

## Women & HIV

This is one in a series of four info sheets on the human rights of women living with or vulnerable to HIV in Canada.

1. Women in Prison, HIV and Hepatitis C
2. Women and the Criminalization of HIV Non-Disclosure
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# Women, Sex Work and HIV

*“Where are our rights, our human rights? You’re allowed to talk. Even if the person is doing prostitution. I think it’s their own rights. It’s not anyone else’s business.”*

— Canadian woman in sex work

### Women and sex work: a Canadian snapshot<sup>1</sup>

In Canada, the exchange of sexual services for money or other valuables is legal. However, it is virtually impossible for those working in the sex industry to engage in it without running afoul of the criminal law, because prostitution-related provisions in the *Criminal Code* render activities related to sex work illegal in all but the narrowest circumstances.<sup>2</sup> This endangers the health and safety of sex workers because most measures that could be taken to increase their personal security are against the law. Sex workers may be forced to make decisions that render them unsafe in order to comply with the law or to reduce their risk of arrest, as well as that of their clients and managers. It also compromises the ability of sex workers to report violence against them.

#### Section 210

Under Section 210 of the *Criminal Code*, it is illegal to “keep,” be found in, or knowingly be an owner, landlord, lessor, tenant, occupier, agent or otherwise have charge or control of a brothel or “common bawdy-house,” which is defined in Section 197 as “a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency.” This includes any defined space, public or private, enclosed or uncovered,

used permanently or temporarily, which a person charged need not have exclusive right to use, and in which sexual intercourse need not necessarily occur.<sup>3</sup> Section 211 of the *Criminal Code* further outlaws knowingly transporting or directing a person to a common bawdy-house.

These provisions mean a sex worker who is working from her own home can be convicted of being “found in” a common bawdy-house, and where there are two or more sex workers working together under one roof, the sex worker with her name on the lease will likely be charged with “keeping” a common bawdy-house. These provisions have also been used to arrest owners, managers and support staff of brothels. In effect, Section 210 precludes the establishment of facilities where sex workers can bring their clients, including indoor venues where street-based sex workers can provide services in a clean and supportive space with effective security measures in place. A person found guilty of keeping a common bawdy-house can be imprisoned for up to two years. A person found guilty of being found in, or transporting or directing a person to, a bawdy-house can be sentenced to a maximum fine of \$2000, six months’ imprisonment, or both.

If a person is convicted of keeping a common bawdy-house and she does not own the premises, notice may be served on the owner, landlord or lessor of the

premises, who must take reasonable steps to terminate the person's tenancy or right of occupation or face a charge of keeping a common-bawdy house if the person re-offends.

### Section 212

Section 212 of the *Criminal Code* prohibits a person from "procuring" a person to engage in prostitution. It also prohibits a person from "living on the avails" (i.e., the earnings) of a sex worker. Specifically, Section 212 makes it illegal to:

- induce a person to enter into, or engage in, sex work, whether through enticement or exploitation (economic or otherwise);
- conceal a person in a common bawdy-house or direct, take or induce a person to frequent a common bawdy-house; and
- live wholly or in part on the avails of prostitution.

Courts have interpreted the offence of living on the avails as only criminalizing "parasitic" relationships — that is, relationships between sex workers and people they are not legally or morally obliged to support. Individuals may be prosecuted for this offence even in the absence of evidence of coercion or control over a sex worker. For example, escort agency owners have been convicted of this offence even where the court has recognized a supportive relationship between the owner and sex workers. Evidence that a person lives with or is habitually in the company of a sex worker, or lives in a bawdy-house, is also considered proof that the person is living on the avails of prostitution, unless there is evidence to the contrary.

Offences related to procuring and living on the avails of prostitution each carry a maximum penalty of 10 years in prison. Section 212 also includes separate subsections stipulating lengthier minimum and maximum sentences for offences related to prostitution involving a person under the age of 18.<sup>4</sup>

### Section 213

Section 213 of the *Criminal Code* outlaws sex workers and clients from communicating in a public place for the purpose of prostitution, including by stopping, attempting to stop or impeding traffic. "Public place" is defined broadly to include any place to which the public has a right of access or that is open to public view. This

provision places a great deal of power in the hands of police to arrest sex workers and their clients, or threaten them with arrest. A person found guilty under this section may be fined up to \$2000, imprisoned for six months, or both. For sex workers and clients living in poverty, a fine may be tantamount to a jail sentence if they can be imprisoned for non-payment.

The vast majority of *Criminal Code* charges for prostitution-related offences are laid against street-based workers and their clients. Street-based sex workers, who work on the street for a range of reasons (including in some cases limited options arising from factors such as poverty, drug dependency, homelessness or inadequate housing, and mental and physical illness), are disproportionately criminalized as a result. Police repression of street-based sex workers and their clients also displaces them to isolated areas and cuts sex workers off from health and harm reduction services. As the section below describes, such criminalization is also linked to significantly elevated rates of violence against street-based sex workers.

***The Criminal Code forces street-based sex workers to work in greater isolation, rendering them more vulnerable to violence.***

### Violence against sex workers

To avoid arrest, sex workers often work in situations that limit the control they exercise over their working conditions, increasing the health and safety risks. For example, evidence shows the communicating provision in the *Criminal Code* forces street-based sex workers to work in greater isolation. This includes moving out of commercial areas (where there are businesses open late at night) into industrial areas, and by working alone in order to avoid attracting police attention, rendering them more vulnerable to violence. After the communicating provision was passed in 1985, sex workers from across the country reported being forced to adopt riskier operating styles and feeling less safe than prior to the

law's passage. In particular, there was a large increase in British Columbia of violence against and murders of sex workers and in Montréal, sex workers reported working in more remote areas with a diminished number of customers, accompanied by an increase in violence.<sup>5</sup>

Criminalization also institutionalizes an adversarial relationship between sex workers and police and impedes sex workers' ability to report violence directed against them. This creates a climate of impunity which fosters and fuels further violence. Statistics Canada has reported high levels of violence experienced by women working in street-based prostitution, yet resolution rates of violence towards sex workers are incredibly low.<sup>6</sup> For a sex worker, reporting a violent experience may mean not only incriminating herself, but her employer, colleagues and clients, leading to a loss of work and income. Reporting a violent incident may also mean police subsequently harass and target her and the men with whom she is in personal relationships for arrest, because they assume that those men are her clients.

Correspondingly, there are reports of police abuse of sex workers, particularly street-based, Aboriginal and transgender sex workers, in the form of harassment, verbal abuse, physical assaults, excessive force, arbitrary detention, sexual misconduct, sexual assault and the confiscation and destruction of property, including harm reduction and safer sex materials such as condoms. Where there is a pattern of negative encounters with the police, sex workers are highly unlikely to turn to them for help. These disincentives to reporting mean sex workers often have little recourse for violence, including in contexts outside of work (e.g., domestic violence).

On the whole, the criminalization of activities related to prostitution, abuses committed by police against sex workers, stigma against sex workers, and the accompanying perception that sex workers are not credible witnesses have meant sex workers have not had equal access to justice in the form of police protection or the prosecution of crimes committed against them. This effect is especially acute for racialized and Aboriginal sex workers, whose access to justice is already compromised due to systemic racism in the judiciary. In particular, the legacy of colonization and dispossession of many Aboriginal people in Canada has resulted in conditions that lead to over-policing and incarceration of, as well as a documented pattern of police non-responsiveness to, Aboriginal sex workers.

## Facts and figures: HIV risks faced by sex workers

- **There is no epidemiological evidence in Canada to show that transmission of HIV from sex workers to their clients regularly takes place.** In fact, there is research to suggest that sex workers tend to be better informed than the general population about modes of HIV transmission and ways to prevent the transmission of HIV and other sexually transmitted infections (STIs).
- Despite research indicating that many sex workers take precautions to reduce their risk of contracting STIs, **stigma, discrimination and the criminalization of sex work hinder sex workers' access to essential health services and create barriers to HIV testing, sexual health education and HIV-related treatment, care and support.** Sex workers may fear that disclosing their occupation to health and social service workers could trigger a report to the police or to child protection authorities. These barriers have a particularly serious effect on sex workers who struggle with intersecting forms of disadvantage, are likely to have the greatest need for services, and already face barriers to accessing them.
- Court- or police-imposed "red zone" orders either on arrest or as a condition of sex workers' probation prohibit them from certain neighbourhoods, particularly urban areas where sex workers may live and work and many crucial health and social services exist (e.g., food banks, emergency shelters, drop-ins, methadone clinics, health clinics and needle and syringe programs). Because contravening a red zone order means its recipient risks re-arrest, **sex workers may be forced to choose between relinquishing their housing and access to health and social services or risking incarceration for breaching the conditions of the red zone order, both of which have negative repercussions for sex workers' health and their vulnerability to HIV.**
- **When criminalization leads to the incarceration of sex workers living with HIV, it often involves a disruption of their HIV treatment.** Sex workers are also put at risk of contracting HIV due to elevated rates of HIV in prisons, and inadequate access to harm reduction materials such as condoms and sterile injection equipment behind bars.<sup>7</sup>

## Sex work and the law

Sex workers are entitled to human rights under the *Canadian Charter of Rights and Freedoms* (Charter) and international human rights law. Recognition of such rights by policy- and decision-makers is essential to realizing the human dignity of sex workers.

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

- Section 2(b) guarantees everyone freedom of expression, which the prohibition on communicating for the purpose of prostitution (Section 213) violates;
- Section 2(d) guarantees everyone freedom of association, but sex workers who “associate” with clients in public or who choose to work with others for economic or safety reasons are prohibited from doing so by prohibitions on bawdy-houses (section 210), procuring and living on the avails of prostitution (section 212) and communicating (section 213);
- Section 7 protects everyone from violations of “life, liberty and security of the person,” which encompasses one’s physical and psychological integrity. In light of evidence linking the criminal law to the violence perpetrated on many sex workers, sex workers’ section 7 rights are violated by the prostitution-related offences in the *Criminal Code*; and
- Section 15 guarantees everyone equality before and under the law, and equal protection and benefit of the law, yet the criminal law singles out sex workers for adverse treatment that exacerbates and perpetuates the disadvantages they otherwise face and its impact is disproportionately felt by women and others who fall into the categories of disadvantage represented by the enumerated or analogous grounds under Section 15.

Three current and former sex workers in Ontario recently sought an order to strike down the *Criminal Code* provisions dealing with common bawdy-houses, living on the avails of prostitution and communicating for the purpose of prostitution. They claimed that those provisions were unconstitutional because they infringed upon their constitutional rights to free expression and to life, liberty and security of the person. In 2010, an Ontario trial court agreed, and found that the provisions had the effect of forcing sex workers to choose between their constitutional rights to liberty (by virtue of the threat of incarceration upon conviction) and personal security. The Court also found the communicating provision had the effect of increasing the risk of violence faced by sex workers. Therefore, the provisions were ordered to be struck down (*Bedford v. Canada*, 2010 ONSC 4264).

In 2012, Ontario’s appellate court unanimously recognized that those three provisions of the *Criminal Code* have serious and negative impacts on the security and liberty rights of sex workers by reducing their ability to take steps to conduct their work more safely and make more informed decisions to protect themselves from harm (*Canada (Attorney General) v. Bedford*, 2012 ONCA 186). It struck down the restriction on common bawdy-houses and revised the prohibition against living on the avails of prostitution by limiting criminalization to situations where there are demonstrated “circumstances of exploitation.” However, three of five justices upheld the prohibition on communicating, concluding that it legitimately works to reduce nuisance and harm to communities. By upholding this prohibition, the law effectively keeps it illegal to engage in outdoor sex work. While the decision is only applicable in Ontario, the case has been appealed to Canada’s Supreme Court.

***Female sex workers are vulnerable to the discrimination and social and economic marginalization that all women face, and face further marginalization that comes from their status as sex workers.***



Under international law, governments must not violate people's human rights, and governments must also protect against human rights violations by other people. Like the Charter, international human rights law protects sex workers' freedom of expression, freedom of association, rights to life, liberty and security of the person and right to equality. But international law goes further. As a party to the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), Canada has an obligation to take steps to ensure sex workers enjoy the rights to:

- work, including the right to freely choose a job, and to enjoy just, favourable, healthy and safe conditions of work;
- social security, including social insurance;
- special protection for mothers during a reasonable period before and after childbirth, including paid leave or leave with adequate social security;
- an adequate standard of living for themselves and their families; and
- the highest attainable standard of physical and mental health.

Specific to women in sex work, Canada is legally obliged to take the following measures:

- refrain from any act or practice of discrimination against women and ensure that public authorities and institutions act in conformity with this obligation;
- modify or abolish laws, regulations, customs and practices which discriminate against women; and
- modify social and cultural patterns of conduct of men and women, with a view to eliminating prejudices and practices that are based on the idea of the inferiority or the superiority of either sex, or on stereotyped roles for men and women.

In particular, Article 6 of CEDAW requires States to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.” In clarifying this provision, the CEDAW Committee has stated that sex workers “are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence” (General Recommendation 19, 1992).

In other words, female sex workers are vulnerable to the discrimination and social and economic marginalization that all women face, and face further marginalization that comes from their status as sex workers. CEDAW is not based on the premise that prostitution should be eradicated, but on protecting all women, including sex workers (who face greater prejudice and abuse when they turn to police and the courts for redress), from discrimination, including violence.

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 UN's *International Guidelines on HIV/AIDS and Human Rights* recommend that for “adult sex work that involves no victimization,” criminal law should be reviewed with the aim of decriminalizing sex work (Guideline 4 (para. 29c)). Correspondingly, in their *Handbook for Legislators on HIV/AIDS, Law and Human Rights*, UNAIDS and the Inter-Parliamentary Union, which represents legislators from all over the world, recognize that criminal regulation of prostitution impedes the provision of HIV prevention and care by driving sex workers underground and calls for the review of those laws with a view towards decriminalization (pp. 56–59).

**(Facts and figures, cont.)**

- A prohibition against bawdy-houses (Section 210) penalizes sex workers who work from their own home and precludes the establishment of secure facilities where sex workers can bring their clients. **Eviction, or the constant threat of it, leads to sex workers' precarious and unstable housing, which renders them more vulnerable to abuse, violence and HIV treatment disruptions. The threat of prosecution also deters those working in bawdy-houses from making large quantities of condoms, other safer sex materials or violence prevention resources available,** for fear of tipping off police about what they do.
- The prohibition on living on the avails of prostitution (Section 212) criminalizes sex workers who work together, people sex workers may hire, and in some cases, sex workers' voluntary personal or professional relationships. This provision **forces sex workers to work in isolation, alienates them from their networks of support, and prevents them from taking measures to ensure their safety (which, in turn, facilitates the practice of safer sex), such as hiring bodyguards or drivers.**
- Penalizing communication in public for the purpose of prostitution (Section 213) forces sex workers to hastily conclude a transaction for fear of police intervention and leaves them with **inadequate time to screen a potential client and negotiate the terms of a transaction, including condom use.** This provision has also been shown to **displace sex workers to more secluded areas to avoid police detection, which further renders sex workers more vulnerable to violence and diminishes their ability to practise safer sex.** Because they are more visible, street-based sex workers are also more likely than their indoor counterparts to have their **condoms confiscated by police,** who may use those condoms as evidence of criminal activity.

It is important to recognize that HIV transmission is related to unprotected sex, not the exchange of sex for money. By unfairly characterizing sex workers as vectors of disease, they have become scapegoats in the HIV epidemic. Increasingly, however, evidence shows that it is the criminalization of sex work, and the accompanying lack of respect for sex workers' human rights, that forces sex workers to work in circumstances that diminish their control over their working conditions.

This leaves them vulnerable to abuse by aggressors as well as to other risks to their health and safety, and without the protective benefit of labour or health standards. Reforming prostitution laws in a way that respects, protects and fulfills sex workers' human rights is a necessary prerequisite for improving prevailing conditions so that sex workers can work free from violence and other health and safety risks, including HIV infection.

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**Recommendations for policy and law reform**

- Research shows that police, prosecutors and judges are often unwilling to take seriously the complaints of sex workers who seek help and do not see them as credible witnesses. A sex worker's complaint can also result in her or her managers' being criminalized instead of focusing on the aggression. This leads to a climate of impunity that renders sex workers vulnerable to violence, robbery and other abuse. **Sex workers must have equal access to police protection and the justice system.**
- **Repeal the following offences in the *Criminal Code*:** Section 213 that makes it an offence to communicate in a public place for the purpose of prostitution; Sections 210 and 211 concerning common bawdy-houses; Sections 212(1)(b), (c), (e) and (f) or the procuring sections that relate to bawdy-houses; Section 212(1)(j) prohibiting living on the avails of adult prostitution; and Section 212(3), the reverse-onus subsection as it applies to living on the avails of adult prostitution. **Parliament should consult sex workers, and organizations whose staff, directors or membership are made up of sex workers or former sex workers,** concerning reform of the subsections of the *Criminal Code* that deal with procuring and exploitation (subsections 212(1)(a), (d), (g), (h) and (i).

- Reform in other areas of law and policy should conform to internationally recognized best practices. **Sex workers' rights should be protected under employment standards and occupational health and safety legislation;** sex workers should be given the option of being classified as employees rather than independent contractors so they can contribute to, and obtain, **state social welfare and industrial benefits; HIV testing and medical certificates should not be mandatory for sex workers or clients;** and controls on organized prostitution should be analogous to other legal business enterprises in terms of zoning, licence conditions and fees, and health requirements.
- **Involve sex workers in law reform,** in order to take account of their views about how to minimize the potential for harm. Federal, provincial/territorial and municipal governments must commit to the meaningful participation of sex workers in future decision-making about law and policy, including by making funding available to support such participation. In particular, sex workers must have a say in determining what laws and policies should apply to prostitution and sex workers.

### A note on terminology

In this info sheet, we use the terms “sex work” and “sex worker” to focus attention on the fact that sex work is work, and out of respect for the dignity of people involved in sex work. However, we sometimes also use the term “prostitution” to refer to the in-person exchange of sexual services by one person for payment by another, as this is the legal term used in the provisions of the Canadian *Criminal Code* that are referenced here.

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## References

<sup>1</sup> This info sheet focuses on adult women, including transgender women, in sex work, because it is one in a series of four info sheets examining the relationship between women and HIV in various contexts. However, male sex workers are also criminalized by prostitution-related offences and subject to stigma and many of the same abuses female sex workers experience, with negative repercussions for their sexual health. Note that this info sheet also does not discuss child prostitution or sex trafficking, for which there are a wide range of resources.

<sup>2</sup> At the time of writing, Ontario’s Court of Appeal had struck down the restriction on common bawdy-houses and revised the prohibition against living on the avails of prostitution in *Canada (Attorney General) v. Bedford*, 2012 ONCA 186. While this decision only applies in Ontario, the case is expected to be appealed to the Supreme Court of Canada, which has the authority to change the laws concerning prostitution for the entire country.

<sup>3</sup> See s. 197(1) of the *Criminal Code* and, for example, in *Marceau v. R.*, 2010 QCCA 1155 (Quebec Court of Appeal), where a majority of the Court held that women who performed private nude dances in a bar, which involved customers touching or caressing their breasts and buttocks, constituted “prostitution” for the purposes of the bawdy-house provision and convicted those dancers, as well as a doorman and a customer, of being found in a common bawdy-house.

<sup>4</sup> Although sex workers’ organizations in Canada support decriminalization of the laws surrounding prostitution, they are not contesting the validity of these subsections.

<sup>5</sup> E. N. Larsen, “The Limits of the Law: A Critical Examination of Prostitution Control in Three Canadian Cities,” *Hybrid: Journal of Law and Social Change* 3(1) (1996): 19–42; Federal/Provincial Territorial Working Group on Prostitution, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution Related Activities*, 1998; J. Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada,” *Violence Against Women* 6(9) (2000): 987–1011 at 1003; and *Étude sur les violences envers les prostituées à Montréal*, Rapport de recherche soumis au ministère fédéral de la justice, Juin 1994.

<sup>6</sup> D. Duchesne, “Street prostitution in Canada,” *Juristat Service Bulletin* 17(2) (1997), Canadian Centre for Justice Statistics.

<sup>7</sup> See “Women in Prison, HIV and Hepatitis C,” part of this series of four info sheets on the human rights of women living with or vulnerable to HIV in Canada.

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