

Brief to the Standing Senate Committee on Legal and Constitutional Affairs

Pre-study on 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*, 2nd Session, 41st Parliament, 2014.

Joint Submission - Pivot Legal Society and Downtown Eastside Sex Workers United Against Violence

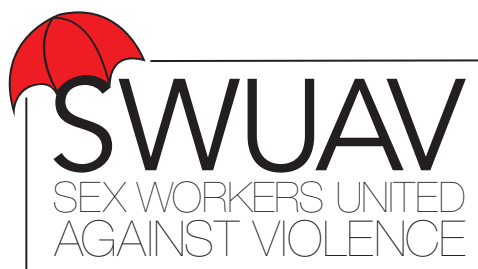
September 3, 2014

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PART I – OVERVIEW

1. Pivot Legal Society (“Pivot”) and Downtown Eastside Sex Workers United Against Violence (“SWUAV”) advocate for the repeal of criminal laws that prohibit the purchase and sale of sexual services by adults and prohibit other aspects of adult sex work, such as living on the avails of prostitution, procuring, and bawdy houses. This position is supported by a comprehensive examination of the evidence from Canada and around the world, by a robust human rights analysis of approaches to regulating prostitution, and by sex workers in the Downtown Eastside of Vancouver who have direct experience of the harms caused by the criminalization of sex workers, clients, and third parties.
2. We oppose the legislative reforms proposed by 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* (House of Commons, 1st reading version) (“Bill C-36”).¹
3. Bill C-36 has been mischaracterized as specifically targeting clients and exploitive third parties, while not criminalizing sex workers and others who may enhance sex workers’ safety. In fact, Bill C-36 will result in sweeping criminalization of the sex industry, targeting sex workers, clients, and third parties, and will have the effect of increasing sex workers’ vulnerability to violence and other forms of abuse. Bill C-36 targets sex workers, clients, and third parties in various ways and will have the following harmful effects:
 - a. The prohibitions on public communication (sections 213 and 286.1(1)) will result in displacement of street-based sex workers to isolated areas where they are unable to properly screen clients and will continue to face barriers to police protection.
 - b. Due to the prohibition on the purchase of sexual services (section 286.1(1)), sex workers will be unable to properly screen clients, will have diminished access to police protection, and will be unable to work in safe indoor venues because it will be against the law for their clients to attend their place of business.
 - c. The safety of sex workers will be impaired by the amended procuring provision (section 286.3(1)), which is extremely broad and will capture many safety-enhancing relationships with third parties (such as managers, drivers, and booking agents). Third parties are also

¹ Pivot and SWUAV take no position regarding the following provisions of Bill C-36: s. 279.011 (trafficking persons under 18 years), s. 279.02(2) (material benefit from trafficking of person under 18 years), s. 286.1(2) (purchasing sexual services from a person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years), 286.3(2) (procuring person under 18 years). However, Pivot and SWUAV wish to note that we oppose the mandatory minimum sentences attached to some of these offences. Mandatory sentences do not ensure that appropriate, proportionate, and constitutional sentences are imposed. They deprive judges of the discretion to make appropriate sentencing decisions, which are not achieved by a one size fits all approach.

criminalized by the prohibition on materially benefitting from another person's sex work (section 286.2(1), (3), (4), (5), and (6)), which captures people who are in a management role, including those who increase the safety of sex workers. In addition to being unnecessarily vague, this provision is extremely complicated, making it virtually impossible to know if a third party is captured by the law or not.

- d. Sex workers' safety will be impaired because it will be virtually impossible to work indoors when sex workers cannot promote their services. The advertising ban (section 286.4) targets newspapers, websites, magazines, and other forms of media that may carry sex industry ads, third parties who advertise other people's sexual services, and sex workers who wish to advertise collectively.

- 4. Bill C-36 proposes a regime of total criminalization that will recreate and exacerbate all of the harms faced by sex workers under the provisions that were at issue in *Canada (Attorney General) v. Bedford*² [*Bedford*]. Bill C-36 is an unconstitutional variation of the recently struck laws, and it imposes the same or increased danger, criminalization, and stigma on sex workers. Given these harmful effects, Pivot and SWUAV are of the opinion that the provisions contained in the Bill that criminalize adult sex work will not withstand a constitutional challenge.

PART II – THE WAY FORWARD FOR CANADA

- 5. For more than a decade, Pivot and SWUAV have urged the federal government to ensure that Canada's prostitution laws are evidence-based and respect human rights. Such an approach means moving away from the criminalization of adult sex work towards a legal framework that protects the health, safety, and rights of sex workers and communities overall. Our position is based on the large body of scientific evidence from Canada and around the world demonstrating how prohibiting sex work and its associated activities has overwhelmingly negative social, health, and human rights consequences for sex workers, including increased violence and abuse, stigma, and inability to access critical social, health, and legal protections.
- 6. Prior to the release of Bill C-36, we recommended to the Justice Minister that a constitutional and evidence-based legislative framework requires:
 - a. Repeal of criminal laws that prohibit the purchase or sale of sexual services by adults;
 - b. Repeal of criminal laws that prohibit other aspects of adult sex work, such as laws against living on the avails of prostitution, procuring, and bawdy houses;

² *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

- c. Maintaining criminal laws that prohibit purchasing sex from persons under the age of 18, procuring persons under the age of 18, living on the avails of prostitution by persons under the age of 18, and trafficking in persons under the age of 18;
- d. Maintaining the trafficking provisions found in the *Criminal Code*, while ensuring that the trafficking laws continue to be of general application and not specific to persons trafficked in the context of the sex industry; ensuring that the enforcement of anti-human trafficking laws is only targeted at those who use force or coercion to procure people into commercial sex, or who abuse migrant sex workers through debt bondage, violence, or deprivation of liberty; and using anti-human trafficking laws to prohibit coercion and forced labour, not against adults involved in consensual sex work.

PART III – SUBMISSIONS ON BILL C-36

- 7. Part III of our submission focuses on some of the most harmful aspects of Bill C-36 and explains how these provisions are inconsistent with sex workers' *Charter*³ rights. The *Charter* rights that would be impaired by the passing of Bill C-36 include life, liberty, security of the person, freedom of expression, freedom of association, and equality. We focus on the most concerning constitutional implications: the impact on sex workers' security of the person, equality, and expression rights.
 - A. **Section 213: Stopping or impeding traffic & communicating to provide sexual services for consideration**
 - i. **Statutory interpretation**
- 8. This provision is substantially similar to the unconstitutional law prohibiting communication in public for the purpose of prostitution. Whereas section 213(1)(c) made it an offence to communicate for the purpose of prostitution in any public place, Bill C-36 (at first reading) proposed a law that targets sex workers who are in a public place that is or is next to somewhere where persons under the age of 18 could reasonably be expected to be present.
- 9. We expressed serious concerns about the harmful and unconstitutional effects of the communication law that was proposed in Bill C-36 at first reading. These concerns were not rectified by the amendment from the Standing Committee on Justice and Human Rights, which specifies that the application of section 213(1.1) is limited to places "open to public view, that is or is next to a school ground, playground or daycare centre." Even with this amendment, the law will cause grave harms to sex workers because of the ongoing criminalization of marginalized

³ *Canadian Charter of Rights and Freedoms*, s 2, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

street-based sex workers, displacement to dangerous areas, diminished ability to screen clients and barriers to police protection.

10. We reiterate the following fundamental point: it is both unnecessary and harmful to engage the criminal law to resolve a concern about the geographic locations that sex work may occur. The federal criminal law power is a blunt and repressive tool that is structurally incapable of responding productively to local contexts and perspectives. The regulation of the geographic boundaries of sex work is an issue that can be, and should be, resolved through dialogue with local sex workers, other community members and local governments. The federal government is proposing to usurp legitimate local interests with this provision. It is, finally, both improper and unconstitutional to use federal criminal law in a fashion that will have dire consequences for street-based sex workers.
11. It is also important to consider section 213(1.1) in the context of s. 286.1(1), the provision that bans purchasing sexual services from an adult, because it also bans communication by clients in any place, not just public areas. Section 213(1.1) in conjunction with section 286.1(1) will create harmful conditions for all street-based sex workers because the provisions, when taken together, ban communication for the purposes of prostitution in all public places.

ii. Impact of the proposed law

12. As a result of section 213(1.1), street-based sex workers will continue to be the target of law enforcement and subject to arrest. Sex workers will, in many cases, be left guessing what “next to” means in terms of proximity to school grounds, playgrounds or daycare centres. Police enforcement of the two provisions banning communication for the purpose of prostitution (sections 213(1.1) and 286.1(1)) will mean the following: sex workers will continue to be displaced into dangerous and isolated areas; sex workers will continue to be more likely to work alone in order to avoid police detection; sex workers will continue to rush to get into vehicles without taking the time to screen clients and negotiate the terms of the transaction; and sex workers will continue to face barriers to police protection as a result of their criminalization.⁴ As found in *Bedford*, this will result in a much greater risk of harm, violence and possibly murder.⁵

⁴ The Hon. Wally T. Oppal, Q.C., *Forsaken: The Report of the Missing Women Commission of Inquiry* (Victoria: Missing Women Commission of Inquiry, 2012), Vol. 1 at pp. 107.

⁵ *Canada v. Bedford* at paras 68 – 71, 155 - 159.

iii. Constitutional analysis

13. Section 213(1.1) is only a marginally narrower version of the communication law found unconstitutional and struck down by the Court in *Bedford*, and defies the spirit of the Supreme Court of Canada's judgment. *Bedford* struck down a law that prevented sex workers from screening clients for safety. The new provision will function in a similar fashion and will have the same dangerous and harmful effects. Further, section 286.1(1) will give the police a broad power to investigate all street based sex work in an attempt to arrest clients.
14. As in *Bedford*, a court examining this new law will find that it engages the security of the person interest protected under section 7 of the *Charter*. A court will ask whether the law is in accordance with the principles of fundamental justice, and we submit that this law will be overbroad, vague, and grossly disproportionate. The putative purpose of protecting people under the age of 18 from seeing street-based sex work is very similar to the purpose found in *Bedford* of preventing public nuisance. This purpose cannot possibly be said to outweigh the harmful effects of this provision. We submit that the government will not be able to justify this infringement of section 7 under section 1 of the *Charter* because it does not minimally impair the rights of sex workers to safety and security and, again, any positive effects the law may have are vastly outweighed by the harm it will cause.

B. Section 286.1(1): Obtaining sexual services for consideration

i. Statutory interpretation

15. Section 286.1(1) criminalizes anyone who, in any place, obtains for consideration (payment), or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person. The provision includes mandatory fines for all violations.

ii. Impact of the proposed law

16. Prohibiting the purchase of sexual services creates the same dangerous conditions for sex workers that were created by the laws struck down in *Bedford*. In Sweden, Norway, and Canadian cities where law enforcement is directed at clients, sex workers are displaced to isolated areas where their clients are less likely to be apprehended. They have a limited ability to screen clients or negotiate the terms of transactions as their clients want to rush any public communication and move to a place where they are less likely to be detected by police. The evidence demonstrates that sex workers have insufficient access to police protection and are less able to operate in safer indoor venues, as clients are concerned about being arrested for attending the venue.⁶ In Norway,

⁶ For more information, please see: *Global Commission on HIV and the Law, HIV and the Law: Risks, Rights and Health*. (New York: Global Commission on HIV and the Law, 2012). Available online at: <http://www.hivlawcommission.org/resources/report/FinalReport->

violence against sex workers increased following the enactment of a law criminalizing the purchase of sex.⁷ Two recent reports on sex work in Vancouver, B.C. concluded that street-based sex workers face dangerous working conditions as a result of law enforcement that targets clients instead of sex workers.⁸

iii. Constitutional analysis

17. Criminalizing the purchase of sexual services does not protect sex workers, nor does it eliminate prostitution. Though the law targets clients, sex workers will suffer the health and safety risks that accompany this provision. Criminalizing clients will have the same impact as the laws that were struck down in *Bedford*, and will be unconstitutional for the same reasons. The ban on purchasing sex or communicating for the purpose of obtaining sexual services will engage the security of the person rights of sex workers as protected by section 7 of the *Charter*. This law would violate the principles of fundamental justice of arbitrariness and gross disproportionality, as the practical effects of the law are inconsistent with its purpose and the negative effects vastly outweigh any positives. As with section 213, this violation should not be saved by section 1, of the *Charter*, as its positive effects are not proportionate to the harms that will result.

C. Section 286.2: Material benefit from sexual services

i. Statutory interpretation

18. Section 286.2 replaces the “living on the avails” section that was struck down in *Bedford* with a new offence of “receiving a material benefit”. Subsections 286.2(1), (3), (4), (5), and (6) criminalize all third parties who “receive a financial or other material benefit” knowing that the benefit is obtained through adult sex work. This provision is excessively vague and complicated, making it difficult to determine who is at risk of prosecution.
19. In an attempt to draft a narrower version of the former “living on the avails” provision, this new provision includes a series of exceptions. However, the drafters have failed to ensure that the provision does not capture non-exploitive and safety-enhancing third parties and it will, therefore, have the same harmful effect as its predecessor.

Risks,Rights&Health-EN.pdf; S Dodillet and P Östergren, “*The Swedish Sex Purchase Act: Claimed Success and Documented Effects.*” (2011) Conference paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague. available online at: http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law_0.pdf

⁷ U Bjørndahl, *Dangerous Liaisons*, A report on the violence women in prostitution in Oslo are exposed to. (Oslo: Municipality of Oslo, 2012) at 5, available at: <http://humboldt1982.files.wordpress.com/2012/12/dangerous-liaisons.pdf>

⁸ Krüsi A et al. *Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study*. *BMJ Open* 2014; 4:e005191 available online at <<http://bmjopen.bmj.com/content/4/6/e005191.full>>; Sex Workers United Against Violence et al. *My Work Should Not Cost Me My Life: The Case Against Criminalizing the Purchase of Sexual Services in Canada*. (Vancouver: Pivot Legal Society, Sex Workers United Against Violence, Gender and Sexual Health Initiative, 2014) available online at <www.pivotlegal.org/my_work>.

ii. Impact of the proposed law

20. The provision does not allow sex workers to establish professional relationships that provide ongoing, secure conditions for themselves. This provision prevents sex workers from working for third parties, from working with other sex workers, and in many cases prevents them from hiring third parties for services related to their work. For example, anyone who receives a material benefit “in the context of a commercial enterprise offering sexual services for consideration” can be prosecuted. It is possible that any established business would meet the definition of “commercial enterprise” which means that many sex workers who wish to work together or employ safety-enhancing third parties, such as bodyguards or receptionists, will not be able to do so. Being able to create these types of business relationships are key components of a safer sex trade. Section 286.2 does not improve access to these services for most sex workers. As the exceptions to the law do not apply in the context of a “commercial enterprise,” the exceptions will only apply to occasional ad hoc services for sex workers.
21. The law also intrudes into personal relationships by purporting to exempt “legitimate living arrangements.” This is an excessively vague standard that will be unworkable in practice. Police, prosecutors, and judges will be left with the impossible task of defining “legitimate” relationships. In addition, the application of this provision will be overbroad and inconsistent with the experiences of sex workers. It may deem a relationship exploitive even though a sex worker considers it legitimate and actually safety-enhancing.

iii. Constitutional analysis

22. Section 286.2 continues to impair the ability of sex workers to retain assistance in their work from safety-enhancing employees, contractors, employers or managers. As such, it does not remedy the problem the Court in *Bedford* identified when it struck down the living on the avails provision. It introduces uncertainties about which relationships are allowed and which are not, it potentially criminalizes relationships that improve sex worker safety, and it recreates the harms associated with the earlier law.
23. This provision is inconsistent with section 7 because it will prevent sex workers from reducing their risks and will be overbroad and grossly disproportionate: it will capture safety-enhancing relationships and will put sex workers at greater risk of harm. Further, this law is unnecessary, as other provisions of the Criminal Code already capture the forms of exploitation and abuse that it seeks to prevent. The range of criminal laws that protect sex workers from abuse by third parties and others are set out clearly in Appendix D of the *Challenge of Change*, the Report of the

Standing Committee on Justice and Human Rights.⁹ As with the previous provisions discussed, and for the same reasons, this provision is unlikely to be saved by section 1 of the *Charter*.

D. Section 286.3(1): Procuring

i. Statutory interpretation

24. The bulk of the procuring provision, section 212, was not the subject of a constitutional challenge in *Bedford*. Only the living on the avails provision, section 212(1)(j), was challenged and struck down. Bill C-36 repeals the entirety of section 212 and reintroduces it in section 286.3 in a substantially similar manner. Section 286.3 makes it an offence to “procure” a person to offer or provide sexual services for payment. It also makes it an offence to facilitate the provision of sexual services by recruiting, holding, concealing, or harbouring a sex worker, or to exercise control, direction, or influence over the movement of a sex worker.
25. We oppose s. 286.3(1) because, despite its intention to prevent exploitation, we submit that it is overbroad and will capture relationships with third parties that are safety enhancing.¹⁰ We submit that the procuring law (to the extent that it relates to adults) should be repealed because it is overbroad and redundant given the range of other *Criminal Code* provisions that protect all people from harms including violence, exploitation, abuse, threats, and extortion, as mentioned above.

ii. Impact of the proposed law

26. The objective of the current procuring provision has been characterized as to protect sex workers from those who may exploit them. However, sex workers have long said that this provision is overbroad and captures non-exploitive relationships in the sex trade. For example, a manager who enhances the safety of a sex worker could be captured as “facilitating the purchase of sexual services” or “exercising control, direction or influence.”
27. These are essentially the same concerns that were raised by the Court in *Bedford* in relation to the current living on the avails provision and that arise in the proposed section 286.2, discussed above. This provision will prevent sex workers from establishing non-exploitive safety-enhancing relationships, because the third party would then be subject to criminal sanctions.

iii. Constitutional analysis

28. The procuring provision punishes those who facilitate the purchase of sexual services or exercise some control over another person’s sex work without distinguishing between those who exploit sex workers (for example, an abusive pimp) and those who could increase the safety and security

⁹ House of Commons, *Report of the Standing Committee on Justice and Human Rights, The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*, (December 2006), Appendix D: Non-Exhaustive List Of Generic Provisions Within The Criminal Code Available To Protect Prostitutes, Children and Youth, and Communities.

¹⁰ We do not oppose section 286.3(2), which prohibits procuring a person under the age of 18.

of sex workers (for example, drivers, managers, or bodyguards). The constitutional implications for this provision are very similar to those discussed above under section 286.2. Though the procuring law was not challenged in *Bedford*, section 286.3 will engage sex workers' section 7 *Charter* right to security of the person, as it prohibits sex workers from establishing helpful relationships and from taking steps to reduce their risks. It is overbroad, as it captures even those who enhance the safety of sex workers, and its negative effects outweigh any benefits. This provision also should not be saved by section 1 of the *Charter*.

E. Section 286.4: Advertising sexual services

i. Statutory interpretation

29. Section 286.4 criminalizes the knowing advertisement of sexual services. The provision captures all forms of media, including websites, newspapers, and other advertising avenues that permit sex industry businesses to advertise their services. It also captures anyone who purchases an advertisement for another person's sexual services, such as an agency or sex industry business. It may also capture sex workers who are working together and collectively advertising their services. Section 286.5(1)(b) provides immunity to sex workers who are advertising only their own sexual services in a way that does not involve a third party advertiser.

ii. Impact of the proposed law

30. This is an entirely new provision that will have a significant negative impact on sex worker safety. Though sex workers who are advertising their own services by their own means would not be targeted, the provision will make advertisement all but impossible. It will make the option of safer indoor work illusory, as it restricts the ability of sex workers to promote their services, communicate with potential clients, and negotiate with and screen clients before meeting them. This is particularly concerning given that the court in *Bedford* clearly found that the ability to operate in safer indoor venues is a key measure for sex workers to reduce their risks, and on this basis struck down the bawdy house provision.
31. It is possible that sex workers and the businesses that they work for will try to avoid the consequence of this law by running ads that are vague and indistinguishable from non-sex work businesses. For example, they may advertise as therapeutic massage services without being clear that sexual services are available. This scenario is dangerous for sex workers, as it is important for them to be able to be explicit about the services they do or do not provide.

iii. Constitutional analysis

32. By restricting the ability of sex workers to effectively work indoors, which the Court in *Bedford* found to be a key measure for reducing risks, this provision puts sex workers at greater risk of

harm and thus engages their section 7 *Charter* right to security of the person. This law is arbitrary in that it bears no relation and is inconsistent with the purpose of protecting sex workers from harm and exploitation, it is overbroad in that it criminalizes more than is necessary to reach the objective of the legislation, and it is grossly disproportionate in that the risk of harm it creates for sex workers greatly outweighs any benefit it might provide. This violation should not be saved by section 1 of the *Charter*, as it does not minimally impair the rights of sex workers and is not proportionate.

PART IV – SEX WORKERS’ EQUALITY AND EXPRESSION RIGHTS

33. The prohibitions on advertising and public communication for the purpose or purchasing and selling sex will violate sex worker’s section 2(b) *Charter* rights by restricting their freedom of expression. Communicating in public is an essential form of expression, given that it is necessary to secure sex workers’ personal safety. Limits on advertising will also impact sex workers’ safety by preventing them from being able to establish safer indoor venues and communicate the scope and limits of their services. The violation of section 2(b) should not be saved by section 1 of the *Charter*, as it does not minimally impair the rights of sex workers and there is disproportionality between the infringement and the objective of the law.
34. Contrary to the objectives set out in the preamble, which state that the Bill will “protect human dignity and the equality of all Canadians,” the proposed legal framework will violate sex workers’ equality rights, which are protected by section 15 of the *Charter*. The criminalization of consensual adult sex work not only creates danger and negative health impacts for sex workers, but also increases the stigma they experience. The legal framework proposed in Bill C-36 will create further disadvantage for sex workers by perpetuating prejudice and stereotypes.

PART V – CONCLUSION

35. The Court in *Bedford* suspended the declaration of invalidity of the laws for one year. The government is entitled to let the current unconstitutional laws expire on December 20, 2014 without enacting any new provisions that criminalize adult sex work. It is Pivot and SWUAV’s position that this is the correct way to proceed.
36. Bill C-36 is not the way forward. It does not assist sex workers and it will not result in the “protection of communities and exploited persons.” Bill C-36 imposes new forms of criminalization on sex workers, rewords and recreates the laws that were struck down in *Bedford* and their associated harms, and defies the letter and spirit of the Supreme Court of Canada’s judgment in *Bedford*. If Bill C-36 becomes law, Canada will have taken a major step backwards in

its treatment of sex workers, its protection of communities, and its respect for the constitutional rights of its citizens.

37. We urge the Committee to reject Bill C-36 in its entirety, and ensure that any future legislative reforms are consistent with the vast body of evidence, the *Charter*, and the opinion of the Supreme Court. We urge the Committee to recommend decriminalization as the best way to improve safety for people engaged in sex work.
38. In the alternative, if the Committee decides that any of the provisions set out in Part III of these submissions should be accepted in its 1st reading state, or with amendments, we ask that the Committee urge the government to submit Bill C-36 to a reference to the Supreme Court of Canada, and avoid placing the burden of advancing legal challenge on organizations and individuals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated the 3rd day of September, 2014