

Sex Work and Changes to the Criminal Code After Bill C-36: What Does the Evidence Say?

Canadian Alliance for
Sex Work Law Reform

*Sex Workers, Organizations and
Individuals Advocating for Sex Workers'
Rights and Community Well-Being*
www.sexworklawreform.com

Criminalizing Communicating

s. 213(1) ¹ Stopping or impeding traffic for the purpose of offering, providing or obtaining sexual services for consideration is a summary (minor) offence

s. 213 (1.1) Communicating for the purpose of offering or providing sexual services for consideration in a public place, or in any place that is, is in view of, or is next to a school ground, playground or daycare centre is a summary offence

s. 286.1(1) Communicating for the purpose of obtaining sexual services for consideration is punishable by imprisonment and/or fine; higher penalties apply in a public place that is, is in view of, or is next to a park or the grounds of a school or religious institution or where persons under 18 can reasonably be expected to be present²

Background

In *Canada (Attorney General) v. Bedford*,³ the Supreme Court of Canada struck down the old communicating law as unconstitutional. In its judgment, the Court highlighted how sex workers in Canada were forced to choose between their liberty interest (obeying the law) and their right to security of the person. The communicating law brought in by Bill C-36 has the same effects as the old law. Like the last communication law, the new one prohibits sex workers and clients from impeding or stopping traffic. It prohibits sex workers from communicating with clients at, next to, or in view of school grounds, playgrounds, and daycares. The new law also prohibits clients from communicating with sex workers anywhere, with higher penalties for communicating at, next to, or in view of parks (a broader term than playgrounds),

schools, and religious institutions, and anywhere minors could be present. As a two-way activity, communicating is just as restricted by these provisions as it was under the old law.

Under the old regime, sex workers on the street had difficulty using established protection strategies including screening of clients and clear negotiation of services, because they were trying to avoid police detection.⁴ This is still true under the new law. Furthermore, although private communications by sex workers are not criminalized, *all* client communications regarding payment for sexual services are criminalized by s. 286.1(1). Indoor sex workers may resort to euphemistic “code” language to accommodate clients, decreasing control over their work conditions.⁵

What does the evidence demonstrate about the effects of prohibiting communicating?

- Sex workers who work on the street experience greater displacement and isolation.
- Sex work commonly occurs in unsafe industrial zones, among the few places where there is a reasonable expectation that anyone under the age of 18 will not be present.
- Sex workers who work on the street experience increased violence.
- Both street-based sex workers and indoor sex workers experience reduced ability to negotiate clear terms of services with clients.
- Both street-based sex workers and indoor sex workers face barriers to accessing police protection because of fear of being criminalized or subject to surveillance.

1 Numbers provided here refer to sections of the *Criminal Code of Canada*, RSC 1985, c. C-46, as of May 2015.

2 Note that this provision criminalizes both communicating about and obtaining sexual services for payment, with the same range of penalties for both acts. “Consideration” is a legal term meaning that something of value is exchanged.

3 2003 SCC 74.

4 *Bedford v. Canada*, 2010 ONSC 4264 (CanLII). See also C. Bruckert and F. Chabot, *Challenges: Ottawa Area Sex Workers Speak Out* (2010), available at: http://www.powerottawa.ca/POWER_Report_Challenges.pdf; J. Lewis, and F. Shaver, “Safety, Security and the Well-being of Sex Workers” STAR Report (2006). Available at http://web2.uwindsor.ca/courses/sociology/maticka/star/pdfs/safety_and_security_report_final_version.pdf; J. Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada,” *Violence against Women* (2000) at 6,9, available at: http://www.hawaii.edu/hivandaids/Violence_and_the_Outlaw_Status_of_Street_Prostitution_in_Canada.pdf.

5 Chris Bruckert and T. Law, *Beyond Pimps, Procurers and Parasites: Mapping Third Parties in the Sex Industry* (2013), available at [http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20\(4\).pdf](http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20(4).pdf).

Criminalizing the Purchase of Sex

s. 286.1(1) Obtaining sexual services for consideration is punishable by imprisonment and fine; mandatory minimum fines apply if the offence occurs in a public place that is, is in view of, or is next to a park or the grounds of a school or religious institution or where persons under the age of 18 can reasonably be expected to be present⁶

This provision, which criminalizes paying for sexual services, was derived from the “Nordic” or Swedish model that aims to reduce or eliminate sex work. In addition to possible imprisonment, offenders face higher fines for acts in public places, a strong incentive for clients to insist on meeting in dark or isolated areas where recourse to police protection is minimized. Selling sex is not technically illegal but this provision criminalizes the exchange of services between sex workers and clients.

Background

Research in Sweden has demonstrated that criminalizing the purchase of sexual services does not eliminate prostitution,⁷ but rather pushes the sex industry underground, resulting in extremely dangerous working conditions for sex workers. In Sweden, sex workers report less access to social services, reduced ability to demand condom use, difficulty securing and retaining housing, increased stigma, and more adversarial relationships with police.⁸ In Norway, researchers have found that violence against sex workers increased following the enactment of a similar law.⁹

In Vancouver, where police policy has targeted clients since 2013, research has similarly found that sex workers on the street experience violence and health-related harms related to their inability to screen prospective clients or negotiate the terms of transactions, displacement to isolated spaces, and barriers to accessing police protection. Sex workers also reported spending more time on the street to find clients, making them more likely to take chances with questionable clients.¹⁰

The new law also impacts indoor workers, many of whom screen their clients by collecting and verifying personal information. The law makes clients’ more unwilling to provide accurate personal information for fear of identification and arrest.¹¹

What does the evidence demonstrate about the effects of prohibiting the purchase of sex?

- Sex workers have decreased ability to screen clients and therefore increased risk of violence.
- Fear of exposure, surveillance, and investigation limit access to police protections.
- Street-based sex workers experience increased isolation and dangerous working conditions.
- Sex workers are less able to establish safe indoor spaces to do sex work.
- Clients and sex workers are less willing to contact police about bad working conditions, exploitation or trafficking.

6 Note that this provision criminalizes both communicating about and obtaining sexual services for payment, with the same range of penalties for both acts. “Consideration” is a legal term meaning that something of value is exchanged.

7 Lanstyrrelson Stockholm, “Summary: The Extent and Development of Prostitution in Sweden,” 2014. See also this article on a report by Malmo University researchers commissioned by RFSU (the Swedish Association for Sexuality Education): <http://www.nswp.org/news/new-report-claims-the-swedish-sex-purchase-law-ineffective> (original report not available in English).

8 Levy J and P. Jakobsson (2014) “Sweden’s abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden’s sex workers” *Criminology and Criminal Justice*, 1-15, available at: <http://lastradainternational.org/lisidocs/3049-Levy%20Sweden.pdf>; S. Dodillet, and P. Östergren, P., *The Swedish Sex Purchase Act: Claimed Success and Documented Effects* (2011), available at: <http://gupub.gu.se/records/fulltext/140671.pdf> (hereinafter Dodillet).

9 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://prosentref.no/wp-content/uploads/2012/06/FARLIGE-FORBINDELSER.pdf> (Norwegian original) <http://humboldt1982.files.wordpress.com/2012/12/dangerous-liaisons.pdf> (English translation); Dodillet, footnote 6, above.

10 A. Krusi, K. Pacey, L. Bird, et al., *Criminalization of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study* (2014), *BMJ Open*, available at <http://www.gshi.cfenet.ubc.ca/crimclients>; SWUAV et al. “My Work Should Not Cost me My Life” (Vancouver: Pivot Legal Society, 2014), available at: http://www.pivotlegal.org/my_work.

11 Ibid.

Criminalizing Materially Benefiting from Sexual Services

s. 286.2(1) & (2): Everyone who receives a material benefit (profit) knowing it was derived from the purchase of sexual services is liable to imprisonment

s. 286.2(3): Living with a sex worker, in the absence of evidence to the contrary, is presumed to be proof of such a benefit

s. 286.2(4) & (5): If a person receiving benefits is in a “legitimate” (i.e., family or intimate) relationship with or provides services at fair market value to the sex worker, exceptions may apply, but not if that person uses threats or violence, abuses a position of power or trust, provides intoxicants, or receives benefits in a “commercial enterprise” to sell sexual services

This section replaces the “living on the avails” provision that was struck down in the *Bedford* decision. The new section continues to criminalize those who profit financially from others’ sex work. There are stated exceptions for those in “legitimate living arrangements” or those with “legal or moral obligations” to sex workers, with the onus of proof on the accused to prove their claim. The exceptions do not apply to exploitative and abusive relationships, or situations when a person supplies a sex worker with drugs or alcohol. The law explicitly applies to anyone receiving benefits in a “commercial enterprise” where sexual services are provided, meaning that owners and employees of escort agencies, massage parlours, and other indoor venues are captured. Sex workers themselves are exempt, providing the profit is from their own services (s. 286.5).

Background

Sex workers have a wide range of occupational relationships with third parties. Independent sex workers may hire individuals to provide specific services (e.g., as security, receptionists, drivers, or spotters taking license plate numbers). As in any other occupation, however, not all sex workers wish to or are able to run their own businesses. Some prefer to work for someone else and to benefit from those services through their employment. Research has shown that these arrangements may be desirable because the practices typically employed increase sex workers’ safety and security: screening and verification of clients’ personal information, zero-tolerance policies for clients engaging in inappropriate behaviour, reliance on bad date lists, and use of on-site or on-call security persons to deter violence. For street-based workers whose housing is precarious, these types of arrangements offer a safer option than soliciting on the street.¹² Criminalization of these third parties excludes sex workers from the protections afforded to other Canadian workers under labour and employment law.¹³

What does the evidence demonstrate about the effects of prohibiting materially benefiting?

- Sex workers have decreased ability to access the services of third parties that could increase their safety and security.
- Sex workers’ personal and professional relationships are criminalized if they cannot be proved to be “legitimate living arrangements.”
- Sex workers are unable to benefit from health and safety regulations, labour laws and human rights protection.
- Sex workers experience increased social and professional isolation.
- Sex workers’ options regarding where and how they engage in sex work are restricted even though research has established that working indoor is safer than working on the street.
- Sex workers who are migrants rely on third parties, and they often get caught up in detention and deportation sweeps when there are anti-trafficking raids—a huge incentive not to report exploitative working conditions.

¹² C. Bruckert and T. Law, *Beyond Pimps, Procurers and Parasites: Mapping Third Parties in the Sex Industry*, (2013), available at [http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20\(4\).pdf](http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20(4).pdf).

¹³ K. Gillies, “A wolf in sheep’s clothing: Canadian anti-pimping law and how it harms sex workers,” in E. van der Meulen, E. Durisin & V. Love (Eds.), *Selling sex: Experience, advocacy, and research on sex work in Canada* (Vancouver: UBC Press, 2013), 412-426.

Criminalizing Advertising of Sexual Services

s. 286.4: Everyone who knowingly advertises the sale of sexual services is liable to imprisonment

s. 286.5: Persons materially benefitting from or advertising the sale of their own sexual services are immune from prosecution under these sections

Section 286.4 criminalizes everyone who knowingly advertises sexual services except the person providing the services. The exemption for “persons”¹⁴ suggests that a business could be charged for advertising the services of its staff, including individual sex workers. A newspaper, magazine, or website that carries or hosts ads could also be liable. It is incomprehensible how an individual sex worker could advertise without using these third party services.

Background

An on-line presence or other form of advertising is essential for sex workers who do not solicit on the street. If service providers cannot advise potential clients about their services, establishing safer indoor workspaces is not viable. The advertising provisions may force sex workers to use euphemistic language in order to avoid having their posts or advertisements blocked. When sex workers are unable to indicate their services (including those they are not providing), specify fees, and outline safer sex expectations, the potential for miscommunication increases, as does the risk of misunderstandings, aggression and violence from clients.

Canadian sex workers may decide to use websites hosted in other countries, beyond the jurisdiction of Canadian law, as sex workers did in Ireland when that country attempted to ban erotic advertisements.¹⁵ The ban on advertising could also result in the closure of region-specific websites that, in addition to providing advertising space, host virtual sex worker-only forums. At these sites, sex workers post information on bad clients, discuss security measures, share industry information on third parties, and elicit client references. These spaces serve as an important security mechanism and foster online communities among independent sex workers who might otherwise be isolated.¹⁶

What can we learn about prohibiting advertising?

- Sex workers’ options are decreased because of barriers to working independently. This increases reliance on third parties, which in turn increases opportunities for exploitation.
- Prohibiting advertising creates significant barriers to working indoors, which research demonstrates is safer than working on the street.
- There is an increased risk that clients will misunderstand the services sex workers are or are not providing, their prices, and safer sex requirements.
- Sex workers face the likelihood of increased violence through the denial of a forum to share vital information that could improve their security.
- Law enforcement’s ability to identify and intervene in situations of exploitation, abuse, and trafficking is decreased.
- Likelihood of collaboration between web providers and law enforcement is reduced.

¹⁴ In Canadian law, a corporation is also a “person;” however, while it is open to judicial interpretation, we believe that “person” here should be interpreted in the ordinary sense of the word, as a human being.

¹⁵ Section 23 of the Irish *Criminal Justice (Public Order) Act*, 1994.

¹⁶ C. Bruckert and T. Law, *Beyond Pimps, Procurers and Parasites: Mapping Third Parties in the Sex Industry*, (2013), available at: [http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20\(4\).pdf](http://www.nswp.org/sites/nswp.org/files/ManagementResearch%20(4).pdf).