary, for the convenience of applicants, must publish on an internet site maintained by the Secretary—
  - (a) a blank application in the form approved by the Secretary; and
  - (b) a list of the kinds of identifying information that are approved by the Secretary as acceptable for the purpose of establishing the identity of an applicant.

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**105C Submission of further information etc.**

- (1) If the Secretary receives an application that does not include all the information required by section 105B, the Secretary may require the applicant to provide that information in the manner required by the Secretary within 28 days or any longer period that the Secretary determines.
- (2) The applicant may submit to the Secretary statements or evidence of a kind referred to in section 105B(6) at any time after making the application and before it has been determined by the Secretary.
- (3) Nothing in subsection (1) prevents the Secretary considering an application that does not include all the information required by section 105B if the Secretary chooses to do so.

**105D Consideration of application**

- (1) In considering an application, the Secretary—
  - (a) must, in particular, consider—
    - (i) any available record of the investigation of the offence, and of any proceedings relating to it, that the Secretary considers to be relevant; and
    - (ii) any statements or written evidence of a kind referred to in section 105B(6) included in, or accompanying, the application or subsequently submitted by the applicant; and

- (b) must have regard to any advice provided by any person to whom the Secretary has referred the application for advice; and

**Note**

See section 105F.

- (c) may make enquiries to, or request information on the application from, any person or body that the Secretary thinks fit, including any court and the Director of Public Prosecutions; and
  - (d) may require the applicant to provide any further information that the Secretary thinks fit in the manner required by the Secretary within 28 days or any longer period that the Secretary determines; and
  - (e) must not hold an oral hearing for the purpose of determining the application.
- (2) Subsection (3) applies to a record of the investigation of an offence or of any proceedings relating to an offence which the Secretary has obtained because of a consent given by an applicant under section 105B(5)(b) or an enquiry or request made by the Secretary under subsection (1)(c) in relation to an application.
  - (3) The Secretary, as soon as reasonably practical after obtaining the record—
    - (a) must give the applicant access to it, except so far as it contains information relating to the personal affairs of any person other than the applicant; and
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- (b) must give written notice to the applicant that the Secretary will not proceed to determine the application until at least 28 days, or any longer period that the Secretary determines and specifies in the notice, have passed from the day on which the applicant is given access to the record.

**Note**

The period provided for under paragraph (b) allows the applicant to determine whether to withdraw the application under section 105H or submit, under section 105C(2), statements or evidence of a kind referred to in section 105B(6).

- (4) In subsection (3)—

*information relating to the personal affairs of any person* means information—

- (a) that identifies a person or discloses their address or location;  
or  
(b) from which a person's identity, address or location can reasonably be determined.

**105E Response to enquiries or requests for information**

- (1) A person or body to whom an enquiry or request for information is made by the Secretary under section 105D(1)(c) must respond to the enquiry or request as promptly as possible.
- (2) Without limiting subsection (1), if a request under section 105D(1)(c) is for a data controller to provide to the Secretary a copy of an official record held by the data

controller, the data controller must comply with that request as promptly as possible.

- (3) A person or body, in responding to an enquiry or request, is not bound by any duty of confidentiality imposed on the person or body by or under any Act (including the **Judicial Proceedings Reports Act 1958**) or agreement, despite anything to the contrary in that Act or agreement.

**105F Appointment of advisors**

- (1) The Secretary may appoint one or more persons who are legal practitioners of at least 5 years standing to provide advice on any particular application or on such applications generally.
- (2) A person appointed under subsection (1) is entitled to be paid the fees and allowances (if any) that are fixed from time to time by the Secretary for that person.

**105G Mandatory tests**

- (1) The Secretary must refuse an application unless satisfied—
  - (a) that the offence is a historical homosexual offence; and
  - (b) that, on the balance of probabilities, both of the following tests are satisfied in relation to the entitled person—
    - (i) the entitled person would not have been charged with the historical homosexual offence but for the fact that the entitled person was suspected of having engaged in the conduct constituting the offence for the purposes of, or in

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connection with, sexual activity of  
a homosexual nature;

(ii) that conduct, if engaged in by the  
entitled person at the time of the  
making of the application, would  
not constitute an offence under the  
law of Victoria.

- (2) In considering whether the test set out in  
subsection (1)(b)(ii) is satisfied, the  
Secretary must (where relevant) have regard  
to—
- (a) whether any person involved in the  
conduct constituting the offence  
(including the entitled person)  
consented to the conduct; and
  - (b) the ages, or respective ages, of any such  
persons at the time of that conduct.
- (3) Subsection (4) applies if—
- (a) consent of a person is a relevant issue  
in determining whether the test set out  
in subsection (1)(b)(ii) is satisfied; and
  - (b) the Secretary is not satisfied, from the  
available official records, that consent  
had been given.
- (4) The Secretary may only be satisfied on the  
issue of consent by written evidence  
touching on that issue—
- (a) from a person (other than the entitled  
person) who was involved in the  
conduct constituting the offence; or
  - (b) if no such person can be found after  
reasonable enquiries are made by the  
applicant, from a person (other than the  
applicant) with knowledge of the

circumstances in which that conduct occurred.

**105H Withdrawal of application**

- (1) An applicant may withdraw their application at any time before the Secretary determines it.
- (2) The Secretary may treat an application as having been withdrawn if the applicant does not, within the applicable period, provide any information required under section 105C(1) or further information required under section 105D(1)(d).
- (3) Despite an application being withdrawn or treated as being withdrawn under this section, the Secretary may reinstate the application if satisfied that the applicant wants to proceed with it and has provided any information required under section 105C(1) or further information required under section 105D(1)(d).

**105I Determination of application**

- (1) The Secretary must determine an application as promptly as possible consistent with this Act and its proper determination.
- (2) The Secretary must give written notice of the determination to the applicant and each relevant data controller within 14 days after making it.
- (3) If an application is approved, the historical homosexual conviction is expunged by force of this section at the end of the prescribed period after the making of the determination.

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- (4) If the determination is a refusal of the application, the written notice must—
- (a) state the reasons for the determination; and
  - (b) inform the applicant that they may apply to VCAT to have the determination reviewed; and
  - (c) explain how an application may be made to VCAT.
- (5) If the determination is an approval of the application, the written notice must—
- (a) state the reasons for the determination; and
  - (b) advise that any relevant data controller may apply to VCAT to have the determination reviewed; and
  - (c) explain how an application may be made to VCAT.

**105J Effect of expungement of conviction**

On and after a conviction of a person becoming an expunged conviction—

- (a) a question about the person's criminal history (including one put in a legal proceeding and required to be answered under oath) is to be taken not to refer to the expunged conviction, but to refer only to any conviction that the person has that is not expunged; and
- (b) the person is not required to disclose to any other person for any purpose (including when giving evidence under oath in a legal proceeding) information concerning the expunged conviction; and

- (c) in the application to the person of an Act, subordinate instrument or agreement—
    - (i) a reference to a conviction, however expressed, is to be taken not to refer to the expunged conviction; and
    - (ii) a reference to the person's character or fitness, however expressed, is not to be taken as allowing or requiring account to be taken of the expunged conviction; and
  - (d) the expunged conviction, or the non-disclosure of the expunged conviction, is not a proper ground for—
    - (i) refusing the person any appointment, post, status or privilege; or
    - (ii) revoking any appointment, status or privilege held by the person, or dismissing the person from any post; and
  - (e) the fact that a refusal, revocation or dismissal of a kind referred to in paragraph (d) occurred, solely on account of that conviction, before the conviction became an expunged conviction is not a proper ground for such a refusal, revocation or dismissal occurring after the expungement; and
  - (f) the person may re-apply, without waiting out any minimum period between applications for the relevant authorisation provided for by or under an Act, for a relevant authorisation
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under an Act an application for which was refused, solely on account of that conviction, before it became an expunged conviction.

**Note**

**Oath** is defined by section 38 of the **Interpretation of Legislation Act 1984** as including an affirmation.

**105K Obligations in relation to official records**

- (1) The Secretary, within the prescribed period after a conviction becomes an expunged conviction, must notify any relevant data controller in writing of that fact.
- (2) A data controller must take the action set out in subsection (3) in relation to any entry relating to the conviction contained in any official records under their management or control as soon as reasonably practical after receiving a notice under subsection (1) and, in any event, not later than the prescribed period after receiving it.
- (3) The action is—
  - (a) except for records covered by paragraph (b), annotate the entry with a statement to the effect that it relates to an expunged conviction; or
  - (b) for records that are secondary records held in an electronic format by Victoria Police or the Office of Public Prosecutions, take any necessary steps to do one or more of the following—
    - (i) remove the entry;
    - (ii) make the entry incapable of being found;

- (iii) de-identify the information contained in the entry and destroy any link between it and information that would identify the person to whom it referred.
- (4) As soon as reasonably practical after taking action in relation to an entry, the data controller must give notice of the action taken to the Secretary.
- (5) As soon as reasonably practical after the Secretary is satisfied that all necessary action has been taken in relation to entries in official records, the Secretary must give written notice of that fact to the person who has the expunged conviction.
- (6) A person who has access to any official records must not, directly or indirectly, disclose or communicate to any person the fact of a conviction, or of a charge related to a conviction, that the person knows, or ought reasonably to have known, is an expunged conviction.  
Penalty: Level 8 fine (120 penalty units maximum).
- (7) Subsection (6) does not apply if—
  - (a) the person who has the expunged conviction gives written consent to the disclosure or communication; or
  - (b) the disclosure or communication is otherwise authorised by law.
- (8) Subsection (6) does not prevent the Chief Commissioner of Police disclosing to Crim Trac, for incorporation into the police information sharing system known as the National Police Reference System, the fact

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that a specified conviction has become an expunged conviction.

**105L Jurisdiction of VCAT**

- (1) An eligible person may apply to VCAT for review of the decision of the Secretary on the determination of an application.
- (2) For the purposes of this section an *eligible person* is—
  - (a) for a decision to refuse an application, the applicant; and
  - (b) for a decision to approve an application, a data controller who has any official records relating to the conviction under their management or control.
- (3) An application for review under subsection (1) must be made within 28 days after the day on which the applicant or the data controller (as the case requires) is given notice of the decision of the Secretary.
- (4) The applicant is entitled to be given notice of an application for review made under subsection (1) by a data controller.

**Note**

See section 72 of the **Victorian Civil and Administrative Tribunal Act 1998**.

**105M Restriction on right to re-apply**

- (1) A person whose application in respect of a historical homosexual conviction has been refused by the Secretary is only entitled to have a further application in respect of that conviction considered by the Secretary in the circumstances set out in subsection (2).

- (2) The circumstances are that the Secretary is satisfied that necessary supporting information contained in the further application became available only after the earlier application was determined.

**105N Delegation**

- (1) Subject to subsection (2), the Secretary, by instrument, may delegate any power conferred on the Secretary by or under this Part, other than this power of delegation, to any person or class of person employed under Part 3 of the **Public Administration Act 2004**.
- (2) A delegation of the power of the Secretary under section 105I to determine an application may only be delegated to a person or class of person employed as an executive under Part 3 of the **Public Administration Act 2004**.

**105O Confidentiality**

- (1) A person must not, directly or indirectly, make a record of, or disclose or communicate to any person, any information relating to an application acquired by the person in performing a function or exercising a power under this Part.

Penalty: Level 8 fine (120 penalty units maximum).

- (2) Subsection (1) does not apply if—
- (a) it is necessary to make the record, or disclose or communicate the information, for the purposes of, or in connection with, the performance of a function or the exercise of a power under this Part; or

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- (b) the person to whom the information relates gives written consent to the making of the record or to the disclosure or communication.
  - (3) Subsection (1) also does not apply to the disclosure or communication of information—
    - (a) to a court or tribunal in the course of a legal proceeding; or
    - (b) under an order of a court or tribunal; or
    - (c) to a legal practitioner for the purpose of obtaining legal advice or representation; or
    - (d) as required or authorised by or under this Part or any other Act.

**105P Giving of notices**

If by or under this Part a notice is required or permitted to be given by the Secretary to an applicant, the notice may be given to the applicant—

- (a) by delivering it personally to the applicant; or
- (b) by sending it to the applicant at the address given in the application for that purpose.

**105Q Evidentiary provisions**

- (1) This section applies to a document purporting to be given by the Secretary or a delegate of the Secretary certifying as to whether an application in respect of a specified historical homosexual conviction was approved or refused.

- (2) The document is admissible in evidence in any proceedings and, in the absence of evidence to the contrary, is proof of the matters stated in the document.
- (3) The document must be presumed in any proceedings, in the absence of evidence to the contrary, to have been given by the Secretary or a person who was, at that time, a delegate of the Secretary, as the case requires.

#### **105R Immunity**

- (1) The Secretary, a delegate of the Secretary or an employee within the meaning of the **Public Administration Act 2004** is not personally liable for anything done or omitted to be done in good faith—
  - (a) in the carrying out of a function or the exercise of a power under this Part; or
  - (b) in the reasonable belief that the act or omission was in the carrying out of a function or the exercise of a power under this Part.
- (2) Any liability resulting from an act or omission that, but for subsection (1), would attach to the Secretary, a delegate of the Secretary or an employee within the meaning of the **Public Administration Act 2004** attaches instead to the State.

#### **105S No entitlement to compensation**

- (1) A person who has an expunged conviction is not entitled to compensation of any kind, on account of that conviction becoming an expunged conviction, in respect of the fact that the person—

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- (a) was charged with, or prosecuted for, the offence; or
  - (b) was convicted of, or sentenced for, the offence; or
  - (c) served a sentence for the offence; or
  - (d) was required to pay a fine or other money (including costs or any amount by way of restitution or compensation) on account of being convicted of, or sentenced for, the offence; or
  - (e) incurred any loss, or suffered any consequence (including, but not limited to, being sentenced as a serious offender in accordance with Part 2A), as a result of any circumstance referred to in paragraph (a), (b) or (c); or
  - (f) has an expunged conviction.
- (2) Nothing in subsection (1) prevents a person being entitled to compensation in respect of anything that occurred while the person was serving a sentence.

**Example**

The person is injured while serving a sentence in prison.

\_\_\_\_\_".

**4 New section 157 inserted**

At the end of Part 12 of the **Sentencing Act 1991** insert—

**"157 Transitional provision—Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014**

This Act, as amended by section 3 of the **Sentencing Amendment (Historical Homosexual Convictions Expungement)**

Sentencing Amendment (Historical Homosexual Convictions Expungement)  
Act 2014  
No. 81 of 2014

s. 4

Part 2—Amendment of Sentencing Act 1991

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**Act 2014**, applies to convictions for historical homosexual offences (within the meaning of Part 8) irrespective of when the offences were committed or the convictions were recorded or findings of guilt were made."

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**PART 3—AMENDMENT OF OTHER ACTS**

**Division 1—Amendment of Victorian Civil and  
Administrative Tribunal Act 1998**

**5 New Part 18 inserted in Schedule 1**

After Part 17 of Schedule 1 to the **Victorian Civil  
and Administrative Tribunal Act 1998** insert—

**"PART 18—SENTENCING ACT 1991**

**78 Application of Part**

The Part applies in respect of a proceeding  
under Part 8 of the **Sentencing Act 1991**.

**79 Constitution of Tribunal**

The Tribunal is to be constituted by the  
President or a Vice President.

**80 Confidentiality of proceeding**

- (1) Unless the Tribunal orders otherwise, a  
person must not publish or broadcast, or  
cause to be published or broadcast, any  
report of a proceeding that identifies, or  
could reasonably lead to the identification  
of—
- (a) a party to the proceeding; or
  - (b) any other person who has given  
evidence in the proceeding as to—
    - (i) whether any person involved in  
the conduct constituting the  
offence (including the applicant)  
that is the subject of the  
proceeding consented to the  
conduct; or

See:  
Act No.  
53/1998.  
Reprint No. 9  
as at  
1 January  
2014  
and  
amending  
Act Nos  
11/2010,  
67/2013,  
1/2014,  
17/2014,  
23/2014,  
37/2014,  
42/2014,  
57/2014,  
60/2014,  
62/2014 and  
66/2014.  
LawToday:  
www.  
legislation.  
vic.gov.au

- (ii) the ages, or respective ages, of any such persons at the time of that conduct.

Penalty: 20 penalty units.

- (2) The Tribunal may make an order under subclause (1) only if it considers that it would be in the public interest to do so.
- (3) An order of the Tribunal under subclause (1) must specify that pictures are not to be taken of any party to the proceeding or other person covered by subclause (1)(b).

**81 Effect of original decision pending review**

- (1) This clause applies, despite anything to the contrary in section 50, if a data controller (within the meaning of Part 8 of the **Sentencing Act 1991**) commences a proceeding.
  - (2) The operation of the decision that is the subject of the proceeding is stayed pending the determination by the Tribunal of the proceeding and the expiration of the appeal period.
  - (3) For the purposes of subclause (2) the appeal period expires—
    - (a) at the end of the period during which an application for leave to appeal from the order of the Tribunal determining the proceeding may be made under Part 5 if an application is not made within that period; or
    - (b) if an application for leave to appeal is made, when that application is determined if leave is not granted; or
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- (c) if leave is granted, at the end of the period during which the appeal may be instituted under Part 5 if an appeal is not instituted within that period; or
  - (d) if an appeal is instituted, when the appeal is determined.

**82 Tribunal file not open for inspection**

Despite anything to the contrary in section 146, the file kept by the principal registrar under that section in a proceeding is not open for inspection or copying by any person."

**Division 2—Amendment of Equal Opportunity Act 2010**

**6 Definitions**

In section 4(1) of the **Equal Opportunity Act 2010** insert the following definition—

"*expunged homosexual conviction* means an *expunged conviction* within the meaning of Part 8 of the **Sentencing Act 1991**;"

**7 Attributes**

After section 6(p) of the **Equal Opportunity Act 2010** insert—

"(pa) an expunged homosexual conviction;"

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Sentencing Amendment (Historical Homosexual Convictions Expungement)  
Act 2014  
No. 81 of 2014

s. 8

Part 4—Repeal of Amending Act

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**PART 4—REPEAL OF AMENDING ACT**

**8 Repeal of amending Act**

This Act is **repealed** on 1 September 2016.

**Note**

The repeal of this Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).

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**ENDNOTES**

† *Minister's second reading speech—*

*Legislative Assembly: 17 September 2014*

*Legislative Council: 15 October 2014*

The long title for the Bill for this Act was "A Bill for an Act to amend the **Sentencing Act 1991** to establish a scheme under which convictions for certain offences related to conduct engaged in for the purposes of, or in connection with, sexual activity of a homosexual nature may be expunged, to make consequential amendments to the **Victorian Civil and Administrative Tribunal Act 1998** and the **Equal Opportunity Act 2010** and for other purposes."