



Criminal Lawyers' Association
189 Queen Street East, Suite 1
Toronto, ON M5A 2S1
Tel: (416) 214-9875
Fax: (416) 968-6818
www.criminallawyers.ca
anthony@criminallawyers.ca

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The Senate of Canada
111 Wellington Street
Ottawa, Ontario K1P 5L1

Submitted via E-Mail: Joelle.Nadeau@sen.parl.gc.ca
Rights-Droits.Rights-Droits@sen.parl.gc.ca

Re: SUBMISSION: BILL C-66: THE EXPUNGEMENT OF HISTORICALLY UNJUST CONVICTIONS ACT

The Criminal Lawyers' Association ("CLA") is very pleased to be invited to make submissions on this issue of great importance to its members, for which legislation is long overdue. We are very grateful for the opportunity.

The Criminal Lawyers' Association of Ontario

The CLA is a non-profit organization founded in 1971 to be the voice of criminal defence lawyers in Ontario. Its objects are to educate, promote and represent its membership on issues relating to criminal and constitutional law. The CLA has over 1000 members in Ontario and associate members across Canada.

The CLA is routinely consulted by both Houses of Parliament and their Committees to offer submissions on proposed legislation pertaining to criminal and constitutional law issues. Similarly, the CLA is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, and various other concerns involving the administration of criminal justice. The CLA is also frequently granted standing to intervene at the Supreme Court of Canada and Ontario Court of Appeal on cases involving criminal law, constitutional law, and civil liberties.

Our Interest in Bill C-66

The CLA is made up of lawyers who make it their life's work to advocate for criminal defendants, who are often society's most vilified and marginalized people. We deal with the effects of criminal charges and convictions on a daily basis. We frequently represent people who are mistreated by those in authority due to their race, age, sexual orientation and gender identity. We are deeply concerned about the effects of criminal law convictions on all facets of a person's life – particularly where the convictions are historically unjust and should never have occurred. We have a special interest in ensuring that Bill C-66¹ appropriately addresses unjust convictions against the LGBTQ+ community.

The CLA makes three Recommendations to strengthen Bill C-66:

1. Amend the age requirement in Bill C-66 to reflect the applicable age of consent;
2. Remove the closed list of offences for which expungement is available; and
3. Provide prosecutorial direction for new historically unjust prosecutions.

Recommendation: Amend the Age Requirement to Reflect the Applicable Age of Consent

It is a central tenant in Canadian law that people cannot be tried or convicted for illegal acts unless those acts were illegal at the time of their commission: Section 11(g) of the *Canadian Charter of Rights and Freedoms*² (the “*Charter*”) effectively prohibits *ex post facto* criminal law in Canada. That is, criminal charges must comport with the *Criminal Code* as it was at the time of the offence's commission, not the criminal law as it is at the time the person is charged.

Yet Bill C-66 adopts the current *Criminal Code* age of consent, rather than the age of consent that applied at the time of the offences in issue. Until 1969, the law criminalized sex between men regardless of the parties' ages. Sex between men was decriminalized in 1969 for those over 21 years (if conducted “privately”). Meanwhile, the heterosexual age of consent during this time period held steady at 14 years.³ This remained true until a 2008 *Criminal Code* amendment which raised the age of consent to 16 years.

The *Criminal Code* also contains two “close in age” exemptions. Section 150.1(2) permits a 12 or 13 year-old to engage in sexual activity if their partner is within 2 years of their age. A second exemption, enacted in 2008, allows 14- and 15-year olds to engage in sexual activity with partners within 5 years of age.⁴

Bill C-66 permits expungement of convictions only in cases where the defendant's sexual partner was 16 years or older, or in cases where the post-2008 exemptions apply -- despite that the

¹ Bill C-66, *An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts*, 1st Sess, 42nd Parl, 2017 (short title: *Expungement of Historically Unjust Convictions Act*).

² Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

³ *Criminal Code of Canada*, s. 150.1, RSC 1985, c C-46.

⁴ *Criminal Code*, *ibid* at ss 150.1 (2)(b) and (2.1)(b). The older partner under the exemptions must not be in a position of trust or authority, there must not be a relationship of dependency, and the relationship must not be exploitative.

heterosexual age of consent for all relevant time periods remained 14 year.⁵ Bill C-66 does not harmonize the age requirement for expungement with the age of consent as it was at the time of the offence if the acts took place before 2008.

The CLA is very concerned that Bill C-66's violates a central tenant of Canadian law by reaching back and applying today's age of consent to yesterday's acts. In so doing, it disadvantages people who would otherwise benefit from the Bill. Bill C-66 should, at a minimum, be amended to allow expungements in all cases where the sexual activity would have been lawful but for the parties' sexual orientation or gender identity.

Without such an amendment, Bill C-66 will perpetuate devastating myths about the LGBTQ community: that same-sex sexual activity is dangerous and damaging to young people in a way that equivalent heterosexual activities are not; and that young LGBTQ people need to be protected from their own sexuality in ways their heterosexual peers do not. Bill C-66 is designed to back up the Federal Government's official apology to LGBTQ+ people with concrete action. The apology is significant. Its associated concrete action must not perpetuate the very stigma and stereotypes that it attempts to ameliorate.

The convictions outlined above should never have happened. The Federal Government now recognizes them as unjust. It would also be unjust to only include those convictions that comport with today's legal standards rather than the law as it then was.

Recommendation: Leave List of Eligible Convictions Open Ended

Bill C-66 provides a process to expunge historical convictions for certain sexual offences. It is extremely narrow in its scope, and provides for expungements only in cases of gross indecency or buggery/anal intercourse.

Criminal lawyers well know the injustice of criminal laws which are neutral on their face being used by police to target racial and sexual minorities. Police have historically used laws which are neutral on their face to target the LGBTQ community. Common criminal charges targeting LGBTQ+ people vary, and have included public indecency, indecent theatrical performances, operating or being a found in bawdy house, nudity, obscenity, disorderly conduct, and a variety of non-criminal charges and by-law infractions. Authorities also use relatively minor non-criminal infractions such as infractions under liquor license, fire code, health and safety legislation to target LGBTQ+ people, culture and spaces.

Police may in fact prefer to lay charges under facially neutral laws because: they may be easier to prove; prosecutions are then possible after the repeal of LGBTQ+ specific laws; and it lends an illusion of neutrality, which makes it easier to deny allegations of homophobia.

These facially neutral laws have not been ruled as running afoul of section 15 of the *Charter*. But the targeting by police of sexual minorities may well violate section 15, as it violates substantive equality by disproportionately affecting minority communities.

⁵ Bill C-66, cl 25(c).

Bill C-66 does not say anything about the thousands of LGBTQ+ Canadians convicted of these seemingly neutral offences which authorities used to target, harass, arrest and convict LGBTQ+ people simply because of their sexual minority status. Virtually all of the cases that we now think of as historically unjust LGBTQ prosecutions are excluded from the ambit of Bill C-66.⁶

It is disturbing that the police targeting of LGBTQ+ individuals continues to present day. For example, in 2017, Toronto Police Services targeted for arrest gay and bisexual men who frequented Etobicoke's Marie Curtis Park in an undercover sting operation titled "Project Marie". CLA members, with the assistance of community groups such as Queers Crash the Beat, mobilized to provide *pro-bono* legal services to the accused men. Those who fought their charges saw exoneration as the prosecution withdrew the charges. Others whose embarrassment or privacy concerns led them to simply plead guilty now have that finding on their records.

While Bill C-66 is backwards looking legislation, designed to remedy historical wrongs, the present day context is relevant in understanding how the criminal law shaped and *continues to shape* the adversarial relationship between police and the LGBTQ+ community. Bill C-66 should reflect the seriousness of the issues faced by LGBTQ+ people as a strong, resilient, proud – but still discriminated against – minority.

Very few of the people discussed above will have the opportunity to see their records expunged under Bill C-66. While the Bill does provide for the addition of additional offences down the line through an Order in Council, the CLA submits that the legislation should be given an appropriate scope when it is first brought into force, not after. There is no need to adopt a "fix it later" approach. The LGBTQ+ community has waited over 40 years for substantive action to address the historical wrongs committed against it. They should not have to wait any longer.

This point cannot be overemphasized. Criminal lawyers know well the devastating effects of a criminal conviction on a person's life. People convicted of crimes, no matter how sympathetic the individual, face significant discrimination in areas such as: employment; bondability; adoption eligibility; child custody; housing; education; volunteer opportunities; and travel. They are also vulnerable to harassment, victimization, and suffer severe social stigma, with all its concomitant mental health effects.⁷

It is unacceptable that some Canadians were not able to adopt their own children because of criminal records that should never have been incurred. Other Canadians could not volunteer at their children's schools or on their children's hockey teams because of unjust criminal convictions, perhaps for entirely consensual sexual activity involving the child's other parent. Those same people continue to be barred from volunteering at the schools and sports teams of their grandchildren, because of their criminal records. The law sees these people as criminals. They are

⁶ These include: the 1981 Bathhouse Raids; the 1974 Brunswick Four; the 1976 Olympics "Cleanup" arrests; the hundreds of indecency charges related to various bathhouse raids from the 1908s to 2000s; the 1990 Sex Garage raids; the 1995 and 1996 undercover operations at Remington's; the 1999 The Bijou raids; the 2000 Pussy Palace raids; and the 2017 Project Marie.

⁷ For a further discussion, see John Howard Society, *Reforming the Criminal Records Act*, 2017, available at: <http://johnhoward.ca/wp-content/uploads/2017/04/Criminal-Records-Act-Reform-Final.pdf>

not criminals. They are members of a disadvantaged minority who were subject to unjust laws that targeted them for their sexuality.

Recommendation: Introduce a Limitation Period for New Prosecutions

The *Criminal Code* provides no limitation periods, even for offences long repealed for being homophobic, such as buggery and gross indecency, both removed from the *Criminal Code* in 1988. Police can, and do, lay new charges under these now repealed provisions, where the allegations pre-date 1988. Crown attorneys can, and do, proceed on these charges and prosecute individuals based on historical allegations.⁸

It is a perverse possibility that new charges will be laid against accused persons in circumstances contemplated by the Bill C-66 expungement process. If convicted, a defendant would be eligible to have their record expunged — but only after the conclusion of the sentence imposed upon them.

Bill C-66 should be amended to provide a prosecutorial guideline disallowing prosecutions in cases which meet the criteria for conviction in which Bill C-66 expungements are available. If Parliament has concluded that such convictions are historically unjust, it logically follows that such convictions are contemporarily unjust. Parliament should not permit a legal regime in which new convictions in these circumstances are allowed.

Yours very truly,



Angela Chaisson for the Criminal Lawyers' Association

⁸ See, e.g.: *R. v. Hawkes*, [2017] N.S.J. No. 30; *R. v. Stuckless*, 2016 ONCJ 338