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

Bill C-36: Entrenched in Personal Moral Values and Inaccurate Stereotypes

(Disponible en français)

A Brief to the Standing Committee on Justice and Human Rights
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Introduction and Research Background

I am a professor in the Department of Sociology and Anthropology. I have been conducting research on various aspects of the sex industry since 1983 when I worked for the Canadian Advisory Council on the Status of Women (CACSW). Over the years I have interviewed over 450 women, men, and transgender people working in the sex industry. My research also includes police and licensing officers, municipal councillors, lawyers, and social service providers who often act as liaisons between regulatory agencies and sex workers. In addition to comparing across genders, geographic locations, and sectors in the sex industry, I have also conducted comparative research between sex work and other service work (i.e., hospital work).

I am currently involved in a team research program funded by the Canadian Institutes of Health Research (CIHR). We are working collaboratively to study the reasons for variability in health and safety among sex workers. Headed by Cecilia Benoit (University of Victoria), we are researching the sex industry in six municipalities across Canada. The study involves a 360 degree analysis of the industry (including interviews with sex workers, their romantic partners, clients, supervisors/managers, as well as police, municipal officials, and other regulatory agencies). The team submitted a brief regarding our findings from this project.[1]

Drawing on my earlier research and that of several colleagues, this brief presents key evidence that is relevant to provisions in Bill C-36. The majority of the research reported here was conducted in collaboration with sex workers and other community partners. The samples were selected using well-established social science methods so the respondents in all the studies (particularly sex workers) were selected in a manner that represents as much as possible, the range of people and organizations involved in the industry (Shaver 2005a).

History & Issues Pertaining to the Legislation

The buying and selling of sexual services between consenting adults has been an issue of social, moral, and legal contention in Canada for well over 250 years. Grounded in British legal tradition, one of the earliest laws related to prostitution was embedded within the Nova Scotia Act of 1759 (Shaver 1996). It made street solicitation a status offence of "vagrancy" for women unable to provide a "good account" of themselves. Disruptive or annoying behaviour was not a prerequisite for detention. The purpose of the law was to provide police with the power to get prostitutes off the streets when necessary, and to alleviate land use conflicts and problems of public disorder associated with the operation of brothels. Similar laws were enacted by several provinces and municipalities prior to the passage of the *Criminal Code* in 1892.

In the mid-19th century—in response to reformers anxious to abolish 'social evil'—more complex provisions designed to protect women from the procurer, pimp, and brothel keeper were introduced at Confederation (1867). These were extended and strengthened in the decades that followed, but there were no decisive changes in enforcement patterns: the clients of street-based workers continued to fall outside the purview of the law, convictions for keepers and frequenters of bawdy houses were sporadic, and conviction rates for procuring were very small. It was the street-based women workers who were most often penalized (McLaren 1986).

In 1972—in response to a recommendation by the Royal Commission on the Status of Women and pressure from women's and civil liberties groups—the vagrancy law was repealed and replaced by a soliciting law.[2] Unfortunately, the wording left unclear whether it applied to both sellers and buyers or just sellers and—according to some police chiefs and municipal politicians—made it more difficult to regulate street prostitution, thus increasing its visibility in middle-class neighbourhoods (Lowman 2005).

Since then there have been several other attempts to address the key issues, including the right to safe and secure sex work environments. Here I include The Special Committee on Pornography and Prostitution—struck in 1983 to investigate the social and economic determinants of prostitution and make appropriate recommendations[3]—and The House of Commons Subcommittee on Solicitation Laws—struck in 2003 to review the solicitation laws and recommend changes to improve the safety of sex workers and communities overall.[4] The outcomes of these initiatives were not successful. Sex workers and their families are still at risk, and the underlying social and economic conditions have not been addressed (Shaver 1996; Canadian HIV/AIDS Legal Network 2007).

On Thursday June 13, 2013—six years after the plaintiffs filed their challenge under the Canadian Charter of Rights and Freedoms—the Supreme Court of Canada heard arguments in the case of *Bedford v Canada*. On December 20, 2013, the SCC struck down three key sections of the *Criminal Code*[5] and gave the government a year to respond. Bill C-36 is the response.

Since the SCC ruling, controversy surrounding the Canadian sex industry has re-emerged in the public domain. This is not unexpected, since the historical record above shows that complex issues provoke debate and expose different moral values.

Can we get it right this time? Getting it right depends upon our ability to separate personal moral values from legal opinions and social policy and to accurately recognize the current realities of Canada's sex industry.

Overview of Bill Amendments and Discussion

Bill C-36 proposes to criminalize communication in public for the purpose of prostitution, the purchase of sexual services, material benefit, procuring, and the advertisement of sexual services. In addition, it effectively prohibits indoor sex work.

The evidence from my research and from other research indicates that the provisions fail to address the problems identified by the Court in Bedford, especially with respect to safe and secure working conditions. Bill C-36 fails for two reasons:

- it does not separate personal moral values from legal opinions;
- it perpetuates inaccurate stereotypes that seriously undermine the relationships that are essential for safe and secure work environments.

Bill C-36 does not separate personal moral values from legal opinions.

Prostitution is a complex and controversial issue that brings into play a wide range of personal moral values concerning the commodification of sexual services, the visibility of such services, and the personal character of those involved. These concerns are reflected in Bill C-36.

The proposal to criminalize the purchase but not the sale of sexual services appears to be drawn from a position that identifies commodified heterosexual relations as patriarchal domination (Flanagan 2014). The Minister of Justice has called clients "perverts" and the comodification of sexual services "degrading" (CTV News, June 4, 2014).[6] Further, Bill C-36 adopts a protectionist perspective that assumes all sex workers are victims lacking agency, hints that human dignity and sex work are incompatible, and takes for granted that viewing sex workers and clients on the street is injurious to the well-being of children and youth. Studies show that protectionist approaches tend to entrench negative stigmas, which have a harmful impact on sex workers' health and health behaviour (Abel 2011; Benoit et al. forthcoming).

> Bill C-36 should not be about morality. In a pluralistic society such as ours we must separate personal moral values and opinions from the legal and policy positions we take. We have accomplished this with legislation governing birth control, abortion, homosexuality, and gay marriage. Why not with sex work?

Many Canadians have already accomplished this separation with respect to Bill C-36. For example, ordained ministers and laity of various faith groups and denominations made it clear that—even though they "uphold marriage as an ideal and as the normative place for sexual relations" and have "great concerns about the commodification of sex"—they cannot support Bill C-36 (Petrescu 2014). And, according to the latest Angus Reid Poll, Canadian women and men—who continue to hold significantly divergent views on the buying and selling of sexual services—do not extend these differences to their overall opinions of Bill C-36. Almost half (47%) say they oppose the proposed law, a third (35%) say the support it, and 18% say they are not sure (Angus Reid 2014).

> These two examples provide a clear indication that members of the Canadian public can separate their personal values from their legal opinions about Bill C-36. I urge you to do the same.

Bill C-36 perpetuates stereotypes that seriously undermine the relationships between sex workers and others that are essential for safe and secure work environments.

Provision 213(1.1): "offering, providing or obtaining sexual services for consideration—in a public place, or in any place open to public view, that is or is next to a place where persons under the age of 18 can reasonably be expected to be present"

This provision is very similar to the communication section struck down in *Bedford* and will have similar consequences. It will displace sex workers trying to avoid detection, reduce their ability to communicate with clients, increase their isolation, and maintain adversarial relations between sex workers and police, making it more difficult to access police protection given the risk of arrest.

Further, the relationships sex workers develop—with each other and with their clients—in order to enhance their own safety and security will be undermined.[7] Research findings from my own work (STAR 2005; STAR 2006, Lewis & Shaver 2011) and that of others (Lowman 2005; Bruckert & Chabot 2010) demonstrate the importance of these relationships. For example,

- Working in groups or pairs and sharing information, especially among street-based workers, is a strategy that empowers them, increases their access to resources, and helps them identify situations of enhanced security or risk.

- When police attention displaces workers far from amenities such as transportation, local restaurants where they meet or take a break, public telephones, and other services and facilities, it increases their isolation and jeopardizes information-sharing, as well as the security and comfort of the working environment.

- Displacement also isolates them from their regular clients who maximize both the physical and economic security of sex workers.

Provision 286.1 (1): a prohibition against the purchase of sexual services

Under this provision, clients are criminalized for purchasing sexual services "anywhere". In addition to displacing workers and undermining the relationships they develop to enhance their own safety and security, this provision will further alienate clients and create conditions for "black markets" where organized crime can easily flourish.

This provision—designed in part to protect sellers of sex—reinforces stereotypes about sex workers. **Sex workers are not all victims lacking agency**. Recent studies indicate they come from a wide variety of social and cultural backgrounds and range in age from 18 to 52 years (Weinberg et al. 1999; Jeffrey & MacDonald 2006). The majority have had varied work experiences outside the sex industry with most jobs being in the service industry[8] (Shaver & Weinberg 2002; Weinberg et al. 1999). Many move about within the industry, a clear indication that not all are 'trapped" on the street (Jeffrey & MacDonald 2006; Lewis & Shaver 2011). Studies reporting that unstable family backgrounds are common—especially among street-based sex workers—are very careful to maintain that this indicates they are structurally disadvantaged, not morally corrupt or helpless (Hallgrimsdottir et al. 2006; McCarthy et al. 2014).

This provision also reinforces stereotypes about clients. **Clients are not all violent perpetrators**. Recent studies indicate they also come from a wide variety of demographic

backgrounds. Motivations for buying sexual services also vary. Some clients are unsatisfied with the sexual aspects in their current relationship; others wish to avoid the long term "obligations" in conventional relationships; still others seek a limited, quasi-romantic connection (Milrod & Weitzer 2012; Sanders 2008). Overall, client violence is exaggerated (Benoit et al. 2014:3-4; Weitzer 2009: 224; Lowman & Atchison (2006).

Contrary to expectations underlying this provision, arresting clients will not improve the working environment. In Montréal and Ottawa, anti-client measures undertaken by the police resulted in increased violence (Chu & Glass 2013). A similar outcome was documented in Vancouver where a VPD policy to criminalize clients reproduced vulnerabilities for violence and poor health among street-based sex workers (Krüsi et al. 2014).

Further, arresting clients weakens the relationships between sex workers and their clients. Client-worker transactions are not anonymous, and longer term relationships are often developed. This is important because having "good" clients maximizes both the physical and economic security of sex workers. In the process, workers are often able to distinguish the predatory violence of aggressors posing as clients from clients who may be aggressive on occasion due to frustrations with the quality of the service (Power 2012).

Anecdotal evidence from Canadian-based sex workers indicates that these relationships are important for another reason: some clients are willing to report violence and other abuse against sex workers when they see it. This is unlikely to happen, however, if this provision becomes law. Reports from Sweden indicate that clients—who would likely have reported violence, coercion or other abuse toward a sex worker—are now reluctant to go to the police for fear of their own arrest (Dodillet & Östergren 2011; Danna 2004).

Finally, this provision further weakens relationships among sex workers in that it makes it more difficult to warn each other about abusive or violent aggressors posing as clients.

Provision 286.2: on receiving "financial or other material benefit" for sex work and Provision 286.3: procuring

These two provisions impede relationships between sex workers and third parties; exclude sex workers from labour-site protections; and increase social and professional isolation.

These provisions also reinforce stereotypes about third parties being exploitive and abusive. **Third parties are not all exploitive and abusive**. Sex workers have a wide range of relationships with third parties. As in other service industries, some third parties provide training, some don't; some maintain a great deal of control over their workers, while others maintain very little control (Lewis et al. 2005). Whether sex workers are working independently or for someone else, research indicates that these relationships are desirable, since most contribute to and help maintain safe and secure working environments. Managers and supervisors enhance economic security, since they are often responsible for advertising, attracting clients, and providing the work space. They can also enhance physical security through precautions and protections against aggressors (Lewis & Maticka-Tyndale 2000; STAR 2005; Bruckert & Law 2013).

Criminalization of third parties also excludes workers from labour protections and security afforded to other Canadian workers (Gillies 2013). In decriminalized environments, such as New Zealand and New South Wales, Australia, the sex industry is subject to the same general laws regarding workplace health and safety and anti-discrimination protections as other industries (Shaver 2012; Abel & Fitzgerald 2010; OSHS 2004).

Decriminalizing the sale and purchase of sexual services would be a preferable to Bill C-36 since it avoids the negative effects of one person or group imposing a moral position on others. It would also be more consistent with the evidence demonstrating the wide variety of individuals involved as both buyers and sellers of sexual services (most of whom are neither "perverts" nor "victims") and strengthen the relationships among sex workers, between sex workers and clients, and between sex workers and third parties that serve to enhance the safety and security of the work environment.

Together these three provisions (286.1(1), 286.2, & 286.3) reinforce the stereotype that sex work is inherently violent. **Sex work is not inherently violent**. Work-related risks and violence are experienced by nurses, health workers, social service workers, taxi drivers, police, and clerks in all-night grocery stores. Nurses are particularly vulnerable to high levels of situational violence: "in 2005, 34% of Canadian nurses providing direct care in hospitals or long-term care facilities reported physical assault by a patient in the previous year" and the victimization of taxi drivers is reported to be as high as twenty times that of Canadians generally (cited in Power 2012:31). My own research comparing a matched sample of sex workers and hospital workers indicated both jobs are risky. The perception of risk varied by gender; regardless of the work environment, women worried more about their safety. Women sex workers also suffered the most with respect to insults and threats, followed by male hospital workers. Robbery was a more significant factor in the sex work environment, while physical violence was a more significant factor in the hospital environment (Shaver 2005b).

This suggests that the health and safety concerns of sex workers—especially those related to violence—parallel those of women and men in other occupations. Within the sex industry, there are also significant gender differences with respect to the experience of violence and arrest: women experience more physical violence than either transgender or male workers; women are also more likely to be arrested (Shaver 2005). These data indicate that violence is not inherent in the industry, but is linked to broader social and economic issues such as gender inequality, unequal education and occupation opportunity structures, poverty, exploitation, and violence.

If situations of victimization, assault, coercion, or exploitations occur, we would be better off using the laws more specifically directed to these problems that are already operational in the *Criminal Code* (e.g., assault, criminal harassment, forcible confinement) rather than broad prohibitions that are formulated on misrepresentations and prejudice.

Provision 286.4: Advertising sexual services

This provision restricts the ability to advertise, limits the opportunities for working indoors, and increases the potential for worker-client miscommunication. Sex workers also argue that it will deny them an important security mechanism by shutting down websites that, in addition to providing advertising space, host virtual sex worker-only spaces where information is shared regarding clients, security measures, and third parties (Bruckert & Law 2013). In short, this provision effectively prohibits working inside in a fixed location and increases the chance of visibility to children and youth.

Finally—as with the outcome of both the Special Committee on Pornography and Prostitution and the Subcommittee on Solicitation Laws—Bill C-36 lacks a set of meaningful policy provisions to deal with the economic and social conditions underlying the sex industry.

Addressing these issues means moving beyond legal provisions and developing social and economic policies grounded in a harm reduction/labour rights framework (Shaver & Lewis 2011; Lewis et al. 2013).

It is not too late to get it right. I urge you to reject C-36 in its entirety and ensure that any future legal regimes or social policies do not reflect personal moral concern or perpetuate inaccurate stereotypes.

Recommendations and Conclusion

As an alternative to Bill C-36 I recommend the following actions:

- Use existing *Criminal Code* legislation to protect sex workers from violence and exploitation (e.g., kidnapping and forcible confinement (279), physical assault (265, 267,268), sexual assault (272, 273), threats (264), extortion (346), theft (322), harassment (264), and human trafficking (279.01).

- Address the social and economic conditions underlying the sex industry—poverty, violence, exploitation, gender inequalities—by developing appropriate social policies.

- Acknowledge sex work as work; use provincial laws governing labour and occupational health and safety, and municipal by-laws governing business licensing and zoning, to improve working conditions and provide workplace benefits.

- Devote resources to research and program evaluation in order to identify those that are most successful, including the development of labour laws dealing with occupational health and safety within the sex industry.

- Work closely together with provincial and municipal jurisdictions in policy and program development to facilitate concordance between municipal by-laws, provincial statutes, and the criminal justice system.

- Most importantly, when developing policies around the sex industry, engage in meaningful consultation with sex workers and other stakeholders on how to develop legal and social reform that respects their rights to safe and secure working conditions.

These actions would enhance the health and safety of sex workers and at the same time address the challenges implied by the formulation of the Provisions above. They would put the moral prohibition against prostitution in its proper place as a legitimate personal position without imposing it on the general population. They would address in a more specific and directed fashion the problems of exploitation and violence that exist within a minority of the sex-for-money translations. They would facilitate the emergence of self-help initiatives among sex workers. They would allow the separation of positive social support from exploitive or dangerous personal relations and facilitate the prosecution of the latter. They would make it easier for those people wishing to leave the industry to do so. And they would facilitate the operation of agencies that offer training, options, and support for those who would like to leave the industry (Abel et al. 2009).

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[1] Benoit et al (2014) *Bill C-36 and the views of people involved in the Canadian Sex Industry*. Brief submitted to the House of Commons Standing Committee on Justice and Human Rights.

[2] The new soliciting law specified that "every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction."

[3] The Special Committee on Pornography and Prostitution (the Fraser Committee)—established in 1983—managed to shift the focus away from the principled moralism of the "social purity" movement. They recommended that sex workers have a place to work without being subject to criminal offence (Special Committee on Pornography and Prostitution, 1985). However, the legislation enacted by the Conservative government in 1985 simply replaced the soliciting offence with a "communicating law." No provisions were made to provide a 'legal' place to work. Section 213 did not reduce street prostitution in Canadian cities: its main effect was to systematically displace prostitution into more dangerous spaces. Nor did it lead to substantial changes in enforcement patterns: they continued to be gender, class, and sector biased (Shaver 1996).

[4] The House of Commons Subcommittee on Solicitation Laws (SSLR)—struck in February 2003—also missed the mark. Its final report gave too much attention to the sexual exploitation of children and human trafficking and too little to the way the laws and their enforcement push sex workers into situations that put their health and safety at risk and leave them open to stigma and discrimination, violence, and possible exposure to HIV (Canadian HIV/AIDS Legal Network 2007).

[5] The SCC struck down keeping, or being in, a common bawdy-house (s.210), living on the avails of prostitution (s.212(1)(j)), and communicating in public for the purposes of prostitution (s.213(1)(c)).

[6] When Justice Minister Peter MacKay tabled Bill C-36 in the House of Commons, he said most Canadians view prostitution "as a dehumanizing phenomenon" that puts people at risk. He also said the bill will protect those who are most vulnerable by going after the perpetrators, the perverts, those who are consumers of this degrading practice" (CTV News, June 4, 2014).

[7] Sex workers have a long history of developing and sharing strategies and techniques to secure their work environments: many are built into the relationships they develop while working. For examples, see the websites managed by Stella in Montréal, Maggie's in Toronto, POWER in Ottawa, and SPOC in Toronto. STAR also produced several brochures using information from research conducted with sex workers in Montréal and Toronto (www.uwindsor.ca/star).

[8] The service industry jobs most often identified include: receptionist, hotel work, fast food industry, cooking, waitressing, hairdressing, bartending, and personal home care.