

Legal Network report calls for decriminalization of prostitution in Canada

In December 2005 the Canadian HIV/AIDS Legal Network released *Sex, work, rights: reforming Canadian criminal laws on prostitution*.¹ The report examines the ways in which the prostitution-related provisions of the Criminal Code, and their enforcement, have criminalized many aspects of sex workers' lives and have promoted their social marginalization. Evidence indicates that the criminal law has contributed to health and safety risks, including the risk of HIV infection, faced by sex workers. The Legal Network calls for the decriminalization of prostitution in Canada, and for other legal and policy reforms that respect the human rights and promote the health of sex workers. Despite the report's Canadian focus, its human rights analysis is relevant to the situation of sex workers in other countries where prostitution is illegal and sex workers face rights abuses. In this article, Glenn Betteridge, the principal author of the report, briefly sets out the case for law reform.

Criminal Code and foundations for reform

Prostitution, the exchange of sex for money and other valuable consideration, is legal in Canada. However, it is difficult for sex workers and their clients to engage legally in prostitution. Four sections of the *Criminal Code* (sections 210 to 213) make illegal virtually every activity related to prostitution and prohibit prostitution in almost every conceivable public or private place.²

Sections 210 and 211 respectively make it illegal for a person to keep a "bawdy-house" – i.e., a place regularly used for prostitution – or to transport a person to such a place. Section 212 makes it illegal to encourage or force people to participate in prostitution (also known as "procuring"), or to live on the money earned from prostitution by someone else (also known as "living on the avails of prostitution"). Section 213 makes it illegal for sex workers and customers to communicate in public for the purposes of prostitution.

In its report, the Legal Network puts forward 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* ("Charter").³

Enforcing marginalization, undermining safety⁴

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 force 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.

Section 213, the communicating section, has resulted in the most pronounced risks for sex workers. Research and sex workers' experience has shown that the enforcement of that section has:

- displaced 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;
- resulted in more tense working conditions and fewer clients, which means that some sex workers may be less cautious about accepting potentially dangerous clients; and
- meant that sex workers have less time to negotiate their services and safer sex with potential clients.

Canadian researchers have identified multiple dimensions to the relationship between the Canadian criminal law and sex workers' health and safety. 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 creates 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.

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Sex workers’ human rights under Canadian and international law

Sex workers are entitled to human rights and freedoms under the Canadian *Charter* and international human rights law. Recognition of such rights by policy and decision makers is essential to realizing the human dignity of sex workers.

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 and the *International Covenant on Economic, Social and Cultural Rights*, 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.

Many of the rights set out in these international treaties are reflected in the Canadian *Charter*. 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* violate these *Charter* rights. This conclusion is based on the *Charter* rights as they have been interpreted by the Supreme Court of Canada, 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.

Take the example of the *Charter* section 7 rights to security of the person. Supreme Court decisions have confirmed that the constitutional right to security of the person protects “both the physical and psychological integrity of the individual.”⁵ Physical integrity includes protection from state interference with a person’s bodily integrity.⁶ 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.”⁷

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.

Human rights and legal standards developed in the context of HIV/AIDS recognize the harms associated with the criminalization of sex work and the need for decriminalization.

The UN's *International Guidelines on HIV/AIDS and Human Rights* suggest that 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.⁸

Treating prostitution as a personal service industry is much more likely to achieve public health objectives than a criminal law approach.

The Inter-Parliamentary Union (IPU) 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.⁹ For the IPU, treating prostitution as a personal service industry which is neither condemned nor condoned is much more likely to achieve public health objectives than a criminal law approach. The IPU calls on parliamentarians to engage in a productive dialogue with the sex industry to these ends.

Reform beyond the criminal law needed

The available evidence indicates that Canada is not respecting, protecting and fulfilling sex workers' right to health or other human rights. 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 moralizing, rather than thoughtful consideration of the issues based on thorough research, study and consultation with those most affected.

Repeal of the prostitution-related offences of the Canadian *Criminal Code* is a necessary prerequisite for improving conditions so that sex workers can work free from violence and other health and safety risks, including HIV infection. However, it is unrealistic to think that decriminalization will put an end to the violence, stigma and discrimination sex workers currently experience.

In consultations with the Legal Network, sex workers articulated forcefully that law and policy reform should also focus on improving health services and working conditions for sex workers. In particular, such reforms should assess sex workers' needs for primary health care and comprehensive sexual health programs. Reforms should examine ways to afford sex workers the protections accorded to workers under occupational health and safety and workers' compensation legislation.

Respect for the human rights of sex workers must be grounded in the experiences, choices and agency of the men, women and transgendered people involved in prostitution. As a matter of both principle and pragmatism, legal and policy reform must include meaningful participation of sex workers in decisions that affect

them. In the absence of meaningful sex worker participation, legal and policy reforms risk perpetuating the very health risks and human rights abuses such reforms were intended to address.

– Glenn Betteridge

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Recently, the STAR (Sex Trade Advocacy and Research) project submitted a report to a Canadian House of Commons subcommittee regarding the prostitution-related sections of the *Criminal Code*. See "Report calls for changes to the law to improve safety, security and well-being of sex workers" in the Canadian Developments section of this issue.

¹ *Sex, work, rights: reforming the Canadian criminal laws on prostitution*. Canadian HIV/AIDS Legal Network, 2005. Available via www.aidslaw.ca/Maincontent/issues/sexwork.htm.

² *Criminal Code*, RSC 1985, C-46.

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

⁴ This section of the article is drawn from chapter 4 of the Legal Network's report. The chapter is entitled "Effects of criminalization on sex workers' health and safety, including vulnerability to HIV/AIDS." Please see the chapter for complete references.

⁵ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46.

⁶ *R v Morgentaler*, [1988] 1 SCR 30.

⁷ *New Brunswick (Minister of Health and Community Services) v G(J)*.

⁸ *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.

⁹ Joint United Nations Program on HIV/AIDS and the Inter-Parliamentary Union. *Handbook for Legislators on HIV/AIDS, Law and Human Rights*. Geneva, 1999, pp 56-59. Available via www.ipu.org/PDF/publications/aids_en.pdf.