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# **GROSSLY INDECENT**

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## **The Just Society Report**

### **Confronting the Legacy of State Sponsored Discrimination Against Canada's LGBTQI2S Communities**

#### **Executive Summary**

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***“THE JUST SOCIETY WILL BE ONE IN WHICH THE RIGHTS OF MINORITIES WILL BE SAFE FROM THE WHIMS OF INTOLERANT MAJORITIES.”***

*“The Just Society will be one in which those regions and groups which have not fully shared in the country's affluence will be given a better opportunity. The Just Society will be one where such urban problems as housing and pollution will be attacked through the application of new knowledge and new techniques. The Just Society will be one in which our Indian and Inuit populations will be encouraged to assume the full rights of citizenship through policies which will give them both greater responsibility for their own future and more meaningful equality of opportunity. The Just Society will be a united Canada, united because all of its citizens will be actively involved in the development of a country where equality of opportunity is ensured and individuals are permitted to fulfill themselves in the fashion they judge best.”*

*Prime Minister Pierre Elliott Trudeau*

*June 10, 1968*

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# Executive Summary

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Canada has a tragic history of state sponsored homophobia, biphobia, and transphobia dating back to contact and the suppression of the Two Spirit traditions among First Nations. The criminal law has been, and continues to be, a cornerstone of that oppression. The Just Society Committee is calling for a process of “truth and rehabilitation”, whereby the Federal Government will acknowledge the wrongs done to our community and commit to a process to make it right.

This social problem has been centuries in the making, and a comprehensive resolution will be complex and involve all levels of government. However, the Federal Government can and must play a leadership role. For example, we are advocating that Canada emulate the process recently undertaken by the German federal government to rehabilitate the victims of their criminal laws.

We had initially proposed a process involving a mediated negotiation between community stakeholders and organizations led by Egale and the Government, facilitated by the Hon. Frank Iacobucci.

Since our initial Report, the Federal Government decided unilaterally to create the LGBTQ2 Secretariat. In addition, victims of the LGBT purge commenced a class action known as Ross et v Canada. It is clear that any progress must take into account those realities.

Although Egale is Canada’s only national charity promoting lesbian, gay, bisexual, trans, queer, intersex, and Two Spirit (LGBTQI2S) human rights, it recognizes that the community is diverse across Canada and that there are important local and regional organizations that should have voice in any solutions. As this project was completed without any federal funding whatsoever, a robust process of community consultation was impossible prior to completing the previous report and the upcoming new edition. However, such a process will be essential for the successful implementation of our recommendations.

We outline our proposed process in **Next Steps** below.

# Executive Summary

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We have identified some items that merit consideration during the implementation process that we have envisioned. Without limiting the generality of the foregoing, these items include:

1. **Accept** our Report in Principle.
2. **Apologize** for Canada's History of LGBTQI2S Persecution
3. **Reform the Criminal Code's** anti-LGBTQI2S provisions, including:
  - a. REPEALING the ban on anal intercourse (s 159)
  - b. REPEALING the bawdyhouse laws (s 210, 211)
  - c. REPEALING sex work laws that harm workers (ss 286.1, 286.2, 286.3, 286.4, 213)
  - d. REPEALING or amending the exception under the genital mutilation law in order to proscribe the ongoing harmful multiplication of intersex babies (s 268.3);
4. **Reform Prosecutorial Practices** including:
  - a. RESTRICTING historic prosecutions of gross indecency to ensure parity between sexual orientations
  - b. RESTRICTING the prosecution of HIV non-disclosure cases under aggravated sexual assault
5. **Expunge Unjust Convictions**
  - a. Considering the British, Australian and German precedents
  - b. Erasure of every single record of conviction under Federal/Provincial power
6. **Compensate for Unjust Government Action**
  - a. Settling the current class action as soon as reasonably possible;
  - b. Considering the German precedent to compensate victims of unjust laws;
7. **End** the MSM and Trans Blood Ban
8. **Add** intersex status to the mandate of the Secretariat, and add intersex status to the *Canadian Human Rights Act* and the hate crime provisions of the *Criminal Code*.
9. **Recognize and Memorialize LGBTQI2S Injustice**, including:
  - a. Rehabilitating Indigenous Two Spirit culture.
  - b. Working with provincial governments to ensure LGBTQI2S inclusion, as appropriate, at all levels of the K-12 educational curriculum as well as post-secondary institutions.
  - c. Police, prosecutor and judicial training regarding LGBTQI2S issues and culture generally

## Next Steps

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### 1. Accept our Report in Principle

In our original Report we called for acceptance of our Report in principle on or before July 3, 2016. Although our Report was praised by the Prime Minister, little concrete action has been taken since our Report was released. Three important developments were initiated by the Government: the appointment of Randy Boissonault as Special Adviser on LGBTQ2 issues, Bill C-16 to protect trans and gender diverse persons (which was eventually passed after a long battle in the Senate) and the introduction of a Bill to repeal section 159.

The first development is laudable, but was not one of our requests.

The latter two initiatives accord with our requests but it is unclear whether or not they are a response to our Report.

The Government is also currently faced with a class action by victims of the LGBT purge, and is in negotiations with the representative plaintiffs.

What is sorely lacking is the type of concrete and comprehensive approach based on community engagement that was called for in our original Report. We respectfully request that Prime Minister Justin Trudeau accept this Report in principle and agree to move to Phase 2 of implementations **on or before International Human Rights Day, December 10, 2017.**

We call on Egale to publicly track progress on the recommendations made in the Report.

### 2. An Apology for Canada's History of LGBTQI2S Persecution

As of the date of the initial Report, the Prime Minister has committed to an apology for the wrongs done to the LGBTQI2S community to be made before the end of 2017. The Prime Minister will be guided by the advice received of the Secretariat. We applaud this commitment and look forward to its fulfillment.

As detailed below, there is good precedent to be found for such an apology in the apologies made in the parliaments at Melbourne and Wellington.

While the apology from the Prime Minister is of fundamental importance, we encourage others whose institutions have played a role in this tragic history to make their own apologies. We note that the Mayor of Montreal and Montreal's Chief of Police used the occasion of the first Canada Pride to apologize for past injustices to Montreal's LGBTQI2S communities. We applaud their initiative.

### 3. Reform of the Criminal Code's anti-LGBTQI2 provisions, including:

#### a. REPEALING the ban on anal intercourse (s 159)

A Bill to repeal this cornerstone of oppression was introduced after our first Report but it has not passed beyond First Reading in the House of Commons. We are advised that this is simply due to procedural bottlenecks. We call on the Government to make passage of this repeal a priority, for the cooperation of opposition parties in its swift passage and for the Honourable Senate to pass this repeal as quickly as possible. It is a law that is both offensive and unconstitutional, and Parliament has a duty to remove it from the Criminal Code.

#### b. REPEALING the bawdyhouse laws (s 210, 211)

As discussed below, Canada's bawdyhouse laws began as laws of English origin targeting sex workers. Canada made changes unique in the Commonwealth during the First World War to add "acts of indecency" to make convictions easier. This wording has been abused to target bathhouses frequented by LGBTQI2S communities. In response to the Bedford ruling, the previous Government caused the section to be amended to remove the original language of "acts of prostitution" that had been used primarily against straight people. This section was thus made even more discriminatory by this "reform" and must be repealed.

#### c. REPEALING sex work laws that harm workers (ss 286.1, 286.2, 286.3, 286.4, 213)

The Just Society Committee stands in solidarity with sex workers. These workers are victimized by the same type of inappropriate sexual regulation that has targeted LGBTQI2S communities. Moreover, we know that some trans and gender diverse persons facing diminished employment opportunities and the high cost of transition resort to sex work. Our communities are thus specially impacted by these laws.

#### d. REPEALING or amending the exception under the genital mutilation law in order to proscribe the ongoing harmful mutilation of intersex babies (s 268.3)

The Just Society Committee does not take issue with the prohibition on female genital mutilation. However, the consideration of bodily integrity and autonomy for minors that animates that section are undermined by the exception. We believe that hundreds, if not thousands of intersex babies are subjected to genital mutilation every year. The evidence from adult intersex persons is that these interventions are unwanted and psychologically damaging. The Federal Government must do its part to bring an end to this modern and unacceptable practice.

### 4. Reform of Prosecutorial Practices including:

- a. RESTRICTING historic prosecutions of gross indecency to ensure parity between sexual orientations

Repeal of discriminatory laws is insufficient to protect LGBTQI2S communities from ill-informed police and prosecutors from pursuing historical charges for events arising prior to repeal. Accordingly, Parliament should prohibit prosecutions for historical discriminatory offences such as gross indecency and anal intercourse. Historic sexual assault prosecutions should be prohibited where they are based on historical discriminatory ages of consent. A sexual encounter that would not constitute a crime between heterosexuals should never be a crime simply because the parties are of the same sex.

- b. RESTRICTING the prosecution of HIV non-disclosure cases under aggravated sexual assault

The science has advanced since the decisions of the Supreme Court of Canada in *Cuerrier* and *Mabior*. It is a national disgrace that Canada has the world's highest rates of prosecutions for sexual assaults based solely on non-disclosure of HIV status. Efforts to persuade provincial prosecution services to introduce sensible guidelines have failed. It is now clear that an HIV positive person whose viral load is undetectable is not infectious. Accordingly, Parliament should prohibit sexual assault prosecutions where the only basis for the alleged lack of consent is failure to disclose HIV infection where the person in question has an undetectable HIV viral load.

### 5. Expungement of Unjust Convictions

- a. Considering the British, Australian and German precedents Parliament should enact legislation expunging convictions for historically discriminatory offences.
- b. Erasure of every single record of conviction under Federal/Provincial power

In expunging convictions, due regard must be had for the storage of these records by various custodians at the international, federal, provincial, territorial and municipal levels.

### 6. Compensation for Unjust Government Action

- a. Settling the current class action as soon as reasonably possible

The Just Society Committee believes that some of the most damaging historic discrimination was the historic LGBT purge that began with the Red Scare arising out of the Gouzenko affair and continued for half a century or more. This matter is now before the Courts, but it would be wrong to force the victims of this wrongdoing to spend their lives fighting their own Government for justice. This case should be settled on a fair and equitable basis as quickly as possible.

- b. Considering the German precedent to compensate victims of unjust laws;

The current class action only covers those who were victims of the LGBT purge. It does not extend to those who were prosecuted under unjust laws. The compensation provided by the German Government to the victims of its unfair laws should be considered the minimum Canada should provide to its citizens.

### 7. Ending the MSM and Trans Blood Ban

The current MSM and the equally offensive trans blood ban are discriminatory, unscientific and are endangering the safety of Canadians who need life-saving transfusions. The bans must be ended now.

### 8. Add Intersex Status to the protections of the *Canadian Human Rights Act and Criminal Code*

The Just Society Committee is delighted that gender identity and gender expression are now protected as a result of the passage of Bill C-16. While intersex status may be interpreted to be included within one of these grounds or the category of sex, we believe that it should be expressly added to Federal law. This is not only needed to achieve certainty, but also to help end the invisibility that has been particularly oppressive for those with intersex status.

### 9. **Recognizing, Remediating and Memorializing LGBTQI2S Injustice**, including:

- a. Rehabilitating Indigenous Two Spirit culture.
- b. The attempted eradication of Two Sprit culture and identities was a part of a larger project of cultural genocide and state enforcement of traditional Christianity epitomized by the residential school system. The Federal Government has a special responsibility to devote resources to restoring that culture, including educational programming.
- c. Working with provincial governments to ensure LGBTQI2S inclusion, as appropriate, at all levels of the K-12 educational curriculum as well as post-secondary institutions.
- d. The Federal Government plays a direct role in the education of Indigenous Canadians, and has not devoted adequate resources to meet that responsibility. Given the Federal Government's role in persecuting Canada's LGBTQI2S communities, the Federal Government should take the lead in developing curriculum to ensure that this history is included in curricula. The Federal Government should endow a fund similar to the German foundation to develop such material and other educational projects to make amends for the attempted erasure of Canada's LGBTQI2S communities.
- e. Training Police, prosecutors and judicial officials regarding LGBTQI2S issues and culture generally. Our research has revealed an appalling ignorance among police and prosecutors. Recent studies and lawsuits suggest that there is a lingering toxic effect from both the LGBT purge and the criminalization of the LGBTQI2S communities. Since the Federal Government played a central role in creating this discriminatory environment, it has a responsibility to take concrete steps to correct it. Recent measures taken to address historical gender discrimination provide one model for response.