Standing Committee on Justice and Human Rights

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(presented on Tuesday 25 September 2018)

Our LGBTQI2S communities are appreciative of the interest shown us by the federal government, in a range of ways, right up to the prime minister.

In our brief, we intend to make four points:

1. Articulate our general perspective or approach
2. Express Egale Canada's agreement with the submission by Gentile, Hooper, Kinsman & Maynard

Call for legislative changes in two respects:

3. Failure to address the problem of surgeries on intersex kids
4. A problem in the otherwise welcome efforts to undo past discrimination against our communities

1. Overall perspective

- We come at these issues from a general perspective attuned to LGBTQI2S equality, dignity, and inclusion
- Fundamentally, we are keenly conscious of the long history of the criminal law's sexual and moral offenses being applied discriminatorily, discretionarily, and disproportionately against our communities
- We emphasize intersectionality, conscious that members of our community experience overlapping disadvantage in virtue of being, say, queer people with disabilities, racialized or indigenous trans people, etc.
- I would emphasize the symbolic significance of the criminal law on matters touching our communities
- The Victorian prohibitions relating to sodomy, bawdy houses, indecency, etc. have consequences beyond their enforcement and convictions obtained. The mere threat of their enforcement can operate powerfully

2. Agreement with Kinsman et al.

- Egale Canada endorses fully endorses the report by Patrizia Gentile, Tom Hooper, Gary Kinsman & Steven Maynard
- We support their calls for Bill C-75 to go further than it does, in a number of ways

- We affirm their call for adopting clear, evidence-based guidelines on the use of criminal law in prosecuting cases of HIV nondisclosure.

Let us turn now to the legislative changes that it is possible nobody else will present to you.

3. Intersex children

Subsection 268(1) of the Criminal Code sets out the crime of aggravated assault.

Subsection 3 addresses excision. It specifies that "wounds" or "maims" includes cutting a person's labia majora, labia minora or clitoris. But it provides an exception where surgery is performed for the purpose of the person having normal reproductive functions or normal sexual appearance or function. The alternative basis for the exemption is for a person at least eighteen years of age.

In other words, paragraph 268(3)(a) deflects the protections of the criminal law from children on whom surgery is inflicted for the purpose of giving them a "normal sexual appearance or function."

The idea of the "normal sexual appearance or function" is a vehicle for cis-normative assumptions about which bodies are medically "correct" or "normal."

We cannot undertake a full Charter analysis here, but s. 268(3) raises concerns about security of the person and equality. Moreover, international human rights bodies have recognized that so-called "corrective" surgery of children whose genitals are characterized as abnormal violates personal autonomy and integrity.

We urge you to amend Bill C-75 to modify s. 268(3). Doing so would not jeopardize the space for parents to authorize male infant circumcision.

4. Legislating to end historical discrimination

Two corrective efforts – s. 156 in Bill C-75, and the expungement mechanism in Bill C-66's s. 25 – rely unjustly and discriminatorily on today's age of consent.

First, proposed s. 156 preserves the possibility of prosecution for wrongful conduct where the offenses once in place have been repealed, so long as the conduct remains criminal now.

Second, s. 25(c) of Bill C-66 provides for applications for expungement orders for convictions in respect of listed same-sex offences on certain conditions, including that the persons participating in the activity were 16 years of age or older at the time.

Both provisions aim to end the harmful effects of criminalizing same-sex conduct in a discriminatory way, while preserving the power to punish conduct that remains plainly criminal by today's standards.

Both are problematic. Efforts to assure equal treatment must not rely on the current age of consent of 16. Instead, it is necessary to take into account the fact that, while the age of consent for anal intercourse was for a time 21 and then 18, the age of consent to different-sex sex was 14, until 2008. Bringing about equality, as the government should, entails rolling back the punitive approach to gay sex by treating past same-sex conduct the same as past different-sex conduct. The provisions in question don't do that.

Proposed s. 156 would permit the prosecution of consensual anal intercourse committed with a fourteen- or fifteen-year-old, because today someone that age can't consent to sex (unless the person is close to them in age). The expungement provision would not permit the expungement of a conviction relating to anal intercourse committed consensually with a fourteen- or fifteen-year-old.

These provisions perpetuate discrimination against our communities insofar as there is no basis for prosecuting a heterosexual who had consensual vaginal intercourse with a fourteen- or fifteen-year-old while the age of consent was fourteen.

Accordingly, Justice Canada's Charter statement is incorrect when it states: "The enactment of proposed section 156 would limit any such prosecutions to those that do not raise Charter concerns."

We believe that changes are required to both proposed s. 156 and to s. 25(c) enacted by Bill C-66. Realistically, it is unlikely that prosecutors will lay fresh charges for anal intercourse relating to historical conduct. Concretely, it is likelier that the restrictions on expungement set out by s. 25(c) will cause problems for gay men convicted for consensual conduct that the government admits was criminalized solely as a result of discrimination against us. Nevertheless, it is sensible to address both, particularly since s. 156 is not yet enacted.