

Fix Bill C-66: Gay and Lesbian Historians Speak Out

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Executive Summary

Bill C-66, known as the “Expungement of Historically Unjust Convictions Act,” is deeply flawed. As a group of historians with expertise in the criminalization of LGBTQ2S+ communities, we are calling on senators to give this bill the appropriate scrutiny that was denied in the House of Commons. This bill was passed to the Senate a mere 15 days after it was first introduced as part of the Prime Minister’s apology. The legislative committee studying C-66 spent a total of 45 minutes considering the bill, and only allowed four government witnesses, despite our requests to provide a statement. We hope that the Senate will take the necessary time to provide community advocates and experts with the opportunity to address the many flaws in this legislation.

The bill provides a process to clear historical convictions for certain sexual offences. The list of offenses covered is limited, and the criteria for their selection are unclear. In debates over the bill, the government did not provide a satisfactory justification for refusing to include offenses other than gross indecency or buggery/anal intercourse. This restrictive approach ignores the various offenses historically used to criminalize the consensual sexual activities of LGBTQ2S+ communities. This includes the bawdy house law, used against gay bathhouses, but also used against sex workers, who successfully challenged the law at the Supreme Court. Other offenses, including indecent act, obscenity and vagrancy are likewise missing. The bill provides powers to the Governor in Council to add new criteria to qualify for an expungement, leaving it up to the government of the day to further restrict the process. Finally, state documents necessary for the preservation of historical LGBTQ2S+ stories and struggles are going to be destroyed. Bill C-66 must be amended to provide a process that protects an individual’s confidentiality, while preserving historical police and judicial documents.

If this bill is to work as a meaningful part of the apology process, particularly for those for whom expungement is desired and needed, it requires much more careful consideration.

We recommend the following:

1. Amend Bill C-66 to establish a clear definition of “historically unjust conviction,” which is broad enough to include offences that have been used to criminalize consensual LGBTQ2S+ sexual and gender activities.
2. That the Senate call for the full repeal of anal intercourse and the bawdy house law from the Criminal Code.
3. That the expungement of historic convictions for sex workers be included in Bill C-66, and that the Senate take steps to urge the government to repeal PCEPA, which continues to criminalize the practices and lives of sex workers.
4. Add the bawdy house law, indecent act, obscenity, and vagrancy to the list of offenses covered in Bill C-66.
5. Remove section 24 of Bill C-66, which allows the Governor in Council to unfairly restrict the process by adding criteria required for an expungement.
6. Ensure the expungement process includes charges brought because of police surveillance in a washroom or park.
7. Amend section 25 (c) of Bill C-66 so that the age of consent is consistent with analogous historical acts of heterosexual sex.
8. Ensure the expungement process includes those who received a discharge so that local police agencies and courthouses can be informed.
9. Establish a process for the access and retrieval of all documents related to an applicant’s expungement.
10. Amend sections 17 and 19 of Bill C-66 to prevent the destruction of expunged documents, and establish a process that strikes a balance between the protection of confidentiality and historic preservation.

Introduction

On November 28th, 2017 Prime Minister Justin Trudeau delivered the federal government's apology to Canada's LGBTQ2S+ communities. The same day, the government introduced Bill C-66. The problem is that this bill was rushed through the House of Commons without any discussion with LGBTQ2S+ community advocates on this issue. Based on the testimony of those who appeared before The Standing Committee on Public Safety and National Security (SECU), very limited consultation was carried out with several individuals, none of whom have any expertise in the history of the criminalization of LGBTQ2S+ sexuality. Our own efforts to appear before and submit material to the committee were refused on the grounds there was not sufficient time (see the media reports listed below).

As researchers who have done considerable investigation into the criminalization of consensual LGBTQ2S+ sexual practices in the history of the Canadian state, we believe this bill is seriously flawed. We have reviewed the government's position as outlined at committee and in debate at third reading, however, we do not find that our concerns have been addressed. We ask that members of the Senate consider the following statement and list of recommendations. Bill C-66 requires your sober second thought.

I. Criteria for a Definition of "Historically Unjust Conviction"

The preamble of Bill C-66 states that "it is now recognized that the criminalization of certain activities constitutes a historical injustice," but the definition of what this means has been left vague. The bill seems to suggest two criteria for establishing that a criminal charge was a historic injustice:

- A. The offense has been deemed unconstitutional contrary to the Charter
-The preamble of Bill C-66 states that if charges for the offense were laid today, "it would be inconsistent with the Canadian Charter of Rights and Freedoms."
- B. The offense no longer exists
-Section 23(2) of Bill C-66 states that the Governor in Council may only add another offence covered by the bill "if the activity no longer constitutes an offence under an Act of Parliament..."

These criteria do not have any direct relation **to the ways in which offences have been used to unjustly criminalize consensual LGBTQ2S+ sexual and gender activities, which in our view is what constitutes an historical and continuing injustice.** Bill C-66 only covers gross indecency and buggery/anal intercourse. Gross indecency criminalized various sexual practices because of its definitional vagueness. It was removed as an offense in 1987 and was not considered in a case under the Charter. Conversely, anal intercourse has been deemed contrary to the Charter by provincial courts, but it remains an offense. This indicates that the initial offenses in Bill C-66 seem to need only one of the two established criteria for an expungement, but that future offenses decided by the Governor in Council may have to meet both. Given this discrepancy, the definition of "historically unjust" as constructed in the bill is unclear, restrictive, and inconsistent. Moreover, it only covers a fraction of the provisions used against LGBTQ2S+ consensual sexual activities.

On December 12, 2017, the Department of Justice tabled a Charter Statement in the House of Commons on Bill C-66. The list of offenses covered is justified under the ameliorative law, which allows Parliament to enact programs intended to rectify discrimination based on various categories, including sexual orientation. The Charter Statement suggests that this is further restricted to offenses “targeted primarily at the sexual activity of gay men.” There is no rationalization for why the policing of lesbian, bisexual, trans, two-spirit, and other queer sexualities and gender identities have been left out of the bill’s ameliorative objectives.

This matter is only more confused by the testimony made before the House committee studying Bill C-66 (SECU). Despite the Charter Statement justifying the bill on the policing of gay men, Conservative MP Pierre Paul-Hus asked, “is it possible in this context that offences not related to the LBGTQ community be expunged?” A member of the Department of Public Safety replied, stating, “Yes. The preamble of the act refers to the possibility of capturing activity that is considered a historical injustice, including those activities that are considered to violate the Canadian Charter of Rights and Freedoms.”

Recommendation #1: Amend Bill C-66 to establish a clear definition of “historically unjust conviction,” which is broad enough to include offences that have been used to criminalize consensual LGBTQ2S+ sexual and gender activities.

II. Bawdy Houses, Bathhouses, Sex Workers

While delivering his apology in the House of Commons, the Prime Minister reflected on the historic injustice of criminalized consensual sexual activities:

Discrimination against LGBTQ2 communities was quickly codified in criminal offences like "buggery," "gross indecency" and bawdy house provisions. Bathhouses were raided, people were entrapped by police. Our laws bolstered and emboldened those who wanted to attack non-conforming sexual desire.

– Justin Trudeau, November 28, 2017

Despite this eloquence, the bawdy house law has not been included in Bill C-66. After 1917, the definition of a bawdy house included places not only of “prostitution,” but also “indecency.” Since 1968, it has been used by police to criminalize not only sex work but also the sexual and social spaces of men who have sex with men, creating a direct link between the struggles of sex workers, and those of the LGBTQ2S+ community. The bawdy house law was used in key historic mass arrests. For example, the 1977 raid on the Truxx bar in Montreal resulted in 147 bawdy house charges, and in the 1981 Toronto bathhouse raids, 306 men were charged under the same law. Using newspaper and other sources, we have been able to find 26 raids on gay baths and bars across Canada from 1968-2002, with more than 1,100 men arrested as being found in a common bawdy house.

During debate in the House of Commons over third reading of Bill C-66, Liberal MP Randy Boissonnault was asked about the missing bawdy house law. In his reply, he suggested that it was not included because it does not meet the criteria for historical injustice, stating “there is no

jurisprudence that indicates that the current state of the law post-2005 Labaye would violate charter provisions.” (December 13, 2017).

Labaye was a 2005 Supreme Court case regarding a Montreal swingers’ club. In the decision, the bawdy house law was not directly declared contrary to the Charter. However, the law’s reference to indecency was altered to conform to the harm-based definition of obscenity. This was directly referencing the 1992 Supreme Court case of R. v. Butler, in which the definition of obscenity was found to be contrary to section 2 of the Charter. After Butler and especially Labaye, an indecent bawdy house would no longer seem to refer to gay bars or baths; it refers to places that cause ‘harm.’ Such an establishment that causes non-consensual injury and harm would be subject to other, more appropriate Criminal Code offenses.

We argue that bathhouse raid charges were historically unjust and meet the stated intent of Bill C-66: if such places were raided today, bawdy house charges would not be used, or would be considered contrary to the Charter. However, because the bawdy house law in its current form is still technically constitutional, and because it still exists in the Criminal Code, it does not meet the government’s definition of historical injustice. This means that, at present, it cannot be added to the list of offenses covered by Bill C-66. As per section 23(2) of Bill C-66, the Governor in Council may only add offenses that are no longer in the Criminal Code, which means Parliament would have to remove the bawdy house law first. At present time, Bill C-39, which seeks to repeal outdated ‘zombie laws’, including anal intercourse, is stalled after first reading in the House of Commons. Moreover, C-39 does not include a repeal of the antiquated bawdy house law. For more than 35 years, LGBTQ2S+ communities have been working with sex worker advocates in calling for the repeal of this law.

Recommendation #2: That the Senate call for the full repeal of anal intercourse and the bawdy house law from the Criminal Code.

On the other hand, the bawdy house law as it refers to sex work meets both of the government’s established criteria for an expungement under Bill C-66. In the 2013 Supreme Court case of Canada v. Bedford, the harms caused to sex workers by the bawdy house law were found to be “grossly disproportionate” to the objectives of the law, contrary to section 7 of the Charter. In 2014, the government passed Bill C-36, the Protection of Communities and Exploited Persons Act (PCEPA), which removed the reference to prostitution from the bawdy house law. Since the bawdy house law as it relates to sex work has been declared contrary to the Charter, and it has been removed from the Criminal Code, it satisfies both of the government’s criteria for a historic injustice in Bill C-66. Meanwhile, many criminal offenses against sex workers were reconstituted in PCEPA. The historic injustice is ongoing, and these laws continue to harm the safety of sex workers.

Recommendation #3: That the expungement of historic convictions for sex workers be included in Bill C-66, and that the Senate take steps to urge the government to repeal PCEPA, which continues to criminalize the practices and lives of sex workers.

III. Missing Offenses in Bill C-66

The rationale for the limited number of offenses contained in Bill C-66 appear to be related to the 1969 Criminal Code reforms, which encoded a rigid distinction between private and public sex. Pierre Trudeau stated that there was “no place for the state in the bedrooms of the nation.” However, the 1969 reforms to gross indecency and buggery ignored the social conditions of sexual morality that often caused LGBTQ2S+ individuals to seek each other in spaces outside the bedroom. Charges for these consensual sexual activities intensified after 1969, including through gross indecency and buggery charges, but also under the indecent act, obscenity, vagrancy, and bawdy house laws. In the Prime Minister’s apology, he acknowledged this, stating that unjust convictions stemming from the Criminal Code “didn’t end in 1969 with the partial decriminalization of homosexual sex.” **By limiting the schedule of offences to gross indecency and buggery/anal intercourse, the past harm Bill C-66 tries to amend continues to reinforce very real historical injustices against people convicted under these other laws.**

- *Bawdy Houses*

The bawdy house law has been central to the policing of sex workers of all gender and sexual identities, as well as the spaces that facilitated interactions between men (see section II above). Police used this law to raid bathhouses in cities across Canada. As it stands, LGBTQ2S+ people charged and/or convicted as “keepers” and “found-ins” of a bawdy house cannot apply to have their records expunged. Due to the 2005 Labaye decision, and the 1992 Butler decision, we argue that such charges, if laid today, would be contrary to the Charter and are historically unjust convictions. This omission also continues to discriminate against sex workers despite the 2013 Bedford decision that ruled the prostitution section of the bawdy house law unconstitutional. According to Statistics Canada, there were zero charges laid under the bawdy house law in 2016. This is a ‘zombie law’ and should be repealed, and historically unjust charges should be expunged.

- *Indecent Act*

There is an even longer history of using the category of “indecent acts” to arrest people in bars, clubs, parks, and washrooms. Given that an indecent act is a lesser offence than gross indecency or buggery, it has proven easier for the police to use against social-sexual spaces where men engage in consensual sex. In Ontario from 1983-1985, this included surveillance and arrests at the Orillia Opera House, in St. Catharines, in Welland, Oakville, Oshawa, Peel region, Guelph, and in Kitchener-Waterloo. The names of those charged were released by the police to the media and these were routinely published in newspapers leading a man in St. Catharines to kill himself. In Toronto alone, between July 1982 and April 1983 369 men were arrested for ‘indecent acts’ with other men, according to the Right to Privacy Committee. As Bill C-66 stands, LGBTQ2S+ people charged and/or convicted with an indecent act cannot apply to have their records expunged.

- *Obscenity*

The Criminal Code’s provisions against obscenity and their enforcement through Canada Customs regulations have had a major impact on criminalizing people working for gay/lesbian publications (including *The Body Politic*) and in lesbian/gay bookstores, such as Little Sister’s (Vancouver) and Glad Day (Toronto). For instance, in 1982 Kevin Orr was charged with obscenity for carrying two gay publications at Glad Day. He was convicted but this was overturned on appeal. Glad Day was also convicted in 1992 for the lesbian sex magazine *Bad Attitude*. The use of these provisions has also restricted access to gay/lesbian erotic materials since they have defined same-sex representations as more ‘obscene’ than similar heterosexual portrayals. As it stands, LGBTQ2S+ people convicted of obscenity-related offences cannot apply to have their records expunged.

- *Vagrancy*

This was a broad, ill-defined offence. Dating from the 19th century, vagrancy has been used historically against sex workers but also to police people’s gender-sexual expression, including those the police have viewed as wearing the clothes and/or otherwise engaging in the self-presentation of the ‘wrong’ gender. In the 1994 Supreme Court case of *R. v. Heywood*, this law was declared unconstitutional and contrary to the Charter. It is also subject for repeal in the stalled Bill C-39. As it stands, LGBTQ2S+ people convicted of vagrancy cannot apply to have their records expunged.

Recommendation #4: Add the bawdy house law, indecent act, obscenity, and vagrancy to the list of offenses covered in Bill C-66.

IV. Power of Governor in Council and Criteria for Expungement

Section 23(2) of Bill C-66 allows the Governor in Council to add to the list of offenses eligible for an expungement. While we do not oppose adding offenses in the future, we argue that shifting this to the Governor in Council is an inappropriate replacement for defining and identifying the broad offenses used unjustly against the LGBTQ2S+ community immediately in the bill. Fixing the flaws in this bill should not be left to the government of the day, which is not required to hear or accept the advice of those with requisite historical expertise and community knowledge.

Section 24 of Bill C-66 allows the Governor in Council to establish additional criteria that must be met to receive an expungement beyond those already indicated in section 25. This allows the government of the day to restrict access to expungements, undermining the intent of the bill.

Recommendation #5: Remove section 24 of Bill C-66, which allows the Governor in Council to unfairly restrict the process by adding criteria required for an expungement.

The criteria established in section 25 of Bill C-66 requires that a) the activity was with someone of the same sex, b) there was consent, c) those involved were 16 years or older. At the present time there is no indication whether this will include those charged or entrapped for meeting in state-defined public spaces, including washrooms or parks. As historians, we can demonstrate the arbitrary and historically shifting definitions of ‘public’ and ‘private’ and their role in

criminalizing LGBTQ2S+ sexual activity. We can further demonstrate a history of the differential policing of heterosexual sex in public, in which heterosexual activity has been treated in a much lighter, lenient fashion, kept beyond the scope of the Criminal Code. The question is left open: will gross indecency and indecent act convictions involving activity that occurred in places deemed to be ‘public’ be expunged, provided all criteria in section 25 are met?

Recommendation #6: Ensure the expungement process includes charges brought because of police surveillance in a washroom or park.

Criteria c) establishes that those who participated in the act must have been at least 16 years of age. However, until 2008, the age of consent for analogous sexual acts among heterosexuals was 14. In effect, the bill demands a higher age of consent for same –sex activity than heterosexual activity for periods prior to 2008. This is inconsistent with provincial court rulings, including the 1995 Ontario Court of Appeal case of R. v. M. (C.), which declared anal intercourse discriminatory on the basis of age and sexual orientation, as contrary to section 15 of the Charter. Age of consent laws have been used historically to target LGBTQ2S+ individuals and to create the idea that our communities are a threat to children. Bill C-66 in its present form unfortunately reasserts that oppressive connection.

Recommendation #7: Amend section 25 (c) of Bill C-66 so that the age of consent is consistent with analogous historical acts of heterosexual sex.

V. Expungement and Destruction of Documents

The process for expungement and the destruction of documents raises serious concerns. First, Bill C-66 only mentions convictions for the specified acts. It is unclear if this also includes those who were found guilty, but were given a conditional or absolute discharge. These individuals may no longer have a criminal record, but documents relating to their charges may still be retained by various state agencies. We have obtained the police documents of two individuals who were found guilty in the 1981 Toronto bathhouse raids. Despite receiving a discharge, these records remain on file with local police in 2018. We are aware that the federal government does not have the jurisdiction to force local agencies to comply with an expungement, but section 18 of Bill C-66 establishes a process where such agencies are at least notified that the records should be removed.

Recommendation #8: Ensure the expungement process includes those who received a discharge so that local police agencies and courthouses can be informed.

The Charter Statement on Bill C-66 indicates that the Parole Board “must expunge if there is no evidence that the applicable criteria are not satisfied and the activity in question is not otherwise prohibited under the Criminal Code.” While this may alleviate the requirement to provide documentary proof for an expungement, the bill provides no process to assist individuals in locating what documents state agencies may still have on file from a historically unjust charge. Such record searches are laborious and time-consuming, dependent on the applicant being familiar with record-keeping institutions and practices, and will require the applicant to make numerous FOI requests.

Recommendation #9: Establish a process for the access and retrieval of all documents related to an applicant's expungement.

Sections 17 and 19 of Bill C-66 instruct the RCMP and other relevant federal agencies to destroy historical documents related to an expungement. While we strongly agree with the need to ensure that these state-produced records can never be used against those who were charged, at the same time, their destruction goes against government policies related to record retention. Indeed, the bill explicitly overrides the *Library and Archives of Canada Act* and the *Privacy Act*. The retention of government records is integral to the democratic process as a way to check on the policies and practices of the state, and the means by which the histories of LGBTQ2S+ people, including the forms of state persecution directed at our communities, are preserved. There must be a clear process built into Bill C-66 to preserve documents, rather than simply having them destroyed. This recommendation has recently been endorsed by the Canadian Historical Association, the professional organization of historians in Canada, which also has serious concerns about Bill C-66 and the destruction of archival documents (see references below).

Recommendation #10: Amend sections 17 and 19 of Bill C-66 to prevent the destruction of expunged documents, and establish a process that strikes a balance between the protection of confidentiality and historic preservation.

Conclusion

Further questions remain on the bill. We have concerns regarding who will be vetting expungement applications. The bill states it will be employees within the Parole Board of Canada. Given that we are dealing with historical convictions for same-sex offences, cases that raise a range of complex issues related to the history of sexuality, we wish to know what efforts are being taken to ensure the review of applications will include people with the appropriate expertise in the history of the criminalization of same-sex sexual activity?

Finally, the onus is on the person with a conviction to be aware of the Act and apply for expungement. What measures will the government take to publicize the Act and assist in the application process?

Historians agree in the case of gross indecency, first introduced into Canadian law in 1890, that the law was deeply flawed by its definitional vagueness. Over 125 years later, Bill C-66, designed to remedy historically unjust convictions, is on course to reproduce in a different context a similar vagueness, in addition to a host of other deficiencies sketched here. In order to avoid repeating the mistakes of the past, we urge that sufficient time be taken to carefully review the problems with the existing bill and appropriate amendments be made before the bill becomes law.

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