BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

VIA EMAIL: Consultations.Prostitution@justice.gc.ca

March 17, 2014

Justice Canada
Ottawa, Ontario

Re: Public Consultation on Prostitution-Related Offences in Canada

To whom it may concern,

Below are our answers to the questions posed in the Public Consultation on Prostitution-Related Offences in Canada:

1. **Do you think that purchasing sexual services from an adult should be a criminal offence? Should there be any exceptions? Please explain.**

No. The British Columbia Civil Liberties Association ("BCCLA") takes the position that the purchase and sale of sexual services between consenting, capable adults should not be a criminal offence. Capable adults should be able to exercise autonomy over their own bodies. As an organization, we believe that only decriminalization and regulation of sex work will afford those involved in sex work the dignity, safety, and autonomy that they deserve. It is our position that criminalizing the sale *or purchase* of sex will recreate the dangerous conditions which not only precipitated the Supreme Court of Canada's ruling of unconstitutionality in *Bedford v. Canada*, but have also ravaged our communities and families. The BCCLA has long recommended the repeal of the provisions that were ultimately declared unconstitutional by the Supreme Court of Canada ("SCC" or "the Court") in the *Bedford* decision.

British Columbia Civil Liberties Association
900 Helmcken Street, 2nd floor
Vancouver, BC, Canada V6Z 1B3
T 604.687.2919
F 604.687.3045
info@bccla.org
www.bccla.org

We start with the principle that the Criminal Code should not be used to restrict individual liberty in circumstances where people's actions are not seriously harmful to others. Moreover, criminal sanctions must be both proportionate and minimally impairing. Attempts to "legislate" the morality of others are incompatible with these principles, and adversely affect our ability to develop adequate social policies and laws governing sex work. In a 1991 address to the Elizabeth Fry Society on so-called "feminine crimes," Madam Justice Beverley McLachlin (as she then was) of the Supreme Court of Canada stated that "more than a breach of morality is required to justify the stigma and infringement on liberty that flow from criminalization." To be deemed justifiably criminal, an individual's actions also require general societal condemnation, and must demonstrate considerable harm.[1] The BCCLA argues that sex work in itself is neither deserving of condemnation nor inherently harmful.

Many people – male, female, transgender and other gendered – choose to support themselves by selling sexual services, and these choices should not be criminalized. As the Court remarked in Bedford, some people make the free choice to engage in sex work. Other people, the Court observed based on the findings of the trial court, do not have meaningful choices other than sex work because of financial desperation, drug addiction, mental illness or compulsion from pimps (para. 86). In either situation, criminalizing these people and the sex work itself puts sex workers' health and safety in danger.

Criminalizing the purchase of sexual services, the approach taken by Sweden that is known as the "Nordic Model", would replace the unconstitutional criminal provisions recently invalidated by the SCC with new criminal provisions whose effects would be likely to render them similarly unconstitutional.

---

[1] Hon. B. McLachlin, "Crime and Women – Feminine Equality and the Criminal Law" (1991) 25 U.B.C. L. Rev. 1-22 at para. 5.

Such new laws criminalizing sex work or activities related to sex work are bound to make conditions more dangerous for sex workers, and will harm those whom such new laws would purport to protect.

In *Bedford*, the SCC found that three provisions of the Criminal Code of Canada related to sex work – the prohibitions on communication (s. 213(1)(*c*)), keeping a common bawdy house (s. 210) and living off the avails (s. 212(1)(*j*)) – violate section 7 of the *Charter of Rights and Freedoms.* The SCC determined that all three provisions negatively impact sex workers' right to security of the person, and that the deprivation of the right was contrary to the principles of fundamental justice and unjustified.

COMMUNICATION PROVISION

The Court found that the communication provision violates sex workers' right to security of the person and struck the provision down on that basis. The Court held that "By prohibiting communication in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risk that they face" (para 71). The Court also stated that "If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established" (para 158). The harm of this provision thus outweighed, in the Court's view, any beneficial purpose for the provision suggested by Parliament or the government.

The BCCLA further takes the position that the communication provision violated the freedom of expression guarantee contained in section 2(b) of the *Charter*. The expression restricted by the communication provision lies at the heart of the right to free expression protected by the Charter. This communication allows sex workers to communicate terms of consent and to screen potential clients, both of which are essential to their basic

health and security needs. Restricting this communication furthers the victimization and vulnerabilities of street sex workers. This expression warrants a high level of protection. The Court did not rule on this question in *Bedford*, but it had previously ruled that section 2(b) was violated by the communication provision in the 1990 *Prostitution Reference Case* (though saved by section 1; we do not believe it would be sustained today). The BCCLA takes the position that the aim of preventing public nuisance – which the Court found was the purpose of the communication provision – is not an adequate rationale for stifling the freedom of expression of sex workers or their clients to communicate about proposed transactions.

The Nordic Model makes it a crime to purchase sex, making any communication for the purpose of purchasing sex part of a criminal transaction. Studies of the effect of the Nordic Model in Sweden have pointed to the criminalization of the purchasing of sex having a similarly negative impact on the ability of street-based sex workers to perform client screening in Sweden, and a pushing of street-based sex work to isolated areas that are less safe for the workers.[2] Street sex workers have also reported an increased incidence of violence, resulting from an increased proportion of clients who are drunk and violent as part of their

---

[2] Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 Alta. L. Rev. 101 at 106, citing Susanne Dodillet & Petra Östergren, "The Swedish Sex Purchase Act: Claimed Success and Documented Effects" (Paper delivered at the International Workshop on Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, 3-4 March 2011), online: Göteborgs Universitet http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law_0.pdf at 22; Norway, Working Group on the Legal Regulation of the Purchase of Sexual Services, Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences, Abbreviated English Version (Oslo: Ministry of Justice and the Police, 2004) [Purchasing Sexual Services] at 19.

clientele as other clients move indoors.[3] In short, adopting the Nordic Model will likely increase sex workers' susceptibility to violence, and make it difficult for sex workers to take measures to protect themselves, which were among the shortcomings that the Court determined applied to the pre-*Bedford* communication prohibition in Canada.

BAWDY HOUSE PROVISION

The Court held that the bawdy house provision violated the right to security of the person, and struck it down because it endangers sex workers by preventing them from using what the Ontario Court of Appeal referred to as the "basic safety precaution" of working together in common indoor location. The bawdy house provision forced sex workers to work on the street, or in other locations determined by clients. The Court held that while Parliament has the power to regulate nuisances and community disruption, it must not do so "at the cost of the health, safety and lives of prostitutes." The Court stated that any law that prevents sex workers from resorting to a safe haven when they are at risk of violence "has lost sight of its purpose" (para. 136).

Similar to the bawdy house provision, the Nordic Model (as practiced in Sweden) criminalizes working together indoors. Indoor sex work is only permitted if the sex worker personally owns the space used to carry on sex work, and uses it by themselves. Swedish law further prohibits anyone from granting the right to another person to use their premises for commercial sex work, as the person granting that right would be seen as "promoting" sex work (*Penal Code*, ch. 6, s. 12). Criminalizing the act of multiple sex workers carrying on their work in an indoor location, together, would prevent sex workers from obtaining the safety benefits referred to by Ontario's Superior Court of Justice

[3] Chu & Glass, op. cit. at 106.

in *Bedford*, namely "the safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate. The Supreme Court noted this finding with approval" (para. 134). The exception to permit sex workers to carry on indoor sex work as long as they own the premises and do so alone does nothing to alleviate the deprivation of safety that sex workers generally will face if they are not permitted to work indoors together. The re-introduction of a criminal prohibition on sex workers working together, at an indoor location, is likely to be unconstitutional for the same reason as the previous provision was declared unconstitutional. Moreover, the BCCLA takes the position that such a provision would also be likely to unjustifiably infringe the *Charter*-guaranteed freedom of association.

LIVING OFF THE AVAILS PROVISION

The SCC determined that the living off the avails provision violated sex workers' right to security of the person, and struck it down. The Court noted that the law "punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad" (para. 142). The Court held that the law's effect of preventing sex workers from taking measures to protect their safety and even to save their lives were outweighed by Parliament's purpose for the law, which was to protect sex workers from exploitative relationships.

As a result, the Court determined that the living off the avails provision was unconstitutional.

The Nordic Model is more precise in its targeting of financial relationships with sex workers than was Canada's living off the avails provision. The Swedish *Penal Code* criminalizes those who "improperly financially exploit" sex workers. In Sweden, however, there are indications that in practice, there is no bright-line distinction between exploitative and non-exploitative relationships in practice, and that sex workers are unable to contract with others for the provision of referral, screening or security services.[4] Any new measure adopted by Canada that would have the effect of making it more difficult for sex workers to employ third parties for their protection, or makes their work less safe, will likely be unconstitutional. To the extent such laws reduce the ability of sex workers to associate together in business, they may also unjustifiably infringe the freedom of association.

2. **Do you think that selling sexual services by an adult should be a criminal offence? Should there be any exceptions? Please explain.**

No, for similar reasons as outlined above, and as outlined in our arguments in *Bedford* at the Ontario Court of Appeal and the Supreme Court of Canada.

The BCCLA takes the position that any provision banning the sale of sexual services (and conversely, the purchase of those services) manifestly interferes with the sphere of personal autonomy protected by the Charter's section 7 liberty interest. Sex workers are continually engaged in highly personal choices about their own bodies and their personal engagement in sexual activity. These are fundamental and personal choices that go to

[4] Dodillet & Östergren, op cit at 4.

the core of what it means to have individual dignity and independence. While Parliament and the legislatures may regulate work, they must do so in a way that is consistent with the *Charter*. We believe that a prohibition on selling sexual services will replicate the harms that have been demonstrated to result from the communication, bawdy house and living off the avails prohibitions. We do not think that such a prohibition would be constitutional or consistent with liberty.

3. **If you support allowing the sale or purchase of sexual services, what limitations should there be, if any, on where or how this can be conducted? Please explain.**

The BCCLA believes that the criminal law should not be used to prohibit or effectively prohibit sex work. Instead, provincial occupational health and safety law, employment law and human rights law should regulate sex work, just as other work is regulated in each province. Municipalities should similarly be able to regulate zoning as it applies to sex work, potentially with the guidance of provincial statute so as to ensure that such regulation is respectful of the rights of sex workers while serving the interest of the wider community.

An example of a regulatory approach worth examination is that of New Zealand. There, Parliament passed the *Prostitution Reform Act 2003* that decriminalized sex work while not endorsing it, created a framework to safeguard the human rights of sex workers and to protect them from exploitation, sought to promote the welfare and occupational health and safety of sex workers while contributing to public health, and prohibited prostitution of persons under the age of 18. This legislation requires sex work brothel owners to take all reasonable steps to ensure that condoms are used and that other health and safety measures are followed, and provides fines if operators fail to do this. The law protects the right of adults not to be forced into sex work, the right of those under age 18 not to be used in sex work,

the right to refuse particular clients or sexual practices, and the right not to be subjected to exploitative and degrading employment practices.[5] While sex work is recognized as work for the purpose of qualifying for social benefits, social benefits recipients cannot be forced to seek sex work, and if a sex worker refuses to continue in sex work, then sex work is deemed to be unsuitable for that person under social benefits legislation. The law also expressly prohibits specific exploitative actions to induce or compel anyone to provide commercial sexual services, or to make any payment derived from commercial sexual services.

Recently, the New Zealand Human Rights Review Tribunal decided the first-ever human rights case brought by a sex worker against her employer, and awarded her NZ$25,000 in damages for sexual harassment.[6] Such a decision, and the protection that it represents, could not take place in a regime in which sex work is criminalized.

New Zealand's Prostitution Law Reform Committee, evaluating the new regime five years after it was enacted, came to the conclusion that in the five years since its enactment "the sex industry has not increased in size, and many of the social evils predicted by some who opposed the decriminalisation of the sex industry have not been experienced. On the whole, the PRA has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off under the PRA than they were previously." The Committee recognized that progress has been

---

[5] New Zealand, Ministry of Justice, "Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003" (2008), available at http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report.

[6] DML v Montgomery [2014] NZHRRT 6 (12 February 2014).

slower than hoped in some areas; while employment conditions had improved, there were still sex workers vulnerable to exploitation.[7] The Committee made recommendations to improve labour and employment practices, and to take other measures to further protect sex workers.

The BCCLA has not had the opportunity to study every aspect of this legislation and thus is not currently in a position to endorse the legislation as it is written, wholesale. However, the BCCLA recommends that the government of Canada study the New Zealand model carefully as a similar model would appear to provide significant protections for sex workers and protect the public interest. New Zealand has a unitary system of government; we recognize that the provinces have the responsibility for implementation of numerous aspects of the New Zealand model under the division of powers, while the federal government would be responsible for other aspects.

The BCCLA takes the position that violent, abusive and exploitative aspects of sex work, including the involvement of minors in prostitution, should be addressed using *existing* Criminal Code provisions and social remedies. Extortion, battery, sexual assault, and juvenile prostitution are prohibited by the Criminal Code. To the extent it is suggested that these provisions have, until now, been ineffective in dealing with exploitation in relation to sex work, we think that with the threat of criminal sanction removed from sex work activities in general, over time, sex workers will avail themselves more readily of the protection of police, and of other laws designed to protect workers in the workplace such as the provincial human rights codes and occupational health and safety regimes.

---

[7] Prostitution Law Review Committee Report, conclusion.

4. **Do you think that it should be a criminal offence for a person to benefit economically from the prostitution of an adult? Should there be any exceptions? Please explain.**

No. Sex workers should be able to hire people to assist them in their work and to keep them safe, including drivers, security guards, and receptionists. Building owners, subject to appropriate provincial or municipal regulation, should be free to rent premises for these purposes. Any criminal prohibition on forming such relationships will breach the freedom of association of sex workers, and be likely to endanger sex workers, resulting in a violation of their right to security of the person. A criminal prohibition on others benefitting economically from sex work will mean that sex work cannot be regularized and will put at risk the ability of sex workers to avail themselves of a range of other services, including workplace protections.

The BCCLA takes the position that the criminal offence of extortion is broad enough to deal with any issue of exploitation of a sex worker by another person. There is no need for an additional provision to target sex work specifically. Section 346(1) of the *Criminal Code* defines extortion as follows: "Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done." This covers exploitative financial relationships in relation to sex workers, meaning those that involve coercion or force, or threats of coercion or force.

5. **Are there any other comments you wish to offer to inform the Government's response to the *Bedford* decision?**

The BCCLA recognizes the myriad social problems surrounding the sex trade today. The BCCLA continues to maintain that the criminalization of sex work is not the solution to these problems. By advocating that Parliament not use the criminal law to address sex work generally, the Association does not condone coercive or violent pimping, trafficking for the purposes of prostitution, or juvenile prostitution. Rather than attempting to legislate moral standards, a regulatory system should aim to reduce harm against all citizens equally. Removing the sex trade from the ambit of the criminal law would properly recognize marginalized sex workers' rights and allow them to reclaim the dignity, autonomy and safety that every citizen deserves.

6. **Are you writing on behalf of an organization? If so, please identify the organization and your title or role:**

Josh Paterson, Executive Director
British Columbia Civil Liberties Association