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

Thank you:

1. Organizers of 7th Annual Alberta Harm Reduction Conference
2. Lethbridge HIV Connection
3. Alberta Community Council on HIV/AIDS
4. Diane Nielson (Safeworks, Calgary) and Marliss Taylor (Streetworks, Edmonton)

Respecting Sex Workers' Voices, Experience & Expertise

In the Canadian discussion and debate about how to solve the so-called “problem” of prostitution (and in particular street-based prostitution), sex workers’ perspectives and experiences have *rarely* been taken into account. Too often sex workers’ views and knowledge have been filtered through assumptions (uncritically adopted in the debate and discussion) or filtered through the methodologies and questions upon which research has been based. As a result of the failure to meaningfully take into account sex workers’ perspectives and experiences, little attention has been paid to the human rights of sex workers or to violations of these rights.

So, I want to start off this morning with sex workers’ -- in their own words. Although the first voices are not from Canada, I think that you will agree that the message transcends borders:

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.

Porn and Liz of the Empower Foundation. Remarks delivered at the Closing Session of the XV International AIDS Conference in Bangkok, Thailand in 2004.

Moving closer to home, I want to read to you some passages from affidavits (sworn statements) given by sex workers in Vancouver's DTES:

Based on my own experience, my opinion on the communication law is that it is a way to placate those of us who work. Prostitution isn't illegal, they gave us a little, but they made it illegal to communicate in any form. How are you supposed to get a customer if you can't communicate? They gave us a little bit but hung us with it.

For example, a couple of years ago I was arrested for soliciting, and one of the things brought up was how I communicated. Supposedly, my breaking-the-law was by eye contact. He drove by, I looked and he pulled over. The law means I can't look at anybody. The justice system can twist everything you do or say to fit into that law for their benefit.

-35 year old woman, volunteer with PACE (Prostitution Alternative Counselling and Education

If I could work from my apartment, I would know who was coming into my home. I could take regular clients and know that I would be safe. On the street, the risk is very high, being in someone's vehicle. You can't be as selective of the clients.

On the street, I am more likely to contract a sexually transmitted disease. I am more likely to get raped or have a date that is not willing to use a condom.

-36 year old Aboriginal woman

I am 43 years old and have been working in the sex-trade for 7 years. I always worked in the Downtown Eastside. I became a sex-worker after I became a cocaine addict. I am HIV positive.

I always wondered whether legalizing prostitution would be a good idea. Before I was working I thought that prostitution should be illegal. Because of the experiences that I've had, I now believe that there shouldn't be a communication law or any laws around prostitution. I think that the laws drive people into hiding and into unsafe places and situations.

Prostitution & Public Policy: Foundations for Reform

The question of how we as a society regard prostitution and sex workers, and how the law treats prostitution and sex workers, is a question of public policy. A public policy question: What does that imply?

It implies a separation between church (ie: religion) and state (ie: government in all its guises). It implies a distinction between personal morality and public good. It implies a firm grounding in the fundamental principles we as a democratic society hold dear. And it implies reasonableness – policy decisions should be grounded in reason, rationality and what we know (rather than opinions formed out of or supplemented by partial knowledge).

These “implications” suggest three foundations should guide public policy debate and formulation:

1. evidence from credible research, from experts, including those people most affected;
2. Canada’s obligations under international human rights law; and
3. the *Canadian Charter of Rights and Freedoms* (“*Charter*”) – our domestic human rights covenant, our fundamental agreement between the people of Canada and the “state” in its many guises (police, bureaucrats, administrators, legislators).

In our report, **Sex, work, rights: reforming Canadian criminal laws on prostitution (2005)**, we recommend that the review and reform of the prostitution-related provisions of the *Criminal Code* should follow these three foundations.

Our report assesses the current criminal code prohibitions on prostitution-related activities using three foundations as a guide.

A little background: The 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. Those people were invited to provide feedback on the draft report.

The report focuses primarily on the criminalization of adult sex workers who choose to engage in prostitution. 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. To a lesser extent, we examined off-street prostitution, 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.

In the limited time I have, I cannot convey the report in its entirety. I will attempt as best I can to summarize our analysis of Canadian criminal law, based on each of the three foundations (evidence; international law, and the Charter). I will also provide a brief look at the experience in two countries that have recently reformed their prostitution laws – Sweden and New Zealand.

But first, I firmly believe that informed discussions concerning matters of public policy should start off from a common point. So, let us examine the legal status of prostitution under Canadian Criminal law.

Prostitution & the *Criminal Code*: Criminalization of Sex Workers' Lives

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. Under the “bawdy-house” offences:

- it is illegal for sex workers to use their residence, or to keep another premises for the purposes of engaging in prostitution;
- sex workers risk eviction if they are found guilty using their residence for prostitution;
- it is illegal in most circumstances to use hotels and hotel rooms for prostitution; and
- massage parlours or body-rub parlours where prostitution takes place are also illegal.

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 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.

While section 212 offers sex workers protection from exploitative situations, paradoxically it also criminalizes situations where a sex worker has chosen to enter into a professional relationship with someone for safety or economic reasons. Under section 212 it is illegal for a sex worker to:

- refer a client to another sex worker;
- allow other sex workers to use their residence to engage in prostitution;
- work with another sex worker on the same premises or in the same place; or
- to employ someone for protection and to ensure that clients pay for services rendered.
- And section 212 is frequently used to criminalize sex workers’ personal relationships.

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. 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.

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. The communicating section, enacted in 1985, 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.

Since it was enacted in 1995, upwards of 90% of charges and convictions related to prostitution have been brought under the communicating in public for the purposes of prostitution section.

Research has shown that the enforcement of the communicating section:

- displaces street-based prostitution from centrally located residential or commercial neighbourhoods to industrial or remote neighbourhoods where sex workers have few people to turn to for help if prospective clients or predators become aggressive or violent;

- results in more tense working conditions and fewer clients, which means that some sex workers may be less cautious about accepting potentially dangerous clients;
- means that sex workers have less time to negotiate their services and safer sex with potential clients; and
- means that some street-based sex workers change hours of work or the days they worked to avoid police.

Evidence of Harm: The Role of the Criminal Law

The evidence shows a complex relationship between 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 sex workers. This marginalization has a concrete dimension and predictable outcomes.

The *Criminal Code*, and its enforcement, often forces sex workers to work on the margins of society and in circumstances where they are vulnerable to violence, exploitation and other threats to their health and safety, including potential exposure to HIV.

Violence

Professor John Lowman reviewed statistical evidence of **violence** against sex workers, media reports of violence against sex workers, and the criminalization of activities related to prostitution in British Columbia. He found that the *Criminal Code*:

- 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.¹

And he is not the only one to arrive at these findings. I invite you to look at our report, and the detailed references contained in it, for a more complete picture.

Risk of Exposure HIV

Vancouver's Pivot Legal Society conducted an in-depth analysis of the impact of criminalization on the health status of sex workers, including exposure to HIV. The analysis, based on affidavits gathered from 91 sex workers from Vancouver's Downtown Eastside, found that the loss of control over working conditions occasioned by the criminal law exacerbated sex workers' potential exposure to HIV.

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

¹ J Lowman. Violence and the outlaw status of (street) prostitution in Canada. *Violence Against Women* 2000; 6(9): 987-1011.

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.

The sex workers who provided evidence for the Pivot study linked the criminalization of prostitution to the poverty many of them experience. They stated that police presence on or near strolls leads to fewer clients, increasing the competition among sex workers which can at times result in a “price war” as sex workers offer lower prices in order to get jobs and creates additional economic pressure to risk sex without a condom. Sex workers also gave evidence that their ability to use condoms is limited when they face challenges of extreme poverty and risk of violence.

International Human Rights, Sex Workers & HIV/AIDS

Efforts to improve the health and safety of sex workers must be based, first and foremost, on a recognition of the individual agency, dignity and worth of sex workers. The recognition of individual agency is central to what it means to be human and to human development. It underpins international human rights guarantees, as expressed in the preamble to the *Universal Declaration of Human Rights*.

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.

I want to focus not on the specific wording of international human rights law, but on how the guarantees have been interpreted and applied in the context of HIV/AIDS and sex work.

The UN's *International Guidelines on HIV/AIDS and Human Rights* suggest that for "adult sex work that involves no victimization," it is useful to review criminal law with the aim of decriminalizing sex work as much as possible. In other words, criminal laws that raise the risk of HIV/AIDS or that otherwise contribute, directly or indirectly, to threats to the health and safety of sex workers should be repealed.

The Inter-Parliamentary Union (IPU), which represents legislators from all over the world, has collaborated with UNAIDS to produce the *Handbook for*

Legislators on HIV/AIDS, Law and Human Rights. It provides examples of best practices for legislation in relation to prostitution, and calls for the review of criminal laws relating to prostitution with a view to decriminalization.

The *Handbook* recognizes that criminal regulation impedes the provision of HIV/AIDS prevention and care by driving people engaged in prostitution underground, and suggests that positive public health outcomes are more likely to be achieved where prostitution is treated as a personal service industry. 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.

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 Canadian Charter of Rights & Freedoms: Time for Serious Consideration

Unfortunately, sex workers' *Charter* rights have not been given serious consideration or support by Canadian courts. The Supreme Court has upheld the constitutionality of certain of the *Criminal Code* provisions relating to prostitution in four *Charter* cases heard in 1988 and 1991 (*Prostitution Reference*, *R v Stagnitta*, *R v Skinner*, and *R v Downey*). However, there are good reasons to revisit these decisions.

Five *Charter* rights are especially relevant when considering the effect of the prostitution-related offences in the *Criminal Code* on the rights of sex workers in Canada:

- freedom of expression.
- freedom of association.
- “life, liberty and security of the person,” except where the violation is “in accordance with the principles of fundamental justice.”
- the right to be presumed innocent in criminal matters
- equality

Let us examine briefly one of those rights – the right to freedom of association. Canadian courts have sketched out the boundaries of the *Charter* guarantee of freedom of association. In *Black v Law Society of Alberta* (1986) – a case about restrictions on how lawyers could organize themselves for business purposes -- the Alberta Court of Appeal decided that the *Charter* protects the right to associate in order to earn a livelihood.

More recently, the case of *Dunmore v Ontario (Attorney General)* (2001) – a case about farm worker ability to unionize -- the Supreme Court of Canada decided that the key question in determining whether the constitutional right to freedom of association has been breached was: Has the state precluded an activity because of its associational nature, thereby discouraging the collective pursuit of common goals?

The *Black* and *Dunmore* cases are obviously relevant to the situation of sex workers. Remembering that prostitution is lawful in Canada, let us return to the question of whether the Criminal Code infringes sex workers' right to freedom of association:

All sex workers must “associate” with clients – it is the essence of the business of prostitution. However, the Criminal Code makes it illegal for sex workers to associate with potential clients in “public” and in many places that are “private.”

Some sex workers work “in association” for economic or safety reasons. But the Criminal Code makes it illegal for sex workers to “associate” with other sex workers, managers or business contacts for the purposes of prostitution. The associations required for organized prostitution (Bawdy-houses, body rub parlours, escort services, drivers, body-guards, referrals, working as a team) are all illegal.

The conclusion – the Criminal Code infringes sex workers' right to freedom of association.

In the report, we provide a detailed legal analysis – looking at the impact of the criminal code on the practice of prostitution and the lives of sex workers. And assessing whether the effect of the criminal code breach sex workers' Charter rights. We believe that there is a strong argument that the prostitution-related offences in the *Criminal Code* violate each of the *Charter* rights I listed a minute ago.

Recommendations for Law Reform: The Criminal Law and Beyond

The *Charter* is the Supreme Law of Canada. Any law that is in conflict with the *Charter*, which infringes a person's *Charter rights*, must be struck down or amended or ignored. This brings me to the principal recommendations in the report:

Parliament should repeal the prostitution-related provisions of the Criminal Code. Essentially, we are recommending the decriminalization of prostitution.

Decriminalization is a necessary first step to improving the health and safety of sex workers. However, it is clear that 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*.

This is why, in the report, we put forth recommendation for law reform beyond the criminal law. Foremost among these recommendations is the call for sex workers to be meaningfully involved in and consulted about laws, policies and programs that apply to them. We are not the first to make this recommendation. 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.

The report makes 10 recommendations in all. I invite you to read them.

Sweden & New Zealand: Two Experiences of Criminal Law Reform

Sweden and New Zealand have traveled in diametrically opposed directions in recent years in their legislative responses to prostitution. Sweden has chosen the path of criminalization; New Zealand the path of decriminalization.

Prior to the passage of the *Prostitution Reform Act, 2003*, prostitution was not illegal *per se* in New Zealand, though many of the activities surrounding it were. This is similar to the situation in many countries, including Canada.

The *Prostitution Reform Act, 2003* received royal assent in June 2003. The Act's stated purpose is to decriminalize certain activities related to 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; and
- prohibits the use in prostitution of persons under 18 years of age.

The Act permits and regulates the business of prostitution, and distinguishes between “brothels” and “small owner-operated brothels” in which not more than four sex workers can work and each maintains control over his or her earnings.

The *Prostitution Reform Act, 2003* contains explicit provisions intended to minimize the transmission of sexually transmitted infections and otherwise protect the health of sex workers and clients. The Department of Labour has published *A Guide to Occupational Health and Safety in the New Zealand Sex Industry*. Finally, the general *Health and Safety in Employment Act 1992* applies to sex workers.

In 1998 the Swedish parliament passed a law reform measure entitled “The Protection of Women.” The official government position in Sweden is that the purchase of sex constitutes violence by men against women.

The aim of the law was to eliminate street prostitution and prevent new sex workers from entering prostitution. The law criminalizes the client who purchases sexual services, but not the sex worker.

In October 2004 the Swedish Ministry of Justice and the Police released a report the experience with the law criminalizing the purchase of sexual services. While the report provides some evidence of a reduction in street prostitution, it states that it is impossible to say whether this was due to the legislation or other factors (e.g., mobile phones, the internet). Overall, the report indicates that since the law came into effect:

- there are fewer clients and a larger proportion are dangerous;
- sex workers have less time to assess clients;
- the prices for sexual services have fallen;
- more clients are prepared to pay for unprotected sex; and

- sex workers feel that their risk of encountering violence while working has increased.

These effects have been experienced most acutely by the most vulnerable women – sex workers who work on the streets, who have psychiatric problems, who are homeless or who are immigrants to Sweden.

In its conception and as written, the New Zealand *Prostitution Reform Act, 2003* is much more respectful of the autonomy, dignity and human rights of sex workers than the Swedish law. The New Zealand model offers a better example of a reform that respects, protects and fulfils the human rights of sex workers and holds more promise for better protecting the health of sex workers.

The New Zealand law should be seriously considered by countries committed to improving the health and safety of sex workers. It should be considered seriously by those people in Canada who are serious about protecting the human right of sex workers in our communities.

Conclusion: Sex work and Harm Reduction

Let me suggest, in closing, that harm reduction in the context of prostitution means two things: One, repealing the prostitution-related provisions of the criminal code – because they result in harms to sex workers. Two, making sure that police enforce the non-prostitution-related provisions of Criminal Code against people who financially exploit or otherwise harm sex workers.

I would like finish by returning to the words of a woman vastly more knowledgeable about sex work than me. She was a 53 year old woman who did sex work for over 30 years in a number of different countries – and now lives in Vancouver's DTES.

If I could have changed anything over the 30 years of my work, I would have provided all the women with a safe place to work. That is the most important aspect. Also, I would not have laws to embarrass the Johns, they are human too and they and their families should not suffer for their indiscretions (as long as nobody got hurt). Men who are bad dates are of course a different story. These men should be charged with assault, rape or kidnapping; laws available under the Criminal Code.

Thank you.
