> All three offences cover fact situations that would not necessarily be prosecutable by the more general offence of sexual assault. The existence of these charges recognizes the varying ways with which sexual harm can be perpetrated against a child. As a result, it holds individuals criminally accountable for a much broader range of damaging and sexually intrusive behaviour than before.
>
> Further, these offences are easily recognizable on a criminal record as offences against children as opposed to the generic charge of sexual assault. (p. 16)

The Committee also notes that the Ontario communities study researchers found that "Crowns, CAS workers, and police commented that the new offences have resulted in more charges being laid because the new offences have expanded the range of criminal conduct against children."[12]

Although the research also indicated that charges continue to be laid under the sexual assault provisions instead of, or in addition to, these new sections the Committee is not persuaded that either s. 151 or s. 153 is unnecessary. For reasons best expressed by the Ontario Ministry of the Attorney General, the Committee finds itself in agreement with those in favour of retention.

Therefore the Committee recommends:

**That sections 151, 152 and 153 of the *Criminal Code* be retained in their present form.**

## *3. Section 159 — Anal Intercourse*

Prior to Bill C-15, the *Criminal Code* prohibited "buggery," except in private between a husband and wife, or between two consenting individuals who were both 21 years of age or more. The new provision retains anal intercourse as an offence, but excludes acts "engaged in, in private, between husband and wife, or any two persons, each of whom is eighteen years of age or more, both of whom consent to the act." Section 159 also says that consent is deemed to be lacking where it is obtained by force, threats, fear or misrepresentations, or where consent is not possible "by reason of mental disability."

A number of different concerns were raised about this provision during the Committee's review. The Institute for the Prevention of Child Abuse called for removal of the specific offence of anal intercourse from the *Criminal Code*, on the ground that it discriminates on the basis of sexual preference. (p. 4) Professor Nicholas Bala agreed, so long as s. 265 of the *Criminal Code* was amended to protect persons with severe mental disabilities.[13] (p. 3) However, the Canadian Association for Community Living argued for repeal of at least that part of s. 159 that identifies mental disability as a bar to the defence of consent "because of the implication that a person with a mental disability is incapable of consensual sexual activities." (p. 10) Finally, the National Association of Women and the Law also called for repeal of s. 159, to be replaced by a new offence of "penetration" which would include anal intercourse in non-consensual circumstances. (p. 11)

The Committee is aware that the constitutional validity of this offence has been challenged under s. 7 of the *Canadian Charter of Rights and Freedoms*, with varying results. It has been upheld in Alberta Provincial Court and, more recently, held to be an unjustified infringement of s. 7 by the

---

[12] Schmolka (1992), p. 33-34.

[13] Section 265(3) sets out various circumstances under which no consent is obtained in assault cases.