



## Social Policy Update

# Age of consent to sexual activity in Canada: Background to proposed new legislation on "age of protection"

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**Abstract:** In June 2006, the Government of Canada introduced Bill C-22 which would amend the criminal code to raise the age of consent to sexual activity from age 14 to 16. It is expected that the bill, which now refers to "age of protection", will be voted on in the House of Commons at some point in 2007. This article provides a summary of the contents of the legislation, outlines the key arguments that non-governmental organizations have articulated for and against raising the age of consent to sexual activity, and clarifies and discusses key issues relevant to the age of protection legislation.

**Key words:** Age of consent, age of protection, sexual activity, Canada

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On June 22, 2006, the Minister of Justice and Attorney General of Canada introduced Bill C-22 (Age of Protection, previously known as Age of Consent) to amend the Criminal Code and to increase the age of consent to sexual activity from age 14 to age 16. It is expected that the Bill C-22 will proceed to second reading and be debated in Parliament sometime in 2007.

Key changes in Bill C-22 include raising the age of consent to non-exploitative sexual activity from 14 to 16 years of age with the following exceptions:

1. A "close-in-age" exception, i.e., an accused who engaged in sexual activity with a 14- or 15-year-old youth but is less than 5 years older than the youth;
2. An accused who is 5 or more years older than the youth but is married to the youth;
3. An accused who is the common-law partner of the youth or cohabiting with the youth in a conjugal relationship for less than a year but they have had or are expecting to have a child as a result of the relationship.

## Key Points

Age of consent to sexual activity has always been a contentious issue. Since 1996, numerous unsuccessful attempts to raise the age of consent have been put forth in the Canadian Parliament. Both opponents and proponents of raising the age of consent emphasize the need to protect children and youth from harm and exploitation.

**Key arguments of proponents of raising the age of consent** (e.g., *Canadians Addressing Sexual Exploitation, 2006; Canadian Association of Police Boards, 2005; Canadian Evangelical Fellowship, 2006*):

1. Current legislation does not adequately empower parents and law enforcement agencies to protect children under age 16 from sexual exploitation.
2. Young adolescents are vulnerable and at risk of being recruited and coerced into the sex trade; recruiters deliberately form consensual relationships with youth who are just over the age of consent (currently 14 years of age) and



once trust or dependency has been established, they coerce these youth into prostitution and other illegal activities. Raising the age of consent will deter the use of these relationships to recruit youth under the age of 16 into the sex trade.

3. Youth under the age of 16 are vulnerable to adult sexual predators. It has been reported that Canada is listed on the Internet as an international source for sex with children and youth. Raising the age of consent will lead to more criminal convictions of sexual predators on children and youth without the need for proof of a negotiation for money or other evidence of prostitution.

**Key arguments of opponents of raising the age of consent** (e.g., *Canadian AIDS Society, 2006; Canadian Federation for Sexual Health, 2006; EGALE Canada, 2006*):

4. The proposed legislation is seen as an unwarranted restriction on the individual rights of youth and an intrusion on their personal privacy related to consensual activity. In addition, young people under the age of 16, and their families, may incorrectly perceive that the legislation indicates that the sexual behaviour of youth under 16 is illegal or immoral.
5. There is no direct evidence that raising the age of consent will better protect youth from sexual exploitation or result in any other benefits.
6. Canada has comprehensive laws and legal provisions to prohibit sexual exploitation of children and youth under age 18; it is the failure to enforce existing laws and not raising age of consent that needs to be addressed.
7. The proposed legislation will lead to misinterpretation of the law and discourage young people under the age of 16 from seeking preventive and therapeutic sexual health care (e.g. birth control, STI info and treatment, abortion, counselling, etc.) for the fear of a “lack of confidentiality” or that an older partner will be charged with a criminal offence. As a result, youth will be at increased risk for STIs and unplanned pregnancy.

8. Despite the provision of a “close-in-age” exemption of 5 years in Bill C-22, there is concern that non-exploitative relationships between youth, particularly marginalized youth (e.g., LGBTTTIQ youth, street youth) aged 14 or 15 and marginalized young adults will be criminalized without any consideration of their unique circumstances (e.g., a 15-year-old street youth in a consensual non-exploitative sexual relationship with another 21-year-old street youth).
9. It is “age differential” and not “age of consent” that should be the focus of legislation.
10. If Bill C-22 is passed, it should be amended to equalize the age of consent for all types of sexual activity including anal sex. (In most provinces of Canada, it is illegal for youth under 18 to engage in anal sex. Courts in Ontario and Quebec have ruled that this law is unconstitutional and that anal sex should be treated the same as other types of sexual activity.)

### **Questions & Answers:**

#### **1. What does the “age of consent” mean?**

According to the Department of Justice Canada, the age of consent refers to “the age at which the criminal law recognizes the legal capacity of a young person to consent to sexual activity” (Department of Justice Canada, 2005).

Currently, the age of consent for non-exploitative sexual activity is 14 years, which was raised in 1890 from age 12. In 1988, the Criminal Code was amended (Bill C-15) to prohibit adult exploitation of children and youth under aged 14 regardless of consent.

Amendments to the *Criminal Code* in 1988 repealed the aforementioned unlawful intercourse and seduction offences. In their place, Bill C-15 created new offences called “sexual interference” and “invitation to sexual touching” that now prohibit adults from engaging in virtually any kind of sexual contact with either boys or girls under the age of 14, irrespective of consent. Introduced at the same time, the offence of “sexual exploitation” also makes it an offence for an adult to have any such contact with boys and girls over 14 but under 18,



where a relationship of trust or authority exists between the adult and child (Library of Parliament Canada, 2001).

## 2. What behaviours are covered by age of consent legislation?

Age of consent laws apply to all types of sexual activity ranging from sexual touching such as kissing to sexual intercourse (Department of Justice, 2005).

## 3. What is the intended purpose of age of consent legislation?

Age of consent legislation is intended to protect children and youth from sexual exploitation. It is **not** intended to be a rule or message to youth about at what age it is appropriate for young people to engage in sexual activity. According to the Canadian government *Badgley Report* (1984) on sexual offences against children “society has a vital interest in ensuring that its naturally weaker members are protected by legal safeguards against the naturally stronger, and particularly, that the welfare and advantage of its children and youths will be protected and fostered.” However, the *Badgley Report* also noted that “perhaps the most difficult legal issue is whether the criminal law can strike an appropriate balance between protecting children from sexual abuse and exploitation, on the one hand, and permitting the sexual expression of young persons as they proceed through adolescence into young adulthood, on the other.” In introducing the legislation to increase the age sexual consent to 16, the Justice Minister at the time stated “Adults who prey on young people are the targets of these reforms, not consenting teenagers” (*Globe & Mail*, 2006).

## 4. What other laws exist to protect children and youth from sexual exploitation?

In addition to existing Age of Consent (Bill C-15), a number of laws have been enacted to protect children from sexual exploitation. They include:

- **Child or youth prostitution:** In 1997, Bill C-27 (child prostitution, child sex tourism, criminal harassment and female genital mutilation) amended the criminal code,

making it illegal for anyone to obtain or attempt to obtain sexual services of a person under the age of 18; it is also illegal for anyone to live wholly or in part on the avails of prostitution of someone under 18 (Department of Justice Canada, 1997).

- **Internet sexual exploitation:** In 2001, Bill C-15A (The Criminal Amendment Act 2001) was enacted to make it illegal to communicate with a child for the purpose of committing a sexual offence against that child and carries a maximum penalty of five years imprisonment. Moreover, it is illegal for anyone to *transmit, make available, export, possess* or *access* child pornography on the internet (Department of Justice Canada, 2002).
- **Child pornography and sexual exploitation:** In 2005, Bill C-2 (protection of children and other vulnerable persons) amended the Criminal Code and the Canada Evidence Act with specific provisions on broadening the definition of child pornography, prohibition of advertising child pornography, and increased penalties for pornography and other sexual offences against children (Department of Justice Canada, 2005). In addition, new sexual exploitation offences were enacted to protect youth aged 14-18. These new laws focus on the wrongful conduct of the exploiter rather than the consent of the young person involved. Specifically, courts may infer that a relationship is exploitative of the young person based on its nature and circumstances:
  - age of the young person and differences of age.
  - the evolution of the relationship (e.g., secretly over the Internet).
  - the degree of control or influence exercised over the young person.

## 5. How will Bill C-22 (age of protection) change the age of consent to sexual activity?

It is always illegal to have sex with someone without consent. In addition, the following table summarizes the changes that Bill C-22 will impose on the legal age to consent to sexual activity:



**Table 1. Changes to the current situation if proposed legislation on age of protection is adopted**

Age of consent under current law	Age of consent under Bill C-22
<b>Under 12:</b> It is illegal to engage in sexual activity with children under 12 regardless of consent.	Same
<b>12 and under 14:</b> It is illegal to engage in sexual activity with a youth aged 12 to 13 with the exemption of a "close-in-age" of two years.	Same
<b>14 and under 18:</b> 1. Youth <b>aged 14 and over</b> can consent (except in the case identified in 2 below).	<b>Changes:</b> It is illegal to engage in sexual activity with a youth <b>aged 14 and under 16</b> , with the exemption of a "close-in-age" of five years.
2. It is illegal to engage in sexual activity with a youth <b>under 18</b> when the person is in a position of trust, authority or if the youth is dependent on the person.	Same
<b>Prostitution under 18:</b> It is illegal to purchase the service of a prostitute under 18; it is also illegal to live wholly or in part on the avails of any prostitute under 18.	Same

## 6. What do we know about adolescent sexuality, sexual expressions and behaviours?

While Canadians are concerned about sexual exploitation of youth and children, they are also concerned with the "criminalization" of adolescent sexual expressions and sexual behaviours that are part of the growth and development of human sexuality. Research findings show that sexual explorations and experimentation are common during adolescence when young people are establishing their sense of identity and interpersonal relationships.

- **Sexual behaviour of Canadian youth.** Data from the *National Longitudinal Survey of Children and Youth (NLSCY)* and the 2003 *Canadian Community Health Survey (CCHS)* show that while the average age of first sexual intercourse was 16.5 for both male and female youth, a substantial number of youth have engaged in sexual activity at a younger age with an estimated 12% of boys and 13% of girls have had sexual intercourse by ages 14 or 15 (Statistics Canada, 2005) *The Canadian Youth, Sexual Health and HIV/AIDS Study* conducted in 2002 also found that 23% of male and 19% of female students in Grade 9 have had sexual intercourse at least once

(Boyce, Doherty, Fortin & Mackinnon, 2003; Boyce et al., 2006).

- **Why do young people engage in sex?** Results from *The Canadian Youth Sexual Health and HIV/AIDS Study* (Boyce et al., 2003) indicated that both Grade 9 and Grade 11 students named "love for the person" as the first and "curiosity/experimentation" as the second most common reasons for having sexual intercourse for the first time.
- **Canadian youth need access to broadly-based sexual health education and sexual and reproductive health care.** Within the limits of the law, Canadian youth have a right to make informed decisions about their sexuality and sexual health. Informed decision making requires that all Canadian youth receive broadly-based sexual health education that provides the information, motivation/personal insight, and skills to prevent sexual health problems (e.g., STI/HIV, unwanted pregnancy) and enhance sexual health (e.g., mutually satisfying relationships, positive self-image) (Health Canada, 2003; Society of Obstetricians and Gynecologists of Canada, 2004). Education is

the most important tool in empowering youth to protect and enhance their sexual health. High quality sexual health education is not accessible to large numbers of Canadian youth and an increased commitment by policy makers to ensure the provision of high quality broadly-based sexual health education to all youth is urgently required (McKay, Fisher, Maticka-Tyndale, & Barrett, 2001).

- **What is the current situation of sexual abuse and/or exploitation of children and youth in Canada?** The *Badgley Report* (1984) established sexual abuse of children and youth as a public issue of critical concern in Canada. It indicated that 1 in 2 females and 1 in 3 males reported being subject to at least one “unwanted sexual act” in their lifetime; 4 out of 5 of these acts occurred during childhood. Fear of the perpetrator, perceptions that they would not be believed and feelings of guilt or responsibility were cited as the key reasons for non-disclosure. More current data suggest that sexual abuse and assault of youth remains a critical social problem. In 2002, close to 9,000 sexual assaults against children and youth were reported; close to 1/3 of these abuse/assaults were committed by family members (Statistics Canada, 2004).

#### 7. Who are sexual abuse perpetrators?

The *Canadian Incidence Study of Reported Child Abuse and Neglect* (CIS) indicated that among substantiated sexual abuse cases, non-parental relatives represented the largest group of alleged perpetrators (44%), followed by biological fathers (8%), stepfathers (8%), other acquaintances (8%) and babysitters (7%). A child’s friends (peers) and family friends were each identified as the alleged perpetrator in 5% of substantiated cases. Teachers were identified in 4% of cases, and other professionals, strangers and a parent’s boyfriend/girlfriend were each identified in 2% of cases. In 5% of substantiated sexual abuse cases, mothers were identified as the alleged perpetrator (3% biological mothers and 2% stepmothers). It is possible that cases of abuse within the family are under-reported because of the risk of breaking up the family and are, therefore, under-represented in this study. Furthermore, the CIS statistics do not reflect those cases—which may be more

severe—that are reported only to police (National Clearing House on Family Violence, 2002).

#### 8. What other kinds of sexual exploitation are Canadians concerned about?

Canadian children and youth have also suffered from institutional sexual abuse. The 1990 *Reaching for Solution* federal report identified government and church-operated institutions such as orphanages and aboriginal residential schools as sites at which children were subjected to physical, emotional and sexual abuse. The Report of the Law Commission of Canada (2000), titled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* cites marginalization, powerlessness and disconnections from society as the underlying processes leading to abuse of institutionalized children and youth by adults in these settings. It emphasizes the need for Canadian society to critically examine our ‘out of sight, out of mind’ attitudes and take on the accountability to protect all children and youth, including those who are institutionalized.

More recently, with advanced technology and globalized Internet communication, Canadians are increasingly concerned with the ease of trafficking child pornography and Internet luring of children and youth.

#### 9. What puts youth at risk of being sexually exploited or coerced into prostitution?

Extensive research studies have documented childhood sexual and physical abuse, and “defamilialization” (i.e., abuse, running away from home, homelessness) and poverty as key factors associated with youth entering prostitution or becoming victims of sexual exploitation (Brittle, 2002). Moreover, research has also shown that sexual victimization of children and youth will continue unless we address abuse prevention and early identification of childhood abuse; provide access to meet the basic needs of at risk youth (protection, shelter, food, employment, health and social services, etc.) to eliminate their reliance on illicit activities or exploitation to survive (Cusick, 2002).



### 10. How would the proposed Bill C-22 affect the provision of sexual health and other services for youth?

- Based on the *Health Care Consent Act* (Ontario, S.O. 1996, Chapter 2), consent to medical or other health/social services is dependent on mental capacity and not age (Justice for Children and Youth, 2000; College of Physicians and Surgeons of Ontario, 2005). Thus, legally speaking, C-22 does not affect the ability of any health or social service organizations to provide youth aged 14-15 their current programs and services.
- However, misinterpretation of Bill C-22 by the public, service providers and youth themselves may create barriers and difficulties for youth under 16 to access sexual health services including counselling and therapeutic treatments. This can potentially put youth under 16 at risk of keeping their sexual relationships or practices 'secretive' and therefore at increased risk of STIs and HIV infections, unplanned pregnancy, sexual violence, depression and other health complications.

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