

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

1

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

1 Decriminalizing sex work(ers): law reform to protect health and human rights

- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Decriminalizing sex work(ers): law reform to protect health and human rights

This info sheet introduces the current context of the debate over reforming Canadian criminal laws on prostitution, and highlights the need for that debate to be informed by sound evidence and a commitment to the human rights of sex workers.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Prostitution and sex workers in Canada

Prostitution – the exchange of sex for money or other valuables – is legal in Canada. However, it is difficult for sex workers and their clients to engage legally in prostitution. The *Criminal Code* prohibits virtually every activity related to prostitution, and prohibits prostitution in almost every public or private space.

Despite this criminalization, there is every indication that thousands of people in Canada are involved in prostitution, including customers, sex workers, and other people who profit economically from prostitution. Although street-based prostitution is one of prostitution's most visible manifestations and is the focus of an inordinate proportion of police and judicial resources, it is estimated to account for at most 20 percent of prostitution activities in Canada. Public and legislative debate has tended to exclude the perspectives of sex workers who work through other venues such as escort agencies and

massage parlours. In recent years, research involving female sex workers in these other venues has increased, but the situations of male and transgendered sex workers still has not received much attention.

Laws related to prostitution have been enacted on the basis that they are needed to address the public “nuisance” of street-based prostitution and/or to protect against exploitation of those working in prostitution. Yet the available evidence suggests that current laws do little more than displace street-based prostitution from one location to another, and that the vast majority of sex workers in Canada have not been trafficked and are not exploited by “pimps” or those involved in organized crime. Until recently, little attention has been paid to the damage done to sex workers by the current laws.

Health and safety risks faced by sex workers

Lack of respect for the human rights of sex workers leaves them vulnerable to abuse by clients, police, predators, and those who exploit sex workers for economic gain. As a result of the murder and disappearance in recent years of over 140 sex workers in Canadian cities – most notably in Vancouver and Edmonton – public debate is only now beginning to conceive of the health and safety risks faced by sex workers as a human rights issue.

For example, recent studies on sex work in Canada conclude that federal law criminalizing communicating for the purpose of prostitution (section 213 of the *Criminal Code*) contributes to the risk of violence and other health and safety risks faced by sex workers (see info sheet 4). Criminalization also increases sex workers' risk of HIV infection, particularly those sex workers living in poverty (see info sheet 2).

Lack of human rights protections and foundations for law reform

Three foundations should guide the review and reform of the prostitution-related provisions of the *Criminal Code*:

- evidence from credible research and from sex workers themselves (see info sheet 4);
- Canada's obligations under international human rights law (see info sheet 6); and
- the *Canadian Charter of Rights and Freedoms* (see info sheet 8).

On the whole, international human rights instruments designed specifically to address prostitution do not reflect a respect for the rights and agency of sex workers. However, the human rights set out in numerous non-prostitution specific conventions to which Canada is a party, and international guidelines addressing HIV/AIDS and human rights, offer sex workers in Canada the potential for greater human rights protection. These international human rights laws and guidelines should be taken into account in the reform of Canada's criminal laws regarding prostitution.

Sex workers' human rights have not received much support to date under the *Canadian Charter of Rights and Freedoms*. A *Charter* analysis of the prostitution-related provisions of the *Criminal Code* shows that criminalization of prostitution results in numerous violations of sex workers' constitutional rights. Reforms to the *Criminal Code* provisions dealing with prostitution should respect the *Charter* rights of sex workers. While some court decisions have upheld various aspects of the *Criminal Code* dealing with prostitution, these judgments have failed to consider seriously the

human rights consequences for sex workers and should be revisited, particularly in light of new evidence and new developments in Canadian constitutional law.

Reforming the criminal law is only part of the challenge of changing social forces that undermine the health and human rights of sex workers. Additional reform requires the meaningful participation of sex workers in future decision-making about all laws, policies and programs that apply to them (see info sheet 5).

About these info sheets

In 2005, the Canadian HIV/AIDS Legal Network published an in-depth report on HIV/AIDS, prostitution, and sex workers entitled *Sex, Work, Rights: Reforming Canadian Criminal Laws on Prostitution*. This series of info sheets is based on that report. While the report contains in-depth analysis of policy, legal and ethical issues, the info sheets provide more concise information.

A note on terminology

In these info sheets, we use the terms "sex work" and "sex worker" out of respect for the dignity of people involved in sex work. However, we sometimes also use the term "prostitution" to refer to the in-person exchange of sexual services by one person for payment by another, as this is the legal term used in the provisions of the Canadian *Criminal Code* that are the focus here.

1

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

2

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability**
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Sex workers and HIV/AIDS: stigma, discrimination and vulnerability

This info sheet describes the relationship among HIV/AIDS, prostitution, and sex workers. It also discusses the concept of vulnerability to HIV and highlights common misconceptions about HIV/AIDS and sex work(ers).

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Combating stigma and discrimination by dispelling the myths

HIV/AIDS and prostitution are associated in problematic ways. Some people see prostitution as a cause of HIV infection in Canada, leading to increased stigma and discrimination against sex workers. However, the general characterization of sex workers as “vectors” of HIV infection is not justified. There is no epidemiological evidence in Canada to show that transmission of HIV from sex workers to their clients regularly takes place. Researchers have emphasized that sex workers in Canada are susceptible to the HIV risks faced by other sexually active people or people who use drugs. In fact, sex workers tend to be better informed than the general population about modes of HIV transmission and ways to prevent transmission of HIV. Many sex workers are “safer sex professionals.”

HIV transmission is related to unprotected sex, not the exchange of sex for money. There may be

individual sex workers living with HIV who do not take the necessary precautions to prevent the spread of sexually transmitted diseases including HIV. In this way sex workers are no different from many other sexually active people. All types of people engage in unsafe sexual practices for a range of reasons. While sex workers may have an economic motivation to engage in sexual intercourse without condoms where clients offer them more money, there is no reliable data verifying the frequency with which this takes place.

Are sex workers “vulnerable” to HIV infection?

Sex workers, advocates, and public health and social science researchers have stated that sex workers as a group are not inherently vulnerable to HIV infection because of the work they do. Instead, social, economic and personal factors can help explain why individual sex workers may be vulnerable to HIV/AIDS.

“Vulnerability” can be defined as “the extent to which individuals are capable of making and effecting free and informed decisions about their life.” Vulnerability to HIV/AIDS can exist at three interrelated levels: personal, programmatic, and societal.

Personal vulnerability arises from inadequate information about HIV infection and the absence of personal characteristics and skills required to reduce the risk of infection. For example, a person may be unable to negotiate sexual practices with a client, or may have an addiction that increases his or her risk of engaging in unsafe drug use or sex.

Programmatic vulnerability reflects the impact of programs on reducing or increasing personal vulnerability to HIV. Any legislation or law enforcement practices that undermine safer sex practices fall into this category. For example, criminal laws can impede sex workers' ability to negotiate and practice safer sex.

Societal vulnerability is the extent to which a person's capacity to reduce his or her vulnerability to HIV is influenced by social context – including factors such as gender inequality and its effects on personal relationships, attitudes toward sexuality, religious beliefs, racism, poverty, lack of adequate shelter or health services, lack of access to adequate employment or income. Many people who engage in “survival sex” or prostitution for drugs have experienced disempowerment in various ways in their lives. For instance, Aboriginal people are over-represented among sex workers who engage in survival sex in Vancouver's downtown eastside, linked to underlying factors such as poverty, addiction and physical and sexual abuse that many Aboriginal communities confront.

Lack of funding for health and safety issues other than HIV/AIDS

When consulted, various sex workers and organizations that provide support services to sex workers indicated that HIV/AIDS is not a “pressing” issue for them. Nonetheless, many of these organizations have benefited from funding for HIV prevention programs to build and sustain their infrastructure. While government funding has been available for HIV prevention initiatives, funding to address the broader health and safety concerns of sex workers has not. Focussing on HIV/AIDS to the exclusion of these broader health issues reinforces the stigmatizing association of sex work and HIV. It also fails to address the systemic societal factors underlying some sex workers' vulnerability to HIV.

Evidence, not stigma, must guide law reform

Historically, stigma and discrimination have caused public debate on prostitution to be shaped by moralism rather than thoughtful research, study and consultation with those most affected. For example, Parliament's Special Committee on Pornography and Prostitution (the “Fraser Committee”) recommended in 1985, after extensive consultation and analysis, that Parliament decriminalize prostitution activities, yet Parliament chose instead to extend criminal penalties to clients by enacting the communicating provision.

Evidence from credible social science and public health research, and from sex workers themselves, is vital to the question of how Canadian law dealing with prostitution is reformed. Evidence-based decision-making can help determine how law and policy affect sex workers' fundamental rights, and help to protect those rights.

In Canada, the stigma associated with sex work and its illegal status makes it challenging to conduct research involving sex workers. Nonetheless, there have been numerous studies undertaken since the mid-1980s on the subject of street-based prostitution. Street-based prostitution has dominated research on sex work in Canada to the point where many unjustifiable generalizations about sex work have been made based only on the unique situation of street-based workers. In this way, research on the link between HIV/AIDS and sex work has sometimes served to heighten the potential stigma affecting sex workers. However, more recent studies have gone to some pains to include off-street sex workers from varied venues.

Conclusion

By unfairly associating sex work with HIV infection, sex workers have become scapegoats in the HIV epidemic. The increased stigma faced by sex workers can, in turn, increase their vulnerability to HIV infection. Thus, it is important that HIV prevention and education among sex workers continue to be part of an overall strategy to reduce HIV transmission in Canada. At the same time, other health and safety concerns faced by sex workers should not be ignored by government and community-based AIDS organizations. Challenging the stigma faced by sex workers, and defending the human rights of sex workers, must be part of the response. Laws, policies, and programs should be based upon evidence, not prejudice and misconceptions.

2

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

3

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the Criminal Code**
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Prostitution offences in the *Criminal Code*

This info sheet outlines how Canadian law criminalizes activities related to prostitution.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Legislating morality vs. reducing harm

In Canada, criminal prohibitions must serve a “legitimate public purpose.” The Supreme Court has stated that Parliament has the right to legislate on the basis of **morality** as long as it is for the purpose of “safeguarding the values which are integral to a free and democratic society.” The Court has also held that Parliament cannot impose a standard of public and sexual morality solely because it reflects the conventions of a given community.¹

The individual rights and freedoms enshrined in the Canadian *Charter of Rights and Freedoms* cannot be infringed for the purpose of conventional “morality.” However, the Supreme Court has recognized the **prevention of harm toward vulnerable groups** as a legitimate purpose of the criminal law. In cases dealing with child pornography, hate speech and obscenity, for example, the Court has justified limitations on fundamental rights – such as freedom of expression – imposed under the

Criminal Code on the basis of the harms that such provisions seek to prevent. Accordingly, the existing prostitution-related offences in the *Criminal Code* are generally defended by the government and others on the basis that they seek to prevent harm or otherwise protect the public interest.

“Prostitution” defined

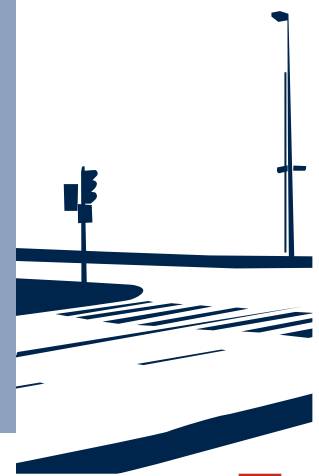
In the *Criminal Code*, “prostitute” is defined as “a person of either sex who engages in prostitution.” While the word “prostitution” is nowhere defined in the *Code*, some Supreme Court of Canada judgments have defined prostitution as the “offering by a person of his or her body for lewdness for payment in return” and “the exchange of sexual services of one person in return for payment by another.” Neither “lewdness” nor “sexual services” are defined in the *Criminal Code*. However, two provincial courts of appeal have recently confirmed that “lewd acts” can include acts that do not involve genital touching but are nonetheless sexually stimulating. For example, courts have found

that sado-masochistic activities not involving genital contact fall within the definition of “prostitution.”

Prostitution is not prohibited by the *Criminal Code*. But the prostitution-related provisions in the *Criminal Code* (sections 210 to 213) make activities related to prostitution illegal in all but the narrowest circumstances

Section 210 and 211: bawdy-house laws

Under Section 210, it is illegal to “keep” a brothel or “common bawdy-house,” which is defined as “a place that is kept or occupied, or resorted to by one or more persons for the purposes of prostitution or the practice of indecency.” In addition, anyone found in a bawdy-house – whether a sex worker, a client, or another employee – can also be charged under section 210 simply for being there. Owners, landlords, lessors, tenants, occupiers, or other persons having control of a place can also be charged for knowingly allowing a place to be used a bawdy-house.



What kind of “place” can be an illegal bawdy-house?

The definition of “place” has been interpreted broadly by courts to mean any defined space, including a car or even a parking lot. A “place” can be public or private, enclosed or uncovered, used permanently or temporarily, and the person charged need not have the exclusive right to use it. The *Criminal Code* also says that, in a criminal trial, the prosecution may introduce evidence of the general reputation of a place in proving that it is a bawdy-house.

Criminal liability of landlords and owners

If a person is convicted of keeping a common bawdy-house and the person does not own the premises, notice may be served on the owner, landlord or lessor of the premises. If the owner/landlord/lessor does not then take steps to terminate the person’s tenancy or right of occupation, and the person re-offends, the owner/landlord/lessor will be found guilty of keeping a common-bawdy house unless they can prove they took reasonable steps to prevent the premises from being used in this way.

Transporting or directing a person to a bawdy-house

Section 211 makes it illegal to knowingly transport or direct any person to a common bawdy-house.

Penalties under sections 210 & 211

A person found guilty of being found in, or of transporting or directing a person to, a common bawdy-house is guilty of a summary conviction offence and can be sentenced to a maximum fine of \$2,000, six months’ imprisonment, or both at once. (If the court only orders the person to pay a fine, it can also impose the condition that if the person does not pay the fine they can be imprisoned for up to six months.) A person found guilty

of keeping a common bawdy-house is guilty of an indictable offence and can be imprisoned for up to two years.

Section 212: “procuring” and “living on the avails”

Section 212 prohibits a person from “procuring” a person to engage in prostitution. It also prohibits a person from “living on the avails” (i.e., the earnings) of a sex worker where they are economically or physically exploiting the sex worker.

Specifically, section 212 makes it illegal to:

- induce a person to enter into, or engage in, prostitution or illicit sexual intercourse, whether through enticement or exploitation (economic or otherwise);
- conceal a person in a common bawdy-house or directing, taking or inducing a person to frequent a common bawdy-house;
- live wholly or in part on the avails of prostitution;
- live wholly or in part on the avails of prostitution of a person under 18 years in aggravating circumstances (i.e., where there is profit, violence, intimidation or coercion); and
- obtain the sexual services of a person under 18 years of age, or communicate with anyone for this purpose.

Penalties under section 212

The first two “procuring” offences listed above carry a maximum penalty of 10 years in prison.

Similarly, living on the avails of prostitution of a person who is 18 or older also carries a maximum 10 year sentence. However, living

on the avails of prostitution of a person under 18 carries a maximum penalty of 14 years in prison. If the person is prostitution is under 18 and there are additional aggravating circumstances, such as aiding or compelling the person to engage in prostitution for the purpose of profit or there is violence or coercion, the law also specifies a minimum penalty of five years’ imprisonment.

Finally, there is a maximum sentence of five years in prison for obtaining sexual services for money from anyone under 18 or communicating with anyone for this purpose.

Living “parasitically” on the avails of prostitution

“Living on the avails” means to have an economic stake in the earnings of a prostitute. The prosecution does not have to prove there was coercion: for example, escort agency owners have been convicted of this offence even where the court has recognized a supportive relationship between the owner and the sex workers. According to court decisions, this section should be interpreted as only criminalizing “parasitic” relationships – that is, relationships between sex workers and people they are not legally or morally obliged to support. Under section 212(3), evidence that a person lives with or is habitually in the company of a “prostitute” or lives in a common bawdy-house is proof that the person is guilty of living on the avails of prostitution, unless there is evidence otherwise. This means that a person charged with “living on the avails” can be convicted even if there is reasonable doubt about his or her guilt.

Trafficking and migration

Section 212 also prohibits “forced” migration and trafficking for the purposes of prostitution. It is illegal to induce persons from outside Canada, or entering Canada, to engage in prostitution or “illicit

sexual intercourse” or to frequent a bawdy-house. It is also illegal to induce people to leave Canada for the purposes of prostitution and related activities.

Section 213: communicating for the purpose of prostitution

Section 213 makes it illegal for sex workers and clients to “communicate” in a public place for the purposes of prostitution or engaging the sexual services of a sex worker. It is illegal to stop, attempt to stop or impede pedestrian or vehicular traffic in order to engage in prostitution or obtain sexual services. “Public place” is defined broadly to include any place to which the public has a right of access or that is open to public view. This includes motor vehicles.

Penalties under section 213

Section 213 is a summary conviction offence. A person found guilty under this section may be fined up to \$2,000, imprisoned for six months, or both.

Public “nuisance”

The communicating offence was enacted in 1985 and was principally intended to address the public “nuisance” resulting from street-based prostitution, increase the enforceability of the law, and extend the law to include clients (not just sex workers). Courts have described the “nuisance” as street congestion and noise, verbal harassment of people who are not sex workers or their clients, and general detrimental effects on passers-by and bystanders, especially children.

Note

- ¹ See the Supreme Court cases of *RJR-MacDonald Inc v. Canada (Attorney General)*, [1995] 3 SCR 199 and *R v Butler*, [1992] 1 SCR 452.

3

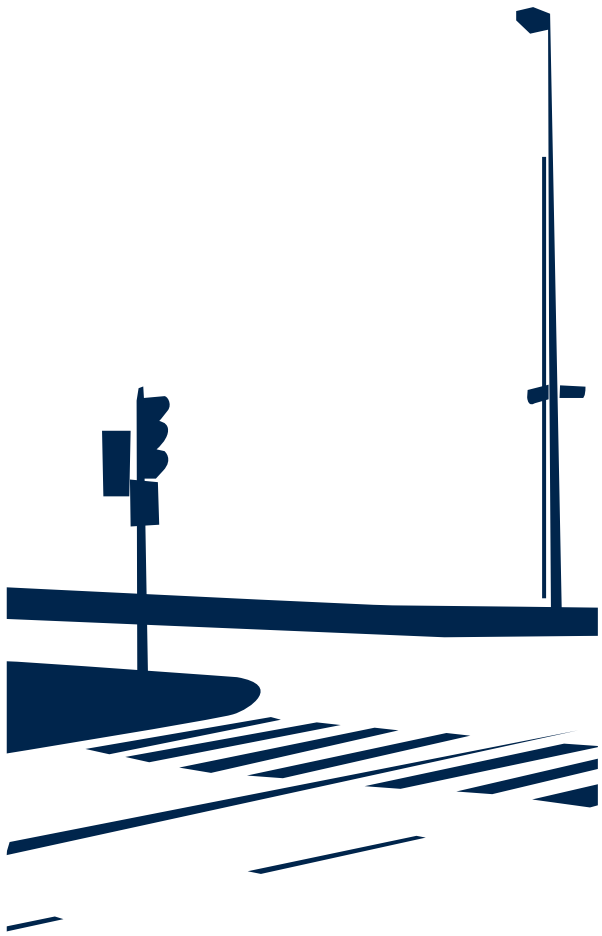
Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.



The logo for the Canadian HIV/AIDS Legal Network and Réseau juridique canadien VIH/sida. It features a white, brush-stroke style arc above a thin white horizontal line. Below the line, the text is arranged in two columns: "Canadian HIV/AIDS Legal Network" on the left and "Réseau juridique canadien VIH/sida" on the right. The entire logo is set against a dark blue background with a red border on the right side.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

4

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers**
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers

This info sheet examines how ways in which law enforcement criminalizes many aspects of sex worker's lives and promotes their social marginalization. This situation has contributed to the health and safety risks, including the risk of HIV infection, faced by sex workers.

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Criminalization, social marginalization and safety risks

The relationship between criminal law and sex workers' health and safety, including the risk of HIV infection, is complex. The criminal law reflects and reinforces the stigmatization and marginalization of sex workers. This marginalization has a concrete dimension and predictable outcomes. The *Criminal Code*, and its enforcement, often forces sex workers to work on the margins of society and in circumstances where they are vulnerable to violence, exploitation and other threats to their health and safety, including potential exposure to HIV.

Criminalizing sex workers' livelihood and lives

Even though the work of prostitution is legal in Canada, the *Criminal Code* offences related to prostitution make it virtually impossible for sex workers to engage legally in prostitution (see info sheet 3). To avoid arrest, sex workers often work in situations that limit the control they exercise over their working conditions, increasing the health and safety risks.

Section 210 and 211: bawdy-houses

Under the "bawdy-house" offences:

- it is illegal for sex workers to use their residence, or to keep another premises for the purposes of engaging in prostitution;

- sex workers risk eviction if they are found guilty using their residence for prostitution;
- it is illegal in most circumstances to use hotels and hotel rooms for prostitution; and
- massage parlours or body-rub parlours where prostitution takes place are illegal.

It appears to be legal for a sex worker to engage in prostitution in a client's residence or other premises controlled by the client, but not if the premises are frequently or habitually used for prostitution.

Section 212: "procuring" and "living on the avails of prostitution"

Section 212 potentially criminalizes sex workers' personal relationships. Police can effectively presume that sex workers' roommates, intimate

partners and family members are living on the avails of prostitution – that is, they are somehow benefiting economically from sex work.

While section 212 offers sex workers protection from exploitative situations, paradoxically it also criminalizes situations where a sex worker has chosen to enter into a professional relationship with someone for safety or economic reasons. Under section 212 it is illegal for a sex worker to:

- refer a client to another sex worker;
- allow other sex workers to use their residence to engage in prostitution;
- work with another sex worker on the same premises or in the same place; or
- to employ someone for protection and to ensure that clients pay for services rendered.

Section 213: communicating in public for the purposes of prostitution

Section 213 places a great deal of power in the hands of police to arrest sex workers, or threaten sex workers with arrest. Since it is illegal for sex workers to publicly solicit or negotiate with clients, they are precluded from working in any public place such as on the street, in parks, or in bars. Sex workers found guilty under this provision may be fined, imprisoned, or both. For sex workers who cannot afford to pay fines, a fine may be tantamount to a jail sentence if they can be imprisoned for non-payment.

Research has shown that the enforcement of the communicating section:

- displaces street-based prostitution from centrally located residential or commercial neighbourhoods to industrial or remote neighbourhoods where sex workers have few people to turn to for help if prospective clients or predators become aggressive or violent;
- results in more tense working conditions and fewer clients, which means that some sex workers may be less cautious about accepting potentially dangerous clients;
- means that sex workers have less time to negotiate their services and safer sex with potential clients; and
- means that some street-based sex workers change hours of work or the days they worked to avoid police.

Violence against sex workers

Criminalization, and the resulting social marginalization, has had a detrimental impact on the health and human rights of sex workers – women, men and transgender – in Canada. A number of Canadian researchers have identified multiple dimensions to the relationship between the Canadian criminal law and sex workers' health and safety.

Professor John Lowman reviewed statistical evidence of violence against sex workers, media reports of violence against sex workers, and the criminalization of activities related to prostitution in British Columbia. He found that the *Criminal Code*:

- contributes to legal structures that tend to make sex workers responsible for their own victimization, whereby sex workers “deserve what they get”;
- makes prostitution part of an illicit market and create an environment in which brutal forms of manager-exploitation can take root;
- encourages the convergence of prostitution with other illicit markets, such as the drug market; and
- alienates sex workers from the protective service of police by institutionalizing an adversarial relationship between sex workers and police.¹

Statistics Canada has also reported on the high levels of violence experienced by women working in street-based prostitution; the majority of known assaults that ended in death were at the hands of customers, while most of the rest were the result of a “drug-related incident”.² In a 2000 study based on interviews with 201 current and former sex workers in Victoria and 13 surrounding municipalities, Professors Benoit and Millar reported that not only does the criminal law penalize sex workers for trying to make a living, but their consequent marginalization leaves them vulnerable to abuses by those more powerful. This vulnerability is exacerbated by the adversarial relationship established between police and sex workers; sex workers' experiences with police make them unwilling to seek help from this source.³

Heightened vulnerability: Aboriginal women and transgender sex workers

The situation of many Aboriginal people in Canada has resulted in conditions that place Aboriginal sex workers, especially women, at greater risk. The legacy of colonization and dispossession has been communities struggling with the challenges of poverty, addiction, and abuse, and alienated from police who should be a source of protection against violence. These factors further marginalize many Aboriginal people involved in sex work and expose them, and in particular Aboriginal women, to greater risks.

The evidence also indicates that transgender sex workers face significant risks of violence while working. The risk is elevated for street-based transgender sex workers. Transgender sex workers are more likely to engage in street-based prostitution because many escort agencies and off-street venues are unwilling to hire transgender sex workers.

Sex workers' HIV risk

Vancouver's Pivot Legal Society conducted an in-depth analysis of the impact of criminalization on the health status of sex workers, including exposure to HIV. The analysis, based on affidavits gathered from 91 sex workers from Vancouver's Downtown Eastside, found that the loss of control over working conditions occasioned by the criminal law exacerbated sex workers' potential exposure to HIV.

Rather than enabling them to make the kinds of choices that reduce risk of HIV infection, they are placed in situations where they are less able to insist upon condom use and are at greater risk of physical and sexual violence if they refuse a client's request to go without protection. Affiants noted that condoms were readily available through the network of public health services in the DTES. However, lack of control over their work and the threat of violence can, at times, limit their ability to use condoms, thereby contributing to the likelihood of their exposure to HIV.⁴

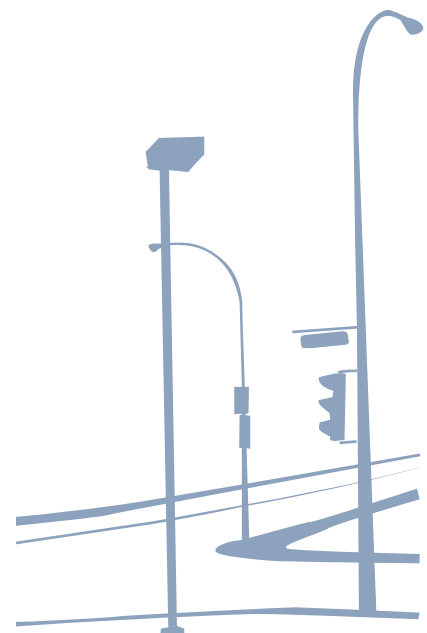
The sex workers who provided evidence for the Pivot study linked the criminalization of prostitution and the poverty many of them experience. They stated that police presence on or near strolls leads to fewer clients, increasing the competition among sex workers which can at times result in a "price war" as sex workers offer lower prices in order to get jobs and creates additional economic pressure to risk sex without a condom. Sex workers also gave evidence that their ability to use condoms is limited when they face challenges of extreme poverty and risk of violence.

Selective enforcement and unequal sentencing

Statistical evidence demonstrates a pattern of selective enforcement. A Statistics Canada report on prostitution-related criminal charges and convictions from 1977 to 1995 revealed that police exercise a high degree of discretion when enforcing the criminal laws relating to prostitution. Since the communicating provision (section 213 of the *Criminal Code*) was enacted in 1985, roughly 90 percent

of criminal charges and convictions have related to communicating, far outstripping charges and convictions related to bawdy-houses (sections 210 and 211) and procuring and living on the avails (section 212).

The Statistics Canada study also documented sex-based discrimination in sentencing upon conviction for communicating. The number of men and women charged was roughly equivalent and nearly all of those charged were found or plead guilty. However, women (overwhelmingly sex workers) convicted under section 213 were dealt with more harshly than men (overwhelmingly clients) and bore the personal costs of law enforcement to a much greater extent than men. Women were sentenced to pay higher fines than men; they were also sentenced to prison more frequently, and received longer prison sentences, than men.



The *Criminal Code* should be used to protect sex workers

The social and political marginalization of sex workers will not end with the repeal of some or all of the prostitution-related provisions of the *Criminal Code*. It will be necessary to examine other laws and practices that either undermine the safety and human rights of sex workers or that can be used to better protect sex workers' safety and rights (see info sheet 5). Sex workers deserve the protection and benefits offered to all people under Canadian laws. True reform will also require a change in social attitudes towards prostitution and sex workers.

One important step toward recognizing the rights of sex workers that can be taken immediately is for police to use the *Criminal Code* to protect sex workers. Sex workers face criminal sanctions for their everyday activities, despite the fact that prostitution is legal in Canada. Research shows that because of the illegality of those activities, sex workers have little expectation that the police will protect them from violence and every expectation that the police will arrest or fine them if given the chance. Police are often unwilling to take seriously the complaints of sex workers who do seek help. Sex workers are thus highly vulnerable to violence, robbery and other abuse from which the police might otherwise provide some level of protection. The *Criminal Code* prohibits assault, attempted assault, aggravated assault, criminal negligence causing bodily harm, criminal harassment, torture, forcible confinement, kidnapping, extortion, and fraud. These sections, which are not prostitution-specific, should be enforced against people

who physically threaten or harm sex workers, who exploit sex workers, or who compel a person to engage in prostitution.

Notes

- ¹ J Lowman. Violence and the outlaw status of (street) prostitution in Canada. *Violence Against Women* 2000; 6(9): 987-1011.
- ² D Duschesne (Canadian Centre for Justice Statistics). Street prostitution in Canada. *Juristat Service Bulletin* (1997); 17(2).
- ³ C Benoit, A Millar. Dispelling myths and understanding realities: working conditions, health status, and exiting experiences of sex workers. October 2001.
- ⁴ Pivot Legal Society. The impact of criminalization on the health status of sex workers (June 2004).

4

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

5

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers

5 Regulating prostitution beyond the criminal law

- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Regulating prostitution beyond the criminal law

This info sheet explores how police in some jurisdictions rely on provincial and municipal laws to regulate sex workers' activities. It also outlines some of the provincial and municipal issues that might arise if the prostitution-related offences in the *Criminal Code* were to be repealed.

Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

Traffic control laws

In addition to the *Criminal Code* provisions related to prostitution (see info sheet 3), police rely upon provincial and municipal laws to control prostitution and related activities. For example:

- Ontario's *Highway Traffic Act* says: "No person, while on the roadway, shall stop, attempt to stop or approach a motor vehicle for the purpose of offering, selling or providing any commodity or service to the driver or any other person in the motor vehicle."
- In Quebec, the *Highway Safety Code* prohibits pedestrians from standing on the roadway to solicit transportation or to deal with the occupant of a vehicle.

Many municipalities have by-laws that mirror provincial highway traffic laws, as well as by-laws that prohibit soliciting in public without a licence, loitering and refusing to circulate.

Under these provincial and municipal laws, police can issue tickets to sex workers. If the sex worker fails to pay the fine associated with the violation, he or she can be arrested and jailed for non-payment of the fine. Controlling street-based prostitution using these laws means that a sex worker may be imprisoned without having been proven guilty beyond a reasonable doubt of a *Criminal Code* offence.

Municipal licensing and zoning

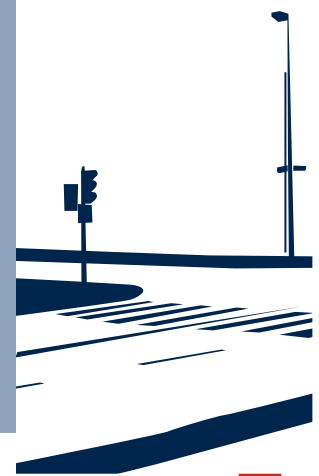
Municipal councils have the ability to tailor by-laws and regulations in an attempt to regulate prostitution locally. Regulation of off-street prostitution (e.g., licensing of escorts and escort agencies, and massage and body-rub parlours) already exists in many municipalities in Canada. For example, in Edmonton, in order to place an escort ad in any Edmonton paper a person must present his or her escort licence. To obtain an escort licence, a person must pay a \$1,600 fee and undergo a rigorous screening process, including a criminal record check.

It is often easier for police to issue tickets and summons under the authority of municipal by-laws than to build a case to support charges under the *Criminal Code*. A study in Windsor, Ontario, found that police were more likely to rely on municipal licensing by-laws governing escorts and escort agencies than on the *Criminal Code*.

Municipalities also have the power to make by-laws affecting zoning of land for different purposes. This power has been used to restrict the operation of escort services and body-rub or massage parlours to non-residential or industrial zones.

Reform beyond the criminal law

Other aspects of provincial or municipal law also need to be examined to ensure that sex workers, whose work is legal under Canadian law, are entitled to the full protection of their health and safety under the law. The UNAIDS/Inter-Parliamentary Union *Handbook for Legislators on HIV/AIDS, Law and Human Rights* and the *International*



Guidelines on HIV/AIDS and Human Rights provides examples of best practices for legislators in the area of prostitution. These best practices and guidelines focus on protecting the health and human rights of sex workers and clients with the goal of reducing the spread of HIV.

Recommendation:

Beyond changes to the criminal law, reform in other areas of law and policy should conform to internationally recognized best practices. Reform should be consistent with the guidance provided by UNAIDS and the Inter-Parliamentary Union in their *Handbook for Legislators on HIV/AIDS, Law and Human Rights*, and by UNAIDS and the Office of the UN High Commissioner for Human Rights in the *International Guidelines on HIV/AIDS and Human Rights*. In particular:

- sex workers' rights should be protected under occupational health and safety legislation;
- sex workers should be given the option of being classified as employees rather than independent contractors so they can contribute to, and obtain, state social welfare and industrial benefits;
- HIV testing and medical certificates should not be mandatory for sex workers or clients; and
- controls on organized prostitution should be analogous to other legal business enterprises in terms of zoning, licence conditions and fees, and health requirements.

If adult prostitution were to be decriminalized, prostitution and sex workers would likely be subject to two types of laws:

- general laws applicable to workers and employers
- municipal laws that regulate prostitution as a business

Federal and provincial/territorial governments have enacted general laws to protect the rights and health and safety of workers (e.g., employment standards, occupational health and safety, workers' compensation, and labour relations). The federal government has also enacted social benefits legislation that applies to all workers in Canada, such as the *Employment Insurance Act*. Sex workers should be entitled to the benefit of such laws.

Recommendation:

The federal government should initiate a process to determine which federal, provincial and municipal laws should apply to the organization and practice of prostitution following decriminalization. This process should involve provincial/territorial governments, municipal governments, sex workers and human rights organizations.

If activities associated with engaging in prostitution are decriminalized, the business of prostitution will likely be subject to some type of regulation. Licensing and zoning by-laws already regulate escort agencies and escorts, and massage and body rub parlours in a number of Canadian cities. Licensing is a source of revenue for municipalities, and in combination with zoning, a way to control business activities.

If left exclusively to provincial and municipal regulation, prostitution would be beyond the reach of the federal Parliament and national standards. This would likely result in a patchwork of widely varying regulatory schemes across Canada. Some regulatory schemes might result in health and safety outcomes worse than those sex workers currently experience under prostitution-related *Criminal Code* prohibitions. Therefore, it is crucial to involve sex workers in law reform, in order to take account of their views about how to minimize this potential for harm.

Recommendation:

Federal, provincial/territorial and municipal governments must commit to the meaningful participation of sex workers in future decision-making about law and policy. In particular, sex workers must have a say in determining what laws and policies should apply to prostitution and sex workers. Where necessary, governments should make available funding to support such participation.

5

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

6

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights**
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Sex workers and international human rights

This info sheet examines human rights protections for sex workers in international law.

Canadian
HIV/AIDS
Legal
Network | Réseau
juridique
canadien
VIH/sida

Sex workers' entitlement to human rights

Efforts to improve the health and safety of sex workers must be based, first and foremost, on a recognition of the individual agency, dignity and worth of sex workers. The recognition of individual agency is central to what it means to be human and to human development. It also underpins international human rights guarantees, as expressed in the preamble to the *Universal Declaration of Human Rights*. Sex workers are part of Canadian society and communities, with full human rights entitlements.

The responsibility of government

Human rights law is based on the principle that states have the primary responsibility for ensuring that human rights guarantees are met. States are obligated to respect, protect and fulfill the rights of all people subject to their jurisdiction. Therefore, they must ensure their laws, policies, budgets and administrative and other

actions do not conflict with human rights guarantees and advance the realization of human rights. All state actors are bound by these obligations – federal, provincial and local governments, and the institutions and people that are legally empowered to act for the state, such as police.

States have a particular duty to respect, protect and fulfill the human rights of the most vulnerable people. Human rights law is of greatest importance to those people within a given society who are marginalized by social institutions and thus are vulnerable to human rights abuses.

International treaties related to prostitution

The primary international treaty dealing with prostitution does not, on the whole, respect for the rights and agency of sex workers. As its name suggests, the 1949 UN *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (the “*Trafficking*

Convention”) addresses two main concerns: trafficking in persons for the purposes of prostitution, and the exploitation of persons for prostitution.

The *Trafficking Convention* requires States who are parties to the treaty to punish any person who exploits the prostitution of another person or who procures or entices another person into prostitution, even with the consent of that person. States also agree to adopt measures to punish people involved in operating brothels or places of prostitution. These requirements are mirrored in a general sense in the Canadian *Criminal Code* prohibitions on bawdy-houses, procuring, and living on the avails of prostitution (see info sheet 3).

While the *Trafficking Convention* implicitly recognizes the theoretical right of adult women to engage in prostitution, it is also “based on the premise that sex work should end, and implicitly endorses the view that adult sex workers should be saved from themselves and rehabilitated.”¹ This undermines sex workers' legitimate claims

to human rights and is a basis for governments' excuses for maintaining laws that either expressly or effectively criminalize sex work and sex workers.

Canada has not ratified the *Trafficking Convention* and so is not bound by its terms; instead, it can and should look to other, binding international human rights treaties in reforming its laws to better respect, protect and fulfil sex workers' human rights.

Other international human rights treaties

Ironically, the non-prostitution-related conventions to which Canada is a party offer sex workers the potential for greater human rights protection than prostitution-specific instruments. As a party to both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Canada has an obligation to respect, protect and fulfill the rights set out in these covenants for all people within its territory, including sex workers.

Under the ICCPR Canada is legally obligated to *guarantee* sex workers':

- Right to life. (Article 6)
- Rights to liberty and security of the person, and the right not to be subject to arbitrary arrest or detention. (Article 9)
- Right not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour or reputation, as well as the right to be protected by law against such interference or attacks. (Article 17)
- Right to freedom of expression. (Article 19.2, 19.3)

- Right to freedom of association with others. (Article 22)
- Right to equality before the law and equal protection of the law without any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, poverty, birth or other status. (Article 26)
- Right to an effective remedy for violations of rights or freedoms, notwithstanding that the violation has been committed by persons acting in an official capacity. (Article 2.3)

Under the ICSECR, Canada is legally obliged to take steps towards the *progressive realization* of sex workers':

- Right to work, including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, with appropriate safeguards for this right. (Article 6.1)
- Right to enjoy just and favourable conditions of work. (Article 7)
- Right to form and join a trade union, and the right of trade unions to function freely. (Article 8.1)
- Right to social security, including social insurance. (Article 9)
- Right to special protection for mothers during a reasonable period before and after childbirth, including paid leave or leave with adequate social security. (Article 10.2)
- Right to an adequate standard of living for themselves and their families. (Article 11.1)
- Right to the highest attainable standard of physical and mental health. (Article 12.1)

Obviously, other international treaties dealing with the human rights of women are also relevant to human rights-based law reform to respect, protect and fulfill sex workers' human rights (see info sheet 7).

HIV/AIDS, sex workers and human rights

The UN's International Guidelines on HIV/AIDS and Human Rights suggest that for "adult sex work that involves no victimization," it is useful to review criminal law with the aim of decriminalizing sex work as much as possible. Criminal laws that raise the risk of HIV/AIDS or that otherwise contribute, directly or indirectly, to threats to the health and safety of sex workers should be repealed.²

The Inter-Parliamentary Union (IPU), which represents legislators from all over the world, has collaborated with UNAIDS to produce the *Handbook for Legislators on HIV/AIDS, Law and Human Rights*. It provides examples of best practices for legislation in relation to prostitution, and calls for the review of criminal laws relating to prostitution with a view to decriminalization. The *Handbook* recognizes that criminal regulation impedes the provision of HIV/AIDS prevention and care by driving people engaged in prostitution underground, and suggests that positive public health outcomes are more likely to be achieved where prostitution is treated as a personal service industry. By treating prostitution as a personal service industry which is neither condemned nor condoned, public health objectives are much more likely to be achieved than under a criminal law approach. The IPU calls on parliamentarians to engage in a productive dialogue with the sex industry to these ends.

Human rights-based reform is needed

The available evidence indicates that Canada is not respecting, protecting and fulfilling sex workers' right to health or other human rights (see info sheet 4). Sex workers continue to face unsafe working conditions, in many instances as a result of the criminalization of sex work. Law and policy reform should examine ways to improve health services for sex workers. In particular, such reforms should assess sex workers' needs for primary health care and sexual health programs, including prevention programs for HIV and other sexually transmitted infections. Reforms should also examine ways to include sex workers under occupational health and safety and workers' compensation legislation.

Notes

- ¹ J Csete, M Seshu. Still underground: searching for progress in realizing the human rights of women in prostitution. *HIV/AIDS Policy & Law Review* 2004; 9(3): 1, 8-13.
- ² *HIV/AIDS and Human Rights: International Guidelines*. UN High Commissioner for Human Rights and UNAIDS, 1998: Guideline 4 (para. 29c), available via www.ohchr.org/english/issues/hiv/guidelines.htm.

6

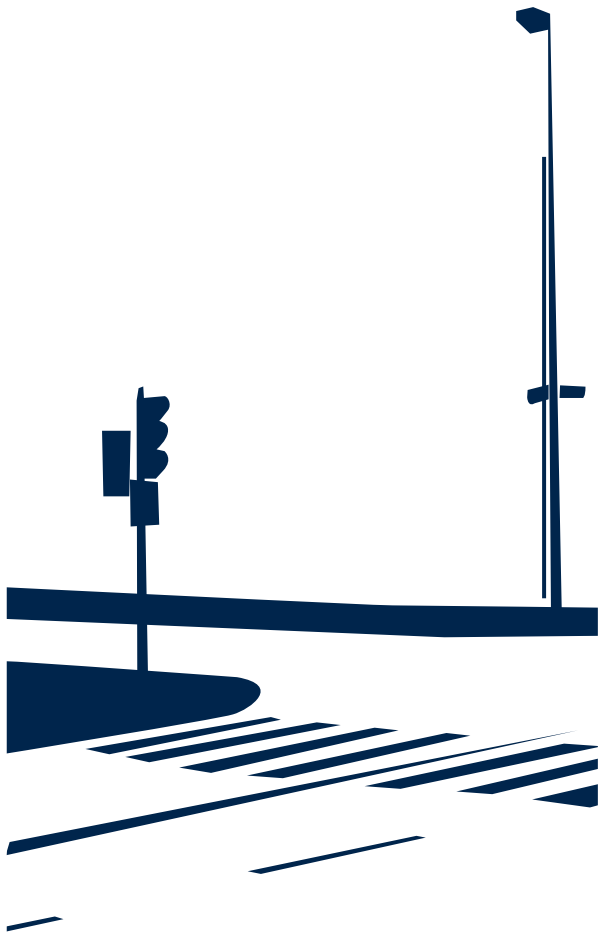
Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.



Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

A dark blue rectangular area with a red border on the right side. At the top, there is a white brushstroke graphic. Below it, the text "Canadian HIV/AIDS Legal Network" is written in white, stacked vertically. To the right of this text, separated by a thin white vertical line, is the French text "Réseau juridique canadien VIH/sida", also stacked vertically.

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

7

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights**
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Sex work and women's rights

This info sheet examines sex workers' health and human rights from a women's rights perspective.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Decriminalizing sex work(ers): treating women with dignity and respect

Many people mistakenly think that no woman would choose prostitution as a profession or a way of earning income, and equate prostitution with coercion and trafficking. Failing to recognize prostitution as a valid job choice and failing to see sex workers as people who can make their own choices rationally is disrespectful of sex workers and their human rights. There are situations where sex workers, and in particular women sex workers, are coerced and exploited, economically and otherwise. However, evidence from sex workers and researchers indicates that most women involved in street-based and off-street prostitution in Canada are not controlled by "pimps." Nor is there credible, verifiable evidence of the involvement of organized crime in prostitution in Canada.

Notwithstanding the ethical and human rights imperative to respect women's agency, in the Canadian debate about the "problem" of prostitution, sex workers' perspectives and experiences have rarely been taken into account. Even when they are taken into account, these perspectives and experiences have too often been filtered through other people's assumptions, or through the methods and questions upon which research has been based. Little attention has been paid to the health or human rights of sex workers.

This is beginning to change, in part because of the tragic murder and disappearance in recent years of over 140 sex workers in Canadian cities (principally women in Vancouver and Edmonton). In February 2003, the House of Commons passed a motion to review the *Criminal Code* in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex-trade workers.

Prostitution and trafficking – not the same thing

The confusion between, and the equation of, prostitution and sex trafficking is problematic, both ideologically and practically. As Kate Butcher put it:

The distinction between trafficking and prostitution is important because it pivots on individual agency. Trafficking, though variously defined, covers coercion, forced labour, and slavery. Prostitution describes the sale of sex, by no means necessarily without consent or with coercion.... Millions of women have made the decision to sell sex, usually but not always on economic grounds. Selling sex is a pragmatic response to a limited range of options.¹

As Joanne Csete and Meena Saraswathi Seshu point out, confounding prostitution and trafficking is not merely a semantic challenge, but has implications for the rights of women involved in prostitution:

There is no question that the motivations for sex work are complex and varied, and that some women enter prostitution because of poverty and because other livelihood alternatives are extremely limited. But to reduce prostitution to something involving no choice or agency on the part of the women practising it is as demeaning and as much a human rights violation as the violence and stigma that sex workers regularly face.²

Women, sex work and international human rights

Sex workers, including women in prostitution, are entitled to protection under international human rights law (see info sheet 6). Aside from general international treaties on human rights, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) sets out the steps that countries who are bound by the treaty must take to eliminate discrimination against women. Under CEDAW, Canada is legally obliged to take the following measures to eliminate discrimination against women sex workers:

- Refrain from engaging in any act or practice of discrimination against women and ensure that public authorities and institutions shall act in conformity with this obligation: Article 2(d).
- Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women: Article 2(g).
- Take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority

of either of the sexes, or on stereotyped roles for men and women: Article 5(a).

- Take all appropriate measures to protect health and safety in working conditions, including safeguarding the function of reproduction: Article 11(1)(f).
- Take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women: Article 6.

While the language of this last article echoes the *Trafficking Convention*, the context in which the language appears is important. Unlike the *Trafficking Convention*, CEDAW is not based on the premise that all prostitution should end. CEDAW is intended to protect women from all forms of discrimination. In relation to article 6 of CEDAW and violence against women in prostitution, the Committee has stated:

Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence. (General Recommendation 19, 1992)

In other words, women sex workers are vulnerable to all of the discrimination and social and economic marginalization that all women face, and face the further marginalization that comes from their status as sex workers. Women victims of male violence have traditionally faced prejudice and abuse when they have turned to police and the courts for redress; the prejudice and abuse are magnified for women who choose to engage in sex work.

Criminalization, discrimination and violence

A great deal of evidence suggests that the prostitution-related provisions of the *Criminal Code* contribute to sex workers' risk of experiencing violence and other threats to their health and safety (see info sheet 4). The criminal law reflects and reinforces the stigmatization and marginalization of prostitution and sex workers. This marginalization has a concrete dimension and predictable outcomes. The criminal law limits sex workers' choices, often forcing them to work on the margins of society, thereby increasing their risk of violence, and other threats to their health.

A Statistics Canada report on prostitution-related criminal charges and convictions from 1977 to 1995 revealed that police exercise a high degree of discretion when enforcing the criminal laws relating to prostitution. Since the communicating provision (section 213 of the *Criminal Code*) was enacted in 1985, roughly 90 percent of criminal charges and convictions have related to communicating, far outstripping charges and convictions related to bawdy-houses (sections 210 and 211) and procuring and living on the avails (section 212). Most communicating charges are laid in situations involving women sex workers. The Statistics Canada study also documented sex-based discrimination in sentencing upon conviction for communicating. The number of men and women charged was roughly equivalent and nearly all of those charged were found or plead guilty. However, women (overwhelmingly sex workers) convicted under section 213 were dealt with more harshly than men (overwhelmingly clients) and bore the personal costs of law enforcement to a much greater extent than men. Women were sentenced to pay higher fines than

men; they were also sentenced to prison more frequently, and received longer prison sentences, than men.

Research also shows that because of the illegality of activities related to prostitution under the *Criminal Code*, sex workers have little expectation that the police will protect them from violence and every expectation that the police will arrest or fine them if given the chance. Police are often unwilling to take seriously the complaints of sex workers who do seek help. Sex workers are thus highly vulnerable to violence, robbery and other abuse from which the police might otherwise provide some level of protection.

Meaningful participation of sex workers

Sex workers have historically been subject to stigma and discrimination, based on stereotype and prejudice and on attitudes about sexual expression. As a consequence, the public debate regarding prostitution has been shaped by moralism, rather than thoughtful consideration of the issues based on thorough research, study and consultation with those most affected. Respect for the human rights of women involved in prostitution, including honouring their individual choice and agency, is an essential principle that must underlie any reform of Canadian laws regarding prostitution. It follows that law reform processes must include meaningful participation of sex workers in decision-making on laws and regulations that affect them.

Recommendation:

Federal, provincial/territorial and municipal governments must commit to the meaningful participation of sex workers in future decision-making about law and policy. In particular, sex workers must have a say in determining what laws and policies should apply to prostitution and sex workers. Where necessary, governments should make available funding to support such participation.

Notes

- ¹ K Butcher. Confusion between prostitution and sex trafficking. *Lancet* 2003; 361: 1983.
- ² J Csete, M Seshu. Still underground: searching for progress in realizing the human rights of women in prostitution. *HIV/AIDS Policy & Law Review* 2004; 9(3): 1, 8-13, available via www.aidslaw.ca.

7

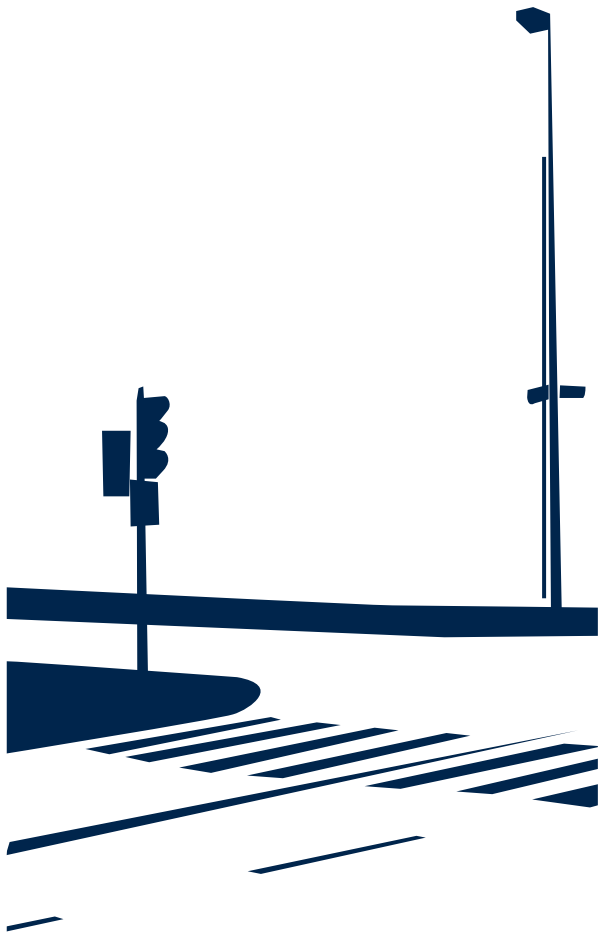
Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.

The logo consists of a white, horizontal brushstroke that tapers at both ends, resembling a smile or a stylized 'C'. It is positioned above a thin white horizontal line.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

8

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter***
- 9 New Zealand and Sweden: two models of reform
- 10 Essential resources

Sex workers and the *Charter*

This info sheet examines the prostitution-related offences in the *Criminal Code* in light of the rights guaranteed under the *Canadian Charter of Rights and Freedoms*.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Sex workers' rights and the Supreme Court of Canada

The *Canadian Charter of Rights and Freedoms* (the *Charter*) is part of the Canadian constitution. Therefore, all other laws and any action by the state, must comply with *Charter* rights. Unfortunately, sex workers' *Charter* rights have not yet been given serious consideration or support in Canadian law. The Supreme Court has upheld the constitutionality of certain of the *Criminal Code* provisions relating to prostitution in four *Charter* cases heard in 1988 and 1991 (*Prostitution Reference*, *R v Stagnitta*, *R v Skinner*, and *R v Downey*). However, these decisions should be revisited, for at least three reasons:

- There has been a significant increase in social awareness of the extreme violence and other harms sex workers face.
- A significant body of statistical, behavioural and social scientific literature regarding prostitution and sex workers in Canada has been produced. This evidence

makes available to courts a more complete record upon which to consider the constitutionality of the *Criminal Code* offences.

- The law regarding relevant *Charter* rights has evolved since those cases were decided more than a decade ago.

The *Charter* and sex workers' rights

Five *Charter* rights are especially relevant when considering the effect of the prostitution-related offences in the *Criminal Code* on the rights of sex workers in Canada:

- Section 2(b) guarantees everyone freedom of expression.
- Section 2(d) guarantees everyone freedom of association.
- Section 7 protects everyone from violations of "life, liberty and security of the person," except where the violation is "in accordance with the principles of fundamental justice."

- Section 11(d) guarantees any person charged with an offence the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
- Section 15 guarantees everyone equality before and under the law, and equal protection and benefit of the law.

Arguably, the prostitution-related offences in the *Criminal Code* (see info sheet 3) violate these *Charter* rights. This conclusion is based on the *Charter* rights as they have been interpreted by the Supreme Court, and evidence that the prostitution-related offences in the *Criminal Code* contribute to sex workers' risk of experiencing violence and other threats to their health and safety (see info sheet 4).

This info sheet provides five examples of the ways in which the *Criminal Code* offences violate sex workers' *Charter* rights.

Freedom of expression: Charter section 2(b)

In the *Prostitution Reference*, the Supreme Court unanimously decided that the communicating provision of the Criminal Code (section 213) breaches the *Charter* right to freedom of expression because it restricts the content of expression, rather than legitimately addressing the consequences of the expression. The fact a person could be convicted even where there was no link between the expression (i.e., communicating for the purposes of prostitution) and the harmful consequences (i.e., public nuisance associated with street-based prostitution) offended the guarantee of freedom of expression. Some judges also recognized that the *Charter* guarantee of freedom of expression protects a person's freedom to communicate for economic purposes, "whether the citizen is negotiating for a Van Gogh or a sexual encounter."

Freedom of association

In *Black v Law Society of Alberta* (1986), the Alberta Court of Appeal considered whether it was constitutional to impose certain limits on how lawyers could organize themselves professionally to conduct their business. The provincial law society's rules prohibited non-residents from entering into business relationships with Alberta residents for the purposes of practicing law, or from being the member of more than one law firm. The Alberta Court of Appeal ruled this was unconstitutional; section 2(d) of the *Charter* protects the right to associate in order to earn a livelihood.

More recently, the case of *Dunmore v Ontario (Attorney General)* (2001) dealt with the rights of farm workers to unionize. The Supreme Court of

Canada decided that there is but one question in determining whether the constitutional right to freedom of association has been breached: Has the state precluded an activity because of its associational nature, thereby discouraging the collective pursuit of common goals?

The *Black* and *Dunmore* cases are obviously relevant to the situation of sex workers who "associate" with clients or who choose to work "in association" for economic or safety reasons. Prostitution and being a sex worker are lawful in Canada. However, it is illegal to associate with potential clients in public or to associate with other sex workers or business contacts for the purposes of prostitution. These types of associations are prohibited by the *Criminal Code* sections on bawdy-houses (section 210), procuring and living on the avails of prostitution (section 212) and communicating (section 213) offences in the *Criminal Code*.

Life, liberty and security of the person

Supreme Court decisions have confirmed that the constitutional right to security of the person, under section 7 of the *Charter*, protects "both the physical and psychological integrity of the individual" (*New Brunswick v. JG*, 1999). Physical integrity includes protection from state interference with a person's bodily integrity (the Morgentaler abortion rights case, 1988). Since the time the *Prostitution Reference* was decided in 1988, the Supreme Court has further clarified that action by the state may be an unconstitutional violation of security of the person if it has a "serious and profound effect on a person's psychological integrity". In order to find a violation of psychological integrity, the effect of the state's action must be "greater than ordinary stress or

anxiety", but it does not need to be so serious as to cause "nervous shock or psychiatric illness" (*New Brunswick v. JG*, 1999).

There is considerable evidence that sex workers, specifically women sex workers engaged in street-based prostitution, face high rates of violence and murder, in addition to other health and safety threats, including increased risk of HIV infection. Moreover, there is compelling evidence that points to a complex causal relationship between the prostitution-related offences in the *Criminal Code* and health and safety risks (and negative outcomes) for sex workers. There are affidavits from sex workers, qualitative studies based on in-depth interviews with sex workers and sex worker advocates, and expert evidence from Canadian researchers who have studied the working conditions and health and safety of sex workers.

Presumption of innocence

In *Downey* (decided in 1992), the Supreme Court considered whether section 212(3) of the *Criminal Code* is constitutional. That section presumes that a person who lives or regularly keeps company with an adult who works in prostitution, or who lives in a common-bawdy house, is guilty of living on the avails of prostitution, unless there is evidence to the contrary. Under the criminal law, the prosecutor usually has the burden of proving every element of the criminal offence beyond a reasonable doubt. But this section effectively reverses that burden, presuming the accused person's guilt and requiring the accused person to put forward evidence that they do not live on the avails of prostitution. In the *Downey* case, the Supreme Court unanimously found that this violates the *Charter* section 11(d) presumption of innocence.

Equality

Under section 15 of the *Charter*, everyone is entitled to equality before and under the law, and equal protection and benefit of the law. Any law – or application of the law by the state – must not discriminate based on personal characteristics such as race, sex, disability, sexual orientation, etc. Discrimination may be found based on either an explicit distinction in the law or the impact of the law on a member of a disadvantaged group. On its face, the communicating section of the *Criminal Code* (section 213) makes no distinction based on sex. The law applies to “every person.”

However, evidence regarding the enforcement of section 213 shows that the number of men and women charged is roughly equivalent, and nearly all of those charged plead guilty or are found guilty at trial. However, women (overwhelmingly sex workers) tend to receive much harsher penalties than men (overwhelmingly clients). In other words, female sex workers disproportionately bear the negative consequences of the communicating section when compared to male clients (see info sheet 4).

Can these infringements of sex workers’ rights be justified?

Section 1 of the *Charter* permits the government to justify a law or action that otherwise violates a *Charter* right, if the government can show:

1. the violation of the right is authorized by a written law;
2. the law relates to a pressing and substantial legislative objective;
3. the law is rationally connected to the legislative objective;
4. the law impairs the right no more than is necessary to accomplish the legislative objective; **and**
5. there is a proportionality between the harmful and positive effects of the law.

As noted above, the Supreme Court has considered four *Charter* challenges to various aspects of the prostitution-related sections of the *Criminal Code* – the *Prostitution Reference* in 1988, and *R v Stagnitta*, *R v Skinner*, and *R v Downey* in 1991. In those cases, the Supreme Court has found violations of various constitutional rights, but has concluded that these infringements were justified under section 1 of the *Charter*.

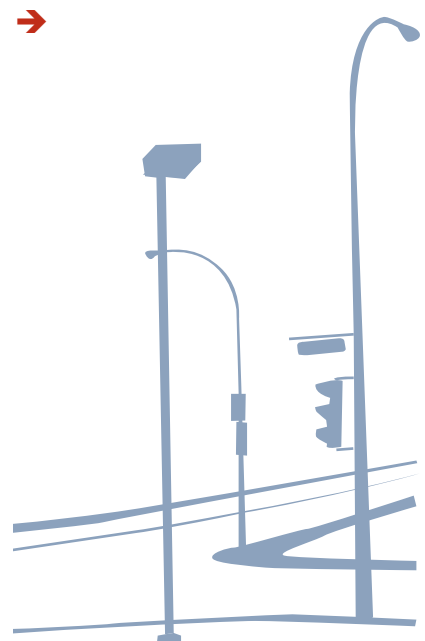
But that analysis should be revisited in light of existing public health and social science research regarding prostitution and sex workers in Canada. The new analysis should take into account evidence of the effects of the prostitution-related offences on the health and safety of sex workers. There are numerous reasons why most of the prostitution-related offences in the *Criminal Code* cannot be considered justifiable under the *Charter*.

- First, the offences as currently defined are not rationally connected to a legitimate legislative objective (e.g., eliminating public nuisance related to street-based prostitution, protecting against harm).
- Second, to the extent that there is any connection between the offences and any legitimate objectives, the *Criminal Code* sections impair *Charter* rights and freedoms more than is necessary to accomplish those objectives.
- Third, and most significant from a human rights perspective, beneficial effects for Canadian society as a whole do not outweigh the harmful effects of the *Criminal Code* offences on sex workers’ rights. The evidence shows that the enforcement of the *Criminal Code* offences:
 - has not suppressed street-based prostitution in most cities;

- has resulted in street-based sex workers working in greater isolation, which increases their health and safety risks
- has led to the social and political marginalization of sex workers and made them targets for violence; and
- deprived sex workers of the full protection of the criminal law when they have been the victim of a violent or other crime while engaging in prostitution.

Reforming the *Criminal Code*

Sex workers are entitled to human rights and freedoms under the Canadian Charter and international human rights law (see info sheet 6). Recognition of such rights by policy and decision makers is essential to realizing the human dignity of sex workers. Repeal of the prostitution-related offences of the *Criminal Code* is necessary a prerequisite for improving prevailing conditions so that sex workers can work free from violence and other health and safety risks, including HIV infection.



Recommendation:

Parliament should repeal the section of the *Criminal Code* that makes it an offence to “communicate in a public place for the purposes of prostitution” (section 213).

Recommendation:

Parliament should repeal the bawdy-house sections of the *Criminal Code* (sections 210 and 211).

Recommendation:

Parliament should repeal the subsections of the procuring section of the *Criminal Code* that relate to bawdy-houses (subsections 212(b), (c), (e), and (f)).

Recommendation:

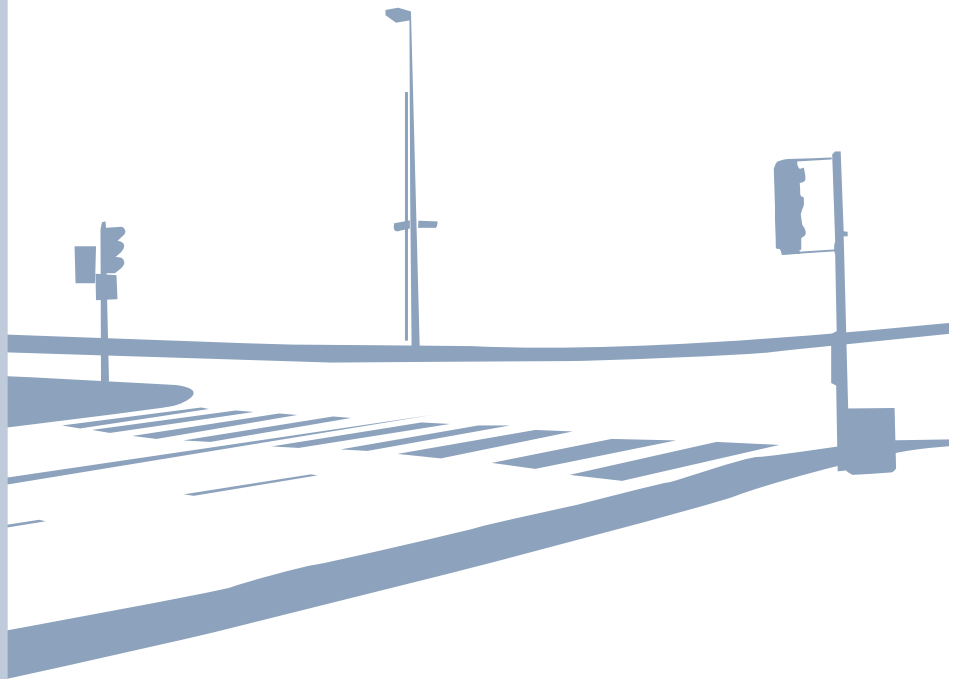
Parliament should repeal the living-on-the-avails offence of the *Criminal Code* as it applies to adult prostitution (subsection 212(1)(j)).

Recommendation:

Parliament should repeal the reverse-onus subsection of the *Criminal Code* as it applies to living on the avails of adult prostitution (subsection 212(3)).

Recommendation:

Parliament should consult sex workers, and organizations whose staff, directors or membership is made up of sex workers or former sex workers, concerning reform of the subsections of the *Criminal Code* that deal with procuring and exploitation (subsections 212(a), (d), (g), (h), and (i)).



8

Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

9

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform**
- 10 Essential resources

New Zealand and Sweden: two models of reform

This info sheet examines recent reforms to prostitution laws in New Zealand and Sweden, and considers the effect of those reforms on the health and human rights of sex workers.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

New Zealand

Prior to the passage of the *Prostitution Reform Act, 2003*, prostitution was not illegal per se in New Zealand, though many of the activities surrounding it were. This is similar to the situation in many countries, including Canada (see info sheet 3). Efforts in New Zealand to curb activities related to prostitution by criminalizing them undermined efforts to promote safer sex education and practices. Sex workers were the subject of routine police harassment. Typically, police would mount operations in major cities like Wellington and Auckland twice a year. The presence of condoms would often be part of the state's evidence to indicate the presence of a brothel; meanwhile, the Ministry of Health supplied condoms to a sex worker group for distribution to sex workers.

Prostitution Reform Act, 2003

The *Prostitution Reform Act, 2003* received royal assent in June 2003. The Act's stated purpose is to decriminalize certain activities related to prostitution and to create a framework that:

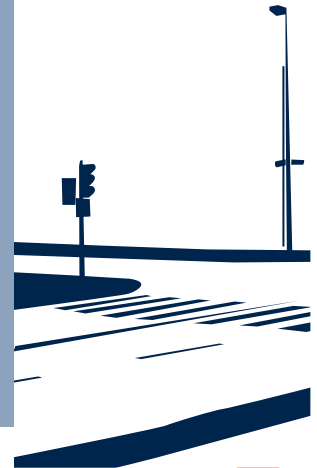
- safeguards the human rights of sex workers and protects them from exploitation;
- promotes the welfare and occupational health and safety of sex workers;
- is conducive to public health; and
- prohibits the use in prostitution of persons under 18 years of age.

The Act defines a "sex worker" as a person who provides "commercial sexual services" and makes it legal to enter into contracts for such services.

It permits and regulates the business of prostitution, and distinguishes between "brothels" and "small owner-operated brothels" in which not more than four sex workers can work and each maintains control over his or her earnings. Restrictions are placed on advertising and local governments are given the power to regulate the location of brothels and signage advertising commercial sexual services. Non-citizens cannot get work permits for the business of prostitution.

Occupational health and safety

The *Prostitution Reform Act, 2003* contains explicit provisions intended to minimize the transmission of sexually transmitted infections and otherwise protect the health of sex workers and clients. Operators of prostitution businesses, sex workers and clients must take all reasonable steps to ensure that



“a prophylactic sheath or other appropriate barrier is used” if the sexual services “involve vaginal, anal, or oral penetrations or other activity with a similar or greater risk” of a sexually transmitted infection. The Act does not require sex workers to undergo medical examinations or provide health certificates. The Act recognizes a sex worker’s right to refuse to provide or continue to provide a sexual service to any other person. The Department of Labour has published *A Guide to Occupational Health and Safety in the New Zealand Sex Industry*.¹ Finally, the general *Health and Safety in Employment Act 1992* applies to sex workers.

In July of 2005, in the first case of its kind, a district court convicted a man of an offence under the Act for taking his condom off during sexual intercourse without the knowledge of a sex worker. He was fined and ordered to pay costs.

Mandatory review of the Act

The Prostitution Law Review Committee was created to carry out reviews, assessments and reporting under the Act. A full review of the operation of the Act must take place by the end June 2008. Significantly, the Act gives the New Zealand Prostitutes Collective the power to nominate three of the eleven members of the Review Committee.

Sweden

Three Swedish government committees have studied the issue of prostitution since 1977. The committees have made recommendations for criminalizing the buyer of sexual services, the seller of sexual services, and in some instances both the buyer and seller. The committees in 1995 and 1997 based their recommendations on the idea that criminalization of prostitution was necessary for the

protection of women, illustrated by the 1995 committee’s statement that “[n]o prostitution can be said to be of a voluntary nature.” In 1998 the Swedish parliament passed a law reform measure entitled “The Protection of Women.” The official government position in Sweden is that the purchase of sex constitutes violence by men against women.

Law on prohibition of the purchase of sexual services

Included in the 1998 reforms was the *Law on prohibition of the purchase of sexual services (1998:404)*, which came into effect on 1 January 1999. The aim of the law was to eliminate street prostitution and prevent new sex workers from entering prostitution. The law criminalizes the client who purchases sexual services, but not the sex worker. The relevant part of the law states:

The person who, for payment, obtains a casual sexual relationship is penalised – unless the action entails punishment in accordance with the Penal Code – for the purchase of sexual services with fines or imprisonment for a maximum of six months. For attempting to do so, the person is sentenced in accordance with chapter 23 of the Penal Code [the section which deals with attempted criminal offences].

The law criminalizes situations where money, narcotic substances, gifts or other forms of compensation have been agreed upon – even if not given – in exchange for sexual services. The law does not define “casual sexual relationship.”

Experience with the law

In October 2004 the Swedish Ministry of Justice and the Police released a report the experience with the law criminalizing the purchase of sexual services.² The report documents that most of the police resources directed at enforcing the law have been used

to target street prostitution. While the report provides some evidence of a reduction in street prostitution, it states that it is impossible to say whether this was due to the legislation or other factors (e.g., mobile phones, the internet). The report acknowledges that because of the extreme unreliability of data regarding off-street prostitution, it is impossible to say anything meaningful about it.

The report also recognizes that violence is an everyday occurrence for women involved in prostitution, but that the extent of the violence has not been recorded systematically before or after the passage of the law. Overall, the report indicates that since the law came into effect:

- there are fewer clients and a larger proportion are dangerous;
- sex workers have less time to assess clients;
- the prices for sexual services have fallen;
- more clients are prepared to pay for unprotected sex; and
- sex workers feel that their risk of encountering violence while working has increased.

These effects have been experienced most acutely by the most vulnerable women – sex workers who work on the streets, who have psychiatric problems, who are homeless or who are immigrants to Sweden. The report also remarks that the law has created a new form of crime: women posing as sex workers rob clients, who dare not report the robbery for fear of being charged with attempting to purchase sexual services.

A number of non-governmental organizations, sex workers and other people have written critiques of the Swedish law.³

Comparison and contrasts

In its conception and as written, the New Zealand *Prostitution Reform Act, 2003* is much more respectful of the autonomy, dignity and human rights of sex workers than the Swedish *Law on prohibition of the purchase of sexual services*. Given that it only came into force in 2003, so far little evidence of the effect of the New Zealand legislation has been gathered. In contrast, evidence indicates that the Swedish law has not eliminated prostitution and has resulted in more dangerous working conditions for women sex workers, especially the most vulnerable women. The New Zealand model offers a better example of a reform that respects, protects and fulfils the human rights of sex workers and holds more promise for better protecting their health. It should be considered seriously by countries committed to improving the health and safety of sex workers.

Notes

- ¹ This guide is available at www.osh.dol.govt.nz/order/catalogue/235.shtml.
- ² This report is available at www.odin.no/filarkiv/232216/Purchasing_Sexual_Services_in_Sweden_and_The_Netherlands.pdf.
- ³ These are available via the website of the Bay Area Sex Worker Advocacy Network (California, US) at www.bayswan.org/swed/swed_index.html.

9

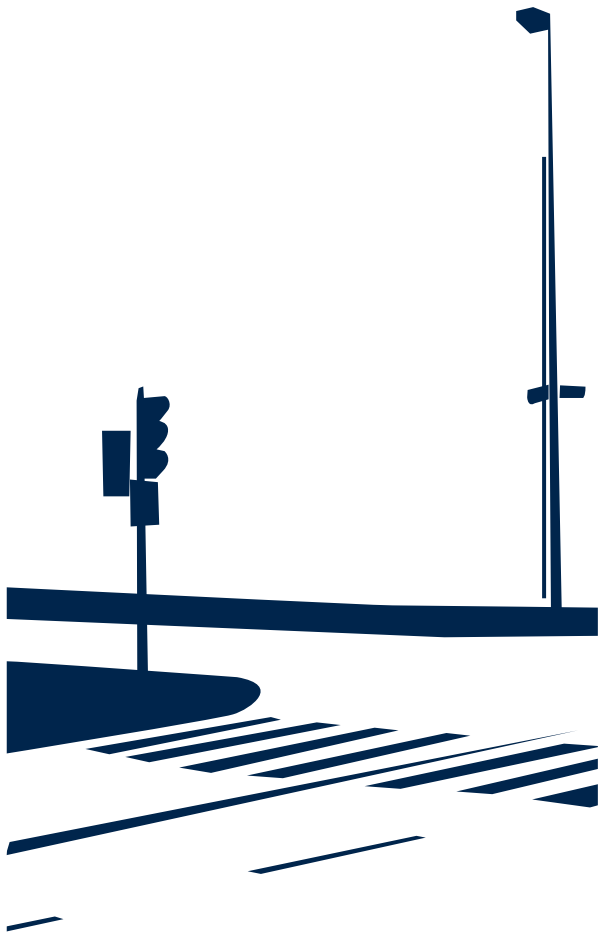
Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.



Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Sex, Work, Rights Reforming Canadian Criminal Laws on Prostitution

10

This is one in a series of 10 info sheets examining the need for reform to Canada's prostitution laws to protect and promote the health and human rights of sex workers.

- 1 Decriminalizing sex work(ers): law reform to protect health and human rights
- 2 Sex workers and HIV/AIDS: stigma, discrimination and vulnerability
- 3 Prostitution offences in the *Criminal Code*
- 4 Enforcing marginalization, undermining safety: the impact of the criminal law on sex workers
- 5 Regulating prostitution beyond the criminal law
- 6 Sex workers and international human rights
- 7 Sex work and women's rights
- 8 Sex workers and the *Charter*
- 9 New Zealand and Sweden: two models of reform

10 Essential resources

Essential resources

This info sheet provides information about a select number of essential resources on prostitution, sex workers, HIV/AIDS and human rights.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida

Canadian resources

Achilles R. *The Regulation of Prostitution: Background Paper*. Toronto Public Health (1995). Explores the consequences of different models designed to control prostitution (prostitution-related activities as criminal offences; legalization and formal government regulation; decriminalization and the application of health, tax, or business code standards; combination of regulatory strategies).

Allman D. *M is for mutual, A is for acts – male sex work and AIDS in Canada*. Health Canada. 1999. The first comprehensive review of Canadian research on male prostitutes and their clients, and men who exchange sex for money and other commodities. Available at www.mutualacts.com

Allman D, Meyers T. **Male sex work and HIV/AIDS in Canada**. In P Aggleton (ed). *Men Who Sell Sex: International Perspectives on Male Prostitution and HIV/AIDS*. London: UCL Press, 1999. Account of the reasons men sell sex, the meanings

involved, and implications for HIV prevention in the Canadian context.

Benoit C, Millar A. *Dispelling myths and understanding realities: working conditions, health status, and exiting experiences of sex workers*. October 2001. A report based on interviews with 201 sex workers and former sex workers – female, male, and transgender. The research looks at the sex trade from a work perspective, arguing that there is an urgent need to give voice to sex workers' issues, whether they work indoors or outdoors. Available via www.peers.bc.ca/pubs.html

Brock D. *Making Work, Making Trouble: Prostitution As a Social Problem*. Toronto: University of Toronto Press, 1998. A detailed account of the sexual marketplace in Canada, this book considers not only the actions of the courts and law enforcement, but also economic shifts, the role of media reporting, and the construction of Canada's often invisible social classes. Occupational safety and feminist theory are discussed throughout.

Brock D. **Prostitutes are scapegoats in the AIDS panic**. *Resources for Feminist Research* 1985; 18(2): 13-17. Consider legal and ethical issues in regard to HIV and sex work. Brock argues that by blaming sex workers for the transmission of HIV, "we forget that they are working women and men who attempt to maintain as much control over their working conditions, including hygiene, as possible."

Brock D. *Making Work, Making Trouble: Prostitution As a Social Problem*. Toronto: University of Toronto Press, 1998. A detailed account of the sexual marketplace in Canada, this book considers not only the actions of the courts and law enforcement, but also economic shifts, the role of media reporting, and the construction of Canada's often invisible social classes. Occupational safety and feminist theory are discussed throughout.

Bruckert C, Parent C, Robitaille P. *Erotic service / erotic dance establishments: two types of marginalized labour*. 2003. The report reflects the findings of a qualitative research project which

examined the in-call sex trade work in Montreal and Toronto from the perspective of marginal labour. This approach positions the study outside of questions of deviance and morality and instead draws attention to the ways laws and regulatory practices are mediated by, and interface with, stigma, labour process, and labour structure to condition the experience of labour. Available at www.lcc.gc.ca/research_project/03_erotic_1-en.asp

Canadian HIV/AIDS Legal Network. **Sex, work, rights: reforming Canadian criminal laws on prostitution** (2005). Examines the three foundations that should guide the review and reform of the prostitution-related provisions of the Criminal Code: evidence from credible research and from sex workers themselves; Canada's obligations under international human rights law; and the *Canadian Charter of Rights and Freedoms*. Includes recommendations for reform. Available via www.aidslaw.ca

Commercial Sex Information Service. **Trials of the Sex Trade: A Survival Guide to Canada's Legal Jungle** (1995). The set of 6 booklets explains in plain English the laws that criminalize sex work in Canada. Developed in Toronto with the help of over 40 volunteers. Available at www.walnet.org/csis/legal_tips/trials/index.html

ConStellation. A magazine produced by and for sex workers by Montréal sex worker organization Stella. Available via www.cheststella.org

Department of Justice Canada. **Street prostitution: assessing the impact of the law, synthesis report**. 1989. A review of the impact of the enforcement of the communicating offence in the *Criminal Code* (section 213) on street-based prostitution in a number of Canadian cities.

Duchesne D. **Street prostitution in Canada**. *Juristat Service Bulletin* (1997); 17(2). Canadian Centre for Justice Statistics. Statistics Canada report which examines prostitution-related criminal incidents, charges and convictions from 1977 to 1995, focusing on street-based prostitution. Briefly examines the dangers faced by sex workers and clients of sex workers.

Federal-Provincial-Territorial Working Group on Prostitution. **Report and recommendations in respect of legislation, policy and practices concerning prostitution-related activities**. The Working Group. 1998. Report of the Working Group on Prostitution, established in 1992 by the Federal, Provincial and Territorial Deputy Ministers Responsible for Justice with a mandate to review legislation, policy and practices concerning prostitution-related activities and asked to bring forward recommendations. Focuses on youth involved in prostitution and street prostitution. Available at <http://canada.justice.gc.ca/en/news/nr/1998/toc.html>.

Jackson L. **HIV prevention programmes and female prostitutes: the Canadian context**. In *Striking to the Heart of the Matter: Selected Readings on Gender and HIV*. In Amaratunga, C. and Gahagan, J. (eds). Halifax: Atlantic Centre of Excellence for Women's Health, 2002: 87-104. Based on previous research on sex workers and HIV risks, examines programmatic issues for prevention.

Lewis J, Shaver F. **Safety, security and the well-being of sex workers: a report submitted to the House of Commons Subcommittee on Solicitation Laws**. STAR, 2005. Report based on a study conducted between 2001 and 2004 that explored how public policies influence the working lives, conditions of work, and the health, safety, and well-being of

sex workers operating in diverse venues. The findings and related recommendations were developed by members of a collaborative partnership referred to as STAR (Sex Trade Advocacy and Research) that brought together academics and community partners representing several sex worker organizations (Maggie's, Stella, EDA, and EDAC) and one health unit. Available at http://web2.uwindsor.ca/courses/sociology/maticka/star/pdfs/safety_and_security_report_final_version.pdf.

Lowman J, Fraser L. **Violence against persons who prostitute: the experience in British Columbia**. Department of Justice Canada. 1996. Study provides information about violence against people who sell sexual services (particularly street-involved women and youths) before and after the enactment of the communicating law (*Criminal Code* section 213) on 20 December 1985. Using a variety of information sources authors describe patterns of violence against persons who prostitute in British Columbia, the offenders involved, measures being taken to prevent violence, and some of the difficulties being experienced in the process. Available at <http://mypage.uniserve.ca/~lowman/violence/title.htm>.

Lowman J. **Prostitution law reform in Canada**. In *Toward Comparative Law in the 21st Century. Institute of Comparative Law in Japan*. Tokyo: Chuo University Press, 1998: 919-946. Paper examining recent law changes, trends in law enforcement, and the hypocritical and often self-defeating nature of Canadian prostitution law. Available at <http://mypage.uniserve.ca/~lowman/ProLaw/prolawcan.htm>.

Lowman J. **Violence and the outlaw status of (street) prostitution in Canada**. *Violence Against Women* 2000; 6(9): 987-1011. Paper analyzes the relationships among media, law, political hypocrisy and

violence against street prostitutes. In particular, examines how the “discourse of disposal” – i.e. media descriptions of the on-going attempts of politicians, police and residents’ groups to “get rid” of street prostitution from residential areas – contributed to a sharp increase in murders of street prostitutes in Canada after 1980. Available at <http://mypage.uniserve.ca/~lowman/violence2/MurdPro.pdf>.

Lowman J. **Identifying research gaps in the prostitution literature.** Department of Justice Canada. 2001. Paper reviews the main trends and issues in contemporary research on prostitution, prostitution law and social service policy in Canada with an eye to identifying immediate research priorities. Examines research on male, female and transgender prostitution and the legal and social response to it. Available at http://canada.justice.gc.ca/en/ps/rs/rep/2002/rr2002_9.pdf.

Maticka-Tyndale E, Lewis J. **Escort services in a border town: literature and policy summary.** A report to the Division of STD Prevention and Control, Laboratory Centres for Disease Control, Health Canada. 1999. Reports the results of an exploratory study, conducted in a border city with a recently opened casino, that examined the potential impact of the licensing of escort services on the spread of sexually transmitted infections (STIs) between the United States and Canada. Concern for the spread of STIs results from their higher prevalence in the United States than in Canada. Recommendations are made in the report with respect to research, policy and programming. Available at <http://web2.uwindsor.ca/courses/sociology/maticka/star/escortreport.pdf>.

Namaste K. **HIV/AIDS and Transgender Communities in Canada.** Toronto: genderpress, 1995. A report on the knowledge, attitudes, and behaviour of transgender people in Canada with regard to HIV/AIDS.

Namaste V. **Invisible Lives: The Erasure of Transsexual and Transgendered People.** Chicago: University of Chicago Press, 2000. Book examines research on transgender people, including research into access to health and social services. Includes discussion of health risks faced by transgender sex workers, and needs in relation to HIV/AIDS and harm reduction programming.

New Zealand Department of Labour. **A Guide to Occupational Health and Safety in the New Zealand Sex Industry.** June 2004. Available at www.osh.dol.govt.nz/order/catalogue/235.shtml

Pivot Legal Society Sex Work Subcommittee. **Voices for dignity: a call to end the harms caused by Canada's sex trade laws.** Pivot Legal Society, 2004. Ground-breaking report from Vancouver-based non-profit organization dedicated to using the law to advance the interests and improve the lives of marginalized persons. Bases on sworn statements from sex workers, contains front-line accounts from individuals who work under the highly regulated criminal law framework. It presents the expertise of sex workers to law and policy makers in order to ensure that the views of those most directly affected by the criminal law's application are taken into account. Advocates a position on prostitution law reform that is consistent with the principles of the *Canadian Charter of Rights and Freedoms*. Available at www.pivotlegal.org/sextradereport/

Canadian court cases

The leading cases from the Supreme Court of Canada regarding the constitutionality of the prostitution-related offences in the *Criminal Code*.

- *R v Downey*, [1992] 2 SCR 10.
- *R v Skinner*, [1990] 1 SCR 1235.
- *R v Stagnitta*, [1990] 1 SCR 1226. **Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)**, [1990] 1 SCR 1123 (*Prostitution Reference*).

All Supreme Court of Canada judgments are available via www.lexum.umontreal.ca/csc-scc/en/index.html

International resources

Aggleton P. **Men Who Sell Sex.** London, UK: Institute of Education, University of London, 1999. Comprehensive account of the reasons men sell sex, the meanings involved, and implications for HIV prevention. Male prostitution is discussed in chapters from England, the Netherlands, France, Canada, United States, Mexico, Dominican Republic, Costa Rica, Brazil, Peru, India, and Bangladesh, Sri Lanka, Thailand, Philippines, and Morocco. Allows for a comparison of international perspectives on male prostitution and AIDS.

Alexander P. **Sex work and health: a question of safety in the workplace.** *Journal of the American Medical Women's Association* 1998; 53(2): 77-82. Examines occupational safety and health hazards for sex workers, and how working conditions affect sex workers' health. Occupational hazards of sex work discussed include repetitive injuries, respiratory infections, dependence on alcohol and other drugs, emotional stress –

particularly in relation to managing stigma – and sexually transmitted infections.

Banach L, Metznerath S. **Principles for model sex industry legislation.** Scarlet Alliance and Australian Federation of AIDS Organizations. 2000. Sets out the principles that should guide sex industry legislation in the Australian context. It includes background information and a series of ten fact sheets on topics such as decriminalisation, occupation health and safety, public health and mandatory testing, and discrimination and human rights. Available at www.afao.org.au/library_docs/policy/sex_law.pdf

Bindman J., Doezema J., **Redefining prostitution as sex work on the international agenda,** Anti-slavery International and the Network of Sex Work Projects, 1997. Unpublished. Identifies prostitution as a “human rights violation akin to slavery” in that “the lack of international and local protection renders sex workers vulnerable to exploitation in the workplace, and to harassment or violence at the hands of employers, law enforcement officials, clients, and the public.” The report includes a substantial bibliography and a Survey of Relevant Human Rights and Labour Standards. Available at www.walnet.org/csis/papers/redefining.html

Csete J, Seshu M. **Still underground: searching for progress in realizing the human rights of women in prostitution.** Discusses the nature of human rights abuses faced by women in prostitution and describes impediments to reducing those abuses. Suggests measures that would help to advance the human rights of women in prostitution and to create an environment conducive to the realization of their crucial role in combating HIV/AIDS. *HIV/AIDS Policy and Law Review* 2004; 9(3): 1, 8-13. Available via www.aidslaw.ca

Delacoste F, Alexander P (eds). **Sex Work: Writings by Women in the Sex Industry,** 2nd ed (1998). A collection of poems, personal stories, essays on sex worker activism, written by women sex workers. Includes the full text of the World Charter for Prostitutes Rights (1985, see below) and the draft statement from the 2nd World Whores’ Congress (1986).

International Committee for Prostitutes’ Rights. **World Charter for Prostitutes’ Rights** (1985). Written at the first World Whores Congress in Amsterdam, February 1985, organized by the defunct International Committee for Prostitutes’ Rights. A manifesto that addresses various aspects of law reform (decriminalization of adult prostitution; enforcement of laws against fraud, coercion, violence, child sexual abuse, etc; human rights protection; working conditions), as well as issues of access to health, legal, employment, and housing services and social benefits, and anti-stigma education. Available at www.walnet.org/csis/groups/icpr_charter.html

Kempadoo K, Doezema J. **Global Sex Workers: Rights, Resistance, and Redefinition.** New York: Routledge, 1998. Challenges conventional ideas about “trafficking in women.” The authors question efforts to distinguish forced from voluntary prostitution, because it is used to grant human rights to victims of force and denies human rights to sex workers who say they were not forced. Part Two focuses on Migration and Tourism, Part Three on Sex Workers’ Organizations, and Part Four on AIDS Prevention and Sex Workers’ Empowerment. Excellent and up to date.

Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS.

HIV/AIDS and Human Rights: International Guidelines. Second International Consultation on HIV/AIDS and Human Rights, Geneva, 23-25 September 1996. 1998. Guidelines intended to support responses to HIV/AIDS that are effective in stemming the epidemic while also supporting human rights. Encourages states to review laws that prohibit commercial sexual encounters sex between consenting adults in private, “with the aim of repeal.” At the least, state criminal law should not impede efforts to respond to the HIV/AIDS epidemic, including providing HIV prevention and health care services to sex workers. Available via www.unaids.org/en/in+focus/hiv_aids_human_rights/international_guidelines.asp

Overs C; Longo P. **Making Sex Work Safe.** London, UK: Network of Sex Work Projects, Russell Press Ltd, 1997. Outlines principles for designing sex work-related HIV/AIDS prevention projects, with an emphasis on working conditions and the legal context. This handbook is a collaborative effort between the Network of Sex Work Projects and AHRTAG. Available online via www.walnet.org/csis/groups/nswp

Research for Sex Work. An annual publication designed for sex workers, health workers, researchers, NGO staff and others who professionally deal with sex work and development. It was founded by Vrije University Medical Centre in the Netherlands, and is now published by the International Network of Sex Work Projects. Available via www.nswp.org

UNAIDS/Inter-Parliamentary Union. **Handbook for Legislators on HIV/AIDS, Law and Human Rights**. Geneva: Joint United Nations Program on HIV/AIDS and the Inter-Parliamentary Union, 1999. Contains section on criminal law and sex work/prostitution. Grounded in the recognition that criminal regulation impedes the provision of HIV/AIDS prevention and care by driving people engaged in prostitution underground. Suggests that positive public health outcomes are more likely to be achieved where prostitution is treated as a personal service industry regulated by laws that place the onus for ensuring health and safety on managers within the industry. Points to features in legislation that have been successful from the perspective of public health promotion and respect for human rights. Available at www.ipu.org/PDF/publications/aids_en.pdf

World Health Organization. **Sex Work Toolkit: Targeted HIV/AIDS Prevention and Care in Sex Work Settings** (2004). The toolkit is intended as a resource to guide the development and implementation of effective HIV interventions in diverse sex work settings. It outlines key steps and issues and provides links to many documents, manuals, reports, and research studies containing more detailed and in-depth information. Available at <http://who.arvkit.net/sw/en/index.jsp>.

Wolffers I, van Bellen N. **Public health and the human rights of sex workers**. *The Lancet* 2003; 361: 1981. Short article argues that public health programs for sex workers should be based on a rights-based approach and a holistic perspective.

Websites

- Canadian Guild for Erotic Labour
www.ericgild.com
- Coalition for the Rights of Sex Workers
www.lacoalitionmontreal.com
- Commercial Sex Information Service
www.walnet.org/csis/
- International Union of Sex Workers
www.iusw.org
- Maggie's & Prostitutes' Safe Sex Project
www.walnet.org/csis/groups/maggies/
- Network of Sex Work Projects
www.nswp.org
- Prostitutes Empowerment Education and Resource Society, PEERS (Victoria)
www.peers.bc.ca
- Prostitutes Empowerment Education and Resource Society, PEERS (Vancouver)
www.peersvancouver.org
- Prostitution Research Page (John Lowman)
<http://mypage.uniserve.ca/~lowman/>
- Sex Professionals of Canada
www.spoc.ca
- Sex Trade Advocacy and Research (STAR)
<http://web2.uwindsor.ca/courses/sociology/maticka/star/index.html>
- Sex Trade Workers of Canada
www.sextraderworkersofcanada.com
- Sex Workers Alliance of Vancouver
www.walnet.org/csis/groups/swav/

- Sex Workers Alliance of Toronto
www.walnet.org/csis/groups/swat
- Stella (Montréal)
www.chezstella.org
- Stepping Stone (Halifax)
www.supercity.ns.ca/~stepping
- Travail du Sexe
www.travaildusexe.com

10

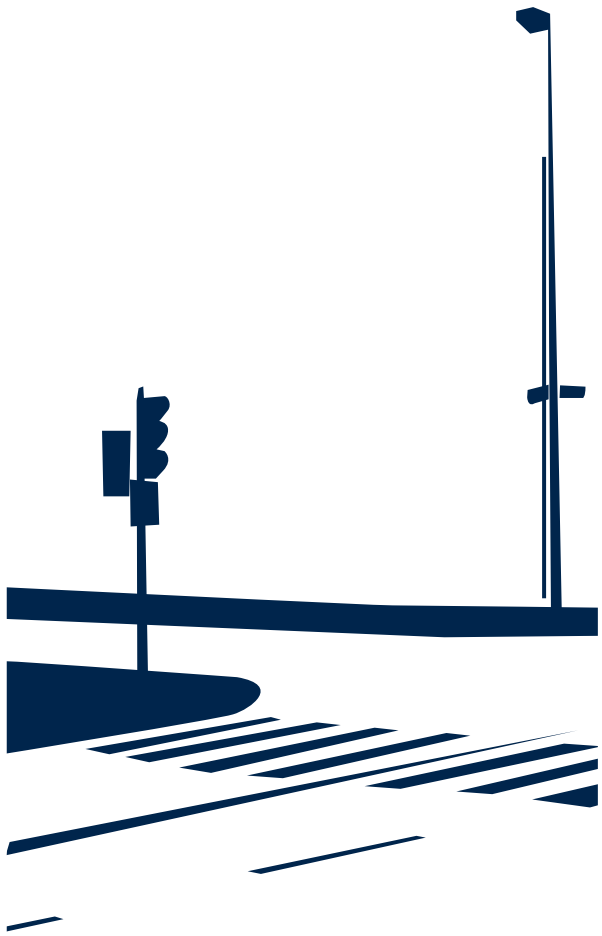
Reproduction of this info sheet is encouraged, but copies may not be sold, and the Canadian HIV/AIDS Legal Network must be cited as the source.

For further information, visit www.aidslaw.ca.

Ce feuillet est également disponible en français.

Funding to produce this info sheet was provided by the Public Health Agency of Canada. The opinions expressed in this publication are those of the authors and do not necessarily reflect the official views of the Public Health Agency of Canada.

© Canadian HIV/AIDS Legal Network, 2005.



The logo for the Canadian HIV/AIDS Legal Network and Réseau juridique canadien VIH/sida. It features a white, brush-stroke-like arc above a thin white horizontal line. Below the line, the text is arranged in two columns: "Canadian HIV/AIDS Legal Network" on the left and "Réseau juridique canadien VIH/sida" on the right. The background is a dark blue rectangle with a red border on the right side.

Canadian
HIV/AIDS
Legal
Network

Réseau
juridique
canadien
VIH/sida