

Sex, work, rights:

reforming Canadian
criminal laws on
prostitution

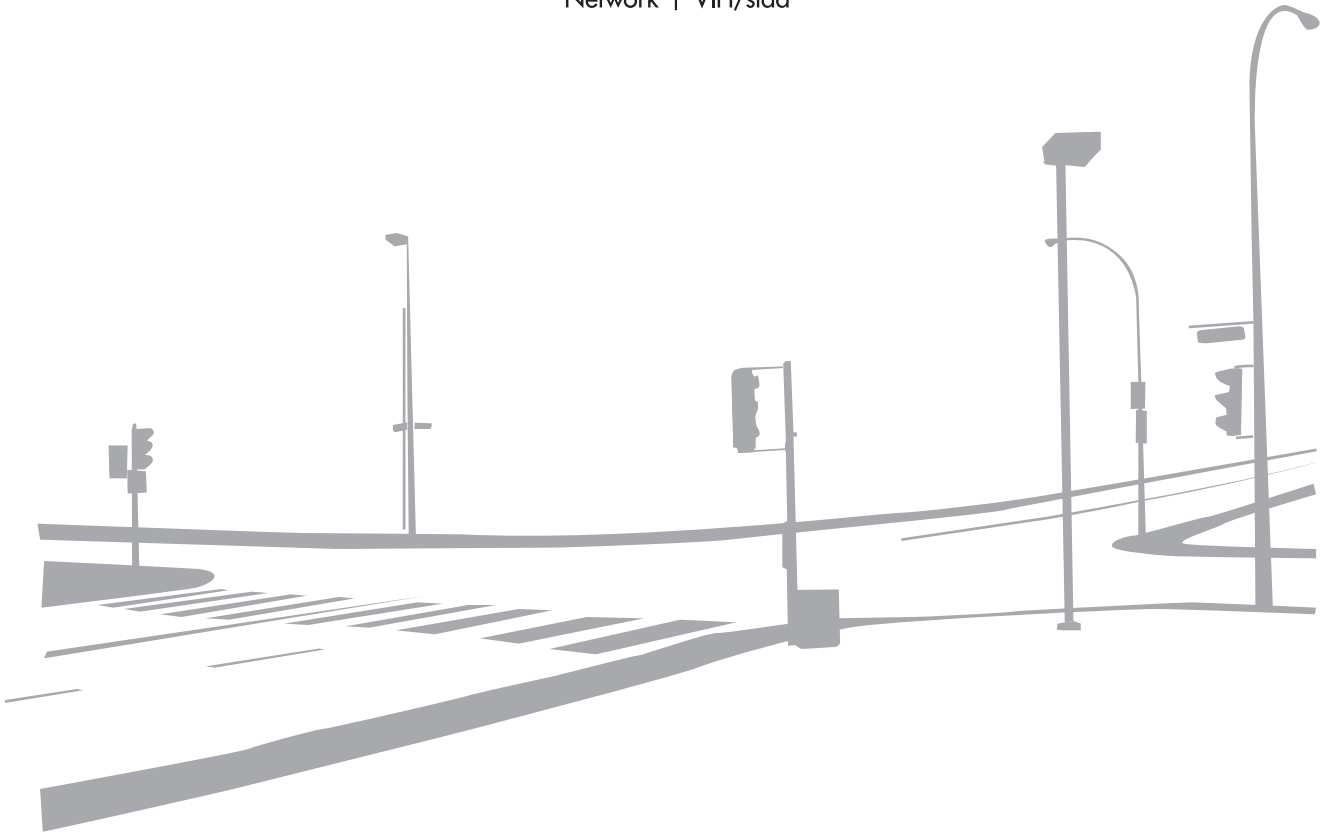


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Canadian HIV/AIDS Legal Network
July 2005



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This report was written by Glenn Betteridge. Joanne Csete contributed to the review of the public health and social science literature regarding prostitution, sex workers and HIV/AIDS. This report was reviewed by a number of outside reviewers, and by Joanne Csete, Richard Elliott, and Richard Pearshouse on behalf of the Canadian HIV/AIDS Legal Network.

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Table of contents

Executive summary	i
Introduction	1
Background and methods	1
A note on terminology	2
Prostitution law reform: recent and current initiatives	3
Scope of the report	8
Outline of the report and principles for law reform	9
Legal regulation of prostitution in Canada	11
Prostitution and the criminal law: legislating conventional morality vs protecting against harm	11
Section 210 and 211: bawdy-houses	13
Section 212: procuring and living on the avails of prostitution	15
Section 213: communicating in public for the purpose of prostitution	16
Criminal law enforcement	17
Prosecutions under the <i>Criminal Code</i>	18
Evidence regarding the effectiveness of the communicating section	20
Provincial and municipal laws	23
Prostitution, sex workers and HIV/AIDS	25
Stigma and discrimination	25
Concepts of vulnerability and risk: HIV/AIDS and sex workers	27
Effects of criminalization on sex workers' health and safety, including vulnerability to HIV/AIDS	30
Evidence-based decision-making as a guiding principle	30
Violence faced by sex workers	31
Quantitative evidence of violence against sex workers	32
Heightened risk of violence: Aboriginal women and transgender sex workers	33
Impact of criminalization on sex workers' experiences of prostitution and violence	33
HIV/AIDS risks among sex workers and those who exchange sex for money, commodities and services	35



Links among the criminal law, sex workers' health and safety, and HIV risk	40
Sex workers' voices	43
Evidence from other jurisdictions	43
Conclusion: A need for law reform to protect the health and safety of sex workers	44
International law and the human rights of sex workers	47
Sex workers' entitlement to human rights	47
International human rights and sex workers	48
HIV/AIDS, sex workers and human rights	53
Canadian Charter of Rights and Freedoms	55
Revisiting the Supreme Court's leading cases	56
Communicating in public for the purposes of prostitution (section 213)	57
Implications for sex workers	57
Section 2(b) guarantee of freedom of expression	58
Section 2(d) guarantee of freedom of association	59
Section 7 rights to liberty and security of the person	61
Section 15 equality rights	64
Section 1 justification?	65
Bawdy-houses (section 210 and 211)	69
Implications for sex workers	69
Section 2(b) guarantee of freedom of expression and section 2(d) guarantee of freedom of association	71
Section 7 rights to liberty and security of the person	72
Section 1 justification?	72
Procuring and living on the avails of prostitution (section 212)	74
Implications for sex workers	75
Section 11(d) right to be presumed innocent	76
Section 2(d) guarantee of freedom of association	76
Section 7 right to liberty	78
Section 1 justification?	78
Prostitution law and policy reform beyond the criminal law	82
Analyzing a recent proposal for reform: Bill C-339	83
Public health and human rights issues	85
Jurisdictional issues in law reform	87
Summary of recommendations	90
Selected bibliography	93
Appendix A: Prostitution-related provisions of the Criminal Code	102
Appendix B: Key informants and consultation participants	105



When I can work in safe and fair conditions.

When I am free of discrimination.

When I am free of labels like “immoral” or “victim.”

When I am free from unethical researchers.

When I am free to do my job without harassment, violence or breaking the law.

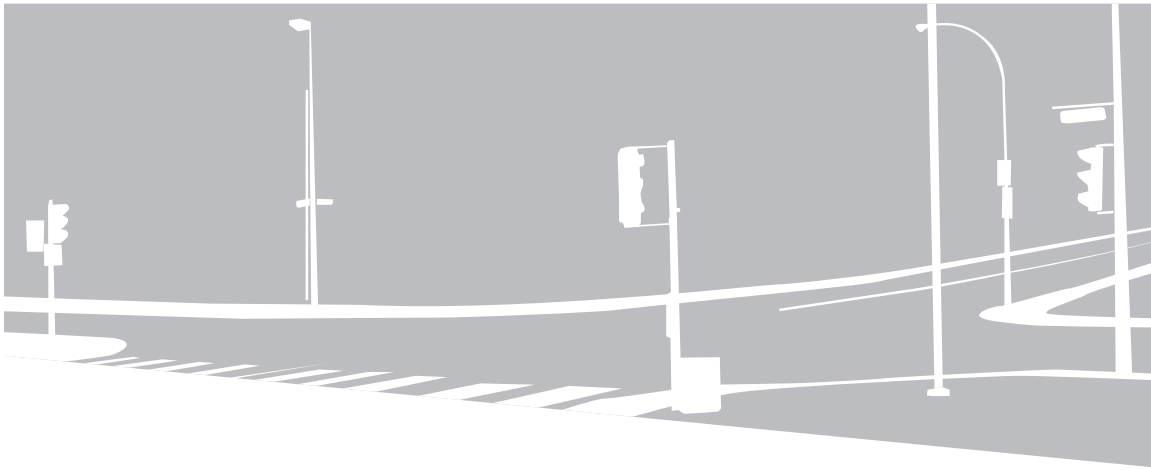
When sex work is recognized as work.

When we have safety, unity, respect and our rights.

When I am free to choose my own way.

THEN I am free to protect myself and others from HIV.¹

¹ Porn and Liz of the Empower Foundation. Remarks delivered at the Closing Session of the XV International AIDS Conference, quoted in P Longo. *NSWP at the XV AIDS Conference in Bangkok, July 2004 – Conference Report*. Network of Sex Work Projects. Available via www.nswp.org.



Executive summary

Background

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. 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. This includes stopping or attempting to stop a vehicle, impeding pedestrian or vehicular traffic, stopping or attempting to stop a person, or in any other manner communicating with a person for the purposes of engaging in prostitution or obtaining sexual services. In spite of these criminal prohibitions, there is every indication that thousands of people in Canada are involved in prostitution, including sex workers, customers and other people who profit from it.

This report is the product of a two-year project on criminal law, prostitution and the health and safety of sex workers in Canada. We conducted a literature review; interviewed key informants (including through a collaboration with the Native Friendship Centre of Montréal); and held a two-day consultation in February 2004 attended by sex workers, former sex workers, members of sex worker organizations, public health and social science researchers, and other community-based organizations.

This report focuses primarily on the criminalization of the activities of adult sex workers who choose to engage in street-based prostitution. An inordinate proportion of police resources directed at combating prostitution is targeted at street-based prostitution, and street-based prostitution has played a leading role in public and parliamentary debate and law reform initiatives.

In the national discussion and debate about how to solve the “problem” of street-based prostitution, sex workers’ perspectives and experiences have sometimes been taken into account. However, these perspectives and experiences have too often been filtered through assumptions adopted in the debate and discussion, or through the methodologies and questions upon which research has been based. Little attention has been paid to the human rights of sex workers or to violations of these rights. 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, the public debate is beginning to consider the health and the human rights of sex workers.

On 24 November 2004, the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness re-established its Subcommittee on Solicitation. The Subcommittee was mandated to review the *Criminal Code* provisions related to prostitution in order to improve the safety of sex workers and communities and to recommend changes that would reduce exploitation of, and violence against, sex workers.

Efforts to improve the health and safety of sex workers must be based, first and foremost, on a recognition of the individual agency, individual dignity and individual worth of sex workers as members of Canadian society. Community safety cannot legitimately be defined as distinct from the health and safety of sex workers, as sex workers are part of Canadian society and communities with the same entitlement to human rights as all others.

Contents of the report

In this report the Canadian HIV/AIDS Legal Network (“Legal Network”) discusses 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* (“Charter”).

Evidence

Public health and social science researchers in Canada have amassed a large body of qualitative and quantitative research exploring whether and how prostitution, sex workers and HIV/AIDS are linked. In Canada, the available public health evidence clearly demonstrates that the blanket characterization of sex workers as vectors of HIV infection is not justified. Nonetheless, a common theme in the literature is the stigma and social vulnerability faced by sex workers, which are exacerbated by the

association of prostitution with HIV/AIDS. Sex workers in Canada face a number of risks to their health including assault, sexual assault, murder and, potentially, HIV and other sexually transmitted infections. The risk of violence is especially prevalent for street-based sex workers, in particular women and transgender sex workers.

The evidence presented in this report explores the complex, multifaceted relationship between Canadian criminal law and sex workers' health and safety, including the risk of HIV infection. 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 the risks they face. The criminal law and its enforcement place sex workers in circumstances where they are vulnerable to high levels of violence and exploitation, as well as potential exposure to HIV. The preponderance of credible evidence points to the fact that the prostitution-related offences in the *Criminal Code*, both directly and indirectly, contribute to sex workers' risk of experiencing violence and other threats to their health and safety.

The punitive consequences of criminalizing prostitution-related activities, and thus the greatest potential for human rights violations, are borne disproportionately by women sex workers. Among adults charged under the communicating section of the *Criminal Code*, the percentage of women and men has been roughly equal. However, data shows that, upon conviction, the sentences given to women have been much harsher than those given to men. Women receive custodial sentences at a much higher rate than men; approximately 90 percent of women are incarcerated, as opposed to only 10 percent of men. Women are less likely to be ordered to pay a fine (as an alternative to incarceration) and less likely to receive probation. When they do receive probation, the length of probation is significantly longer. In cities where "john schools" exist, communicating charges against men may be stayed or dropped in exchange for spending a few hours in a classroom setting.

International human rights

On the whole, those 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 offer sex workers in Canada the potential for greater human rights protection than instruments specifically dealing with prostitution. In this report, we point to those aspects of international human rights law that must be applied in reforming Canada's criminal laws regarding prostitution.

Canadian Charter of Rights and Freedoms

Sadly, sex workers' human rights, as reflected in the *Charter*, have not yet been given serious consideration or support in Canadian law, a deficiency that should be rectified by reforming the *Criminal Code* provisions dealing with prostitution (and other areas of law affecting sex workers).

The Supreme Court has upheld the constitutionality of certain parts of the *Criminal Code* provisions relating to prostitution in a number of *Charter* cases heard in 1988 and 1991. However, these decisions should be revisited, principally for three reasons. First, since the Supreme Court cases challenging these sections were decided, there has been a significant increase in social awareness of the extreme violence and other harms sex workers face.

Second, and highly significant from a legal perspective, a significant body of statistical, behavioural and social scientific literature regarding prostitution and sex workers in Canada has been developed. If this evidence had existed at the time of the earlier cases, the Supreme Court would have had a more complete record upon which to consider the merits of the *Charter* challenges to the bawdy-house, living-on-the-avails, and communicating offences set out in the *Criminal Code*. Third, the law has changed. In the years since the cases were decided, the *Charter* rights at issue in those cases have been refined.

A *Charter* analysis of the prostitution-related provisions of the *Criminal Code* shows that these provisions give rise to numerous violations of sex workers' constitutional rights: the right to freedom of expression, the right to freedom of association, the right to liberty, the right to security of the person, the equality rights of women sex workers, and the right to be presumed innocent. Furthermore, there is a strong argument that these infringements of sex workers' rights cannot be justified by the government (under section 1 of the *Charter*).

Reform beyond the *Criminal Code*

By all credible accounts, street-based prostitution, while a primary focus in the enforcement of the criminal law, accounts for a small fraction of prostitution in Canada. 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, often at the provincial or municipal level, that either undermine the safety and human rights of sex workers or that can be used to better protect sex workers' safety and rights. The international human rights guarantees and the Canadian *Charter* rights and freedoms examined in this report suggest certain essential principles and directions for future reform of law and policy in Canada.

Goals of the report

Complementing recommendations and analysis previously published by sex workers and sex workers' organizations, the analysis and recommendations presented in this report are intended to:

- add to the call for law and policy reforms that respect, protect and fulfil the human rights of sex workers;
- inform the work of community-based AIDS service organizations in promoting the health and human rights of sex workers, as part of effective HIV prevention, care, treatment and support for sex workers;

- inform the work of the House of Commons Subcommittee on Solicitation Laws; and
- inform the larger debate concerning public policy regarding prostitution in Canada.

Recommendations

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. It is also a prerequisite for improving prevailing conditions so that sex workers can work free from violence and other health and safety risks, including HIV infection. To this end, the Legal Network makes 10 recommendations which are set out below and are explained in more detail in the report.

Recommendation for an evidence-based and a human rights-based approach to law reform

Recommendation 1:

Legislation and legislative reforms must comply with Canada's human rights obligations. Proposals for reform of the prostitution-related provisions of the Canadian *Criminal Code* should be assessed in light of Canada's legal obligations under international human rights law and the *Canadian Charter of Rights and Freedoms*. Existing laws and proposed reforms must also be assessed on the basis of the best available evidence of the harms and benefits of various legislative options.

Recommendations for decriminalization

Recommendation 2:

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 3:

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

Recommendation 4:

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 5:

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

Recommendation 6:

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 7:

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)).

Recommendations for additional law and policy reform

Recommendation 8:

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.

Recommendation 9:

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.

Recommendation 10:

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.

By adopting these recommendations, Parliament and the federal government would be taking steps to uphold Canada's obligations under international law to respect, protect and fulfill the human rights of sex workers in Canada. These recommendations are also consistent with the rights and freedoms guaranteed to all persons in Canada, including sex workers, as set out in the *Charter*.

For further information...

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Introduction

Background and methods

This is the first in-depth Legal Network report on HIV/AIDS, prostitution, and sex workers.² This report focuses on legal issues related to adult prostitution and sex workers. It is the product of a two-year project on criminal law, prostitution and the health and safety of sex workers in Canada. We conducted a literature review, focussing on the Canadian context, but also drawing on international literature relevant to prostitution, law reform and the health and human rights of sex workers in the context of HIV/AIDS. We interviewed sex workers, key informants from the academic world, and persons from organizations that represent sex workers. We drafted a consultation paper, and held a two-day consultation in Montréal in February 2004.

Sex workers, former sex workers, representatives of sex worker organizations, public health and social science researchers, and representatives of HIV/AIDS and other community-based organizations attended the consultation. Sex workers were paid an honorarium for their time. The consultation was co-facilitated by a sex worker and activist, and a prostitution researcher and advocate. Feedback from the consultation has been incorporated into the analysis in this report. However, the report does not necessarily reflect the views of sex workers as a group, or any individual sex worker or other consultation participant.

² Previously, the Legal Network has published an info sheet and several articles on prostitution, sex work and legal and ethical issues related to HIV/AIDS, and has addressed prostitution and sex work in a number of reports: e.g., R Jürgens. *HIV Testing and Confidentiality: Final Report*. Canadian HIV/AIDS Legal Network and Canadian AIDS Society, 1998, pp 180-186; T de Bruyn. *HIV/AIDS and Discrimination: A Discussion Paper*. Canadian HIV/AIDS Legal Network and Canadian AIDS Society, 1998, pp 61-64. For more information on the Legal Network's activities concerning the health and human rights of sex workers, see www.aidslaw.ca/Maincontent/issues/sexwork.htm.



The participants at the consultation felt that more in-depth consultation with Aboriginal sex workers was needed. In cooperation with the Native Friendship Centre of Montréal (NFCM), we developed a survey tool. Using the survey tool, the NFCM conducted taped interviews with seven Aboriginal women who have engaged in street-based and off-street prostitution. The interviews were transcribed. The information obtained from these interviews helps to underpin the analysis of this report. In addition, excerpts from these interviews appear throughout the report, reflecting the voices of women who have had first-hand experience with prostitution and its legal regulation.

Drawing further on the evidence of sex workers' themselves, we commissioned Pivot Legal Society in Vancouver to produce a short report on the impact of criminalization on the health status of sex workers, including risk of exposure to HIV. The report was based on affidavits (sworn statements) from sex workers (or former sex workers) from Vancouver's Downtown Eastside.

Finally, those who attended the consultation, key informants, and others with an interest in the health and human rights of sex workers commented on a draft of this report. The key informants and consultation participants are listed in Appendix B.

A note on terminology

The terms used in the debate about selling sex for a livelihood or survival shape that debate to a large extent. The words we use to name people and activities can perpetuate stigma, discrimination and abuse. These cautions are especially important in relation to the activity of selling sex and the people involved.

The social stigma attached to the words "prostitution" and "prostitute" is profound. This is one reason that many people involved in prostitution and organizations involved in the struggle for the rights of people working as prostitutes eschew the terms "prostitute" and "prostitution" in favour of "sex worker" and "sex work." In addition, these latter terms are intended to focus attention on the rights of sex workers as workers, both in the public discourse and policy and legislative debate.³ The ultimate goal is that sex work, including prostitution, will be recognized as work and sex workers will have the protection of labour and employment rights, as part and parcel of full human rights. Out of respect for the dignity and human rights of people involved in prostitution, we use the term "sex worker" in this report.

³ It should be mentioned that, even amongst people who sell sexual services for money, the terms "sex worker" and "sex work" are not universally accepted. One key informant expressed a dislike for the terms, on the basis that they are so broad as to be meaningless, and that they blur the real distinctions between the experiences of people who sell sex for money and those who exchange sex for other commodities. The same informant noted that transgender people often do not have access to some of the broader forms of "sex work" such as massage and erotic dancing since there is no market for transgender people as service providers in such areas of work. Interview, Key Informant #1 (20 August 2003).

However, we often use the term “prostitution” rather than “sex work.” The term “sex work” may be used to mean a wide range of activities where sexual services are exchanged for money. These include work on phone sex lines, stripping, live sex performances and erotic performances, fantasy services (submission-domination, bondage, and cross-dressing), pornography, street-based prostitution, erotic massage, escorting, call girls and boys, hosts and hostesses.⁴ Some of these activities are legal in Canada, some are not. Some are subject to greater social stigma than others.

The focus of this report is on those provisions of the Canadian *Criminal Code*⁵ that specifically regulate activities related to what it refers to as “prostitution.” Therefore, in order to provide a precise and detailed analysis of this criminalization, we use the term “prostitution” to refer to the in-person exchange of sexual services by one person for payment by another, including intercourse, oral sex, masturbation and other services usually (although not necessarily) involving bodily contact intended for the sexual gratification of the purchaser. One key informant stated that although he preferred the term “sex work” to “prostitution” since it focused attention on occupational health and safety issues, he nonetheless recognized the historical and legal significance of the word “prostitution” and believed it was important that it remain part of the discussion of reform.⁶

Prostitution law reform: recent and current initiatives

Prostitution, the exchange of sex for money, is legal in Canada. However, it is difficult for sex workers and their clients to engage legally in prostitution. The criminal law prohibits virtually every activity related to prostitution, and prohibits prostitution in almost every conceivable public or private place.

- Section 210 of the *Criminal Code* makes it illegal to keep a place for the purpose of prostitution (known as a “common bawdy-house”), or to be found in such a place.
- Section 211 makes it illegal to transport a person to a common bawdy-house.
- Section 212 prohibits enticing, encouraging or forcing a person to engage in prostitution (“procuring”), and “living on the avails” of prostitution.⁷
- Section 213 makes it illegal to communicate in a public place or stop a person or vehicle for the purposes of engaging in prostitution. “Public place” is defined broadly, to include any place to which the public has a right of access and includes motor vehicles.⁸

The bawdy-house, procuring and living-on-the-avails laws originated in Canada’s

⁴ T Owens et al. *Recommendations for political policy on prostitution and the sex industry*. International Union of Sex Workers [undated]. Available at www.iusw.org/policy/index.html.

⁵ *Criminal Code*, RSC 1985, C-46.

⁶ Interview, Key Informant #3 (26 August 2003).

⁷ Living on the avails means to “live parasitically” on the income earned from prostitution. See *R v Downey*, [1992] 2 SCR 10, at para 40.

⁸ *Criminal Code*, s 213(2).

first *Criminal Code* in 1892.⁹ The communicating law was enacted in 1985 to give police greater powers to arrest street-based sex workers and their clients. The procuring and living-on-the-avails sections were amended in 1997 to discourage the exploitation of youth and trafficking in humans for the purposes of prostitution.¹⁰

Despite these prohibitions, there is every indication that thousands of people in Canada are involved in prostitution – sex workers and other people who profit economically from prostitution, as well as customers. While there is no comprehensive demographic information on sex workers in Canada, nor comprehensive information on the range of venues where prostitution takes place, there is a growing body of research identifying aspects of prostitution in Canada that should be kept in mind in considering legislative reforms.



Really lobby for changes that would benefit women and men in the sex trade. It's always going to be there.

– 36-year-old Ojibwe woman

One study has found that prostitution “does not have a recognizable career ladder” and that people “work in a variety of venues, sometimes two at the same time.”¹¹ The influence of venue on the practice of prostitution is significant:

Venues differed in regard to sex workers’ control over their earnings, pace of work, clientele, sex activities performed, and health and safety. Compared to other venues, however, sex workers operating independently out of their own homes are in the best relative position to determine their own cost of labour, net earnings, pace of work, clientele and sex activities performed while working.¹²

There are no doubt situations where sex workers, and in particular women sex workers, are exploited (both economically and otherwise) by pimps. However, evidence from sex workers and researchers has indicated that pimps do not play a large part in street-based or off-street prostitution in Canada.¹³ Nor is there credible, verifiable evidence regarding the involvement of organized crime in prostitution.

⁹ For a discussion of the early Canadian criminal law relating to prostitution see J McLaren. Recalculating the wages of sin: the social and legal construction of prostitution, 1850-1920. *Manitoba Law Journal* 1996; 23: 524-555. For a brief review of the legislative reforms relating to the *Criminal Code*, see J Allain, M Pilon. *Prostitution: Current issue review*. Library of Parliament Research Branch. 6 September 1995.

¹⁰ *An Act to Amend the Criminal Code (Child Prostitution, Child Sex Tourism, Criminal Harassment and Female Genital Mutilation)* SC 1997, c 16.

¹¹ C Benoit, A Millar. *Dispelling myths and understanding realities: working conditions, health status, and exiting experiences of sex workers*. Short Report. October 2001 at 7. Available at www.peers.bc.ca/images/DispMythsshort.pdf. Full report available at <http://web.uvic.ca/%7Ecbenoit/papers/DispMyths.pdf>. The research involved a non-random sample of currently active and former adult female (n=160), male (n=36) and transgendered (n=5) sex workers residing in Victoria, BC and the surrounding 13 municipalities that make up the Capital Regional District. Persons in the survey were asked about whether they experienced their “sex trade” activity as a job or not, the degree of control they experienced in their current venue, their health status, and their access to health and related services in the metropolitan area.

¹² C Benoit, A Millar. Short Report at 7.

¹³ Numerous witnesses before the Subcommittee on Solicitation Laws addressed the issue of pimping of adult sex workers. All references below are from the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human

The available evidence indicates that an inordinate proportion of police and court resources directed at combating prostitution is targeted at street-based prostitution. One of prostitution's most visible manifestations, street-based prostitution has played a leading role in public and parliamentary debate and law reform initiatives.¹⁴ However, it has been estimated that street-based prostitution accounts for 20 percent or less of prostitution in Canada.¹⁵

Finally, male sex workers have been much less visible than female sex workers, working primarily through indoor venues or private residences.¹⁶ Thus, male sex workers have been almost entirely absent from the debate, whether as participants or as subjects of debate. There has been even less information about, and attention to, the particular situation of transgender sex workers.

It is beyond the scope of this report to review the full history of laws criminalizing activities related to prostitution in Canada, and efforts to reform those laws. Significant developments include legislative amendments, decisions by the Supreme Court of Canada and reports from Parliamentary and other government committees.¹⁷ These have all been reviewed elsewhere.¹⁸ We note here recent Parliamentary initiatives to reform the *Criminal Code* sections related to prostitution.

Rights, Public Safety and Emergency Preparedness, 38th Parliament, 1st Session, *Evidence*. See for example Meeting No 9, 7 February 2005 at 1810 where F Shaver stated that, "Another important lesson for me and for my research team is that pimping is exaggerated"; Meeting No 9, 21 February 2005 at 1900, where J Lowman stated that, "it accounts for a very small percentage of street prostitution"; Meeting No 11, 9 March 2005 at 1935 where C Parent stated that only one of 19 sex workers in her study had a pimp; Meeting No 11, 9 March 2005 at 1940, where C Bruckert stated, "Can I just add one thing around the pimping? It's not just our research that has found this, but study after study, including the Department of Justice research in the mid-1980s, came to the same conclusion. So it's not just a sample of 19 women that proved this; it's many studies by Fran Shaver, Cecilia Benoit, and the justice department"; Meeting No 12, 15 March 2005 at 925, where Det H Page stated that "The Hollywood aspect of the pimp standing on the corner waiting for the prostitute to return to him and the money being turned over to him or to others is not what we're seeing in downtown Toronto"; Meeting No 12, 15 March 2005 at 1035, where E Smith stated, "I don't have a pimp, other than my landlord who wants rent"; Meeting No 12, 15 March 2005 at 1115, where A Kusyk stated, "At 16, I was working the street. I did not have a pimp and I never smoked crack.." Two witnesses who do not conduct research with or work directly with sex workers took the contrary view; Meeting No 9, 21 February 2005 at 1825 where A Lebrun stated that a "significant proportion" of sex workers were pimped. Meeting No 6, 9 February 2005 at 1840, where R Poulin stated that "between 85 and 90 percent of prostituted persons in the Western world are under the control of a pimp."

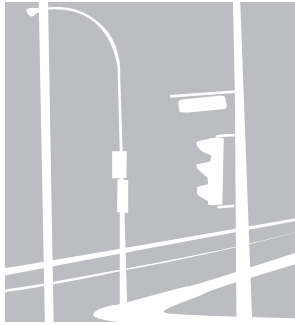
¹⁴ Dan Allman, commenting on the draft report, suggested that advertisements in daily and weekly newspapers have become the most publicly visible manifestation of prostitution in Canada.

¹⁵ See, for example, Committee on Sexual Offences Against Children and Youths. *Sexual offences against children: report of the Committee on Sexual Offences against Children and Youths*. Government of Canada. 1984; (Toronto) Bureau of Municipal Research. *Cities*. 1983; F Shaver. *Traditional data distort our view of prostitution*. Paper presented at International Conference on Prostitution and Other Sex Work, 1996, Montréal; Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Public Safety and Emergency Preparedness, 38th Parliament, 1st Session, *Evidence* (Meeting No 9, 21 February 2005) at 1825. One participant at the Legal Network's national consultation stated that, in Toronto, street-based prostitution was a very small part of the prostitution market given the range of indoor opportunities that rarely attract police attention.

¹⁶ British Columbia. *Community consultation on prostitution in British Columbia: overview results*. Ministry of the Attorney General, 1996. Quoted in D Allman, *M is for mutual, A is for acts – male sex work and AIDS in Canada*. Health Canada. 1999, p 18.

¹⁷ Special Committee on Pornography and Prostitution. *Pornography and prostitution in Canada: report of the Special Committee on Pornography and Prostitution*. Minister of Supply and Services Canada. 1985 ("Fraser Committee" and "Fraser Report"); Standing Committee on Justice and the Solicitor General. *Fourth report of the Standing Committee on Justice and the Solicitor General on Section 213 of the Criminal Code (prostitution-soliciting)*. October 1990; Federal-Provincial-Territorial Working Group on Prostitution. *Report and recommendations in respect of legislation, policies and practices concerning prostitution-related activities*. 1998. Available at www.justice.gc.ca/en/news/nr/1998/toc.html. The relevant Supreme Court case law is reviewed and analyzed in the text below.

¹⁸ For succinct summaries and analysis, see Federal-Provincial-Territorial Working Group on Prostitution; J Lowman. 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. Available in unpublished format at <http://mypage.uniserve.ca/~lowman/ProLaw/prolawcan.htm>. All subsequent citations will also refer to the online text.; J Allain, M Pilon. *Prostitution: current issue review*. Library of Parliament Research Branch. Revised 6 September 1995.



Where are our rights, our human rights? You're allowed to talk. Even if the person is doing prostitution, I think it's their own rights. It's not anyone else's business. As long as it's two consenting adults, that there's no violence and there are no children involved, I think the law is retarded.

– 29-year-old Inuit and Cree woman

On 11 December 2002, a bill entitled *An Act to decriminalize activities related to prostitution and to implement measures to assist sex workers and persons with drug addiction* received first reading in the House of Commons.¹⁹ Bill C-339 was a private member's bill introduced by Bloc Québécois Member of Parliament Réal Ménard. If enacted as presented at first reading, the Bill would have legalized or decriminalized for a period of time certain activities related to adult prostitution. The Bill also provided a number of sexually transmitted disease-related summary conviction offences for sex workers, clients and licence holders.

Finally, the Bill would have obliged the Minister of Justice to prepare and present to the House of Commons a comprehensive report on the operation of the Act. The Bill did not progress to second reading. It died when the Parliamentary session ended in November 2003. As one recently proposed model for decriminalization and regulation of prostitution, Bill C-339 will be examined in greater detail in the final section of the report as a means of analyzing certain approaches.

In February 2003, the House of Commons passed the following motion:

That the Standing Committee on Justice and Human Rights be ordered to review the solicitation laws 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.

The motion was introduced by Libby Davies, the New Democratic Member of Parliament for the riding of Vancouver East. The Vancouver East riding includes Vancouver's Downtown Eastside, the neighbourhood that was home to many of the sex workers who were reported missing or were murdered in recent years in Vancouver.

The Committee established a Subcommittee on Solicitation Laws to conduct the review. Given the reference in the Subcommittee's name just to "solicitation", it might be thought that its mandate was just to examine the "communicating" sections of the *Criminal Code* (which replaced the reference to "soliciting" as a result of amendments in 1985). However, judging by the House of Commons debate over the motion and the Subcommittee hearings themselves, it is clear that the

¹⁹ *An Act to decriminalize activities related to prostitution and to implement measures to assist sex workers and persons with drug addiction*. Bill C-339. Second Session, Thirty-Seventh Parliament, 51 Elizabeth II, 2002 ("Bill C-339").

Subcommittee's mandate extended to review section 213 and sections 210 to 212 of the *Criminal Code*.²⁰

The first Subcommittee held five hearings in October and November of 2003 during which it heard from several invited witnesses from the Department of Justice and academia, but did not have an opportunity to hear from sex workers, community associations or other witnesses.²¹ In mid-November 2003, the Parliamentary session, and along with it the mandate of the Subcommittee, came to an end. At the time, the Subcommittee had been in the process of drawing up a list of additional witnesses, including groups that work with, or are made up of, sex workers.

The laws they have right now are criminal laws, so that should be abolished. Instead, if they want to start doing something, they want to change the laws, maybe... You know, they're changing the laws for marijuana, decriminalizing it. Why can't they do it for prostitution?

– 37-year-old Inuk woman



A year later, on 24 November 2004, with a new government in place and a new Parliamentary session under way, the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (newly renamed) re-established a Subcommittee on Solicitation Laws. It held its first meeting on 9 December 2004.²² The Subcommittee held hearings in Ottawa and other cities throughout Canada, including Toronto, Ottawa, Montréal, Halifax, Vancouver, Edmonton and Winnipeg. Witnesses included the Department of Justice, academics who have researched and studied sex work, non-governmental organizations, community associations, sex workers and sex worker organizations, front-line service providers, organizations that combat the exploitation of children and human trafficking, law enforcement agencies and associations, and a range of individuals. The Subcommittee also made plans to travel to England, the Netherlands, Sweden and the United States in relation to its study of prostitution laws.

²⁰ Hansard, 37th Parliament 2nd Session No 026 (18 November 2002) 1110-1205; Hansard, 37th Parliament 2nd Session No 055 (7 February 2003) 1330-1425.

²¹ For more information on the work of this previous subcommittee, go to: www.parl.gc.ca/committee/CommitteeHome.aspx?CommitteeId=4233&Lang=1&ParlSession=372&SelectedElementId=e17_ or look for the Subcommittee on Solicitation Laws under the 37th Parliament, 2nd Session on the House of Commons Committee home page via the Parliamentary internet site.

²² For more information on the Subcommittee on Solicitation Laws (including notice of meetings, minutes from meetings, testimony before the committee, contact information for the members and the clerk of the committee), see the Subcommittee's home page: www.parl.gc.ca/committee/CommitteeHome.aspx?CommitteeId=9243&Lang=1&ParlSession=381&SelectedElementId=e17_.

Scope of the report

This report focuses primarily on the criminalization of adult sex workers who choose to engage in prostitution.²³ The idea that someone might choose prostitution as a profession or a way of earning income is controversial. However, we recognize prostitution as a valid choice and the agency of sex workers to make their own choices because doing so is respectful of their human rights. The report focuses on street-based prostitution because this is the principal focus of police enforcement efforts under the *Criminal Code*, and because the effects of criminalization are experienced most acutely by sex workers when working on the street. Off-street prostitution will also be examined since it is criminalized in all but the narrowest of circumstances, and because off-street sex workers also experience health and safety risks as a result of the criminal law.

The report does not address the issue of international human trafficking linked to prostitution (in reality, something experienced overwhelmingly by women and children). The confusion between, and equation of, prostitution and sex trafficking is problematic, both ideologically and practically.²⁴ To give but one example from the fight against the HIV/AIDS epidemic, as a precondition of receiving funding from the United States government under the *US Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003*,²⁵ an organization must have a policy explicitly opposing prostitution and sex trafficking.²⁶ However, as one commentator has succinctly 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.²⁷

Other commentators, focussing their analysis on the situation of women in prostitution, argue that the confounding of 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

²³ The report will not directly address the legal situation of prostitution by people under the age of 18 years, except where this is relevant to the analysis of potential reform of, or amendments to, sections 210 to 213 of the *Criminal Code*.

²⁴ See e.g., A-L Crago. The fight against “white slave trade.” *ConStellation* 2003; 8(1): 22-30.

²⁵ Pub L No 108-25 (2003).

²⁶ House International Relations Committee approves international AIDS bill, amendments. *Kaiser Daily HIV/AIDS Report*, 3 April 2003; Bush Administration to require US AIDS groups to take pledge opposing commercial sex work to gain funding. *Kaiser Daily HIV/AIDS Report*, 28 February 2005.

²⁷ K Butcher. Confusion between prostitution and sex trafficking. *The Lancet* 2003; 361: 1983 at 1983. See also J Lowman. *Prostitution Law Reform in Canada* at 5.

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.²⁸

This more nuanced analysis suggests that individual choice and agency are important principles that should be taken into account in determining whether the *Criminal Code* provisions related to prostitution should be reformed, and if so, what reform is appropriate.

This report focuses primarily on making recommendations for change to the *Criminal Code* based on the available evidence and on the need to respect, protect and fulfil the health and human rights of sex workers. However, reforming the criminal law is only part of the challenge of bringing about broader social changes in attitudes and behaviour that undermine the health and human rights of sex workers. With this in mind, the final section will also include some general recommendations aimed at larger social reforms to improve the health and safety of sex workers and communities.

Outline of the report

The remainder of the report is divided into six main sections. The first section examines the legal regulation of prostitution in Canada. It examines the prostitution-related sections of the *Criminal Code*, and touches briefly on provincial and municipal laws used to regulate activities related to prostitution. The second section explores the relationship between prostitution, sex workers and HIV/AIDS. The third section presents the public health and social science evidence of the effects of criminalization on sex workers' health and safety, including vulnerability to HIV/AIDS. Evidence from sex workers is also included. These three sections set the stage for the legal analysis and recommendations that follow. Together they establish the first foundation that should guide the review and reform of the prostitution-related provisions of the *Criminal Code*: evidence from credible social science and public health research and from sex workers themselves.

The fourth section sets out another foundation of law reform: Canada's obligations to sex workers under international human rights law. It examines sex workers' rights under treaties to which Canada is a party, both general and prostitution-specific treaties. International guidelines specific to prostitution, HIV/AIDS and human rights are also reviewed. The fifth section examines the final foundation of law reform: the rights of sex workers under the *Canadian Charter of Rights and Freedoms*.²⁹ The recommendations arising out of the *Charter* analysis call for the decriminalization of most activities related to adult prostitution. The sixth section sketches out the principles that should guide prostitution law and policy reform beyond the criminal law and makes recommendations in this regard.

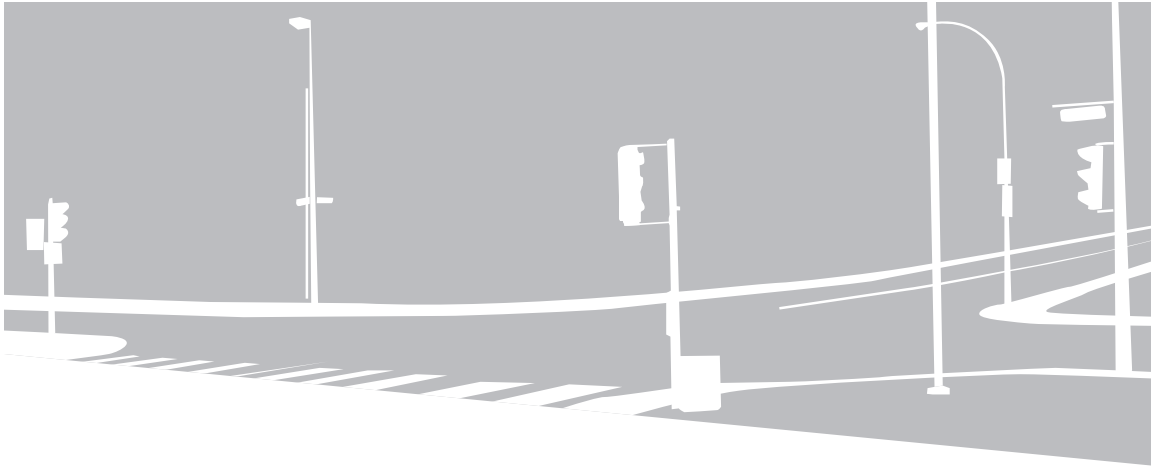
²⁸ J Csete, M Seshu. Still underground: searching for progress in realizing the human rights of women in prostitution. *HIV/AIDS Policy and Law Review* 2004; 9(3): 1, 8-13 at 9.

²⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Following the six main sections the report presents a summary of the recommendations (drawn from the preceding sections of the report), a selected bibliography, an appendix setting out the prostitution-related provisions of the *Criminal Code*, and an appendix listing the key informants and consultation participants.

Recommendation 1

Legislation and legislative reforms must comply with Canada’s human rights obligations. Proposals for reform of the prostitution-related provisions of the Canadian *Criminal Code* should be assessed in light of Canada’s legal obligations under international human rights law and the *Canadian Charter of Rights and Freedoms*. Existing laws and proposed reforms must also be assessed on the basis of the best available evidence of the harms and benefits of various legislative options.



Legal regulation of prostitution in Canada

Under the Canadian constitution, federal Parliament has exclusive jurisdiction to enact criminal laws applied in the provinces and territories.³⁰ Prostitution is legal under Canadian law. However, as will be examined in this chapter, most of the activities related to prostitution are prohibited under sections 210 to 213 of the *Criminal Code*. This section focuses on these *Criminal Code* provisions, their enforcement, and whether or not they have achieved their ostensible purpose. Provincial and municipal laws are also used, principally by police, to control street-based prostitution. These laws are examined in brief.

Prostitution and the criminal law: legislating conventional morality vs protecting against harm

The Supreme Court has stated that a “legitimate public purpose” must underlie a criminal prohibition, and has identified morality as a legitimate concern of the criminal law.³¹ In the words of the Court, Parliament has “the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society.”³²

Among those values are the human rights guaranteed in the *Canadian Charter of Rights and Freedoms*, which is part of the Constitution of Canada, the supreme law of the land.³³ Therefore, the Supreme Court has also ruled: “To impose a certain

³⁰ *Constitution Act, 1867 (UK)*, 30 & 31 Victoria, c 3, s 92(27).

³¹ *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199. The leading statement of the scope of Parliament’s criminal law power was set out by the Supreme Court in its 1949 decision in the *Margarine Reference* at 49-50: “A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect maybe in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.... Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law....”

³² *R v Butler*, [1992] 1 SCR 452 at para 80.

³³ See section 52 of the Charter. The Canadian constitution includes the *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3 and

standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.”³⁴ Instead, in cases dealing with abortion, pornography and possession of marijuana, the Court has justified limitations on fundamental rights imposed under the *Criminal Code* on the basis of the harms that such provisions seek to prevent.

The Court has stated on a number of occasions that the protection of vulnerable groups is a valid objective of the criminal law.³⁵ Protecting the exploitation of children through the prohibition of the possession of child pornography has been upheld as a valid limit on freedom of expression;³⁶ the criminalization of obscenity has likewise been held to be a valid limit with the objective of protecting women from “abject and servile victimization”;³⁷ and the *Criminal Code* hate speech provisions are justified to protect against potential attacks on minorities.³⁸

The terms “prostitute” and “prostitution” are the common threads that link together sections 210, 211, 212 and 213 of the *Criminal Code*.³⁹ These sections do not prohibit prostitution per se. Yet together they make illegal the activities related to prostitution in all but the narrowest of circumstances. The term “prostitution” is nowhere defined in the *Criminal Code*. The term “prostitute” is defined, in a circular manner, as “a person of either sex who engages in prostitution.”⁴⁰ In the Supreme Court of Canada’s decision in *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*,⁴¹ Lamer J defined prostitution as the “offering by a person of his or her body for lewdness for payment in return.” He went on to state: “It seems to me that there is little dispute as to the basic definition of prostitution, that being the exchange of sexual services of one person in return for payment by another.”⁴² The term “lewdness” is not used or defined in the *Criminal Code*. Nor is the phrase “sexual services.”

Two provincial courts of appeal have lately clarified somewhat the meaning of prostitution. In *R v Bedford*, the Ontario Court of Appeal was called upon to determine, among other questions, whether prostitution is limited to conventional sexual activities such as sexual intercourse and oral sex. The accused in that case offered sadomasochistic services involving domination, bondage and erotica

the Canada Act 1982 (UK), 1982, c 11. The latter includes as Schedule B the Constitution Act, 1982. The Charter is Part I of the Constitution Act, 1982. The Charter applies not only to laws enacted by Parliament and provincial legislatures, but also to any body that exercises authority under such laws: see section 32 of the Charter; *RWDSU, Local 580 v Dolphin Delivery*, [1986] 2 SCR 573.

³⁴ *R v Butler*, [1992] 1 SCR 452 at para 79.

³⁵ See a summary of the case law in the recent case of *R v Malmo-Levine; R v Caine*, [2003] 3 SCR 571, para 76, 77.

³⁶ *R v Sharpe*, [2001] 1 SCR 45.

³⁷ *R v Butler*.

³⁸ *R v Keegstra*, [1995] 2 SCR 381.

³⁹ *Criminal Code*, ss 210 and 211 (relating to bawdy-houses), 212 (procuring) and 213 (offences in relation to prostitution).

⁴⁰ *Ibid.* at s 197(1).

⁴¹ *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at para 45 (“*Prostitution Reference*”). A reference is a special procedure established by legislation for bringing an issue before a court. This type of legislation gives a minister or the cabinet the power to state a question, such as a question related to the constitutionality of a particular piece of legislation, directly to a court for a determination.

⁴² *Ibid.*

sessions. The trial judge determined that such activities were primarily sexual in nature. The Court of Appeal held that “the common law is clear that ‘prostitution’ refers to lewd acts for payment for the sexual gratification of the purchaser” and “the phrase ‘lewd’ ... is broad enough to encompass acts that do not include genital touching but are intended to be sexually stimulating.”⁴³

In *R v St Onge*, the Quebec Court of Appeal was called on to determine if prostitution included the situation where dancers disrobed and masturbated for customers who masturbated themselves. The Court of Appeal rejected the argument that sexual contact was required for the act of prostitution, and adopted Lamer J’s definition that “prostitution is the offering of one’s body for lewdness for payment in return,” concluding that stripping and masturbating in front of a customer falls within the term “prostitution.”⁴⁴

Again it comes back to the same issue: what people do behind closed doors, it’s no one else’s business as long as it’s two consenting adults, with no violence.
– *29-year-old Inuit and Cree woman*



Canadian courts’ reliance on the terms “lewd” and “sexual services” still leaves some doubt whether certain activities constitute prostitution under the *Criminal Code*. Despite this lack of precision, courts have rejected the claim that the term “prostitution,” as used in the *Criminal Code*, is unconstitutionally vague.⁴⁵ In the opinion of one judge of the Supreme Court, the meaning of the term “prostitution” is possible to discern in advance.⁴⁶

Section 210 and 211: bawdy-houses

Section 210 makes it illegal to keep a “common bawdy-house,” 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.”⁴⁷ Persons found in common bawdy-houses, whether sex workers, other employees or clients, can also be charged. It is also illegal for an owner, landlord, lessor, tenant, occupier or other person having control of a place to knowingly permit that place to be used as a common bawdy-house. In those circumstances, merely providing accommodation for the purposes of prostitution is “keeping” a common bawdy-house.⁴⁸

⁴³ *R v Bedford* [2000] OJ No 887 (OCA) (QL) at para 25-26; Leave to appeal to SCC dismissed [2000] SCCA No 328 (QL).

⁴⁴ *R v St. Onge* (2001), 15 CCC (3d) 517 (QCA) at para 9.

⁴⁵ *Prostitution Reference; R v DiGiuseppe; R v Cooper* (2002), 161 CCC (3d) 424 (Ont CA).

⁴⁶ *Prostitution Reference*, per Lamer J, para 47.

⁴⁷ *Criminal Code*, s 197(1).

⁴⁸ *R v Wong* [1980] BCJ No 152 (BCCA) (QL).

The restrictiveness of the bawdy-house provisions is in large part a result of the broad, general language of the definitions of “place” and “common bawdy-house” set out in *Criminal Code* section 197. The definition of “place” includes any place whether or not covered or enclosed, whether used permanently or temporarily, or whether any person has an exclusive right to use it.⁴⁹ Courts have held that any defined space, including a parking lot, can be a common bawdy-house if prostitution regularly takes place there,⁵⁰ and that a car can also be a place.⁵¹ The words “kept or occupied” and “resorted to,” which are used in the definition of a common bawdy-house, connote a frequent or habitual use of the premises for the purposes of prostitution.⁵² Evidence of the general reputation of a house is admissible to show that it is a bawdy-house.⁵³

In the case where a person is found guilty of keeping a common bawdy-house, and the person does not own the premises, the law authorizes a notice to be served on the owner, landlord or lessor of the place. The notice should state the name of the person convicted and that he or she was convicted of keeping a common bawdy-house under section 210 of the *Criminal Code*. The notice also advises the owner, landlord or lessor that he or she is under a legal duty to take immediate steps to terminate the tenancy or right of occupation, or take all reasonable steps to prevent the premises from being used by the guilty party as a common-bawdy house.

If the guilty party re-offends, the owner, landlord or lessor will be found guilty of keeping a common bawdy-house unless he or she can prove he or she took eviction proceedings or all reasonable steps to prevent the use of the premises in this fashion. *The effect of the notice provisions is to reverse the usual onus of proof in criminal law.* The accused person has to prove that he or she is innocent, rather than the state having to prove his or her guilt. The constitutionality of section 210 (section 193 at the time) was upheld by the Supreme Court in a 1990 decision, which will be analyzed in detail below in light of developments since the case was decided.⁵⁴

Section 211 is straight-forward in comparison to section 210. Section 211 makes it illegal to knowingly to transport or direct any person to a common bawdy-house.

A person found guilty of keeping a common bawdy-house is guilty of an indictable offence and is liable to a term of imprisonment not exceeding two years.⁵⁵ A person found guilty of being an “inmate” of, or found in, a common bawdy-house, or who is guilty of transporting or directing a person to a common bawdy-house, is guilty of a summary conviction offence.⁵⁶ A summary conviction offence carries a maximum

⁴⁹ *Criminal Code*, s 197(1).

⁵⁰ *R v Pierce* (1982), 66 CCC (2d) 388 (OCA).

⁵¹ *Rex v Thompson* (1920), 34 CCC 101 (Sup Ct Ont – HC).

⁵² *R v Patterson*, [1968] 1 SCR 157.

⁵³ *Theirlynck v R* (1931), 56 CCC 156 (SCC).

⁵⁴ *Prostitution Reference*.

⁵⁵ *Criminal Code*, s 210(1).

⁵⁶ *Ibid.*, s 210(2), 211.

fine of \$2,000, imprisonment for six months, or both.⁵⁷ If a person defaults on the payment of a fine imposed as a result of a finding of guilt under the bawdy-house provisions, the person may be jailed for a term not exceeding six months.⁵⁸

Section 212: procuring and living on the avails of prostitution

Section 212 is intended to prohibit a person from procuring, soliciting, inveigling or enticing another person to engage in prostitution, and to prohibit the exploitation (economic and physical, including violence) of those engaged in prostitution. The section places particular attention on preventing persons under 18 years from being procured into, and exploited in, prostitution.

Section 212 makes illegal six general types of activities:

- inducing a person to enter into, or engage in, prostitution or illicit sexual intercourse, whether through enticement or exploitation (economic or otherwise);⁵⁹
- concealing a person in a common bawdy-house or directing, taking or inducing a person to frequent a common bawdy-house;⁶⁰
- living wholly or in part on the avails of prostitution of a person 18 years of age or older;⁶¹
- living wholly or in part on the avails of prostitution of a person under 18 years of age;⁶²
- living wholly or in part on the avails of prostitution of a person under 18 years in aggravating circumstances (i.e., profit, violence, intimidation or coercion);⁶³ and
- obtaining the sexual services of a person under 18 years of age, or communicating with such a person for such purposes.⁶⁴ Communicating in public for the purposes of prostitution includes stopping or attempting to stop a vehicle, impeding pedestrian or vehicular traffic, or stopping or attempting to stop a person or in any manner communicating with a person for the purposes of engaging in prostitution or obtaining sexual services.⁶⁵

The *Criminal Code* provides for a maximum of ten years' imprisonment for the offences listed in the first three points above. The offence in the fourth point carries a maximum penalty of 14 years' imprisonment. The offence under the fifth point carries a maximum penalty of 14 years' imprisonment and a minimum penalty of five. The final offence carries a maximum of five years' imprisonment.

⁵⁷ Ibid., s 787(1).

⁵⁸ Ibid., s 787(2).

⁵⁹ Ibid., s 212(1)(a), (b), (d), (g), (h), (i).

⁶⁰ Ibid., s 212(1)(c), (e), (f).

⁶¹ Ibid., s 212(1)(j), (3).

⁶² Ibid., s 212(2), (3).

⁶³ Ibid., s 212(2.1), (3).

⁶⁴ Ibid., s 212(4).

⁶⁵ Ibid., s 213 sets out the "communicating in a public place" offence.

The living-on-the-avails section targets the person who has an economic stake in the earnings of a prostitute, and who lives “parasitically” off such earnings.⁶⁶ The living-on-the-avails offence does not require proof of coercion.⁶⁷ Escort agency owners have been convicted of living on the avails in the absence of coercion.⁶⁸ Properly applied, the living-on-the-avails section should only criminalize sex workers’ personal relationships where such relationships are characterized by parasitism:

The true parasite whom s. 212(1)(j) seeks to punish is someone the prostitute is not otherwise legally or morally obliged to support. Being a prostitute is not an offence, nor is marrying or living with a prostitute. A person may choose to marry or live with a prostitute without incurring criminal responsibility as a result of the financial benefits likely to be derived from the pooling of resources and the sharing of expenses or other benefits which would normally accrue to all persons in similar situations. Prostitutes are under no special restrictions as to the disposition they may wish to make of their income. A woman may agree to be supported by a man, in whole or in part, and vice versa. That option becomes unavailable, however, if the provider is a prostitute and the relationship is parasitic in nature.⁶⁹

Section 212 is also intended to combat migration and trafficking for the purposes of engaging in 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.⁷⁰ It is also illegal to induce people to leave Canada for the purposes of prostitution and related activities.⁷¹

A person charged with living on the avails of prostitution is in the position whereby he or she can be convicted even though there is a reasonable doubt about his or her guilt, according to section 212(3). Under that section, evidence that a person lives with or is habitually in the company of a prostitute, or lives in a common-bawdy house, in the absence of evidence to the contrary, is proof that the person is guilty of living on the avails of prostitution. This is an important departure from the presumption that a person accused of a crime is presumed to be innocent until proven guilty. The constitutionality of section 212(3) under the *Charter* right to be presumed innocent will be examined below.

Section 213: communicating in public for the purpose of prostitution

Enacted in 1985, the communicating offence 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.⁷² The nuisance has been recognized

⁶⁶ *R v Downey*, at para 40, referring to section 212(1)(j). See also *R v Barrow* (2001), 155 CCC (3d) 362 (OCA).

⁶⁷ *R v Barrow*, para 31.

⁶⁸ See, for example, *R v Downey*; *R v Barrow*.

⁶⁹ *R v Grilo* (1991), 64 CCC (3d) 53 (OCA).

⁷⁰ *Criminal Code*, s 212(1)(a), (d), (f), (g).

⁷¹ *Ibid.*, s 212(1)(e), (g).

⁷² R Achilles. *The regulation of prostitution: background paper*. 14 April 1995. Unpublished. See also *Prostitution Reference*. In that case the judges of the court put forward a number of different characterizations of the legislative purpose of the communicating section for the purposes of conducting the Charter section 1 analysis. Dickson CJC (writing for LaForest and Sopinka JJ, at para 2) and Wilson J (writing for L’Heureux-Dubé J, at para 128) both characterized the purpose as addressing solicitation in public places with a view to eradicating various forms of social nuisance arising from the public

as including street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children.⁷³

Section 213 makes it illegal for sex workers and clients to communicate in a public place for the purposes of engaging in prostitution or engaging the sexual services of a sex worker. More precisely, it is illegal to stop, attempt to stop or impede pedestrian or vehicular traffic for the purposes of engaging in prostitution or obtaining sexual services. Section 213 also makes it illegal for a sex worker or client to communicate or attempt to communicate in any manner in a public place with any person for the purposes of engaging in prostitution or of obtaining sexual services. “Public place” is defined broadly to include any place to which the public has a right of access and includes motor vehicles.⁷⁴

Section 213 is a summary conviction offence, meaning that a person found guilty under that section is liable to a fine of not more than \$2000, imprisonment for six months, or both.⁷⁵ Further, where the court orders a person to pay a fine, it can impose a condition whereby if the person does not pay the fine he or she can be imprisoned for up to six months.⁷⁶

Criminal law enforcement

The overall goal of the Canadian criminal law on prostitution is not clear. Although prostitution is legal in Canada, the vast majority of the activities related to prostitution are prohibited under the *Criminal Code*. Commentators have noted that, in practice, this paradox in the criminal law has promoted the invisibility of prostitution and of sex workers. As one established researcher of prostitution in Canada notes:

While the activity proscribed by each law is relatively clear, the overall goal of Canadian prostitution law is not. Apparently it is not prohibition, otherwise the buying and selling of sexual services as such would be prohibited. However, the aforementioned criminal laws circumscribe prostitution in a way that makes it difficult to conceive how a person can prostitute without breaking the law. The practical solution to this contradiction is that, *as long as it is off the street, laws against prostitution are rarely enforced*. Indeed, most large municipalities facilitate the off-street trade by licensing and regulating it. And yet the rhetoric of Canadian politicians about prostitution is almost entirely abolitionist. The Canadian political solution to the problems created by prostitution has been to say one thing and do another.⁷⁷ [Emphasis added.]

display of the sale of sex. Lamer J (at para 97) found that the legislative objectives go beyond preventing nuisance related to traffic and general street disorder: “There is an additional objective of minimizing the public exposure to an activity that is degrading to women in the hope that potential entrants in the trade can be deflected at an early stage and of restricting the blight that is associated with public solicitation for the purposes of prostitution.”

⁷³ *Prostitution Reference*, per Dickson CJC (writing for LaForest and Sopinka JJ) at para 3; per Wilson J (writing for L’Heureux-Dubé J) at para 127; per Lamer J at para 95, based on the submissions of various attorneys general regarding the legislative objective of the communicating section of the *Criminal Code*.

⁷⁴ *Criminal Code*, s 213(2).

⁷⁵ *Ibid.*, s 787(1).

⁷⁶ *Ibid.*, s 787(2).

⁷⁷ J Lowman. *Prostitution law reform in Canada* at 1. For a thorough analysis of the invisibility of prostitution, in sources and effects, see S Davis, M Shaffer. *Prostitution in Canada: the invisible menace or the menace of invisibility?* 1994. Unpublished. Available at www.walnet.org/csis/papers/sdavis.html.

The Canadian political solution has been “achieved” in large measure at the expense of the health and human rights of sex workers. The continued illegality of prostitution and the prevailing public discourse that prostitution is a social evil have permitted the systemic abuse of the human rights of sex workers, as evidenced in the extreme by the disappearances and murders of many street-based sex workers in Vancouver and Edmonton. The illegality of prostitution-related activities makes street-based and off-street sex workers reluctant to go to police when they have been victimized, and often makes police unwilling to take seriously the complaints of sex workers who do seek help. Indeed, the continued illegality of prostitution renders human rights protections illusory for sex workers.

Prosecutions under the *Criminal Code*

Statistical evidence has demonstrated a pattern of selective enforcement by police of *Criminal Code* sections 210 to 213, though government statistics on enforcement of the *Criminal Code* prohibitions are somewhat dated. These statistics indicated that as long as sex workers did not conduct prostitution and related activities in public, the police rarely enforced those *Criminal Code* prohibitions.



How the police enforce the law, yes I believe it puts our health in danger because prostitution is illegal, therefore we're afraid of the police, we run away from the police. The law itself is very stupid because prostitution has been around since the beginning of time and it's work, no matter how you look at it. It's not just about intercourse, it's not just about what people see as their values, their morals, whatever. As a former sex trade worker, I did it for other reasons than to earn a living. I did it for survival, for my habit. And in turn, prostitution actually saves a lot of people because it beats beating somebody up for their money.

– 37-year-old Inuk woman

The most recent and comprehensive report on this subject was published by Statistics Canada in 1997. It examined prostitution-related criminal incidents, charges and convictions from 1977 to 1995 and focused on street-based prostitution.⁷⁸ For the purpose of the report, an “incident” was defined as an occurrence that may or may not have led to criminal charges being laid. The report also briefly examined the dangers faced by sex workers and clients of sex workers. Given the time frame studied, the Statistics Canada report looked not only at the communicating section but also at its predecessor section, which prohibited “soliciting.”

⁷⁸ D Duchesne. Street prostitution in Canada. *Juristat Service Bulletin* (1997); 17(2). Canadian Centre for Justice Statistics, p 10.

The statistics presented in the Statistics Canada report are significant insofar as they reflect, to a certain extent, the high degree of discretion police exercise when deciding in what circumstances and against whom to enforce the criminal laws relating to prostitution. The change in the distribution of prostitution incidents reported by police before and after the enactment of the communicating provision in December 1985 was dramatic.⁷⁹ From 1977 to December 1985, 58 percent of incidents related to the bawdy-house provision; 22 percent related to soliciting; and 19 percent related to procuring. After the enactment of the communicating section, the percentage of incidents related to communicating far outstripped the other two offences combined, and the change was immediate and long lasting. In 1986, eight percent of incidents related to the bawdy-house provision; 87 percent related to communicating; and five percent related to procuring and living on the avails. In 1995, the percentages were three (bawdy-house), 92 (communicating), and five (procuring and living on the avails).

The evidence also suggests severe sex-based discrimination in sentencing upon conviction. Among adults charged in 1995 under the communicating section, the percentage of women and men was roughly equal (54 percent women; 46 percent men). Almost all of those charged with communicating (97 percent) were convicted. However, the sentences given women and men convicted of communicating differed dramatically.

- Three percent of men were imprisoned versus 39 percent of women. Of all adults imprisoned, 1350 (94 percent) were women and 90 (six percent) were men.⁸⁰
- The median amount of the fine was the same for men and women (\$200); however, of the men convicted, 56 percent were ordered to pay a fine versus 32 percent for women.
- While a smaller percentage of women than men were sentenced to probation (13 percent vs 22 percent) the median duration of probation for women was twice that of the men (one year vs six months).

Prostitution should be legalised. Sex work. There's all kinds of sex work, escorts, dancers. They're all sex work but they're not being targeted, they're not being harassed. Why are the women on the streets being harassed? It's basically the same thing, but in different ways.

– 37-year-old Inuk woman



Another option offered to clients charged for the first time under the communicating offence is the so-called “john school,” a program intended to divert those charged

⁷⁹ D Duchesne, pp 5, 10.

⁸⁰ This is borne out by more recent statistics that show that although men account for 56 percent of people charged under section 213, 92 percent of those who received prison sentences were women. Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Public Safety and Emergency Preparedness, 38th Parliament, 1st Session, Evidence (Meeting No 3; 31 January 2005), p 1900.

from the usual criminal prosecution process. A communicating charge is stayed or dropped in exchange for spending a few hours in a classroom setting, where the men are informed about the legal, medical and social ramifications of their activities.⁸¹ Statistics Canada has not analyzed john schools.

Without a more thorough understanding of all the individual circumstances of those convicted for communicating (significantly, whether or not the convicted person had a previous criminal record), it is impossible to determine definitively whether these statistics are evidence of a systematic bias in case management by Crown Counsel or in sentencing by the judiciary. However, it is evident that, on the whole, women convicted under this section have been dealt with more harshly than men. Regardless of individual circumstances, women as a group bear the personal costs of enforcement to a much greater extent through the loss of liberty and other sanctions. Regarding charges brought against adults in 1995 under the other prostitution-related section of the *Criminal Code*, women accounted for 63 percent of those charged with bawdy-house offences and men accounted for 73 percent of those charged with procuring and living on the avails.⁸²

Finally, Statistics Canada data for fiscal year 2003-2004 adds to our knowledge of prostitution-related offences.⁸³ Of all criminal charges, those laid under the prostitution-related offences of the *Criminal Code* took the longest to resolve, with a mean elapsed time of nearly a year from first to last court appearance.⁸⁴ From fiscal years 1994-1995 to 2003-2004, the number of prostitution-related cases disposed of in adult criminal court declined every year except for one, with an overall decrease of 38 percent.⁸⁵ In fiscal year 2003-2004, the mean fine handed out in relation to prostitution was surpassed only by fines for drug trafficking, fraud and impaired driving.⁸⁶

Evidence regarding the effectiveness of the communicating section

The communicating section replaced the soliciting section, which had largely ceased to be enforced by police as a result of a series of court decisions culminating in the Supreme Court decision in the *Hutt* case.⁸⁷ In *Hutt*, the Court affirmed that solicitation had to be “pressing and persistent” in order to fall within the criminal prohibition. In practice, the “pressing and persistent” threshold was difficult to prove.

⁸¹ D Duchesne, p 11. For a more thorough account of john schools in Canada see Federal-Provincial-Territorial Working Group on Prostitution; S Wortley, B Fischer, C Webster. Vice lessons: a survey of prostitution offenders enrolled in the Toronto John School diversion program. *Canadian Journal of Criminology and Criminal Justice* 2002; 44(4): 369-402; J Lowman. Prostitution law reform in Canada, p 25; E Van Brunschot. Community policing and john schools. *Canadian Review of Sociology and Anthropology* 2003; 40(2): 215-232.

⁸² D Duchesne, p 4.

⁸³ M Thomas. Adult criminal court statistics, 2003/04. *Juristat Service Bulletin* (2004); 24(12). Canadian Centre for Justice Statistics.

⁸⁴ *Ibid.*, p 4. The mean time elapsed was 350 days.

⁸⁵ *Ibid.*, p 19.

⁸⁶ *Ibid.*, p 22.

⁸⁷ *R v Hutt*, [1978] 2 SCR 476. Lowman has pointed out that the “conventional wisdom” that a series of court decisions led to the “prostitution problem” is not completely accurate. See J Lowman. *Prostitution law reform in Canada* at 2. Lowman

The communicating section was intended to increase the enforceability of the law, address the public nuisance resulting from street-based prostitution, and extend the *Criminal Code* penalty to clients. The bill (Bill C-49) that amended the *Criminal Code* included a mandatory review of the impact of the communicating section, within three years of its coming into force.

As part of that review, the Department of Justice commissioned a number of studies to assess the impact of the communicating provision, and published a synthesis report based on those studies.⁸⁸ The comprehensive studies examined street-based prostitution in several Canadian locations. Extensive research was conducted in Halifax, Montréal, Toronto, Calgary and Vancouver. The researchers interviewed key respondents, conducted counts of street-based sex workers, analyzed off-street prostitution advertisements, analyzed charges laid under the communicating section, and analyzed media reports. The research did not formally survey residents of communities affected by street-based prostitution.

The most significant chapter of the synthesis report examined the practice of street-based prostitution from the time of the enactment of the communicating section, in an effort to assess the impact of the law. The chapter begins by pointing out that gentrification in the cities and a number of urban centres had resulted in conflicts over land use. Individual citizens, citizen groups and business groups “have continued to complain to and lobby police departments, municipal officials and the federal Department of Justice about the continuing nuisance caused by street prostitution.”⁸⁹ The report sought to answer the “critical question in terms of the objectives of Bill C-49”: Did the law contribute to a decrease in street-based solicitation? If yes, to what degree? If no, why not? It was a question, or series of questions, that proved “most difficult to answer.”⁹⁰ The findings for the cities where extensive research was conducted were as follows:

- Halifax: The law had a short-term effect in reducing the number of street-based sex workers.
- Montréal: The concentration of street-based sex workers in the main traditional stroll was reduced, accompanied by a small dispersal of female sex workers to a new area.

also gave evidence of this before the Subcommittee: “I have always disagreed with that point of view, because it turns out that in Vancouver and Toronto, the spread of street prostitution had occurred long before these changes in jurisprudence. Police in Toronto and Vancouver had put prostitution on the street by closing down the off-street locations. That happened in Toronto on Yonge Street, after the Emmanuel Jack murder in 1977. A 14-year-old shoeshine boy had been killed on top of one of the bawdy houses on Yonge Street. That was used as the rationale for closing down that strip. Of course, what happened at that point was that street prostitution problems in Toronto started to increase. I think the Fraser committee got it right when they said that what had caused the street prostitution problem was the contradictory and self-defeating nature of our prostitution law.” Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights, Public Safety and Emergency Preparedness, 38th Parliament, 1st Session, *Evidence* (Meeting No 9, 21 February 2005) at 1750. See also D Brock. *Making Work, Making Trouble: Prostitution as a Social Problem*. Toronto: University of Toronto Press, 1998.

⁸⁸ Department of Justice Canada. *Street prostitution: assessing the impact of the law, synthesis report*. 1989; A Brannigan, L Knafla, C Levy. *Street prostitution: assessing the impact of the law, Calgary, Regina and Winnipeg*. Department of Justice Canada. 1989; R Gemme, N Payment, L Malenfant. *Street prostitution: assessing the impact of the law in Montréal*. Department of Justice Canada. 1989; F Graves. *Street prostitution: assessing the impact of the law in Halifax*. Department of Justice Canada. 1989; S Moyer, P Carrington. *Street prostitution: assessing the impact of the law in Toronto*. Department of Justice Canada. 1989.

⁸⁹ *Street prostitution: assessing the impact of the law, synthesis report* at 67-69.

⁹⁰ *Ibid.*, p 69.

- Toronto: Prostitution decreased in some areas of the city because it had shifted to new streets within the city core.
- Calgary: No substantial long-term reduction of street-based prostitution.
- Vancouver: There may have been a short-term reduction in the number of street-based sex workers as a result of police enforcement, but the main effect was to displace sex workers to new strolls.⁹¹

The synthesis report also noted that the practice of street-based prostitution was “modified somewhat” by the communicating law.

- Street-based sex workers reported more tense working conditions.
- Police arrests caused the number of clients to be reduced, and less money was available on the streets.
- As a result, some sex workers were less choosy and more likely to accept clients who were potentially dangerous.
- Female sex workers attempted to work in teams to look out for one another.
- Street-based sex workers changed hours of work to avoid police, working in the afternoon and after midnight, or changed days of work.
- Most acts of prostitution continued to be carried out in automobiles and some clients drove to more remote areas to avoid police.⁹²

The synthesis report also states that, “[a]ccording to many prostitutes, area restrictions – aimed at removing them from the main prostitution strolls – simply forced them to work in more isolation, increasing the danger to them... some geographic displacement occurred in most cities.”⁹³ However, the authors also note that in cities where police enforcement attempted to contain sex workers in a specific area, geographic displacement did not occur.⁹⁴ In the concluding chapter of the synthesis report, the authors summarize the evidence in relation to changes in the practice of street-based prostitution as follows: “Perhaps the clearest conclusion of this evaluation is that police enforcement of the new s. 195.1 did not suppress the street-based prostitution trade in most cities. The main effect was to move street-based prostitutes from one downtown area to another, thereby displacing the problem.”⁹⁵

Less detailed studies were conducted in Ottawa, Niagara Falls, London, Winnipeg, Regina, Trois-Rivières and Quebec City. The information gathered consisted primarily of police estimates and opinions.⁹⁶ In Quebec City and Trois-Rivières, street-based prostitution was not considered a problem. In Regina, street-based prostitution was regarded as a substantial problem despite the law. In Winnipeg, the law had a limited short-term effect in reducing the presence of street-based

⁹¹ Ibid., pp 70-74.

⁹² Ibid., p 88.

⁹³ Ibid. at 89.

⁹⁴ Ibid., pp 92, 93.

⁹⁵ Ibid., at 119.

⁹⁶ Ibid., at 74-76.

prostitution. In London, Niagara Falls and Ottawa, there was a substantial or marked decline in street-based prostitution.

Provincial and municipal laws

In addition to the *Criminal Code* provisions related to prostitution, police in certain jurisdictions rely upon provincial and municipal laws to control prostitution and related activities. Regarding street-based prostitution, key informants and consultation participants advised us that provincial highway traffic legislation and related municipal by-laws are enforced against sex workers in a number of Canadian cities. For example, Ontario's *Highway Traffic Act* provides: "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."⁹⁷ 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.⁹⁸

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 whom they believe to be in violation of the law. 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.⁹⁹ 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. Two key informants and several participants at the Legal Network consultation pointed out that the Montréal police routinely issue tickets to street-based sex workers. In one example, a female sex worker accumulated \$8,000 in tickets in one year, including tickets for jaywalking and spitting. A key informant reported that a court found that these tickets were issued in a discriminatory manner and cancelled them. However, many sex workers in Montréal were unable to pay tickets and ended up in prison and, as a result, lost their housing.¹⁰⁰

Canadian municipalities also use licensing by-laws to exert legislative control over prostitution and sex workers. In their study of escort services in Windsor Ontario, Maticka-Tyndale and Lewis found that police are more likely to rely on municipal by-laws and regulations than to lay charges under the *Criminal Code*.¹⁰¹ They provide two reasons for this. First, it is easier to issue tickets and summonses under the authority of municipal by-laws than to investigate and build a case to support charges under the *Criminal Code*. Second, municipal by-laws and regulations can be moulded to fit local situations.

⁹⁷ RSO 1990, H-8, s 177(2).

⁹⁸ RSQ, C-24.2, s 448.

⁹⁹ See e.g. *Provincial Offences Act*, RSO 1990, P-33, s 69(14) to (20); *Code of Penal Procedure*, RSQ, C-25.1, s 366.

¹⁰⁰ *ConStellation*. April 2005 at 86, 87. A lawyer acting on behalf of many sex workers who had received tickets was prepared to challenge the tickets in court arguing that the sex workers' rights had been infringed under the Charter. However, on the day of the hearing, the prosecutor withdrew all of the tickets to avoid the challenge.

¹⁰¹ E Maticka-Tyndale, J Lewis. *Escort services in a border town: literature and policy summary*. A report to the Division

One key informant provided an example of how a municipal by-law can limit sex workers' ability to work in off-street prostitution. In order to place an escort ad in any Edmonton paper, a person must present his or her escort licence. In order to obtain an escort licence a person must pay a \$1,600 licensing fee and undergo a rigorous screening process, including a criminal record check. A person who has been convicted of any one of a number of criminal offences is barred from obtaining the license. Thus, in Edmonton, sex workers who have a low income or who have a criminal record including prostitution-related offences cannot legally work as escorts.

Municipalities also have the power to make by-laws affecting zoning of land for different purposes. Maticka-Tyndale and Lewis state that this power has been used to restrict the operation of escort services and body-rub or massage parlours to non-residential or industrial zones.¹⁰² Maticka-Tyndale and Lewis conclude that practices used by Windsor police to enforce escort-related by-laws have undermined the potential health and safety benefits offered by municipal licensing schemes:

From the women's perspective, licensing is primarily a way to increase the money in police and municipal coffers. It increases police presence in the lives of escorts, makes policing easier and less costly, and disempowers escorts, and their employees, from taking action to enhance health and safety.¹⁰³

of STD Prevention and Control, Laboratory Centres for Disease Control, Health Canada. 1999, p 27. Available at web2.uwindsor.ca/courses/sociology/maticka/star/index.html .

¹⁰² Ibid., p 28.

¹⁰³ Ibid., p 36.



Prostitution, sex workers and HIV/AIDS

Key informants and consultation participants expressed a range of opinions on the significance of HIV/AIDS for sex workers in Canada. Some expressed the opinion that it is not a “pressing issue” for sex workers, not a “major issue,” or “not the most important issue.” Other expressed the opinion that it is important, especially for sex workers who are living with HIV and potentially face criminal prosecution for failing to disclose this fact to their clients before engaging in high-risk activities. Most key informants and consultation participants expressed serious concern about the problematic ways in which HIV/AIDS and prostitution have been associated. This association has increased stigma and discrimination against sex workers.

This section examines the relationship among prostitution, sex workers (in their work and personal lives) and HIV/AIDS. The purpose of the section is to counter common misperceptions with evidence and analysis. Some of this evidence and analysis was provided by key informants and consultation participants. The public health and social science literature provide further evidence and analysis. The first part of this section examines the stigma and discrimination sex workers face. Next, the concept of vulnerability to HIV is reviewed. Then, the public health and social science literature on the link between prostitution and HIV/AIDS in Canada is summarized.

Stigma and discrimination

In Canada, the available epidemiological evidence suggests that the general characterization of sex workers as vectors of HIV infection is not justified. Existing studies suggest that transmission of HIV from sex workers to their clients is relatively rare. There may be individual sex workers living with HIV who do not take precautions necessary to prevent exposing other people to HIV, but in this way sex workers are no different from other individuals. In the literature, little if any attention is paid to the role or responsibility of clients regarding their own sexual health. Numerous authors have remarked that sex workers have been scapegoats in the HIV epidemic. The epidemic has increased the stigma and discrimination faced

by sex workers, which has in turn increased their vulnerability to HIV infection. A participant at the Legal Network's national consultation remarked that HIV stigma and prostitution stigma have unjustifiably become synonymous.

Another participant remarked that stigma and discrimination were also evident *among* sex workers. Distinctions were drawn based on whether or not one consumes illegal drugs, and if so whether one sniffs or smokes drugs, whether one is an escort or a street-based worker, and whether one works the "high track" or the "low track."¹⁰⁴ Some sex workers also stigmatize and discriminate against people living with HIV.¹⁰⁵ One key informant said that HIV remains a very taboo topic among sex workers and very few sex workers living with HIV will discuss their HIV status among colleagues. But this is not unique to sex workers. Many people report a great reluctance to disclose their HIV status to work colleagues, family, friends and social service providers due to the climate of stigma and discrimination that continues to surround HIV/AIDS.¹⁰⁶

Many consultation participants remarked that sex workers are better informed than the general population about modes of HIV transmission, and ways to prevent HIV transmission. Sex workers were referred to as "safer sex professionals."¹⁰⁷ Participants also stated that HIV transmission is about unprotected sex, not prostitution, and that prostitution does not inherently carry a risk of HIV infection.

Prostitution is but one part of a sex worker's identity. One key informant remarked that some people, sex workers included, choose to have unprotected sex, based on a range of motivations. For sex workers, there may be an economic motivation to engage in sexual intercourse without condoms (i.e., clients offering more money for unprotected sex), although there are no reliable data on the extent of this phenomenon or whether it has any impact on HIV transmission. In fact, given the prevailing climate of stigma and discrimination, many sex workers go to great lengths to hide the fact that they engage in prostitution, and many may not self-identify as sex workers.

Consultation participants and key informants also remarked on the paradox HIV-related funding presents for organizations that provide support services to sex workers. Despite the fact that HIV is not the most pressing issue for many sex workers or sex worker organizations, money for programs for HIV prevention among sex workers has been an important source of funding for services for sex workers since the beginning of the HIV epidemic and has helped build and sustain the infrastructure of many sex worker organizations. One key informant referred to the "strategic thinking" on the part of sex worker organizations who understood that they

¹⁰⁴ The term "track" refers to a geographic area where street-based sex workers encounter clients. Such areas are also referred to as "strolls." Sex workers working the "high-track" charge more money for sexual acts than sex worker working the "low track."

¹⁰⁵ For an early article on the scapegoating of sex workers in the HIV/AIDS epidemic, see D Brock. Prostitutes are scapegoats in the AIDS panic. *Resources for Feminist Research* 1985; 18(2): 13-17.

¹⁰⁶ See, generally, T de Bruyn. *HIV/AIDS and discrimination: a discussion paper*; T de Bruyn. *A Plan of Action to reduce HIV/AIDS-related stigma and discrimination*. Canadian HIV/AIDS Legal Network. 2004.

¹⁰⁷ This term has been attributed to Danny Cockerline, sex worker and activist from Toronto. See D Allman, *M is for mutual, A is for acts*, pp 57-58.

could get funding for projects involving HIV/AIDS. One participant stated that HIV is the reason why services exist for sex workers and injection drug users.

The availability of government funding for HIV prevention, rather than broader health and safety initiatives for sex workers, has served to reinforce the stigmatizing association of prostitution and HIV and further marginalize other pressing health and safety concerns of sex workers. Nevertheless, HIV prevention and education among sex workers should continue to be seen as an important component of an overall strategy to reduce HIV transmission in Canada. These education and prevention efforts should be based on scientifically and methodologically sound research, and should be linked to broader efforts to protect the health and safety of sex workers.¹⁰⁸ It is unfortunate that the new Federal Initiative to Address HIV/AIDS in Canada does not recognize sex workers as a group for whom there is a need to develop discrete approaches to addressing the epidemic.¹⁰⁹

Concepts of vulnerability and risk: HIV/AIDS and sex workers

In research and writing on HIV/AIDS, it is common to state that certain groups are “vulnerable” to becoming infected with HIV. For example, prisoners are said to be vulnerable to HIV transmission. High rates of infection in prisons combined with a lack of access to some or all harm reduction measures such as clean needles, opiate substitution therapy, condoms, dental dams, information and health care services put prisoners at high risk of contracting HIV. We asked our key informants and those people who attended our national consultation whether it is accurate and appropriate to say that sex workers in Canada are vulnerable to HIV infection and AIDS.¹¹⁰ Consultation participants were in general agreement that prostitution does not inherently carry the risk of HIV infection, and did not like the use of the word “vulnerable” to describe sex workers’ risk of HIV infection.

Jonathan Mann and Daniel Tarantola have suggested that vulnerability means “the extent to which individuals are capable of making and effecting free and informed decisions about their life.”¹¹¹ It follows that “vulnerability is the converse of

¹⁰⁸ See D Allman, T Myers. 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, where the authors summarize 10 research questions that could be applied to the study of male sex work in Canada. Additional areas of inquiry on male sex work are set out in D Allman, *M is for mutual, A is for acts*, pp 78-79.

¹⁰⁹ Public Health Agency of Canada. *The Federal Initiative to Address HIV/AIDS in Canada*. 2004. The document recognizes the need for the federal government to develop discrete approaches to addressing the epidemic for people living with HIV/AIDS, gay men, injection drug users, Aboriginal people, prison inmates, youth and women at risk for HIV infection, and people from countries where HIV is endemic.

¹¹⁰ We also asked consultation participants a number of more detailed questions, such as: Does the type of prostitution someone engages in increase his or her vulnerability to HIV infection? For example, do people who work the streets run a greater risk than escorts of being infected with HIV? Are people who engage in sex-for-money working in bars, saunas or massage parlours less likely to become infected with HIV than people who engage in “survival sex”? We also asked about the influence of other identities on people’s vulnerability and risk: Are certain people more likely to be infected with HIV, based on factors unrelated to their work as a sex worker? For instance, does being gay, transgendered, an Aboriginal person or an immigrant have a greater impact on someone’s risk of contracting HIV than the fact he or she is a sex worker? Finally, we asked about sex workers’ personal lives. Do sex workers’ personal lives put them at greater risk of HIV infection and AIDS than their work activities? For example, are known high-risk activities, such as sharing injection drug equipment and unprotected vaginal and anal intercourse, a greater risk factor for HIV infection than sex work?

¹¹¹ The analysis of vulnerability draws heavily on J Mann, D Tarantola. Vulnerability: personal and pragmatic. In J Mann, D

empowerment.” Mann and Tarantola propose, when analyzing vulnerability to HIV/AIDS, three interdependent levels of vulnerability: personal, programmatic and societal.

- **Personal vulnerability** involves both cognitive and behavioural dimensions. The cognitive dimension relates to the information needed to reduce vulnerability to HIV infection. The behavioural dimension consists of two overlapping categories: personal characteristics (including emotional development, perceptions of risk and attitudes towards risk-taking, history of sexual and substance abuse), and personal skills (including the ability to negotiate sexual practices and the skills needed to use condoms). In the context of HIV, people are more or less vulnerable to infection depending on whether they lack information, or possess the personal characteristics and personal skills necessary to protect themselves. However, people who have access to the same information and share many of the same personal skills and characteristics may nonetheless engage in different risk behaviours for reasons unique to each person.

Consultation participants noted that the range of distinct activities involved in prostitution varies in the risk of HIV transmission they present for sex workers. One sex worker commented that, while working on the street, she rarely engages in vaginal or anal intercourse: In most transactions, she engages in oral sex or masturbates a client, activities with much lower risk of HIV transmission. It was also noted that HIV risk increases with a person’s personal circumstances, including addiction. One key informant, an HIV/AIDS outreach worker, stated that the greatest HIV risk for male sex workers was from a lack of education and awareness about HIV. However, a consultation participant commented that the word “vulnerable” can disempower individual sex workers. Others cautioned that vulnerability, when applied to a group of people, puts the focus on high-risk *groups* rather than high-risk *behaviours*.

- **Programmatic vulnerability** focuses on “the contributions of HIV/AIDS programs toward reducing or increasing personal vulnerability.”

Numerous key informants and consultation participants stated that the criminal law and its enforcement create a context that “undermines and sabotages” safer sex practices. One key informant specifically pointed to a 2003 police crackdown on street-based prostitution in Montreal that made it more difficult at that time to reach male sex workers with safer sex information and support services. Other sex workers remarked that while sex workers know a great deal about condom use and safer sex, police enforcement of prostitution-related criminal laws can make it challenging to negotiate and practice safer sex.

- **Societal vulnerability** recognizes that personal and programmatic vulnerability are both strongly influenced by social context. Social context is made up of factors such as governmental structure, gender relationships, attitudes towards sexuality, religious beliefs and poverty, which can all influence a person’s capacity to reduce his or her vulnerability to HIV.

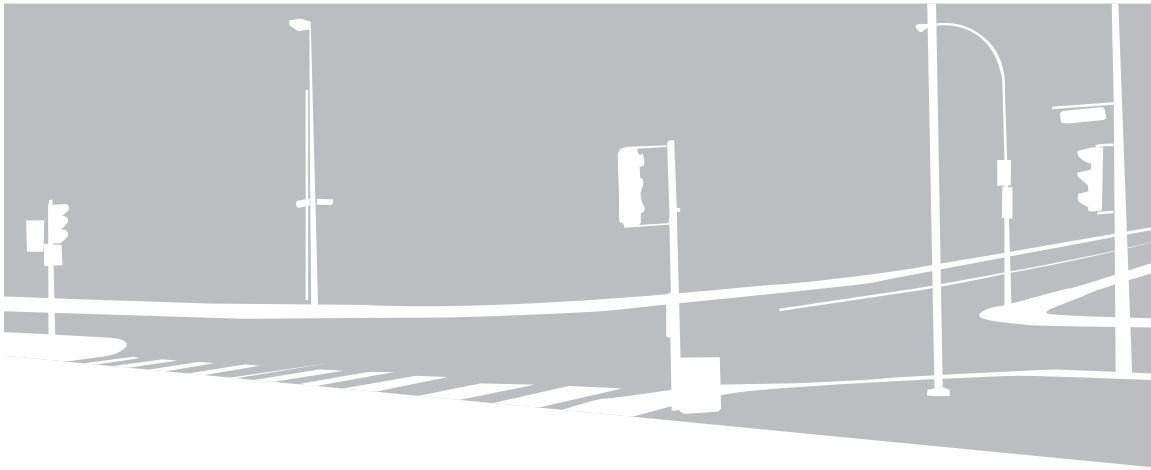
Tarantola (eds). *AIDS in the World II*. New York: Oxford University Press, 1996 at 441-443, quoting from J Mann, D Tarantola, T Netter (eds). *AIDS in the World*. Cambridge, MA: Harvard University Press, 1992, pp 325-420.

One key informant remarked on the disempowerment that has marked the lives of people who engage in prostitution for drugs, termed “survival sex” by the informant.¹¹² The informant pointed out that as a result of “abuse by the system,” Aboriginal people are over-represented among people who engage in survival sex.

Vulnerability, understood this way, provides a framework for understanding sex workers’ risk of HIV infection. It can also help explain why individual sex workers may be vulnerable to HIV infection, yet at the same time there is no evidence that sex workers infect large numbers of clients. For example, a sex worker may not insist on condom use with his or her intimate sexual partners, putting himself or herself at risk of HIV infection in his or her personal life. Yet, when engaging in prostitution, he or she may never engage in vaginal or anal intercourse with clients, thereby avoiding sexual activities with a high risk of HIV transmission. A different sex worker may engage in vaginal or anal intercourse when working, but use condoms sporadically. When he or she needs money to meet his or her needs, including possibly the need for food, shelter, medication or illicit drugs, he or she may be willing to accept a client’s request to have unprotected sex for more money. This would potentially increase the risk of HIV infection for the sex worker and the client.

Regardless of the distinct vulnerabilities of individual sex workers in Canada, the *Criminal Code* prohibition of prostitution-related activities affects sex workers’ social vulnerability to HIV. The extent to which these prohibitions and their enforcement by police increase a sex worker’s vulnerability to HIV varies depending on his or her circumstances – in particular, whether he or she engages in street-based prostitution. The effect of different circumstances on sex workers’ vulnerability to health and safety risks, including HIV infection, is examined in the next section of the report.

¹¹² The term “survival sex” is often used to describe people who engage in sex with others in order to meet their basic needs, involving the exchange of sex for drugs, money or gifts and favours. E Essien et al. Primary source of income is associated with differences in HIV risk behaviours in street-recruited samples. *International Journal for Equity in Health* 2004; 3: 5. There is little research in Canada that attempts to analyze whether the HIV risks associated with the exchange of sex for money and sex involving another type of exchange differ. In fact, some research has been criticized for this analytical shortcoming. See, for example, letter from A Sorfleet to Members of the Vanguard Project Advisory Committee, 15 May 1995, available via www.walnet.org. Dan Allman and colleagues at the University of Toronto have examined the differences between monetary and non-monetary exchanges involving sex. See D Allman et al. Sex as work, sex as other: Do men who receive money vs goods or drugs for sex differ? 13th Annual Canadian Conference on HIV/AIDS Research, 2004, Montréal (abstract no. 415). Available at www.cahr-acrv.ca/english/resources/abstracts_2004/abs/abs415.htm; D Allman et al. The clients of male sex workers: Do men who pay money vs goods or drugs for sex differ? 14th Annual Canadian Conference on HIV/AIDS Research, 2005, Vancouver.



Effects of criminalization on sex workers' health and safety, including vulnerability to HIV/AIDS

Evidence-based decision-making as a guiding principle

The law reform process is no different from other public policy formation and decision-making concerning such fundamental issues as individual and community health and safety. 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 should be reformed. This type of evidence and evidence-based decision-making can help determine how sex workers' fundamental rights are affected by law and policy, and help protect those rights. (Other vital foundations of law reform discussed in more detail below are international human rights law and the *Charter*.)

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. An illustration of the pitfalls of public policy based on moralism was the enactment of the communicating provision in 1985. Despite the recommendation of the Fraser Committee to essentially decriminalize prostitution-related activities of both adult sex workers and clients when undertaken on a small scale, Parliament amended the *Criminal Code* to extend criminal penalties to clients and prohibit public communication for the purposes of prostitution.

In Canada, as in many countries, the stigma associated with prostitution and its regulation under criminal law make it challenging to conduct research involving sex workers. Studying the link to HIV/AIDS only heightens the potential stigma and

increases the difficulty of recruiting research subjects. Nonetheless, public health and social science researchers in Canada have published numerous qualitative and quantitative research studies on the link between prostitution and HIV/AIDS. This research includes studies of both street-based and other sex workers.

In a comprehensive review of prostitution research in Canada, Lowman notes a “flood” of such research since the mid-1980s that he attributes to the greater public consciousness of the “problem” of street-based prostitution following changes in municipal laws regulating it in the 1970s.¹¹³ He suggests that street-based prostitution dominated research on prostitution in Canada in the 1980s to the point where unjustifiable generalizations were made about prostitution based only on the unique situation of street-based workers. It is perhaps for this reason that more recent research has gone to some pains to include sex workers from varied venues and to fill in the picture of distinguishing traits of off-street sex workers.

This section focuses on studies that are relatively recent, that are peer-reviewed or commissioned by government, and that treat directly or indirectly factors related to health and safety risks for sex workers, including HIV risk. (The issues of the exploitation of children in prostitution and of persons trafficked to Canada for prostitution are not addressed in this report.)

Violence faced by sex workers

Street-based sex workers interact with police and face criminal sanctions for their everyday activities, despite the fact that prostitution is legal in Canada. Lowman notes 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.¹¹⁴ Sex workers are thus highly vulnerable to violence, robbery and other abuse from which the police might otherwise provide some level of protection.

In an article concerning the violence faced by sex workers in Canada, Lowman has analyzed the role of the Canadian criminal law in contributing to that violence.¹¹⁵ He reviewed statistical evidence of violence against sex workers, media reports of violence against sex workers, and the criminalization of activities related to prostitution. His analysis of the situation in British Columbia describes the complex relationships among the media, the criminal law, the political process, and violence against street prostitutes. For Lowman, the “de facto criminal prohibition of prostitution plays a major part in this [moral-political] marginalization.”¹¹⁶ It does so in a number of ways. Lowman says that the *Criminal Code* prohibition:

¹¹³ J Lowman. *Identifying research gaps in the prostitution literature*. Department of Justice Canada. 2001, p 2. Available via <http://canada.justice.gc.ca/en/ps/rs/title.cfm>.

¹¹⁴ *Ibid.*, pp 21-22.

¹¹⁵ J Lowman. Violence and the outlaw status of (street) prostitution in Canada. *Violence Against Women* 2000; 6(9): 987-1011.

¹¹⁶ *Ibid.* at 1006.

- 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.¹¹⁷

Criminalization of activities related to prostitution, when combined with municipal regulation of escort services, and massage and body rub parlours, leave women at the low-priced end of street-based prostitution “with few or no viable off-street alternatives. Neither the women nor many of their clients have the resources needed to control private spaces to conduct their business.”¹¹⁸

Quantitative evidence of violence against sex workers

A 1997 Statistics Canada report of street-based prostitution in Canada, reviewing data from 1991 to 1995, stated the following under the heading “Street Prostitution is Dangerous”:

A recent study confirms that physical and sexual assaults on street prostitutes are commonly carried out by clients, pimps and boyfriends. Police reports in 1995 reveal that four in ten incidents encompassing procuring also involved at least one other criminal violation; in almost half of these incidents, a sexual and/or other assault was recorded.

Sometimes assaults are serious enough to cause death. Indeed, 63 known prostitutes were found murdered between 1991 and 1995.... Most (50) appeared to have been killed by customers. Eight were thought to have been killed by pimps or in a drug-related incident. The remaining deaths were at the hands of husbands, common-law spouses and boyfriends. Almost all of the murdered prostitutes were female: 60 of the 63 who died between 1991 and 1995. Seven of the prostitutes killed were juveniles aged 15 to 17 – all females. During this period, known prostitutes accounted for 5% of all female homicides reported (1,118 deaths).

The private nature of a street prostitute’s activities can make the identification of a killer very difficult – all the more so when that person is also a stranger. In fact, most prostitute homicides go unsolved. At the end of 1996, 34 incidents (54%) reported between 1991 and 1995 remained unsolved. In comparison, 20% of homicide incidents involving victims other than known prostitutes were unsolved.¹¹⁹

According to Lowman, “86 prostitutes were murdered in Canada from 1992 through 1998.”¹²⁰ Since 1998, police investigations into missing women, many of whom were

¹¹⁷ Ibid., pp 1006-1007.

¹¹⁸ Ibid. at 1007.

¹¹⁹ D Duchesne at 8. For other detailed reports, see: J Fleischman. *Violence against street prostitutes in Halifax*. Department of Justice Canada. 1996; La boîte à qu’on-se-voir. *Étude sur les violences envers les prostituées à Montréal*. Ministère de la Justice Canada. 1996; J Lowman, L Fraser. *Violence against persons who prostitute: the experience in British Columbia*. Department of Justice Canada. 1996.

¹²⁰ J Lowman. Violence and the outlaw status of (street) prostitution in Canada. *Violence Against Women* 2000; 6(9): 987-1011 at 988.

sex workers, have been initiated in two Canadian cities. A joint task force of the RCMP and the Vancouver Police Department has an official list of 69 women who are missing or dead; murder charges have been laid in 15 of these cases.¹²¹ According to the task force, the women who have disappeared fit a similar profile, namely “women who have ties to the Downtown Eastside of Vancouver or surrounding areas, and who have been involved in the prostitution or who had been known to use alcohol or drugs.” An RCMP task force has also been set up to review cases of missing Edmonton-area women known to be involved in prostitution or who used drugs. In January 2005, the RCMP added the 84th woman to the Edmonton list, which spans a 20-year period.¹²²

Heightened risk of violence: Aboriginal women and transgender sex workers

The discrimination faced by Aboriginal people in Canada has resulted in conditions that place Aboriginal sex workers, especially women, in situations of extreme risk. In an October 2004 report, Amnesty International examined the role of discrimination in acts of violence carried out against indigenous women in Canada.¹²³ The backdrop to the violence is the history and legacy of colonization of Aboriginal people in Canada. This contributes to a situation in which many Aboriginal people distrust the police and are reluctant to seek police protection. Amnesty’s report points out that police in Canada have been implicated in acts of violence against Aboriginal people or “apparent reckless disregard for their welfare and safety.”¹²⁴

The available evidence also indicates that transgender sex workers have faced significant violence while working. In a 1995 report, 20 of 34 transgender sex workers replied that violence was the worst thing about sex work.¹²⁵ The risk of violence is elevated for street-based transgender sex workers. Transgender sex workers are more likely to engage in street-based prostitution than non-transgender sex workers because of the unwillingness of many escort agencies and off-street venues to hire transgender sex workers.¹²⁶ They have also faced violence from clients who discover that they are transgender.

Impact of criminalization on sex workers’ experiences of prostitution and violence

In a 2000 study, Benoit and Millar observed that “the criminal nature of the sex trade in Canada has a dramatic impact on workers’ rights and safety and leaves all

¹²¹ Missing Women Joint Task Force RCMP/VPD Media Briefing, 6 October 2004. Available at www.rcmp-bcmedia.ca/missing_women.jsp.

¹²² Edmonton police add another name to missing women list. *CBC News*. 20 January 2005. Available at www.cbc.ca/story/canada/national/2005/01/20/edmonton-missing050120.html.

¹²³ Amnesty International. *Stolen sisters: a human rights response to discrimination and violence against Indigenous women in Canada*. 2004. Available via www.amnesty.ca/stolensisters/index.php.

¹²⁴ *Ibid.* at 30.

¹²⁵ K Namaste. *HIV/AIDS and Transgender Communities in Canada: A Report on the Knowledge, Attitudes and Behaviour of Transgendered People in Canada with Respect to HIV and AIDS*, Toronto: genderpress, 1995, p 15.

¹²⁶ *Ibid.*, p 16.

respondents [in their research study] at risk.”¹²⁷ Their research involved interviews with 201 current and former sex workers from Victoria, British Columbia, and the surrounding 13 municipalities. Criminalization makes sex workers unwilling to seek help from police.

Virtually all of those interviewed expressed alienation from the protective services of the police and expressed a reluctance to report violent incidences [sic] or turn to the police for help. As noted ..., the police do not factor at all into respondents’ first choice of who to turn to when they face a crisis situation, and only 1.1% of respondents chose the police as their second choice in a crisis. Respondents made comments such as, “Are you kidding? I never call the police, that’s the last thing you do”; or “The police, I mean, my god, I don’t think they care about us.” Another stated that “I think the police should... you know, when somebody has a bad date they should stop blaming the girls and start going after the guys.” Many felt that because of the nature of their job, they could expect little help from the police, and that their complaints would not be taken seriously. Other incidents impinge upon sex workers’ willingness to turn to the police in times of danger. For example, 39.4% reported being belittled by the police sometimes or frequently, and 23.4% answered that the police sometimes or frequently caused them to be emotionally distressed.¹²⁸

This research by Benoit and Millar identifies the complex, multi-faceted relationship between the Canadian criminal law and sex workers’ health and safety. 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 concerning their work, often forcing them to work on the margins of society, thus increasing the risks they face.

The impact of this stigma is amplified by the tendency of Canadians to view the sex trade as a social problem that needs to be solved through criminal sanctions.... The law often leaves the sex worker with little choice but to do their work in hidden locations where they have little control over their personal safety. Further, they often must provide the service in a different location every time, thereby limiting their ability to establish a safe place to provide services. These unique aspects of the sex trade leave workers vulnerable to abuse by those more powerful than themselves and at the same time in danger of breaking the law while trying to make a living. Changes to these factors would help improve sex workers [sic] safety and well-being and reduce their marginalization.¹²⁹

In two other studies, sex workers and erotic or exotic dancers in Canada have also reported the non-responsiveness of police to their concerns about violence and abuse. Women working as exotic dancers in Ontario said the typical response of police to their complaints of abuse was “What do you expect – you’re a dancer.”¹³⁰ One police officer interviewed in Calgary told researchers that not responding to sex workers’ complaints was ultimately good for the sex workers because experiencing victimization without assistance might lead them to abandon sex work.¹³¹

¹²⁷ C Benoit, A Millar. Short Report at 7.

¹²⁸ Ibid. at 54, 55.

¹²⁹ Ibid. at 93, 94.

¹³⁰ E Maticka-Tyndale et al. Social and cultural vulnerability to sexually transmitted infection: the work of exotic dancers. *Canadian Journal of Public Health* 1999; 90(1): 19-22 at 20.

¹³¹ E Maticka-Tyndale. *Escort services in a border town*, p 31.

Namaste reported on high levels of police harassment experienced by transgender sex workers in Toronto.¹³² All of the sex worker respondents reported police harassment, intimidation and verbal abuse. Some reported being beaten by police, and many reported that they did not trust police. Those who did experience violence (whether from police, clients or lovers) did not report it to police because of their experiences of being ridiculed when they had done so previously, because the police were the source of the violence, or because of the need to preserve harmonious relations with police in order to avoid police surveillance and harassment that would limit their ability to earn money through prostitution.

Bruckert, Parent and Robitaille found that the illegality of prostitution acts, in part, to deprive off-street sex workers of protection under laws other than the criminal law. Due to the criminal nature of the place where organized, off-street prostitution occurs (i.e., places that would be considered bawdy-houses), sex workers are deprived of the full protection of provincial laws designed to set minimum labour standards and to protect workers' health and safety.¹³³ These authors also found that the criminalization of prostitution caused stress for women employed as off-street workers (i.e., in erotic service establishments such as massage parlours).¹³⁴ Their research included 14 in-depth semi-structured interviews with women employed in escort agencies in Montréal and Toronto and three interviews with sex worker advocates. They state, in a section of their report titled "the everyday spectre of the law":

The illegal nature of aspects of their work is also [sic] source of stress and anxiety for the workers and affects their ability to negotiate with clients. In addition, when the owner of the establishment feigns ignorance that sexual services are being provided, the workers are denied the opportunity to openly discuss their work and the difficulties they encounter. They are therefore deprived of a method of relieving pressure, and of receiving protection... Furthermore, when this is the prevailing strategy, the house does not provide condoms. Accordingly the workers must procure them for themselves, store them and dispose of them discretely. The illegal aspects of sex work in erotic establishments also restricts the option of going to the police for protection from a client who is aggressive, harassing or threatening, or from individuals who disrupt the work by making endless obscene phone calls. Finally, arrest causes significant trauma.¹³⁵

HIV/AIDS risks among sex workers and those who exchange sex for money, commodities and services

Both quantitative and qualitative studies in Canada have aimed to assess the HIV transmission risk of sex workers. However, Lowman correctly notes the paucity of research studies that follow sex workers over a long period. These types of studies allow causal factors for an outcome, such as HIV seroconversion, to be observed

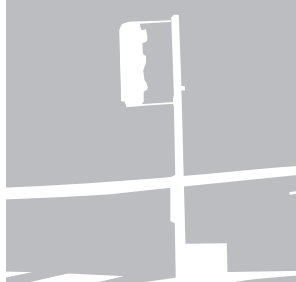
¹³² K Namaste. *Invisible Lives: The Erasure of Transsexual and Transgendered People*. Chicago: University of Chicago Press, 2000, pp 169-173, citing the author's previous report: K Namaste. *Access denied: a report on the experiences of transsexuals and transgenderists with health care and social services in Toronto, Ontario*. Project Affirmation and the Coalition for Lesbian and Gay Rights in Ontario. 1995.

¹³³ C Bruckert, C Parent, P Robitaille. *Erotic service / erotic dance establishments: two types of marginalized labour*. 2003, pp 21-22. Available at www.lcc.gc.ca/en/themes/er/tvw/parent/parent_toc.asp.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* at 30-31.

over time. Virtually all of the quantitative studies on HIV and prostitution and other forms of sex work in Canada are cross-sectional studies which have used both surveys and case-control methods.¹³⁶ Using these study methods, it is not possible to establish a causal relationship between prostitution and HIV/AIDS. Rather, cross-sectional studies are by their nature *suggestive* of degrees of causality.



HIV is on the top of the list because you can't control or see where it's coming from, no matter how much you protect yourself. I've been beat up so much, it's not as shocking as it used to be, you know?

– 39-year-old woman from Iqaluit

Researchers have emphasized that sex workers in Canada are not immune from the HIV risks faced by all sexually active persons. A 2001 study of sex workers in Halifax concluded that women in prostitution who were highly motivated for a variety of reasons to insist on condom use by their male clients often did not insist on condom use with their private sex partners.¹³⁷ Various reasons were cited: they desired “emotional closeness” with their private partners; they thought their partners were “clean”; they did not want their partner to feel like a “trick.” The authors concluded that many of these women faced their greatest HIV risk at home because of their reluctance to insist on condom use outside the sphere of their work. A quantitative study of risks faced by women injecting drugs in Vancouver in 2002 found that there was no evidence that exchanging sex for money or drugs was predictive of HIV seroconversion.¹³⁸ The study also suggests that among women injection drug users who exchanged sex for money or drugs (no distinction was made between money and drugs), risk of HIV transmission was probably greater in their personal lives than from their exchanges.¹³⁹

It is a common theme in this work that the stigma and vulnerability faced by sex workers are related to their economic vulnerability and disenfranchisement, and that all of these increase HIV/AIDS risk. Sex workers, or at least those with a history of street-based prostitution, are more likely than non-sex workers to be exposed to unsafe and non-consensual sex and, in some cases, more likely to have used drugs. As Maticka-Tyndale and Lewis noted with respect to the escorts in Windsor, most of the women they encountered were escorts because they were not highly educated or because in their experience there simply are not other jobs that provide a living wage for them and their families.¹⁴⁰ Several of these studies report that sex workers most

¹³⁶ Case-control studies look at two groups with respect to a given outcome of interest – for example, HIV-positive and HIV-negative persons – and examine their histories and experiences to discern suggested causal factors.

¹³⁷ L Jackson et al. Sex trade workers in Halifax, Nova Scotia: What are their risks of HIV at work and at home? *Canadian Woman Studies* 2001; 21(2): 45-50.

¹³⁸ P Spittal et al. Risk factors for elevated HIV incidence rates among female injection drug users in Vancouver. *Canadian Medical Association Journal* 2002; 166(7): 894-899.

¹³⁹ *Ibid.*

¹⁴⁰ E Maticka-Tyndale. *Escort services in a border town*, pp 33-34.

constrained by poverty are the least likely to insist on condom use, a result reported frequently in developed and developing countries alike.¹⁴¹ With respect to drug use, some researchers have emphasized that the estimated level of drug use among women sex workers in Canada apparently varies greatly from under 10 percent or less in Montréal to as much as 50 percent in the Atlantic provinces.¹⁴²

A 2002 study by Weber and others used a structured survey of girls and young women, aged 14 to 25 years, who were or had recently been living on the streets in Montréal. In this population, those who reported exchanging sex for money, commodities or services were found to be more likely to have binged recently on drugs and alcohol, more likely to have had a history of injection drug use, and more likely to have had anal sex in a recent period.¹⁴³ They also were more likely to be cocaine users – and thus to be very frequent injectors – and to have been very young at the time of their first sexual experience. The authors suggest that drug-use patterns among the girls and young women involved in exchanging sex for money, commodities or services in this study increased their HIV risk both by the “disinhibiting” effect of drugs with respect to unsafe sex and by rendering these young people “more dependent on the street economy” and less able to refuse unsafe sex if they need money.¹⁴⁴ They also note that these girls and young women need to be reached with HIV prevention information and services related not only to sexual exchanges but also to drug use, and that this is a particular challenge for those working on the streets.

It should be noted that this study and the two others described below of which Weber is the principal author do not necessarily define prostitution or sex in the way that they are defined in this report. Rather, the researchers questioned subjects in a broader way about their experience with prostitution that may include one-off or occasional transactions for sex. These studies also do not distinguish between people who exchange sex only for money, those who exchange sex for other commodities or services, and those who exchange sex for both money and other commodities or services.

Weber and another set of colleagues were able to explore similar questions in a quantitative study among young gay and bisexual men in Vancouver using data gathered over several years in the late 1990s. In this case, men who exchanged sex for money, commodities or services had a more than six-fold higher HIV prevalence than those who did not engage in such exchanges at the start of the study.¹⁴⁵ In this population, men who exchanged sex for money or other commodities or services also had much higher rates of substance abuse, including cocaine and heroin, than those who did not engage in such exchanges.

¹⁴¹ See, for example, Human Rights Watch. *Policy paralysis: a call for action on HIV/AIDS-related human rights abuses against women and girls in Africa*. 2003, pp 55-57.

¹⁴² See, for example, Shaver.

¹⁴³ A Weber et al. HIV risk profile and prostitution among female street youths. *Journal of Urban Health* 2002; 79(4): 525-535 at 525.

¹⁴⁴ *Ibid.*, p 531.

¹⁴⁵ A Weber et al. Sex trade involvement and rates of Human Immunodeficiency Virus positivity among young gay and bisexual men. *International Journal of Epidemiology* 2001; 30: 1449-1454. p 1449.

Rates of unprotected sex with regular partners were reportedly similar in the two groups, but those in the exchange group reported a higher occurrence of risky practices, and they more frequently reported a history of non-consensual sex and of sex with both male and female casual partners.¹⁴⁶ Men who exchanged sex for money, commodities or services had lower levels of education than non-exchangers, as well as lower incomes and more unstable housing. Aboriginal men were over-represented among those who exchanged sex.¹⁴⁷ The authors assert the need for HIV prevention education that takes into account the complex reality of these men.

Another 2001 study led by Weber pooled longitudinal data gathered from gay and bisexual men in Vancouver and Montréal and concluded that those who were living with HIV/AIDS were more likely to have exchanged sex for money, commodities or services and to have used injection drugs.¹⁴⁸

A useful compilation and analysis of research on male sex workers in Canada through the late 1990s by Allman highlights both methodological challenges and the need for research on sex workers to combat well-established myths about this population. Allman summarizes numerous studies showing high levels of condom use among male sex workers and concludes they go a long way toward dispelling the idea that men in prostitution are important vectors of HIV transmission in Canadian society.¹⁴⁹ He notes, however, methodological differences that make it difficult to synthesize these studies. The study also suggests that male sex workers may be more likely to practice safer sex with their clients than with sex partners in their personal lives, a theme that recurs in studies on women sex workers.

Allman and colleagues studied men who have sex with men in Ontario.¹⁵⁰ They analyzed data based on men who had received only money for sex (what they call “professional prostitution”) versus those that had received other resources in exchange for sex (i.e., drugs, goods, clothing, protection or shelter). The analysis suggests that the HIV risk behaviours associated with these two groups may not be the same. Receiving money alone was associated with being HIV-negative, no history of gonorrhoea, and no use of cannabis, tranquilizers or cocaine in the previous year. Men who received only non-monetary compensation were more likely to be HIV positive, have a history of gonorrhoea, and to have used cannabis, tranquilizers or cocaine in the previous year.

The high HIV risk of Aboriginal persons, especially women, who engage in prostitution is cited in several studies. A 2002 study of women living with HIV in Manitoba concluded that Aboriginal women of low economic status were at the highest risk of all women interviewed as they were likely to engage in sex work, often had lived through a history of sexual abuse, and were at high risk of engaging

¹⁴⁶ Ibid., pp 1451, 1453.

¹⁴⁷ Ibid., pp 1452-1453.

¹⁴⁸ A Weber et al. Risk factors associated with HIV infection among young gay and bisexual men in Canada. *Journal of Acquired Immune Deficiency Syndromes* 2001; 28: 81-88, p.81.

¹⁴⁹ D Allman. *M is for mutual, A is for acts*, pp 69-73.

¹⁵⁰ Allman D et al. Sex as work, sex as other: Do men who receive money vs goods or drugs for sex differ? 13th Annual Canadian Conference on HIV/AIDS Research, 2004, Montréal (abstract no. 415).

in injection drug use.¹⁵¹ The authors suggest that effective HIV/AIDS programs need to target Aboriginal girls and young women, including with support services to prevent them becoming runaways or otherwise interrupting their education.

There is little published research on transgender sex workers and HIV/AIDS in Canada. Rates of HIV infection among transgender sex workers in Canada, or among the transgender population in general, are not known. Research in other jurisdictions reveals extremely high rates of HIV prevalence among transgender sex workers, and comparative studies indicate that transgender sex workers have higher HIV prevalence rates than non-transgender sex workers.¹⁵²

According to Namaste, four factors contribute to unsafe behaviours among the male-to-female transgender population as a whole in developed countries: (1) self-esteem and stigma of AIDS; (2) unsafe sexual relations with clients or lovers; (3) alcohol and drug use; and (4) unsafe injecting practices, including drug injection and hormone and silicone injection.¹⁵³ Marginalization from health care and social service networks, and from the information and services such networks provide about HIV prevention, also contribute to the vulnerability of transgender people to HIV.¹⁵⁴

The Canadian-specific information that does exist in relation to transgender sex workers has mainly been produced in the context of needs assessment and other survey-based reports. A 1995 report found that among 34 transgender sex workers, unsafe sex (both oral and anal or vaginal intercourse) occurred frequently, particularly among those individuals engaged in street-based prostitution.¹⁵⁵ The use of alcohol or drugs, and higher prices for unsafe sex, were the primary reasons given for unsafe sex. Specific to oral sex, participants justified not using a condom because of the perceived low risk of this activity for HIV transmission.

¹⁵¹ I McKeown et al. *Sexual violence and dislocation as social risk factors involved in the acquisition of HIV among women in Manitoba*. The Prairie Women's Health Centre of Excellence. 2002. Available at www.pwhce.ca/pdf/sexualViolenceComplete.pdf.

¹⁵² K Namaste. *Invisible Lives*, p 237.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*, pp 236, 239.

¹⁵⁵ K Namaste. *HIV/AIDS and Transgender Communities in Canada*, p 17.

Links between the criminal law, sex workers' health and safety, and HIV risk

A salient feature of some recent studies on prostitution and other sex work in Canada is the conclusion that federal laws related to solicitation contribute to women's risk of facing violence and, directly or indirectly, their HIV risk.



Well, yeah, the law makes it illegal and the girls or the guys have to be very sneaky. So, often, especially when you're doing street prostitution you have to do it very, very quickly, slam, bang, thank you ma'am, and so it's not safe because the condom can break and they risk getting HIV or hepatitis C or STDs greater than if it was not against the law and you'd have a safe place to go and do your business, nothing would be rushed. It's stupid.

– 37-year-old Inuk woman

The overall objective of the recent *Voices for Dignity* report by the Pivot Legal Society in Vancouver was to gather the expert opinions of sex workers on the current criminal laws and their experiences working under those laws.¹⁵⁶ Pivot gathered affidavits (sworn statements) from 91 self-selected sex workers (or former sex workers) from Vancouver's Downtown Eastside.¹⁵⁷ Pivot researchers asked sex workers to respond to the following questions:

If you were speaking to the people who are reviewing the communicating law, bawdy-house law, or procuring law, what would you say to them about these laws? Can you describe an experience that you have had that has made you feel that way about the law?

In addition, Pivot collected data from two discussion groups of sex workers who had attended an information session and provided an affidavit.

Numerous sex workers told Pivot they would go off to secluded areas with clients to avoid police harassment even though the seclusion presented a probable danger.¹⁵⁸ The Pivot study also highlights the difficulty that low-income sex workers in particular often have in enforcing condom use by their clients, a situation it

¹⁵⁶ 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. [Undated.] Available at www.pivotlegal.org/sextadereport/1short2.pdf.

¹⁵⁷ Many people who live in the Vancouver's Downtown Eastside suffer from extreme poverty, homelessness, drug dependence, poor health or a combination of these. Downtown Eastside rates of HIV and hepatitis C infection are the highest of any neighbourhood in Canada, with the HIV prevalence among people who inject drugs roughly that of adults in the hardest hit countries of Southern Africa. An open and active drug trade and street-based prostitution are part of the Downtown Eastside. The disappearance and murder of female sex workers from the Downtown Eastside of Vancouver led to the establishment of a joint RCMP/Vancouver Police Department Task force.

¹⁵⁸ Pivot Legal Society Sex Work Subcommittee, p 17.

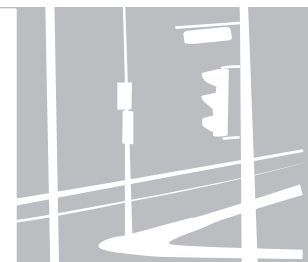
concludes is also exacerbated by women's vulnerability to violence and abuse because of the law. A number of the women Pivot interviewed said they would be more likely to enforce condom use by clients if they could work indoors rather than on the street, but the provisions of Canadian law prevent this.¹⁵⁹

Health was one of the key themes identified in the *Voices for Dignity* report. The Canadian HIV/AIDS Legal Network commissioned Pivot to do an in-depth analysis of the impact of criminalization on the health status of sex workers, including exposure to HIV.¹⁶⁰ The objective of that additional analysis was to determine the effects of criminalization on the health status, including risk of exposure to HIV, of Downtown Eastside sex workers. Sex workers described the ways in which the criminal laws place them in circumstances where they are vulnerable to high levels of violence and exploitation as follows:

- Although many sex workers would prefer to work indoors in a protected environment where safety measures can be put in place, the criminal law makes this illegal.
- Low-income sex workers (who cannot afford a phone, cannot pay to advertise, and often cannot find work in quasi-legal escort or massage services) have few options but to work on the street.
- The communicating law forces sex workers into very dangerous situations and practices to avoid detection by police and prosecution.
- Many sex workers solicit clients in deserted industrial areas to avoid harassment by police and neighbourhood residents.
- In order to avoid detection, sex workers feel compelled to get into vehicles quickly without taking adequate time to assess a potential client and negotiate the terms of the transaction.
- Clients often take sex workers into deserted locations chosen by clients, where violent clients feel less inhibited.¹⁶¹

A few times they've [the police] taken my money and put me in the tank. I got kicked a couple of times, but that was out West. They were not very respectful.

– 39-year-old woman from Iqaluit



The affidavits also contained evidence of the ways in which the loss of control over working conditions occasioned by the criminal law exacerbated violence against sex workers as well as potential exposure to HIV.

¹⁵⁹ Pivot Legal Society Sex Work Subcommittee, p 19.

¹⁶⁰ Pivot Legal Society. *The impact of criminalization on the health status of sex workers*. June 2004. Unpublished. On file at the Canadian HIV/AIDS Legal Network.

¹⁶¹ *Ibid.*, pp 11-15.

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.¹⁶²

The sex workers who provided evidence for the Pivot study linked the criminalization of prostitution and the poverty many of them experience.¹⁶³ Sex workers stated that police presence on or near strolls causes a decline in clients, increasing the competition among sex workers for clients which can at times result in a “price war” as sex workers offer lower prices in order to secure clients. Also, sex workers gave evidence that their ability to utilize their knowledge of safer sex is limited when they face challenges of extreme poverty and risk of violence.¹⁶⁴ As a number of sex workers noted:¹⁶⁵ Some clients are willing to pay more for unprotected sex – either oral sex or penetrative intercourse without a condom. Sex workers who are financially desperate, due in part to law enforcement efforts aimed at street-based prostitution, may not be able to afford to refuse the offer of more money despite the acknowledged risk.

Jackson and colleagues, working in Toronto, echoed the conclusion that risk of HIV and other severe harms was much higher for street-based women sex workers than for women escorts working indoors, even though the services escorts provide may more often include vaginal and anal sex than is the case for street-based workers.¹⁶⁶ Escorts are paid for the time that they spend with a client rather than for a sex act, they note, whereas street-based sex workers are frequently under pressure to have as many clients and sex acts as possible, completing their service quickly. This pressure is partly economic and partly due to fear of being caught by police. Perhaps because street-based workers often met their clients in cars, oral sex and hand jobs were more frequent services for them than for escorts, which might lead to the conclusion that street-based workers are at lower HIV/AIDS risk. But, according to these researchers, the much greater pressure on street-based workers to engage in sex without condoms makes their HIV risk greater overall.¹⁶⁷

A study of escorts in Windsor, Ontario, near the US border, acknowledged the relative safety of escort work compared to street-based sex work, but highlighted other risks particular to escorts. In this case, the city of Windsor, home to a casino that draws large numbers of visitors from the US, attempted to license escorts with the goal of legitimizing them and with the promise that licensing them would increase police protection and reduce police harassment. Instead, according to this study based on interviews with escorts, licensing helped the police to

¹⁶² Ibid. at 15.

¹⁶³ Pivot Legal Society. *The impact of criminalization on the health status of sex workers*, pp 17-18.

¹⁶⁴ Ibid., p 20.

¹⁶⁵ Ibid., pp 18-20.

¹⁶⁶ L Jackson, A Highcrest, R Coates. Varied potential risks of HIV Infection among prostitutes. *Social Science and Medicine* 1992; 35(3): 281-286, p 283.

¹⁶⁷ Ibid., p 283.

identify escorts and in some cases to raid their workplaces or entrap them in sting operations.¹⁶⁸ In addition, the authors conclude that the municipal authorities in this case were fearful that overt recognition of the sexual nature of escorts' work would place them in violation of federal criminal law, which caused authorities to distance themselves from providing services and information that could help escorts protect themselves from sexually transmitted diseases; the authorities take no responsibility for monitoring or addressing the health and safety risks associated with the sexual aspect of the work.¹⁶⁹

Sex workers' voices

One example of sex workers writing in their own words about their lives, including the health and safety risks they face, is *ConStellation*. Since 1996, this magazine has been published by Stella, a non-governmental organization in Québec representing sex workers. In a 2003 article, Stella enumerates the effects of criminalization on the lives of sex workers:

In our opinion, what we're seeing is that the effort to combat prostitution or other forms of sex work has highly negative repercussions, especially among sex workers with serious problems, such as extreme poverty, drug abuse and/or mental health problems. These individuals are, first and foremost, stalked, marginalized, isolated, and imprisoned.

Legally-speaking, you must bear in mind that criminalizing prostitution has serious consequences, above and beyond the fact that sex workers have criminal records and stiff fines to pay; or that for those of us who would like to give up the sex trade, a criminal record can actually hinder possible reorientation efforts. Harassment and extortion by police officers or other authorities, lack of fair and equitable treatment during arrest, imprisonment without trial, absence of investigation or prevention of crimes against sex workers, threats and reprisals against sex workers' family and entourage (especially when laws on procuring are involved) have as many punitive repercussions as the stigmatizing attitude. In other words, criminalization supports the illicit and transgressive nature of the institution of prostitution, maintains the enduring nature of the 'whore' stigma, and promotes abuse.¹⁷⁰

Evidence from other jurisdictions

The links between criminalization of prostitution and risks to sex worker health and safety have also been analyzed in other countries, including the United States, France, South Africa and the United Kingdom.¹⁷¹ Priscilla Alexander, a leading US researcher and advocate on behalf of sex workers, has noted that "the overarching factor that affects the health of individuals involved in prostitution and sex barter is the legal context in which such exchanges occur."¹⁷² This conclusion is based primarily on qualitative research and informal discussions with sex workers over a 22-year period. Alexander argues that law enforcement has a number of effects

¹⁶⁸ E Maticka-Tyndale. *Escort services in a border town*, p 32.

¹⁶⁹ *Ibid.*, p 31.

¹⁷⁰ Stella et le débat sur la prostitution. *ConStellation* 2003; 8(1): 70-78 at 75.

¹⁷¹ See various articles in *Research for Sex Work* 2001; 4. Available via <http://hcc.med.vu.nl/rfsw.htm>.

¹⁷² P Alexander. Sex work and health: a question of safety in the workplace. *Journal of the American Medical Women's Association* 1998; 53(2): 77-82 at 77.

on sex workers' health.¹⁷³ First, sex workers modify their work behaviour to avoid visibility and the accompanying risk of arrest. Sex workers on the street negotiate rapidly with clients before getting into cars, or may agree to acts carrying higher risk of HIV in order to reduce time on the street and the likelihood of arrest.¹⁷⁴

The reduction in the amount of time spent assessing a client makes it harder for sex workers to screen out potentially violent clients. Alexander argues that intense law enforcement on the streets increases the risk of violence for sex workers. “[T]here is a synergistic relationship between increases in law enforcement activity and violence against sex workers, including violence by clients, drug dealers, neighbourhood vigilantes, lovers, and police.”¹⁷⁵ Finally, sex workers working indoors, who provide prostitution services under the cover of legitimate massage services, are discouraged from using condoms since condoms may be used as evidence of prostitution.

Conclusion: A need for law reform to protect the health and safety of sex workers

The research concerning the health and safety risks faced by sex workers in Canada reviewed in this section shows that:

- sex workers and other people working in sex work in Canada reported to researchers the non-responsiveness of police to their concerns about violence and abuse;
- sex workers in Canada are not immune from the HIV risks faced by all sexually active persons;
- the risk of HIV and other severe harms was higher for street-based women sex workers than for women escorts working indoors;
- the *Criminal Code* provisions related to prostitution contribute to sex workers' loss of control over their working conditions, resulting in increased risk of facing violence and, directly or indirectly, their risk of HIV infection;
- the stigma and social vulnerability faced by sex workers are related to their economic vulnerability and disenfranchisement, and all of these increase HIV/AIDS risk;
- Aboriginal persons, especially women, who engage in prostitution face high HIV risk; and
- transgender people who engage in prostitution face high HIV risk.

The criminal law and its enforcement encourage violence against sex workers, contribute to the continued low income of sex workers who have few options but to work on the street because of their poverty and other issues such as addictions, and increase those sex workers' risk of being exposed to HIV. The preponderance

¹⁷³ Ibid., p 78.

¹⁷⁴ On this point, see also P Alexander. Contextual risk versus risk behaviour: the impact of the legal, social and economic context of sex work on individual risk taking. *Research for Sex Work* 2001; 4: 3-4. Available at via <http://hcc.med.vu.nl/rfs.w.htm>.

¹⁷⁵ P Alexander. Sex work and health at 78.

of credible evidence points to two conclusions. First, the *Criminal Code* communicating offence (section 213) has not reduced the overall prevalence of street-based prostitution in Canada. Second, the continued criminalization of activities related to prostitution has contributed, both directly and indirectly, to the risk of violence and other health and safety risks faced by sex workers in Canada.

Researchers in Canada have made numerous policy recommendations on prostitution flowing from the studies reviewed in this chapter, of which a few recur and are worth citing.

- HIV/AIDS programs should take better account of the reality of sex workers, including the variations in their situations. It is not useful to base HIV prevention programs for sex workers on education about the value of condom use if they are living in poverty to the point where they have little choice but to engage in unsafe acts, or if the conditions under which they work make it more difficult to insist on condom use. Basic survival needs – food and shelter – are so pressing for some sex workers in Canada that they must be addressed in some way for there to be hope that HIV/AIDS programs will succeed.¹⁷⁶ If drug addiction is part of their reality, that too must be taken into account in HIV/AIDS programs. Finally, programs need to take into account the evidence suggesting that sex workers, male and female, are as much, if not more, at risk of HIV and other sexually transmitted diseases from sexual encounters in their personal lives than from sexual encounters with their professional clients.
- A number of studies reviewed in this section conclude that the current federal law related to prostitution may be a hindrance to HIV prevention and prevention of violence against sex workers and should be revisited or largely rescinded. The Pivot study, for example, recommends that the current laws against solicitation be struck down except for the law related to the protection of women from trafficking and the sexual exploitation of children, which were not addressed in the Pivot study.¹⁷⁷
- Prostitution should be treated as work when it comes to protections related to health and safety that other workers in Canada enjoy.¹⁷⁸ Maticka-Tyndale and colleagues assert that this would be a much more effective approach to ensuring the rights, and especially the safety, of sex workers than legislating controls on prostitution-related activities, which is what the federal criminal law currently attempts to do.
- Politicians should engage in dialogue with sex workers about prostitution and ways to make it safer. Lowman concludes that, “[w]ithout this dialogue and a wholesale rationalization of Canadian prostitution law, many more women will die.”¹⁷⁹

The previous section of the report reviewed the available evidence regarding the enforcement of the prostitution-related provisions of the *Criminal Code*. This section

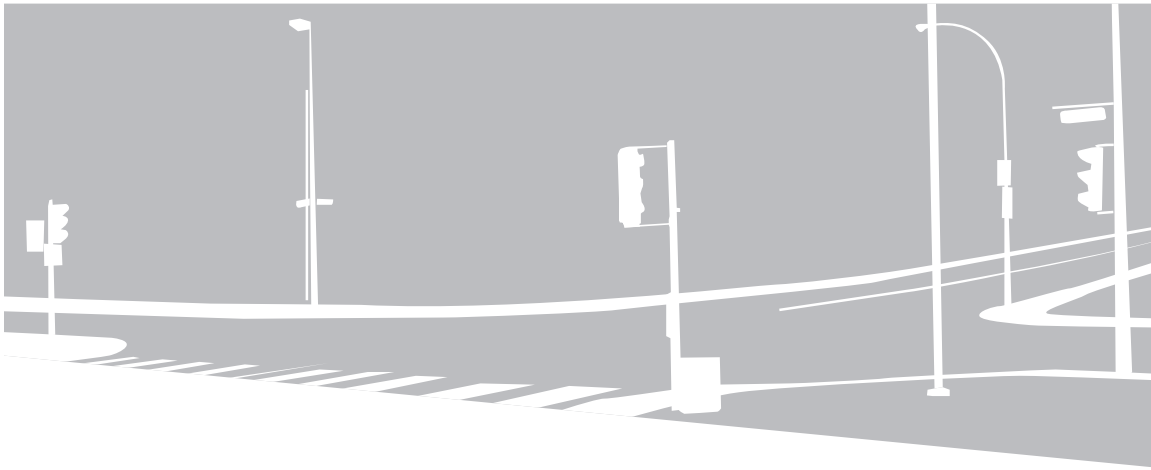
¹⁷⁶ See also J Duddy. Expanding HIV treatment options for female sex workers in Vancouver’s Downtown Eastside. *Research for Sex Work* 2004; 7: 23-25.

¹⁷⁷ Pivot Legal Society Sex Work Subcommittee, p 2.

¹⁷⁸ E Maticka-Tyndale. *Escort services in a border town*, p 21; Pivot Legal Society Sex Work Subcommittee, p 2.

¹⁷⁹ J Lowman. Violence and the outlaw status of (street) prostitution in Canada at 1008.

reviewed the evidence regarding the impact of the law on sex workers. Taken together, this evidence strongly suggests that the *Criminal Code* provisions related to prostitution have not achieved their ostensible objective, yet have contributed to the health and safety risks faced by sex workers. Thus, the evidence provides a strong basis for the proposition that the prostitution-related activities as applied to adults currently prohibited under the *Criminal Code* should be decriminalized.



International law and the human rights of sex workers

As set out above, there are three foundations of sound reform of law and policy dealing with prostitution in Canada:

1. the best available evidence, both credible social science and public health research and evidence from sex workers themselves;
2. Canada's obligations under international human rights; and
3. the *Canadian Charter of Rights and Freedoms*.

As set out in previous sections, the evidence strongly suggests that the *Criminal Code* provisions related to prostitution contribute to the health and safety risks faced by sex workers, and thus should be reformed. This section considers how Canada's obligations under international law to respect, protect and fulfil the human rights of sex workers should be reflected in reforms to the criminal law relating to prostitution. The next section analyses the existing prohibitions on prostitution-related activities in the *Criminal Code* in light of the constitutional rights of sex workers in the *Canadian Charter of Rights and Freedoms*.

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, individual dignity and individual worth of sex workers as members of Canadian society. Conceived of in this light, community safety and the prevention of nuisance are not necessarily opposed to the health and safety of sex workers. Sex workers are part of Canadian society and communities.

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. The Declaration recognizes the inherent dignity, equality and inalienable rights of all members of the human family as the foundation of freedom, justice and peace.

Some of the basic features of human rights are as follows:

- Human rights are universal and indivisible.
- Human rights treat all people as equal.
- Human rights are primarily the rights of individuals, and set standards for the conduct of states with respect to individual rights.

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. In practice, states respect, protect and fulfill human rights obligations by ensuring that their constitution, laws, policies, budgets and administrative and other actions flow from, do not conflict with, and advance human rights guarantees. A state's obligations apply to all components of the state – federal, provincial and local governments, and the institutions and people that are legally empowered to act for the state. States must also regulate behaviour of third parties – corporations, international organizations, and individuals – to ensure that human rights are effectively enjoyed. 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.

The foundational document of modern human rights law is the *Universal Declaration of Human Rights*. The fact that the *Universal Declaration* was adopted by a resolution of the General Assembly of the United Nations means that it is not, technically speaking, binding on UN member states.¹⁸⁰ However, many of the rights articulated in the *Universal Declaration* were incorporated into two United Nations treaties (also known as covenants): the *International Covenant on Civil and Political Rights (ICCPR)*,¹⁸¹ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.¹⁸² Treaties such as the *ICCPR* and *ICESCR* bind states that ratify them.

Canada has ratified both the *ICCPR* and the *ICESCR*. In doing so, Canada has undertaken to give immediate effect to the rights in the *ICCPR*, and to take steps towards the progressive realization of the rights set out in the *ICESCR*. The principle of progressive realization of human rights imposes an obligation on states to move as expeditiously and effectively as possible to realize the *ICESCR* rights, while recognizing that different states have different resources available to do so.

International human rights and sex workers

On the whole, international human rights instruments that were drawn up expressly to address prostitution do not reflect a respect for the rights and agency of sex

¹⁸⁰ However, there is some authority for the argument that the *Universal Declaration* reflects customary international law, and is therefore binding on all states. See W Schabas. *International Human Rights Law and The Canadian Charter* 2nd ed. Scarborough: Carswell, 1996, p 64 (note 40).

¹⁸¹ 999 UNTS 171, entered into force 23 March 1976.

¹⁸² 993 UNTS 3, entered into force 3 January 1976.

workers.¹⁸³ The 1949 United Nations *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Trafficking Convention)* addresses two main concerns, as indicated by its title: trafficking in persons for the purposes of prostitution, and the exploitation of persons for prostitution. Regarding the exploitation of persons for prostitution, the *Trafficking Convention* requires States 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.¹⁸⁴ State parties also agree to adopt measures to punish people involved in operating brothels or places of prostitution.¹⁸⁵ 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.

States who are parties to the *Trafficking Convention* agree to repeal or abolish existing laws, regulations or administrative provisions “by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification.”¹⁸⁶ Further, states agree to take “measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.”¹⁸⁷

Under the *Trafficking Convention* persons who engage in prostitution (i.e., sex workers) are conceived of as victims, regardless of whether and to what extent the sex worker chose to be involved in prostitution. The *Convention* “recognizes in a complicated way the theoretical right of adult women in prostitution to ply their trade, but is based on the premise that all sex work should end, and implicitly endorses the view that adult sex workers should be saved from themselves and rehabilitated.”¹⁸⁸ The premise that all prostitution should end undermines sex workers’ legitimate claims to human rights and serves as a basis for governments to make excuses for their failure to take action to respect, protect and fulfill the human rights of sex workers. Canada has not ratified this convention and thus is not bound by its terms.

Ironically, the human rights set out in numerous non-prostitution-specific conventions, to which Canada is a party offer sex workers in Canada the potential for greater human rights protection than prostitution-specific instruments. The prostitution-specific instruments do not address the rights of sex workers who have not been trafficked and who are not being exploited, or the rights of sex workers who have come out of situations of trafficking or exploitation and who choose to continue in sex work.

Although it is difficult to determine with certainty, the available evidence seems to indicate that the majority of sex workers in Canada have not been trafficked and are

¹⁸³ Csete & Seshu, p. 11.

¹⁸⁴ 96 UNTS 271, entered into force 25 July 1951, art 1.

¹⁸⁵ *Ibid.*, art 2.

¹⁸⁶ *Ibid.* at art 6.

¹⁸⁷ *Ibid.* at art 16.

¹⁸⁸ Csete & Seshu, p. 12.

not subject to exploitation by a pimp or organized crime. Sex workers who engage in prostitution by choice (even as a choice made from a limited range of options) are offered little protection under the prostitution-specific human rights instruments. Any serious commitment to respecting, protecting and fulfilling human rights of sex workers must include a commitment to measuring the situation of sex workers against Canada's general human rights commitments.

At the most fundamental level, sex workers deserve to be treated with dignity and to enjoy the human rights guaranteed to all people. As a party to both the *ICCPR* and the *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, which must be protected by law. (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. Exercise of the right may be restricted by law where necessary for respect of the rights or reputations of others, or for the protection of national security or public order, or of public health or morals. (Article 19.2, 19.3)
- Right to freedom of association with others. No restrictions may be placed on the exercise of the right other than those which are prescribed by law *and* which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of 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 *ICESCR*, 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. In particular, this includes a fair wage and decent living, safe and healthy working conditions, equal opportunity for promotion, and rest, leisure and reasonable limitation of working hours and periodic holidays with remuneration for public holidays. (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. This includes states taking steps to prevent and treat epidemic and occupational diseases. (Article 12.1)

The laws make it hard. In Quebec recently, I've had to look for a medical form and it's hard to find a doctor who will see you. There was no one in the area I lived in. So they should have a clinic for sex workers where they'll have no problem getting treatment, with no judgement.

– 39-year-old woman from Iqualuit



Specific to women sex workers, the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* contains obligations regarding steps that states, including Canada, must take to eliminate discrimination against women.¹⁸⁹ Many of these obligations are relevant to the situation of women sex workers. Listed below are those articles that are central to the reform of the *Criminal Code* provisions relating to women in prostitution. 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 to eliminate discrimination against women by any person, organization or enterprise. (Article 2(e))
- Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. (Article 2 (g))
- Repeal all national penal provisions that 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))

¹⁸⁹ 1249 UNTS 13, entered into force 3 September 1981.

- 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 Article 6 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. Combating traffic in women and exploitation for the purposes of prostitution is one among many legitimate measures for protecting women against discrimination. The larger objective of *CEDAW* is to ensure that states take measures to eliminate discrimination against all women, regardless of whether those women engage in prostitution.

In General Recommendation 19, the UN Committee on *CEDAW* examined the issue of violence against women.¹⁹⁰ By way of background, the Committee states that “[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.” Specifically, in relation to article 6 of *CEDAW* and violence against women in prostitution, the Committee 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.¹⁹¹

Sex workers have embraced human rights in their efforts to improve their health and working conditions, and as a means to counter the social and political marginalization of sex workers and prostitution. For example, in 1985, the International Committee for Prostitutes’ Rights developed the *World Charter for Prostitutes’ Rights*.¹⁹² Sex workers and advocates have also examined in detail the applicability of international labour law to prostitution and sex workers. In the leading analysis of the applicability of international labour law, the authors state: “An employment or labour perspective is a necessary, if not sufficient, condition for making prostitution part of the mainstream debate on human, women’s, and workers’ rights at a local, national and international level.”¹⁹³ It is beyond the scope of this report, with its focus on the criminalization of prostitution in Canada, to analyze the labour and employment rights of sex workers under international or Canadian law. However, such an analysis is an important element of the discussion of the reforms needed beyond changes to the criminal law to ensure that the rights of sex workers are respected, protected and fulfilled.

¹⁹⁰ United Nations Committee on the Elimination of All Forms of Discrimination Against Women. *General recommendation 19*. UN Doc No A/47/38, 1992. The UN Committee on CEDAW is mandated to monitor and encourage states’ compliance with CEDAW. One way the committee does so is by making general recommendations.

¹⁹¹ *Ibid.*, s 15.

¹⁹² International Committee for Prostitutes’ Rights. *World Charter for Prostitutes’ Rights*. 1985. Available at www.walnet.org/csis/groups/icpr_charter.html.

¹⁹³ J Bidman, J Doezeema. *Redefining prostitution as sex work on the international agenda*. 1997. Unpublished. Available at www.walnet.org/csis/papers/redefining.html.

HIV/AIDS, sex workers and human rights

Given the scale of the HIV/AIDS pandemic and the resulting challenges for governments, international bodies such as the Joint United Nations Programme on HIV/AIDS (UNAIDS) have developed guidelines and policy documents. These documents are intended to guide state actors (legislators and other decision-makers) in formulating responses to HIV/AIDS. They outline standards and best practices for addressing HIV/AIDS at a legislative and policy level, and within everyday spheres of activity such as employment. In recognition of the real and potential human rights violations faced by sex workers, international bodies have provided states with guidance in developing policies and programs or taking other measures that respect, protect and fulfill the rights of sex workers.

The *International Guidelines on HIV/AIDS and Human Rights (International Guidelines)*¹⁹⁴ are intended to support responses to HIV/AIDS that are effective in stemming the epidemic while also supporting human rights. The International Guidelines refer to the human rights of sex workers:

In the context of HIV/AIDS, international human rights norms and pragmatic public health goals require States to consider measures that may be considered controversial, particularly regarding the status of women and children, *sex workers*, injecting drug users and men having sex with men.¹⁹⁵ [Emphasis added.]

International Guideline 4 addresses one measure that has been the subject of controversy and debate in Canada as it relates to prostitution, namely criminal law reform. Guideline 4 provides:

States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.

The commentary on International Guideline 4 encourages states to review laws that prohibit commercial sexual encounters sex between consenting adults in private, “with the aim of repeal.” In the absence of state action to repeal such laws, 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.

With respect to adult sex work that involves no victimization, criminal law should be reviewed with the aim of decriminalizing, then legally regulating occupational health and safety conditions to protect sex workers and their clients, including support for safe sex during sex work. Criminal laws should not impede provision of HIV/AIDS prevention and care services to sex workers and their clients.¹⁹⁶

¹⁹⁴ 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.

¹⁹⁵ *Ibid.* at para 15(d).

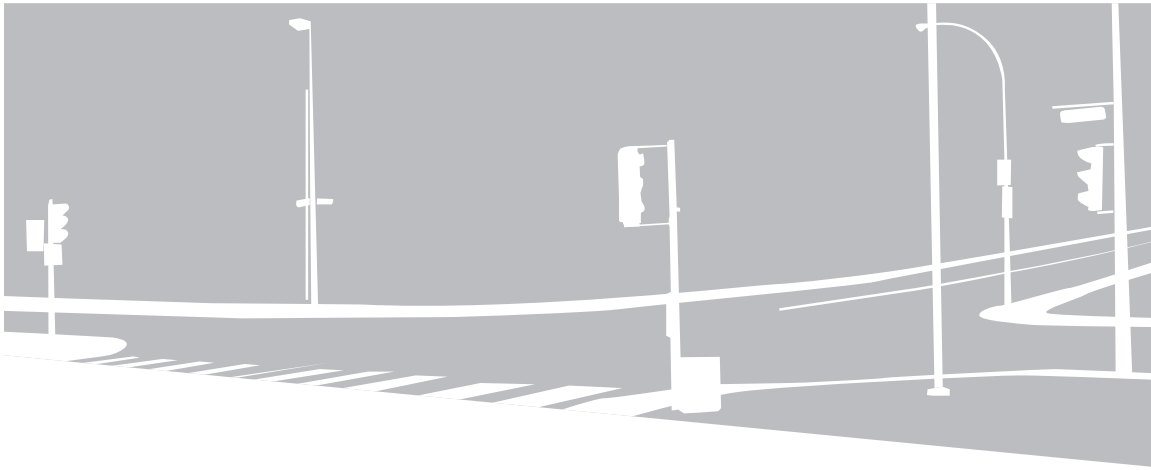
¹⁹⁶ *Ibid.* at para 29(c).

The UNAIDS/Inter-Parliamentary Union *Handbook for Legislators on HIV/AIDS, Law and Human Rights (Handbook for Legislators)* further elaborates on the *International Guidelines*, and provides examples of best practices.¹⁹⁷ The section on criminal law and sex work/prostitution begins with the recognition that criminal regulation impedes the provision of HIV/AIDS prevention and care by driving people engaged in prostitution underground. The *Handbook for Legislators* 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. The *Handbook* points to features in legislation that have been successful from the perspective of public health promotion and respect for human rights:

- obligations imposed on owners and operators should not be so onerous as to create a second, illegal industry beyond the reach of services;
- controls on land use and public nuisance protection should be analogous to other personal service businesses;
- mandatory HIV-testing, or requiring medical certificates related to HIV status, should be prohibited;
- managers or clients should be prohibited from requiring unsafe sex;
- management should be responsible for providing condoms and educational materials;
- workers should be classified as employees rather than independent contractors so that they can contribute to, and obtain, state social welfare and industrial benefits; and
- special offences should not apply to HIV-positive sex workers. General public health measures for exceptional cases of irresponsible behaviour, regardless of whether it occurs in a commercial sex work context, should apply.

The Inter-Parliamentary Union (IPU), which represents legislators from all over the world, calls for the review of criminal laws relating to prostitution with a view to decriminalization. The IPU has seen the wisdom of understanding prostitution as work with all the protective measures that entails. 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.

¹⁹⁷ 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.



Canadian Charter of Rights and Freedoms

The final foundation for law reform that respects the health and human rights of sex workers is the *Charter*. The fundamental human and legal rights of individuals in Canada are set out in the *Charter*. The Constitution of Canada, including the Charter, is the supreme law of Canada.¹⁹⁸ The *Charter* applies not only to laws enacted by Parliament and provincial legislatures, but also to any body that exercises authority under such laws.¹⁹⁹ Six *Charter* sections are especially relevant when considering the effect of the prostitution-related provisions of 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.” In practice, the section 7 analysis involves two steps. First, the court will determine whether a law or administrative action violates one of the rights protected under section 7 – the right to life, right to liberty, or right to security of the person. If the court finds a violation of one or more of these rights, it will then determine whether the violation was “in accordance with the principles of fundamental justice.”²⁰⁰ If so, then there is no breach of section 7 of the *Charter* and the court will not inquire further. The principles of fundamental justice are found in the basic, bed-rock principles of the Canadian law and legal system.²⁰¹ Canada’s international legal obligations, including obligations under international human rights law, are one source of the principles of fundamental justice.²⁰²

¹⁹⁸ See section 52 of the *Charter*.

¹⁹⁹ See section 32 of the *Charter*; *RWDSU, Local 580 v Dolphin Delivery*.

²⁰⁰ *R v Beare*, [1988] 2 SCR 387, at para 28.

²⁰¹ *Reference Re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 SCR 486.

²⁰² W Schabas, pp 173 -177.

- 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.
- Section 1 permits the government to justify a law or action that otherwise violates a *Charter* right, if it meets certain conditions.²⁰³

To justify a law or action that violates a *Charter* right the government must demonstrate that:

1. the violation or limitation 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.

This section reviews the current prostitution-related provisions of the *Criminal Code* in light of sex workers' *Charter* rights, including a discussion of how these provisions have been interpreted and applied by the courts to date.

Revisiting the Supreme Court's leading cases

The Supreme Court is Canada's highest court and its interpretation of the law is authoritative and binding on all lower courts. The Supreme Court has considered the constitutionality of the prostitution-related provisions of the *Criminal Code* in four cases: the *Prostitution Reference*, *R v Stagnitta*,²⁰⁴ *R v Skinner*,²⁰⁵ and *R v Downey*. In each case, the Court upheld the constitutionality of the challenged *Criminal Code* provision(s). There are four principal reasons why these decisions should be revisited.

First, since the four Supreme Court cases challenging these sections were heard in the late 1980s and early 1990s, there has been a significant increase in social awareness of the extreme violence and other harms sex workers face. This change in social awareness is attributable, at least in part, to evidence of a spate of murders and disappearances of sex workers in Vancouver and Edmonton. These led Parliament to establish the first Subcommittee on Solicitation Laws with a mandate to review the solicitation laws in order to improve the safety of sex workers and communities overall, and to recommend changes that would reduce the exploitation of, and violence against, sex workers.

²⁰³ Section 1 of the *Charter* states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

²⁰⁴ *R v Stagnitta*, [1990] 1 SCR 1226.

²⁰⁵ *R v Skinner*, [1990] 1 SCR 1235.

Second, and highly significant from a legal perspective, is the development of a body of behavioural and social science literature on prostitution and sex workers in Canada, exemplified by the research reviewed in this report. Courts take this type of information into account, when properly brought before them as evidence, in determining whether or not laws unjustifiably violate *Charter* rights. If this evidence had existed at the time, the Supreme Court would have had a more complete record upon which to consider the merits of *Charter* challenges to the bawdy-house, communicating, and living-on-the-avails sections of the *Criminal Code*. Referring to the evidence available to the Standing Committee on Justice and the Solicitor General when it conducted a statutorily-mandated review of the communicating section in 1989, Lowman noted concerning the Supreme Court decisions: “With the benefit of the empirical record placed before the Standing Committee, one can only wonder if the Supreme Court would have reached the same conclusion.”²⁰⁶

Third, the law has changed. It has been more than a decade since the Supreme Court decided the cases on the prostitution-related provisions of the *Criminal Code*. In that time, the judicial understanding and interpretation of the *Charter* rights considered in those cases have been refined. The *Charter* is a relatively young constitutional document. It came into force in 1982, with the exception of the equality rights section which came into force in 1985. Since the Supreme Court decided the prostitution-related cases, it has released a number of leading cases interpreting *Charter* rights. These cases are relevant to the constitutional rights of sex workers and their clients, and suggest that a more refined, nuanced analysis of the prostitution-related provisions in the *Criminal Code* is in order.

Finally, the Supreme Court’s prostitution-related decisions should be revisited because, in some respects, they were poorly decided and failed to give serious consideration to the sex workers’ constitutional rights.

The constitutionality of the prostitution-related provisions of the *Criminal Code* will be analyzed in the remainder of this section. The analysis begins with the communicating section (section 213) because it has received the most judicial attention. The bawdy-house sections (section 210 and 211) are analyzed next, followed by an analysis of the procuring and living-on-the-avails provisions related to adult prostitution (section 212).

Communicating in public for the purposes of prostitution (section 213)

Implications for sex workers

Section 213, given its sweeping scope, places a great deal of power in the hands of police to arrest sex workers, or to threaten sex workers with arrest. Section 213 structures the way street-based prostitution is conducted. It makes it illegal for sex workers to solicit or negotiate with clients – in other words, to work – in any public place. When sex workers work in public places, such as on the street, in parks, or

²⁰⁶ J Lowman. Prostitution law reform in Canada at 7.

in bars, they run the risk of being arrested for communicating for the purposes of prostitution. When a sex worker pleads or is found guilty under section 213, he or she may be imprisoned, fined or both.

Under the criminal law, being fined is a less severe punishment than imprisonment. Nevertheless the impact of a fine on a sex worker may be no less harsh than imprisonment. If the sex worker cannot pay the fine, he or she may end up being imprisoned for non-payment. Or, in order to pay the fine, the sex worker may have no other realistic option but to return to street-based prostitution to earn the money needed for the fine, in addition to earning the money he or she requires for ordinary living expenses.

One of the main implications of section 213 for sex workers has been the dislocation of street-based prostitution from centrally located residential or commercial neighbourhoods to industrial or remote neighbourhoods where there are few people present. Police enforcement of laws criminalizing the various aspects of street-based prostitution has been complaint-driven. Sex workers working on the streets in residential neighbourhoods have faced both individual complaints and organized opposition from residents. When police enforcement has been focussed on a particular residential area, sex workers have been forced to move to another area.

In dark, sparsely populated or industrial areas, sex workers face increased health and safety risks. A sex worker may have few if any people to turn to for help if prospective clients or predators become aggressive or violent. In industrial areas, especially at night, there is little or no pedestrian or street traffic, few if any pay phones, and no public services such as bars and coffee shops. It is perhaps for these reasons that virtually all of the sex workers and former sex workers who provided affidavits for the Pivot study demanded that the communicating provision be repealed.²⁰⁷

Section 2(b) guarantee of freedom of expression

In the *Prostitution Reference*, all six judges decided that the Charter *section 2(b) guarantee of freedom of expression was breached* by the communicating provision because it restricted the content of expression, rather than seeking to control the physical consequences of a certain expressive activity.²⁰⁸ The judges reasoned that the fact a person could be convicted even where there was no link between the expressive activity (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. The 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."²⁰⁹

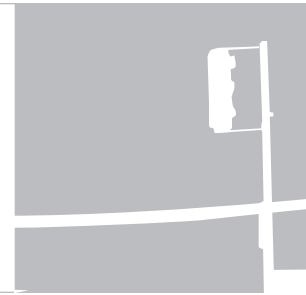
²⁰⁷ Pivot Legal Society Sex Work Subcommittee, p 2. Various cites.

²⁰⁸ *Prostitution Reference*, per Dickson CJC, La Forest and Sopinka JJs, para 1; per Wilson and L'Heureux-Dubé JJs, para 116; per Lamer J, para 89.

²⁰⁹ *Prostitution Reference*, per Wilson J at para 116.

[S]ex workers are like anybody else, so if anybody wants to speak to us, they should have the right to speak to us without the law coming in, stepping in and saying, “you’re under arrest for solicitation.” It’s not right.

– 37-year-old Inuk woman



There have been no Supreme Court cases that warrant overturning the majority decision on freedom of expression in the *Prostitution Reference*. It is still the law that *the communicating section violates sex workers’ freedom of expression*. Whether this violation is justified under section 1 of the *Charter*, the conclusion reached by a majority of the judges in the *Prostitution Reference*, is examined below.

Section 2(d) guarantee of freedom of association

In *Skinner*, the Supreme Court decided that the *Criminal Code* section prohibiting communicating in a public place of the purpose of prostitution *did not violate the Charter section 2(d) guarantee of freedom of association*. The majority of judges rejected the *Charter* challenge on two grounds. First, the association between a sex worker and client is beyond the ambit of the association protected by the *Charter*.²¹⁰ Second, the communicating provision of the *Criminal Code* targets expressive conduct and does not attack conduct of an associational nature.²¹¹

The two dissenting judges took a different view of the leading cases addressing the scope and purpose of *Charter* guarantee of freedom of association. Wilson J, writing for L’Heureux-Dubé J, wrote that, “so long as it remains lawful to sell sex for money, there is a right to associate with others, i.e., potential customers, in order to reach an agreement for this purpose,” regardless of whether the common purpose is commercial in nature.²¹² The dissenting judges held that both the purpose and effect of the communicating provision violated the right to freedom of association of sex workers and their clients.²¹³

The majority’s analysis in *Skinner* is at odds with its analysis of the *Charter* section 2(d) guarantee of freedom of association in other cases, both before and after *Skinner*. For example, *in light of the decisions in Dunmore*²¹⁴ and *Black*,²¹⁵ *there is a strong argument that the communicating offence (section 213) of the Criminal Code violates sex workers’ right to freedom of association*, and potentially that of clients. Based on these cases, it now appears that the minority judgment in *Skinner* should be viewed as the correct interpretation of the law,²¹⁶ and that people have a right to associate with one another for the purposes of prostitution.

²¹⁰ *R v Skinner*, at paras 14, 18.

²¹¹ *Ibid.*, paras 16, 17.

²¹² *Ibid.* at paras 35-36.

²¹³ *Ibid.*, paras 32-37.

²¹⁴ *Dunmore v Ontario (Attorney General)*, [2001] 3 SCR 1016, paras 14-18.

²¹⁵ *Black v Law Society of Alberta* (1986), 27 DLR (4th) 527 (Alta CA); affirmed on other grounds, [1989] 1 SCR 591.

²¹⁶ Commenting generally on the decision in the cases respecting *Charter* challenges to the *Criminal Code*, two eminent

In *Black*, a case relevant to sex workers, the limits on how lawyers organized themselves professionally to conduct business was considered. The Law Society of Alberta had rules prohibiting non-residents from entering into business relationships with residents for the purposes of practicing law, or from being the member of more than one law firm. The Alberta Court of Appeal ruled that section 2(d) protects association for the purposes of earning a livelihood. The decision was appealed to the Supreme Court of Canada, where the appeal was eventually decided primarily on other grounds.

It is worth noting, however, that the two judges of the Supreme Court who did address the issue of freedom of association found that Law Society of Alberta rules prohibiting associations involving non-residents violated section 2(d) of the *Charter*. The analysis in *Black* should apply to sex workers who wish to associate with one another without the interference of the criminal law for the purposes of earning a livelihood, given that prostitution is legal in Canada.

Dunmore was a later Supreme Court case dealing with the rights of farm workers to unionize. The scope and application of the freedom of association guarantee have been determined to a great extent in the context of cases involving unions. In *Dunmore*, the Supreme Court set out the analysis required under the section 2(d) guarantee. The majority of judges held that the law must distinguish between the associational aspect of the activity and the activity itself.²¹⁷ The Supreme Court decided that the purpose of section 2(d) commands a single inquiry: Has the state precluded an activity because of its associational nature, thereby discouraging the collective pursuit of common goals? When deciding whether legislation violates the *Charter* guarantee of freedom of association, a court should keep in mind that section 2(d) of the *Charter*:

- protects the freedom to establish, belong to and maintain an association;
- does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association;
- protects the exercise in association of the constitutional rights and freedoms of individuals; and
- protects the exercise in association of the lawful rights of individuals.²¹⁸

The dissent in *Skinner*, written by Wilson J, better reflects the subsequent developments in the *Charter* freedom of association cases, especially the analysis in *Dunmore*. Wilson J stated:

... the legislature has chosen to prohibit both meetings between prostitutes and potential customers and communications between prostitutes and potential customers. They can neither associate with each other or talk to each other in a public place or a place open to public view.... Indeed, given that the legislature was concerned to deal with the social nuisance accompanying the concentration of street solicitation, it is not altogether surprising

criminal lawyers state: “Some day in a future judgment the minority dissenting views in the prostitution cases will probably prevail as majority views.” A Gold, M Fuerst. The stuff that dreams are made of! – criminal law and the Charter of Rights. *Ottawa Law Review* 1992; 24: 13.

²¹⁷ *Dunmore v Ontario (Attorney General)*, para 18.

²¹⁸ *Dunmore v Ontario (Attorney General)*, para 14.

that the legislature would seek to prevent prostitutes and potential customers from associating in public places as well as making their “deals” in public places. But the end result in my opinion is that the provision not only infringes the right to freedom of expression, it also infringes the right to freedom of association.²¹⁹

Based on developments in the Supreme Court case law since *Skinner*, there is a strong argument that the communicating section of the Criminal Code violates sex workers’ right to freedom of association of the Charter. Whether this violation can be justified under section 1 of the Charter is examined below.

Section 7 rights to liberty and security of the person

In the *Prostitution Reference* it was argued that the communicating section, alone or in combination with the bawdy-house section, violated sex workers’ Charter section 7 rights to liberty and to security of the person. It was argued that the threat of imprisonment violated the right to liberty and also that the right to liberty and security of the person were violated because the impugned *Criminal Code* provisions did not allow sex workers to exercise their chosen profession to provide for their basic necessities of life. Finally, it was argued that the provisions violated sex workers’ sections 7 rights because they were unconstitutionally vague.

In a brief analysis, Dickson CJC, writing for himself and two other judges, found a clear violation of the Charter section 7 right to liberty given the possibility of imprisonment under the bawdy-house and communicating provisions. However, he decided that the bawdy-house and communicating provisions did not violate the principles of fundamental justice.²²⁰ According to Dickson CJC, “[t]he fact that the sale of sex for money is not a criminal act under Canadian law does not mean that Parliament must refrain from using the criminal law to express society’s disapprobation of street solicitation.”²²¹ Dickson CJC declined to decide whether the right to liberty or security of the person under section 7 of the Charter had been violated in an “economic” way in relation to sex workers’ economic or commercial interests.²²²

In detailed reasons, Lamer J decided that the communicating provision did not violate Charter section 7 rights and that it was not unconstitutionally vague. The terms used in the communicating section established “an ascertainable standard of conduct, a standard that has been given sensible meaning by courts.”²²³ Lamer J further decided that neither the section 7 Charter rights to liberty or to security of the person protected economic rights; therefore, the sex workers’ right to exercise a chosen profession to earn a living was not protected.²²⁴

²¹⁹ *R v Skinner*, at para 41.

²²⁰ *Prostitution Reference*, para 19.

²²¹ *Ibid.*, at para 19.

²²² *Ibid.*, para 15.

²²³ *Ibid.* at para 42.

²²⁴ *Ibid.*, paras 60, 72.

Wilson J, writing in dissent for L'Heureux-Dubé J, decided that the communicating provision could result in a deprivation of a sex worker's right to liberty.²²⁵ As required under the section 7 analysis, she then went on to determine whether the violation of the right to liberty was “in accordance with the principles of fundamental justice.” Wilson J concluded that it was not. Because the communicating section also unjustifiably violated another *Charter* right (freedom of expression), it could not be said that the communicating section's violation of sex workers' right to liberty was in accordance with the principles of fundamental justice.²²⁶ She did not consider whether the *Charter* section 7 right to security of the person was violated by the communicating provision.

There have been no Supreme Court cases that warrant overturning the Court's decision in the *Prostitution Reference* concerning the right to liberty. *Five of six judges found that the communicating section violated sex workers' Charter section 7 right to liberty, and that finding is still the law.* There are, however, reasons to reconsider the decisions of the majority of the Supreme Court judges regarding the *Charter* section 7 right to security of the person and the “principles of fundamental justice” analysis. The Supreme Court has clarified its interpretation of the right to “security of the person.” In addition, there is now a great deal of evidence concerning sex workers' safety and security, or lack thereof, in relation to the communicating provision of the *Criminal Code*.

The *Charter* section 7 right to security of the person protects “both the physical and psychological integrity of the individual.”²²⁷ Physical integrity includes protection from state interference with a person's bodily integrity,²²⁸ including “freedom from the threat of physical punishment or suffering as well as freedom from the actual punishment or suffering itself.”²²⁹ Since the time the *Prostitution Reference* was decided, the Supreme Court has expanded upon the meaning of psychological integrity in relation to state action. In order to attract constitutional scrutiny, the impugned state action must have a “serious and profound effect on a person's psychological integrity,” which effect need not rise to the level of “nervous shock or psychiatric illness” but must be “greater than ordinary stress or anxiety.”²³⁰

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. To prove that her section 7 right to life or right to security of the person has been violated, a sex worker would have to present evidence that the *Criminal Code* or police enforcement of the *Code* caused or contributed to the health and safety threats she experienced. In the words of the Supreme Court, “there must be a sufficient

²²⁵ *Ibid.*, paras 143, 144.

²²⁶ *Ibid.*, para 150.

²²⁷ *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, per Bastarache J writing for the majority at para 58.

²²⁸ *R v Morgentaler*, [1988] 1 SCR 30, per Dickson CJC, writing for himself and Lamer J, paras 18-19.

²²⁹ *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, per Wilson J, writing for herself, Dickson CJC and Lamer J at para 47.

²³⁰ *New Brunswick (Minister of Health and Community Services)*, per Bastarache J writing for the majority at para 60.

causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered.”²³¹

For example, in *Morgentaler*, the Supreme Court decided that the *Criminal Code* prohibition on abortion (section 251), except when approved by a therapeutic abortion committee of an approved or accredited hospital, was an unconstitutional violation of women’s section 7 rights to liberty and to security of the person. Based on statistical and other evidence, the judges found that the section 251 requirement of approval by a therapeutic abortion committee “caused in large measure” delays for women seeking abortions, and that such delays negatively affected women’s physical and psychological health.²³²

There is a significant body of evidence that points to a complex causal relationship between the *Criminal Code* and health and safety risks (and negative outcomes) for sex workers. There are affidavits from sex workers (from the Pivot project), 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. Taken together this evidence demonstrates that *the communicating provision contributes to violations of sex workers’ Charter section 7 right to security of the person*, with respect to both physical and psychological integrity.

Moreover, *the violation of sex workers’ right to liberty and right to security of the person resulting from the communicating section of the Criminal Code is not in accordance with the principles of fundamental justice under section 7 of the Charter*. A leading Canadian constitutional scholar has asserted that the Supreme Court has assumed an “enormous discretion” in determining the principles of fundamental justice in a given case, such that “[a]ny change in the composition of the Court or even the judges’ perceptions of public opinion can lead to different results.”²³³ Since the *Prostitution Reference* was decided, there has been an increase in social awareness concerning the extreme violence faced by street-based women sex workers and the unwillingness of police to take seriously sex workers’ reports of such violence, as well as greater statistical evidence that female street-based sex workers are heavily and repeatedly criminalized as a result of the enforcement of the communicating section. Moreover, a number of fundamental principles set out in international law and recognized in Canadian law are violated by the enforcement of the communicating section, including:

- the right to freedom of expression;
- the right to freedom of association;
- the right to be free from discrimination in the form of gender-based violence;
- an effective remedy for violations of rights or freedoms;
- the right to enjoy favourable conditions of work; and
- the right to the highest attainable standard of physical and mental health.

²³¹ *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, per Bastarache J for the majority at para 60.

²³² *R v Morgentaler*, per Dickson CJC, writing for himself and Lamer J, at paras 29, 31, 35; per Beetz J writing for himself and Estey J at paras 89-121.

²³³ P Hogg, *Constitutional Law of Canada*. 4th ed (loose-leaf). Scarborough, ON: Thomson Carswell, 1997 at 44-20.

The enforcement of the *Criminal Code* deprives sex workers of these fundamental rights and freedoms. In assessing the principles of fundamental justice, it also should be borne in mind that prostitution and being a sex worker are legal in Canada. Yet the communicating section of the *Criminal Code*, and the enforcement of that section, effectively make street-based prostitution into an extremely risky and harmful activity for sex workers, resulting in often serious violations of sex workers' *Charter* rights. Off-street sex workers also face violations of the rights to liberty and to security of the person, perhaps with less regularity, but with no less severe consequences for the sex workers affected.

Section 15 equality rights

In *R v White*, the Nova Scotia Court of Appeal considered whether the manner in which the police enforce the communicating section of the *Criminal Code* violated the *Charter* section 15 equality rights of women sex workers. The appellants in the case, both women, argued that their section 15(1) right to equality on the basis of sex had been violated as a result of the methods of enforcement used by the Halifax Police. The evidence showed that for an 18-month period spanning 1990 and 1991, 189 females and 45 males were charged with communicating for the purposes of prostitution (section 213(1)(c)).

The Halifax Police enforcement relied on decoys – female officers posing as sex workers; male officers posing as clients on known strolls. Despite the fact that the same numbers of male and female decoys were used, the court heard evidence of the limitations associated with using female decoys which resulted in fewer charges against men. The police offered evidence, accepted by the court, of an additional explanation for the disparity in charges:

The appellants' argument has a major flaw and that is that it is premised on the assumption that every time an offence is committed under s. 213(1)(c) there are two parties to the offence, usually a male and a female. It is clear from the evidence of Constable MacLeod that many solicitations are made by a prostitute before one is accepted by a customer.... There was no evidence that male customers regularly approach women who are not prostitutes and engage in conversation that is prohibited by the section. If the offence is committed more often by females than by men, it is not surprising that more females are charged. If the burden of s. 213 falls more heavily on females because the offence is committed more often by females, then the appellants have not met the burden of proving a breach of s. 15 of the *Charter*.²³⁴

Under section 15 of the *Charter*, a law may be found to violate a person's right to equality based on a distinction written into the text, or based on the impact of the law on a member of an already disadvantaged group.²³⁵ Thus, a law that does not make a distinction based on a prohibited personal characteristic under section 15 (such as race, religion, disability, or sex) may nevertheless violate the *Charter* right to equality if it results in differential treatment on the basis of such a personal characteristic.

²³⁴ *R v White; R v SB* (1994), 136 NSR (2d) 77 (NSQB) at 8. Although the communicating section has been renumbered since these decisions, the wording of the *Criminal Code* is identical to sections the Supreme Court upheld as constitutional.

²³⁵ For example, *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *Symes v Canada*, [1993] 4 SCR 695; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, paras 25, 88.

On its face, the communicating section of the *Criminal Code* makes no distinction based on sex. The law applies to “every person.” At the time the communicating section was introduced and debated in Parliament it was clear that the section was intended to apply to clients as well as sex workers, and thus was intended to give police and courts greater powers to decrease street-based prostitution and associated nuisance.²³⁶ Thus, the analysis of whether the communicating section violates the *Charter* section 15 equality right must focus on the effects of the law.

The evidence of the enforcement of the prostitution-related provisions of the *Criminal Code* throughout Canada shows that the number of men and women charged under section 213 is roughly equivalent, and that nearly all of those charged are found or plead guilty. However, upon conviction under the communicating section, 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: Women who are sentenced to a fine are sentenced to pay higher fines than men; women go to prison more frequently than men; women receive longer prison sentences than men, and for the most part they are not given the option of diversion programs such as john school. *This evidence is a strong indication that the communicating section of the Criminal Code violates women sex workers’ rights to equal treatment based on sex under section 15 of the Charter.*

Section 1 justification?

In this section, it has been argued that the communicating section of the *Criminal Code* (section 213) violates the following *Charter* rights of sex workers:

- section 2(b) right to freedom of expression
- section 2(d) right to freedom of association
- section 7 right to liberty
- section 7 right to security of the person
- section 15 right to equality, on the basis of sex (i.e., women sex workers’ right to equal treatment under the law)

These conclusions are based on the *Charter* rights as they have been interpreted by the Supreme Court, supported by evidence presented in detail above. Under the *Charter*, once a person has established a violation of a right, section 1 of the *Charter* provides the government the opportunity to justify the rights violation imposed by the law being challenged as unconstitutional. The basic framework of the section 1 analysis, as developed by the Supreme Court, was set out at the beginning of this chapter.

To determine if the legislative objective is “pressing and substantial” under the first part of the *Charter* section 1 test, a court must first identify the legislative objective. In the *Prostitution Reference* different judges (and groups of judges)

²³⁶ Achilles, p. 3.

accepted somewhat different legislative objectives of the communicating provision.²³⁷ Three judges found that the objective of *Criminal Code* section 213 is “taking street solicitation for the purposes of prostitution off the streets and out of public view,” thereby responding “to the concerns of home-owners, businesses, and the residents of urban neighbourhoods” regarding “street congestion and noise and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children.”²³⁸

A fourth judge, Lamer J, agreed that the objective of the communicating provision included eradicating these nuisances. But for Lamer J, “[t]here is the additional objective of minimizing the public exposure of an activity that is degrading to women with the hope that potential entrants in the trade can be deflected at an early age.”²³⁹ Wilson and L’Heureux-Dubé JJ, in dissent, found that the fundamental legislative purpose of the communicating provision was to address the social nuisance (including all-night noise, traffic congestion, trespass, reduced property values, impeded pedestrian traffic, the indignity of being propositioned, exposure of children to the vices of adults, and viewing and hearing communications related to prostitution in a public place) arising from the public display of the sale of sex.²⁴⁰ Despite the judges’ divergent views concerning the legislative objective of the communicating section, all found that the objective was pressing and substantial.

In the *Prostitution Reference* and in *Skinner*, four of the six judges found that the limitation of *freedom of expression* imposed by the communicating section could be justified under section 1 of the *Charter*.²⁴¹ The communicating section was found to be rationally connected to the legislative aim, and to impair the rights of sex workers as little as possible in achieving that legislative aim. Three judges determined that the right of sex workers to communicate for the purposes of exchanging sex for money did not “lie at, or even near, the core of the guarantee of freedom of expression.”²⁴²

The four judges accepted that the legislation struck an appropriate balance between the criminalization of the serious social nuisance aspects of street prostitution and sex workers’ right to freedom of expression. Finally, the four judges decided that harmful effects of the communicating section did not outweigh the positive effects.²⁴³ It should be noted, however, that there was no evidence before the court of positive effects and little evidence of negative outcomes associated with the enforcement of the communicating section.

²³⁷ The judges in the *Prostitution Reference* can be placed into three groups based on their reasons under the Charter section 1 analysis: (1) Dickson CJC writing for LaForest and Sopinka JJ; (2) Lamer J; (3) Wilson J writing for L’Heureux-Dubé J. In *Skinner* the judges maintained their respective groups with respect to the section 1 analysis of the violation of the freedom of expression. Only Wilson J wrote additional section 1 reason in *Skinner* since, unlike the other groups, she found a violation of the right to freedom of association.

²³⁸ *Prostitution Reference*, per Dickson CJC for LaForest and Sopinka JJ at paras 2-3.

²³⁹ *Ibid.*, per Lamer J at para 97.

²⁴⁰ *Ibid.*, per Wilson J and L’Heureux-Dubé JJs, para 128.

²⁴¹ *Ibid.*, per Dickson CJC, La Forest and Sopinka JJs, paras 3-13; per Lamer J, para 107.

²⁴² *Ibid.*, per Dickson CJC, La Forest and Sopinka JJs at para 5.

²⁴³ *Ibid.*, per Dickson CJC, La Forest and Sopinka JJs, paras 11-12; per Lamer J, para 106.

The two dissenting judges in the *Prostitution Reference* and in *Skinner* reached a different conclusion under the *Charter* section 1 analysis: The limits on freedom of expression resulting from the communicating section could not be justified. They did not find that preventing nuisance was proportionate to the violation of sex workers' rights resulting from the communicating section. The prohibition on communicating for the purposes of prostitution was found to result in too great a violation of sex workers' rights since it outlawed all communicating in public for the purposes of prostitution regardless of whether it resulted in public or social nuisance.²⁴⁴

In *Skinner*, the two judges who had decided that the communicating section of the *Criminal Code* violated the *Charter* right to *freedom of association* analyzed the violation under section 1 of the *Charter*. Wilson J, writing for L'Heureux-Dubé J, noted that the communicating section prohibited all expressive activity conveying a certain meaning, even though such activity only causes a nuisance in some circumstances.²⁴⁵ Similarly, in *Skinner*, Wilson J found that the communicating provision impaired the right to freedom of association more than necessary to accomplish the legislative objective. "In my view, it is not reasonable to prohibit associational activity that harms no one on the basis that in some circumstances and in some areas a high concentration of that activity may give rise to a public or social nuisance."²⁴⁶

The Supreme Court's section 1 reasons in *Skinner* and the *Prostitution Reference* were one-sided. The governments' assertions that street-based prostitution was a significant and widespread problem that merited the limitation of fundamental *Charter* rights were accepted based on the evidence presented to the Court. The Court accepted that street-based prostitution caused public and social nuisances such as traffic congestion, a reduction in property values, and was bothersome to uninterested pedestrians and property owners.

The Court also accepted that street-based prostitution was related to criminal activity such as the possession and trafficking in drugs, juvenile prostitution, violence and pimping. None of the judges addressed the harmful effect of the communicating section on the health and safety of sex workers. None of the judges cited or referred to evidence, statistical or otherwise, regarding the effect of the communicating section on the situation or circumstances of sex workers – perhaps, in part, because such evidence was not available at the time.

The Court's section 1 analysis should be re-visited in light of existing public health and social science research regarding prostitution and sex workers in Canada. In particular, the Charter section 1 analysis should take into account evidence of the effects of the communicating section on the health and safety of sex workers. Taking into account the body of research regarding the effect of the communicating section

²⁴⁴ *Ibid.*, para 135.

²⁴⁵ *Ibid.*, per Wilson J writing for L'Heureux-Dubé, para 135.

²⁴⁶ *R v Skinner* at para 47.

on prostitution and sex workers in Canada, there is a strong argument that the communicating section cannot be saved under *Charter* section 1, for three reasons.

First, the communicating section (section 213), is not rationally connected to its legislative objective.

- The enforcement of section 213 has tended to move street-based prostitution from neighbourhood to neighbourhood, displacing rather than eliminating the nuisance.
- Sex workers run the risk of being arrested for communicating in a public place for the purposes of prostitution even when no nuisance results.

Second, section 213 impairs *Charter* rights and freedoms more than is necessary to accomplish the legislative objectives.

- There is a significant body of evidence that points to a complex, if somewhat indirect, causal relationship between the *Criminal Code* and health and safety risks (and negative outcomes) for sex workers.
- Section 213 and its enforcement contribute to the marginalization of sex workers.
- Section 213 and its enforcement encourage violence against sex workers, contribute to the continued poverty of sex workers who have few options but to work on the street, and increase street-based sex workers' risk of being exposed to HIV.

Third, and most significant from a human rights perspective, the harmful effects of section 213 on sex workers' rights are not outweighed by its beneficial effects for Canadian society as a whole.

- Police enforcement of section 213 has not suppressed street-based prostitution in most cities. The main effect has been to move street-based prostitution from one downtown area to another, thereby displacing the problem.
- Police enforcement of the section 213 has resulted in street-based sex workers working in greater isolation, which increases their health and safety risks. These health and safety risks include more dangerous working conditions; less money available, resulting in a greater likelihood of accepting clients who are potentially dangerous; changes in hours or days of work to avoid police; working in remote areas to avoid police; and not having sufficient time to properly negotiate safer sex with clients.
- Section 213 and its enforcement deprive 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. Sex workers are reluctant to go to police for assistance, and many of those who have done so report that their concerns were not taken seriously by police solely because they were identified as sex workers.
- A criminal record or large debt resulting from convictions for prostitution-related offences makes it more difficult for sex workers to obtain another type of employment, within or outside of prostitution. A criminal record will be an obstacle to those sex workers who wish to work in a workplace or obtain a licence that requires a criminal records check, or to work in occupations that require international travel.

There is a strong argument that the violation of Charter rights and freedoms by the communicating section of the Criminal Code (section 213) cannot be justified under section 1 of the Charter. The evidence demonstrates that Criminal Code section 213 is not rationally connected to its legislative objective, impairs Charter rights and freedoms more than is necessary to accomplish the legislative objective, and the harmful effects on sex workers' rights significantly outweigh any beneficial effect in advancing the objective of preventing the nuisance associated with street-based prostitution. Therefore, communicating in public for the purposes of prostitution should be decriminalized.

Recommendation 2

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).

Bawdy-house (section 210 and 211)

It appears that few if any people are charged under the section 211 *Criminal Code* offence of transporting a person to a bawdy-house. Section 211 has never been the subject of a *Charter* challenge in court. Therefore, the analysis of the bawdy-house provisions in the report will focus on section 210, the offence related to keeping or being found in a common bawdy-house.

Much of the analysis of the bawdy-house section of the *Criminal Code* will refer back to the analysis of the communicating section. There are two reasons for this. First, the Supreme Court's *Charter* analysis of the bawdy-house sections has been intimately linked to the analysis of the communicating provision. In the *Prostitution Reference*, the questions before the Court were whether the communicating section (section 213) and the bawdy-house section (section 210) “separately or in combination” violated certain *Charter* rights.

Second, the communicating section and the bawdy-house section together structure where prostitution can be carried out legally or, more to the point, where it is illegal to engage in prostitution. From the perspective of sex workers, the effects of the communicating and bawdy-house sections of the *Criminal Code* on their work cannot be separated neatly. The bawdy-house provisions make it illegal to engage in prostitution indoors in all but a narrow range of circumstances and the communicating provision makes it illegal to communicate in public for the purposes of prostitution.

Implications for sex workers

While prostitution is legal in Canada, the bawdy-house provisions of the *Criminal Code* severely restrict the off-street places where it can be carried out legally. In effect, engaging in prostitution in places where there would otherwise be a reasonable expectation of privacy (such as massage parlours, private residences

and hotel rooms) is made illegal with one exception: places not habitually used for the purposes of prostitution. As a result, sex workers are effectively forced to make a choice: They can engage in prostitution in places where it is clearly illegal, thereby risking arrest and other punitive legal consequences, but where they have more control over the situation. Or they can work where their ability to control the circumstances is greatly diminished, and where they may face other prostitution-related criminal sanctions.



That [bawdy-house law] makes no sense. It would be a lot easier to have a safe place, than somebody's car or some other bad place. Yeah! It would be a lot safer for everybody. Nobody gets ripped off or beat up.

– 39-year-old woman from Iqualuit

Sex workers' premises: Given the definition of “common bawdy-house,” it is illegal for sex workers to engage in prostitution in their homes (whether rented or owned), or to keep an apartment or other premises for the purposes of engaging in prostitution.²⁴⁷ If a sex worker works out of a premises she has leased, a conviction under section 210 will likely result in eviction proceedings, which can have serious personal and financial consequences, particularly if the sex worker lived on the premises. If the sex worker is a parent, a criminal conviction under section 210 or eviction proceedings based on section 210, if brought to the attention of child protection authorities, could result in child protection proceedings. Child protection services would likely become involved if the bawdy-house upon which the criminal conviction was founded was the family home, even if children were never present when prostitution took place.

Hotels: Sex workers who use hotel rooms to engage in prostitution also run the risk of criminal charges and conviction under section 210, as do hotel staff or owners who knowingly permit the hotel to be used as a common bawdy-house. Whether or not a sex worker engaging in prostitution in a hotel is keeping a common bawdy-house or would be guilty of being a “found-in” would have to be determined based on the circumstances of the particular case.²⁴⁸ A found-in is any person who is physically present in a bawdy-house. Courts have noted that not every room must be used for the purposes of prostitution to make a hotel a common bawdy-house, nor does a particular room have to be used exclusively for prostitution in order to qualify.²⁴⁹ A sex worker who paid for a hotel room (for a prolonged period, or for the same room on several occasions) and engaged in prostitution in the room could conceivably be found guilty of keeping a common bawdy-house. If a client paid for the hotel room, then the sex worker would not be caught by the definition of a “keeper” of a common bawdy house, but might be determined to be a found-in if the hotel (or hotel room) was found to be a common bawdy-house.

²⁴⁷ *R v Worthington* (1972), 10 CCC (2d) 311 (OCA).

²⁴⁸ *R v Wong; R v McLellan* (1980), 55 CCC (2d) 543 (BCCA).

²⁴⁹ *R v McLellan*, *ibid.*

Massage or body-rub parlours: Given the definition of “common bawdy-house” in section 197 of the *Criminal Code*, it is illegal to keep or be found in premises such as massage parlours or body rub parlours where prostitution takes place.²⁵⁰

Client’s premises: Under section 210 of the *Criminal Code*, it would appear to be legal for a sex worker to engage in prostitution in a client’s residence or other premises controlled by the client so long as the residence or premises was not frequently or habitually used for the purposes of prostitution.

Finally, in any given set of circumstances sex workers also run the risk of being convicted of both keeping a common bawdy-house *and* being a found-in since the latter offence is not included in the former.²⁵¹

In reality, the police enforcement of the bawdy-house provisions, like many aspects of criminal law, may be determined by sex workers’ and clients’ socio-economic situation. It is not surprising that the hotels examined in the leading cases determining whether a hotel is a bawdy-house were small establishments in economically disadvantaged neighbourhoods where street-based sex workers work. With one exception, all of the sex workers and former sex workers who provided affidavits for the Pivot study demanded that the bawdy-house provisions be repealed.²⁵²

Section 2(b) guarantee of freedom of expression and section 2(d) guarantee of freedom of association

In the *Prostitution Reference*, the Court unanimously decided that the bawdy-house section (current section 210) of the *Criminal Code* did not violate the *Charter* section 2(b) guarantee of freedom of expression, separately or in combination with the communicating section. There is no reason to doubt this conclusion.

The Supreme Court has not considered whether the bawdy-house sections (either 210 or 211) infringe the *Charter* section 2(d) guarantee of freedom of association. However, a lower court has decided that the bawdy-house section violates the guarantee of freedom of association.²⁵³ Based on the Supreme Court decisions in *Dunmore* and *Black* (analyzed above), *there is a strong argument that the bawdy-house section (section 210) violates sex workers’ right to freedom of association guaranteed under section 2(d) of the Charter*. As interpreted in those cases, *Charter* section 2(d) guarantees freedom of association for the purposes of gaining a livelihood and protects the exercise in association of the lawful rights of individuals. Prostitution and being a sex worker are lawful in Canada.

²⁵⁰ See, for example, *R v Suen*, [1995] OJ 4409 (OCJ- Prov Div); *R v Webb*, [1995] SJ No 252 (Sask QB) (QL); *R v MacNab*, [2000] AJ 558 (Alta Prov Ct) (QL).

²⁵¹ *Labelle v R*, [1957] BR 81 (Que CA).

²⁵² Pivot Legal Society Sex Work Subcommittee at 9.

²⁵³ *R v Kwasniak* (1996), 31 WCB (2d) 379 (Ont Ct – Prov Div). The Court upheld the violation under section 1 of the Charter. The reasons for decision in this case were not published or available on Quick Law.

Section 7 rights to liberty and security of the person

In the *Prostitution Reference* it was argued that the section 210 bawdy-house offence, alone or in combination with the communicating section, *violated sex workers' Charter section 7 rights to liberty and to security of the person*. Five of six judges found that the communicating and bawdy-house sections together violated sex workers' *Charter* section 7 right to liberty but that the violation attributable to the bawdy-house section was in accordance with the principles of fundamental justice.

There is a strong argument that *the bawdy-house section contributes to violations of sex workers' Charter section 7 right to security of the person*, with respect to both physical and psychological integrity. The bawdy-house laws discourage sex workers from working indoors by making indoor work illegal in almost every conceivable circumstance. Sex workers who work indoors risk arrest and conviction under the bawdy-house section, and if the bawdy-house is their apartment, they risk being evicted. Yet sex workers engaged in street-based prostitution, especially women and transgender sex workers, face greater health and safety risks than sex workers who work indoors. Some of these risks are attributable to, or heightened by, the enforcement of the communicating section of the *Criminal Code*.

For many of the reasons set out in the analysis of the communicating section, *the violation of sex workers' rights to liberty and to security of the person resulting from the bawdy-house section of the Criminal Code are not in accordance with the principles of fundamental justice under section 7 of the Charter*. The violations offend the basic tenets of the Canadian legal system. The enforcement of the bawdy-house section of the *Criminal Code* deprives sex workers of the right to freedom of association to carry on the legal activity of prostitution. It deprives sex workers of the potential to exercise international human rights such as the right to enjoy favourable conditions of work and, for women sex workers, the right to be free from gender-based violence.

Section 1 justification?

In this section, it has been argued that the bawdy-house section of the *Criminal Code* (section 210) violates the following *Charter* rights of sex workers:

- section 2(d) right to freedom of association
- section 7 right to security of the person

These conclusions are based on the *Charter* rights as they have been interpreted by the Supreme Court, supported by evidence presented elsewhere in this report.

None of the judges in the *Prostitution Reference* and in *Skinner* found that the bawdy-house section violated a *Charter* right. Therefore, they did not conduct a section 1 analysis of that section. Indeed, there are no modern, published Canadian court decisions considering the legislative objective of the section 210 bawdy-house provision. The bawdy-house provision originated in English common law and was

directed at restoring public order or morality.²⁵⁴ However, as the Supreme Court stated in the *Butler* case on pornography and obscenity, “[t]o impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.”²⁵⁵

Given this reasoning, in defending the prohibition on bawdy-houses under section 1 of the *Charter* the government would likely put forward a legislative objective related to reducing harm to vulnerable groups, namely women or children. The government might also argue that the prohibition on bawdy-houses is intended to discourage the involvement of organized crime in prostitution, and to prevent nuisance to neighbours of bawdy-houses. In light of the Supreme Court’s decisions in the *Prostitution Reference* and in *Skinner*, in all likelihood a court would accept these objectives as pressing and substantial.

Yet, *there is a good argument that the violation of sex workers’ Charter section 2(d) right to freedom of association under the bawdy-house section of the Criminal Code is not justified under section 1 of the Charter.* The evidence to establish that the bawdy-house section is rationally connected to these legislative objectives is lacking. There is no evidence establishing that outlawing bawdy-houses protects a vulnerable group, such as women or children. In fact, in the case of women, the bawdy-house law makes it more likely that women sex workers, and especially the most disadvantaged women, will end up working on the street.

Since bawdy-houses are illegal, it is very difficult to determine whether their existence would result in nuisance. However, by all accounts, numerous bawdy-houses do exist (e.g., massage and body rub parlours) and have not been the focus of significant public attention due to nuisance or issues related to property values. With respect to the involvement of organized crime in prostitution, there is a lack of significant, verifiable evidence. It could be argued that the illegality of bawdy-houses encourages organized criminal involvement and that by making bawdy-houses legal, the state would be better able to monitor their activity. However, this has not been established.

The bawdy-house section of the *Criminal Code* significantly impairs sex workers’ right to freedom of association. It makes illegal the organized, habitual practice of prostitution in a specific location. A sex worker cannot associate with clients in his or her own residence, nor keep or be found in another location for this purpose, either alone or in association with other sex workers or owner/managers. Thus, the bawdy-house section impairs the right to freedom of association far more than is necessary to accomplish the legislative objective.

²⁵⁴ See J McLaren, at 527, where the author writes: “The object of criminal law was to allow the authorities to intervene to maintain or restore public order or morality where they were threatened or had been shattered by drunken and immoral activities of vagabonds, and by the dubious establishments such as brothels and low gaming houses to which they resorted. The law offered a gradually expanding pattern of vagrancy offences which seemed to accommodate the mix of moral determinism and pragmatic concerns about disorder in the conservative view of vice. Although Canadian law on prostitution took its general inspiration from English common law and legislative models, differences were apparent in its detail. Eighteenth century English legislation making brothel keeping a vagrancy offence was applied or copied. However, under the law on bawdy houses in the Nova Scotia and the Canadas being an inmate or a frequenter were also vagrancy offences.” [References omitted.]

²⁵⁵ *R v Butler* at para 79.

Finally, there is a lack of proportionality between the harmful and positive effects of the law as regards freedom of association. The harmful effect of the law is that it prevents sex workers from working indoors in almost every circumstance, leaving them less able to protect their health and safety. It also puts them at risk of losing their shelter if they are convicted of keeping a bawdy-house in a rented unit where they live. The positive effect of the law is presumably to prevent any nuisance that could be associated with the operation of a bawdy-house, although there is little evidence about what such nuisances might be.

There is also a good argument that the violation of sex workers' Charter section 7 right to security of the person under the bawdy-house section of the Criminal Code is not justified under section 1 of the Charter. The bawdy-house sections significantly impair sex workers' right to security of the person. The impairment results from the operation of the "legislative scheme" involving both the communicating section and the bawdy-house section.

Thus, for many of the reasons outlined in the section 1 analysis of the communicating section, above, the bawdy-house sections cannot be justified. Therefore, bawdy-houses and transporting a person to a bawdy-house should be decriminalized.

Recommendation 3

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

Procuring and living on the avails of prostitution (section 212)

As noted above, section 212 of the *Criminal Code* prohibits numerous activities, in relation to both adult prostitution and prostitution involving persons less than 18 years of age. In relation to adult sex workers, it prohibits "procuring" and "living on the avails of prostitution." Procuring includes two general categories of acts: (1) inducing a person to enter into or engage in prostitution or illicit sexual intercourse, whether through enticement or exploitation (economic or otherwise);²⁵⁶ and (2) concealing, directing, taking or inducing a person to frequent a common bawdy-house.²⁵⁷

The living-on-the-avails parts of section 212 targets persons who have an economic stake in the earnings of a prostitute, and who live parasitically off such earnings.²⁵⁸ Proof of coercion is not required.²⁵⁹ The Supreme Court has only considered the

²⁵⁶ *Criminal Code*, s 212(1)(a), (b), (d), (g), (h), (i).

²⁵⁷ *Criminal Code*, s 212(1)(c), (e), (f).

²⁵⁸ *R v Downey*, para 40, referring to section 212(1)(j). See also *R v Barrow*.

²⁵⁹ *R v Barrow*, para 31.

constitutionality of section 212 in one case, in which one aspect of section 212 was challenged under the *Charter* right to be presumed innocent until proven guilty.

Implications for sex workers

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 where such people gain economically as a result of the prostitution. These people risk criminal charges. Where a person lives with a sex worker, or is habitually in a sex worker's company, it is up to that person to prove that there is no parasitic economic relationship. The sex worker will likely be called upon, either by the Crown Prosecutor or the accused person, to give evidence regarding the relationship.

Regarding sex workers' professional relationships, those parts of section 212 that address non-exploitative procuring make it illegal for a sex worker to refer a client to another sex worker, to set up situations to meet the desires of clients (including where clients wish to have sexual relations with more than one sex worker), or to allow other sex workers to use his or her residence to engage in prostitution. This may undermine strategies that sex workers use to promote and protect their safety. For example, it is illegal for a sex worker to refer a non-aggressive, respectful client to another sex worker, or to work together on the same premises to increase safety. Those who procure people into prostitution may or may not be exploiting an adult sex worker, depending on the circumstances of the situation. Sex workers may be protected by procurers who can help ensure their safety, and ensure that clients pay for services rendered.

In other circumstances, procurers represent a threat to a sex worker's physical safety and can take economic advantage of the sex worker. Section 212 potentially offers sex workers protection from exploitative situations by criminalizing the actions of people who exploit them. Yet at the same time, section 212 criminalizes all professional relationships, including the situation where a sex worker has chosen to enter into a professional relationship with someone else for safety or economic reasons.

Sex workers and former sex workers who provided opinions about section 212 for the Pivot study stated that the law limited their ability to carry out activities that create safer working conditions.²⁶⁰ However, those who addressed the issue had a favourable view of the parts of section 212 that protect sex workers from exploitation, violence and extortion.²⁶¹

²⁶⁰ Pivot Legal Society Sex Work Subcommittee, p. 10.

²⁶¹ *Ibid.*

Section 11(d) right to be presumed innocent

In *Downey*, the Supreme Court considered the constitutionality of section 212(3) of the *Criminal Code*. That section presumes a person who lives with or is habitually in the company of an adult prostitute or lives in a common-bawdy house, *in the absence of evidence to the contrary*, is guilty of living on the avails of prostitution (emphasis added).²⁶² This is another example of reverse onus. It effectively reverses the standard burden of proof under the criminal law such that the Crown Prosecutor does not have to prove every element of the criminal offence beyond a reasonable doubt.

Once the Crown Prosecutor proves a basic fact, it is up to the person accused to prove that he or she is not guilty of the offence on a balance of probabilities. If the accused can not do so, he or she will be convicted despite the fact that there may be a reasonable doubt about his or her guilt. The Supreme Court unanimously found that the reverse-onus part of section 212, as it applies to adults, violated the *Charter* section 11(d) presumption of innocence.

There have been no Supreme Court cases that warrant overturning the Court's decision in *Downey*. *The judges unanimously found that the reverse-onus provision in Criminal Code section 212(3) violated the Charter section 11(d) presumption of innocence, and that finding is still the law.*

However, as noted below, the majority of the judges in *Downey* upheld the reverse-onus provision under section 1 of the *Charter*, which decision should be revisited.

Section 2(d) guarantee of freedom of association

The Supreme Court has not directly considered whether the living-on-the-avails part of section 212 of the *Criminal Code* infringe sex workers' rights under the *Charter* section 2(d) guarantee of freedom of association. The British Columbia Court of Appeal has considered such a challenge, although brought not by a sex worker but by a person charged with living on the avails of prostitution. In *R v Boston*, the Court of Appeal held that, “[t]he provision of the *Criminal Code* does not interfere with his freedom of association, but rather prevents him from living on the avails of prostitution.”²⁶³

From the perspective of sex workers the central issue in the *Charter* section 2(d) freedom of association analysis becomes whether the *Criminal Code* makes illegal relationships into which sex workers choose, or would choose, to enter into if not illegal. In analyzing this issue, it must be remembered that prostitution is legal in Canada, and that the Alberta Court of Appeal in *Black* decided that section 2(d) protects association for the purposes of earning a livelihood. It should also be remembered that the question under the *Charter* section 2(d) analysis, as set

²⁶² *Criminal Code*, s 212(3).

²⁶³ *R v Boston*, [1988] BCJ No 1185 (BCCA) (QL).

out in *Dunmore*, is: Has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals? In the case of prostitution and sex workers, the question becomes: Does the living-on-the-avails” part of section 212 criminalize non-coercive, business relationships into which sex workers enter, or would enter, if they were not illegal?

Court decisions interpreting “living on the avails” in the situation where individuals supply services to sex workers shed some light on the type of business relationships made illegal under the *Criminal Code*. The factual circumstances in those cases indicate that *the living-on-the-avails offence in Criminal Code section 212(1)(j) violates sex workers’ Charter section 2(d) right to freedom of association. It criminalizes any business association a sex worker enters into for purposes of conducting prostitution, such as an association with an escort agency or for security purposes.*

In a 2001 Ontario Court of Appeal case, an escort agency owner was convicted of living on the avails despite the Court’s recognition that the owner had a supportive rather than coercive relationship with the sex workers she employed.²⁶⁴ The owner counselled sex workers about how to handle certain clients, including safety precautions to take, safer sex, what to wear and other aspects of the business. She also provided sex workers with business cards and made all of the financial arrangements with clients. The Court of Appeal held that, while the relationship between the escort agency owner and the sex workers was not parasitic, and was in fact supportive, the occupation itself was parasitic. “The element of parasitism is found in the fact that she [the escort agency owner] is in the business of rendering services to the escorts because they are prostitutes.”²⁶⁵

The factual circumstances in the Supreme Court’s decision in *Downey* are also enlightening regarding the criminalization of sex workers’ business relationships. In that case, the owner of an escort agency was convicted at trial of living on the avails, despite the fact that the majority judgment recognizes that the cases did not involve “pimps manipulating young girls,” and that both sex workers were “mature women” who, parenthetically, did not consider themselves to be prostitutes.²⁶⁶

There was no indication in the judgment that the relationship between the sex workers and the accused involved any violence or coercion whatsoever. It is also clear that it would be illegal for a street-based sex worker to pay someone to safeguard her safety – for instance, by being a physical presence on the stroll, taking down clients’ licence plate numbers, or waiting outside of a hotel room. This type of association would clearly fall within the scope of “parasitic economic relationships” delineated in the Court’s decisions.

²⁶⁴ *R v Barrow*.

²⁶⁵ *R v Barrow* at para 29.

²⁶⁶ *R v Downey*, per Cory J at para 8, writing for the majority.

Section 7 right to liberty

The living-on-the-avails offence, in combination with the reverse-onus provision, has the potential to significantly disrupt sex workers' personal relationships. These *Criminal Code* provisions invite scrutiny of sex workers' sexual, spousal and romantic relationships and living arrangements. As set out above, the Ontario Court of Appeal has examined how the living-on-the-avails offence should be applied to personal relationships.²⁶⁷ Accordingly, persons who are supported by a sex worker, where there is no legal or moral obligation to do so, are seen as "idle parasites" and risk being charged and convicted under section 212(1)(j).

The Supreme Court has recognized that the right to liberty guaranteed under section 7 of the *Charter* is not restricted to freedom from state interference with a person's physical liberty; it applies whenever the law prevents a person from making fundamental personal choices.²⁶⁸ However, in no case has a majority of the Court agreed upon a personal choice protected by the liberty guarantee.²⁶⁹ The living-on-the-avails and reverse-onus provisions in section 212 clearly limit the ability of sex workers to choose the type of relationships they enter into.

More specifically, they criminalize and thereby limit sex workers' ability to choose whom they wish to support financially. The state has made it illegal for sex workers to choose to financially support, in whole or in part, someone whom a sex worker has no legal or moral obligation to support – a choice available to all other people.

For the reasons set out below in the section 1 analysis, removing such a choice from sex workers is not in accordance with the principles of fundamental justice. It offends the autonomy and dignity of sex workers by depriving them opportunity to enter into certain personal relationships. The violation also arguably amounts to unlawful interference with sex workers' right to privacy and family life as protected in the *ICCPR*. (This is relevant to determining whether the violation is in accordance with the principles of fundamental justice.) Therefore, *there is a strong argument that living- on-the-avails and reverse-onus provisions in section 212 of the Criminal Code infringe sex workers' Charter section 7 right to liberty, and that such an infringement is not in accordance with the principles of fundamental justice.*

Section 1 justification?

In this section, it has been argued that the living-on-the-avails offence, and the reverse-onus provision related to that offence, set out in the *Criminal Code* (section 212) violate the following *Charter* right of sex workers:

- section 11(d) presumption of innocence
- section 2(d) right to freedom of association
- section 7 right to liberty

²⁶⁷ *R v Grilo*.

²⁶⁸ *Blencoe v British Columbia*, per Basterache J writing for the majority, paras 49, 54.

²⁶⁹ P Hogg, p 44-8, note 34.

These conclusions are based the *Charter* rights as they have been interpreted by the Supreme Court, supported by evidence presented elsewhere in this report.

In *Downey*, the Supreme Court concluded that the reverse-onus part of section 212, although an infringement of the accused person's *Charter* right to be presumed innocent, was saved under section 1 of the *Charter*.²⁷⁰ The majority judges in *Downey* acknowledged the Fraser Committee findings that "most prostitutes in Canada were independent operators."²⁷¹ Nonetheless, they found that the legislative objective of the living-on-the-avails provision was pressing and substantial, in that it was "attempting to deal with a cruel and pervasive social evil. The pimp personifies abusive and exploitative malevolence."²⁷² They further recognized that the reverse-onus provision is specifically geared to addressing the "prostitute as a reluctant witness" in criminal proceedings against pimps.²⁷³

The majority held that the reverse-onus provision was rationally connected to the legislative objective, given the reluctance of sex workers to be witnesses against pimps. It was found to minimally impair the rights of the accused to be presumed innocent since the accused had an opportunity to prove himself or herself innocent. Finally, the Court held that the legislation struck an appropriate balance. The violation of an accused person's right to be presumed innocent was relatively minor in relation to the important goal of successfully prosecuting pimps and protecting sex workers from exploitation.²⁷⁴

However, the three judges in the minority decided the reverse-onus provision was not justified under section 1. Two judges in the minority examined the effects of the impugned provision on sex workers' lives, relationships and working conditions. McLachlin J, writing for Iacobucci J, stated:

The effect of the presumption [in section 212(3)] is to compel prostitutes to live and work alone, deprived of human relationships save with those whom they are prepared to expose to the risk of a criminal charge and conviction and who are themselves prepared to flaunt that possibility. By this presumption prostitutes are put in the position of being unable to associate with friends and family, or to enter into arrangements such as those evidenced in this case, arrangements which may alleviate some of the more pernicious aspects of their frequently dangerous and dehumanizing trade. The predictable result is to force prostitutes onto the streets or into the exploitive power of pimps, thereby undercutting the very pressing and substantial objective which the presumption was designed to address. Where legislation has the actual effect of operating to preserve and exacerbate the very exploitation the amelioration of which is its purported objective, it cannot be said to possess the degree of rationality necessary to justify the violation of a right guaranteed by our Charter.²⁷⁵

²⁷⁰ *R v Downey*.

²⁷¹ *R v Downey*, per Cory J at para 41.

²⁷² *Ibid.*, per Cory J at para 50.

²⁷³ *Ibid.*, per Cory J, paras 45-47.

²⁷⁴ *Ibid.*, per Cory J, paras 56-57.

²⁷⁵ *Ibid.*, per McLachlin J at para 76, writing for Iacobucci J.

She then examined the reverse-onus provision in the context of the other *Criminal Code* sections that prohibit prostitution-related activities:

This Court, unlike the Special Committee, is not charged with the task of recommending a comprehensive revision of the criminal law as it pertains to the control of prostitution. But where, as here, an element of that labyrinth of laws which have as their object the control of prostitution violates a principle so fundamental to our society as the presumption of innocence, and does so in a manner which is so manifestly capricious, unfair and irrational, then we must fulfil our constitutional duty and declare that law to be of no force or effect.²⁷⁶

LaForest J, also dissenting, in brief reasons found that the reverse-onus provision “cast too wide a net” and “catches people who have a legitimate non-parasitic living arrangements with prostitutes.”²⁷⁷

Available evidence now demonstrates that clients and predators, not necessarily pimps, present the greatest risk to the health and safety of sex workers, especially street-based sex workers. Evidence also shows that the enforcement of *Criminal Code* prohibitions on prostitution contribute to the violence faced by sex workers. The living-on-the-avails offence and the reverse-onus provision limit sex workers’ ability to mitigate the violence they too often face. Available evidence indicates that the vast majority of adult sex workers are not in violent, exploitive relationships with pimps. Moreover, the conception of “prostitutes as victims” reflected in the majority reasons in *Downey* is increasingly being called into question by research into sex workers’ experiences in prostitution, as recounted by sex workers themselves.

McLachlin J’s dissenting reasons in *Downey* more accurately assess the negative affects of the *Charter* rights violations experienced by sex workers as a result of the living-on-the-avails and reverse-onus provisions of section 212. Her reasons emphasize the way in which the criminal law, rather than pimps, endangers sex workers’ health and safety. Her reasons point to the predictable and perverse effects of the law on the lives of sex workers. Therefore, *there is strong argument that the Supreme Court would not uphold the living-on-the-avails offence and would not today uphold the reverse-onus provision in section 212 of the Criminal Code under section 1 of the Charter*. The activities caught by the living-on-the-avails section as it applies to adult prostitution should be decriminalized.

It should be noted that other sections of the *Criminal Code*, which are not specific to prostitution, prohibit violence and exploitation (e.g., assault, attempted assault, criminal negligence causing bodily harm, criminal harassment, torture, forcible confinement, kidnapping, extortion, fraud). These sections could, and should, be enforced against a person who exploits a sex worker (physically, psychologically and economically) or is violent towards a sex worker or other person involved in prostitution against his or her will. The people with the greatest interest in the existence and enforcement of the parts of section 212 that prohibit procuring and exploitation, namely sex workers, should be consulted about the need for reform.

²⁷⁶ *Ibid.*, per McLachlin J at para 78, writing for Iacobucci J.

²⁷⁷ *Ibid.* at para 2.

Sex workers are in the best position to determine whether these subsections of the *Criminal Code*, or the procedures adopted in their enforcement, adequately protect and promote the human rights of sex workers.

Recommendation 4

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 5

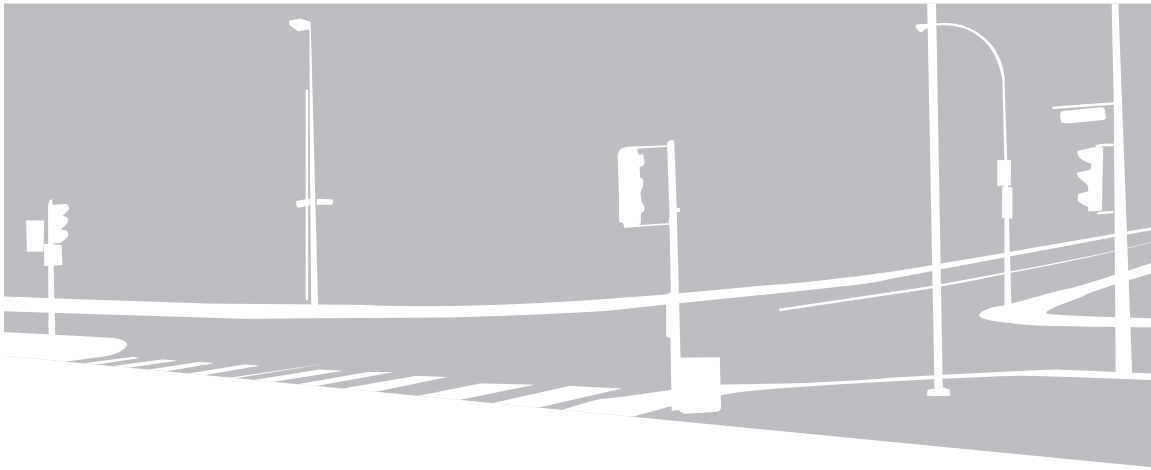
Parliament should repeal the living-on-the-avails offence of the *Criminal Code* as it applies to adult prostitution (subsection 212(1)(j)).

Recommendation 6

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 7

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)).



Prostitution law and policy reform beyond the criminal law

The recommendations for reform of the *Criminal Code* made in the previous section are a necessary first step to improving the health and safety of 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*. In the absence of *Criminal Code* prohibitions, municipal and provincial governments that have not already done so will likely seek to regulate prostitution and sex workers. 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. The international human rights law and Canadian *Charter* rights and freedoms examined in this report suggest certain essential principles and directions for future reform of both law and policy in Canada.

The first recommendation for additional reform flows from the call for sex workers to be meaningfully involved in and consulted about laws, policies and programs that apply to them. This call has been made by sex workers, sex worker advocates, academics and researchers, and government committees. The participation of sex workers is essential to ensuring that such laws and policies protect their health and human rights. It is a matter of ethics, of respect for human rights, and of pragmatism.

Recommendation 8

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.

Analyzing a recent proposal for reform: Bill C-339

In 2002, Member of Parliament Réal Ménard of the Bloc Québécois introduced a private member's bill in the House of Commons, *An Act to decriminalize activities related to prostitution and to implement measures to assist sex workers and persons with drug addiction* (Bill C-339).²⁷⁸ At this writing, Ménard represents a traditionally working-class Montréal riding in which there had been active street-based prostitution. Sex workers in that riding have been subject to hostility and harassment by individual residents and resident organizations opposed to street-based prostitution. If enacted as presented at first reading, the Bill would have legalized or decriminalized for a period of time certain activities related to adult prostitution.

The preamble to the Bill recognized the complexity of prostitution, the rights of sex workers to carry on their work and have it regulated according to laws governing work and commerce, the right of citizens to peaceful enjoyment of their home, and the need to balance the rights of citizens and sex workers. The Preamble also recognized that the criminalization of prostitution had “proven incompatible with the establishment of peace in communities, the implementation of a harm reduction strategy and the achievement of public health objectives.”

The Bill defined “sex worker” as “a man or a woman eighteen years of age or more who offers or provides prostitution services.”²⁷⁹ Part 1 of the Bill proposed suspending for a period of five years section 212 and 213 of the *Criminal Code* as they applied to persons 18 years or older.²⁸⁰ This would have effectively decriminalized street-based prostitution and legalized off-street prostitution in certain circumstances.

Part 2 of the Bill addressed the bawdy-house provisions (section 210 and 211). The Bill proposed to make it illegal for a person to operate a place of prostitution *without* a licence issued by the Minister of Justice,²⁸¹ and a licensed place of prostitution would not have been considered a common-bawdy house under the *Criminal Code*.²⁸² The licensing process would have involved not only the federal government, but also municipal governments and certain of their areas of legislative competence. The place of prostitution would have had to have been in an area that was commercially or industrially zoned.

²⁷⁸ *An Act to decriminalize activities related to prostitution and to implement measures to assist sex workers and persons with drug addiction*. Bill C-339. Second Session, Thirty-Seventh Parliament, 51 Elizabeth II, 2002. Bill C-339 was not Menard's first proposal for reform. In 2000, he worked on a legislative proposal, entitled the *Brothel's Act*, which was meant to amend the *Criminal Code* to establish municipally licensed brothels in which adult prostitution could legally take place. Also, sex workers employed in brothels would have had to prove that they were not infected with sexually transmitted diseases. The text of the proposed legislation was never introduced into the House of Commons.

²⁷⁹ *Ibid.*, s 2.

²⁸⁰ *Ibid.*, s 3.

²⁸¹ *Ibid.*, ss 7-20.

²⁸² *Ibid.*, s 29.

The Minister would have had the power to direct the municipality in which the proposed place was located to proceed with a broad consultation.²⁸³ The municipality would then have been required to report back to the Minister with its recommendations concerning the application for a licence.²⁸⁴ The Minister would have had discretion to refuse the licence where he or she believed “on reasonable grounds that it would be prejudicial to the public interest to issue a licence to the applicant.”²⁸⁵ A person who held a licence would have been entitled to hire sex workers for the purposes of offering or providing prostitution services in the place of prostitution.²⁸⁶ The Bill also provided for revocation, suspension and renewal of licences.²⁸⁷

Part 3 of Bill C-339 intended “to ensure that sex workers have the same rights and obligations as all other workers.”²⁸⁸ The *Employment Insurance Act*, *Canada Pension Plan*, *Canada Labour Code* and other measures respecting workers that confer a right or entitlement would have applied to licence holders and sex workers.²⁸⁹

Part 3 of the Bill also provided a number of sexually transmitted disease-related summary conviction offences for sex workers, clients and licence holders. As a condition of working in a licensed place of prostitution, a sex worker would have had to “satisfy the Minister and the person who operates the place of prostitution” that he or she is “not a carrier of a sexually transmitted disease.”²⁹⁰ If the sex worker failed to do so, he or she would have been “guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding \$5000, or both.”²⁹¹

The Bill would also have made it a summary conviction offence for a sex worker or licence holder who knew or should have known that the sex worker was a carrier of a sexually transmitted disease to work in a place of prostitution.²⁹² The penalty for contravention would have been a maximum six month term of imprisonment, a \$10,000 fine, or both.²⁹³ The Minister would have been empowered by regulation to prescribe the frequency with which a sex worker would have to prove that he or she was not a carrier of specified sexually transmitted diseases.²⁹⁴ Part 3 of the Bill also proposed that the Department of Justice, alone or in co-operation with another department, would provide financial assistance (payment, loans or guarantees) enabling any person or groups or persons to assist sex workers or clients who proved they had a drug addiction.²⁹⁵

²⁸³ *Ibid.*, s 9.

²⁸⁴ *Ibid.*, s 12.

²⁸⁵ *Ibid.*, s 13(2).

²⁸⁶ *Ibid.*, s 14.

²⁸⁷ *Ibid.*, s 17, 18.

²⁸⁸ *Ibid.*, s 21.

²⁸⁹ *Ibid.*, s 22.

²⁹⁰ *Ibid.*, s 23.

²⁹¹ *Ibid.*, s 23(2).

²⁹² *Ibid.*, s 25(1), (2).

²⁹³ *Ibid.*, s 25(3).

²⁹⁴ *Ibid.*, s 28(a), (f).

²⁹⁵ *Ibid.*, s 27.

The Bill would have obliged the Minister of Justice to prepare and present to the House of Commons a comprehensive report on the operation of the Act.²⁹⁶ The report was to have been prepared in consultation with representatives of federal departments and provincial and municipal governments, and would have included the Minister's recommendations and conclusions regarding legislation and other measures to pursue the goals of the Bill. The Bill passed first reading in the House of Commons on 11 December 2002, but progressed no further in the legislative process. Therefore, a House of Commons committee was not charged with analyzing the proposed legislation or conducting public hearings on it.

Public health and human rights issues

From a public health perspective, the value of the sexually transmitted infection provisions of Bill C-339 was suspect. The likely effect of imposing mandatory sexually transmitted disease testing for sex workers and clients would have been to prevent many sex workers and clients from working in or patronizing licensed places of prostitution. This would promote underground, unlicensed and unregulated prostitution. Public health and community programs designed to prevent the spread of sexually transmitted infections would have had greater difficulty reaching sex workers with information and harm reduction tools. In *HIV Testing and Confidentiality: Final Report*, Jürgens analyzed the literature on the issue of mandatory HIV testing for sex workers. He found that the few organizations that had addressed the issue had concluded that mandatory HIV testing was unwarranted for a number of reasons: There was no evidence that it deterred high-risk behaviours; female prostitution was not a significant factor in the transmission of HIV; it was not clear that male clients of female sex workers were at significantly increased risk of HIV infection; and where such laws had been enacted they had served to drive prostitution underground.²⁹⁷

Jürgens made the following conclusions and recommendations:

...interventions are necessary that would give sex workers the means to protect themselves against HIV transmission and would empower them to use them. This will also necessitate an analysis of the impact of laws regulating and/or penalizing prostitution on efforts to prevent HIV infection.

9.1 Mandatory or compulsory testing of sex workers and other coercive measures directed at them will do little to prevent the spread of HIV among sex workers and to clients. Rather than undertake such measures, policymakers must consult with sex workers to develop policies that will truly prevent and reduce the spread of HIV.

9.2 An analysis of the impact of municipal, provincial and federal policies and laws regulating and/or penalizing prostitution on efforts to prevent HIV infection should be undertaken, and alternatives to current regulation recommended.²⁹⁸ [References omitted.]

²⁹⁶ Ibid., s 5.

²⁹⁷ R Jürgens, pp 180-181, references omitted.

²⁹⁸ Ibid. at 186.

Although written in 1999 and specific to HIV, the above analysis and recommendations continue to be valid today in relation to the full range of sexually transmitted infections.

From a human rights perspective, mandatory testing is an infringement of the rights of sex workers. Moreover, it only serves to stigmatize sex workers as vectors of HIV transmission, thereby encouraging discrimination against sex workers. For this reason, international guidelines intended to protect the human rights of sex workers in the HIV/AIDS epidemic have been developed. These guidelines are set out above. In particular, the UNAIDS/Inter-Parliamentary Union *Handbook for Legislators on HIV/AIDS, Law and Human Rights* provides examples of best practices for legislators in the area of prostitution with a view to protecting the health and human rights of sex workers and clients with the goal of reducing the spread of HIV.

Sex workers, human rights advocates and researchers have called for a rights-based, participatory approach to programs aimed at preventing HIV and improving the health of sex workers. They have pointed to the failure of programs that do not respect the rights and autonomy of sex workers.²⁹⁹

Recommendation 9

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.

²⁹⁹ I Wolffers, N van Bellen. Public health and the human rights of sex workers. *The Lancet* 2003; 361: 1981; B Loff, C Overs, P Longo. Can health programs lead to mistreatment of sex workers? *The Lancet* 2003; 361: 1982. See also, generally, *Research for Sex Work* 2003; 6, available via <http://hcc.med.vu.nl/rfs.w.htm>.

Jurisdictional issues in law reform

Different levels of government in Canada have distinct legislative jurisdiction. Aspects of the proposed Bill C-339 were outside the legislative jurisdiction of Parliament, or of suspect legality on that basis.

- The federal government does not have authority to direct a municipality to take part in the licensing scheme contemplated under the Bill. Under the Canadian Constitution, municipalities are wholly under provincial authority, and in fact rely on provincial legislation for their existence.
- It is questionable whether Parliament could regulate by licence enterprises or sex workers within a province, since such could not be considered a federal work or undertaking.³⁰⁰ In addition, it is highly questionable whether Parliament could subject licensed employer-sex worker relations to the provisions of the *Canada Labour Code*, which regulates employer-employee relations in federal works and undertakings.

However, Parliament could rely on its criminal law power to permit legal exceptions to otherwise illegal activities, as it has done with medical marijuana. Licences issued under *Marihuana Medical Access Regulations* permit persons to produce and possess marijuana for medical purposes, thereby exempting such people from the application of the *Controlled Drugs and Substances Act*.³⁰¹ Alternatively, Parliament could attempt to rely on its Constitutional power to pass legislation for the “peace, order and good government of Canada,” based on the argument that prostitution was a matter of “national concern.”³⁰² In response, provincial or municipal governments could challenge any attempt by a Parliament to regulate places of prostitution, sex workers and employment relationships, on the basis that they have exclusive legislative jurisdiction to do so under sections 92(9)³⁰³, 92(13)³⁰⁴ or 92(16)³⁰⁵ of the *Constitution Act, 1867*.

The above analysis focuses on the situation in Bill C-339, which proposed the suspension of the *Criminal Code* provisions relating to prostitution, not their repeal. What if the *Criminal Code* provisions as they apply to adult prostitution were repealed? Would Parliament retain any legislative jurisdiction over prostitution? Professor Peter Hogg, one of Canada’s leading constitutional scholars, is of the opinion that an express Parliamentary intention to occupy a legislative field over which it has authority granted under the Constitution would be effective so long as the law enacted was not inconsistent or in conflict with a provincial law.³⁰⁶ So, for example, the federal government and a provincial government can pass legislation

³⁰⁰ *Constitution Act, 1867*.

³⁰¹ SOR/ 2001-227, as amended.

³⁰² *Constitution Act, 1867*, s 91. For a discussion of the “peace, order and good government” power, see P Hogg, Chapter 17.

³⁰³ Section 92(9) deals with: “Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.”

³⁰⁴ Section 92(13) deals with: “Property and Civil Rights in the Province.”

³⁰⁵ Section 92(16) deals with: “Generally all Matters of a merely local or private Nature in the Province.”

³⁰⁶ P Hogg, s 16.4(b).

in relation to the same subject matter (e.g. prostitution) so long as there is not an inconsistency or conflict between the laws.³⁰⁷

It is beyond the scope of this report to analyze in detail the issue of legislative jurisdiction in a situation where prostitution-related *Criminal Code* offences regarding adults were repealed. However, the division of powers and other matters related to legislative jurisdiction are of central importance to law reform in this area.

If adult prostitution is decriminalized, sex workers will likely be subject to other forms of regulation. Licensing is a source of revenue for municipalities, and in combination with zoning, a way to control where business activities take place. There would likely also be political pressure brought to bear on provincial and local governments to regulate prostitution-related activities in some way. Such schemes might be similar to the licensing schemes for escort agencies and escorts that exist in a number of Canadian cities.

Left 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 schemes might result in health and safety outcomes worse than those sex workers currently experience under prostitution-related *Criminal Code* prohibitions. This point was raised by numerous project key informants and consultation participants. Moreover, in at least one documented case, municipal licensing of escort services has proven to be harmful from the perspective of the rights of sex workers.³⁰⁸ 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.



I think they should decriminalize all the sex industry itself. I don't think women or men should be penalized for that and I think it would also help if there was some regulation, like a licence. You have a licence to drive a car. Or some kind of permit, because basically you're your own boss, you own your own business.

– 36-year-old Ojibwe woman

Work and employment constitute one area where the legislative authority of the federal and provincial/territorial governments co-exists. For businesses that do not fall under federal regulation, provinces have enacted legislation governing employment standards, occupational health and safety, workers' compensation,

³⁰⁷ For a discussion “paramountcy” see P Hogg, Chapter 16.

³⁰⁸ See, generally, E Maticka-Tyndale, J Lewis. *Escort services in a border town*. One of the two factors the authors cite as an impediment to positive policy outcomes was the reliance by the City of Windsor on police to enforce the licensing by-law. In a subsequent interview with the Legal Network, Maticka-Tyndale indicated that the vulnerability of sex workers to police harassment has decreased since the city switched to using special by-law enforcement officers who are not peace officers under the *Criminal Code* or employed by the police service.

and labour relations (i.e., unions and employee associations). The federal government has enacted legislation to regulate these matters in relation to federal “undertakings,” industries such as banking, airlines and inter-provincial transport. The federal government has also enacted social benefits legislation that applies to all workers in Canada, such as the *Employment Insurance Act*³⁰⁹ and the *Canada Pension Plan*.³¹⁰ If, as recommended above, the *Criminal Code* prohibitions on prostitution were repealed, there is no reason why, in principle, laws governing work and employment should not apply to sex workers and their employers.

Assuming that the licensing scheme proposed in Bill C-339 was constitutionally valid and the bill was enacted as presented at first reading, the proposed scheme would have been unlikely to result in the “establishment of peace in communities, the implementation of a harm reduction strategy and the achievement of public health objectives.”³¹¹ The municipal-level consultation process envisaged in the licensing process may or may not have resulted in “community peace.”

In a best-case scenario, the consultation would have involved a fruitful discussion of the licence application at the municipal level, and the municipal recommendation to the Minister would have been considered in light of the purpose of the legislation, as would have the Minister’s decision. In a worst-case scenario, the process would have pitted a range of groups and organizations (residents, economic and social groups, school boards and police forces) against the applicant for a licence.

Many sex workers would have likely been reluctant to apply for a license since applicants’ names and the proposed location of work would have had to have been disclosed as part of the application process – making both targets for community opposition. The process seemed better suited to well-resourced business people, given its highly public nature and formality. As with liquor licensing, another process involving community input into business licenses, lawyers, tribunals and courts would be involved in the adjudication of disputes at great expense to the licence applicant or holder.

Recommendation 10

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.

³⁰⁹ SC 1996, c 23.

³¹⁰ RSC 1985, C-8. The Canada Pension Plan does not apply in Québec, where parallel legislation applies and is administered by the Québec government, *An act respecting the Québec Pension Plan*, RSQ, R-9.

³¹¹ Bill C-339, Preamble.



Summary of recommendations

By adopting these recommendations, Parliament and the federal government would be taking steps to uphold Canada’s obligations under international law to respect, protect and fulfill the human rights of sex workers in Canada. These recommendations are also consistent with the rights and freedoms guaranteed to all persons in Canada, including sex workers, as set out in the *Charter*.

Recommendation 1

Legislation and legislative reforms must comply with Canada’s human rights obligations. Proposals for reform of the prostitution-related provisions of the Canadian *Criminal Code* should be assessed in light of Canada’s legal obligations under international human rights law and the *Canadian Charter of Rights and Freedoms*. Existing laws and proposed reforms must also be assessed on the basis of the best available evidence of the harms and benefits of various legislative options.

Recommendation 2

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 3

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

Recommendation 4

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 5

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

Recommendation 6

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 7

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)).

Recommendation 8

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.

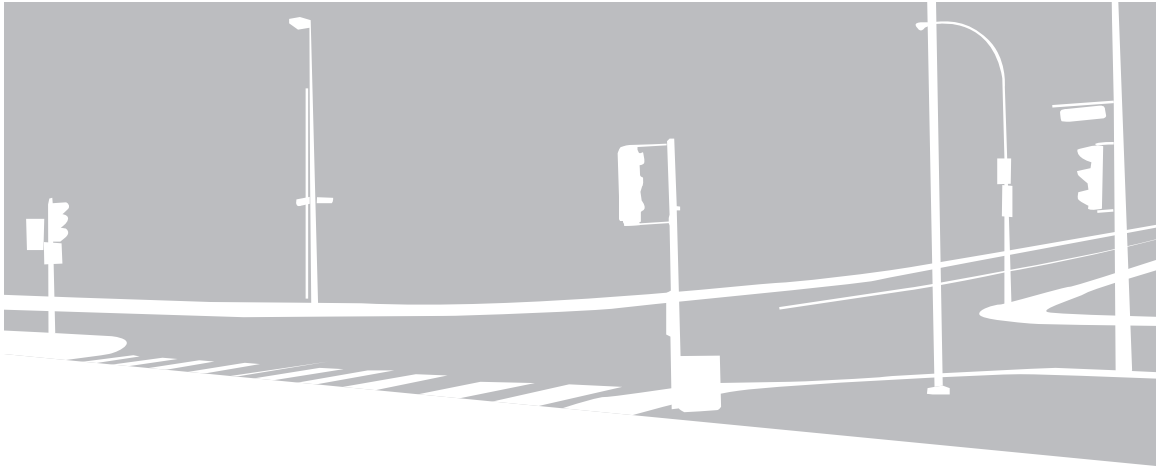
Recommendation 9

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.

Recommendation 10

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.



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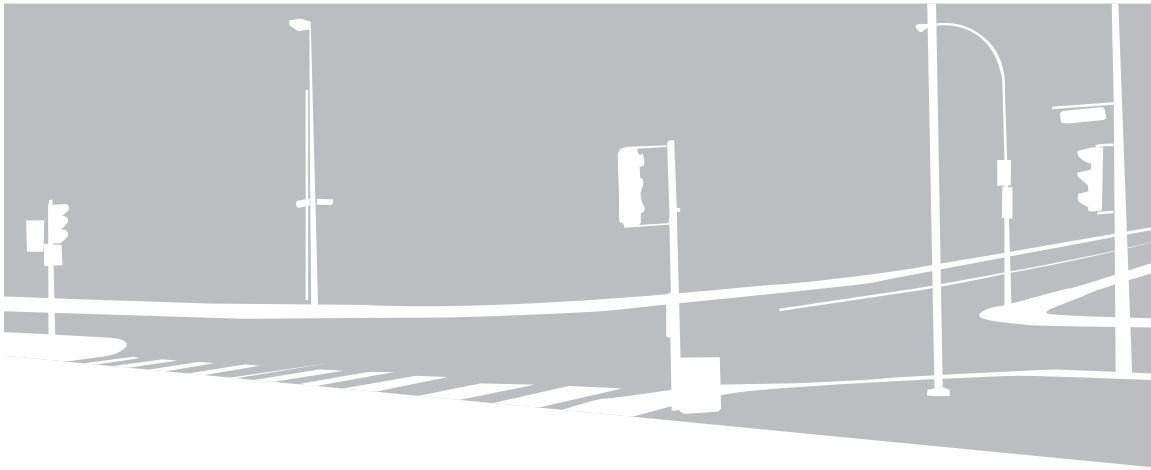
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Appendix A: Prostitution-related provisions of the *Criminal Code*

197. (1) In this Part,
“common bawdy-house” means a place that is

- (a) kept or occupied, or
- (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency;

“disorderly house” means a common bawdy-house, a common betting house or a common gaming house;

“keeper” includes a person who

- (a) is an owner or occupier of a place,
- (b) assists or acts on behalf of an owner or occupier of a place,
- (c) appears to be, or to assist or act on behalf of an owner or occupier of a place,
- (d) has the care or management of a place, or
- (e) uses a place permanently or temporarily, with or without the consent of the owner or occupier thereof;

“place” includes any place, whether or not

- (a) it is covered or enclosed,
- (b) it is used permanently or temporarily, or
- (c) any person has an exclusive right of user with respect to it;

“prostitute” means a person of either sex who engages in prostitution;

“public place” includes any place to which the public have access as of right or by invitation, express or implied.

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

- (a) is an inmate of a common bawdy-house,
 - (b) is found, without lawful excuse, in a common bawdy-house, or
 - (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,
- is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.
R.S., c. C-34, s. 193.

211. Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.
R.S., c. C-34, s. 194.

212. (1) Every one who

- (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
- (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
- (c) knowingly conceals a person in a common bawdy-house,
- (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
- (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
- (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,
- (g) procures a person to enter or leave Canada, for the purpose of prostitution,
- (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,

- (i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or
- (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) Notwithstanding paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2.1) Notwithstanding paragraph (1)(j) and subsection (2), every person who lives wholly or in part on the avails of prostitution of another person under the age of eighteen years, and who

- (a) for the purposes of profit, aids, abets, counsels or compels the person under that age to engage in or carry on prostitution with any person or generally, and
- (b) uses, threatens to use or attempts to use violence, intimidation or coercion in relation to the person under that age,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years but not less than five years.

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).

(4) Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

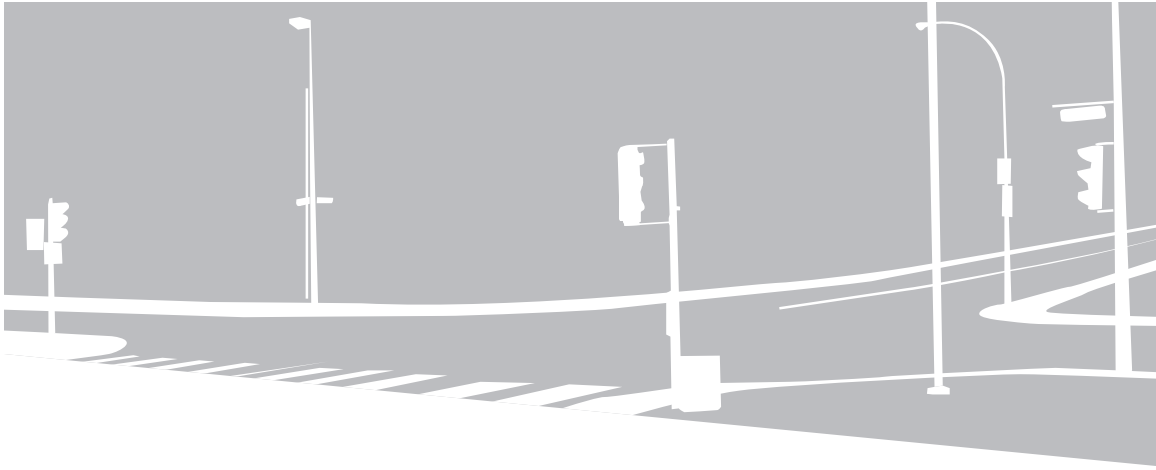
(5) [Repealed, 1999, c. 5, s. 8]
R.S., 1985, c. C-46, s. 212; R.S., 1985, c. 19 (3rd Supp.), s. 9; 1997, c. 16, s. 2; 1999, c. 5, s. 8.

213. (1) Every person who in a public place or in any place open to public view

- (a) stops or attempts to stop any motor vehicle,
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
- (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, “public place” includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.
R.S., 1985, c. C-46, s. 213; R.S., 1985, c. 51 (1st Supp.), s. 1.



Appendix B: Key informants and consultation participants

Key informants

Andrew Sorfleet, Sex Workers' Alliance of Vancouver
Cristen Gleeson, Pivot Legal Society
Dan Allman, University of Toronto
Eleanor Maticka-Tyndale, University of Windsor
Frances M. Shaver, Concordia University
John Lowman, Simon Fraser University
Katrina Pacey, Pivot Legal Society
Maria Nengeh Mensah, Université du Québec à Montréal
Michèle Burque
Patrick Berthiaume, Séro-Zéro
Sylvie Gendron
Viviane Namaste, Concordia University

Consultation participants

Note: A number of participants at the consultation requested that organizational rather than individual names be listed.

2-Spirited People of the 1st Nations (Toronto)
Ainsley Chapman, Canadian AIDS Society (Ottawa)
CACTUS Montréal
Coalition for the Rights of Sex Workers (Montréal)
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Eleanor Maticka-Tyndale, University of Windsor
Frances M. Shaver, Concordia University
Gail MacDonald, St Thomas University
Kali Shiva AIDS Services (Winnipeg)

Katrina Pacey, Pivot Legal Society (Vancouver)
Maggie's (Toronto)
Maria Nengeh Mensah, Université du Québec à Montréal
PEERS (Vancouver)
Penny Summers, AIDS Calgary Awareness Association
Priscilla Alexander, North American Task Force on Prostitution (New York)
Sex Workers Alliance of Vancouver
Stella (Montréal)
Stepping Stone (Halifax)
The 519 Church Street Community Centre (Toronto)
Toronto Migrant Workers Support Group
Toronto People with AIDS Foundation
Vivianne Namaste, Concordia University



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canadien
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