British Columbia Civil Liberties Association

Position paper – Age of Sexual Consent

Issue – Should the age of consent to sexual activity be raised from the current age of 14 to age 16?

Position and Summary of the Argument

The British Columbia Civil Liberties Association does not support the current Bill in the House of Commons that seeks to raise the age of consent to sex to age 16 years.

Responsible sexual decision-making is a developmental process that requires social guidance, not legislative control. Young people are already protected from sexual exploitation, internet luring, and prostitution by ss. 150 through 172.1, and ss. 212(2) and 212(4) of the *Code* (Sexual Offenses and Disorderly Conduct). Raising the age of consent will create barriers to sexual health information, especially among marginalized youth who need it the most. Barriers to sexual health information will result in more cases of SDIs, HIV/AIDS and pregnancies among youth. Raising the age of consent may criminalize healthy sexual relationships between young people, and places undue restrictions on their autonomy. The best way to protect children and youth is through education and empowerment.

Historical Background

- The current age of sexual consent was raised to 14 from age 12 in 1892, which made it an offence for a man to have sexual contact with a girl under 14 who was not his wife. The seduction of a girl over 12 and under 16 "of a previously chaste character" was made an offence in 1886.
- Criminal Code amendments in 1988 (Bill C-15) created new offences of "sexual interference" and "invitation to sexual touching," which prohibits adults from any kind of sexual contact with a boy or girl under 14. "Sexual exploitation" was another offence created at that time, which made it an offence for an adult to have sexual contact with boys and girls 14 to 17, where a relationship of trust or authority exists[1].
- The same Bill created and expanded the definition of sexual assault. Prior to this amendment, a person could only be charged with rape if sexual intercourse took place. After Bill C-15, a person could be charged with sexual assault if any sexualized contact occurred without the consent of both parties, including forced kissing or sexual touching.
- In 1997, Bill C-27 amended the *Code* to make it an offence to obtain sexual services from a person under 18, or to lives wholly or in part on the avails of prostitution of another person under 18 (s.212(4)).

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[1] The Parliamentary Research Branch, *Canada's Legal Age of Consent to Sexual Activity,* prepared by Marilyn Pilon, January 25, 1999, revised April 12, 2001. Retrieved from the World Wide Web, www.parl.gc.ca/information/library/PRBpubs/prb992-e.htm

The Current Law

Today, a boy or girl can consent to sexual activity with the opposite sex if he or she is age 14 and older, with some exceptions. These are:

1. The close-in-age exemption: If the young persons are over 12, and the difference in age is less than 2 years.

2. Exploitive relationship: While Bill C-27 (1997) made it illegal to live on the avails of prostitution of a person under 18, Bill C-2, Protection of children and other vulnerable persons (Royal Assent July 2005), created new offences for the purpose of protecting adolescents from exploitation. The new offence is the sexual exploitation of youth under 18 years (s. 153.1(2)). The relationship is to be judged as exploitive based on the nature and circumstances of the relationship, including the age of the young person, the difference in age between the youth and the other person, how the relationship evolved, and the degree of control or influence exercised over the young person. The section of the *Code* takes into account:
    a. the age of the young person
    b. the age difference between the two persons,
    c. the evolution of the relationship, and
    d. control or influence over the young person

The Current Bill

On June 22, 2006, the federal government tabled legislation in the House of Commons once again, which included provisions to prevent the criminalization of consensual sex between adolescents:

1. Raise the age of consent from age 14 to 16.

2. The “close-in-age” exemption is expanded from 2 years to 5 years.

Voice of Sexually Exploited Youth

On March 7 through 12, 1999, 55 experiential youth delegates gathered in Victoria, B.C., for the Out From the Shadows - International Summit of Sexually Exploited Youth. The Summit provided a forum for the voice of sexually exploited youth to express their beliefs, their stories and their recommendations, thereby providing valuable information about the experiences of these youth.

The International Summit experiential youth delegates summarized their beliefs, their stories, and their recommendations in the Declaration and Agenda for Action of Sexually Exploited Children and Youth. All Summit youth delegates ratified the Declaration and Agenda for Action declaring that,

1. The commercial sexual exploitation of children and youth is a form of child abuse and slavery.

2. All children and youth have the right to be protected from all forms of abuse, exploitation and the threat of abuse, harm or exploitation.
3. Governments are obligated to create laws that reflect the principle of zero tolerance of all forms of abuse and exploitation of children and youth.
4. One avenue for reducing vulnerability is for community and government action to be taken to support safer sex education.

Position Papers from other Agencies

Summary of Argument in Favour of Raising the Age of Consent

The Evangelical Fellowship of Canada[2] and the Catholic Women's League[3] have each written position papers in support of raising the age of consent. A summary of their arguments is provided here:

The law reflects what is right and wrong, and raising the age of consent would send a message to sexual predators that those under age 16 are off-limits in Canada. Young people under 16 are not mature or capable enough to handle the responsibilities of sexual activity. There are negative physical and emotional consequences of sexual activity, and young adolescents need to be protected from these. Raising the age of consent will also protect youth from sexual exploitation, because it removes the onus on the Crown to prove that a particular relationship between a 14 or 15 year old and an adult is exploitive. The key to protection is to raise the age of consent and better enforce the existing laws.

Arguments Against Raising the Age of Consent

Equality for Gays and Lesbians Everywhere (EGALE) is a national group that advocates equality and justice for gay, lesbian, trans-identified and bisexual people and their families. EGALE submitted a paper to the Department of Justice in March of 2000, detailing their arguments against raising the age of consent to sex from 14 to 16[4]:

1. Equality of enforcement in determining an "exploitive" relationship: Perception of harm may be more likely if the young persons involved are of the same sex, due to stigma attached to homosexuality. Parents may be more likely to call the police and police may be less lenient in these cases.
2. Effectiveness in preventing harm: EGALE would like to see evidence that raising the age of consent will minimize harmful sex and not criminalize healthy sex. As a society, we have to accept that adolescents, including young adolescents, are sexual beings. Denying this fact may cause more harm than good.

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[2] The Evangelical Fellowship of Canada, *Response to the Department of Justice Child Victim Consultation,* March 30, 2000. Retrieved from the World Wide Web, http://www.evangelicalfellowship.ca/social/issue_viewer.asp?Issue_Summary_ID=13

[3] The Catholic Women's League of Canada, Yukon and British Columbia Provincial Council, *Age of Consent Legislation,* Newsletter, September 25, 2005. http://www.cwl.bc.ca/ageofconsent.html

[4] Equality for Gays and Lesbians Everywhere, *EGALE'S submission on Age of Consent to the Department of Justice Canada,* March 30, 2000. Retrieved from the World Wide Web, www.egale.ca/index.asp

3. Maintaining a young person's ability to consent will empower youth, giving them confidence and ability to withhold that consent. The government needs to give youth the tools to make informed choices, such as confidence, communication skills to negotiate their sexual lives and prevent abuses of power.
4. Effect on communication between youths and parents, schools and adults in authority: EGALE is concerned that by raising the age of consent, school boards will discourage discussions of sexual relations with those under 16. They are also concerned that young people who have questions about their relationships are less likely to talk to adults about it if there if they risk criminal charges against themselves or their partner. Access to education, health services may be reduced, thus curtailing prevention and treatment of STDs, including AIDS.
5. Encourages speaking to youths themselves to hear their voices.

The AIDS Committee of Toronto (ACT) submitted a statement to the Department of Justice, Canada, on March 13, 2000. ACT presented a number of concerns related to raising the age of consent:[5]

1. Effective HIV/AIDS prevention must be based on empowering youth, by giving them the information and support they need to make safe choices in private and intimate situations where the law may not offer much protection, or where it forbids the activity.
2. ACT does not support the raising of the age of consent unless it can be shown that such a change will not interfere or undermine an effective HIV/AIDS prevention strategy that is based on empowering youth to make informed decisions for themselves.
3. Concerns that raising the age of consent will marginalize young people who seek HIV/AIDS prevention information, and undermine support services aimed at these young people. Also, raising the age may motivate public school boards and health departments to change sexual health curricula so that HIV/AIDS prevention information is less available to young people.
4. Concerns about young people's access to appropriate and ethical health care services, including HIV, STI testing and treatment, birth control, abortion services, emergency contraception, and safer sex materials such as condoms or dental dams.

Legal-Psychological Perspective

The 2005 *Code* amendments, brought about by Bill C-2, allows for the prosecution of a person who enters into an "exploitive" relationship with a youth under 18. Those who argue in support of raising the age of consent say that the law is still not broad enough, because it requires the Crown to prove the exploitive nature of a relationship between a 14 or 15 year old and an older person. Raising the age of consent, it is argued, removes the onus of the Crown to prove the exploitive nature of the relationship in these circumstances. Any sexual relationship between a person aged 15 years old or younger, and a person 5 or more years older, will automatically be subject to legal intervention.

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[5] AIDS Committee of Toronto, *ACT Statement on the Legal Age of Consent to Sexual Activity,* March 13, 2000. Retrieved from the World Wide Web, www.actoronto.org/website/home.nsf/pages/consentlaw

Legal psychologists empirically examine developmental changes across the life span to determine decision-making competency (as defined by statutes or case law), and whether the presumed competency (or presumed incompetency) under the law reflects the actual abilities of young people. Raising the age of consent to sex is based on the presumption under the law that youth under the age of 16 do not have the maturity to make autonomous decisions about their sexual lives.

Some statutes explicitly define competent decision-making in a specific context. For example, under B.C.'s Infants Act (s.3(a)), a child or adolescent under the age of majority can consent to medical procedures if they understand the nature and consequences, and the reasonably foreseeable benefits and risks, of the health care. However, there is no explicit standard that defines competent sexual decision-making. Implicit in the current sexual consent laws is the assumption that youth 14 and older are competent to make autonomous sexual decisions. The exception to this is when the relationship is "exploitive," in which case, only those ages 18 and older have the capacity to navigate these more complex relationships.

Are 14 and 15 year olds competent to make autonomous sexual decisions? Legal psychologists engage the perspective that sexual development is a normal developmental process in adolescence, and that decision-making is a dynamic and complex process subject to change in conjunction with cognitive, physical, contextual and psychosocial changes. Complicating this issue further is the fact that decision-making is both legally and psychologically context-dependent; a young person may be psychologically competent and legally able to consent to some behaviours or procedures, but not others.

Very generally, adults do outperform adolescents in decision-making competence, as defined by their spontaneous considerations of options, risks, long-term consequences and benefits associated with medical and family-related (which parent to live with after a divorce) decisions.[6] However, differences in abilities across age do not necessarily mean that young people are incompetent according to specific legal standards. That is, adolescents' less sophisticated abilities (compared to adults) do not always imply legal incompetence. For example, a number of studies have demonstrated that by the age of 14, most adolescents are legally competent to consent to abortion procedures,[7,8] and perform on par with adults when considering the costs of risky behaviours.[9] One study examined the common perception that adolescents feel invulnerable to negative outcomes of risky behaviour, and this perception was not supported.[10] In fact, adults will rate themselves as less vulnerable to the negative consequences of sexual activity, compared to adolescents[11].

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[6] Halpern-Felsher, B.L., & Cauffman, E. (2001). Costs and benefits of a decision: Decision-making competence in adolescents and adults. *Applied Developmental Psychology, 22,* 257-273.

[7] Ambuel, B., & Rappaport, J. (1992). Developmental trends in adolescents' psychological and legal competence to consent to abortion. *Law and Human Behavior, 16,* 129-154.

[8] Adler, N.E., Ozerm E.J., & Tschann (2003). Abortion among adolescents. *American Psychologist, 58,* 211-217.

[9] Beyth-Maron, R., Austin, L., Fischhoff, B., Palmgren, C., & Jacobs-Quandrel, M. (1993). Perceived consequences of risky behaviors: Adolescents and adults. *Developmental Psychology, 29,* 549-563.

[10] Cohn, D.L., Macfarlane, S., YAnez, C., & Imai, W.K (1995). Risk perception: Difference between adolescents and adults. *Health Psychology, 14,* 217-222.

[11] Quandrel, M.J., Fischhoff, & Davis, W (1993). Adolescent (In)vulnerability. *American Psychologist, 48,* 102-116.

Unfortunately, no studies have examined the capacity of adolescents to navigate potentially exploitive relationships and their decision-making abilities in that context. While research in forensic psychology should be used as a guide in the present debate, it cannot offer definitive conclusions regarding the capacities of young people to make sexual decisions across different contexts.

Sex education and social science

There is social science evidence that government policies and laws influence the sexual health among adolescents. In general, countries that have comprehensive sex education programs, free and accessible contraception, and whose social policies accept adolescent sexuality as a normal part of development, have fewer sexual health problems. Position papers from EGALE and ACT detail their respective concerns that raising the age of consent may lead to restrictions in sexual health information. The effects of restricted sexual health information can be gauged by looking at outcomes across jurisdictions that have more and less restrictive sex education programs.

Pregnancy and birth rates across countries

	Per 1000 females ages 15 to 19[12]		
Country	**Pregnancy Rate**	**Birth Rate**	**Abortion Rate**
Australia	43.7	19.8	23.8
Canada	45.4	24.2	21.2
Mexico		77	
Netherlands	4	7	8.6
United Kingdom	44	26	19
USA	83.6	54.4	29.2

The WHO noted there was a relationship between countries with comprehensive sex education, free and accessible contraception, and low teenage pregnancy rates across countries. Sex education programs were only effective when combined with accessibility of contraceptive services. The WHO does not endorse abstinence-only sex education because it makes adolescents less likely to ask for contraception when they need it.

The U.S. leads the developed world in adolescent pregnancies, births and abortions. Under the Bush administration in the United States, federal funding for abstinent-only (or "abstinent-until marriage") sex education programs has grown 50% since 1996, with 39 million dollars allocated to these kinds of programs in 2005. This has led a number of commentators and social scientists to examine the outcomes of such programs. One study compared sex education policies and

[12] World Health Organization (2004). *Adolescent pregnancy: Issues in health and development.* Department of Child and Adolescent Health Development, Author: Geneva.

indicators of sexual health in the Netherlands, France, Australia and the United States[13]. The average age of sexual initiation is roughly the same in each country, however, adolescents in France, Australia and the Netherlands had better sexual health outcomes than United States adolescents (including rates of STDs, and pregnancies). The three countries with better health statistics had more sex-positive government policies (including comprehensive sex education) aimed at young people, whereas American adolescents are primarily exposed to abstinence-only sex education. The authors of this study conclude that government policies that are sex-positive do not "promote" sexual behaviour itself, but better equip young people for making healthy sexual decisions.

One study compared the social and political contexts surrounding adolescent sexuality and sex education in the United States and Denmark[14]. Denmark provided an interesting comparison group, because 50 years ago, this country's views on sexuality and adolescent pregnancy rates were on par with Americans. Today, while the age of sexual debut between the US and Denmark is about the same (age 16.7 years), Denmark has reduced its pregnancy, abortion and STD rates among teenagers since the 1970s. Denmark considers sex education a human right, and has mandated comprehensive sex education in schools. They have worked to create an enabling environment for adolescents to make healthy sexual decisions. By comparison, a grassroots Christian movement began in the 1980s in the United States to supplant comprehensive sex education in schools with abstinence-only sex education. Today, this movement has led to extensive federal support for abstinent-only sex education programs, but this country still leads the industrial world for pregnancies, STDs and abortions in adolescents.

The American Civil Liberties Association has launched a campaign against abstinence-only sex education, with some success. Maine, California and Pennsylvania have rejected federal funding for sex education, because U.S. federal funding now requires that programs reflect abstinence-only curricula. From the ACLA website:

> An independent, federally funded evaluation of the abstinence-only education programs authorized under the 1996 welfare reform law concludes that there is "no definitive research [linking] the abstinence education legislation with" the downward trend in "the percentage of teens reporting that they have had sex. " Likewise, another recent study found that while in limited circumstances virginity-pledge programs - which encourage students to make a pledge to abstain from sex until marriage - may delay first intercourse, it also found that virginity pledgers are less likely than non-pledgers to use contraception at first intercourse[15].

Thus, the argument that changing the age of consent will lead to fewer pregnancies, STDs or abortions lacks any kind of empirical support. On the contrary, countries with more liberal sexual values, and comprehensive sexual education and accessible contraception have lower pregnancy, birth and STD rates among adolescents.

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[13] Weaver, H., Smith, G., & Kippax, S. (2005). School-based sex education policies and indicators of sexual health among young people: A comparison of the Netherlands, France, Austalia, and the United States. *Sex Education, 5(2)*, 171-188.

[14] Rose, S. (2005). Going too far? Sex, sin and social policy. *Social Forces, 84(2).* 1207-1232.

[15] Bearman, P.S. & Bruckner, H. (2000). Columbia Univ. Inst. for Social & Econ. Theory & Research, Promising the Future: Virginity Pledges as they Affect Transition to First Intercourse 35.

Position Arguments

The central issue in this debate whether protection of young people should be achieved through legislative changes, or education and empowerment. While legislative change and education are not necessarily mutually exclusive, those who advocate maintaining the current age argue that legislative change may restrict education and empowerment. The primary argument for raising the age of consent is to provide the police and Crown with better legislative power to prosecute adults who have sex with young people. This latter argument implies that those under 16 are not competent to navigate sexual relationships with older people, even if education and empowerment are provided.

The BCCLA does not support raising the age of consent to 16 years old. The Association has serious concerns about the impact of this legislative change on the health and well being of Canadian adolescents. The *Code,* as it stands, responds well to the specific needs of young people who are in the process of their sexual development. For example, the *Code* protects children and youth under the age of 18 years from exploitive relationships (s. 153.1(2)), internet luring (s. 172.1(1)) and prostitution (ss. 212(2) and 212(4)).

Section 153.1(2) of the *Code* provides the Crown with the legislative power to determine, on a case-by-case basis, if a particular relationship is exploitive. This section provides protection against sexual exploitation for those who require it, while providing autonomy to those who are competent. The social science reviewed above provides support that by age 14, many adolescents are capable of making healthy decisions, and feel no more invulnerable (compared to adults) to the negative consequences of risky behaviour, including sex.

A common reaction to the current age of consent is that people aged 14 years are too young to have sex. However, the law does not provide a sweeping sanction of sexual activity, but specifies the age at which they are competent to consent to non-exploitive and developmentally appropriate sexual activity. Sexual relationships are a part of a young person's normal sexual development, and require social guidance, education, and empowerment. The current laws allow young people the make autonomous sexual decisions about their sexual lives, but provide protection for those who might be vulnerable to exploitation.

One of the most important arguments against raising the age of consent concerns equal access to health information. The BCCLA is concerned that raising the age of consent will be interpreted by some health providers as the age at which young people may be instructed about safer sex practices. To illustrate, under s. 159(1) of the *Code,* the age of consent for anal intercourse is 4 years older than the age of consent for vaginal intercourse. In declaring this section of the *Code* unconstitutional, the Ontario Court of Appeal spoke to this issue directly. Albella, writing for the majority, wrote[16]:

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[16] *R v. M, (*1995), 23 O.R. (3d) 629, per Albella J at 638

> "Health risks ought to be dealt with by the health care system. Ironically, one of the bizarre effects of a provision criminalizing consensual anal intercourse for adolescents is that the health education they should be receiving to protect them from avoidable harm may be curtailed, since it may be interpreted as counseling young people about a form of sexual conduct the law prohibits them from participating in. Hence, the *Criminal Code* provision ostensibly crafted to prevent adolescents from harm may itself, by inhibiting education about health risks associated with that behaviour, contribute to the harm it seeks to reduce."

Therefore, the BCCLA does not support the current Bill in the House of Commons that seeks to raise the age of consent to 16. The Association is concerned that raising the age of consent will restrict young people's decision making autonomy, and may restrict access to health information and services for these young people. The Association questions the efficacy of legal sanctions on sexual activity. A legislative change in this direction sends a message to adolescents under 16 years that they are automatically incompetent to navigate their own sexual lives, and does not teach them *how* to make autonomous and healthy decisions in an inherently private situation.