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March 28, 2007

Mr. Art Hanger, M.P.
Chair
Standing Committee on Justice and Human Rights
Sixth Floor, 180 Wellington Street
Wellington Building
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Hanger,

**RE: Bill C-22, *Criminal Code* amendments (age of protection)**

We are writing on behalf of the Canadian Bar Association's National Criminal Justice Section and the Sexual Orientation and Gender Identity Conference (SOGIC), with respect to Bill C-22, *Criminal Code* amendments (age of protection).

The CBA is a national association of 37,000 lawyers, notaries, students and law teachers, with a mandate to seek improvements in the law and the administration of justice. The Criminal Justice Section members include represents both prosecutors and defence counsel from every province and territory in Canada, as well as legal academics specializing in criminal law. SOGIC is a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity.

**Introduction**

Canada currently has one of the lowest age of consent laws,[1] and it has been shown that children in Canada are vulnerable to sexual abuse and exploitation by adults.[2]

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1 National Centre for the Prosecution of Child Abuse, *Child Abuse Crimes: Sexual Offences* (current through July 25, 2006). Available at: www.ndaa.org/pdf/ncpca_statute_sexual_offnses_july_06.pdf; Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (New York: Parlgrave MacMillian, 2005) c.3.

2 Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect: Final Report* by N. Trocme, B. MacLaurin *et al* (Ottawa: Minister of Public Works and Government Services Canada, 2001) at 33.

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The CBA supports measures to protect children from sexual exploitation by adults, and recognizes that a low age of consent may, in some cases, contribute to that sexual exploitation. We support the intent of the proposal to raise the age of consent from 14 to 16 years of age, and recognize that the recent introduction of new "exploitative relationship" provisions to the *Criminal Code*[3] may not cover situations where there is no pre-existing relationship between the parties involved.

In this letter, we stress two points in regard to changing the age of consent to sexual activity in Canada. First, a higher age of consent must be accompanied by a larger "close-in-age" exemption, so that it does not inadvertently criminalize consensual sexual activity between young people. Second, any reform of the age of consent should address current inconsistencies in the law for different forms of sexual activity.

**Close in Age Exemption**

The CBA supports measures to prevent exploitation of young people by mature adults, but clearly the intent is not to criminalize sexual activity between consenting young people. If the age of consent is raised to 16, we applaud Bill C-22's proposal for a larger close-in-age exception. The exception is required to achieve the objective of protecting young people, while ensuring that the law does not unjustifiably infringe upon young people's sexual choices.

**Consistency in Age of Consent**

The *Criminal Code* currently singles out one sexual act, anal intercourse, and applies different standards to that act than to other sexual acts. Bill C-22 provides the opportunity to bring these provisions in line with the *Canadian Charter of Rights and Freedoms*, and we strongly believe that lawmakers should not neglect that opportunity.

Section 159 of the *Criminal Code* imposes an age of consent for anal intercourse of 18 years of age. This distinction has been found unconstitutional by courts in Ontario, Quebec, British Columbia, Alberta, and Nova Scotia, as well as the Federal Court of Canada.[4] These courts have found that section 159 violates the *Charter* by discriminating on the basis of age, marital status and sexual orientation. In *R. v CM*, Abella J.A. (as she then was) commented extensively on the discriminatory impact of section 159 on the constitutional rights of gay men.

Section 159 also criminalizes sexual activity between two people in the presence of other consenting adults. Like the age restriction, this restriction applies only to anal intercourse, and not to any other form of sexual activity. This was the particular aspect of the section at issue in *R. v. Roth*. This aspect of the section is clearly inconsistent with developments in indecency law, reflected in the Supreme Court's decision in *R. v.*

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[3] Bill C-2, now S.C. 2005, c.32.

[4] See, *R. v. C.M.* (1995), 41 C.R. (4th) 134 (Ont. C.A.); *R. v. Roy* (1998), 125 C.C.C. (4th) 442 (Que. C.A.); *R. v. Blake* (2003), 187 B.C.A.C. 255; *R. v. Roth*, 2004 AB.Q.B. 305; *R. v. Farler* (2006), 43 N.S.R. (2d) 237 (C.A.); *Halm v. Canada*, [1995] 2 F.C. 331 (T.D.).

*Labaye*[5], where the court held that group sexual activity that did not harm individuals or society did not meet the established test for criminal indecency or obscenity.[6]

During its consideration of Bill C-22, we urge the government to bring the *Code* in line with the *Charter* by repealing section 159 and treating all consensual sexual activity identically. Any other approach opens the door to discrimination on the basis of sexual orientation.

Thank you for the opportunity to express the CBA's views on Bill C-22.

Yours truly,

(*original signed for Greg P. DelBigio by Gaylene Schellenberg*)

Greg P. DelBigio
Chair, National Criminal Justice Section

(*original signed for Robert Muir by Gaylene Schellenberg*)

Robert Muir
Chair, Sexual Orientation and Gender Identity Conference

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5 [2005] 3 S.C.R. 728.
6 *Ibid*., para. 70.