JUSTICE FOR CHILDREN AND YOUTH

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# Submission of Justice for Children and Youth concerning Bill C-22

**Submitted to the Standing Committee on Justice and Human Rights**
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# Justice for Children and Youth Submission on Bill C-22: Raising Canada's Legal Age of Consent/ Age of Protection

This submission will review the current "age of consent" laws in Canada and set out the comments of Justice for Children and Youth on Bill C-22, and its intent to raise the legal age for consent to sexual activity from 14 to 16.

## Justice for Children and Youth

Justice for Children and Youth is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth, and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of education law, criminal law, constitutional law, human rights, family law, mental health law, health law, and income maintenance.

Justice for Children and Youth ("JFCY") prepares policy/law reform positions on issues relating to the legal practice of the clinic based on the needs of and experiences of its clients. JFCY also conducts test case litigation, through interventions and applications, on specific issues related to the rights of children and youth. The clinic provides public legal education to youth and youth-serving agencies and has created numerous publications for young people.

Justice for Children and Youth supports Canada's implementation of the U.N. *Convention on the Rights of the Child* and the *Convention's* recognition of both children's rights to autonomy and self-determination, and their right to special protections.

## Bill C-22: Overview

The age of consent in Canada has not changed in over a century.[1] Currently, the *Criminal Code* does not criminalize consensual non-exploitative sexual activity with or between persons 14 or over.[2] The defence of consent may even be raised where an accused engages in non-exploitative sexual activity with a 12 or 13 year old, provided the accused is at least 12 but less than 16, is less than two years older than the complainant and is not in a position of trust or authority towards the complainant.[3] The exception, of course, is anal intercourse, to which unmarried persons under 18 cannot legally consent under the Criminal Code. If the sexual activity takes place in a relationship of trust or dependency, it is deemed exploitative and the older person is guilty of an offence where the complainant is at least 14 but under 18, notwithstanding the complainant's

[1] Over a century ago in Canada, only girls under 12 were absolutely unable to consent to sexual intercourse until 1890, when the age limit was raised to 14.
[2] *Section 150.1(1).*
[3] *Section 150.1(2*).

consent.[4] The legal indicia of exploitation were refined and expanded recently[5] to allow courts to consider more individual circumstances, including, but not limited to: the age of the young person, the age difference between the older and younger person, the evolution of their relationship, and the degree of control or influence of the older person over the younger person. In our submission, the 2005 amendments to s. 253 of the *Criminal Code* were praiseworthy amendments that did much to protect young people from exploitative relationships. They showed an understanding of the circumstantial nature of exploitation. It is a question of fact that goes beyond our formal, category understandings that teachers should always be guilty of exploitation if they enter into sexual relationships with their students and includes more nuanced situations such as the "gratitude" a 16-year-old is expected to show an older friend with an apartment who agrees to take in the younger person when his or her parents throw him out of home.

What Bill C-22[6] does is amend the *Criminal Code* so as to raise, from 14 to 16, the age at which a person can legally consent to non-exploitative sexual activity.[7] There is no change to the criminal law rules about exploitative sexual activity. Activity that is exploitative is already criminalized by the 2005 amendments. Bill C-22 provides that the consent of the complainant, who is less than 16 years old, is no defence to the sexual assault offences and never a defence to other age-specific sexual offences like sexual interference, invitation to sexual touching and indecent exposure. These latter offences are all proposed to have the same "age of protection".

The Bill does, however, expand the scope of the protection against the predatory conduct of luring[8]: Bill C-22 expands the offence so that it would be criminal conduct to "lure" a young person under the age of 16, rather than the current protection for youth under 14. Justice for Children and Youth agrees with

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[4] *Section 153(1).*

[5] Bill C-2, 2005, c.32, s.4

[6] Bill C-22, titled as "an Act to amend the *Criminal Code* (age of protection) and to make consequential amendments to the *Criminal Records Act*," was tabled by the federal government on June 22, 2006. It received second reading on October 30, 2006 and has been referred to the House of Commons Standing Committee on Justice and Human Rights.

[7] It is important to note that the prohibited activity affected by these changes includes a wide range of sexual offences. Thus, the non-exploitative sexual activity referred to in the Bill includes not only sexual intercourse, but also such minor sexual activities as kissing.

[8] Section 172.1 (1) creates the offence of using a computer system to lure children for the purpose of committing certain sexual offences. The offence is committed if the person was under the particular age specified. Subsection (b) currently states that every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with a person who is, or who the accused believes is, under the age of **sixteen years**, for the purpose of facilitating the commission of an offence under section 280 (abduction) with respect to that person. Under Bill C-22, sections 151 (sexual interference), 152 (invitation to sexual touching), 160(3) (bestiality in the presence of ) or 173(2) (indecent exposure) are added to the list as additional sexual offences for the "under 16" category of complainant.

this proposed amendment that would expand the age category of potential complainants.[9]

Bill C-22 does, however, create exceptions – the first, and absolutely critical exception, is a close-in-age exception, in respect of an accused who engages in consensual sexual activity with a 14 or 15 year old youth and who is less than five years older than the younger person. The intent is to avoid criminalizing the normal sexual development of adolescents whose sexual maturation will not proceed in lock-step with all identically aged peers.

The second is a transitional exception with regard to the nature of the relationship, excusing an accused who, on the day the Act comes into effect, is five or more years older than and married to the youth in question. The legislation also extends this transitional exception to a common-law partner or to a co-habitator with whom the accused has had or is expecting to have children.

## Justice For Children and Youth's Response

1. Sexual Exploitation and Internet Luring Clauses

The issue of child sexual exploitation by adults, and the increasing use of the internet to facilitate this, is of great concern and needed to be addressed, as it was by Bill C-2 in 2005. Bill C-2, included a broader definition of child pornography, increased penalties, and an emphasis on the internet as a means for exploitation.[10] These amendments were heralded by child and youth serving agencies across Canada, including the Child Welfare League of Canada, which deemed it: "a positive step in addressing several key aspects of sexual victimization of children"[11]. Justice for Children and Youth supports these 2005 amendments, in particular the more case-specific, individual approach to identifying exploitation.

Bill C-22 expands the offence of "luring" so that it would be criminal conduct to "lure" a young person under the age of 16, rather than the current protection for youth under 14. Justice for Children and Youth agrees with this proposed

[9] The issues of sexual exploitation and Internet luring were addressed with the passage of amendments in 2002, c.13, s.8. It seems, however, that those amendments to the *Criminal Code* did not extend the offence of luring to include adults who, by means of a computer system, communicate with a fourteen or fifteen year old, for the purpose of facilitating the commission of non-exploitative sexual activity. Bill C-22 would. For example, under Bill C-22 a 30 year old could now be charged with luring a 14 year old to facilitate the commission of sexual interference, regardless of consent, whereas, under the current law, the same scenario would not constitute that specific offence.

[10] Department of Justice. (July 2005). *Highlights of Bill C-2 Amendments to Protect Children and Other Vulnerable Persons*. Retrieved from: http://www.justice.gc.ca/en/news/nr/2005/doc_31584.html

[11] Child Welfare League of Canada. (2005). Presentation to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

amendment that would expand the age category of potential complainants[12] and supports the desire to reduce predatory conduct directed at young people. This amendment also helps make our laws governing sexual conduct more consistent and, therefore, more likely to be understood by the general public.

2. Underlying Policies: Child Protection versus Children's Rights

Justice for Children and Youth is very grateful for the opportunity to comment on Bill C-22 and, in accordance with the U.N. *Convention on the Rights of the Child*, hopes that legislators are also listening to young people themselves in this law-making process that will affect them. The naming of Bill C-22 as concerning the "Age of Protection" is highly symbolic. But it should not be empty symbolism. Those we are trying to protect should be encouraged to say what it is that they need protection from,[13] especially since they may know of forms of exploitation that have not yet been identified by those who seek to protect. Those who seek to protect must be clear about what protection means. Then Justice Minister Toews said that the Bill is intended to protect young people from exploitation and adult predators, but not to take away rights from young people or to criminalize them. Justice for Children and Youth agrees that children need protection from exploitation and predatory conduct, but recognizes that young people are individuals and that age difference in itself does not always indicate exploitation or power imbalance. Age difference is a proxy for exploitation, but is not exact. A children's rights approach would allow for the differences between individual young people and the circumstances of a particular case.

A legal approach that would reflect the general validity of age difference as an accurate proxy while recognizing the importance of individual circumstances is the use of legal presumptions. If a difference in age of 5 years or more were legally presumed to correspond to exploitation, but the presumption could be rebutted where appropriate, the "Age of Protection" would truly protect while allowing for unique circumstances in which age difference is not in fact exploitative.

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[13] Federle, K. H. (2000). Children's rights and the need for protection. *Family Law Quarterly, 34*(3), 421-440.

3. Equality Issues: Discrimination Against LGBT Youth

The Supreme Court of Canada has repeatedly ruled that the equality provisions of the *Canadian Charter of Rights and Freedoms* have the effect of striking down any legislation that discriminates against same-sex relationships. The *Criminal Code* continues to create a different and older age of consent for anal intercourse. While Bill C-22 attempts to be consistent in enforcing a uniform age of consent, it does not address section 159 (2) of the *Criminal Code*, the criminalizing of anal intercourse except between husband and wife, or between two adults over the age of 18. This penal provision clearly discriminates against homosexual, bi-sexual and transgendered youth and would not likely withstand a constitutional challenge. Indeed, several provincial courts of appeal and the Federal Court have already struck down the discriminatory provisions as unconstitutional: Ontario Court of Appeal [14], Quebec Court of Appeal[15], B.C. Court of Appeal[16], Alberta Court of Queen's Bench[17] and the Federal Court of Canada.[18] Furthermore, the government's Backgrounder describes 18 as the age of consent for "exploitative activity",[19] a characterization which, if applied to anal intercourse, has a discriminatory effect.

Even if section 159 were to be removed from the *Criminal Code*, the "close in age" exemption in Bill C-22 may have a discriminatory impact on the LBGT youth community. Many of our clients report experiencing homophobia, homophobic language, slurs, and bullying by adolescents, particularly in school. This may restrict their choice of sexual partners to partners who are not in the same schools, athletic clubs or ordinary social groups.[20] To criminalize non-exploitative sexual relationships in the LBGT youth community may perpetuate the disproportionate policing of the LGBT youth community[21].

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[14] *R v Carmen M* (1992), 75 CCC (3d) 556; 15 CR (4th) 368 (Ont Ct Gen Div), Ont Ct App (25 May 1995) (unreported).

[15] *R. v. Roy* (1998), 161 D.L.R. (4th) 148 (Que. C.A.). While the government claims that the increase will protect youth, the opposite is much more likely. Studies show that youth are significantly less likely to seek sexual health information or advice if they fall below the age of consent

[16] Marchildon, G. (nd). Age of consent: Inequality remains. *Times 10.* Retrieved from: http://www.times10.org/jm0708110.htm

[17] Ibid

[18] *Halm v Canada (Minister of Employment and Immigration)* [1995] FCJ no 303 (24 February 1995)

[19] See, "Age of Protection Legislation" Backgrounder, Department of Justice Canada, http://canada.justice.gc.ca/en/news/nr/2006/doc_31832.html.

[20] In response to significantly higher dropout rates of LBGT students as a result of bullying and harassment, the Toronto District School Board created a new program, the Triangle School, for students who could not find acceptance of their sexual orientation in their home schools. The program was highly successful, but such options are not available generally across Canada. The stigmatizing of LBGT adolescents by their chronological peers has been sadly reported in the media in stories describing ostracism, significant mental health issues and even suicide.

[21] McCann, M. (November 3, 2006). Age of Consent Bill Sent to Committee. *Xtra*. http://www.xtra.ca/public/viewstory.aspx?SESSIONID=edglmf554trt1k55luhyov45&STORY_ID=2279&PUB_TEMPLATE_ID=2

It is always dangerous to drive sexual behaviour underground. Reduction or avoidance of health risks and health education about safe sex must be encouraged, not discouraged by fear of penal consequences.

4. <u>"Close In Age" Exception</u>

It is laudable that the Government contends that Bill C-22 criminalizes only adult sexual predators and not teenage sexuality. As then Minister of Justice Toews said on introducing Second Reading of Bill C-22, the Government proposes " to better protect youth against sexual exploitation by adult predators", to condemn " those adults who prey on and sexually exploit our youth". The purpose of a "close in age exception is "to prevent the criminalization of sexual activity between two young consenting persons" and "not to criminalize consensual activity between teenagers", he said. He acknowledged the reality that "many 14 and 15 year olds are sexually active, **mostly** with peers or cohorts." [Emphasis added.] This allows anyone less than five years older than a 14 or 15 year old sexual partner to raise the defence of consent. While this exemption goes some way in limiting the effect of criminalizing the sexual activity of youth, it uses age difference as a proxy for exploitation or power imbalance, rather than ensuring that all actual exploitation in the circumstances of a particular relationship is prohibited. Teenagers are not protected from sexual activity; they are prevented from exercising consensual choices.

The complexity arises in defining "consent". For consent to be legally binding, it must be informed and voluntary. The determination of each of these criteria is challenging in the realm of sexual conduct. At its heart, exploitation takes away the possibility of genuine consent. As indicated above, in 2005, Parliament made a praiseworthy attempt to set out factors that should be considered in determining whether exploitation exists. It may be that more refinements are possible, but the list of criteria to be considered in the 2005 amendments is not exhaustive and a judge can determine whether, on the facts of a particular case, exploitation exists. Also as suggested above, a rebuttable presumption that an age difference of 5 or more years is exploitative would help refine section 153 of the *Criminal Code* without criminalizing the genuinely non-exploitative relationship between a grade nine student aged 14 on November 30th and a grade twelve student aged 19 on November 29th. If the Minister Toews acknowledges that sexually active 14- and 15-year-olds are "mostly" partnering within the "close in age exception", it is nonetheless important not to criminalize the relationships of the few who are not, unless there is exploitation.

5. Creation of Barriers in Accessing Sexual Health Services for Youth

The ultimate concern and goal of those seeking to protect young people while encouraging the development of autonomous decision-making should be the promotion of sexual responsibility in youth - the solution is better access to education and services. There is a concern that the effect of the legislation may be to have a significant chilling effect on youth seeking sexual health education and services. Criminal law often has the effect of driving behaviour underground, making the provision of accessible education and support services much more difficult.

There is a general concern that increasing the Age of Consent/Protection to 16 will result in barriers for youth in accessing sexual health resources. These resources include sexual health education and information, Sexually Transmitted Infection (STI) and HIV/AIDS testing, contraception, as well as potentially life-saving treatments. According to a British study conducted by Southhampton University[22], a majority of youth who engage in sexual activity before the age of 16 refrain from accessing sexual health resources for fear of being considered "too young", issues of judgment, confidentiality, and criminalization.

From a Canadian perspective, sexual health agencies such as the Canadian AIDS Society[23], EGALE Canada[24], and the Canadian Federation for Sexual Health[25] (formerly Planned Parenthood), have further asserted their concerns that youth will "go underground" with sex practices, rather than seeking out the information and resources they need to be safe. Currently, youth aged 15 to 19 have the highest rates of Sexually Transmitted Infections, and females in that age group have the highest rates of HIV infection[26]. Currently, to the extent that the "age of consent" is 14, it parallels the average age of first (14.1 and 14.5 years old for boys and girls respectively)[27]. There is a concern that 14 and 15-year-olds will not access sexual health resources out of concern that they will be asked questions about their sexual partner, or simply out of a misunderstanding of Bill C-22. In a recent paper by the Canadian Children's Rights Council[28] addressing Bill C-22, the author asserted that "age-appropriate comprehensive sexual health education would do much to empower young people to protect themselves". Will the results of Bill C-22 be an increase in youth pregnancy, STI and HIV/AIDS infection, as well as Canadian 16 year olds being left in the dark

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[22] BBC News (February 15, 2000). *Sex not risky, say teenagers*. Retrieved from: http://news.bbc.co.uk/1/hi/health/642799.stm

[23] Canadian AIDS Society. (2006). *Age of Consent Position Paper*

[24] EGALE Canada. (2006). *Talking Points re: Bill C-22*

[25] Canadian Federation for Sexual Health. (2006). *Age of Consent Position Paper*

[26] Canadian AIDS Society. (2006). *Age of Consent Position Paper*

[27] *Canadian Youth, Sexual Health and HIV/AIDS* Study. (2003). Retrieved from http://www.cmec.ca/publications/aids/

[28] Kovell, C. (2006). Child sexual exploitation and the age of consent. *Canadian Children's Rights Council*. Retrieved from: http://www.canadiancrc.com/Child_sexual_exploitation_age_consent_K_Covell_07SEP06.htm

about sexual health? It is critical that the government launch an effective, targeted public education campaign to eliminate such presumably unintended consequences.

As the Federal Government once stated in its argument against raising the age of consent to 16 for non-exploitative sexual activity, "(e)ducating youth to make informed choices that are right for them is better addressed through parental guidance and sexual health education than by using the *Criminal Code* to criminalize youth for engaging in such activity."[29] Education about the complex criminal rules about sexual conduct must be an important part of the implementation of any *Criminal Code* amendments, both to protect and empower young people and to deter exploitative and predatory conduct. A public education campaign demonstrating examples of exploitation and luring would also empower young people to say, "Hey, you can't do that to me!" [30]

Examples from our clinic

One of JFCY's clients, a 17 year old gay youth, had been engaging in a sexual relationship (including anal sex) with his 20 year old boyfriend. The 17-year- old's mother discovered her son's sexual activity by reading his journal. The mother called the police, which resulted in the 20 year old being charged with sexual assault despite the 17 year old's assertion that their acts were truly consensual. In Provinces where s. 159 of the *Criminal Code* is in force, the younger person would have been charged as well.

A group of five boys who were 12 years old and in grade 6 had all been charged with sexual assault for pinching 12 year old girls' bums at school. JFCY managed to persuade the Crown Attorney to withdraw the charges, since the actions were part of a chase game, and although in the end the pinches may have been unwelcome by the girls, there might have been a defence of consent, if it was part of a game. While Bill C-22 would not rescind the defence of consent in this situation, this case does exemplify the relatively minor forms of sexual activity caught up by the current age of consent law and the Bill.

A 15-year-old female client of JFCY told us she had been lying to her 21-year-old boyfriend about her age. Her parents found out and threatened to have him charged, however, their acts were not illegal under the "Age of Consent" legislation. Although she was clear that the relationship was consensual, and that she had been deceiving her boyfriend about her age, under the new "Age of Protection", her boyfriend would be charged with sexual assault. Such age gaps are increasingly common in secondary schools, since newly arrived immigrants to Canada may avail themselves of all possible secondary school education before seeking post-secondary training.

JFCY represented a 14-year-old female student whose immigration papers identified her as being 23 years old. Her secondary school wished to force her out of day school to attend an adult education centre where the school board could charge her fees. The school board advised us that, although she looked very young and was achieving credits at a grade 8 or 9 level, the board would not accept any documentation proving her age, other than an amendment to her immigration papers. Immigration refused to make any changes, because age was not a vital or even relevant piece of information to them. Our client's boyfriend was 14. No charges were laid, but could be if the same situation recurred after passage of Bill C-22.

**Recommendations**

1. **Justice for Children and Youth supports the portion of Bill C-22 that raises the "age of protection" from "luring" to 16.**
2. **Instead of unequivocal "close in age exceptions, s.153 of the *Criminal Code* should be amended to create a rebuttable presumption that an age difference of 5 years or more constitutes a relationship that is exploitative of the young person.**
3. **Section 159 of the Criminal Code should be repealed and anal intercourse should be included with other sexual intercourse.**
4. **The government should launch a significant, targeted public education campaign:**

- **to inform young people of the laws governing sexual conduct affecting them, to deepen their understanding of what exploitation and luring are, and to empower them to seek access to health and other needed services**
- **to inform the general public, both for deterrent effect and to deepen adult understanding of what constitutes luring and exploitation**