



February 27, 2017

Via email: [mcu@justice.gc.ca](mailto:mcu@justice.gc.ca)

The Honourable Jody Wilson-Raybould, P.C., M.P.  
Minister of Justice  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Minister:

**Re: *Bill C-32, An Act related to the repeal of section 159 of the Criminal Code***

We are writing on behalf of the Canadian Bar Association's Sexual Orientation and Gender Identity Community Forum (SOGIC) and Criminal Justice Section in support of Bill C-32, to repeal section 159 of the *Criminal Code*.

The CBA is a national association representing over 36,000 jurists, including lawyers, Québec notaries, law teachers and law students, with a mandate to improve the law and promote equality in the justice system. SOGIC is a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity. The Criminal Justice Section members include prosecutors, defense counsel, and legal academics specializing in criminal law.

In March 2007, we wrote to the House of Commons Justice and Human Rights Committee about then Bill C-22, *An Act to amend the Criminal Code (age of protection)*. We urged the repeal of section 159 and equal treatment of all forms of consensual sexual expression. Bill C-32 is a long overdue step to remove antiquated and discriminatory consensual sodomy laws from the *Criminal Code*.

Section 159 singles out one sexual act, anal intercourse, and treats it differently than other sexual activity. In effect, it prohibits consensual anal intercourse involving 16- or 17-year-old unmarried persons, even though they may consent to all other forms of non-exploitative sexual activity.

In 1995, the legislative history of section 159 was extensively reviewed by Reed, J. in *Halm v. Canada (Minister of Employment and Immigration)*.<sup>1</sup> From its roots in the sodomy laws of the middle ages and then incorporated into the first codification of Canadian criminal law in 1892, the section was intended and continues to have the overriding purpose of discouraging gay sexual expression.

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<sup>1</sup> [1995] 2 FCR 331, 1995 CanLII 3573 (FC), <http://canlii.ca/t/4ghg>

Some have argued that the current version of section 159 is meant to protect young people from the risk of HIV transmission. Reed, J. found that this argument did not bear scrutiny on examination of the evidence. She concluded that the section had no purpose other than to discourage gay youth from acknowledging their sexual orientation.

In May 1995, the Ontario Court of Appeal reached the same conclusion. In *R. v. C.M.*, the Crown conceded that fostering the development of sexual preferences was not a constitutionally defensible purpose, and argued instead that section 159 was intended to protect youth from the risk of HIV transmission.<sup>2</sup> [Then] Abella, J.A. concluded there was no empirical evidence to support the assertion. She observed that section 159 might have the effect of increasing health risks:

*Health risks ought to be dealt with by the health care system. 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. Hence, the Criminal Code provision ostensibly crafted to prevent adolescents from harm may, itself, by inhibiting education about health risks associated with the behaviour, contribute to the harm it seeks to reduce.<sup>3</sup>*

Since then, appellate courts in British Columbia, Quebec and Nova Scotia have also ruled that section 159 violates equality rights guaranteed by section 15 of the *Charter of Rights and Freedoms*.<sup>4</sup>

For those who continue to argue that section 159 exposes children to exploitation, we think it important to note that Bill C-32 leaves intact existing *Criminal Code* protection to all Canadians, including children, against sexual abuse and exploitation.

Section 159 also criminalizes sexual activity between two people in the presence of other consenting adults. Like the age restriction, this applies only to anal intercourse and to no other form of sexual activity. This aspect was at issue in *R. v. Roth*,<sup>5</sup> where the Alberta Court of Queen's Bench also concluded that section 159 breached *Charter* equality rights relating to age, marital status and sexual orientation.

There have been suggestions that the government should withdraw this Bill, pending a comprehensive review and updating of the *Criminal Code*. We welcome the news that Justice Canada will be undertaking a review of the *Criminal Code*. However, we encourage proceeding with this Bill, which is an ongoing matter of safety and support for the gay community targeted by section 159. As noted in the background information for Bill C-32, section 159 continues to be relied on – erroneously – by law enforcement officials. Despite its constitutional standing as a nullity, section 159 continues to disrupt lives, undermine the dignity of young Canadians, and perpetuate outmoded and illegal stereotypes. We urge its repeal at the earliest opportunity.

We are pleased to offer the CBA Sections' support for Bill C-32.

Yours truly,

*(original letter signed by Tina Head for Brian Yuen, Francis Durnford and Loreley Berra)*

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Loreley Berra  
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<sup>2</sup> (1995) 23 O.R. (ed) 629; 1995 CanLII 8924 (ON CA), <http://canlii.ca/t/231v2>

<sup>3</sup> 1995 CanLII 8924 (ON CA), <http://canlii.ca/t/231v2>, at page 14.

<sup>4</sup> *R. v. Blake*, 2003 BCCA 525 (CanLII), <http://canlii.ca/t/4rcr>; *R. c. Roy*, 1998 CanLII 12775 (QC CA), <http://canlii.ca/t/1n9rq>; *R. v. T.C.F.*, 2006 NSCA 42 (CanLII), <http://canlii.ca/t/22cch>

<sup>5</sup> (2002) 306 AR 387; 2002 ABQB 145 (CanLII), <http://canlii.ca/t/4zt9>