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## LEGISLATIVE SUMMARY



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

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**Julia Nicol**

Legal and Social Affairs Division  
Parliamentary Information and Research Service

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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*Legislative Summary of Bill C-32*  
(Legislative Summary)

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# LEGISLATIVE SUMMARY OF BILL C-32: AN ACT RELATED TO THE REPEAL OF SECTION 159 OF THE CRIMINAL CODE

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## 1 BACKGROUND

Bill C-32, An Act related to the repeal of section 159 of the Criminal Code, was introduced in the House of Commons on 15 November 2016 by the Minister of Justice, the Honourable Jody Wilson-Raybould.<sup>1</sup>

The bill repeals section 159 of the *Criminal Code*<sup>2</sup> (the Code). The provision criminalizes anal intercourse, subject to certain exceptions. The bill also includes related amendments to remove references to section 159 in a number of Code provisions, as well as in the *Corrections and Conditional Release Act*<sup>3</sup> and the *Youth Criminal Justice Act*.<sup>4</sup> The repeal of section 159 is a change that has been sought for many years by the LGBTQI2S (lesbian, gay, bisexual, trans, queer, intersex and 2-spirited) community because of its impact on that community.

### 1.1 HISTORY OF SECTION 159 OF THE *CRIMINAL CODE* AND RELATED PROVISIONS

#### 1.1.1 THE LAW IN THE 19<sup>TH</sup> AND 20<sup>TH</sup> CENTURIES

When Canada's *Criminal Code* was first enacted in 1892, it included the precursor to the current anal intercourse offence, which was known as the “buggery” offence. The same provision dealt with bestiality as well. Prior to that, the applicable law was either the British buggery offence or provisions of similar effect under the laws of individual colonies and then a number of federal laws enacted after Confederation. Originally, the punishment for buggery was death, though there are no records that such a sentence was ever carried out in Canada. The punishment for buggery was reduced to life in prison in the Province of Canada (now Ontario and Quebec) in 1865 and maintained at Confederation.<sup>5</sup> The punishment was later reduced to 14 years in 1955 and then to 10 years in 1988.

The buggery offence was not the only sexual offence for which members of the LGBTQI2S community could be prosecuted for sexual acts with a consenting partner. Other related provisions included those concerning “acts of gross indecency,” a term for which there was no definition in the Code. The focus of the criminal law and prosecutions has been mostly on men engaged in sexual activity with men, rather than women with female sexual partners, and offences were originally gender-specific (e.g., indecent assault on a woman was a separate offence from indecent assault on a man).<sup>6</sup>

### 1.1.2 REFORMS TO PERMIT PREVIOUSLY ILLEGAL CONSENSUAL SEXUAL ACTIVITIES IN CERTAIN CIRCUMSTANCES

In 1954, the British government created the Committee on Homosexual Offences and Prostitution, in part because of the public's reaction to a number of high-profile convictions for "homosexual offences." In 1957, the committee released its final report – better known as the "Wolfenden Report" – which was named after the committee chairman, Sir John Wolfenden. It concluded that "homosexual behaviour between consenting adults in private should no longer be a criminal offence."<sup>7</sup> The report was controversial, and it took until 1967 before the recommendation to permit consensual sexual activities between adults of the same sex in private was implemented with the passing of the *Sexual Offences Act 1967*.<sup>8</sup> The report and resulting legislation were to prove influential in Canada.

That same year, a case before the Supreme Court of Canada – and the reaction to it – provided further impetus to modernize the law on anal intercourse in Canada.<sup>9</sup> Everett George Klippert had pleaded guilty in 1965 to four counts of gross indecency and had previous convictions for similar offences from five years prior. At trial, two psychiatrists testified that, while Mr. Klippert was likely to commit further sexual offences by engaging in sexual activities with consenting adult males, he was unlikely to present a danger to others (i.e., cause "injury, pain or other evil" to another person in the meaning of section 659(b) of the *Criminal Code*<sup>10</sup> as it then existed).

Nonetheless, an application was made to declare Mr. Klippert a "dangerous sexual offender," a designation that did not require a finding that he presented a danger to others, but only that he was likely to commit a further sexual offence (such as engaging in consensual anal intercourse or acts of gross indecency). The result of such a designation was detention for an indeterminate period. The Supreme Court of Canada, in a three-to-two decision, upheld the lower court's designation of Mr. Klippert as a dangerous sexual offender and his sentence of preventive detention. The ruling led to calls from parliamentarians and others for *Criminal Code* amendments.<sup>11</sup>

In 1967, then justice minister Pierre Trudeau introduced a bill that – among other social reforms – proposed to legalize a number of sexual acts, including buggery, in certain circumstances. The bill died on the *Order Paper* when the 1968 election was called, but it was reintroduced once Mr. Trudeau became Prime Minister. In 1969, the resulting Act came into force, amending the Code to allow anal intercourse where it takes place:

- between a husband and wife, or two individuals aged 21 or older;
- in private (no more than two people present and not in a public place); and
- where both parties consent.<sup>12</sup>

A 1981 government bill proposed repealing the buggery offence entirely, among other changes, but it never got beyond the committee stage.<sup>13</sup> Two reports commissioned by the federal government in the early 1980s made further recommendations regarding sexual offences affecting the LGBTQI2S community. In 1984, the Committee on Sexual Offences Against Children and Youths made a number of recommendations, which included decreasing the age of consent to 18 for

anal intercourse; decreasing the maximum sentence for anal intercourse – which was 14 years at the time – to 10 years; and repealing the gross indecency provision.<sup>14</sup> The 1985 report from the Special Committee on Pornography and Prostitution made similar recommendations.<sup>15</sup> That same year, the Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs in the House of Commons went further, recommending a uniform age of consent for all sexual activities.<sup>16</sup>

In 1986, the government introduced legislation that incorporated recommendations from the first two committees mentioned above, but did not introduce a uniform age of consent as suggested by the Sub-Committee on Equality Rights.<sup>17</sup> The gross indecency provision in the Code was repealed, the name of the offence of “buggery” was changed to “anal intercourse,” and that offence was separated from the offence of bestiality. While the age of consent for anal intercourse was decreased to 18, it remained higher than that for other sexual acts.<sup>18</sup> The justice minister at the time, Ramon Hnatyshyn, explained the government’s reasons for maintaining the higher age:

Medical evidence does indicate different kinds of psychological or physical harm may attach to different types of intercourse for young persons. Medical experts are not certain at what age sexual preference is established, and many argue that the age is fixed only in the later teen years. Also the question here is the heightened danger of contracting Acquired Immune Deficiency Syndrome or other sexually transmitted disease[s] from anal intercourse since the tissues are more susceptible to physical damage from penetration.<sup>19</sup>

These arguments were later used by the Crown to respond to constitutional challenges to section 159.

In 2007 and 2011, Joe Comartin, a member of Parliament from the New Democratic Party (NDP), proposed private members’ bills to repeal section 159.<sup>20</sup> In 2013, MP Craig Scott, also of the NDP, brought forward another bill on this issue.<sup>21</sup> None of these bills proceeded past first reading before dying on the *Order Paper*.

## 1.2 CASES CHALLENGING THE CONSTITUTIONALITY OF SECTION 159 OF THE *CRIMINAL CODE*

Section 159 of the Code has been found to be unconstitutional numerous times by appeal courts across Canada: Ontario (1995), Quebec (1998), British Columbia (B.C.) (2003) and Nova Scotia (2006). The Federal Court (1995) and the Alberta Court of Queen’s Bench (2002) have reached similar conclusions.<sup>22</sup> The appeal court decisions are binding within the province where they were made but the trial-level decisions cannot bind other judges at the same level. None of the judgments are binding in other provinces or territories, though they may be persuasive (the B.C. and Nova Scotia cases rely on the earlier decisions from Ontario and Quebec, for example).

### 1.2.1 *R. v. C.M.*

In 1995, the Court of Appeal for Ontario was the first appeal court in Canada to find section 159 of the Code to be unconstitutional.<sup>23</sup> Two of the three judges who decided the case of *R. v. C.M.* concluded that section 159 discriminated based on age (a violation of section 15 of the *Canadian Charter of Rights and Freedoms* (Charter)<sup>24</sup>), a point the Crown conceded. The third judge, Justice Abella (now a Supreme Court justice), concluded that the provision discriminated primarily on the basis of sexual orientation, though age and marital status were also factors (all violations of section 15). She explained:

Anyone who is 14 or older, whether married or not, can consent to most forms of non-exploitive sexual conduct without criminal consequences, whereas no one can consent to anal intercourse unless he or she is at least 18 or married. Sexual orientation is an analogous ground of discrimination prohibited under s. 15 of the Charter. Gays and lesbians form a historically disadvantaged group, and s. 159 violates s. 15(1) of the Charter because it arbitrarily disadvantages individuals in that historically disadvantaged group – gay men – by denying to them until they are 18 a choice available at the age of 14 to those who are not gay, namely, their choice of sexual expression with a consenting partner to whom they are not married. Anal intercourse is a basic form of sexual expression for gay men. The prohibition of this form of sexual conduct in s. 159 accordingly has an adverse impact on them. Section 159 infringes s. 15(1) of the Charter on the grounds of sexual orientation.<sup>25</sup>

The Court found that the provision was not saved by section 1 of the Charter, which allows for reasonable limits on Charter rights where prescribed by law and demonstrably justified in a free and democratic society. The provision was thus found to be unconstitutional.

### 1.2.2 *HALM V. CANADA*

The case of *Halm v. Canada (Minister of Employment and Immigration)* related to a deportation order. Mr. Halm had been convicted of sodomy in the United States and was not a Canadian citizen or permanent resident. Section 19(1)(c.1)(i) of the *Immigration Act*<sup>26</sup> deemed a foreign national inadmissible to Canada if convicted of an offence outside Canada that would constitute an offence in Canada punishable by a maximum of 10 years' imprisonment. The issue in the case was whether Canada had an equivalent provision to the sodomy offence in the United States that would justify deportation. If section 159 were found to be unconstitutional, then Canada would not have an equivalent provision.

The Federal Court judge in the case found that section 159 violated section 15 of the Charter because it discriminated based on sexual orientation and age. In this case also, the court concluded that the violation of section 15 could not be saved by section 1 of the Charter and it found the provision to be unconstitutional.

### 1.3 PROSECUTIONS AFTER FINDINGS OF UNCONSTITUTIONALITY

None of the preceding cases were ever appealed to the Supreme Court for a definitive answer that would apply nationwide. Despite the findings of various courts that section 159 is not constitutional, individuals continue to be charged under that provision, including in jurisdictions where an appeal court has already ruled the provision to be unconstitutional. For example, in 2016, an individual was convicted under section 159 in Quebec as part of a plea bargain, even though the provision had been found to be unconstitutional by the province's appeal court in 1998 (in *R. c. Roy*).<sup>27</sup> This is not an isolated case: a total of 69 Canadians were charged in adult courts under the provision in 2014–2015, though none of those charges resulted in a conviction. The previous year, 98 charges were laid under the provision, leading to seven convictions.<sup>28</sup>

In 2001, an individual who had been charged under section 159 sued the Attorney General of Canada and others over the charges, which had subsequently been withdrawn. He tried unsuccessfully to argue that there was a constitutional duty to repeal the provision to reflect the state of the law. The court in that case concluded that such a declaration was redundant given that the provision had already been found to be unconstitutional at the appellate level.<sup>29</sup>

## 2 DESCRIPTION AND ANALYSIS

### 2.1 SECTION 159 OF THE *CRIMINAL CODE*

Section 159 of the Code currently makes it a hybrid offence<sup>30</sup> to engage in anal intercourse unless one of two exceptions applies:

- the act is between a husband and wife (must be a heterosexual marriage); or
- the act is between two individuals aged 18 or older.

In addition, the participants must consent and the act must take place in private. The term “in private” is defined to exclude public places and anywhere where “more than two persons take part or are present.” Where consent is extorted by force, threat or fear of bodily harm or obtained by false and fraudulent misrepresentation regarding the nature and quality of the act, or a participant cannot consent due to mental disability, the person is deemed not to have consented.

Where the charge relates to an act where one of the parties involved is under the age of 18, the minor involved may be charged, as well as the adult. If both parties are minors, they may both be charged.

The maximum punishment for an offence under section 159 is 10 years' imprisonment.

Clause 1 of Bill C-32 repeals section 159 so that anal intercourse is treated the same way as other forms of sexual activity, with a uniform age of consent. Non-consensual anal intercourse could still be the object of other charges, such as sexual assault (sections 271 to 273 of the Code).

Currently, the age at which a person can consent to most sexual activities is 16 years. Exceptions provide for a lower age of consent where the act is consensual and the complainant is 14 or 15 years old and the accused is less than five years older or where the complainant is 12 or 13 years old and the accused is less than two years older.<sup>31</sup> The age of consent is raised to 18 years where there is a relationship of trust, authority or dependence, or where the sexual activity is exploitative.<sup>32</sup>

## 2.2 CONSEQUENTIAL AMENDMENTS

In addition to repealing section 159 of the *Criminal Code*, Bill C-32, under clause 4, creates a new section 156, which deals with historical offences. It states that:

No person shall be convicted of any sexual offence under this Act as it read from time to time before January 4, 1983 unless the conduct alleged would be an offence under this Act if it occurred on the day on which the charge was laid.

While charges of buggery or gross indecency may still be used to address historical cases of sexual assault or child sexual abuse – since individuals are charged based on the law at the time of the alleged offence – they may not be used against individuals involved in consensual sexual acts that are now legal.

The year specified in the clause is 1983, since the general sexual assault offences currently in the Code came into force that year. Previously, the Code had contained gender- and act-specific sexual offences. According to the Department of Justice, buggery and gross indecency are the main pre-1983 offences that can address certain types of historical cases, particularly those involving male victims.<sup>33</sup>

Other consequential amendments in Bill C-32 remove mention of section 159 from a number of provisions in the Code, since the section is no longer part of the criminal law. These include:

- section 7(4.1), which allows for prosecution of listed offences where acts occur outside Canada (clause 2);
- section 150.1(5), which outlines limitations on the defence of mistaken belief that the complainant was aged 18 or older (clause 3);
- section 161(1.1)(a) regarding orders prohibiting an offender from being in public parks, public swimming areas or near the home of the victim of an offence, etc. (clause 5);
- section 273.3(1)(c), which creates an offence of removing a resident of Canada who is under the age of 18 from the country to commit what would be one of a number of listed offences if it took place in Canada (clause 6);
- sections 274, 275, 276(1), 277 and 278.2(1) regarding evidence in trials for sexual offences (clauses 7 to 10);
- section 486(3) regarding exclusion of the public from the courtroom (clause 11);
- section 486.4(1)(a)(i) regarding publication bans (clause 12); and

- section 810.1(1), which provides for a restraining order where there is fear a sexual offence will be committed against a person under the age of 16 (clause 13).

Similarly, Bill C-32 makes consequential amendments to the *Corrections and Conditional Release Act* and the *Youth Criminal Justice Act* to remove mention of section 159.

## 2.3 RECORD SUSPENSIONS

Bill C-32 does not address whether record suspensions (pardons) will be granted to individuals previously convicted of the offence of anal intercourse or its precursor offences. The Minister of Public Safety is currently studying that issue.<sup>34</sup> Concerns have been raised that granting record suspensions to individuals for section 159 offences could inadvertently result in grants for offenders who committed sexual assault.<sup>35</sup>

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## NOTES

1. [Bill C-32, An Act related to the repeal of section 159 of the Criminal Code](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament.
2. [Criminal Code](#), R.S.C. 1985, c. C-46.
3. [Corrections and Conditional Release Act](#), S.C. 1992, c. 20.
4. [Youth Criminal Justice Act](#), S.C. 2002, c. 1.
5. *An Act for abolishing the punishment of death in certain cases*, 29 Victoria, c. 13, s. 1(5) [1865]; *An Act respecting Offences against the Person*, S.C. 1869, 32–33 Victoria, c. 20, s. 63; and *Criminal Code, 1892*, S.C. 1892, 55–56 Victoria, c. 29, s. 174.
6. Egale Canada Human Rights Trust [Egale], [The Just Society Report: Grossly Indecent – Confronting the Legacy of State Sponsored Discrimination Against Canada’s LGBTQ2S/ Communities](#), 2016, pp. 23–24, 37 and 50.
7. United Kingdom, Committee on Homosexual Offences and Prostitution, *Report of the Committee on Homosexual Offences and Prostitution*, September 1957, para. 62.
8. United Kingdom, [Sexual Offences Act 1967](#), 1967, c. 60. See also Robert Demers, “[De la lex scantinia aux récents amendements du Code criminel: homosexualité et droit dans une perspective historique](#),” *Les Cahiers de droit*, Vol. 25, No. 4, 1984, p. 788.
9. [Klippert v. The Queen](#), [1967] SCR 822.
10. *Criminal Code*, S.C. 1953–54, c. 51, s. 659(b), as amended by *An Act to amend the Criminal Code*, S.C. 1960–61, c. 43, s. 32.
11. Egale (2016), p. 32. Mr. Klippert was released from prison in 1971.
12. *Criminal Law Amendment Act, 1968–69*, S.C. 1968–69, c. 38, s. 7.
13. Bill C-53, An Act to amend the Criminal Code in relation to sexual offences and the protection of young persons and to amend certain other Acts in relation thereto or in consequence thereof, 1<sup>st</sup> Session, 32<sup>nd</sup> Parliament.
14. Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths*, Vol. 1, Ottawa, 1984, p. 47.

15. Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, Vol. 2, Ottawa, 1985, p. 554.
16. House of Commons, Sub-Committee on Equality Rights of the Standing Committee on Justice and Legal Affairs, *Equality for All*, First Report, 1<sup>st</sup> Session, 33<sup>rd</sup> Parliament, October 1985.
17. *An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, s. 3.
18. Egale (2016), p. 39.
19. House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15: An Act to amend the Criminal Code and the Canada Evidence Act*, 2<sup>nd</sup> Session, 33<sup>rd</sup> Parliament, 27 November 1986, 1025 (Honourable Ramon Hnatyshyn, Minister of Justice and Attorney General of Canada).
20. [Bill C-438, An Act to amend the Criminal Code \(consent\)](#), 1<sup>st</sup> Session, 39<sup>th</sup> Parliament, reinstated 2<sup>nd</sup> Session, 39<sup>th</sup> Parliament; and [Bill C-628, An Act to amend the Criminal Code \(consent\)](#), 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament.
21. [Bill C-448, An Act to amend the Criminal Code \(consent\)](#), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament, reinstated 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament.
22. [R. v. C.M.](#), 1995 CanLII 8924 (ON CA); [R. c. Roy](#), 1998 CanLII 12775 (QC CA) [available in French only]; [R. v. Blake](#), 2003 BCCA 525 (CanLII); [R. v. T.C.F.](#), 2006 NSCA 42 (CanLII); [Halm v. Canada \(Minister of Employment and Immigration\)](#), [1995] 2 FCR 331, 1995 CanLII 3573 (FC); and [R. v. Roth](#), 2002 ABQB 145 (CanLII).
23. In *R. v. C.M.*, the accused had had a relationship with his fiancée's niece, which began when he was 23 years old and the niece was 13 years old, and which lasted three years. He was convicted at trial of sexual assault and sexual interference and sentenced to 18 months' imprisonment, but was found not guilty of the offence of anal intercourse under section 159 because the provision was found to be unconstitutional.
24. [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
25. *R. v. C.M.*
26. *Immigration Act*, R.S.C. 1985, c. I-2, s. 19(1)(c.1)(i). An equivalent provision may be found in section 36 of the [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27.
27. [R. c. D.G.](#), 2016 QCCQ 6167 (CanLII). [Available in French only]
28. Department of Justice, [Questions and Answers – An Act related to the repeal of section 159 of the Criminal Code](#) [Questions and Answers].
29. [Lucas v. Toronto Police Service Board](#), 2001 CanLII 27977 (ON SC).
30. A hybrid offence may be proceeded with by summary conviction or indictment, depending on the severity of the acts in question.
31. *Criminal Code*, s. 150.1.
32. *Criminal Code*, s. 153.
33. Department of Justice, [Questions and Answers](#).
34. Kathleen Harris, "[Liberals to revamp 'discriminatory' age law for anal intercourse: Change comes as Justin Trudeau appoints new adviser to advance equality agenda](#)," *CBC News*, 15 November 2016; and John Ibbitson, "[Edmonton MP to lead efforts to redress wrongs against sexual minorities](#)," *Globe and Mail* [Toronto], 15 November 2016.
35. *Ibid.* (Ibbitson).