

Briefing Paper | January 2013

Sex Work Law Reform in Canada: Considering problems with the Nordic model

“The criminalisation of clients is not a human rights–based response to sex work.”

—Global Network of Sex Work Projects,
Briefing Paper #02: The Criminalisation of Clients, 2011.

■ Introduction

In Canada, two cases have been making their way through courts in Ontario and in British Columbia, challenging provisions of the *Criminal Code* that deal with sex work.¹ While sex worker activists who promote the human rights of sex workers argue for the complete removal of prostitution laws that criminalize sex workers (known as decriminalization), others propose alternative models of criminalization.

Known as the “Swedish” or “Nordic” model of regulating sex work, this model has been proposed as an alternative to the current regime of criminalization. This model — adopted in Sweden, Norway and Iceland — criminalizes the purchase of sexual services, most indoor sex work and promoting and “living on the avails of” sex work.

Given the strong prospect that at least some of the challenged provisions of the *Criminal Code* may soon no longer form part of Canadian law, it is important to consider the impact of the Swedish model on sex workers and whether it is a constitutional — and therefore legal — alternative, or if it merely replaces one unconstitutional set of laws with another.

This policy brief considers the impact of the Swedish model on sex workers and, in light of its harmful effects, argues that this approach would not withstand constitutional scrutiny in Canada.

What is the “Swedish” or “Nordic” model?

In 1999, the Swedish government passed the law *Prohibiting the Purchase of Sexual Services (Sex Purchase Act)*. This law, now part of Sweden’s *Penal Code*, punishes those who purchase sex with a fine or imprisonment for up to one year.² The stated objective of the law is to “end demand” for prostitution because sex workers are deemed to be “victims” and sex work is considered to cause serious harm to individuals and to society as a whole.

Sweden’s *Penal Code* also punishes those who “promote” sex work or “improperly financially exploit” someone’s engagement in sex work with imprisonment of up to four years (or up to eight years if the crime is “gross,” i.e., involving large-scale exploitation). In effect,

this provision punishes:

1. those who “promote” sex work — including sex workers themselves — by permitting individuals to use their premises for sex work; and
2. sex workers working collectively, who are all deemed to be financially “exploiting” one another.³

Impacts of the Swedish model

Despite its stated intentions, the Swedish model is not effective at reducing prostitution. While the number of sex workers working on the street appeared to decline following the passage of the law, **sex workers have merely moved indoors, online and to neighbouring countries.**

As a result of this law, most sex workers who work indoors are criminalized, and they are unable to work or live with others, including their partners, since it is illegal to share in any income derived from sex work.⁴ Sex workers are also forced to lie in order to rent premises or are pressured to pay exorbitant rent because of the risk of criminal prosecution.⁵ More broadly, sex workers are unable to access social security benefits that are available to all other workers in legal labour activities.⁶

Also reported are the following:

INCREASED RISKS OF AND EXPERIENCES OF VIOLENCE

Street sex workers have reported **increased risks of and experiences of violence.** Regular clients have avoided them for fear of police harassment and arrest, instead turning to the internet and to indoor venues. There are **fewer clients on strolls, and those that remain are more likely to be drunk or violent and to request unprotected sex.**

DECREASED NEGOTIATING POWER FOR SAFER SEX PRACTICES

There is **greater competition for clients and lower prices for services.** This means that sex workers accept clients they would have otherwise refused and there is **more pressure on them to see clients who insist on unsafe sex practices.** When safer sex practices are being negotiated, **both clients and sex workers must do so rapidly and often with unclear communication and in more secluded locales,** to avoid lingering for fear of arrest for purchasing sex.

SAFETY NETWORKS AND WARNING SYSTEMS AMONG SEX WORKERS ARE THREATENED

Since police surveillance has driven sex workers to more isolated locations, informal support networks among sex workers have weakened **and it has**

become more difficult for sex workers to warn each other about abusive or violent aggressors posing as clients.

CLIENTS ARE MORE RELUCTANT TO REPORT VIOLENCE THEY WITNESS AGAINST SEX WORKERS

Clients who would have previously reported violence, coercion or other abuse towards a sex worker are now more reluctant to go to the police for fear of their own arrest.

AGGRESSIVE POLICING

Sex workers who work on the street in Sweden have reported **aggressive policing, police harassment, police persecution and overall mistrust of police.**

STRONG LEGAL INCENTIVES TO AVOID CONDOM USE

Police have confiscated belongings to use as evidence against clients, **providing sex workers with a strong incentive to avoid carrying condoms.**

INCREASED DISCRIMINATION FROM HEALTH SERVICE PROVIDERS

Sex workers report **an increase in discrimination from health service providers** and from the general population. Rampant stigma around sex work and fear of discrimination prevents sex workers from talking about their sex work experiences when testing for HIV and other sexually transmitted infections and when accessing health services for their overall health.

INCREASED DIFFICULTIES IN ACCESSING AND MAINTAINING HOUSING

Sex workers frequently face **difficulties accessing and maintaining housing as a result of discrimination and associated stigma.** Sex workers' increased mobility and displacement to hidden venues also impede their access to and ability to maintain housing.

INADEQUATE SOCIAL SERVICES

In Sweden, most social service providers oppose condom provision as it is perceived to render them complicit in prostitution-related offences. After the passage of the Swedish model, **HIV prevention projects aimed at clients of sex workers also ceased.**

ERASURE OF MALE AND TRANS SEX WORKERS

Government evaluations of the law often **ignore its impact on male and trans sex workers,** so very little is known about their risks of and experiences of violence, access to health care, sexual behaviour and sexual health.

Comparison of the laws regarding sex work in Canada and in Sweden⁷

The Swedish model is very similar to the current legislative model for sex work in Canada. Canada already has core elements of a Nordic model in place, including parallel provisions which have been demonstrated (and accepted in court) to have detrimental effects. The following chart compares key laws governing sex work in Canada and in Sweden, illustrating that the legislative frameworks in each country are more similar than they are different.

Activity	Canada	Sweden
Keeping a bawdy house	Illegal , including for sex workers who work out of their own homes S. 210 of the <i>Criminal Code</i> makes it an offence to keep, be found in, own, or be a landlord, lessor, tenant, occupier, agent or otherwise have charge or control of any place that is used regularly for the purpose of prostitution.	Illegal , unless the sex worker owns the space that she or he uses for sex work and works alone Ch. 6, s. 12 of the <i>Penal Code</i> makes it an offence for a person to grant the right to use his or her premises to another when it is “wholly or to a substantial extent used for casual sexual relations in return for payment” because that person is “considered to have promoted the activity ...”
Procuring, working collectively, and living on the avails of prostitution	Illegal S. 212 of the <i>Criminal Code</i> makes it an offence to procure a person to become a prostitute and to live wholly or in part on the avails of prostitution, including for sex workers who live wholly or in part on the avails of <i>another</i> sex worker's prostitution.	Illegal Ch. 6, s. 12 of the <i>Penal Code</i> makes it an offence to promote or improperly financially exploit “a person's engagement in casual sexual relations in return for payment.”
Selling sexual services	Technically legal — as long as it happens in a private place If any related communication happens in public (e.g., a conversation or an ad in the paper or online), s. 213(1)(c) of the <i>Criminal Code</i> has been violated.	Legal
Buying sexual services	Technically legal — as long as it happens in a private place If any related communication happens in public, s. 213(1)(c) of the <i>Criminal Code</i> has been violated.	Illegal Ch. 6, s. 12 of the <i>Penal Code</i> makes it an offence for a person to obtain “a casual sexual relation in return for payment.”

Would the Swedish model be considered constitutional in Canada?

Comparing the Swedish model with Canada's approach to sex work illustrates their similarities, including the fact that the Swedish model would not make any headway in addressing violence against sex workers and the violation of sex workers' rights. Many of the reasons underpinning the Ontario courts' invalidation of the

challenged provisions in Canada's *Criminal Code* would seem to apply under a Swedish model (see footnote 1 for a more detailed description of the cases). The table below compares the documented impact of key provisions of the Swedish model with the closest analogy in Canadian law, and assesses whether a hypothetical Swedish model would withstand constitutional scrutiny in Canada. The analysis is largely based on the Ontario courts' findings in the *Bedford* case, many of which could be applied to the Swedish model.

Canada's approach	Sweden's approach
1. Prohibition on keeping a common bawdy house	
VIOLATES RIGHT TO SECURITY OF THE PERSON In the <i>Bedford</i> case, the Ontario Court of Appeal found that the prohibition on “common bawdy-houses” limited sex workers’ security of the person. The court said: “The bawdy-house provisions prevent prostitutes from taking the basic safety precaution of moving indoors to locations under their control, which the application judge held is the safest way to sell sex. In this way, as the application judge found, the provisions dramatically impact on prostitutes’ security of the person.”⁸	VIOLATES RIGHT TO SECURITY OF THE PERSON In Sweden, sex workers are forced to lie in order to rent premises, pressured to pay exorbitant rent and banned from hotels and other venues after police inform management of sex work on their property. The limited exception in Sweden's <i>Penal Code</i> for sex workers working <i>alone out of property they own</i> does not assist those sex workers who wish to work collectively or who do not own the property in which they work. As in Canada, criminalizing indoor work undermines sex workers’ safety because it inhibits the screening of clients, who may not wish to disclose any identifying information for fear of criminal liability.
2. Prohibition on procuring, working collectively, and living on the avails of prostitution	
VIOLATES RIGHT TO SECURITY OF THE PERSON In the <i>Bedford</i> case, the Ontario Court of Appeal held that criminalizing activities that force sex workers to work in isolation materially contribute to a deprivation of their security of the person. The court said that the prohibition on “living on the avails” of prostitution prevents sex workers from hiring staff who could keep them safe, and it could conversely increase the likelihood that sex workers would be exploited by “forcing them to seek protection from those who are willing to risk a charge under this provision.”⁹	VIOLATES RIGHT TO SECURITY OF THE PERSON Swedish law criminalizes those who “improperly financially exploit” sex workers, but makes no distinction between relationships that involve exploitation and those that do not. As a result, sex workers work in isolation and cannot work together, recommend customers to each other, advertise, or work from property they rent or where they cohabit with a partner, since that partner is likely to share part of any income derived from sex work. By preventing sex workers from working for or with or employing third parties, the prohibition denies sex workers control over their working conditions, limits their options on how they work and ultimately makes their work less safe.
3. Prohibition on buying sexual services	
VIOLATES RIGHT TO SECURITY OF THE PERSON The purchase of sex is not in itself illegal in Canada, but laws targeting clients have dangerous implications for sex workers. In Montréal, police sweeps targeting clients have led to dramatic increases in violence experienced by street sex workers, whose regular clients turn to sex workers working indoors where the risk of criminalization is lower. Street sex workers have less choice of clients as a result, are unable to assess if someone is a client or an aggressor, and are pressured to accept clients whom they would otherwise reject.¹⁰ In Ottawa, a police trend of targeting clients has resulted in sex workers’ increased feelings of risk to personal security and of being unable to trust or turn to the police for help.¹¹ While a majority of the Ontario Court of Appeal in the <i>Bedford</i> case upheld the constitutionality of the prohibition on communicating in public for the purpose of prostitution,¹² it also recognized that the provision violates sex workers’ security of the person by preventing them from screening potential customers for fear of arrest.	VIOLATES RIGHT TO SECURITY OF THE PERSON When clients are criminalized by the prohibition on buying sex, sex workers face threats of violence and poor health because they are prevented from screening their clients, who are exposed to police scrutiny for such communication. Since the passage of the <i>Sex Purchase Act</i>, sex workers who work on the street have less time and power to negotiate safer sex or to assess potential danger. They have also been displaced to more isolated locations. The provision renders sex workers more susceptible to violence by preventing them from taking basic safety precautions while they work. Whereas one rationale of the majority of the Ontario Court of Appeal for upholding the communication provision in the <i>Bedford</i> case was that sex workers could move indoors (since the court struck down the prohibition on common bawdy-houses) and thus avoid many of the harms sex workers on the street face, this would not be applicable to the Swedish model because the majority of indoor sex work is still criminalized under that model.

Rights and Reason: The Way Forward

In Canada and in Sweden, both approaches for regulating sex work violate sex workers' security of the person (Section 7 of the *Canadian Charter of Rights and Freedoms*). The Swedish model is harmful for sex workers because it denies them control over their working conditions and impedes their ability to practise their profession safely and without risk to their bodily integrity. This was recognized by the Global Commission on HIV and the Law, which released a report in 2012 denouncing the Swedish model. In the report, the Global Commission found that "[s]ince its enactment in 1999, the law has not improved — indeed, it has worsened — the lives of sex workers" and noted that "the sex trade may now be more violent."¹³ There is also increasing evidence in Canada of the vicious consequences of client sweeps on sex workers, a foreseeable consequence should the Swedish model be applied in Canada.

Both approaches also entrench and exacerbate stigma against sex workers and constrain their access to legal recourse by institutionalizing an adversarial relationship between sex workers and the police. Sex workers who report a violent experience risk incriminating not only themselves but their employer, colleagues and clients, leading to a loss of work, income and potentially child custody. Reporting a violent incident may also mean that police harass and target a sex worker and the men she is in personal relationships with for arrest, because they assume that those men are her clients. Sex workers are consequently dissuaded from reporting violence against them, creating a climate of impunity which fosters and fuels further violence. This is especially true for sex workers who work on the street, and who already face horrific violence, stigma and disproportionate criminalization. Introducing the Swedish model in Canada would force sex workers on the street to continue

to work in isolation in order to avoid their clients' arrest.

The dangerous and potentially fatal consequences of criminalizing the purchase of sex outweigh any questionable benefits that might arise. The courts and Parliament owe a responsibility to sex workers to ensure that one deadly — and unconstitutional — regime is not replaced with another. Rather than imposing the Swedish model on sex workers in Canada, Parliament should meaningfully consult with sex workers about the best ways to protect their human rights and promote secure working conditions, which necessarily includes the repeal of the prostitution-related offences of the *Criminal Code*. This approach is a far more effective way of addressing exploitation in the sex industry than one already proven not to work.

Recommendations

- 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).
- Parliament should repeal the bawdy-house sections of the *Criminal Code* (sections 210 and 211).
- Parliament should repeal the subsections of the procuring sections of the *Criminal Code* that relate to bawdy-houses (subsections 212(1)(b),(c), (e), and (f)) and to procuring more generally (subsections 212(1)(a), (d) and (h)).
- Parliament should repeal the section of the *Criminal Code* that makes it an offence to live on the avails of prostitution (subsection 212(1)(j)).
- Parliament should repeal the reverse-onus subsection of the *Criminal Code* as it applies to living on the avails of prostitution (subsection 212(3)).

References

- 1 In **Ontario** (*Bedford v. Canada*, 2010 ONSC 4264), the Superior Court of Justice struck down three provisions of the *Criminal Code* in 2010 which make it illegal for anyone to keep a common bawdy-house (s. 210); live on the avails of prostitution (s. 212(1)(j)); and communicate for the purpose of prostitution in public (s. 213(1)(c)). The Court held that these provisions infringe sex workers' rights to liberty, security of the person and freedom of expression pursuant to the *Canadian Charter of Rights and Freedoms*. Two years later, the Ontario Court of Appeal partially upheld this ruling (*Canada (Attorney General) v. Bedford*, 2012 ONCA 186) by invalidating the prohibition on common bawdy-houses; qualifying the prohibition on living on the avails of prostitution by limiting it to "circumstances of exploitation"; and maintaining the prohibition on communicating in a public place for purposes of prostitution. In **British Columbia** (B.C.), an organization of sex workers (SWUAV) and a former sex worker (Sheri Kiselbach) are challenging the constitutionality of *Criminal Code* provisions dealing with sex work. The case was dismissed at trial because the judge held that the group did not have "public interest standing" to bring the case to court. However, B.C.'s Court of Appeal overturned this decision and in 2012, the Supreme Court of Canada

affirmed the group's right to challenge those laws (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45).

- 2 Government Offices of Sweden, *Legislation on the Purchase of Sexual Services*, last updated September 5, 2012, accessible at www.sweden.gov.se/sb/d/4096/a/119861.
- 3 *Penal Code of Sweden* (Law 1998:393), Ch. 6, Section 8, accessible at www.sweden.gov.se/content/1/c6/15/14/61/e97ee975.pdf.
- 4 S. Dodillet and P. Östergren, "The Swedish Sex Purchase Act: Claimed Success and Documented Effects," paper presented at the International Workshop on Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, March 2011.
- 5 P. Östergren, "Sexworkers critique of Swedish Prostitution Policy," undated, accessible at <http://www.petraostergren.com/pages.aspx?rid=40716>.
- 6 A. Jordan, "The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering," Center for Human Rights and Humanitarian Law, Washington College of Law, April 2012, p. 5.
- 7 This chart is adapted from one developed by Katrina Pacey, Litigation Director at Pivot Legal Society.
- 8 *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 at para 207.
- 9 *Bedford v. Canada (Attorney General)*, 2012 ONCA 186 at para 244.
- 10 Émilie Laliberté, Executive Director of Stella, personal communication, August 1, 2012.
- 11 Frédérique Chabot, POWER Board of Directors, personal communication, August 2, 2012.
- 12 This decision is being challenged before the Supreme Court of Canada in 2013.
- 13 The Global Commission on HIV and the Law was tasked with analyzing the interaction among the legal environment, human rights and HIV, and with making recommendations for rights-based law and policy in the context of HIV. See Global Commission on HIV and the Law, *Risks, Rights, and Health*, July 2012, p. 38.

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About the Canadian HIV/AIDS Legal Network

The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

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