

Sex, work, rights

Changing Canada's criminal laws to protect sex workers' health and human rights



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For further information about this publication, please contact:

Canadian HIV/AIDS Legal Network

Tel: 416 595-1666

Fax: 416 595-0094

Email: info@aidslaw.ca

Website: www.aidslaw.ca

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Ce document est également disponible en français.

Note: The information in this booklet is not legal advice. If you need legal advice, please speak to a lawyer who knows criminal law. A local sex workers' organization or HIV/AIDS organization, or a local legal aid clinic or the province's law society, may be able to refer you to someone.

About this booklet

This booklet explains how Canada's criminal laws related to prostitution affect the health and the human rights of sex workers. It recommends changes to those laws to improve the lives of sex workers.

We hope it will be useful to sex workers who are already fighting for their rights every day, and to others who want to support efforts to change Canada's laws. We hope it will encourage people and organizations, such as HIV/AIDS organizations, to support sex workers.

This booklet is based on the report ***Sex, work, rights: reforming Canadian criminal laws on prostitution***, published in 2005 by the Canadian HIV/AIDS Legal Network. The report and a set of info sheets about these issues, as well as this booklet, are available on the Legal Network's website at www.aidslaw.ca.

The terms “sex worker” and “prostitution”

The words we use to talk about people, and about what people do, can reinforce discrimination and abuse. Words like “prostitution” and “prostitute” carry intense social stigma. This is one reason why many people involved in prostitution, and groups fighting for human rights, prefer to use the terms “sex work” and “sex worker” instead.

Obviously just changing the words cannot eliminate the stigma that sex workers face. But these terms focus attention on the fact that this is work, and insist that sex workers deserve rights and protection in their jobs like other workers. So we use the term “sex worker” here rather than “prostitute” – out of respect for the dignity and human rights of people who exchange sexual services for money or other things of value.

The term “sex work” has a broader meaning than “prostitution” and includes other activities such as stripping, phone sex lines and pornography. Many activities that are “sex work” are legal in Canada; others are not.

Sometimes we use the more specific term “prostitution” because the *Criminal Code* uses this term and makes illegal most of the activities related to prostitution. Because this booklet explains why the *Criminal Code* needs to be changed to respect and protect the health and rights of sex workers, we need to use the term “prostitution” in analyzing what the law currently says about certain kinds of sex work.

Caught in the Criminal Code web: many activities related to prostitution are illegal

Prostitution means exchanging sex for money and other things of value (such as meals, housing, or drugs). Prostitution is legal in Canada, and it is legal to be a sex worker.

But it's hard for sex workers actually to engage in prostitution without breaking the law and risking criminal charges. The *Criminal Code* makes almost every activity related to prostitution illegal and prohibits prostitution in almost every public or private place.

Four sections in the *Criminal Code* deal with activities related to prostitution. We talk about each of these in more detail below.

- **Section 210 outlaws what are called “common bawdy-houses.”**
- **Section 211 makes it illegal to take or direct a person to a bawdy-house.**
- **Section 212 prohibits “procuring” prostitution or “living on the avails” of prostitution.**
- **Section 213 outlaws “communicating for the purposes of prostitution.”**

Essentially, even though exchanging sex for payment is legal, these parts of the *Criminal Code* create a web of criminal offences around people who actually do so.

Changing the law: what's important?

Canadians are starting to recognize the need to change these laws. In the last few years, over 140 sex workers have disappeared or been murdered in Canada, especially in Vancouver and Edmonton. These tragedies make it even clearer that changes are needed, and needed now, to protect sex workers better.

Changes are needed to the *Criminal Code*, but also to other laws (like provincial laws and municipal by-laws) that affect sex workers' health and rights. Changes to these laws should be based on three things:

1. Evidence from sex workers themselves and from reliable research.
2. The government's human rights obligations under international law.
3. The human rights guaranteed in the *Canadian Charter of Rights and Freedoms*.

We talk about these things more below, after explaining what the law says now.

The “bawdy-house” laws

Section 210 of the *Criminal Code* makes it illegal to “keep” a “common bawdy-house.” It is also illegal just to work in or even to be in a bawdy-house. Anyone found by police in a common bawdy-house, whether they are a sex worker, another employee, or a client, can be arrested and charged. It is also illegal for knowingly letting a place to be used for prostitution.

Section 211 makes it illegal to take a person to a common bawdy-house or to give someone directions to a bawdy-house, or even to offer to do these things.

What is a “bawdy-house”?

Canada’s outdated laws against bawdy-houses go back to 1892, when Parliament added these sections to the *Criminal Code* in an effort to discourage establishments where prostitution took place. A “bawd” is an old term for a woman who runs a brothel, and so a bawdy-house was another term for a brothel. Prostitution has been seen as something beyond respectable society, and in fact, the word “bawdy” has come to mean “indecent.” The language of Canada’s laws reflects this deep-rooted stigma that continues to surround prostitution and those who engage in it.

But under the law, a “bawdy-house” means much more than just a brothel. The *Criminal Code* says a “common bawdy-house” is any place that someone keeps or occupies for the purpose of prostitution (or for “the practice of acts of indecency”). Even if this is not its primary purpose, if a place it is used on a regular basis for prostitution (or indecent acts), then it can be considered an illegal bawdy-house.



The bawdy-house laws force sex workers to make a difficult choice. If a sex worker wants to work indoors and in a place where they have more control over their own safety, they risk being charged under the bawdy-house law. They can instead choose to do out-calls or work on the street. But this usually means giving up control over their working situation – and in the case of working on the street, they risk being charged with “communicating for the purposes of prostitution.”

Between the *Criminal Code* and the courts, the word “place” has been interpreted very broadly. It can mean any public or private place, whether it’s enclosed or uncovered. Below is some more information about whether certain kinds of places can be illegal bawdy-houses.

Brothels: At one time, “bawdy-house” was just another word for brothel, although it now means much more than this under Canadian law. Obviously, a brothel is a place specifically kept for the purpose of prostitution, so it is illegal to keep, work in, or be found in a brothel.

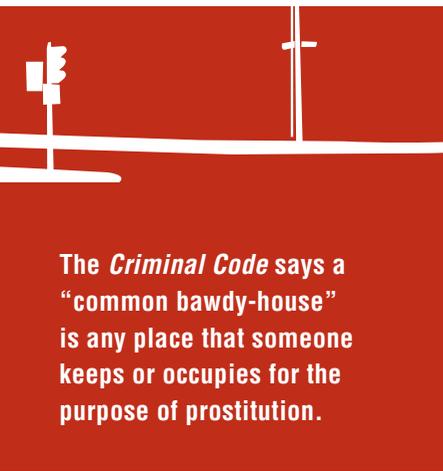
Sex workers’ homes: It is illegal for sex workers to rent an apartment or other place to work in, or even to work in their own homes. This would amount to keeping a bawdy-house. If a sex worker works out of a place that she or he rents and is convicted of keeping a bawdy-house, then the landlord or owner must be notified. If the landlord or owner thinks the sex worker will continue to use the place for his or her work, then the landlord will likely evict the sex worker to avoid the risk of being criminally charged for keeping a bawdy-house.

Hotels: Sex workers who use hotel rooms to work in can be charged under the bawdy-house laws, and so can hotel staff or owners who let sex workers use a hotel room for prostitution.

Massage or body-rub parlours: If sexual services are exchanged for money in a massage or body-rub parlour, then it is an illegal bawdy-house. It is illegal to keep or be found in places such as massage parlours or body-rub parlours where prostitution takes place.

Client’s home: It is probably legal for a sex worker go to a client’s home or other place controlled by the client, as long as that place is not used frequently or regularly for prostitution.

Parking lots and cars: The courts have said that a parking lot or a car can be a common bawdy-house if it is used regularly for prostitution.



The *Criminal Code* says a “common bawdy-house” is any place that someone keeps or occupies for the purpose of prostitution.

What is the penalty for breaking the bawdy-house laws?

Anyone who is convicted of *working in* or being *found in* a bawdy-house, and anyone who directs or takes a person to a bawdy-house, may get a fine of up to \$2000, or up to 6 months in jail, or both. In some cases, even if the court just orders a fine, it might add the condition that the person can be jailed if he or she does not pay it.

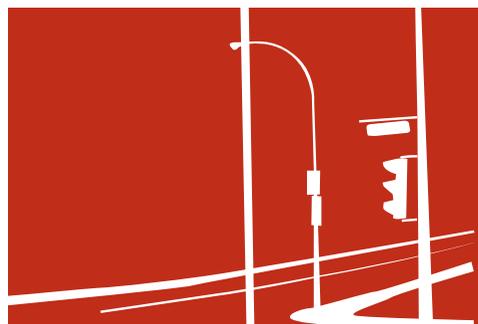
Keeping a bawdy-house is a more serious crime; it carries a maximum sentence up 2 years in jail.

Someone does not need to be actually running a place where prostitution takes place in order to be charged with “keeping” a bawdy-house. It is a crime just to let the place be used for prostitution, knowing this is going on. If someone is convicted of using a place as a bawdy-house, the law says that the owner, landlord or tenant of that property must be notified. If he or she does not evict the sex worker, and the sex worker is later convicted again for using the same property for prostitution, the owner, landlord or tenant is presumed to be guilty of “keeping” a bawdy-house, unless she or he can prove “all reasonable steps” were taken to prevent the place from being used in this way. This puts pressure on landlords to evict sex workers.

Procuring and “living on the avails of prostitution” are illegal

Section 212 of the *Criminal Code* outlaws various kinds of prostitution-related activities. Some parts of this section are important to keep people from being forced into prostitution or having their work exploited for other people’s benefit. But in other ways, section 212 makes things harder for sex workers.

- ❶ **Procuring:** It is illegal to talk a person into engaging in prostitution or to talk a person into purchasing sexual services (as in the case of making referrals to a sex worker).
- ❷ **Living on the avails of prostitution:** It is illegal to profit from the prostitution of someone else.
- ❸ **People coming to or leaving Canada:** It is illegal to convince or force anyone from outside Canada, or anyone coming into Canada, to engage in prostitution or to go to a bawdy-house. It is also illegal to convince or force people to leave Canada for the purposes of prostitution abroad.



The sections of the *Criminal Code* that prohibit procuring and “living on the avails of prostitution” make it hard for sex workers to work in ways that promote their safety. They also can make some of sex workers’ personal relationships criminal.

***Procuring and “living on the avails”:* what do they mean in practice for sex workers?**

Living with a sex worker: The *Criminal Code* says that anyone who regularly spends time with a sex worker and who is supported by the sex worker is assumed to be “living on the avails of prostitution.” It is up to that person to prove that he or she is not living “parasitically” off the money the sex worker makes. This casts the shadow of possible criminal charges over a sex worker’s partner, family members, roommates or friends.

Referrals: It is illegal for a sex worker to refer a client to another sex worker. It is also illegal for a sex worker to arrange to have another sex worker join him or her with a client. And it is illegal for a sex worker to allow other sex workers to use his or her home for prostitution. This can make it difficult for sex workers to work together for their own safety.

Procurers – good and bad:

In defining “procuring,” the law is too broad and does not recognize that sex workers can have different working arrangements. Someone who “procures” an adult to engage in prostitution may or may not be exploiting that person. Sometimes “procurers” can be violent and threatening and can take too much money from a sex worker – what people usually imagine as pimping. In other circumstances, “procurers” protect sex workers, help ensure their safety, and make sure that clients pay. But the law does not reflect this. Section 212 can be used to protect sex workers from violent or threatening people who want to exploit them. But in fact, police spend much more time arresting sex workers than investigating and arresting people who exploit sex workers.

In the *Downey* case in 1992, the Supreme Court of Canada said that the “living on the avails” offence should be used only against a person who lives “parasitically” off a sex worker’s earnings. By this, the Court means someone the sex worker has no legal or moral obligation to support.

What are the penalties for breaking these laws?

In most cases, the *maximum* sentence for these offences is 10 years in jail. But if someone is convicted of procuring or living on the avails of the prostitution of a person who is under 18, the sentence can be as high as 14 years. And if someone threatens or forces a person under 18 to engage in prostitution, or if, in order to make profit, someone encourages or helps the young person engage in prostitution, there is also a *minimum* sentence of 5 years.

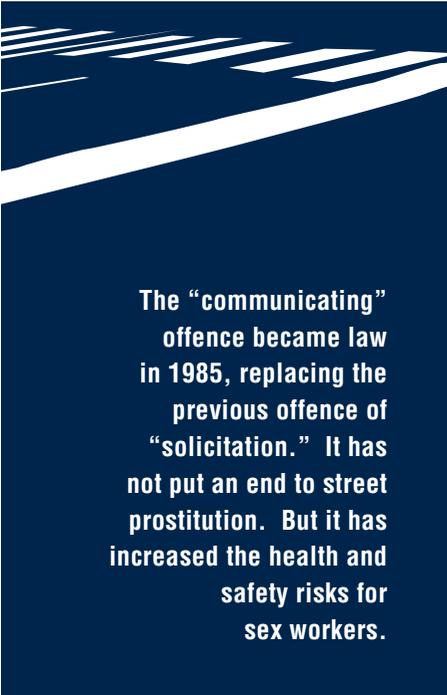
Communicating in public for the purposes of prostitution is illegal

Section 213 of the *Criminal Code* essentially makes it illegal for a sex worker to meet potential clients in a public place.

- ❶ **It is illegal** to “communicate” in any public place with any person for the purposes of prostitution. This means it is illegal for a sex worker to talk with a client in a public place to negotiate services, or even make gestures to a client.
- ❷ **It is also illegal** to stop people on the street or stop vehicles for the purposes of prostitution.
- ❸ Even *attempting* to do these things **is illegal**.

What is a “public place”?

A “public place” includes the street, parks, bars, and even inside cars. This means that it is practically impossible for a sex worker to work legally anywhere in public. (And the bawdy-house laws described earlier make it illegal for a sex worker to work in private places on any regular basis.)



The “communicating” offence became law in 1985, replacing the previous offence of “solicitation.” It has not put an end to street prostitution. But it has increased the health and safety risks for sex workers.

How do police use the “communicating” section of the *Criminal Code*?

Police have a great deal of power to arrest sex workers or to threaten them with arrest. Since 1985, when the *Criminal Code* was changed to make “communicating” a crime, about 90 percent of criminal charges for activities related to prostitution have been for communicating.

If a sex worker is found guilty on a communicating charge, she or he may be imprisoned, fined or both. A jail sentence is more serious than a fine, but a sex worker can be sent to jail for not paying a fine.

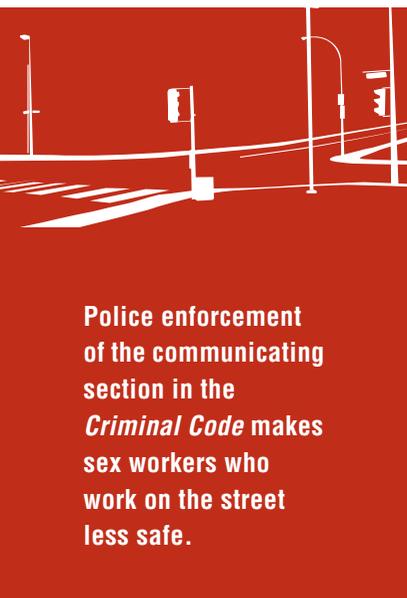
Sex workers (usually women) receive much harsher penalties than clients (usually men) do when they are convicted under the communicating section. As a result, women end up suffering from the enforcement of the communicating section of the *Criminal Code* more than men. According to information gathered over 30 years by Statistics Canada, women:

- ☾ get sentenced to prison more often than men;
- ☾ get longer prison sentences than men;
- ☾ do not get probation as often as men;
- ☾ if they do get probation, usually get twice as long; and
- ☾ are not offered diversion programs such as “john school” nearly as often as men.

Police enforcement of the communicating section has serious consequences

Sex workers and researchers have shown that police enforcement of the communicating section has had serious consequences for people who work on the street. Sex workers:

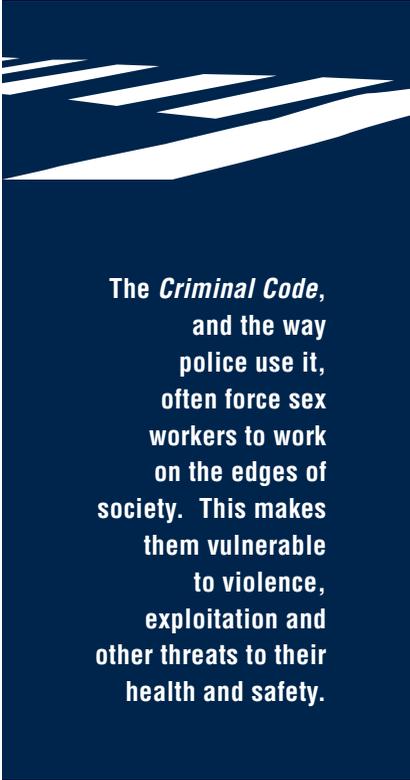
- are often forced to move to darker, more remote areas, like industrial areas or parks. In these areas, especially at night, there is less traffic and fewer people around. There are also few if any pay phones, and there are no places like bars or coffee shops. This means there are few places to run or few people to turn to for help if a client or predator becomes aggressive or violent;
- have had to change their hours of work or the days they work to avoid police;
- experience tenser working conditions because of the risk of arrest, including from undercover police officers;
- have less time to check out clients and negotiate price, sex acts and safe sex, because of the risk of arrest; and
- may be competing for fewer clients, since some are scared off by a police presence. This means they may agree to provide services they wouldn't otherwise provide because they really need the money.



Criminalizing sex workers increases risks and harms

Even though prostitution is legal in Canada, the *Criminal Code* makes every activity related to prostitution illegal. This criminalization reinforces the stigma associated with prostitution and pushes sex workers to the margins of society. And this:

- reinforces the attitude that sex workers “deserve what they get” when they are beaten up or murdered;
- makes prostitution part of an illegal market and pushes people involved in prostitution and other illegal activities, such as the drug scene, together;
- creates an environment in which brutal forms of exploitation of sex workers can take root;
- creates a relationship of conflict between sex workers and police. Police may not take sex workers seriously when they do report crimes and concerns because of the work they do. Because of this, because of police harassment and violence, and because they fear arrest, sex workers often don’t or can’t turn to the police for help if they need it;
- means sex workers often have to work more to pay off fines if they are charged and convicted; and
- makes it more difficult for sex workers to get other sorts of work because they have a criminal record.



The *Criminal Code*, and the way police use it, often force sex workers to work on the edges of society. This makes them vulnerable to violence, exploitation and other threats to their health and safety.

Sex workers' rights and the Charter

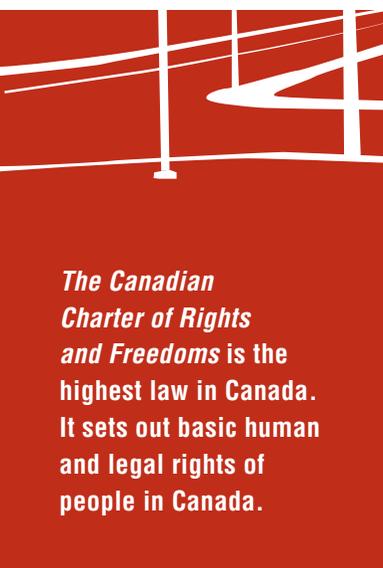
All levels of government have a responsibility to make sure their laws – and their enforcement of these laws – do not violate the rights of Canadians under the *Canadian Charter of Rights and Freedoms*. If a law violates a right guaranteed by the *Charter*, the courts can strike it down as unconstitutional unless the government can convince the court it is justified.

Five *Charter* rights are especially relevant when considering the effect on sex workers of the *Criminal Code* sections that deal with activities related to prostitution. Like everyone else in Canada, sex workers have the right to:

- freedom of expression;
- freedom of association;
- life, liberty and “security of the person” (meaning protection for their physical and mental integrity);
- be presumed innocent until proven guilty; and
- equality.

This means that, unless the government can convince a court that it is justified in limiting these rights for some good reason, sex workers have:

- the right to talk with clients on the street about what services they are willing to provide, for what price, and under what circumstances;
- the right to work together and form working relationships with each other to improve their working conditions;
- the right to be protected by police and the law against violence and coercion; and
- to not be punished under the law in a way that effectively discriminates against women with more convictions and harsher sentences.



The Canadian Charter of Rights and Freedoms is the highest law in Canada. It sets out basic human and legal rights of people in Canada.

There is a good argument that many parts of the *Criminal Code* sections dealing with prostitution violate sex workers' rights under the *Charter*, and that this cannot be justified by the government. This argument is based on several factors:

- In some early decisions, more than 10 years ago, the Supreme Court of Canada said the prostitution-related sections in the *Criminal Code* were acceptable. But since then, it has interpreted some of these *Charter* rights in ways that should make courts reconsider those earlier decisions.
- Many of the *Criminal Code* sections have little to do with legitimate goals like protecting against harm or getting rid of the so-called “public nuisance” associated with street-based prostitution.
- Even where there are goals that seem legitimate, the current laws violate *Charter* rights of sex workers more than is needed to achieve those goals. This is contrary to human rights principles.
- There is growing evidence that the *Criminal Code* sections increase the risk of violence against sex workers and other threats to their health and safety, as described by sex workers themselves and as documented by researchers. Sex workers are harmed by the various ways in which their work is criminalized, and these harms outweigh any small benefits to be gained by others.

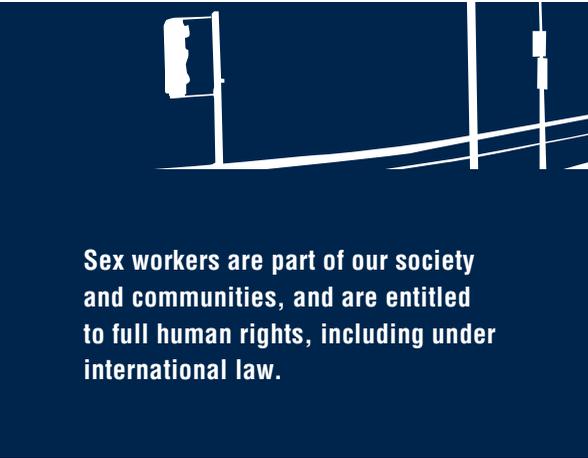
Sex workers' rights and international law

Under human rights law, governments must not violate people's human rights, and governments must also protect against human rights violations by other people. In some cases, it takes time to achieve full human rights for everyone, but governments have to take action to make this happen as quickly as possible. Human rights law is most important for people who are marginalized and vulnerable to human rights abuses. So there is a special duty of governments to ensure the human rights of the most vulnerable people.

Like the Canadian *Charter*, international human rights law protects rights such as freedom of expression, the right to physical safety, the right to be presumed innocent until proven guilty and other rights.

But international human rights law goes further. Some human rights recognized in international law are especially important to sex workers. Under international law, Canada has the legal obligation to take steps to make sure people enjoy the right to:

- work, including the right to freely choose a job;
- fair, safe and favourable conditions of work;
- social security, including social insurance;
- an adequate standard of living for themselves and their families; and
- the highest attainable standard of physical and mental health.



Sex workers are part of our society and communities, and are entitled to full human rights, including under international law.

Several international guidelines about HIV/AIDS and human rights recommend that criminal laws that increase the health and safety risks (including the risk of HIV infection) of sex workers should be repealed.

The Criminal Code needs to be changed

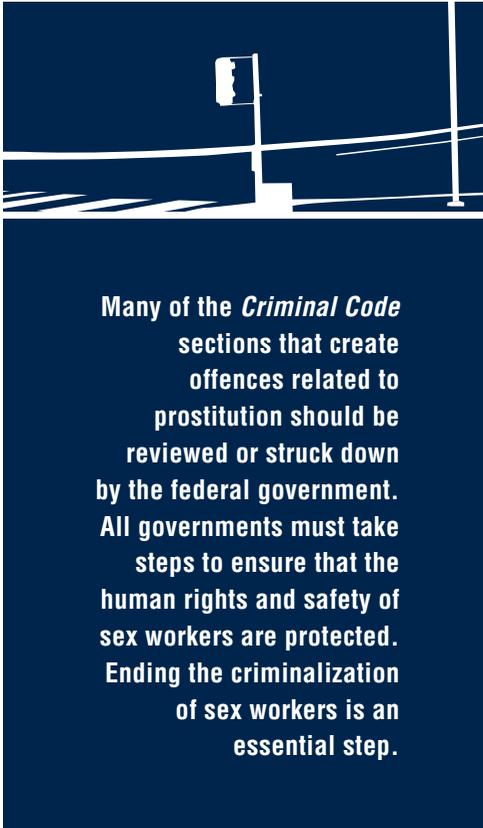
The Canadian HIV/AIDS Legal Network recommends that the federal government:

- repeal the section of the *Criminal Code* that makes it illegal to “communicate in a public place for the purposes of prostitution” (section 213);
- repeal the “bawdy-house” sections of the *Criminal Code* (sections 210 and 211); and
- repeal the parts of the *Criminal Code* section that make it an offence to “live on the avails” of prostitution, insofar as it applies to adult prostitution (section 212).

The process of law reform must include sex workers. In changing the *Criminal Code* – and in putting in place any other policies or programs that affect sex workers’ health and safety – Parliament should consult sex workers.

Criminalizing sex workers just reinforces the stigma they already face. Being on the margins of society puts them at more risk of harm. So decriminalizing sex workers is essential to protecting and promoting their human rights.

But changing the *Criminal Code* is not the only step that’s needed. Beyond changing the criminal law, other aspects of the law – including provincial laws and municipal by-laws – need to be reformed to protect and promote the health and human rights of sex workers. All governments in Canada must make sure that sex workers have a say in future decisions about laws and policies that affect them. Governments should make funding available to support the participation of sex workers and sex worker organizations in the process of making these decisions.



Many of the *Criminal Code* sections that create offences related to prostitution should be reviewed or struck down by the federal government. All governments must take steps to ensure that the human rights and safety of sex workers are protected. Ending the criminalization of sex workers is an essential step.

Canadian laws must protect sex workers

The police and the criminal law should protect sex workers. The *Criminal Code* has many sections that make violence and exploitation illegal. The following are crimes when committed against anyone, including sex workers:

- ☪ assault;
- ☪ criminal negligence causing bodily harm;
- ☪ criminal harassment;
- ☪ torture;
- ☪ forcible confinement and kidnapping; and
- ☪ extortion and fraud.

These sections should be used against any person who exploits a sex worker physically, psychologically and economically, or who is violent or threatens violence towards a sex worker.

We also need to look at other laws to make sure that sex workers, whose work is legal under Canadian law, are entitled to the full protection of their health and safety. Sex workers should be able to benefit from laws about:

- ☪ employment standards;
- ☪ occupational health and safety;
- ☪ workers' compensation;
- ☪ union rights and organization;
- ☪ employment insurance; and
- ☪ public pensions.

By taking these steps, governments in Canada would be taking steps to uphold their duty under international law and the *Charter* to protect and promote the health and safety of sex workers.

Canadian law must treat sex workers as people and as workers. They should have the full benefit and protection of the law. The law should not put them at greater risk of harm.

For more information ...

... see the report *Sex, work, rights: reforming Canadian criminal laws on prostitution*, along with a set of 10 info sheets, on the website of the Canadian HIV/AIDS Legal Network at www.aidslaw.ca.

... see these websites of sex workers' groups and researchers:

Canadian Guild for Erotic Labour www.eroticcguild.com

Coalition for the Rights of Sex Workers www.lacoalitionmontreal.com

Commercial Sex Information Service www.walnet.org/csis/

International Union of Sex Workers www.iusw.org

Maggie's & Prostitutes' Safe Sex Project www.walnet.org/csis/groups/maggies/

Network of Sex Work Projects www.nswp.org

Prostitutes Empowerment Education and Resource Society, PEERS (Victoria)
www.peers.bc.ca

Prostitutes Empowerment Education and Resource Society, PEERS
(Vancouver) www.peersvancouver.org

Prostitution Research Page (Prof. Lowman)
<http://mypage.uniserve.ca/~lowman/>

Sex Professionals of Canada www.spoc.ca

Sex Trade Advocacy & Research
web2.uwindsor.ca/courses/sociology/maticka/star/index.html

Sex Trade Workers of Canada www.sextradeworkersofcanada.com

Sex Workers Alliance of Vancouver www.walnet.org/csis/groups/swav/

Sex Workers Alliance of Toronto www.walnet.org/csis/groups/swat

Stella (Montréal) www.chezstella.org

Stepping Stone (Halifax) www.supercity.ns.ca/~stepping

Travail du Sexe www.travaildusexe.com