



## SPEAKING NOTES

**OCCASION:** Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (House of Commons)

**DATE:** 15 March 2005

**PRESENTER:** Glenn Betteridge, Senior Policy Analyst

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### Introduction

I am a Senior Policy Analyst with the Canadian HIV/AIDS Legal Network, a lawyer by training, and a member in good standing of the Ontario Bar. On behalf of the Legal Network, I would like to thank the Subcommittee, and its staff, for making our appearance today possible.

### Canadian HIV/AIDS Legal Network & Prostitution Law Reform

The Canadian HIV/AIDS Legal Network is a national charitable organization engaged in education, legal and ethical analysis, and policy development on issues related to HIV/AIDS. Our work is both Canadian and international in scope. The Network has been involved in extensive government, community, and international consultations regarding a wide range of issues related to law, policy and HIV/AIDS. We have 250 members across Canada, about half of whom are community-based organizations with an interest in HIV/AIDS issues.

In 2003 we began a project on Sex Work, Criminalization & HIV/AIDS. In the context of that project we have:

- interviewed key informants,
- held a national consultation attended by current and former sex workers, sex worker advocates, and public health and social science researchers; and
- researched the links between Canadian criminal law relating to prostitution and the health and safety of sex workers (including HIV/AIDS-related health and safety issues).

This year we will be producing a full length report, provisionally titled: **Prostitution under the Canadian Criminal Code: Principles for Law Reform in the Context of HIV/AIDS**. We will make the report available to the Subcommittee.

Today I will provide a very short summary of selected sections of that report.

### **Prostitution, Sex Workers & HIV/AIDS**

Public health and social science researchers in Canada have amassed a fairly large body of qualitative and quantitative research on the link between sex work and HIV/AIDS. The available evidence clearly demonstrates that sex workers are not “vectors” of HIV infection.

Despite this evidence, the HIV epidemic has had a stigmatizing effect on sex workers. Our report will dispel the myths surrounding HIV/AIDS, prostitution and sex workers. We will recommend reforms that aim to protect sex workers (and clients) from exposure to HIV/AIDS, while protecting the human rights of sex workers. Our report will also address the situation of sex workers living with HIV.

### **Prostitution Law Reform**

In the context of prostitution law reform, and in particular the mandate of the Subcommittee on Solicitation Law Reform, we believe that the crucial question is:

1. Do the Criminal Code provisions related to prostitution (sections 210 to 213, either individually or together) minimize or contribute to the health and safety risks faced by sex worker?

The answers to this question will provide a strong indication of the necessary, although not necessarily sufficient, elements of law reform.

Sections or subsections of the Criminal Code that contribute to the health and safety risks faced by sex workers should be repealed in the absence of strong justification for not doing so. Whether or not a “harmful” section can be justified should depend upon an assessment of the section’s legislative objective, and the rationality and proportionality of its effects. Any section or subsection (or combination thereof) that is not rationally related to a pressing and substantial legislative objective, or that results in more harm than good, should be repealed.

### **Health & Safety Impacts of Criminal Laws Regulating Prostitution**

The research concerning the health and safety risks sex workers face demonstrates:

- murders of sex workers rose alarmingly during the 1990s;

- women sex workers experience more assaults, rapes and arrests than male sex workers and are more likely to be robbed;
- workers in many forms of the sex trade in Canada reported that police are not responsive to their concerns about violence and abuse;
- sex workers in Canada are not immune from the HIV risks faced by all sexually active persons;
- risk of HIV and other severe harms was much higher for street-based women sex workers than for women escorts working indoors;
- 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;
- the high HIV risk of Aboriginal persons, especially women, engaging in sex work; and finally
- the Criminal Code provisions related to prostitution contribute to women's risk of facing violence and, directly or indirectly, their risk of HIV infection.

The Canadian HIV/AIDS Legal Network commissioned Pivot Legal Society to do an in-depth analysis of the impact of criminalization on the health status of sex workers, including risk of exposure to HIV.<sup>1</sup> That study shows:

- Sex workers in Canada are at risk of violence (including assault, sexual assault, and murder) and at risk of HIV infection.
- The risks are heightened for sex workers engaged in street prostitution.
- **The criminal law, and its selective enforcement, encourage violence against sex workers, contribute to the continued poverty of many sex workers who have few options but to work on the street, and increase sex workers' risk of being exposed to HIV.**

Law reform is clearly needed to protect the health and human rights of sex workers.

## Foundations of Healthy Law Reform

We suggest that three foundations should guide law reform related to prostitution and sex workers:

1. International Human Rights Law
2. Canadian Charter of Rights and Freedoms
3. Evidence-Based Decision Making

### 1. International Human Rights Law

Human rights law is based on the principle that states have the primary responsibility for ensuring human rights guarantees are realized. States are obligated to respect, protect and fulfill the rights of all people who are within its territory. States should focus on respecting, protecting and fulfilling human rights of the most vulnerable people. Human rights law is intended not as a protection for those who already enjoy advantages by virtue of their socioeconomic, cultural or

religious position. It is primarily intended to enhance the dignity of those people within a given society who are marginalized by social institutions and thus are vulnerable to human rights abuses. Sex workers are evidently marginalized within Canadian society.

Canada is a signatory to numerous human rights conventions. Examples include the *Convention on the Elimination of All Forms of Discrimination Against Women*,<sup>2</sup> *International Covenant on Civil and Political Rights*,<sup>3</sup> and the *International Covenant on Economic, Social and Cultural Rights*.<sup>4</sup>

On the whole, international human rights instruments specific to prostitution and sex workers do not respect the rights and agency of women in prostitution.<sup>5</sup> The 1949 United Nations *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*<sup>6</sup> “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.”<sup>7</sup> Sex workers are conceived of as victims, regardless of whether or not, and to what extent, he or she has chosen to be involved in prostitution. Canada has not ratified this convention, and thus is not bound by its terms.

Numerous non-prostitution specific conventions to which Canada is a signatory offer sex workers the potential for greater human rights protection than existing prostitution-specific instruments. At the most fundamental level, sex workers are members of the human family and as such deserve to be treated with dignity and to enjoy the human rights guaranteed to all people. Canada is a signatory to both the ICCPR and the ICESCR. As a result 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.

## 2. Canadian Charter of Rights and Freedoms

The Supreme Court has considered the constitutionality of the existing Criminal Code provisions relating to prostitution in a number of cases -- *R v Downey*<sup>8</sup>; *R v Stagnitta*<sup>9</sup>, *R v Skinner*<sup>10</sup>, and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)*.<sup>11</sup> In all of these cases the Supreme Court has upheld the constitutionality of the impugned Criminal Code provision. Some challenges have been upheld on the basis of section 1 of the Charter. That section “saves” a prima facie violation of Charter rights where the section being challenged is prescribed by law and can be demonstrably justified in a free and democratic society.

But the evidentiary record before the Supreme Court in the above-noted Charter challenges has been incomplete. For example, with respect to the communicating section (section 213), the Court has considered at length the evidence of the nuisance caused by street solicitation. However, there was a marked lack of evidence before the Court concerning the enforcement of Criminal Code sections related to prostitution, the impact of those sections on street prostitution, the health and safety of sex workers, and the potential links between these things. At the time the Supreme Court heard those cases, that evidence was not available to the Court.

This evidence is relevant not only to the Charter section 1 justification, but also to the analysis of prima facie infringements of Charter rights. For example, evidence of the violence and other health and safety risks experienced by sex workers in Canada is highly relevant to a Charter section 7 analysis. This evidence would support the argument that sex workers' rights to life and security of the person (ie: Charter section 7 rights) are routinely infringed as a result of the existing Criminal Code provisions relating to prostitution.

The full report re-visits the decided Supreme Court cases in light of the new body of literature and evidence (both quantitative and qualitative) concerning the enforcement and impacts of section 210 to 213.

### 3. Evidence-Based Decision Making

The Canadian HIV/AIDS Legal Network strongly believes that public policy decisions should be made based on the best available evidence. In the context of the work of the Subcommittee and prostitution law reform, a commitment to evidence-based decision-making means:

- Valuing the experiences of sex workers and sex worker organizations. Their voice has been almost entirely absent from the public debate about issues that affect their health and human rights. Yet sex workers experience the ever-present threat of criminal prosecution, and can articulate how that threat and prosecution under the Criminal Code shape their work and their lives.
- Valuing the work, expertise and expert opinions of researchers and academics who have spent years studying sex work and conducting research in cooperation with sex workers. Many of whom have presented, or will present, evidence to the Subcommittee (eg: Professors Lowman, Shaver, Brock, Parent, Lewis, Maticka-Tyndale and Bruckert).
- Being wary of opinions that are not based on reliable, verifiable evidence or lived experience. Not all opinions are worthy of the same consideration in matters that relate to the health and human rights of groups of people who have been historically marginalized. Fundamental public policy decisions should not be made on the basis of narrow perspectives. Perspectives informed by prejudiced, stereotypical, or dogmatic beliefs, or paternalistic, moralistic, or demeaning attitudes should likewise be eschewed.

### **Recommendations to the Subcommittee**

Based on Canada's human rights obligations and the evidence of the harms caused by the Criminal Code provisions relating to prostitution, the Canadian HIV/AIDS Legal Network calls upon the Subcommittee to recommend that:

1. Parliament repeals the bawdy-house section of the Criminal Code (section 210 and 211).
2. Parliament repeals the communicating section of the Criminal Code (section 213).

3. Parliament repeals those subsections of the procuring section of the Criminal Code (section 212) that do not respect the rights of sex workers, or do not offer sex workers real protection from violence and exploitation.
  - ❖ Consult sex workers, and organizations of sex workers, about the particular subsections of section 212 that should be repealed.
4. The government initiates a process to determine which federal, provincial and municipal laws should apply to the organization and practice of prostitution.
5. The government ensures sufficient funding to allow sex workers to participate in future decision-making. In particular, sex workers must have a say in determining what laws should apply to prostitution and sex workers. The participation of sex workers is essential to ensuring that such laws protect their health and human rights.

This is a partial list of the Canadian HIV/AIDS Legal Network's recommendations. The full list will appear in our forthcoming report.

Thank you.

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## Notes

<sup>1</sup> Pivot Legal Society. *The Impact of Criminalization on the Health Status of Sex Workers*. June 2004. Unpublished.

<sup>2</sup> GA res.34/180, 34 UN GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981. Hereinafter CEDAW.

<sup>3</sup> UN GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171, *entered into force* 23 March 1976. Hereinafter ICCPR.

<sup>4</sup> UN GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966), 993 UNTS 3, *entered into force* 3 January 1976. Hereinafter ICESCR.

<sup>5</sup> J Csete, M Seshu. Still underground: searing for progress in realizing the human rights of women in prostitution. *HIV/AIDS Policy and Law Review* (2004); 9(3): 1, 8-13.

<sup>6</sup> 96 UNTS 271, *entered into force* 25 July 1951. Hereinafter CSTPEPO.

<sup>7</sup> J Csete, M Seshu. Still underground: searing for progress in realizing the human rights of women in prostitution. *HIV/AIDS Policy and Law Review* (2004); 9(3): 12.

<sup>8</sup> *R v Downey*, [1992] 2 SCR 10.

<sup>9</sup> *R v Stagnitta*, [1990] 1 SCR 1226.

<sup>10</sup> *R v Skinner*, [1990] 1 SCR 1235.

<sup>11</sup> *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123.