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LEGISLATIVE SUMMARY

Bill C-66:

An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts

Publication No. 42-1-C66-E
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Legal and Social Affairs Division
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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-66
(Legislative Summary)

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Ce document est également publié en français.

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LEGISLATIVE SUMMARY OF BILL C-66: AN ACT TO ESTABLISH A PROCEDURE FOR EXPUNGING CERTAIN HISTORICALLY UNJUST CONVICTIONS AND TO MAKE RELATED AMENDMENTS TO OTHER ACTS

1 BACKGROUND

On 28 November 2017, the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, introduced in the House of Commons Bill C-66, An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts (short title: *Expungement of Historically Unjust Convictions Act*).[1] The bill was read a second time on 8 December 2017 and referred to the House of Commons Standing Committee on Public Safety and National Security (the House of Commons Committee) and was reported without amendment on 12 December 2017. It was concurred in and passed third reading in the House of Commons on 13 December 2017. It received first reading the following day in the Senate and was read a second time on 27 March 2018 before being referred the same day to the Standing Senate Committee on Human Rights (the Senate Committee) for study. The Senate Committee reported the bill without amendments but made certain observations.[2] The bill received Royal Assent on 21 June 2018.

The bill establishes a procedure for expunging, under certain circumstances, convictions in respect of the offences listed in the schedule, which relate to gross indecency, buggery and anal intercourse.

The bill accordingly gives the Parole Board of Canada (Board) the power to order or refuse to order, under certain conditions, the expungement of convictions involving the offences listed in the schedule to the bill. If an expungement order is issued, the person convicted of the offence is deemed never to have been convicted of that offence.

The bill also requires the Royal Canadian Mounted Police (RCMP) and other federal departments and agencies to destroy or remove any judicial record of the conviction to which the expungement order relates.

Further, the bill authorizes the Governor in Council to add certain offences to the schedule, under certain circumstances, and to establish the criteria that must be satisfied for expungement to be ordered.

1.1 Discrimination Against the Lesbian, Gay, Bisexual, Transgender, Queer and Two-Spirit Communities and Official Apology by the Government of Canada

Bill C-66 was introduced in the context of the apologies made on behalf of the Government of Canada to the lesbian, gay, bisexual, transgender, queer and two-spirit communities (LGBTQ2),[3] which have suffered many historical injustices

and prejudices, specifically as a result of discrimination and oppression. Moreover, the report prepared by the Egale Canada Human Rights Trust entitled *Grossly Indecent: The Just Society Report – Confronting the Legacy of State Sponsored Discrimination Against Canada's LGBTQI2S Communities*,[4] which the government drew on in developing the bill's objectives,[5] notes that

> Canada has a checkered history of homosexual, bisexual, transgender and intersex regulation, driven by the enforcement of sexual and gender norms, as well as unjust discrimination supported by the criminal law.[6]

The report further notes that "the criminal law has been, and continues to be, a cornerstone of that oppression."[7] LGBTQ2 communities have indeed long been targeted by the criminal law, as it codified offences that pertained to them specifically, such as those of gross indecency, buggery and anal intercourse.

On 28 November 2017, the day Bill C-66 was introduced, Prime Minister Justin Trudeau recognized "Canada's role in the systemic oppression, criminalization, and violence against the lesbian, gay, bisexual, transgender, queer, and two-spirit communities"[8] and made an official apology in the House of Commons to those affected.

He noted that, not that long ago, "the state orchestrated a culture of stigma and fear around LGBTQ2 communities and in doing so destroyed people's lives."[9] He explained the role the state played in this and described the "Purge," specifically in the public service:

> From the 1950s to the early 1990s, the Government of Canada exercised its authority in a cruel and unjust manner, undertaking a campaign of oppression against members, and suspected members, of the LGBTQ2 community. The goal was to identify these workers throughout the public service, including the foreign service, the military, and the RCMP, and persecute them. The thinking of the day was that all non-heterosexual Canadians would automatically be at increased risk of blackmail by our adversaries due to what was called "character weakness." This thinking was prejudiced and flawed.
>
> …
>
> When the government felt that enough evidence had accumulated, some suspects were taken to secret locations in the dark of night to be interrogated. They were asked invasive questions about their relationships and sexual preferences. Hooked up to polygraph machines, these law-abiding public servants had the most intimate details of their lives cut open.
>
> Women and men were abused by their superiors and asked demeaning, probing questions about their sex lives. Some were sexually assaulted.
>
> Those who admitted they were gay were fired, discharged, or intimidated into resignation. They lost their dignity and their careers, and had their dreams and indeed their lives shattered.[10]

It is in this context that Bill C-66 was introduced.

2 DESCRIPTION AND ANALYSIS

2.1 PREAMBLE

The preamble to Bill C-66 recognizes the historical injustice caused by the criminalization of certain activities (for the time being, those listed in the schedule to the bill). The preamble also states that the criminalization of certain activities may constitute a historical injustice because, among other things, were it to occur today, it would be inconsistent with the *Canadian Charter of Rights and Freedoms*.

In its consideration of this bill, the House of Commons Committee noted that the preamble pertains to activities considered to be historical injustices, which, in the future, might include activities unrelated to the LGBTQ2 community.[11] Indeed, the bill provides for offences to be added to the schedule.

2.2 SCHEDULE TO THE BILL

2.2.1 OFFENCES LISTED IN THE SCHEDULE

The schedule to the bill lists various offences in respect of which the expungement of a conviction may be ordered. The offences in question are primarily related to gross indecency, buggery, anal intercourse, and similar offences set out in the *National Defence Act*[12] (NDA) and any previous version thereof.

In considering the bill, the House of Commons Committee noted that the RCMP currently has more than 9,000 records of convictions relating to these offences.[13]

In its report, the Senate Committee requested, among other things, that the Department of Public Safety and Emergency Preparedness launch “consultations with stakeholders and subject-matter experts to address other sections of the *Criminal Code* that were applied in a discriminatory fashion against the LGBTQ2 community”[14] as soon as the bill receives Royal Assent and provides several examples of these sections.

In addition, the Senate Committee requested that the Minister of Public Safety and Emergency Preparedness broaden the schedule “to fully address the wrongs mentioned in the Prime Minister’s apology to LGBTQ2 Canadians.”[15]

2.2.1.1 GROSS INDECENCY

Clause 1 of the schedule pertains to the offence of gross indecency or the attempt to commit gross indecency and provisions that have set out this offence in different versions of the *Criminal Code* (Code)[16] over the years. The text of the provisions setting out these offences is provided in Table A.1 of Appendix A of this Legislative Summary.

The offence of gross indecency was created in 1885 under British criminal law and was "specifically designed to outlaw a broad spectrum of male homosexual behavior."[17] Specifically, the offence was "intended to 'correct' a shortcoming in common law, which did not criminalize male homosexual acts such as fellatio and mutual masturbation."[18]

The offence of gross indecency was included in the first *Criminal Code* of Canada in 1892. That version of the offence pertained to acts of gross indecency committed specifically between men. It was repealed in 1988 and no longer exists today.

In 1955, the Code was amended such that the offence of gross indecency no longer pertained exclusively to men. It could therefore apply to acts committed between heterosexuals and between lesbians.[19]

In 1968, the Code was amended to add exceptions to the offence of gross indecency. From that time forward, a person could not be found guilty of gross indecency for an act committed in private between a husband and wife who both consent to the act, or between two persons of 21 years of age or older who consent to the act.

The Code did not define gross indecency. The case law interpreted gross indecency as a "marked departure from the decent conduct expected of an average Canadian."[20] Although some individuals were convicted of the offence of gross indecency for acts engaged in between heterosexuals, gross indecency was primarily interpreted to apply to homosexual acts.[21] The notion of gross indecency evolved over time, in accordance with changing social mores. Thus, certain acts considered by the courts to constitute gross indecency for a period of time may no longer have been considered so a few years later.[22]

Finally, the maximum prison term for gross indecency was five years, from the time the offence was established until it was repealed.

2.2.1.2 Buggery

Clauses 2 to 4 of the schedule list the various provisions of the Code that have set out the offences of buggery and attempted buggery over the years.[23] The wording of these provisions is provided in Table B.1 of Appendix B of this Legislative Summary.

The *Criminal Code* of 1892 included an offence involving buggery, which preceded the inclusion in the Code of the current offence involving anal intercourse. At that time, the wording of the offence of buggery included the offence of bestiality. The maximum penalty for the offence of buggery was life imprisonment.

In 1955, the maximum prison term provided in the Code for the offence of buggery was reduced to 14 years.

In 1968, the government amended the Code to add exceptions to the offence of buggery. From that time forward, a person could not be found guilty of buggery if the act was committed in private between a husband and wife who both consented to the act, or between two persons who were both 21 years of age or older and who both consented to the act.

In 1988, the offence of buggery was renamed “anal intercourse,” and the age of consent for this offence was reduced from 21 to 18 years.[24]

2.2.1.3 Anal Intercourse

Clause 5 of the schedule pertains to the offence of anal intercourse or attempted anal intercourse, as set out in section 159 of the Code.[25] The text of this offence is provided in Table C.1 in Appendix C of this Legislative Summary.

The maximum prison term for the offence of anal intercourse is 10 years. The offence of anal intercourse does not apply to acts committed in private between a husband and wife, or between two persons who are both 18 years of age or older and who consent to the act.

Section 159 of the Code has been declared unconstitutional a number of times by various courts of appeal in Canada, because the treatment of consensual anal intercourse in the Code differs from the treatment of other forms of sexual activity that are also consensual.[26] Specifically:

> Four appellate-level courts and two trial-level courts have found that section 159 of the *Criminal Code* violates equality rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms* on the basis of marital status, age and sexual orientation.[27]

Three bills were introduced in the 1st Session of the 42nd Parliament to repeal section 159 of the Code:

- Bill C-32, An Act related to the repeal of section 159 of the Criminal Code,[28] seeks to

  > [repeal] section 159 so that anal intercourse is treated the same way as other forms of sexual activity, with a uniform age of consent. Non-consensual anal intercourse could still be the object of other charges, such as sexual assault (sections 271 to 273 of the Code).[29]

- Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts,[30] would amend the unconstitutional provisions of the Code, including repealing section 159 of the Code. Bill C-39 includes the provisions of Bill C-32, “to enable Parliament to address similar issues at the same time.” [31]
- Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts,[32] also provides for the repeal of section 159 of the Code and includes the legislative amendments made in Bill C-39.[33]

2.2.1.4 Similar Offences in the *National Defence Act*

Clause 6 of the schedule pertains to offences included in the NDA, or any previous version thereof, that constitute an offence relating to one of clauses 1 to 5 of the schedule; that is, offences related to gross indecency, buggery or anal intercourse.

The military justice system is separate from the civilian criminal justice system. The Code of Service Discipline (CSD) set out in Part III of the NDA forms the legal basis of the military justice system. In particular, the CSD establishes who is subject to it and incorporates into military law all offences set out in the *Criminal Code* and any other federal act. Indeed, section 2 of the NDA defines the term "service offence" as "an offence under this Act, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline."

Individuals convicted under the military justice system, as set out in the NDA, of offences similar to those listed in clauses 1 to 5 of the schedule will therefore be able to apply to the Board for an expungement order.

2.2.2 Additions to the Schedule (Clause 23)

Clause 23 of the bill provides that the Governor in Council may, by order, add to the schedule any item or portion of an item setting out an offence to allow for the expungement of convictions arising from an activity. The following two conditions must be met:

- the activity in question is no longer an offence under federal law; and
- the Governor in Council is of the opinion that the criminalization of the activity constitutes a historical injustice.

In its review of the bill, the House of Commons Committee noted that the bill does not authorize the Governor in Council to remove an offence already listed in the schedule.[34]

2.3 Powers, Duties and Functions (Clauses 3 and 4)

Clause 3 of the bill gives the Board the power to order or refuse to order the expungement of a conviction in respect of one of the offences listed in the schedule, subject to the requirements set out in the bill.

The Board was established under the *Corrections and Conditional Release Act*[35] (CCRA); it is an independent administrative tribunal in the Public Safety portfolio. The Board makes conditional release and record suspension decisions, as well as clemency recommendations.

Subject to the approval of the Chairperson of the Board (clause 4), any powers, duties or functions under the bill may be conferred on any of its employees or on any class of employees.

2.4 Individuals Authorized to Apply for an Expungement Order (Clauses 7, 9 and 11)

Clause 7 of the bill designates the following individuals as authorized to apply to the Board for an expungement order:

- any person who has been convicted of an offence listed in the schedule; or
- if the person convicted of an offence listed in the schedule is deceased, any of the following individuals:
    (a) the person's spouse or the individual who, at the time of the person's death, was cohabiting with the person in a conjugal relationship for at least one year;
    (b) the person's child;
    (c) the person's parent;
    (d) the person's brother or sister;
    (e) the person's agent or mandatary, attorney, guardian, trustee, committee, tutor or curator, or any other person who was appointed to act in a similar capacity before his or her death;
    (f) the person's executor or the administrator or liquidator of the person's estate; [or]
    (g) any other individual who, in the opinion of the Board, is an appropriate representative of the person.

The Board must reject any application for an expungement order submitted by an individual who is not authorized to do so (clause 9(1)). The same clause states that the Board must reject any application that does not relate to an offence listed in the schedule.

The Board also has the power to make inquiries to determine whether the applicant is authorized to apply (clause 11(a)).

2.5 Form and Manner of Application (Clauses 8, 24, 25 and 26)

Clause 8 of the bill sets out the form and manner of an application for an expungement order. As a rule, applications must be made in the form and manner determined by the Board and in accordance with clauses 8(2) and 8(3).

Clause 8(2) provides that any application relating to an offence for which certain criteria are set out, either in clause 25 or in an order, "must include documents that provide evidence that those criteria are satisfied."

Clause 24 gives the Governor in Council the power to establish, by order, the criteria that must be met for an expungement order to be issued in respect of an offence listed in the schedule.[36]

Clause 25 stipulates what evidence must be provided in the application for an expungement order relating to an offence listed in the schedule. Specifically, the evidence must demonstrate that the following criteria have been met:

- The conviction pertained to an activity between persons of the same sex (clause 25(a)).
- The individuals other than the person who was convicted had given their consent to participate in the activity (clause 25(b)). The concept of consent is set out in section 273.1 of the Code and means the voluntary agreement of the complainant to engage in the sexual activity in question (clause 26).
- The individuals who participated in the activity for which the person was convicted were 16 years of age or older at the time of the activity, or the person who was convicted could have relied on a defence under section 150.1 of the Code, had that defence been available in respect of the offence (clause 25(c)).

The minimum age of consent for sexual activity is normally 16 (section 151 of the Code). Section 150.1 of the Code does, however, set out exceptions to this principle, which constitute a defence based on proximity of age. The defences that the convicted person could have relied upon, had they been available in respect of an offence listed in the schedule, are the following:

- in the case of a partner aged 12 or 13 at the time of the sexual activity, who had consented to the acts that were the subject of the charge, the person convicted was less than two years older and was not in a position of trust or authority; or
- in the case of a partner aged 14 or 15 who had consented to the acts that were the subject of the charge, the person convicted was less than five years older and was not in a position of trust or authority.

Clause 8(3) provides that, if it is not possible to present documents that provide the evidence required in clause 25 or in an order, the applicant must submit a sworn statement or solemn declaration that

- explains the reasonable efforts the applicant has made to obtain these documents and the reasons they could not be obtained (e.g., because they have been lost or destroyed); and
- affirms the evidence referred to in clause 25 or in an order that could not otherwise be provided.

An applicant who makes a false statement could be found guilty of perjury (section 131 of the Code). Perjury is a criminal offence subject to a maximum term of imprisonment of 14 years (section 132 of the Code). Moreover, clause 22 of the bill provides that the Board is authorized to disclose any information submitted or produced in an application for an expungement order for the purposes of inquiry or prosecution of the offence of perjury set out in section 131 of the Code.

Finally, it was mentioned during the House of Commons Committee's review of the bill that the federal government will not charge any fees to applicants seeking an expungement order,[37] although this is not explicitly stated in the bill.

2.6 Review, Order, and Effects of Order (Clauses 12 to 15)

Clause 12 of the bill provides that the Board must review both the application and the evidence gathered through any inquiry into the application (authorized by clause 11(b)) to determine whether there is evidence that:

- one or more of the criteria set out in clause 25 or in an order are not satisfied; or
- the activity in respect of which the application is made is prohibited under the Code at the time the application is reviewed.

The Board must rely on the presence or absence of this evidence in deciding whether to order or refuse to order an expungement. On the one hand, if the review conducted under clause 12 reveals no evidence, the Board must order the expungement of the conviction in respect of which the application was made (clause 13). On the other hand, if the review conducted under clause 12 finds such evidence, the Board must refuse to order the conviction expunged (clause 14).

The Board must notify the applicant in writing of its decision under clause 13 or 14 (clause 15).

If the Board orders expungement of a conviction, the person who was convicted of the offence is deemed never to have been convicted of that offence (clause 5(1)).

Clause 6 of the bill provides that nothing in the bill limits or affects the royal prerogative of mercy for violations of federal laws. The royal prerogative of mercy is "an unfettered discretionary power to apply exceptional remedies, under exceptional circumstances, to deserving cases"[38] and is exercised by the Governor General or Governor in Council as the Queen's representative, on the recommendation of a federal minister.

The effect of expungement under the bill is different from the effect of a record suspension, which can also be ordered by the Board under the *Criminal Records Act*[39] (CRA). As provided by section 2.3 of the CRA, a record suspension

> allows people who were convicted of a criminal offence, but have completed their sentence and demonstrated that they are law-abiding citizens for a prescribed number of years, to have their criminal record kept separate and apart from other criminal records.[40]

In other words, the conviction is not erased, but it is kept *separate* from other convictions. Moreover, a record suspension can be revoked or cease to have effect in certain situations, for example, if there is convincing evidence that the applicant is no longer of good conduct (sections 7 and following of the CRA).

On the other hand, as explained above, if the Board issues an expungement order under Bill C-66, the person who was convicted of the offence is *deemed never to have been convicted*. Moreover, as explained in section 2.7 below, the bill requires the RCMP and other federal departments and agencies to destroy or remove any judicial records of convictions to which the Board's expungement order relates.

2.7 Destruction and Removal (Clauses 16 to 21)

2.7.1 Board's Obligation to Notify (Clause 16)

The Board must notify the RCMP of any expungement order it issues. Similarly, it must advise any superior, provincial or municipal court that, to its knowledge, has custody of any judicial record of the conviction to which the expungement order relates.

2.7.2 Obligations of the Royal Canadian Mounted Police (Clauses 17 and 18)

As soon as feasible after receiving notification from the Board, the RCMP must destroy or remove any judicial record of the conviction to which the order relates that is in its repositories or systems (clause 17).

In addition, as soon as feasible after receiving notification of an expungement order from the Board, the RCMP must notify any federal department or agency and any provincial or municipal police force that, to its knowledge, has custody of any judicial record of the conviction to which the expungement order relates (clause 18).

2.7.3 Obligations of Federal Departments and Agencies (Clause 19)

As soon as feasible after receiving notification of an expungement from the RCMP under clause 18 of the bill, the federal department or agency must destroy or remove any judicial record of the conviction to which the expungement order relates that is in its repositories or systems.

Thus, judicial records of convictions that are expunged are destroyed or removed from federal records. However, superior, provincial and municipal courts, and provincial and municipal police forces, are not required to remove or destroy these judicial records.

2.7.4 Exceptions (Clauses 20 and 21)

Clauses 17 and 19 of the bill, which provide for the destruction and removal of judicial records, apply despite the requirements related to the preservation of records set out in sections 12 and 13 of the *Library and Archives of Canada Act*,[41] in sections 6(1) and 6(3) of the *Privacy Act*[42] and in any other provision of a federal act (clause 20).

Clause 21 of the bill provides that clauses 17 to 20 do not apply to documents submitted or produced in respect of an application for expungement under the bill.

2.8 Related Amendments

Clause 30(1) of the bill amends the *Sex Offender Information Registration Act*[43] (SOIRA) by requiring the destruction or removal of information gathered under the SOIRA when the Board issues an expungement order. The SOIRA provides for the registration of offenders who are convicted of certain sexual crimes designated by the Act and who are subject to a court order that requires them to register with the National Sex Offender Registry.[44]

NOTES

1. Bill C-66, An Act to establish a procedure for expunging certain historically unjust convictions and to make related amendments to other Acts, 1st Session, 42nd Parliament (S.C. 2018, c. 11).
2. Senate, Standing Committee on Human Rights [RIDR], *Tenth Report*,1st Session, 42nd Parliament, 7 May 2018.
3. House of Commons, *Debates*, 1st Session, 42nd Parliament, 28 November 2017.
4. Egale Canada Human Rights Trust [Egale], *Grossly Indecent: The Just Society Report – Confronting the Legacy of State Sponsored Discrimination Against Canada's LGBTQI2S Communities*, 2017. The Egale report uses the acronym LGBTQI2S, which means "lesbian, gay, bisexual, transgender, queer, intersex and two-spirit," whereas the Government of Canada uses LGBTQ2, which means "lesbian, gay, bisexual, transgender, queer and two-spirit."
5. House of Commons, Standing Committee on Public Safety and National Security [SECU], *Evidence*, 1st Session, 42nd Parliament, 11 December 2017, 1555 (Kathy Thompson, Assistant Deputy Minister, Community Safety and Countering Crime Branch, Department of Public Safety and Emergency Preparedness).
6. Egale (2017), p. 11.
7. Ibid., "Executive Summary," p. 1.
8. House of Commons, *Debates*, 1st Session, 42nd Parliament, 28 November 2017, 1510 (Right Honourable Justin Trudeau, Prime Minister).
9. Ibid., 1515.
10. Ibid.
11. SECU (2017),1545 (Angela Connidis, Director General, Crime Prevention, Corrections and Criminal Justice Directorate, Department of Public Safety and Emergency Preparedness).
12. *National Defence Act*, R.S.C. 1985, c. N-5.
13. SECU (2017), 1555 (Thompson).
14. RIDR (2018).
15. Ibid.
16. *Criminal Code*, R.S.C. 1985, c. C-46.
17. Egale (2017), p. 23.
18. William A. Schabas, *Les infractions d'ordre sexuel*, Les Éditions Yvon Blais, Cowansville, 1995, p. 88. [Translation]

19. Ibid., p. 89.

20. *R. v. Sharpe*, 2007 BCCA 191. See also Hamish C. Stewart, *Sexual Offences in Canadian Law*, Canada Law Book, Division of Thomson Reuters, Toronto, May 2013, p. 2:500.10.10; and Schabas (1995), p. 89.

21. Egale (2017), p. 37.

22. Schabas (1995), p. 89.

23. For a detailed history of the offence of buggery and of the reforms and attempted reforms relating to this offence, see Julia Nicol, *Legislative Summary of Bill C-32: An Act related to the repeal of section 159 of the Criminal Code*, Publication no. 42-1-C32-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 January 2017.

24. Department of Justice, *Questions and Answers – An Act related to the repeal of section 159 of the* Criminal Code.

25. This refers to section 159 of the version of the *Criminal Code* currently in effect as enacted by the *Revised Statutes of Canada*, 1985, s. 3, c. 19 (3rd Supp.).

26. Department of Justice, *Questions and Answers:* An Act to amend the Criminal Code *(removing unconstitutional portions or provisions)*.

27. Department of Justice Canada, "Section 159 of the Criminal Code," Backgrounder. This quotation refers to the following decisions: *R. v. C.M.*, 1995 CanLII 8924 (ON CA); *R. c. Roy*, 1998 CanLII 12775 (QC CA); *R. v. Blake*, 2003 BCCA 525 ; *R. v. T.C.F.*, 2006 NSCA 42; *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 FC 331, 1995 CanLII 3573 (FC); and *R. v. Roth*, 2002 ABQB 145. See also Nicol (2017).

28. Bill C-32, An Act related to the repeal of section 159 of the Criminal Code, 1st Session, 42nd Parliament.

29. Nicol (2017).

30. Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts, 1st Session, 42nd Parliament. See Maxime Charron-Tousignant, Robin MacKay and Julia Nicol, *Legislative Summary of Bill C-39: An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts*, Publication no. 42-1-C39-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 June 2017.

31. Department of Justice Canada, "Removing unconstitutional provisions from the *Criminal Code*," Backgrounder.

32. Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, 1st Session, 42nd Parliament.

33. Department of Justice, *Charter Statement – Bill C-75: An Act to Amend the Criminal Code, Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 29 March 2018.

34. SECU (2017), 1550 (Connidis).

35. *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 103.

36. If, for example, a new offence was added to the schedule pursuant to clause 23 of the bill, the Governor in Council could, by order, establish new criteria for that offence.

37. SECU (2017), 1600 (Talal Dakalbab, Chief Operating Officer, Parole Board of Canada).

38. Government of Canada, *What is the exercise of clemency (Royal Prerogative of Mercy)?*

39. *Criminal Records Act*, R.S.C. 1985, c. C-47.

40. Government of Canada, *What is a record suspension?*

41. *Library and Archives of Canada Act*, S.C. 2004, c. 11. Pursuant to sections 12 and 13 of the *Library and Archives of Canada Act*, the destruction and disposal of government or ministerial records requires the written consent of the Librarian and Archivist or their delegate, and the records that, in their opinion, are of historical or archival value may be transferred under the care and control of the Librarian and Archivist.

42. *Privacy Act*, R.S.C. 1985, c. P-21. Section 6(1) of the *Privacy Act* requires government institutions to retain personal information that has been used for an administrative purpose for such period of time as may be prescribed by regulation so that the individual to whom it relates has an opportunity to access the information. Section 6(3) provides that government institutions shall dispose of the personal information in accordance with the regulations and any directives or guidelines issued by the designated minister.

43. *Sex Offender Information Registration Act*, S.C. 2004, c. 10.

44. Royal Canadian Mounted Police, *Backgrounder: National Sex Offender Registry*.

APPENDIX A – TEXT OF PROVISIONS PERTAINING TO THE OFFENCE OF GROSS INDECENCY LISTED IN CLAUSE 1 OF THE SCHEDULE TO BILL C-66

Table A.1 –Text of Provisions Pertaining to the Offence of Gross Indecency Listed in Clause 1 of the Schedule to Bill C-66

Section 178 of the *Criminal Code* (enacted by the *Statutes of Canada*, 1892, c. 29) Section 206 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1906, c. 146) Section 206 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1927, c. 36)	Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person.[a]
Section 149 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1953–1954, c. 51)	Everyone who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.
Sections 149 and 149A of the *Criminal Code* (enacted by the *Statutes of Canada*, 1968–1969, c. 38, s. 7) Section 157 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1970, c. C-34) Section 161 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1985, c. C-46)	149. Everyone who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.[b] 149A. Section 147 and 149 do not apply to any act committed in private between (a) a husband and his wife; or (b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act. (2) For the purposes of subsection (1), (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and (b) a person shall be deemed not to consent to the commission of an act (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act; or (ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble minded, insane, or an idiot or imbecile.[c]

Notes: a. The text of the offence of gross indecency is the same in the 1892, 1906 and 1927 versions.

b. The text of the offence of gross indecency is nearly the same in the 1968–1969, 1970 and 1985 versions.

c. The text of section 149A (1968–1969) is nearly the same as in the 1970 (section 158) and 1985 (section 162) versions.

Source: Table prepared by the Library of Parliament.

APPENDIX B – TEXT OF PROVISIONS PERTAINING TO THE OFFENCE OF BUGGERY AND ATTEMPTED BUGGERY LISTED IN CLAUSES 2, 3 AND 4 OF THE SCHEDULE TO BILL C-66

Table B.1 – Text of Provisions Pertaining to the Offence of Buggery and Attempted Buggery Listed in Clauses 2, 3 and 4 of the Schedule to Bill C-66.

Sections 174 and 175 of the *Criminal Code* (enacted by the *Statutes of Canada*, 1892, c. 29) Sections 202 and 203 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1906, c. 146) Sections 202 and 203 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1927, c. 36)	202. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature.[a] 203. Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the last preceding section.[a]
Section 147 of the *Criminal Code* (enacted by the *Statutes of Canada*, 1953–1954, c. 51)	147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.
Sections 147 and 149A of the *Criminal Code* (enacted by the *Statutes of Canada*, 1968–1969, c. 38, s. 7) Sections 155 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1970, c. C-34) Section 160 of the *Criminal Code* (enacted by the *Revised Statutes of Canada*, 1985, c. C-46)	147. Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.[b] 149A. Sections 147 and 149 do not apply to any act committed in private between (a) a husband and his wife; or (b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act. (2) For the purposes of subsection (1), (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and (b) a person shall be deemed not to consent to the commission of an act (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act; or (ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble minded, insane, or an idiot or imbecile.[c]

Notes: a. The text of the offence of buggery and attempted buggery is nearly the same in the 1892, 1906 and 1927 versions.

b. The text of the offence of buggery is nearly the same in the 1968–1969, 1970 and 1985 versions.

c. The text of section 149A (1968–1969) is also nearly the same in the 1970 (section 158) and 1985 (section 162) versions.

Source: Table prepared by the Library of Parliament.

APPENDIX C – TEXT OF PROVISIONS PERTAINING TO THE OFFENCE OF ANAL INTERCOURSE REFERRED TO IN CLAUSE 5 OF THE SCHEDULE TO BILL C-66

Table C.1 – Text of Provisions Pertaining to the Offence of Anal Intercourse Referred to in Clause 5 of the Schedule to Bill C-66

Section 159 of the *Criminal Code* (version enacted by the *Revised Statutes of Canada*, 1985, c. 19, s. 3. (3rd Supp.)	159(1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction. (2) Subsection (1) does not apply to any act engaged in, in private, between (a) husband and wife, or (b) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act. (3) For the purposes of subsection (2), (a) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and (b) a person shall be deemed not to consent to an act (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations respecting the nature and quality of the act, or (ii) if the court is satisfied beyond a reasonable doubt that the person could not have consented to the act by reason of mental disability.

Source: Table prepared by the Library of Parliament.