

## Age of Consent for Sexual Activity

Are you confused about how old someone has to be before they can consent to sexual activity in Canada? Although the criminal law has been reformed to remove any differences between the ages of consent for males and females and between homosexual and heterosexual sex, the age of consent varies depending on what you are doing and who you are doing it with. If you are 18 years of age you can consent to all lawful sexual activity.

You can consent to sexual activity if you are 14 to 17 years of age as long as:

1. no relationship of trust, authority, or dependency exists;
2. there is no payment or offer of payment for sex;
3. there is no anal sex (unless you are in a legal, heterosexual marriage with the other person).

Do not even think about having sex if you or your partner are under 14! The law prohibits touching or inviting, counselling or inciting a person under 14 to touch, directly or indirectly, with a part of the body or with an object, any part of the body for a sexual purpose. As well, someone can be convicted of sexual assault of a person between 14 and under 18 if they are in a position of trust or authority or dependency toward the person between 14 and 18 (even if the accused is also under 18).

Whether a relationship of trust, authority or dependency exists depends on each situation and has been interpreted by the courts very broadly. For example, it was found to exist in one case where a man lived in the same apartment as a 14 year old girl and her family and he was treated by them as a member of the family. In another case a 14 year old boy of limited mental capacity "taught" a 16 year old boy of far more severely limited mental capacity everything he knew about sex. The law presumes there is exploitation of a young person if an accused is in a position of trust or authority, even if the sexual activity is truly consensual.

The Criminal Codes states it is not a defence that an accused believed that a complainant was 18 years of age or more at the time the offence was alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant. What "reasonable steps" are is not defined. Does this mean you should be requesting two pieces of picture ID and a sworn declaration? Certainly just to say that someone looked like they were 18 will not likely cut it with a judge.

Neither the Criminal Code nor case law defines "anal intercourse". The Code states that "sexual intercourse is complete on penetration to even the slightest degree, notwithstanding that seed is not emitted." The Criminal Code does not stipulate that penetration must be by the penis. There is no case law on whether penetration of the anus by something other than a penis constitutes "anal intercourse".

Ironically, a challenge to the constitutionality of the anal intercourse provisions of the Code came from a heterosexual male charged with engaging in anal intercourse with a 13 year old female complainant. The accused argued there was no rational basis for distinguishing anal intercourse from other forms of consensual sexual activity and that the provisions discriminated against homosexuality (even though he was heterosexual). The accused's application was allowed and the defence of consent was read into the provisions and the accused was acquitted. Although the accused argued the provision had a disproportionate effect on gay men by making it a crime for young gay males to engage in a primary mode of sexual intercourse, when young heterosexual males could engage in their primary mode of sexual intercourse, namely vaginal intercourse, the trial court found it unnecessary to consider these equality rights arguments as it found on a different section of the Charter. However, one of the judges in the Ontario Court of Appeal who upheld the decision did find that it was discriminatory on sexual orientation and contrary to the Charter.

Until either the federal government amends the Code or the Supreme Court of Canada rules on the issue, gay men are safer to assume the provisions on anal intercourse apply and not engage in anal intercourse if they or their partner are under 18.

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