

# Criminalisation of sex work: A human rights crisis in Canada and beyond

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# Overview

- **Human rights questions raised by legal approaches to sex work**
- **Human rights analysis of Canadian law related to sex work**
- **Recommendations for human rights-based approaches**
- **What can we do?**

# Legal approaches to regulation of sex work (1)

## Abolition

- Assumes all sex work is abusive, victimizing, enslaving; seeks eradication; repudiates person agency of sex workers
- Reflected in UN 1949 Trafficking Convention: all sex work should end and sex workers should be “saved” (Canada is not a party)
- Reflected in US policy: confounding of trafficking and sex work
- Rarely basis of national law per se

# Legal approaches to regulation of sex work (2)

## Criminalisation: 3 approaches

- **Act of prostitution illegal (China, Islamic republics, So Africa)**
- **Act of prostitution not illegal, but acts associated with it are, e.g.**
  - **soliciting, procuring**
  - **brothel-keeping, abetting brothel-keeping**
  - **living off sex work earnings**
  - **vagrancy, loitering, public nuisance, etc.**  
(approach of Canada, India, UK, ex-USSR, many others – reflects in perverse way abolitionist idea of sex worker as victim)
- **Criminalisation of buying but not selling sex (Sweden)**

# Legal approaches to regulation of sex work (3)

- **Decriminalisation (New Zealand, Australia):** also limited decriminalisation in 'zones of tolerance,' other circumstances
- **Legalisation with regulation (Netherlands, Nevada in US):** extensive health and other regulations and conditions of licensing may be abusive

## Effect of criminalisation (greater detail later on Canada case)

- **Greater stigma, marginalization, driving underground, opportunity for organised crime**
- **Greater risk of abuse by clients: less time to check out prospective clients**
- **Greater risk of abuse by police (widespread “subbotnik”)**
- **Unlikelihood of police protection for sex workers or prosecution of abusers of sex workers**
- **Inhibition of sex workers’ right to organise.**

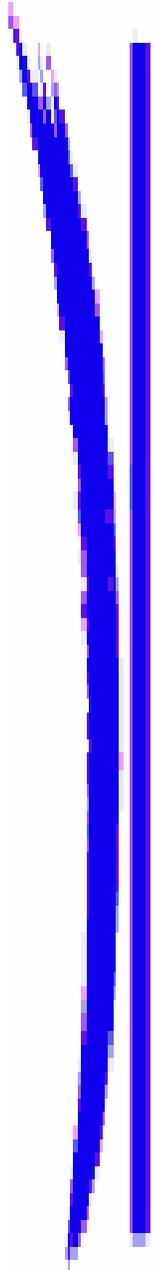
# Swedish model: Criminalising the client

- **Hailed as pioneering innovation, even by some women's rights advocates**
  
- **Evaluations show:**
  - **clients not on the streets; sex work goes indoors (impact of internet too)**
  - **workers left on the streets face more violent clientele, more unsafe sex; no time to assess quality of clients**
  - **new crime: “phony” sex workers rob clients who fear reporting the crime**
  - **no evidence of less sex work or less crime associated with sex work**

## Some first conclusions

- **Legal approaches to sex work with few exceptions are the antithesis of rights-based**
- **Few real-life models of decriminalisation but impressive record of reducing abuse**
- **Need a re-examination of what can be done to address human rights abuses of sex workers with the flow of resources linked to HIV/AIDS**





**Sex, work,  
rights:**  
reforming Canadian  
criminal laws on  
prostitution

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

## *Sex, work, rights* - project

- **Two-year PHAC-funded project on criminal law, prostitution and the health and safety of sex workers in Canada**
  - **literature review**
  - **key informant interviews**
  - **two-day consultation**
  - **feedback on draft report**

## *Sex, work, rights - goals*

1. Add to the call for law and policy reforms that respect, protect and fulfil the human rights of sex workers.
2. 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.
3. Inform the work of the House of Commons Subcommittee on Solicitation Laws; and
4. Inform the larger debate concerning public policy regarding prostitution in Canada.

## *Sex, work, rights* – real goals!

- **Decriminalization**
- **Respect for the human rights of all sex workers**
- **Protect and promote the health of sex workers**
- **No more disappearances, murders, or HIV infections**

## *Sex, work, rights (1) - contents*

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

- 1. Evidence from credible research and from sex workers themselves**
- 2. Canada's obligations under international human rights law**
- 3. Canadian Charter of Rights and Freedoms ("Charter").**

## *Sex, work, rights (2) - contents*

- **Legal regulation of prostitution in Canada**
- **Prostitution, sex workers and HIV/AIDS**
- **Effects of criminalization on sex workers' health and safety, including vulnerability to HIV/AIDS**
- **International law and the human rights of sex workers**
- **Canadian Charter of Rights and Freedoms**
- **Prostitution law and policy reform beyond the criminal law**

# Criminalisation in Canada

- Prostitution, the exchange of sex for money, is legal in Canada.

**BUT**

- *Criminal Code* prohibits virtually every activity related to prostitution, and prohibits prostitution in almost every conceivable public or private place.

## Criminalisation in Canada (2)

- 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.



## Criminalisation in Canada (3)

- Section 212 prohibits enticing, encouraging or forcing a person to engage in prostitution (**procuring**), and **living on the avails** of prostitution.



## Criminalisation in Canada (4)

- **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.

## Criminalisation in Canada (5)

- Overall goal of the Canadian criminal law on prostitution is not clear.
  - “paradox” promotes invisibility
  - politicians’ rhetoric about prostitution is almost entirely abolitionist
  - “Canadian political solution to the problems created by prostitution has been to say one thing and do another”
  - solution “achieved” at the expense of the health and human rights of sex workers

## Effects of criminalisation

- **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.**



## Effects of criminalisation (2)

- **The research concerning the health and safety risks faced by sex workers in Canada shows that:**
  - 1. violence against sex workers pervasive**
  - 2. risk of severe harm higher for street-based women sex workers than for women working indoors**

## Effects of criminalisation (3)

- 3. non-responsiveness of police to concerns about violence and abuse**
- 4. sex workers not immune from the HIV risks faced by all sexually active persons**
- 5. 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**

## Effects of criminalisation (4)

6. **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**
  
7. **Aboriginal persons, especially women, and transgender people who engage in prostitution face high HIV risk**

## *Charter* analysis

- **Supreme Court has upheld constitutionality of *Criminal Code* ...these decisions should be revisited:**
  - **social awareness of the extreme violence and other harms**
  - **behavioural and social science literature**
  - **law has changed**
  - **no serious consideration given to the sex workers' constitutional rights**

## *Charter* analysis (2)

- **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:**
  - **Section 2(b) guarantees everyone freedom of expression.**
  - **Section 2(d) guarantees everyone freedom of association.**

## *Charter analysis (3)*

- **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.”**

## *Charter analysis (4)*

- **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.**

## *Charter analysis (5)*

- **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.**



## *Charter* analysis (6) – case study

- 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.

## *Charter* analysis (7) – case study

- ***Criminal Code* section 213 “structures” prostitution and impacts sex workers**
  - **Illegal to communicate (ie, work) in any public place**
  - **Police given wide discretion/power to arrest or threaten arrest**
  - **Fine or imprisonment or both ... have to work to pay off fines**
  - **Less time to check out client, negotiate**
  - **Fewer clients ... same bills to pay**
  - **Dislocation of street-based prostitution to dark sparsely populated industrial areas**
  - **Promotes violence (predators and clients)**

## *Charter* analysis (8) – case study

- Charter section 15 guarantees the right to equality/equal treatment ... based on sex
  - **CrC 213 makes no distinction based on sex, it applies “every person”**
  - **applies to sex workers and clients**
  - **a law may violate the right to equality if it has an unequal, detrimental impact on a member of an already disadvantaged group**

## *Charter* analysis (9) – case study

- **Evidence re enforcement of *CrC* 213:**
  - **Number of men and women charged under *CrC* 213 roughly equivalent**
  - **Nearly all of those charged are found or plead guilty**



## *Charter* analysis (10) – case study

- **Upon conviction women (overwhelmingly sex workers) receive much harsher penalties than men (overwhelmingly clients)**
  - **higher fines**
  - **sentenced to prison more frequently**
  - **receive longer prison sentences**
  - **typically not given diversion (ie, “john school”) option**

## *Charter analysis (11) – case study*

***“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.”***

## *Charter* analysis (12) – case study

- Section 1 – Can the violation be justified?

There is a strong argument that communicating section (*CrC* 213) cannot be saved under *Charter* section 1, for three reasons:

- First, not rationally connected to its **legislative objective.**
  - Displacing rather than eliminating the “nuisance.”
  - Risk of arrested even when no “nuisance.”

## *Charter* analysis (13) – case study

- **Second, CrC 213 impairs sex workers' *Charter* right to equality more than is necessary to accomplish the legislative objective.**
  - **Causes health and safety risks.**
  - **Contributes to marginalization of sex workers.**
  - **Encourages violence, contribute to the continued poverty of sex workers who have few options but to work on the street, and increases their risk of HIV exposure.**

## *Charter* analysis (14) – case study

- **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.**

# Decriminalization in New Zealand

- ***Prostitution Reform Act, 2003***
  - **The purpose of this Act is to decriminalise prostitution ... and to create a framework that**
    - **safeguards the human rights of sex workers and protects them from exploitation**
    - **promotes the welfare and occupational health and safety of sex workers**
    - **is conducive to public health**
    - **prohibits the use in prostitution of persons under 18 years of age**
    - **implements certain other related reforms**

## Decriminalization in New Zealand (2)

- **The basics**
  - **“sex workers” offer “commercial sex services”**
  - **contracts for sexual services not void**
  - **permits and regulates “brothels,” including “small owner-operated brothels”**
  - **brother “operators” must be licensed**
  - **restrictions on advertising**
  - **local governments given power to regulate location of brothels and signage/advertising**
  - **prohibits person under 18 years old from engaging in commercial sex**
  - **no work permits for commercial sex industry**

# Decriminalization in New Zealand (3)

- **Occupational health & safety**
  - **sex workers are covered by general occupational health and safety legislation**
  - **brothel operators, sex workers and clients are required to “take all reasonable steps” to ensure safer sex practices and to minimise the risk of sex workers or clients acquiring or transmitting sexually transmissible infections**
    - **powers of inspection**
  - **creating awareness amongst sex workers that their right to insist on condom use**



# Decriminalization in New Zealand (4)

- **Review of operation of Act**
  - **full review of operation of Act within 5 years (by 2008)**
  - **Prostitution Law Review Committee**
    - **“3 persons nominated by the New Zealand Prostitutes Collective”**
    - **“entitled to receive remuneration by way of fees, salary, or allowances and travelling allowances and expenses”**



## What to do globally?

- **Obvious need for a global campaign on decriminalisation of sex work and right of sex workers to organise**
- **Any reform must be based on meaningful involvement of sex workers in decision-making**
- **HIV/AIDS programs: Strategies must include legal support and human rights protections**

## What to do globally? (2)

- **Resources and public opinion also mobilised for violence against women: urgent need to include sex workers meaningfully and constructively**
- **As new laws are evaluated, human rights abuse of sex workers **MUST** be a central evaluation criterion.**
- **Keep our eyes on the lawsuit by DKT against the US government**

# What to do in Canada?

- **Law reform**
  - **Subcommittee on Solicitation Law Reform report fall 2005**
    - **Lobby? Who?**
    - **Public awareness? How?**
  - **Law reform beyond the *Criminal Code* ...**
  - **Civil society voice(s) in law reform**
    - **Role of sex workers & activists, academic community, HIV/AIDS community, civil libertarian & human rights organizations (Legal Network)**
    - **Who should work together? How?**

## What to do in Canada?(2)

- **Community organizing to combat human rights abuses locally**
  - Sources of abuse include police, neighbourhoods & communities, health care and social service providers, bad dates and predators, criminal “pimps”
  - **S**trengths, **W**eaknesses, **O**pportunities, **T**hreats
  - Do local sex workers activists/advocates need resources and support from others, like the Legal Network? What might this look like?

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