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CONFIDENTIALMEMORANDUM TO THE CABINETRE: CRIMINAL CODE AMENDMENT BILLWOLFENDEN REPORT AND UNITED KINGDOM LEGISLATION

On August 24, 1954, a Committee of twelve men and three women, under the Chairmanship of Sir John Wolfenden, was appointed in the United Kingdom to consider, inter alia, "the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts". The Committee devoted 32 days to the examination of witnesses and met on an additional 30 days. On August 12, 1957, the Committee delivered its Report to the Secretary of State for the Home Department and the Secretary of State for Scotland recommending:

- "(i) That homosexual behaviour between consenting adults in private be no longer a criminal offence.
- (ii) That questions relating to 'consent' and 'in private' be decided by the same criteria as apply in the case of heterosexual acts between adults.
- (iii) That the age of 'adulthood' for the purposes of the proposed change in the law be fixed at twenty-one.
- (iv) That no proceedings be taken in respect of any homosexual act (other than an indecent assault) committed in private by a person under twenty-one, except by the Director of Public Prosecutions or with the sanction of the Attorney-General."

The Parliament of the United Kingdom recently passed an Act the most significant provisions of which, for the purposes of this memorandum, are as follows:

"1. (1) Notwithstanding any statutory or common law provision, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of twenty-one years.

(2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done -

- (a) when more than two persons take part or are present; or
- (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise."

"8. No proceedings shall be instituted except by or with the consent of the Director of Public Prosecutions against any man for the offence of buggery with, or gross indecency with, another man, for attempting to commit either offence, or for aiding, abetting, counselling, procuring or commanding its commission where either of those men was at the time of its commission under the age of twenty-one:

"Provided that this section shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for any such offence, or the remand in custody or on bail of a person charged with any such offence."

The Committee reported the following to be the more serious arguments in favour of continuing to provide that homosexual acts between consenting adults in private shall be criminal:

- "(i) it menaces the health of society;
- (ii) it has damaging effects on family life;
- (iii) a man who indulges in these practices with another man may turn his attention to boys."

Each of these arguments was rejected by the Committee with one dissenter. The Committee found "no evidence" to support the view that homosexual activity "is a cause of the demoralization and decay of civilizations and that therefore, unless we wish to see our nation degenerate and decay, such conduct must be stopped by every possible means". The Report goes on to say: "... we cannot feel it right to frame the laws which should govern this country in the present age by reference to hypothetical explanations of the history of other peoples in ages distant in time and different in circumstances from our own."

With respect to the second contention that homosexual behaviour between males has a damaging effect on family life the Committee found this may well be true and deplored "this damage to what we regard as the basic unit of society", but went on to say that: "We have no reasons shown to us which would lead us to believe that homosexual behaviour between males inflicts any greater damage on family life than adultery, fornication or lesbian behaviour. These practices are all reprehensible from the point of view of harm to the family, but it is difficult to see why on this ground male homosexual behaviour alone among them should be a criminal offence." Note that with respect to lesbian behaviour Section 149 of the Canadian Criminal Code makes no distinction between male and female persons. It provides:

"149. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years."

This is a change from Section 206 of the Criminal Code in force prior to April 1, 1955, which provided:

"206. 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 acts of gross indecency with another male person."

Finally, with respect to the contention that a man who indulges in homosexual practices with another man may turn his attention to boys, the Committee came to this conclusion:

"Our evidence, in short, indicates that the fear that the legalization of homosexual acts between adults will lead to similar acts with boys has not enough substance to justify the treatment of adult homosexual behaviour in

"private as a criminal offence, and suggests that it would be more likely that such a change in the law would protect boys rather than endanger them."

RECOMMENDATION

The undersigned recommends that the Criminal Code be amended by adding thereto a new Section to be numbered 149A and worded along these lines:

- "149A. (1) 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 ex-
 torted by threats or
 fear of bodily harm or
 is obtained by false and
 fraudulent misrepresen-
 tations as to the nature
 and quality of the act, or
 (ii) if that person is, and the
 other party to the commis-
 sion of the act knows or
 has good reason to believe
 that that person is, feeble-
 minded, insane, or an idiot
 or imbecile."

Respectfully submitted,

"Pierre Elliott Trudeau"
Minister of Justice.

Note: Section 149 is quoted on page 2 of this Memorandum and Section 147 reads as follows: "Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years."