Policy Brief: Legalizing Gay Sex

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Goal

Remove section 159 from the Criminal Code, which states the Legal Age of Consent for anal sex is 18 years old, "unless it is an act engaged in, in private, between husband and wife" (Library of Parliament, 2017; Smith, 2020).

Executive Summary:

According to Lennon-Dearing and Delavaga (2015, p. 412), "there has been a dramatic increase in anti-lesbian, gay, bisexual, and transgender" legislative initiatives in Canada within the last several years. This policy brief discusses the complexities and contradictions associated with the relationship of policy, laws and same-sex intercourse. Although there is no law in Canada prohibiting same-sex intercourse, there are many legal discriminations and criminal regulations that negatively influence the lives of members of the Lesbian, Gay, Bisexual, Transgender, Queer community (LGBTQ+) and other related communities in Canada (Smith, 2020). This brief is intended to direct Canadian Parliament in altering section 159 of the Criminal Code, which states the Legal Age of Consent for anal sex is 18 years old, "unless it is an act engaged in, in private, between husband and wife" (Library of Parliament, 2017; Smith, 2020). This is discriminatory towards the LGBTQ+ community because the Legal Age of Consent in Canada is 16 years old (Smith, 2020). This brief recommends removing section 159 from Canada's Criminal Code, expungement of Criminal Records of those charged with offences related to anal intercourse, and education for policymakers on the LGBTQ+ community

Addressees:

This policy brief is directed at policymakers, specifically members of Canada's Trudeau Liberal Government. It is addressed to the Minister of Justice and Attorney General of Canada, David Lametti. Mr. Lametti is responsible for areas of Canada's federal law, specifically, criminal justice and youth criminal justice (Government of Canada, 2019). This brief is to be used by LBGTQ+ advocates and community members in fighting for their rights, clearly stated in the Canada's Charter of Rights and Freedoms.

The Issue with the Age of Consent in Canada

- Criminalization of a normal aspect of gay sexual activity (Scott, 2016).
- Discrimination based on a person's sexual orientation, age, and marital status (Charron-Tousignant et al., 2017; Smith, 2020)
- Perpetuates the myth that gay sexual activity is "dangerous, devastating and damaging to young people in a way that equivalent heterosexual activity is not, and that young LGBTQ people need to be protected from their sexual activity in a way that their heterosexual peers do not need to be protected" (Senate of Canada, 2018).
- Gay youth are not educated in schools about safe sex (Scott, 2016).
- Violating Section 159 of the Canadian Criminal Code has a maximum punishment of 10 years of imprisonment (Charron-Tousignant et al., 2017).

Statement of the Issue

According to section 159 of the Criminal Code, in Canada, the Legal Age of Consent is 16 years old (Smith, 2020). The Legal Age of Consent for anal sex in Canada is 18 years old, "unless it is an act engaged in, in private, between husband and wife" (Library of Parliament, 2017; Smith, 2020). This is legally discriminatory against gay men and the LGBTQ+ community. Many scholars, such as Smith (2020, p. 72), have stated, "in a free and democratic society, it is not justifiable to make an activity criminal merely because a segment, indeed maybe a majority, of the citizenry consider it to be immoral. The reinforcement of moral precepts and the inhibition of homosexual youth from acknowledging their sexual orientation at an early age are not purposes which can support making the activity in question a Criminal Code offence". There has been a failure at the Parliament level for their inaction to remove section 159 from the Canadian Criminal Code (Smith, 2020).

Section 159 from the Criminal Code violates the Canada's Charter of Rights and Freedoms. The Charter states, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or physical disability." (Canadian Charter, 1982, s15). Section 159 of the Criminal Code ensures discrimination towards the LGBTQ+ community based on sexual orientation, gender identity and age.

The problem with this bill not being passed is that many men throughout Canada continue to be charged with crimes associated with same-sex intercourse (Smith, 2020). This is discriminatory because their heterosexual counterparts are not receiving the same treatment in the law's eyes. Section 159 of the Criminal Code can charge a minor and an adult for participating in anal sex and charge two minors who participate in anal sex (Charron-Tousignant, Mackay, & Nicol, 2017). This offence has a maximum punishment of 10 years of imprisonment for an adult (Charron-Tousignant et al., 2017). Many courts have deemed this section in the Criminal Code to violate the Charter of Rights and Freedoms and it no longer is enforced (Charron-Tousignant et al., 2017; Smith, 2020). However, many Canadians continue to get charged for offences associated with violating section 159. Sixty-nine Canadian adults were charged within 2014-2015; however, none of them ensued a conviction (Charron-Tousignant et al., 2017).

Due to the COVID-19 pandemic, this policy brief is particularly relevant. Salerno

and Williams, and Gattamorta (2020), have claimed that members of the LGBTQ+ community are particularly vulnerable during this time. They have been shown to report higher rates of mental health issues due to their lack of interaction with their community members (Salerno et al., 2020). This is relevant to this policy brief because section 159 of Canada's Criminal Code restricts members of the LGBTQ+ community from forming meaningful, intimate relationships with each other, which Salerno and colleagues (2020) had already deemed essential for mental stability.

History and Existing Policies

Canadian laws are developed in a legislative process, which included three segments. "To become law, legislation must be approved by Parliament. Proposed legislation is introduced in Parliament in the form of a bill which provides the basis to amend or repeal existing laws or put new ones in place. Canada's legislative process involves all three parts of Parliament: the House of Commons (elected, lower Chamber), the Senate (appointed, upper Chamber), and the Monarch (Head of State, who is represented by the Governor General in Canada)." (Department of Justice Canada, 2020, Legislative Process section).

According to the IFSW, the global definition of social work is "Social work is a practice-based profession and an academic discipline that promotes social change and development, social cohesion, and the empowerment and liberation of people. Principles of social justice, human rights, collective responsibility and respect for diversities are central to social work. Underpinned by theories of social work, social sciences, humanities and indigenous knowledge, social work engages people and structures to address life challenges and enhance wellbeing. The above definition may be amplified at national and/or regional levels." (International Federation of Social Workers, 2021, para. 2).

Social workers and social work agencies fit into the of equation of law reform in many ways. It is a social worker's responsibility to engage in advocacy of vulnerable and at-risk populations. Social workers can provide information and experiences through policy briefs, which speak to the injustices that vulnerable individuals are faced with regards to social or political policies (Levy, 1991).

Once a law is reformed, it is a social worker's and social work agencies' job to monitor the implementation of these new grounds. Social workers educate and advocate for their cliental when their rights are being violated (Levy, 1991). There are many ways in which social workers and social work agencies can be involved in a law reform from the beginning stages to the monitoring of new laws or social policies.

The legalization and decriminalization of homosexuality was passed in 1969 (Smith, 2020). The relationship acknowledgement and parenting rights for same-sex couples was established in 2005 (Smith, 2020). The Liberal government of Justin Trudeau has passed more laws and legislation since he was elected in 2015 (Smith, 2020). In 2016 the government made attempts at reforming the Criminal Code; they made a "commitment on apology, expungement, and compensation for past discrimination." (Smith, 2020, p. 75). This allowed members of the LGBTQ+ community the opportunity to live according to the laws of heterosexual individuals, as opposed to the discrimination they were given previously. All this considered, the Canadian Liberal government of Justin Trudeau has yet to remove section 159 from the Criminal Code, even after being brought to Parliament and the House of Commons on numerous occasions.

There have been many bills introduced in Parliament regarding this injustice, most notably Bill C-448 and Bill C-600. Bill C-448 was introduced in October 2012, titled An Act to amend the Criminal Records Act (Parliament of Canada, 2011-2012). It pursued abolishing section 159 of the Criminal Code (Parliament of Canada, 2011-2012). It aimed are regarding all forms of sexual activity without separate distinction, meaning anal and vaginal intercourse were the equivalent in the eyes of the law (Parliament of Canada, 2011-2012). In three courts in Canada, in Ontario, Quebec and British Columbia, section 159 has been ruled unconstitutional; however, there has been no legislative appeal as of yet (Scott, 2016). Bill C-600 was introduced in May 2014, titled An Act to amend the Criminal Records Act (Parliament of Canada, 2013-2014). This bill intended to expunge criminal records of those convicted of crimes only involving their homosexual activities (Parliament of Canada, 2013-2014). Justifiably, these bills would aid in the discriminatory legislation; however, neither of these bills became laws. Action has been absent for these discriminatory legislations.

International Context

Australia has an age of consent of 16 or 17 years of age depending on the state in which you live (Australian Institute of Family Studies, 2017). This age of consent includes anal intercourse and regards anal intercourse in the same way it does vaginal intercourse (Australian Institute of Family Studies, 2017). Before 2016, Queensland was the last state in Australia to lower the age of consent for anal sex to 16 years of age (Burke, 2016). Previously, the age of consent for anal intercourse was 18 years of age (Burke, 2016). This reform removed many of the barriers the LGBTQ+ community faced within healthcare (Burke, 2016). The criminal code in Australia no longer refers to anal sex as sodomy, removing stigma that contributes to homophobia (Burke, 2016). This demonstrates the need for Canada to follow suit and reform the long-outdated laws that continue to discriminate against the LGBTQ+ community.

Opportunities for Change

Remove Section 159 from the Criminal Code in Canada

The benefits of this approach are that it will lower the Age of Consent for anal sex to 16 (Charron-Tousignant et al., 2017). It will include anal intercourse the same way it does vaginal intercourse. It will promote equality and not discriminate based on a person's sexual orientation or gender identity. The consequences of this change are that it will only be removed and not re-evaluated. This Age of Consent should be representative of the entire population and allow a full picture approach.

Charged with Offenses Related to Anal Intercourse

The policy change should include historical offences and expunge those convicted of sexual offences related to anal intercourse (Charron-Tousignant et al., 2017; Smith 2020). These charges associated with anal intercourse need to be removed from Criminal Records. As discussed in Bill C-600, those charged with crimes only involving homosexual activity have the right to be expunged for such crimes (Parliament of Canada, 2013-2014).

Educate Policymakers on the LGBTQ+ Community Members

More research should be conducted with the LGBTQ+ community members to assess their needs and desires (Redcay, McMahon, Hollinger, Mabry-Kourt, & Cook, 2019). This will not allow the heterosexual society we live in to assume they know what is best for this community. This research can form the basis for social policies that directly affect members of this community and make attempts to decrease discrimination towards them. An example of this would be "information about sexual orientation, and gender identity should be collected in the same way as other socio-demographic characteristics that affect health (e.g., race, age, ethnicity, income, gender, and education) are collected" (Redcay et al., 2019, p. 271). Another example would be integrating safe sexual health discussions in classrooms for LGBTQ+ youth (Scott, 2016). LGBTQ+ youth need to have opportunities to be empowered and supported in making safe decisions when it comes to their sexual health

Recommendation

Members of the LBGTQ+ community continuously face discrimination and mistreatment in the eyes of the law and legislation while living in this predominantly built heterosexual society (Berkman, & Zinberg, 1997). They are underrepresented in the policy legislature's development and not supported in their fight to ensure their rights are equal. This community has continually been discriminated against based on sexual orientation and gender identity in the eyes of the law. LGBTQ+ youth need to be empowered to embrace themselves, rather than continue to be discriminated against. These policy changes would allow members of the LGBTQ+ community to feel confident in the Canadian criminal justice system that has continually marginalized them (Charron-Tousignant et al., 2017).

As the Standing Committee on Human Rights states, "the bill should, at a minimum, be amended to allow expungement in all cases where the sexual activity would have been lawful but for the party's sexual orientation or gender identity. Without such an amendment, the bill perpetuates a devastating myth about the LGBTQ community, that same-sex sexual activity is dangerous, devastating and damaging to young people in a way that equivalent heterosexual activity is not, and that young LGBTQ people need to be protected from their sexual activity in a way that their heterosexual peers do not need to be protected" (Senate of Canada, 2018).

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