



## Submission to the Standing Senate Committee on Legal and Constitutional Affairs

September 5, 2014

### 1. Overview

Egale Canada (Egale), Canada's national lesbian, gay, bisexual and trans\*<sup>1</sup> (LGBT) human rights organization, joins organizations throughout Canada in supporting the full decriminalization of adult sex work. Dedicated to advancing equality, diversity, education and justice, Egale understands the considerable harms caused by the criminalization of sexual activities between consenting adults.

In view of Canada's history of criminalizing LGBT people, along with the disproportionate impact the proposed legislation will have on LGBT sex workers, Egale is deeply concerned by Bill C-36.<sup>2</sup> Egale supports legislative approaches that prioritize the human rights, safety, and dignity of all sex workers regardless of their gender or sexual orientation. Egale opposes Bill C-36 in its entirety.

### 2. Canada's History of Criminalizing LGBT Identities

Canada has a long history of misguided use of the criminal law to legislate sexual morality. In particular, actors within the Canadian criminal justice system have consistently stigmatized, targeted, and punished sexual activities—including gay sex and sex work—taking place outside married, different-sex relationships. Bill C-36 is little more than an updated version of this antiquated approach.

Introduced in 1892, the *Criminal Code of Canada* contained a series of offences imported from the United Kingdom that condemned extramarital sexual practices. In particular, offences of the *Criminal Code* criminalized buggery<sup>3</sup> and gross indecency.<sup>4</sup> At their core, these offences were designed to stigmatize—and ultimately to eradicate—homosexuality.

The Canadian government used the bawdy-house provisions<sup>5</sup> of the *Criminal Code* not only to target sex workers engaged in different-sex encounters, but also to target same-

---

<sup>1</sup> Trans\* is an umbrella term including people who identify as transgender, transsexual, genderqueer, transvestite, trans men, trans women, transfeminine, transmasculine, and two-spirit.

<sup>2</sup> Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*.

<sup>3</sup> *Criminal Code of Canada*, RSC 1953-1954, c 5, s 147.

<sup>4</sup> *Ibid*, s 149.

<sup>5</sup> *Ibid*, s 192.



sex activities. While Canada's bawdy-house legislation initially aimed exclusively at prostitution, in 1917 Parliament expanded the provision to include "acts of indecency." The amendment did not only make it easier to target workers who provided heterosexual sexual services in indoor locations such as massage parlours. It also made it easier to prosecute same-sex activities.<sup>6</sup>

In 1948, Parliament enacted another series of offences designed to combat what came to be viewed as an emerging social problem: the sexual psychopath.<sup>7</sup> Together with other provisions of the *Criminal Code*, this legislation allowed for the indefinite detention of those convicted of committing homosexual acts. The Supreme Court of Canada upheld the legislation in 1967.<sup>8</sup> Largely in response to the decision, Parliament amended criminal laws prohibiting same-sex conduct in 1969. It famously initiated a project of taking the state out the bedrooms of the nation.

In light of the shared histories between LGBT communities and sex workers, Egale is keenly aware of the considerable harms arising when Parliament attempts to legislate sexual morality. While Bill C-36 may deploy the language of harm, it is best to understand it as another misguided attempt to use the blunt force of the criminal law to direct sexual morality beyond protecting autonomy and consent.<sup>9</sup> As Justice Minister Peter MacKay noted when tabling the legislation, the goal of Bill-36 is to target "the perpetrators, the perverts, [and] the pimps."

Egale supports an approach that, rather than using the criminal law to legislate sexual morality, would fully decriminalize adult sex work and prioritize the human rights, safety, and dignity of all sex workers. Egale opposes Bill C-36.

### 3. The Impact of Criminalization on LGBT Sex Workers

Beyond Egale's concerns about continuing to use the criminal law to legislate sexual morality, it finds troubling Parliament's failure to appreciate the multiple forms and

---

<sup>6</sup> J Stewart Russell, "The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law" (1982) 14 *Ottawa Law Review* 270.

<sup>7</sup> Canada, *Report of the Royal Commission on the Criminal Law Relating to Criminal Sexual Psychopaths* (Ottawa: Queen's Printer, 1958) at 8.

<sup>8</sup> *Klippert v The Queen*, [1967] SCR 822.

<sup>9</sup> Among other things, the Preamble of Bill C-36 notes that the legislation is aimed at targeting the "exploitation that is inherent in prostitution" along with the "social harm caused by the objectification of the human body and the commodification of sexual activity".



complexities of adult sex work. Bill C-36 remains silent about the realities of male and trans\* sex workers.

Egale urges the Standing Committee on Legal and Constitutional Affairs to consider more carefully the range of sexual activities that Bill C-36 will capture. As Sandra Ka Hon Chu and Rebecca Glass explain, legislative frameworks that purport to criminalize the purchase of sexual services rely on a simple underlying logic: “[A]ll men who purchase sex are deemed to be aggressors and all women in sex work are deemed to be victims of male violence and patriarchal oppression.”<sup>10</sup> This framing is problematic because it “conflates sex work with trafficking, pathologizes male clients, and renders male and trans workers largely invisible.”<sup>11</sup>

In a 2006 report,<sup>12</sup> the House of Commons Standing Committee on Justice and Human Rights found that male and trans\* sex work accounted for approximately 20 per cent of street-based work in Canada. The report also noted that there is limited research about the numbers of male and trans\* workers operating within indoor establishments.<sup>13</sup> In addition, the report found that trans\* sex workers working in a criminalized environment were “doubly marginalized”—the interaction between their employment status and their trans\* status placed them in particularly precarious positions.<sup>14</sup> As in the case of other labour practices, a complex set of factors, including include pervasive discrimination and marginalization, may lead trans\* people to engage in sex work. Sex work may also, however, help trans\* people create communities, providing spaces where their gender identities and bodies are celebrated.

Bill C-36’s direct and indirect criminalization of adult sex work will continue to make male and trans\* sex workers vulnerable to discrimination, harassment, and violence. Despite the House of Commons Standing Committee’s amendments, section 213(1.1) continues to cast a wide and dangerous net. It does so by criminalizing communicating for the purpose of selling sex next to a school, playground, or daycare centre. In a number of Canadian cities, including Toronto, Montreal, and Vancouver, there are

---

<sup>10</sup> Sandra Ka Hon Chu & Rebecca Glass, “Sex Work Law Reform in Canada: Considering Problems with the Nordic Model” (2013) 51 *Alberta Law Review* 101 at 104.

<sup>11</sup> *Ibid.*

<sup>12</sup> House of Commons, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*, Report of the Standing Committee on Justice and Human Rights (Ottawa: Government of Canada, December 2006), online: Government of Canada <[http://www.parl.gc.ca/Content/HOC/Committee/391/SSLR/Reports/RP2610157/391\\_JUST\\_Rpt06\\_PD\\_F/391\\_JUST\\_Rpt06-e.pdf](http://www.parl.gc.ca/Content/HOC/Committee/391/SSLR/Reports/RP2610157/391_JUST_Rpt06_PD_F/391_JUST_Rpt06-e.pdf)>.

<sup>13</sup> *Ibid* at 14.

<sup>14</sup> *Ibid* at 14-5.



well-established areas of the city where male and trans\* street-based sex workers operate. Some are relatively close to schools, playgrounds, and daycare centres. With section 213(1.1), police will continue to profile male and trans\* sex workers for communicating in these well-known urban areas. As a result, male and trans\* sex workers will be dispossessed into new, often more isolated, locations. Such a move may intensify their risk of experiencing violence.

Parliament's repeated failure to recognize the human rights and dignity of trans\* Canadians by passing Bill C-279 amplifies the significant harms that Bill C-36 will cause.<sup>15</sup> Currently stalled in the Senate, Bill C-279 would, among other things, amend the *Canadian Human Rights Act*<sup>16</sup> to include "gender identity" as a prohibited ground of discrimination. A considerable body of empirical evidence suggests that trans\* Canadians experience high levels of poverty and violence. For example, a 2010 study by Trans PULSE, a community-based, academic research group, found that 43 per cent of respondents had attempted suicide, 20 per cent had been targets of physical or sexual assaults, and 34 per cent had been verbally harassed or threatened.<sup>17</sup> As Professor Dean Spade argues, these factors may increase trans\* "participation in criminalized work to survive, which, combined with police profiling, produces high levels of criminalization."<sup>18</sup>

In the face of high rates of profiling and criminalization, the relationship between police and trans\* Canadians is one marked by discrimination, harassment, and antagonism. Among some trans\* communities, the phenomenon of police interactions with trans\* people—in particular, the profiling of trans\* women suspected of engaging in sex work—is captured by the phrase "walking while trans."<sup>19</sup> Egale is concerned about the wide discretion that Bill C-36 affords police officers and its disproportionate impact on trans\* street-based sex workers.<sup>20</sup> A report published by the Ontario

<sup>15</sup> Bill C-279, *An act to amend the Canadian Human Rights Act and the Criminal Code (gender identity)*.

<sup>16</sup> RSC, 1985, c H-6.

<sup>17</sup> Greta Bauer et al, "Who are Trans People in Ontario?" (26 July 2010) 1:1 Trans PULSE e-Bulletin, online: TransPULSE <[http://www.ohtn.on.ca/Documents/Publications/didyouknow/july28\\_10/E-Bulletin.pdf](http://www.ohtn.on.ca/Documents/Publications/didyouknow/july28_10/E-Bulletin.pdf)>

<sup>18</sup> Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Brooklyn: South End Press, 2011) at 89.

<sup>19</sup> See e.g. Priya Sankaran, "Toronto transgender people say they're targets of police" (CBC News, 28 June 2012), online: CBC <<http://www.cbc.ca/news/canada/toronto/story/2012/06/26/toronto-transgender-police.html>>.

<sup>20</sup> Chris Bruckert & Frederique Chabot, eds. *Challenges: Ottawa Area Sex Workers Speak Out* (Ottawa: Prostitutes of Ottawa/Gatineau Work, Educate and Resist, 2012) at 101.



Association of Chiefs of Police notes: “[D]iscriminatory treatment of sex workers and the prospect of arrest for sex work-related offences may force individuals into precarious situations. Sex workers may find it difficult to access police protection if and when they experience violence and abuse.”<sup>21</sup> The report recommends that police services consult widely with community organizations, “particularly those that understand the lived experiences of sex workers.”<sup>22</sup>

Street-based sex workers may receive boundary restrictions from police or courts (a practice sometimes referred to as “red-zoning”). Failure to comply with a condition of probation by entering certain restricted “red-zones” may result in the imposition a custodial sentence of up to two years.<sup>23</sup> Given the unique health needs of trans\* people, and the limited number of service providers that offer appropriate care, the practice of “red-zoning” disproportionately impacts trans\* sex workers. The environment created by Bill C-36 may impede their ability to access necessary healthcare.

Egale is concerned that the government, in bringing Bill C-36 before Parliament, has overlooked the realities of LGBT people. In particular, Bill C-36 will create criminalized conditions that expose LGBT sex workers to high levels of discrimination, harassment, and violence.

*Egale Canada is our national lesbian, gay, bisexual and trans (LGBT) human rights organization: advancing equality, diversity, education and justice. Its vision is a Canada free of homophobia, biphobia, transphobia and all other forms of discrimination so that every person can achieve their full potential, unencumbered by hatred and bias. Egale has intervened before Canadian courts and tribunals in 25 cases, including 11 before the Supreme Court of Canada. It has represented the interests of Canada’s LGBT communities in every major LGBT human rights case to reach the Supreme Court.*

---

<sup>21</sup> Ontario Association of Chiefs of Police (Principal Investigator: Kyle Kirkup), *Best Practices in Policing and LGBTQ Communities in Ontario* (Toronto: Ontario Association of Chiefs of Police, November 2013) at 58, online: OACP <[www.oacp.on.ca](http://www.oacp.on.ca)>.

<sup>22</sup> *Ibid* at 63.

<sup>23</sup> Section 161(4) of the *Criminal Code of Canada*, RSC 1985, c C-46, provides: “Every person who is bound by an order of prohibition and who does not comply with the order is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.”