

**IN THE SENATE OF CANADA**

with respect to

**BILL C-66 (“THE EXPUNGEMENT OF HISTORICALLY  
UNJUST CONVICTIONS ACT”)**

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**SUBMISSIONS OF AIDS ACTION NOW!,  
QUEER ONTARIO and QUEERS CRASH THE BEAT**

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## Introduction

1. Lesbian, gay, bisexual, trans and queer (LGBTQ) people have a special interest in ensuring that Bill C-66 appropriately addresses historically unjust convictions. In this Submission, AIDS Action Now!, Queer Ontario, and Queers Crash the Beat make three Recommendations for how the Senate can strengthen Bill C-66, by: (1) Amending the age requirement in Bill C-66 to reflect the applicable age of consent; (2) Introducing a limitation period for new historically unjust prosecutions; and (3) Removing the closed list of offences for which expungement is available.

## Recommendation: Amend the Age Requirement in Bill C-66

2. Bill C-66, as drafted, reproduces the very discrimination that it is intended to ameliorate.<sup>1</sup> At its narrowest, the purpose of Bill C-66 is to correct a historical injustice: that consensual same-sex sexual activity was criminalized in cases where comparable heterosexual activity was not. The Preamble to the Bill evokes the *Charter* and, by inference, the equal protections afforded to LGBTQ people under Section 15.<sup>2</sup>
3. For context: Until 1969, sex between men was criminalized no matter the age of the parties. After 1969, sex between men was decriminalized for two adults over the age of 21, if conducted in private.<sup>3</sup> The age of consent for anal sex continues to be, nominally, 18.<sup>4</sup>

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<sup>1</sup> Bill C-66, *An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts*, 1st Sess, 42nd Parl, 2017 (short title: *Expungement of Historically Unjust Convictions Act*).

<sup>2</sup> Bill C-66, *supra* (see Preamble).

<sup>3</sup> For a good summary, see: Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto, University of Toronto Press, 2002).

<sup>4</sup> *Criminal Code of Canada*, RSC 1985, c C-46 s 159(1) ("*Criminal Code*").

4. Meanwhile, the equivalent age of consent for heterosexuals for virtually all of this period was 14.<sup>5</sup> This was true until the Criminal Code was amended on May 1, 2008 to raise the age of consent to 16.
5. The Criminal Code contains near-age exemptions under Section 150.1. Section 150.1(2) permits sexual activity between a 12- or 13-year-old youth so long as the partner is close in age (within 2 years). In 2008, an additional near-age exemption was added, allowing 14- and 15-year old youths to engage in sexual activity with older partners who are within 5 years of age. The older partner under both exemptions must not be in a position of trust or authority, there must not be a relationship of dependency, and the relationship must not be exploitative.<sup>6</sup>
6. The Supreme Court of Canada recognizes that young people are rightsholders,<sup>7</sup> including when it comes to their own sexual expression.<sup>8</sup> In 2001, Chief Justice McLachlin concluded that young people can and do engage in sexual exploration which is important to their development. She wrote:

Indeed, for young people grappling with issues of sexual identity and self-awareness, private expression of a sexual nature may be crucial to personal growth and sexual maturation.<sup>9</sup>
7. Bill C-66, as it is currently drafted, does not account for this framework. It permits expungement of convictions only in cases where the accused's sexual partner was 16 years of age or older, or in cases where the post-2008 near-age exemptions apply.<sup>10</sup>

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<sup>5</sup> *Criminal Code*, supra at s 150.1.

<sup>6</sup> *Criminal Code*, supra at ss 150.1 (2)(b) and (2.1)(b).

<sup>7</sup> *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 and *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 3.

<sup>8</sup> *R v Sharpe*, 2001 SCC 2 at para 107.

<sup>9</sup> *R v Sharpe*, supra at para 107.

<sup>10</sup> Bill C-66, cl 25(c).

8. In other words, the Bill does not harmonize the age requirement for expungement with the age of consent *as it was at the time of the offence* if the acts took place before 2008. This is a troubling omission, especially considering that two of the three offences (Buggery and Gross Indecency) were removed from the Criminal Code in 1988.
9. Unless Bill C-66 is amended, Parliament will be sending that message that same-sex sexual activity is more dangerous and damaging to young people than equivalent heterosexual activities. This is one of the most persistent and pernicious myths about the LGBTQ community: that same-sex sexuality is a threat, and that young LGBTQ people need to be protected from their own sexuality in ways that their heterosexual peers do not.
10. The only framework which would ameliorate this differential treatment is one in which replaces Clause 25(c) of Bill C-66 the requirement that:

For acts which took place before May 1, 2008:

- a. If the other party was at least 14 years of age or older; or
- b. Where the other party was 12 or 13 years of age, if the accused was near in age (less than 2 years older);

And, if the acts took place on or after May 1, 2008:<sup>11</sup>

- a. If the other party was at least 16 years of age or older; or
- b. The person who was convicted would have been able to rely on a defence under section 150.1 of the *Criminal Code*, had that defence been available in respect of the offence.

11. If the scope of Bill C-66 remains narrow (i.e., focussed on Buggery, Gross Indecency and Anal Intercourse), it must at a minimum be amended to allow for expungements in all cases where the sexual activity would have been lawful but for the sexual orientation or gender of the participants.

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<sup>11</sup> The post-2008 language is unnecessary for historical convictions for Buggery and Gross Indecency, both of which were removed from the *Criminal Code* before 2008. However, this language is necessary in light of the Anal Intercourse provision.

### **Recommendation: Introduce a Limitation Period for New Prosecutions**

12. There are no limitation periods on prosecutions for Buggery or Gross Indecency, which means that police in 2018 can still lay new charges based on historical allegations. This is no mere theoretical possibility: Buggery and Gross Indecency charges are still laid<sup>12</sup> and such charges are prosecuted<sup>13</sup> when the alleged acts took place before 1988.
13. As a result, there is every possibility that new charges will be laid against accused persons in circumstances contemplated by the expungement process in Bill C-66. An accused in such a situation would be eligible to have their record expunged if convicted — but would still have to serve whatever sentence was imposed upon them.
14. This is a manifestly unfair scenario. If Parliament has concluded that in certain circumstances, such convictions are unjust, then it cannot permit a legal regime in which new convictions in those circumstances are allowed.
15. We therefore recommend that Bill C-66 be amended to add a limitation period (30 years for Buggery and Gross Indecency, and an immediate moratorium for Anal Intercourse) for historical prosecutions in cases which meet the criteria for conviction in which expungements are available.

### **Recommendation: Leave List of Eligible Convictions Open Ended**

16. The Senate should amend Bill C-66 by striking the closed list of offences contained in the Bill.

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<sup>12</sup> See for example *R v Stuckless*, 2016 ONCJ 338.

<sup>13</sup> *R v Hawkes*, NSSC 2017 (unreported).

17. Police have historically used laws which are neutral on their face to target the LGBTQ community. Because of this, virtually all of the cases that we now think of as historically unjust LGBTQ prosecutions are excluded from the ambit of Bill C-66. Charges targeting LGBTQ people vary, and have included public indecency,<sup>14</sup> indecent theatrical performances,<sup>15</sup> operating<sup>16</sup> or being a found in bawdy house,<sup>17</sup> nudity,<sup>18</sup> obscenity,<sup>19</sup> disorderly conduct,<sup>20</sup> and a raft of non-criminal charges and by-law infractions.<sup>21</sup> Authorities also use relatively minor non-criminal infractions (liquor license, fire code, health and safety) to target LGBTQ people and spaces.<sup>22</sup>
18. If the Senate does not amend Bill C-66 by striking the closed list of eligible offences, the Senate should adopt the recommendations of LGBTQ Historians, HIV Groups and LGBTQ Organizations that the list of offences be broadened to include at a minimum the above offences, plus prostitution-related offences, anti-vagrancy laws and criminal HIV-nondisclosure.
19. There are many reasons why police prefer to lay charges under laws which are neutral on their face. Proceeding in this way has practical advantages, allowing police to choose infractions where the elements of the offence are easier to prove. It also makes prosecutions possible in situations where a sex-specific or LGBTQ-specific law did not

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<sup>14</sup> Indecent Acts, *Criminal Code*, *supra* s 173(1); *R v Follett*, [1995] 98 CCC (3d) 493 (NLCA).

<sup>15</sup> Immoral Theatrical Performance, *Criminal Code* s 167; *R. v. Potts*, [1999] O.J. No. 4737 (“Potts”); *R v McKeigan*, [2000] O.J. No. 1598 (“McKeigan”).

<sup>16</sup> Keeping a Common Bawdy House, *Criminal Code* at s. 210; *McKeigan*, *supra*.

<sup>17</sup> Found in..., *Criminal Code*, *supra* s 210(2)(b); *R. v. MacLaren*, *supra*.

<sup>18</sup> Nudity, *Criminal Code*, *supra* s 174; see description of 2002 nudity charges in Bob Tarantino, *Under Arrest* (Toronto, Dundurn Press, 2007) at p 95, and the raid on les chutes Sainte-Marguerite, *infra*.

<sup>19</sup> *R v Pink Triangle Press*, (1980) 51 CCC (2d) 485; *R v Popert*, (1981) 58 CCC 505.

<sup>20</sup> See discussion of The Brunswick Four, *infra*; *R v Hornick*, 53 WCB (2d) 275 (Ont CtJ) (“Hornick”).

<sup>21</sup> *Hornick*, *supra*; see also discussion of Project Marie, *infra*.

<sup>22</sup> *Hornick*, *supra*; see also discussion of Sex Garage raid, *infra*.

apply or no longer existed. And there is inevitably a political advantage to proceeding in this way, lending the police and prosecutors a veneer of neutrality.

20. Unless Bill C-66 is amended, the historically unjust convictions related to the 1981 **Bathroom Raids** are ineligible for expungement under Bill C-66. On February 5, 1981, Toronto Police arrested 286 men as found-ins of a bawdy house, and it charged 20 owners with keeping a common bawdy house for the purposes of indecent acts.<sup>23</sup>
21. In 2016, Toronto Police Services expressed “regret” for its role in the Bathroom Raids,<sup>24</sup> but the convictions related to the raids are not eligible for expungement under Bill C-66. The Bathroom Raids are by no means the only examples of high profile historically unjust prosecutions which would not be eligible for expungement under C-66.
22. In 1974, four women were arrested for singing *I Enjoy Being a Dyke* at the Brunswick House tavern in Toronto. Police were violent and abusive, and the case, known as the **Brunswick Four**, became a rallying point for the nascent LGBTQ movement in Canada. Pat Murphy, the only person ultimately to face criminal penalties, was convicted of disorderly conduct — which is not eligible for expungement under Bill C-66.
23. In 1976, police raided more than a half dozen Montreal gay bars and at least one lesbian bar between 1975 and 1976, sometimes charging staff and sometimes clientele.<sup>25</sup> This was intended as a “clean up” of the city in the lead-up to the **1976 Olympics**. To the extent that charges were related to liquor licence violations, keeping a common bawdy

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<sup>23</sup> See Warner, *supra*.

<sup>24</sup> Patty Winsa and Robin Levinson King, “Toronto police regret 1981 bathroom raids, chief says” (Toronto, the Toronto Star, June 22, 2016).

<sup>25</sup> Gary Kinsman and Patrizia Gentile, *The Canadian War on Queers* (Vancouver, University of British Columbia Press, 2010). See also Kinsman and Gentile, “Resisting the Olympic Cleanup” (Toronto, *Xtra*, December 29, 2009).

house, or indecency, those charges would not be eligible for expungement under Bill C-66.

24. Throughout the 1980s, police **continued to raid gay bathhouses** and other sexualized spaces and charge both staff and patrons. These arrests continued into the 2000s, with Hamilton's Warehouse Spa and Baths<sup>26</sup> and Calgary's Goliath's<sup>27</sup> being the last known raids of their kind. Police were also active during this period laying charges targeting men who have sex with men for sexual activity in parks and other public and semi-public spaces, laying **hundreds of Indecency charges** in Ontario between 1980 and 1985 alone.<sup>28</sup>

25. In 1990, police raided **Sex Garage**, an LGBTQ party in Montreal, initially, police claimed, for liquor license violations. When they ordered patrons to evacuate the bar, LGBTQ people found themselves in a hostile street confrontation with 40 officers with billy clubs. Police hurled homophobic epithets and beat patrons, eventually arresting eight patrons for, among other things, assaulting officers.<sup>29</sup> These charges are not eligible for expungement under Bill C-66.

26. In 1995 and 1996, Toronto Police conducted an extensive operation at **Remington's**, a male strip club, attending undercover on eight or more occasions. A manager, Kenneth McKeigan, was tried and convicted of keeping a common bawdy house and indecent

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<sup>26</sup> Tanya Gulliver, "Charged for Bathhouse Sex" (Toronto, *Xtra*, August 18, 2004).

<sup>27</sup> Patrick Brethur. "Calgary Bathhouse Raid Angers Gays", (Calgary, *Globe and Mail*, December 18, 2002).

<sup>28</sup> See, Patrizia Gentile et al, "Fix Bill C-66: Gay and Lesbian Historians Speak Out" (Senate Submissions on C-66, unpublished, 2018) at p 6.

<sup>29</sup> Linda Dawn Hammond, "Sex Garage." Photographs are available at: <[dawnone.com/attack.html](http://dawnone.com/attack.html)> (accessed: January 8, 2018).

theatrical performance.<sup>30</sup> McKeigan's conviction is not eligible for an expungement under Bill C-66.

27. These raids continued. In 1999, after 19 men were charged with committing indecent acts at **The Bijou** in Toronto, the LGBTQ community rallied around what they saw as police overreach of consensual sexual activity.

28. Police raided Canada's only queer women's bathhouse, a monthly party known as **Pussy Palace**, on September 14-15, 2000. Police sent uniformed male officers into the women's-only space, where women recorded incidents of the officers being rough, violent, and homophobic. Organizers including JP Hornick<sup>31</sup> were accused of six liquor license violations, including permitting disorderly activity on the premises. Again, the LGBTQ community mobilized support.

29. In both the Bijou and the Pussy Palace cases, after intense public scrutiny and under pressure from the community, the charges were eventually withdrawn. But it is worth noting that the underlying charges themselves – Indecency in the case of the Bijou and Permit Disorderly Activity in the case of the Pussy Palace – are not eligible for expungement under Bill C-66.

30. Police continue to target LGBTQ people. In November 2016, more than 70 men were caught in an undercover sting operation of a gay cruising in **Marie Curtis Park**. In 2017, the Sûreté du Québec raided a popular LGBTQ nudist area at **les chutes Sainte-Marguerite** à Sainte-Adèle, an hour Northwest of Montreal.<sup>32</sup> The charges in both these cases were for laws which are seemingly neutral on their face — Trespass, Sexual

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<sup>30</sup> Potts, *supra* and McKeigan, *supra*.

<sup>31</sup> Hornick, *supra*.

<sup>32</sup> Brigitte Noël, "Des interventions policières aux chutes Sainte-Marguerite inquiètent la communauté LGBTQ" (Montreal, *Vice*, September 19, 2017).

Activity in the Park, Nudity — and which are not eligible for expungement under Bill C-66.

31. Given this history, limiting expungements to Buggery, Gross Indecency and Anal Intercourse is unjustified. Any historically unjust conviction that meets the other requirements under Bill C-66 must be eligible for expungement.

### **About the Organizations**

32. **AIDS ACTION NOW!** was established in 1988 as an activist response to failures in Canadian HIV policy. AIDS Action Now! remains a grassroots organization committed to public demonstrations, lobbying, collaboration, and research.
33. **QUEER ONTARIO** was formed in 2009, following the dissolution of the Coalition for Lesbian and Gay Rights in Ontario (1975-2009). It is a provincial network of gender and sexually diverse people and allies who are committed to challenging laws, institutional practices, and social norms that regulate queer people.
34. **QUEERS CRASH THE BEAT** is a queer collective which responds to historical and ongoing failures in policing. It was formed in 2016, following an undercover sting operation conducted by Toronto Police Services in Marie Curtis Park.

### **Summary of Recommendations**

This Submission makes three Recommendations:

1. Amend the age requirement in Bill C-66 to reflect the applicable age of consent;
2. Introduce a limitation period for new historically unjust prosecutions; and
3. Remove the closed list of offences for which expungement is available.