



THE CANADIAN
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April 30, 2018

Via email: ridr@sen.parl.gc.ca

The Honourable Wanda Thomas Bernard
Chair, Senate Committee on Human Rights
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator Bernard:

Re: Bill C-66, *Expungement of Historically Unjust Convictions Act*

The Criminal Justice and Sexual Orientation and Gender Identity Community Sections of the Canadian Bar Association (CBA Sections) are pleased to comment on Bill C-66, which would create a procedure to expunge certain convictions now deemed to be historically unjust and provide that judicial records of those convictions be destroyed.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The Criminal Justice Section consists of a balance of prosecutors and defence lawyers from across Canada. The Sexual Orientation and Gender Identity Community Section works to address the needs and concerns of lesbian, gay, bisexual, transgendered and two-spirited people within the CBA.

The CBA Sections appreciate and support the intention of this Bill as outlined in its Preamble. Together with the Prime Minister's apology,¹ it represents an important first step in redressing the harms experienced by LGBTQ2S people in Canada as a result of federal legislation, policies and practices, and particularly those who were unfairly criminalized by unjust laws and actions. We encourage the federal government to consult with affected communities to identify other *Criminal Code* provisions that also unjustly criminalized LGBTQ2S activity.

We offer seven areas for improvement during the Committee's study of the Bill, based on our experiences as criminal lawyers, and as advocates for and on behalf of the LGBTQ2S community.

¹ Remarks by Prime Minister Justin Trudeau LGBTQ2 Canadians; [online \(https://bit.ly/2HmDHTN\)](https://bit.ly/2HmDHTN).

- 1. The criteria in sections 25(c) and 26 require that the person involved in the activity other than the person convicted (i.e. the 'victim') was 16 years old and consented under the current meaning of section 273(1). The Bill should specifically require that the criteria for expungement also include consideration of the law of consent and age of consent at the time of the conviction, to be consistent with the general spirit of sections 11(g) and 11(i) of the *Charter*.**

These convictions will predominantly be of a historical nature, when the age of consent was legally 14 years of age. Imposing today's age of consent to actions years ago could compound the injustice that the Bill seeks to redress. Further, using the meaning of consent under the current section 273(1) to acts committed years ago when the legal definition of consent was less restrictive would be unjust. The result will be that people may be ineligible for expungement under Bill C-66 even if their conduct would have been legal at the time, if not for the very discrimination targeted by the Bill.

- 2. Section 7(2) should permit an application to be made for someone who is incapacitated, if it does not appear to be against that person's wishes.**

Individuals affected who are not deceased may have insufficient mental capacity to pursue their own application. Mental incapacity should not present a bar to seeking relief. Where someone with power of attorney (or similar legal authority) makes an application for a living person, and where the application does not appear to be against the person's wishes, the designate should be allowed to pursue an expungement on that person's behalf.

- 3. "Any other individual" in section 7(2)(g) should be defined in the Act or Regulations.**

The definition of "any other individual" should not be defined by the Parole Board, but in the Act or Regulations. The term should be inclusive, since the goal of the legislation is remedial. Many members of the LGBTQ2S community do not have "traditional" family or community ties and have fashioned their own unique network of support. It would continue the injustice and discrimination to allow decision makers to exclude applications from otherwise eligible candidates simply because their network of support is unfamiliar to those decision makers.

- 4. The effect of an expungement in section 17 should include the destruction of all Canadian Police Information Centre (CPIC) records and fingerprints related to the conviction.**

While a conviction may be expunged, other CPIC records related to the charge, complaint or investigation are likely to remain. For this Bill to have its intended effect, it must apply to all records connected to the expunged conviction that are under the jurisdiction of the federal government. The definition of expungement should be broad enough to keep pace with ongoing changes in technology and innovations in digital record-keeping.

- 5. Appropriate consequences should apply for non-compliance or intentional disclosure of expunged records.**

Prejudice against LGBTQ2S persons continues to exist in Canadian society, and the RCMP, CPIC and police services across the country are not immune. Appropriate consequences for non-compliance should apply.

6. Regulations should limit and guide the manner in which the Parole Board conducts its inquiries.

Where the Parole Board gathers its own or additional information, it should do so in a manner that respects the remedial purpose of the legislation. This means respecting confidentiality and sensitivity, and not unnecessarily pursuing all facts and information connected to the incidents and persons involved. Appropriate boundaries around fact finding could be articulated in the Regulations.

7. The list of offences in the Schedule should be expanded, in consultation with LGBTQ2S persons and community representatives.

The list of offences included in the Schedule is shorter than that initially suggested by the LGBTQ2S community and in public discourse at the time this legislation was contemplated. The more restrictive list, as it stands now, offers less redress than is necessary and just. History illustrates that LGBTQ2S persons have been prosecuted using every offence possible – not just those most obvious in 2018. To truly address the many insidious ways that the criminal process was used against this population, the legislation should include an expansive list of offences eligible for expungement.

The CBA Sections appreciate the opportunity to comment on Bill C-66. We trust that our comments will be helpful and would be pleased to provide further clarification.

Yours truly,

(original letter signed by Sarah MacKenzie for Loreley Berra and Francis Durnford)

Loreley Berra
Chair, CBA Criminal Justice Section

Francis Durnford
Chair, CBA Sexual Orientation and Gender
Identity Community Section