Overview of Parliamentary Efforts to Repeal Section 159 of the Criminal Code from Bill C448 Onward: Collection of Documents for the Historical Record

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Overview of Parliamentary efforts to repeal section 159 of the Criminal Code from Bill C448 onward: collection of documents for the historical record

Compiled by Craig Scott, Professor of Law, Osgoode Hall Law School of York University; former Member of Parliament for Toronto-Danforth

November 13, 2016

My first private member’s bill after being elected MP for Toronto-Danforth on March 19, 2012, was Bill C-448, An act to amend the Criminal Code (consent). Bill C-448 repealed section 159 of the Criminal Code. Section 159 criminalizes anal intercourse, subject to certain exceptions. It has been ruled unconstitutional by three courts of appeal in Canada dating back to 1995 (Ontario, Quebec, and BC), and yet no government had tabled legislation to repeal it. It therefore continues to sit in the text of the Criminal Code in the Consolidated Statutes of Canada.

It is heartening news to hear that the present Liberal Government of Prime Minister Trudeau is about to introduce legislation to remove this testament to bigotry, persecution and ignorance from our statute books. The Government of Canada has given notice on November 10, 2016, that it will introduce on November 14 an Act to repeal section 159 of the Criminal Code.

After introducing Bill C-448, I spent close to three years trying to work cooperatively with two successive Ministers of Justice to have the government of the day legislate as they and I knew the chances of my bill coming up before the end of the last Parliament were slim. In this collection of documents, I record aspects of that history, for the record. The documents are as follows:

1) The text of the present section 159 of the Criminal Code
2) The remarks I delivered in the House of Commons on October 10, 2012, at first reading of Bill C-448.
3) The (very dry and technical) text of Bill C-448.
4) The front of a postcard my office and the LGBTQ caucus of MPs in the NDP used (as part of our “Gay Agenda” campaign) for those years to try to drum up awareness about the need to repeal s.159.
5) The back of the same postcard.
6) Announcement of NDP “Gay Agenda” in June 2014
7) February 3, 2015: My open letter to then Justice Minister Peter MacKay, recalling earlier correspondence between him and me on the issue – and asking him to follow through with a government bill before the end of the last Parliament. The letter included attachments, which are #7 forward.
8) August 26, 2013: My first letter to Justice Minister Peter MacKay
9) October 2012: Brief on the legal and societal issues surrounding s.159 provided to then Justice Minister Rob Nicholson and also supplied to succeeding Minister MacKay on Aug, 26, 2013
10) February 14, 2014: Justice Minister MacKay’s reply to my Aug. 26, 2013 letter in which he confirms (for the first time from the Department of Justice or any Minister of Justice) that section 159 is unconstitutional.
11) May 20, 2014: Letter to me from the Canadian Association of Chiefs of Police, providing the CACP support for the repeal of section 159.
Section 159 of the Criminal Code

Anal intercourse

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.

Exception

(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.

Idem

(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.
Criminal Code
Routine Proceedings

October 4th, 2012 / 10 a.m.

NDP

Craig Scott Toronto—Danforth, ON

moved for leave to introduce Bill C-448, An Act to amend the Criminal Code (consent).

Mr. Speaker, I rise with pride to introduce this private member's bill, and I thank the hon. member for Vancouver East for seconding. I would note that the hon. member is the health critic, which is actually very relevant to this motion to introduce the bill.

The bill would repeal an outdated provision of the Criminal Code that unconstitutionally discriminates against members of the LGBTQ community. Essentially the goal is to repeal section 159 of the Criminal Code, which discriminates against the gay community with regard to sexual activity and the age of consent.

As far back as 1995 with the Ontario Court of Appeal and 1998 with the Quebec Court of Appeal, this provision had been deemed unconstitutional. For that reason, this is essentially a constitutional cleanup, something that should have happened under successive Liberal and Conservative governments. It has not happened. It is the fourth time that an NDP member has risen to table a bill to repeal this provision.

I would like to end by reading a short quote from Jeremy Dias of Jer’s Vision, who says:

During the Senate debate of Bill 22 some years ago, JersVision.org requested equalization of ages of consent for gay sex. The current legislation creates a double standard for gay youth, not only discriminating, but also leading to other challenges. One we are seeing is that safer gay sex is not talked about in schools. The existing legislation is not reflective or effective of the realities of youth, and Mr. Scott's bill is urgently need to empower youth, and support them in making healthier and safer decisions in their live.

(Motions deemed adopted, bill read the first time and printed)
BILL C-448
An Act to amend the Criminal Code (consent)

FIRST READING, OCTOBER 4, 2012

Mr. Scott
SUMMARY
This enactment repeals section 159 of the Criminal Code, thus removing the distinction between anal intercourse and other forms of sexual activity. It also amends other sections of that Act in consequence.

SOMMAIRE
Le texte abroge l’article 159 du Code criminel afin de faire disparaître la distinction entre les relations sexuelles anales et d’autres formes d’activité sexuelle, et il modifie d’autres dispositions de cette loi en conséquence.
Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. Subsection 7(4.1) of the Criminal Code is replaced by the following:

   (4.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153 or 155, subsection 160(2) or (3), section 163.1, 170, 171, 171.1, 172.1, 172.2 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act.

2. Subsection 150.1(5) of the Act is replaced by the following:

   (5) It is not a defence to a charge under section 153, 170, 171 or 172 or subsection 212(2) or (4) that the accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

3. Section 159 of the Act is repealed.

4. Paragraph 161(1.1)(a) of the Act is replaced by the following:

   (a) The fact that the accused croyait que le plaignant était âgé de dix-huit ans au moins au moment de la perpétration de l’infraction reprochée ne constitue un moyen de défense contre une accusation portée en vertu des articles 153, 170, 171 ou 172 ou des paragraphes 212(2) ou (4) que si l’accusé a pris toutes les mesures raisonnables pour s’assurer de l’âge du plaignant.

3. L’article 159 de la même loi est abrogé.

4. L’alinéa 161(1.1)(a) de la même loi est remplacé par ce qui suit:
(a) an offence under section 151, 152 or 155, subsection 160(2) or (3), section 163.1, 170, 171, 171.1, 172.1 or 172.2, subsection 173(2) or 212(1), (2), (2.1) or (4) or section 271, 272, 273, 280 or 281;

5. Paragraph 273.3(1)(c) of the Act is replaced by the following:

(c) under the age of eighteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 155, subsection 160(2) or section 170, 171, 267, 268, 269, 271, 272 or 273 in respect of that person.

6. Sections 274 and 275 of the Act are replaced by the following:

274. If an accused is charged with an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

275. The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 153.1 and 155, subsections 160(2) and (3) and sections 170, 171, 172, 173, 271, 272 and 273.

7. The portion of subsection 276(1) of the Act before paragraph (a) is replaced by the following:

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

8. Section 277 of the Act is replaced by the following:

277. The portion of subsection 277(1) of the Act before paragraph (a) is replaced by the following:
277. In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

9. Paragraph 278.2(1)(a) of the Act is replaced by the following:

(a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272 or 273,

10. Subsection 486(3) of the Act is replaced by the following:

(3) If an accused is charged with an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 212, 271, 272, 273, 279.01, 279.011, 279.02 or 279.03 and the prosecutor or the accused applies for an order under subsection (1), the judge or justice shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.

11. Subparagraph 486.4(1)(a)(i) of the Act is replaced by the following:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 280, 281, 346 or 347,

12. Subsection 810.1(1) of the Act is replaced by the following:

810.1 (1) Any person who fears on reasonable grounds that another person will commit an offence under section 151 or 152, subsection 153(1), section 155, subsection 160(2) or (3), section 163.1, 170, 171, 171.1, 172.1 or 172.2, subsection 173(2) or 212(1), (2), (2.1) or (4) or section 271, 272, 273, 280 or 281, in respect of 40 one or more persons who are under the age of 16 years, may lay an information before a provincial court judge, whether or not the
person or persons in respect of whom it is feared that the offence will be committed are named.

dénonciation devant un juge d’une cour provinciale, même si les personnes en question n’y sont pas nommées.
It is a question of the rule of law.

This discriminatory Criminal Code section violates the Charter of Rights.
Why must section 159 of the Criminal Code be repealed?

✓ It criminalizes a normal part of gay sexual activity until age 18, despite 16 being the age of consent. It also criminalizes this sexual activity for all adults of any age by defining bedrooms and other private places as “public” space.

✓ It sends a stigmatizing signal, especially to gay youth, that gay sexuality is criminal and is an obstacle to effective sex education.

✓ It has been ruled to be unconstitutional by the three leading Courts of Appeal – of Ontario, Quebec and B.C. in 1995, 1998, and 2003.

For 18 years, successive Liberal and Conservative governments have not repealed s.159. The time to act is now. It’s a question of the rule of law.

Yes ___ I support Craig’s Bill C-448 to repeal section 159 and end its unfair treatment of the LGBTQ community and consensual sexual relations.

SIGNED: __________________________ Name __________________________

Phone ___________ Address __________________________

Postal Code _______ Comment __________________________

Learn more about section 159 and Craig’s Bill C-448 at http://craigscott.ndp.ca/Repeal159

Craig Scott
Member of Parliament
House of Commons
Ottawa, ON
K1A 0A6
June 18th, 2014

**New Democrats release gay agenda for Pride season**

Members of the NDP LGBTQ Caucus presented a package of initiatives today to help bring about full equality for lesbian, gay, bisexual and transgender Canadians.

“There is still much unfinished business when it comes to achieving full equality for the LGBTQ community in Canada,” said LGBTQ critic for the Official Opposition Randall Garrison (Esquimalt-Juan de Fuca). “That’s why New Democrats are putting forward a package of measures aimed at bringing about full equality for the LGBTQ community now.”

“If we are to build a more inclusive Canada it is necessary to acknowledge the harmful history of homophobia and transphobia in Canada,” said Deputy Leader Libby Davies (Vancouver East). “We can begin by recognizing the harm that was done when Canada unfairly fired public servants or discharged members of the Canadian Forces solely on the basis of sexual orientation or gender identity.”

“Many subtle and not so subtle discriminatory policies and practices remain in place in Canada,” said MP Craig Scott (Toronto Danforth). “It is past time to end discriminatory practices like the ban on blood and organ donations by gay men and past time to remove the unequal age of consent for anal sex from Canadian law.”

The package of measures the NDP has introduced in the House includes:

- Bill C-279, which would guarantee equal rights for transgender and gender variant Canadians
- Motion M-516, which calls for an end to discriminatory policies on blood and organ donation from gay men
- Bill C-600, which would suspend criminal records for gay offences which are no longer illegal
- Bill C-448, which would equalize the age of consent for all by repealing the unconstitutional section 159 from the Criminal Code
- Motion M-517, which would revise service records for those discharged from the Canadian Forces on the basis of sexual orientation or gender identity
- Motion M-521, which would secure an apology for civil servants fired on the basis of sexual orientation or gender identity

February 3, 2015

The Honourable Peter Gordon MacKay
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister MacKay,

Re: Repeal of s. 159 of the Criminal Code

With this letter, I am returning to the correspondence between me and both you and your predecessor Justice Minister (Hon. Rob Nicholson) concerning the need to repeal s. 159 of the Criminal Code. You will recall I wrote to you on August 26, 2013 (letter attached as appendix 1) alongside a “Note with respect to legal reasons for the repeal of section 159 of the Criminal Code” (which I attach as appendix 2). In that letter, I requested two things:

1. that you recognize the unconstitutionality of s.159 of the Criminal Code; and
2. that you take immediate steps to table a government bill to repeal s.159.

I drew attention to my Bill C-448 which would accomplish this, but I agreed that repeal should not depend on its fate. Indeed, it is unlikely that C-448 will be adopted before the dissolution of Parliament.

You responded to my August 26, 2013 letter on February 14, 2014 (attached as appendix 3), in which you do recognize that s. 159 is unconstitutional – the first time a Minister of Justice has said in writing that s.159 is of no force and effect across Canada (versus only in the provinces where courts have rules s.159 is a violation of the Charter of Rights). I thank you for that recognition. However, you did not take me up on my request that s. 159 be repealed by a government bill.

Thus, we continue to have a provision sitting in the Criminal Code that sends a confusing and discriminatory signal to Canadian society. This is unnecessary. Your government is constantly tabling bills dealing with the Criminal Code, but, yet, s.159’s repeal has never been included. A government bill repealing s.159 would easily meet with fast-track approval from the Official Opposition, to allow its passage before the next election is called.
Should you have any doubts about society support for such a bill, please find attached (appendix 4) a letter to me dated May 20, 2014, from the Canadian Association of Chiefs of Police (CACP), which supports the removal of s.159 of the Criminal Code. To emphasize the “rule of law” problem with leaving unconstitutional provisions in Canada’s statutes the CACP ends their letter by saying: “The section in question [s.159] should be removed and the Code examined for any other sections that might also be removed.”

I trust you will appreciate that I have adopted a collaborative approach to this issue for over two years, starting with my early efforts to engage former Justice Minister Rob Nicholson. At this point, in the view of your own explicit acknowledgement s.159 should not be in the Criminal Code and of the support I have secured from the CACP, I am now making this matter public by treating this letter and its appendices as an open letter for all Canadians to know about.

In the name of respect for human rights and the rule of law, I do hope you will now act to ensure s.159 is repealed by way of government legislation.

Yours sincerely,

Craig Scott, M.P.
Toronto-Danforth
The Honourable Peter Gordon MacKay  
Minister of Justice and Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario K1A 0H8  

August 26, 2013  

Dear Minister MacKay,  

*Re: Repeal of s.159 of the Criminal Code*  

Congratulations on your recent appointment as Minister of Justice.  

The reason I write is to ask that you recognize the unconstitutionality of section 159 of the Criminal Code, which deals with anal intercourse, and accordingly take immediate steps, as soon as the House returns, to table a government bill to repeal that section and eliminate cross-references to s.159 in the rest of the Code. Once section 159 is repealed, all the same Criminal Code rules and safeguards would apply to anal intercourse as apply to any other lawful sexual activity. My Private Member's Bill C-448, introduced on October 4, 2012, seeks to accomplish the repeal of section 159, but I believe that there is a special duty on the part of the Minister of Justice to ensure unconstitutional provisions are excised from Canadian law and also that section 159's removal should not depend on the success or failure of a PMB.  

I would like to emphasize that, from the outset, I attempted to take a constructive approach to the repeal of section 159. As soon as C-448 was tabled last October, I spoke to then Minister Nicholson in the House, providing him at the time with a copy of the bill and a three-page written brief on the issue. I then requested on several occasions over a number of months a meeting with the Minister to discuss cooperating to secure thé repeal of section 159. However, I received no response from him or his office, let alone an agreement for a meeting.  

I very much hope that I can count on you to take a different approach to this matter. I enclose...
with this letter the same brief I provided to Minister Nicholson almost a year ago. The upshot of this brief is that the continuing presence of s.159 in the Code is an affront both to anti-discrimination principles and to the rule of law. It is further argued that the Minister of Justice has a special role in ensuring the Consolidated Statutes of Canada no longer contain provisions that violate the Charter of Rights; from there stems the government’s duty to introduce government legislation to repeal section 159 of the Criminal Code.

I would note that this is the fourth time an NDP MP has tabled a bill such as this one. I would like nothing more than to withdraw my bill in order to support a government bill in its place, and I have no doubt that the Official Opposition would facilitate a government bill’s passage so as to use a minimum of legislative time.

I am available to meet between now and the return of the House, if that would prove useful. However, in light of the fact that the Department of Justice has had this matter before it for almost a year and in light of former Minister Nicholson’s avoidance, I will feel free to assume that the government does not intend to seek the repeal of section 159 if a bill to that effect is not tabled in the House within a week of the Throne Speech. Should the government not act, I will release this letter to the public along with the briefing note, and any other supporting materials that are appropriate. I should add that, while this letter will remain confidential for the time being, the briefing note is something I may decide to provide at any time to others interested in this issue.

Allow me to add a few other considerations beyond the rule-of-law considerations contained in the three-page briefing note.

Even if s.159 in the published Criminal Code were treated as a dead letter everywhere in Canada, such that no arrests, charges, prosecutions or convictions were to ever occur in Canada, the presence of the text in the statute still has very real negative effects. It sends a discriminatory, stigmatizing and sexuality-denigrating signal throughout the country. The average citizen – indeed, I would suggest, the average lawyer – has no idea the courts of appeal of Ontario, BC and Quebec have struck down s.159. Anecdotal but extensive evidence suggests that it is widely believed that s.159 is valid law – even in Ontario, Quebec and BC. Discussion with a variety of people, in my own riding and beyond, suggests that at least some, if not most, teachers of high school courses in law or sex education do not know s.159 is invalid. A few may know of the relevant Court of Appeal decision in their province, but be confused by the ongoing presence of s.159 in the Code and thereby assume it must somehow still be valid (if not, Parliament would surely have repealed it – this would be the way many lay people would think about the matter). They may erroneously assume that the section remains constitutional until the Supreme Court of Canada has ruled it is not.

Does such erroneous signaling of such the state of the law matter? It does. The following two observations, sent to me by young men living in Ottawa who had heard about Bill C-448, make clear that the failure to repeal s.159 in the Criminal Code has negative consequences regardless of whether the section is enforced by the criminal justice system.
A young man named Cameron is from Sault Ste. Marie and has been living in Ontario. Despite the 1995 Ontario Court of Appeal ruling that s.159 is unconstitutional, Cameron believed that anal intercourse was unlawful until age 18 because of the fact of section 159 being in the Criminal Code. He writes:

As a Queer youth, this limitation is something I've always had in mind, especially during past relationships. Had I been straight, I would've been able to have consensual intercourse at 16, but it is only since January 26th, 2012 that I've been legally able to consent. In my opinion, Section 159 is an outdated and discriminatory provision, as it primarily applies to and limits the homosexual population of Canada. The Criminal Code states that the age of consent for sexual intercourse is 16 and this should apply to all youth, regardless of their sexual orientation.

And anti-bullying and LGBTQ rights activist Jeremy Dias wrote to say:

The current legislation creates a double standard for gay youth, not only discriminating, but also leading to other challenges. One we are seeing is that safer gay sex is not talked about in school. The existing legislation is not reflective or effective of the realities of youth, and Bill [C-448] is urgently needed to empower youth, and support them in making healthier and safer decisions in their live.

In conclusion, repeal of section 159 constitutes a long-overdue constitutional housecleaning, something successive governments – and this of course includes predecessor Liberal governments – have failed to do in the 17 years since the Ontario Court of Appeal judgment, the 14 years since the Quebec Court of Appeal judgment, and the 9 years since the BC Court of Appeal judgment. Accordingly, I respectfully request that the government immediately introduce a bill that mirrors the content of Bill C-448. If the government were to commit to doing this, I would happily withdraw Bill C-448 in order to pave the way for a government bill of identical content. And I will work with you and your Parliamentary Secretary, with the Official Opposition Justice Critic, with the Official Opposition House Leader, and with the Government House Leader to do everything possible to ensure rapid passage of such a government bill. It is the simplest of bills, accomplishing a self-evident purpose. No significant time is needed in the Parliamentary schedule to turn a government version of C-448 into law.

I look forward to your response and hope that we can work together to accomplish a result that accords with justice, with the rule of law, and with the best traditions of Parliamentarianism.

Allow me to end with the following observation. In June 2014, Toronto will be hosting the most important event for the global LGBTQ community – World Pride. The eyes of the world will be on Canada, and I am sure there will be considerable disbelief and consternation if it is discovered that Canada retains such a Victorian-era provision in its Criminal Code. Undoubtedly, with the awareness that World Pride may generate, other states in the international community will also reach for the word “hypocrisy” to criticize Canada, given how
vocal Canada has become under the leadership of Minister Baird in speaking out against the
criminalization of sexual diversity in other countries, from Uganda to Russia. It will not just be
the right thing to do, but the smart thing to do, to have section 159 of the Criminal Code
repealed by the time that the world begins to focus on the state of human rights for the LGBTQ
community in Canada. By reason of the foreign policy implications of the retention of section
159, I copy this letter to Minister Baird.

Yours sincerely,

Craig Scott,

Member of Parliament (Toronto-Danforth); Official Opposition Critic for Democratic and
Parliamentary Reform

Cc: Minister of Foreign Affairs John Baird
Cc: Francoise Boivin, MP (Gatineau), Official Opposition Justice Critic
Cc: Randall Garrison, MP (Esquimalt - Juan de Fuca), Official Opposition Public Safety Critic
and LGBTQ Critic
Note with respect to legal reasons for the repeal of section 159 of the Criminal Code

Private Member's Bill C-448, tabled on October 4, 2012, seeks to repeal section 159 of the Criminal Code and to eliminate cross-references to s.159 in the rest of the Code. Section 159 reads:

Anal intercourse

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.

Exception

(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.

Idem

(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.

R.S., 1985, c. C-46, s. 159; R.S., 1985, c. 19 (3rd Supp.), s. 3.

Section 159 is a direct descendant of anti-homosexual Criminal Code provisions that criminalized "sodomy." Section 159(1) starts with the statement that "Every person who engages in an act of anal intercourse is guilty of an indictable offence...", thereby singling out one — and only one — form of sexual activity as being, in general terms, a criminal act. As such, it contains a special stigmatization of the sexuality of members of the LGBTQ community — notably, gay and bisexual males — with respect to intercourse that is a normal form of sexual expression. From this discriminatory starting point, ss.159(2) and 159(3) create certain exceptions to this general rule. However, those exceptions do not save s.159 from being an affront to justice. The definition of privacy in s.159(3) severely compromises sexual liberty between consenting partners — whatever their sexual orientation — in their private lives. And gay youth are especially stigmatized because s.159(2)(b) stipulates that the age of consent of
this form of sexual activity is age 18 whereas all other forms of normal sexual activity can be consented to at age 16. As well, an exception in s.159(2)(a) is made specifically applicable only to married heterosexual couples (“husband and wife”) where one or both are under age 18.

Three courts of appeal – those in Canada’s three most populous provinces – have ruled that s.159 is unconstitutional by virtue of violating s.15 of the Canadian Charter of Rights and Freedoms. In 1995, the Ontario Court of Appeal in R. v. M. unanimously ruled s.159 to be unconstitutional; Justice Abella adopted broader reasoning than the two other judges, notably by reference to how s.159 discriminates on the basis of sexual orientation and how it has special stigmatizing effects for gay male youth. In 1998, a unanimous Quebec Court of Appeal in R. v. Roy struck down s.159, building on the judgment of Justice Abella in R. v. M.. In 2003, the BC Court of Appeal in R. v. Blake accepted the provincial Crown counsel’s concession that s.159(1) was unconstitutional; the BCCA referenced the Ontario and Quebec appellate judgments as one reason to accept the provincial Crown’s concession and thus to invalidate the charges brought under s.159. Section 159 has also been treated as unconstitutional by a lower court in Alberta in 2002 (R. v. Roth). As well, a lower court in Manitoba clearly approved of the reasoning that s.159 is unconstitutional even as it was not required to rule on that issue in the specific case (R. v. Geisel, 2000).

Notwithstanding the unconstitutional character of s.159, successive federal governments have so far declined to introduce legislation to repeal s.159. As a result, the Consolidated Statutes of Canada continue to be published with s.159 still appearing in the Criminal Code text. Since statutes are not published with annotations to indicate that a given provision has been found to be unconstitutional on one or more occasions by Canadian courts, the official Consolidated Statutes of Canada publication of s.159 casts no doubt on its unconstitutionality.

There remain provinces whose courts have not specifically ruled that s.159 is unconstitutional. Because s.159 has not yet been the subject of a Supreme Court of Canada ruling, s.159 remains chargeable in those provinces.

Even in a province where s.159 has been ruled unconstitutional, its presence in the text of the Criminal Code can create legal jeopardy. In Quebec as recently as 2005, a person was charged with a range of offences including s.159. After the trial was conducted, the lower court in R. v. C.D. dismissed the case on the basis of believing the accused’s account of events, but failed to note – let alone act on – the fact that s.159 was not even chargeable in Quebec due to the Roy judgment in 1998. It would seem that all the police and legal professionals (lawyers and the judge) involved in the above R. v. C.D. case appear to have relied on the published text of the Criminal Code, oblivious to the Quebec Court of Appeal having struck down that provision seven years previously.

Beyond a case like R. v. C.D. that actually went as far as prosecution, there are reasons to be concerned that charging – or arresting without subsequent charges – can still occur in Ontario, BC or Quebec. Backhouse J. in Lucas v. Toronto Police Services Board (2000), in which the plaintiff sought to bring a civil claim against the federal Crown for the failure to repeal s.159, observed:
Brief to Minister Peter MacKay from Craig Scott, MP, August 2013 – identical to brief provided to former Minister Nicholson in October 2012

Counsel for Canada submits there is no duty on Parliament under the Charter owed to repeal or amend the statute.

The Rule of Law is a fundamental principle of Canada's constitution.... If what counsel for Canada says is correct, Canada need never amend the provision in question. The potential for arbitrary application of a law which remains on the books after it has been definitively determined to be unconstitutional is very real. The police can continue to arrest gay men and rely on the statutory shield which protects public authorities under colour of right.

On appeal, it was found in Lucas that any duty on Parliament to repeal an unconstitutional provision of a statute is non-justiciable.

Even if it is correct that Parliament's failure to repeal an unconstitutional provision cannot generate civil liability (Lucas), the Minister of Justice stands in a very special position in relation to ensuring that the statute books accord with clear constitutional imperatives. Without entering into a technical legal debate about whether the Minister of Justice's formal legal responsibilities under the Department of Justice Act require her or him to seek the repeal of known unconstitutional provision from statutes, there may well be an unwritten constitutional principle requiring the Minister of Justice to act in this spirit. This may especially be the case when the unconstitutionality of a statutory provision has been affirmed by key appellate courts and averted to by the Department of Justice itself (see below).

The robustness of the duty to ensure s.159 is repealed may be all the greater when it is noted that the Department of Justice itself has seemingly already conceded in court proceedings that s.159 is unconstitutional. The BC Court of Appeal in the earlier-mentioned R. v. Blake (2003) made the following observation:

We are told that the federal Crown does not seek to uphold the section and has elected not to appear in response to the appellant's Notice of Constitutional Question.

In the context of the Court of Appeal's decision to treat s.159 as unconstitutional due to the provincial Crown's concession, it is reasonably clear that the Court of Appeal assumed the federal government Department of Justice also took the same view.

The Minister of Justice's duty is further deepened when we realize that the Department of Justice is sending a very clear signal on the government's own website that it treats s.159 as constitutionally inoperative or obsolete. Here, see the detailed discussion on the Department of Justice's website called “Age of Consent to Sexual Activity: Frequently Asked Questions” (http://www.justice.gc.ca/eng/dept-min/clp/faq.html, most recently accessed October 29, 2012) that does not even mention s.159, even as it specifically references every other conceivable provision in the Code. In a list of “child-specific offences in the Criminal Code”, the following sections are expressly listed and their content summarized: ss. 7(4.1)-7(4.3), 151, 152, 153, 155, 160, 163.1, 170, 171, 172.1, 173(2), 212(2), 212(2.1), and 212(4). Section 159 is absent. This is compelling evidence that well-trained lawyers in the Department of Justice are well aware that s.159 is unconstitutional.
FEB 14, 2014

Mr. Craig Scott, M.P.
Room 914, Confederation Building
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Scott:

Thank you for your correspondence in relation to your Private Member’s Bill C-448, *An Act to amend the Criminal Code (consent)*, seeking the repeal of section 159. I regret the lengthy delay in responding.

As you know from the October 2013 Speech from the Throne, the Government’s priorities with respect to criminal law are focused on supporting victims and holding criminals accountable. These include ending sentencing discounts for child sexual offenders and protecting children through legislation that would give law enforcement new tools to address cyberbullying. Our government has fulfilled the latter commitment by introducing Bill C-13, the *Protecting Canadians from Online Crime Act*, on November 20, 2013.

As you note, section 159 of the *Criminal Code* has been struck down as unconstitutional and, accordingly, is of no force and effect. Please be assured that we will follow Bill C-448 through the Parliamentary process.

Thank you again for writing.

Yours truly,

[Signature]

The Honourable Peter MacKay

Canada
May 20, 2014

House of Commons
Ottawa, ON K1A 0A6

Attention: Mr. Craig Scott

Subject: House of Commons Bill C-448: Repeal of Section 159 CC

Mr. Scott,

In follow up to my correspondence to you dated April 25, 2014 concerning the above subject, your correspondence was tabled with the CACP Law Amendments Committee on or about May 8, 2014.

The CACP supports the removal from the Criminal Code of Canada any section that has been repealed and that is therefore not enforced, such as the one you have presented. The section in question should be removed and the Code examined for any other sections that might also be removed.

Sincerely,

Peter Cuthbert
Executive Director,
Canadian Association of Chiefs of Police