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AGE OF CONSENT (SEXUAL OFFENCES) AND CHILD PROTECTION LEGISLATION

Prepared for Sex Matters: From Precedents to Practice, a Conference on
Preferential Populations and Sexually Transmitted and Blood Borne
Infections



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Age of Consent (sexual offences) and Child Protection Legislation

- Overview
- Setting the stage: Points of view
- Legal context
- CFS Act and the Duty to Report
- Sexual crimes and age of consent
- Age of consent and child protection: Where do we go from here?

Overview

Criminal law punishes the offender. Child protection laws protect children. When Parliament amended the age of consent provisions in *The Criminal Code* five years ago, the primary stated objective was to better protect children from sexual predators. Each client brings a different story, and health providers working with affected populations take their duty to report suspected child abuse very seriously. What effect, if any, should the changes in the age of consent have on a clinician's exercise of professional judgement?

Points of view: advocacy groups

“There is no evidence that this increased restriction on individual rights will increase protection of youth from sexual exploitation or provide any other benefit sufficient to justify the intrusion into personal privacy and consensual activity. The current law makes discriminatory distinctions among various types of sexual activity that are not supportable on health or other objective grounds. The best way to protect and support young people is to ensure that they have access to accurate, comprehensive, timely and non-judgmental sexual health education and services that inform them about their rights and options, and the risks and benefits of engaging in sexual activity.”

Canadian Federation for Sexual Health, *Age of Consent Position Statement*,
<http://www.cfsh.ca/What-We-Do/Archived-Position-Statements/Age-of-Consent.aspx>

Points of view: advocacy groups

“Children are among our society’s most vulnerable persons... Children must be protected from engaging in exploitive sexual relationships with adults...Protecting children means both protecting them from the actions of others and from undertaking serious or dangerous activities before they have attained the appropriate level of maturity...Early sexual activity has the potential to bring devastating, life-long consequences and should be reserved for those who have reached an age of maturity.”

The Evangelical Fellowship of Canada, *Age of Consent to Sexual Activity*, <http://www.evangelicalfellowship.ca/page.aspx?pid=488>

Points of view: The judicial skeptic

“We live in an age where, fortunately, the stigma of older people having relationships (sexual or otherwise) with younger people has to a large degree disappeared. If these relationships, many of which start off “friendly” but later develop into consensual sexual relationships, are transformed in some way into a “trust” relationship, countless criminal charges can be laid and endless civil litigation could result. The purpose of s. 153(1) is an admirable one, but one must be careful not to cast too wide a net.”

R. v. Mercer (2000), 194 Nfld & PEIR; CanLII 28386 (NLSCTD) per Easton J.

<http://www.canlii.org/en/nl/nlsctd/doc/2000/2000canlii28386/2000canlii28386.html>

Points of view: The cautious supporter

“Age of consent laws are really only necessary where the judicial understanding of non-consent is so thin and impoverished that the power imbalances between a girl and an older man cannot be recognized for what they are, proof that no consent was in fact present. Reliance on presumptions based on age or other factors may make us lazy about developing a definition of coercion or non-coercion that reflects the reality of male violence as practiced.”

J. Benedet, “The Age of Innocence: A Cautious Defense of Raising the Age of Consent in Canadian Sexual Assault Law” (2010), 13 New Crim. L.R. 665 at 682.

Legal Context: Child Protection and Criminal Law

- Child protection falls within provincial jurisdiction and is covered by *The Child and Family Services Act*. “Child” = a person under the age of majority.
- Provincial legislation creates CFS authorities and agencies that have jurisdiction to deal with child protection matters.
- Criminal law falls within federal jurisdiction. The Canadian *Criminal Code* is the most significant piece of legislation in the criminal law context.
- Generally individuals do not enforce criminal law – usually the police and the Crown have carriage of criminal prosecutions.

CFS Act: Duty to Report s. 18(1)

Reporting a child in need of protection

“... where a person has information that leads the person reasonably to believe that a child is or might be in need of protection as provided in section 17, the person shall forthwith report the information to an agency or to a parent or guardian of the child.”

CFS Act: Abuse reporting policies

- For example, WRHA Public Health staff are governed by WRHA Regional Policy 80.00.010
- <http://home.wrha.mb.ca/corp/policy/files/80.00.010.pdf>
- Provides a summary of several statutes dealing with abuse. In child abuse context, reporting obligation under the CFS Act is summarized.

CFS Act: Duty to report applies even where information is obtained within a confidential relationship s. 18(2)

“Notwithstanding the provisions of any other Act, subsections (1) and (1.0.1) [reporting child pornography] apply even where the person has acquired the information through the discharge of professional duties or within a confidential relationship, but nothing in this subsection abrogates any privilege that may exist because of the relationship between a solicitor and the solicitor's client.”

CFS Act: Agency's Duty to Investigate s. 18.4(1)

“Where an agency receives information that causes the agency to suspect that a child is in need of protection, the agency shall immediately investigate the matter and where, upon investigation, the agency concludes that the child is in need of protection, the agency shall take such further steps as are required by this Act or are prescribed by regulation or as the agency considers necessary for protection of the child.”

CFS Act: Child in need of protection s. 17(1)

- For the purposes of the CFSA:
- A child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.
- Expansive definition which is informed by the illustrations in the subsequent section.

CFS Act: Illustrations of child in need of protection s. 17(2)

- (a) Child lacks adequate care, supervision or control
- (b) Is in the care, supervision or control of a person:
 - (i) Who is unable/unwilling to provide adequate care, supervision or control
 - (ii) Whose conduct endangers the life, health or emotional well-being of the child
 - (iii) Who neglects or refuses to provide medical care or treatment

CFS Act: Illustrations of child in need of protection s. 17(2)

(c) Is abused or is in danger of being abused

“Abuse” is defined elsewhere in the legislation.

[1\(1\)](#) In this Act

"abuse" means an act or omission by any person where the act or omission results in

- (a) physical injury to the child,
- (b) emotional disability of a permanent nature in the child or is likely to result in such a disability, or
- (c) sexual exploitation of the child with or without the child's consent

CFS Act: “Sexual exploitation”

- “Sexual exploitation” (one of the definitions of “abuse” in CFS Act - not defined in the legislation. (But see later slides).
- We will see use of this term in the criminal law context.

CFS Act: further illustrations of child in need of protection - s. 17(2)

- (d) Is beyond the control of a person who has care, custody, control or charge of the child
- (e) Is likely to suffer harm or injury due to the behavior/environment/associations of the child or a person having control of the child
- (f) Is subjected to aggression or sexual harassment
- (g) Is under the age of 12 years and is left unattended without reasonable provisions being made

CFS Act: Returning to concept of abuse as sexual exploitation

(c) Is abused or is in danger of being abused

1(1) In this Act

"**abuse**" means an act or omission by any person where the act or omission results in ...

(c) sexual exploitation of the child with or without the child's consent

If sexual exploitation = “abuse,” how do we define sexual exploitation?

Sexual Crimes and Age of Consent

- For more than a century up to 2008, strict prohibitions existed dealing with sex with girls under age 14.
- Exceptions emerged over time – eg. marriage and consensual sexual activity between persons less than 2 years apart in age.
- 1984 – Badgley Report - led to law reform expanding on sexual crimes recognizing the reality of adult predatory behavior, eg. “sexual interference,” “sexual touching,” and “sexual exploitation.”
- If factually there is no “consent” that ends the discussion.
- If the “victim” says he/she consented, you move to the question of “age of consent” and “age gap.”

Sexual Crimes and Age of Consent

- Amendments to *The Criminal Code* (federal legislation) in 2008 dealt with the age of consent – came into force May 1, 2008.
- The first question is which of 3 age groups the complainant falls into:
 1. 12 and 13 year olds
 2. 14 and 15 year olds
 3. 16 and 17 year olds
- Sexual exploitation remains a live issue until age 18.

Sexual Crimes and Age of Consent: Sexual Exploitation

“Inference of sexual exploitation

153 (1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

- (a) the age of the young person;
- (b) the age difference between the person and the young person;
- (c) the evolution of the relationship; and
- (d) the degree of control or influence by the person over the young person.”

Sexual Crimes and Age of Consent: Sexual Exploitation

On its website Manitoba Family Services uses the following list of activity under the heading “Sexual Exploitation of Children”:

- Prostitution
- Sex trafficking
- Sex tourism
- Child pornography and exploitive child modeling
- Internet luring

http://www.gov.mb.ca/fs/cfsmanual/1.3.5.html#_Prostitution

Sexual crimes and the age of consent: Age groupings

The following slides will briefly summarize the significance of the age groups.

Sexual Crimes and Age of Consent: 12 and 13 year old complainants

- If the accused is charged a sexual offence listed in the legislation* and wants to plead the act was consented to, the accused:
 - Must be no more than 2 years older than complainant; **AND**
 - Must not have been in a relationship of trust, authority or dependency, or in an exploitive relationship with the complainant

(continued from last slide)

*Sexual offences listed in the legislation include:

- Touching or invitation to touching the body of a person under 16 for a sexual purpose, whether or not the accused is in a relationship of trust or dependency.
- “Sexual exploitation.”
- Offences involving bestiality.
- Offences involving exposure of genital organs.
- Sexual assault with or without a weapon or causing bodily harm.
- Aggravated sexual assault.

Sexual Crimes and Age of Consent: 14 and 15 year old complainants

- If the accused is charged with a sexual offence listed in the legislation and wants to plead the act was consented to, the accused:
 - Must be no more than 5 years older than complainant; **AND**
 - Must not have been in a relationship of trust, authority or dependency, or in an exploitive relationship with the complainant;
- OR**
- The under-16 complainant and the accused were married, the couple were in a common law relationship or they were cohabiting and have a child **UNLESS** the act was not consented to.

Sexual Crimes and Age of Consent: 16 and 17 year old complainants

- If the accused is charged with a sexual offence listed in the legislation and wants to plead the act was consented to, there is no “age differential” formula in this case, however, the accused:
 - Must not have been in a relationship of trust, authority or dependency, or in an exploitive relationship with the complainant;

Sexual Crimes and Age of Consent: Anal Intercourse

“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.”

Sexual Crimes and Age of Consent: 16 and 17 year old complainants

- The age differential and whether there is a relationship of dependency remains a factor depending on the facts of the case (age differential a factor in the sexual exploitation inference).
- *The Criminal Code* provisions dealing with anal sex have been ruled unconstitutional by multiple courts, however the law is still on the books that the defense of consent is not available to an accused having anal sex with a person under the age of 18.
- Keep in mind that the issue of consent is always a live issue in sexual offences, regardless of the age of the complainant.

Age of consent and child protection: Where do we go from here?

- In the health care environment, clinicians generally seek and obtain only the information needed to provide health services to their clients.
- Ongoing need to reconcile:
 - On the one hand, clinicians obtain limited information to provide service. Further, in providing service to affected populations, the need to build trust and reserve judgment becomes particularly acute.
 - On the other hand, the CFS Act imposes a duty to report a child believed to be in need of protection.

Age of consent and child protection: Where do we go from here?

- Maintaining this balance may be an ongoing challenge.
- While it is important for well informed clinicians to be aware of criminal law concepts, *The Criminal Code* does not provide pat algorithms to determine a clinician's decision to report in any particular case.
- As one legal commentator suggested, reliance on presumptions can “make us lazy.”

Age of consent and child protection: Where do we go from here?

- Ultimately the reconciliation of the duty to report with the age of consent lies in the exercise of professional judgment on a case by case basis (as it always has been).
- Help is always available – colleagues and supervisors.



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