



**BRIEF TO THE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

**SENATE OF CANADA
41st Parliament, 2nd Session**

Protection of Communities and Exploited Persons Act

Bill C-36

Presented by the Canadian Criminal Justice Association

September 8, 2014

Background of Canadian Criminal Justice Association

The Canadian Criminal Justice Association (CCJA) welcomes the opportunity to present this brief to the Standing Committee on Justice and Human Rights regarding Bill C-36 *The Protection of Communities and Exploited Persons Act*. The members of the Association fundamentally disagree with the changes proposed by this bill. We have serious concerns with both the premise and the likely outcomes of the Act. We outline them here and look forward to your questions and comments.

The CCJA is one of the longest serving non-governmental organizations of professionals and individuals interested in criminal justice issues in Canada, having begun its work in 1919 and having testified before this committee on numerous occasions. Our association consists of nearly 700 members and publishes the **Canadian Journal of Criminology and Criminal Justice, the Justice Report and the Justice Directory of Services**. We also organize the "Canadian Congress on Criminal Justice" every two years.

History & Relevant Issues Pertaining to the Legislation

This bill, in response to the December 2013 Supreme Court decision in *Attorney General of Canada v. Bedford*, attempts to create a new legal framing for prostitution in Canada. Rooted in the belief that prostitution is inherently violent and exploitative, the legal framework of C-36 seeks to denounce and prohibit the purchase of sexual services, procurement of persons for the purposes of

prostitution, and the development of economic interests in the prostitution of others. Parliament has also been quite clear that they wish to encourage people to leave prostitution and, as such, have committed to funding agencies that provide “exit strategies” and support.

The proposed legal framework in bill C-36 appears to be a modified version of what has been called the Swedish or Nordic model, as exemplified by the Swedish *Sex Purchase Act* of 1999. This form of asymmetrical criminalization (the criminalization of the purchase, but not the sale, of sex, and the criminalization of third parties profiting from the industry) is intended to protect sex workers from exploitation and encourage them to leave prostitution. However, research on the Swedish experience finds that there are a range of unintended consequences which continue to place sex workers in danger.

The Canadian Criminal Justice Association has grave concerns for the potential implications of this legislation and the effects that it will have on the lives of sex workers and their clients. It appears that Bill C-36 contains a wide range of provisions, some of which are only tangentially, or not at all, related to the issue of sex work. While the CCJA agrees that the laws which prohibit and sanction human trafficking and the sexual abuse of minors in prostitution should remain in force, the amendments proposed in Bill C-36, which target the purchasers of sex regardless of the consensual nature of the transaction, are problematic. Bill C-36 will result in the continued marginalization of people working in the sex trade, and will not protect them from harm. It is the opinion of our organization that the continued conflation of consensual prostitution with human trafficking and sexual exploitation prevents the development of a legal framework that can effectively provide sex workers with safe working conditions, while also protecting the interests of those who are victims of coercion and abuse.

Analysis & Comments

Clause 15 alters section 213 of the Criminal Code to reintroduce the offence of stopping or impeding traffic and communicating in a public place for the purposes of offering or providing sexual services for consideration (prostitution). This provision is almost identical to the original communicating prohibition that was struck down by the Supreme Court, but it would now be applied only in situations where sex workers are at or near “a school ground, playground, or daycare centre.” This prohibition on communication about the sale of sexual services in public places, while intended to “protect” children from exposure to prostitution, would have the effect of criminalizing communication in many public places.

We know (based on the evidence presented to the Supreme Court¹ and decades of research on prostitution in Canada) that the criminalization of communication in

¹ Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101 (available: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/13389/1/document.do>)

public for the purposes of prostitution has the effect of reducing the safety of women and men working in the street-based sex trade in Canada.² Because they fear detection and prosecution, sex workers work in secluded areas, and often do not take the time to assess risk before getting into a client's vehicle. Further, involvement in illegal activity also makes sex workers vulnerable to abuse from police and reduces the likelihood that a sex worker who has been victimized would approach police for assistance.³ This outcome is entirely counter to the spirit of this legislation which, by the government's own account, intends to "protect" vulnerable sex workers from violence. Our Association questions whether the reintroduced section 213 would meet the Supreme Court's test of proportionality of interference with respect to the intent of the law. We suspect, along with others,⁴ that this revised communication provision will be found to violate Section 7 of the Charter, inasmuch as it continues to place sex workers at greater risk of violence.

Section 286.1, "Commodification of Sexual Services," modifies the Criminal Code to criminalize the purchase, but not the sale, of sexual services. This law, based on the "Nordic model" or the *Swedish Sex Purchase Act* of 1999, has its roots in the idea that prostitution, the exchange of sex for money or other consideration, is inherently gendered violence and that all women who work in the sex trade are victims of their male clients. As such, the intent of this law is to abolish prostitution by criminalizing demand for sexual services. It is the opinion of our Association that this line of reasoning is flawed in several respects and that this law will not have the desired effect of abolishing prostitution, but will make the sex trade more dangerous for workers.

Although it is difficult to gain accurate statistics on the prevalence of prostitution (due to the fact that it is a clandestine and stigmatized activity), evidence from the Swedish experience suggests that this asymmetrical criminalization of the purchase of sex has not reduced the levels of indoor and online sex work.⁵ In Vancouver police implemented a Nordic-type enforcement scheme in January 2013, and the evidence collected by researchers finds "limited to no effect" in preventing street-based sex work and no reduction in violence against sex workers.⁶ Considering the international experience with the "war on drugs" over the past forty years, it should come as no surprise that criminalizing a desirable commodity has very little impact on "demand". Thus, the criminalization of the purchase of sex is unlikely to have any substantive impact on the overall prevalence of the sex industry.

The criminalization of clients also contributes to the perpetuation of unsafe working conditions for both street-based and indoor sex workers. Indoor workers who screen clients by collecting personal information and references will find their ability to obtain this information compromised by clients' fear of identification and arrest.

² See also Bruckert and Chabot (2010); Lewis & Shaver (2006); Lowman (2000)

³ See Bruckert & Hannem, 2013.

⁴ See Briefing Note – Bill C-36 from PIVOT Legal Society.

⁵ Levy & Jakobsson, 2014: 5.

⁶ Krüsi et al., 2014.

The criminalization of the purchase of sex and the framing of all prostitution as abusive also obscures important distinctions between clients who wish to purchase a service and predators who take advantage of the marginal position of sex workers in our society. A recent qualitative study of clients of escorts in southern Ontario found that clients were concerned about the possibility of coercion in the industry and wanted to ensure that the workers whose services they purchased were working voluntarily and were not under-aged.⁷ Clients might also be valuable partners in identifying and reporting suspected cases of trafficked and exploited women and under-aged prostitution; but criminalizing these clients and constructing them as perpetrators reduces the likelihood that they would report incidents of suspected abuse.

Section 286.2, “Material benefits from sexual services,” replaces the former “living on the avails” provision that was struck down in *Bedford* by continuing to criminalize those who gain material benefits from sex work. This provision fails to recognize the very wide range of relationships that sex workers may have with third parties; many third parties provide valuable services to sex workers (such as transportation, security, advertising, reception and booking clients) that increase their ability to work safely.⁸ Fundamentally, a broad criminalization of third parties in the sex industry, such as this one, constructs prostitution as a form of exploitation, rather than a form of labour. It is well accepted that individuals and corporations profit from the labour of others in a capitalist society; the government, through labour regulations and protections for workers, attempts to minimize harms to workers and ensure fair labour practices. By failing to recognize sex work *as work*, the government excludes sex workers from the protection of these regulations available to other Canadian workers.⁹ Further, as argued in *Bedford*, the inability to legally hire and contract with third parties increases the isolation of sex workers and increases the likelihood that they will work alone, once again leaving them more vulnerable to violence.

Section 286.4 criminalizes “everyone who knowingly advertises an offer to provide sexual services for consideration.” Although sex workers would be exempt from prosecution for advertising their own sexual services, in practice their ability to advertise will be restricted as the owners/operators of newspapers or websites could be charged for permitting the ad. The inability to effectively advertise one’s services in this way will make safer indoor sex work more difficult. As POWER and PIVOT have argued: “working indoors is futile if a service provider cannot advise potential clients about their services.”¹⁰ Sex workers are likely to utilize websites hosted outside of Canada as a means of advertising, and this will have the unintended consequences of making it more difficult for Canadian law enforcement to collaborate with website providers to obtain information and evidence of trafficking or exploitation in the sex industry. Further, location-specific message

⁷ Jones, 2013.

⁸ Bruckert & Law, 2013; Bruckert & Chabot, 2010.

⁹ Gillies, 2013.

¹⁰ POWER / PIVOT, 2014, p. 8.

boards for advertisement of the sex industry also provide a key function for sex workers by enabling them to exchange information about “bad dates,” third party services, and provide client references. The closure of these boards will reduce the ability of sex workers to communicate and increase social and professional isolation.¹¹

Clause 2 is somewhat tangential to the overall legislative framing of prostitution and amends section 2 of the Criminal Code to redefine “weapon” to include *“anything used, designed to be used, or intended for use in binding or tying up a person against their will.”* While Parliament is clearly attempting to broaden the range of scenarios which might be considered assault with a weapon, the criminalization of ligatures in this way is problematic. Considering the wide range of objects which might reasonably be interpreted as falling within this definition, it is unclear as to how the judicial system would usefully ascertain and differentiate the intent of persons possessing such objects. Moreover, since this change appears in a bill directed at controlling prostitution, it is clear that the prohibition of objects designed for binding might be used to target consensual bondage, as it is practiced in BDSM communities. Since the consent (or lack thereof) of the bound partner cannot be determined until the binding is proposed or occurs, the inclusion of this definition of weapon as a possession offence, and extrapolating the “intent” of the individual in possessing the object, is over-broad and ineffectual.

Discussion & Recommendations

Considering this legislation in light of available social science evidence and the spirit of the Bedford Supreme Court decision, the CCJA finds Bill C-36 to be an inadequate response. Were it to be passed, Bill C-36 will reproduce and exacerbate many of the harms identified in the Bedford decision, will not effect a measurable reduction in the prevalence of prostitution, and will certainly not achieve its goal of abolishing the sex industry. Continued harm to sex workers will result.

The CCJA urges the committee to reject this legislation and recommends that the government engage in meaningful consultation with those who will be most affected by this legislation – people currently engaged in sex work. Serious consideration might be given to legislative models that have been found to improve the health and safety of sex workers – for example, New Zealand’s decriminalized model.¹² The implementation of a progressive policy of decriminalization, which counters the moral stigma associated with sex work and recognizes it as labour, would enable sex workers to be protected under existing labour laws, and laws against criminal violence. This approach is less expensive, requiring less enforcement, and enables law enforcement to focus on reducing real harms to women and children who are victims of trafficking, violence, or abuse – all crimes which already exist in our criminal code. In a decriminalized milieu, individuals who are in the sex industry voluntarily, or because they find themselves with limited options, can be provided

¹¹ Bruckert & Law, 2013.

¹² Abel et al., 2010.; Pitcher & Wijers, 2014.

with support to improve their working conditions, health, and safety, and will be afforded the protection of the law.

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