

Canadian Alliance for
Sex Work Law Reform

Alliance Canadienne pour
la Réforme des Lois sur
le Travail du Sexe

PIVOT
equality lifts everyone

***Joint Submission for Canada's Review before the UN Committee on the
Elimination of All Forms of Discrimination Against Women, 65th Session***

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The Canadian Alliance for Sex Work Law Reform

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The Canadian Alliance for Sex Work Law Reform is composed of 29 sex worker rights and allied groups and individuals in 17 cities across Canada: Calgary, Edmonton, Halifax, Hamilton, London, Longueuil, Montreal, Ottawa, Gatineau, Kingston, Québec, Sault Ste. Marie, St. John's, Toronto, Vancouver, Victoria, and Winnipeg. Members work together to fight for sex work law reform, sex workers' rights, and community well-being.

Its member groups include:

Angel's Angels (Hamilton)
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BC Coalition of Experiential Communities (Vancouver)
Butterfly Asian and Migrant Sex Workers Network (Toronto)
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Pivot Legal Society is a leading Canadian human rights organization that uses the law to address the root causes of poverty and social exclusion in Canada. Pivot's award winning work includes challenging laws and policies that force people to the margins of society and keep them there. Since 2002 Pivot has won major victories for sex workers' rights, police accountability, affordable housing, and health and drug policy.

This submission is endorsed by Action Canada for Sexual Health & Rights, a progressive, pro-choice charitable organization committed to advancing and upholding sexual and reproductive health and rights in Canada and globally.



Action Canada
for Sexual Health & Rights

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Overview

The Canadian Alliance for Sex Work Law Reform and Pivot Legal Society make this submission to supplement information received by the Committee in the Government of Canada's eighth and ninth periodic reports specifically on the issue of sex work and the issue of trafficking. We write also to respond to the following questions posed by the Committee at item 9 in the List of Issues:

Trafficking and exploitation of prostitution

9. It is indicated in the combined reports that more than \$1.3 million was allocated to support projects addressing human trafficking at the federal and provincial levels (paras. 84, 114 and 115). Furthermore, reference is made to the adoption of the Protection of Communities and Exploited Persons Act (2014), which reflects a fundamental paradigm shift towards the treatment of prostitution as a form of sexual exploitation and violence that has a disproportionate and negative impact on women and children, especially aboriginal women and girls, as well as the adoption of programmes to support grass-roots organizations that have a proven record of helping prostitutes to leave the sex trade (para. 68). Please indicate the human, technical and financial resources allocated for the implementation of those initiatives. Please also indicate whether any coordination, monitoring and assessment mechanisms have been established for the implementation of the National Action Plan to Combat Human Trafficking at the federal, provincial and territorial levels. Please provide information on the number of investigations, prosecutions and convictions and the type of sanctions imposed for trafficking and exploitation of prostitution, especially of aboriginal women and girls, under Bill C-49, an Act to amend the Criminal Code (trafficking in persons) (2005); Bill C-268, an Act to amend the Criminal Code (minimum sentence for to law enforcement officials and prosecutors with a view to protecting all women and girl victims of trafficking and prostitution and improving the enforcement of existing legislation.

The Government's report misconstrues the negative impacts that law and policy are having for those in Canada who sell or trade sex. Criminalization of sex work and anti-trafficking enforcement efforts continue to put self-identified women from the most marginalized groups (especially poor racialized women, including Indigenous and im/migrant women) in danger.

The *Protection of Communities and Exploited Persons Act* (PCEPA) is a regressive, unconstitutional law that serves to undermine rather than promote the safety and rights of sex workers, particularly those who are disadvantaged by pre-existing socio-economic inequities. It should be repealed along with other laws criminalizing sex work as a matter of urgency. Criminalization of any part of sex work -- including sex workers, clients, and third parties -- has significant and grave consequences on sex workers themselves that duplicate many of those demonstrated in the 2013 Supreme Court constitutional challenge.

The National Action Plan to Combat Human Trafficking is ideologically driven and not based in evidence. Claims that significant numbers of im/migrant or Aboriginal/Indigenous women are being trafficked internally or across national borders into situations of sexual exploitation are not supported by data. The reality is that most women who engage in sex work do it of their own volition as a means of earning income, despite the constrained options that some have. Consequently, enforcement to eliminate "trafficking" to date has resulted in relatively few trafficking arrests and fewer prosecutions, but has been actively harmful to those engaged in sex work.

Immigration restrictions prohibiting women from working in legal establishments offering sensual services, such as strip clubs, massage parlours, and escort services infantilize immigrants and treat them as incapable of making their own life decisions, in comparison to Canadian women. They are discriminatory and should be removed.

Rights Violations under CEDAW Articles

Canada's laws and efforts by government to police sex work, in the name of reducing sexual exploitation and human trafficking, have resulted in violations of women's rights under the following CEDAW Articles:

Article 5

Continued criminalization of sex work reinforces two conflicting but widely held stereotypes of women-identified sex workers: as hapless victims lacking agency and as deviants subverting the mores of traditional hetero-normative monogamy. The stigma surrounding sex work distorts the way that law and policy-makers see sex workers. As a result, sex workers are not treated as adults capable of consenting to (and refusing) sex. This has serious implications for women's autonomy, as well as their experiences accessing criminal law protections, particularly as complainants in cases of sexual assault.

Article 6

Criminalization of sex work, including clients and third parties, increases sex workers' susceptibility to violence by alienating sex workers from protective mechanisms, including law enforcement, as a result of continuously attempting to avoid conflict with the criminal law. The conflation of sex work and trafficking has led to law enforcement targeting of women working in situations that are not exploitative and made it more difficult for courts to cognize actual trafficking. This focus on non-exploitative workplaces is reflected in the relatively low number of trafficking convictions, including in exploitative labour.

Article 11

The denial of sex work as a form of employment and income generation prevents sex workers from associating to achieve common goals of safety and economic empowerment. The criminalization of commercial sex work enterprises such as massage parlours and microbrothels and third-party activities leaves sex workers without access to labour protections such as occupational health and safety or employment standards, and no mechanisms for redress in cases of unfair or discriminatory practices, unsafe work conditions, or workplace injuries.

Article 12

The criminal provisions against communicating for the purpose of purchasing sexual services in any context interfere with the negotiation of safer sex practices. The criminalization of communicating for the purposes of selling sex in certain outdoor settings exacerbates this challenge for outdoor workers. Provisions that criminalize third parties isolate sex workers, including from each other.

Article 15

Criminalization of sex work alienates sex workers from police, dissuading them from accessing the justice system when they are victims of crimes. As a result, sex workers in a wide variety of circumstances do not benefit from the criminal law protections afforded to others in Canada, including in cases of theft and robbery. Additionally, the criminalization of sex workers' clients means that sex workers have no civil law recourse to enforce contracts when clients renege on agreements by refusing to pay.

General Recommendation No. 19 on Violence Against Women

Street-based and migrant indoor sex workers continue to experience sexual and physical violence at elevated rates. Structural factors such as poverty, Indigeneity and the ongoing effects of colonization, and immigration status make these sex workers less able to escape violence. Stigma and victim blaming by law enforcement render women doing sex work more vulnerable to predators posing as clients.

The Harms of Criminalizing Sex Work: The Protection of Communities and Exploited Persons Act

The Government of Canada's report states:

68. Recognizing the significant harms that flow from prostitution, the Government of Canada announced new legislative and programmatic measures in June 2014. The *Protection of Communities and Exploited Persons Act*, adopted in 2014, reflects a fundamental paradigm shift toward the treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and children, including Aboriginal women and girls.

PCEPA Reproduces Previous Unconstitutional Laws and Violates Sex Workers' Rights

Sex workers in Canada face significant risks to their safety, health, and human rights as a result of the criminalization of sex work. On December 6, 2014, the *Protection of Communities and Exploited Persons Act* (PCEPA) came into force. The PCEPA was the Government's response to a unanimous Supreme Court of Canada decision in *Canada (Attorney General) v Bedford, Lebovitch and Scott*.¹ Prior to *Bedford*, neither paying for nor selling sexual services was illegal, although many of the activities associated with sex work were. *Bedford* struck down three *Criminal Code*² provisions as unconstitutional: the prohibitions on publicly communicating to sell sexual services, keeping a "bawdy house" or brothel, and living on the avails of another's sex work. The Court found these provisions violated sex workers' rights to security under s. 7 of the *Charter of Rights and Freedoms* by preventing them from legally employing safety-enhancing practices and could not be justified in the name of preventing nuisance. The Government was given one year to enact constitutionally compliant legislation. The changes it introduced with the PCEPA not only reproduce the harms of the three *Criminal Code* provisions struck down, but also add new offences that magnify the difficulties of doing sex work safely.

The Government of Canada pointed to the PCEPA in its Eighth and Ninth Combined Reports as a positive measure, asserting that "significant harms ... flow from prostitution." The law has been touted as one that will reduce sex workers' exposure to violence by treating them as "victims" while subjecting only clients and third parties benefiting from sex work to criminal sanctions. In fact, sex workers across Canada continue to be arrested under the law and experience heightened surveillance and harassment from police. While the new laws target

¹ 2013 SCC 72 (*Bedford*). The *Bedford* decision considered 25,000 pages of Canadian and international evidence from sex workers and social science research.

² RSC 1985, c C-46.

women assumed to be “exploited,” particularly racialized street-based and migrant women, they are also being used to investigate indoor independent sex workers who were previously virtually ignored by law enforcement, but who make up a significant proportion of sex workers.³ As should be evident from the name, the PCEPA continues to emphasize community standards and nuisance over sex workers’ rights.

Ignoring the diversity that exists within the sex industry in Canada, the PCEPA applies a one-size-fits-all approach to sex work based in the Nordic or “end demand” model. It sets out five primary sex work-related offences⁴ with specific immunity for sex workers in terms of obtaining a material benefit from or advertising their own sexual services.

- 1) Purchasing sexual services is illegal in all circumstances.
- 2) Communicating to exchange sexual services for money is illegal for sex workers in certain public places (at or in view of a school, playground or daycare) and for clients everywhere, with higher penalties at or in view of a school, park or religious institution.
- 3) Third parties are prohibited from benefiting from another’s sex work, with a number of exemptions: in cases of familial or personal relationships, moral obligations, publicly provided services, or services provided at fair market value. However, all these exemptions are nullified when benefits are received in the context of a commercial enterprise, effectively making all sex work businesses illegal.
- 4) Procuring someone to provide sexual services is illegal.
- 5) Advertising anyone else’s sexual services, whether by publishing an advertisement in print, broadcasting it, or hosting it online, is illegal.

Each of these provisions independently engenders specific harms. Taken together, they make the legal practice of indoor sex work, particularly in-call work, which the Supreme Court of Canada in *Bedford* found to be on the whole safer than other forms of sex work, nearly impossible.

Criminalizing the Purchase of Sexual Services Creates Riskier Working Conditions and Stigma

Research has consistently shown that “end demand” or Nordic regimes of sex work regulation put sex workers in increased danger and expose them to human rights abuses. In May 2016, Amnesty International concluded over two years of international consultations with a broad range of stakeholders by publishing its global policy explicitly recommending the decriminalization of consensual sex work and associated activities, including buying, soliciting, and organization of sex work.⁵ Amnesty’s policy recognizes that intersectional discrimination

³ Street-based or outdoor sex work is has been estimated to comprise between 5% and 20% of the sex industry in Canada. The Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada’s Prostitution Law*, Report of the Standing Committee on Justice and Human Rights, 2006, p. 5.

⁴ For the provisions criminalizing purchasing sexual services, communicating to purchase sexual services, and benefiting from another’s sexual services, parallel provisions exist providing for more serious penalties when minors are involved.

⁵ Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers, POL 30/4062/2016, 26 May 2016; accessed at: <https://www.amnesty.org/en/latest/news/2016/05/amnesty-international-publishes-policy-and-research-on-protection-of-sex-workers-rights/>.

and structural inequalities not only impact on one's decision to engage in sex work, but may also contribute to their experiences of human rights abuses while doing sex work.

The PCEPA is premised on the notion that sex work is inherently harmful. Notions of sex work and attendant risks tend to draw on more visible street-based sex work. Studies across Canada have found that, although street-based sex workers have experienced particularly dangerous work conditions as a result of the laws and their enforcement, violence⁶ against sex workers has been empirically overestimated, and the majority of sexual transactions are not violent.⁷ The *Bedford* case reaffirmed these findings, finding that expert testimony about the intrinsic violence of sex was ideologically motivated and lacked a firm evidentiary basis.⁸ Indoor sex work offers higher remuneration than most other jobs for which institutional training is not required. It is one of the few fields in which women consistently earn higher incomes than men.⁹

Criminalizing the purchase of sexual services magnifies the clandestine nature of sex work. It pressures outdoor sex workers and indoor businesses to minimize their visibility. Police enforcement solely against clients results in the same dangers and human rights abuses as direct criminalization of sex workers. Between 2012 and 2014, the Vancouver Police Department followed a model of asymmetric enforcement targeting clients, in the wake of a Commission of Inquiry into the disappearances of 70 street-based sex workers that found “a clear correlation between law enforcement strategies of displacement and containment of the survival sex trade... and violence against women.”¹⁰ Research with sex workers during this period confirmed that criminalization of clients recreated the impacts of the former unconstitutional laws for sex workers: “displacement to isolated spaces; inability to screen clients or safely negotiate terms of transactions; and inability to access police protection.”¹¹

⁶ In one study (Benoit and Shumka), violence is defined according to the United Nations definition of violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life.” In another other (O’Doherty, 2015), it comprises physical and sexual violence and any threats of either, but treats acts of theft as victimization. See note 7.

⁷ Cecilia Benoit and Leah Shumka, *Sex Work in Canada*, May 7, 2015, accessed at www.understandingsexwork.com; Chris Atchison, Dalia Vulmirovich and Patrick Burnett, Executive Summary of the Preliminary Findings for Team Grant Project 4 – Sex, Safety and Security: A Study of the Experiences of People who Pay for Sex in Canada, Canadian Institutes of Health Research, June 2015; Tamara O’Doherty, *Victimization in the Canadian Off-street Sex Industry*, Doctoral Dissertation, School of Criminology, Simon Fraser University, 2015.

⁸ Justice Himel’s evaluation of the testimony of Melissa Farley in *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264.

⁹ Tamara O’Doherty, *Victimization in the Canadian Off-street Sex Industry*, Doctoral Dissertation, School of Criminology, Simon Fraser University, 2015, p. 104-105.

¹⁰ The Honourable Wally Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry, Volume 1: Executive Summary*, at p. 15 (*Forsaken*).

¹¹ A Krusi, K Pacey K, L Bird, et al. “Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study.” *BMJ Open* 2014, accessed at <http://bmjopen.bmj.com/content/4/6/e005191.full>; Sex Workers United Against Violence, S. Allan, D. Bennett, J. Chettiar, G. Jackson, A. Krusi, K. Pacey, K. Porth, M. Price, K. Shannon and C. Taylor, *My Work Should Not Cost Me My Life* (Vancouver: Pivot Legal Society, 2014), p. v

Criminalization reinforces existing stigma around sex work, often resulting in both over-policing of nuisance complaints and victim blaming if sex workers do experience violence.¹² The Missing Women Commission of Inquiry also found that adversarial relationships between street-based sex workers and police prevented sex workers from accessing police services when they had experienced physical and sexual violence, leading to a culture of impunity for predators.¹³ The Vancouver Police Department has since engaged with sex worker and community groups to develop official guidelines¹⁴ that prioritize sex worker safety and dignity over enforcement, employing a liaison officer to specifically investigate complaints of violence and harassment by sex workers. This model represents a promising model of practice for police departments across the country pending law reform.

Evidence from Sweden has shown that, under an end-demand model, when social service provision is contingent upon sex workers exiting the sex industry, harm reduction activities are curtailed, undermining sex workers' access to information and safer sex supplies. Since criminalization of the purchase of sex, Swedish social service agencies have reported less contact with sex workers, making it much harder to identify those in situations of exploitation.^[53] Swedish researchers have also found that the prohibitionist underpinning of the prostitution laws informs the attitudes of service providers, resulting in increased stigma and isolation for sex workers who do not wish to transition out of sex work.^[54]

Criminalizing Communicating About and Advertising of Sexual Services Inhibits Screening and Negotiation of Consent

Laws that criminalize the ways that sex workers attract and negotiate with clients also impact directly on their right to and experience of safety.

Restrictions on communicating in public for sexual services mimic the impacts of criminalizing the purchase, severely limiting sex workers' abilities to employ such safety measures as careful client screening and working in secure, familiar settings. Criminalizing street-based communicating disproportionately impacts sex workers who are Indigenous, poor, and transgender or two-spirit. While police stings in Calgary, Ottawa, Hamilton, Cape Breton, Montreal and other cities¹⁵ in Canada in 2015 and 2016 have primarily targeted clients of sex workers, sex workers themselves continue to be arrested, belying the assertion that the current laws see them as "victims." Sex workers in major cities such as Ottawa also report ongoing

¹² A Krusi, T Kerr, C Taylor, T Rhodes, K Shannon, "They Won't Change It Back In Their Heads That We're Trash: The Intersection of Sex Work Related Stigma and Evolving Police Strategies," *Sociology of Health and Illness*, 2015.

¹³ *Forsaken*, supra, note 10.

¹⁴ Vancouver Police Department, *Sex Work Enforcement Guidelines (2013)*, accessed at: <http://vancouver.ca/police/assets/pdf/reports-policies/sex-enforcement-guidelines.pdf>.

¹⁵ Media articles on stings including the following: <http://www.900chml.com/2015/01/21/hamilton-police-lay-charges-under-new-prostitution-law/>; <http://www.cbc.ca/news/canada/manitoba/winnipeg-police-sex-trade-task-force-charges-26-men-age-18-77-1.3205790>; <http://www.lapresse.ca/le-droit/actualites/justice-et-faits-divers/201505/08/01-4868217-trente-clients-de-la-prostitution-arretes.php>; <http://www.cbc.ca/news/canada/calgary/prostitution-stings-lead-to-36-people-charged-in-calgary-1.3142408>; <http://calgaryherald.com/news/crime/police-charge-33-people-in-four-day-prostitution-operation>; <http://www.cbc.ca/news/canada/nova-scotia/sydney-prostitution-crackdown-will-continue-says-cape-breton-police-chief-1.3220927>.

over-policing and surveillance, including seizure of harm reduction materials and drug paraphernalia.¹⁶

In July 2016, police in St. Catharine's, ON, conducted a sweep to “sting” street-based sex workers by having undercover officers pose as potential clients – then arrested sex workers under s. 213(1)(a) of the *Criminal Code* for stopping traffic. Known as “Operation Red Light,” this sting was part of an intensified effort by the police to eliminate street-based sex work in the area. A Staff Sergeant with the Niagara Regional Police was quoted in the local paper stating, “They are victims, but the women — and the johns — are breaking the law, and we are the cops. This is what we do.”¹⁷ The sex workers were released on conditions that included “no-go orders” prohibiting them from entering the area where the community and health services they access are located. A similar sting took place in October 2015.¹⁸ While the charges against these women have since been withdrawn by the Crown, the fear and stress of more possible arrests isolates sex workers from police and encourages their movement away from visible locations to avoid harassment.

Communicating clearly about services offered is fundamental to negotiating mutual consent to sexual activity. Increasingly, sex workers make use of electronic and online platforms to connect with clients, including through phone text messages, chat and social media applications, web cameras, and websites specifically devoted to advertising escort and independent in-call services. These applications make it easier to screen clients; they are also easier for law enforcement to monitor. As a result, some clients are leery of engaging in explicit boundary-setting communications or providing the kind of verifiable information sex workers have typically requested for pre-screening purposes.

Advertising is another method sex workers rely upon to set out the services they offer and those they are not willing to provide. In response to the ban on advertising, some websites have banned explicit references to particular acts. This prohibition encourages the use of coded and euphemistic language that may be misunderstood, confounding sex workers' efforts to screen out clients seeking services they do not offer and to agree to fundamental terms before meeting clients face-to-face, where negotiation may be more difficult.

Criminalizing Working Together Prevents Development of Safety-Enhancing Relationships

The prohibitions on third party benefits and procuring prevent sex workers from legally enjoying the security of working with others -- including managers, call-takers and other administrative staff, bouncers, and drivers – and with each other, since sex workers often fulfill these roles. A key finding of *Bedford* was that working and living with others was often safety-enhancing. In a study of almost 600 sex workers, along with managerial practices such as venue safety policies and access to sexual and reproductive health supplies and services, social cohesion was found

¹⁶ POWER, an Ottawa-based sex worker group, is engaged in ongoing research with street-based sex workers that showed a pattern of ongoing low level harassment that is tantamount to criminalization, throughout 2015 and 2016; for example, seizure of drug paraphernalia, condoms and other harm reduction equipment, identification checks, and other forms of scrutiny without apparent cause.

¹⁷ <http://www.stcatharinesstandard.ca/2016/07/20/undercover-cops-take-aim-at-sex-trade>.

¹⁸ <http://www.niagarabuzz.ca/2015/10/31/police-reports/prostitution-sweep-st-catharines/>.

to significantly improve sex workers' health and safety and their abilities to negotiate use of barrier contraceptives.¹⁹

Although third party and procuring provisions ostensibly target exploitation, research has found that stereotypical "pimps," who manipulate or coerce sex workers through the use of threats and violence, are relatively rare in Canada, even accounting for the possible non-participation of those controlled by pimps in studies.²⁰ Home-based in-call and street-based sex workers in Canada are typically self-employed or independents. Many managers are women and themselves former sex workers.²¹ In some commercial establishments, administrative or maintenance duties are shared between sex workers on rotation.

Research in Canada shows that strong community relationships among structurally marginalized sex workers strengthen their abilities to insist on harm reduction practices that mitigate against unwanted pregnancy and contracting STIs including HIV. The criminalization of commercial sex work establishments deters sex workers from keeping prophylactics such as condoms onsite, because they are sometimes seized by law enforcement and used as evidence of sex work.

Being unable to legally work with and for others disadvantages those who wish to work indoors, but lack the monetary resources, stable location, and/or management skills to undertake the booking, scheduling, and accounting, and other arrangements (for example, for phone and internet service) required to work independently. Their experiences as workers in a precarious, unregulated, illegal business are dependent on the dispositions and actions of individual managers and co-workers. Criminalization of sex work prevents sex workers from accessing occupational health and safety or employment standards regimes, leaving them without legal recourse or complaints mechanisms for situations involving sexual harassment, underpayment or non-payment of contracts or wages, unsafe or unhygienic facilities, or unfair or discriminatory hiring and dismissal practices.²²

¹⁹ P. Duff, J. Shoveller, G. Ogilvie, J. Montaner, J. Chettiar, S. Dobrer, K. Shannon, "The Impact of Social, Policy and Physical Venue Features and Social Cohesion on Negotiation of Barrier Contraceptives Among Sex Workers: A Safe Indoor Environment Scale," *Journal of Epidemiology and Community Health*, 2014; E. Argento, P. Duff, B. Bingham, J. Chapman, P. Nguyen, S.A. Strathdee, K. Shannon, "Social Cohesion among Sex Workers and Client Condom Refusal in a Canadian Setting: Implications for Structural and Community-Led Interventions," *AIDS & Behaviour*, October 2015.

²⁰ C. Benoit & A. Millar, *Dispelling Myths and Understanding Realities: Working Conditions, Health Status and Exiting experiences of Sex Workers*, 2001, accessed at: <http://www.hawaii.edu/hivandaids/Working%20Conditions,%20Health%20Status%20and%20Exiting%20Experience%20of%20Sex%20Workers.pdf>; C. Bruckert & T. Law, *Beyond Pimps, Procurers and Parasites: Mapping third parties in the in-call/outcall sex industry. Rethinking Management in the Adult and Sex Industry Project* (Ottawa: Social Sciences and Research Council of Canada, March, 2013, accessed at: <http://www.powerottawa.ca/ManagementResearch.pdf>; L. Casey & R. Phillips, *Behind Closed Doors: Summary of Research Findings*, 2008, accessed at <http://www.safersexwork.ca/wpcontent/uploads/2014/06/BehindClosedDoors.pdf>; K. Gillies, "A Wolf in Sheep's Clothing: Canadian Anti-Pimping Law and How It Harms Sex Workers," in E. van der Meulen, E. Durisin, & V. Love (Eds.) *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada*, (Vancouver: UBC Press, 2013) p. 269-278; O'Doherty, 2015, p. 47.

²¹ Bruckert & Law, supra, note 20.

²² Ibid.

Recommendations

We urge the Government to:

- Repeal the Protection of Communities and Exploited Persons Act and other Criminal Code provisions criminalizing sex workers, clients and third parties. As a federal state, Canada needs the Government to lead the reform process with decriminalization before other laws and regulations for sex worker health and safety can be enacted.
- Ensure that any other legislation proposed to address sex work is developed in coordination with sex workers, recognizes the diversity of sex workers' opinions and experiences, and puts sex workers' human rights at the forefront.
- Address violence against sex workers by guaranteeing that they enjoy the full benefit of existing laws criminalizing physical and sexual assault, robbery, forcible confinement, kidnapping, stalking, and other forms of abuse, instead of segregating them through use of a separate set of stigmatizing laws.
- Recognizing that policing is a provincial matter, encourage federal Justice, Public Safety and Health authorities to provide guidelines for criminal law enforcement that prioritize the health, safety and human rights of sex workers in all situations, and that prohibit, for example, seizing harm reduction supplies such as condoms as evidence. The Vancouver Police Department's Sex Work Enforcement Guidelines are a best practices example and could be used as a model for other municipalities.
- Similarly, draft guidelines for provinces to make occupational health and safety regulations and employment standards legislation available to sex workers, recognizing that differently situated sex workers may have vastly different experiences and needs.

Collateral Damage Caused by Anti-Trafficking Programs in Canada

In Canada, as elsewhere, "anti-trafficking" campaigns have been promoted as a means of protecting vulnerable women but have primarily put women doing sex work in danger. Anti-trafficking discourse and programming by the government has focused on sex work to the detriment of other forms of labour exploitation, equating all sex in exchange for money or goods with sexual exploitation and violence against women, even in the absence of coercion. This understanding is not in keeping with the definition of human trafficking in international law and fails to account for what sex workers themselves say about their experiences. The PCEPA contained minor amendments to the *Criminal Code* trafficking provisions indicative of the linkage between the two from the Government's perspective.

As under the PCEPA, sex workers who are targeted in anti-trafficking investigations are labeled as victims but treated as criminals subject to a range of punitive responses. Consequently, anti-trafficking campaigns work together with historical discriminatory immigration policies to make certain groups of women more susceptible to human rights violations. In fact, it has become common practice for criminal law officers to enter into sex work establishment with Canadian Border Services Agencies, under the guise of "anti-trafficking" mandates. Since the implementation of PCEPA, Butterfly (the Migrant and Asian Sex Worker Support Network based in Toronto) has worked with at least 16 sex working women deported in the context of "anti-trafficking enforcement, none of whom identified as "victims." These anti-trafficking campaigns,

with the added power of PCEPA, have isolated and alienated migrant sex workers from protective agencies and mainstream services.

Canadian Legal Definitions of Trafficking Differ from International Law Definitions

Trafficking offences are contained in two pieces of legislation enacted in part to fulfill Canada's obligations as a signatory to the UN *Trafficking Protocol*.²³ Both differ significantly from the *Trafficking Protocol*, which sets out three constitutive elements in defining human trafficking: the **action** of recruiting, harbouring, or moving persons; the **means** of some kind of coercion to exercise control; and the **end purpose of exploitation** of labour, servitude or organ removal.

Section 118 of the *Immigration and Refugee Protection Act* applies to international cross border trafficking and makes it an indictable offence to act to "knowingly organize" the entry of persons into Canada by means of abduction, fraud, deception or use or threat of force or coercion. The exploitative purpose element of the *Trafficking Protocol* is omitted.

The *Criminal Code* creates a separate offence for "domestic" trafficking, which consists of an action to transport, hold, conceal, or exercise control, direction, or influence over the movements of another, for the purpose of "exploitation," defined as causing someone to provide services through conduct reasonably believed to constitute threats to their safety or the safety of others.²⁴ Other *Criminal Code* provisions criminalize obtaining a material benefit from such actions and withholding documents; there are parallel provisions for offences involving minors.²⁵

Under the *Criminal Code* provisions, the victim's consent is immaterial, but fear for safety is critical to establishing the offence. This definition is broader than the *Trafficking Protocol's*, replacing the idea of moving persons with a range of activities from facilitating movement to exercising control, and eliminating reference to "means" or the requirement to show proof of threats or use of force.²⁶ This difference is significant, because under international law, it is the "means" that differentiates trafficking from other crimes involving exploitation.²⁷ In other words, the coercion that distinguishes trafficking from exploitation generally is missing in the Canadian criminal law, making "trafficking" both less conceptually precise and ironically more difficult to detect or prove, especially in cases that do not involve sexual exploitation.²⁸

²³ United Nations General Assembly resolution 55/25, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, A/RES/55/25 (8 January 2001) [Article 1], accessed at <http://www.un-documents.net/uncatoc.htm>.

²⁴ *Criminal Code*, ss. 279.01(1).

²⁵ *Criminal Code*, ss. 279.011 (1) [trafficking of a person under 18 years of age]; 279.02(2) [receiving a material benefit from trafficking of a person under 18 years of age]; 279.03(2) [withholding or destroying documents of a person under 18 years of age].

²⁶ Section 279.04(2) has a permissive clause, allowing but not requiring courts to consider threats or use of force, coercion, or abuse of a position of trust, power or authority.

²⁷ https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf. Arguably the notion of means is imported into the definition of exploitation through the concept of creating "fear for safety" (section 279.04(1)).

²⁸ Julie Kaye and Bethany Hastie, "The Canadian Criminal Code Offence of Trafficking in Persons: Challenges from the Field and within the Law," *Social Inclusion*, 2015, Volume 3, Issue X, pages 1-15, accessed at: <https://www.kingsu.ca/public/download/documents/33771>.

Lack of Reliable Data Means Trafficking Estimates are Unsourced and Exaggerated

Estimates of trafficked persons provided by the RCMP and Government of Canada vary widely and are often unsourced or offered without methodologies explaining how they were arrived at. In 2005, the RCMP estimated 800 people were trafficked into Canada each year; they no longer make annual estimates public.²⁹

Academic researchers suggest the Canadian criminal justice system lacks conceptual clarity of what trafficking is, particularly in the face of sensational media accounts focused on sex trafficking, introducing complications for the prosecution of labour trafficking cases.³⁰ Trials are weighted towards victim testimony about perceived fear, failing to reach the criminal burden of “proof beyond a reasonable doubt” if complainants’ credibility is attacked.³¹

In an in-depth study of trafficking prosecutions across Canada between 2005 and 2015, three participants working with government authorities suggested,

the prevalence and need for pressing attention devoted to combatting human trafficking in Canada was a political theory that received institutional approval and was subsequently assigned to Crown counsel and police departments to enforce – or create... as a way of justifying resources spent.³²

One participant suggested,

If you have 200-300 investigators working on this issue across Canada over a period of multiple years, you would think we would have come up with a few more cases by now, if it is as big of a problem as presented.³³

In terms of sex trafficking, organizations that work with sex workers and some government officials believe the truth is simply there are fewer cases – particularly of sex trafficking -- than is sometimes alleged. In the case of cross-border trafficking, organizations set up specifically to provide outreach services and information to migrant sex workers such as SWAN, Butterfly and the Migrant Sex Work Project have not encountered victims of trafficking in their work; in the case of SWAN after 10 years of working closely within a well-connected migrant community.

Raids Impact Indoor Im/migrant Workers Even When No Charges Are Laid

Despite little evidence of actual trafficking in Canada, fear of international sex trafficking has resulted in racial profiling of Asian women with non-Western accents working in massage parlours and micro-brothels – even when they have immigrated legally and are permanent

²⁹ Laura Barnett and Julie Béchar, *Trafficking in Persons and Human Smuggling*, Library of Parliament, 2011, accessed at: <http://www.lop.parl.gc.ca/content/lop/researchpublications/cei-10-e.htm>.

³⁰ H. Millar & T. O’Doherty in collaboration with SWAN Vancouver Society, *The Palermo Protocol and Canada Ten Years On: The Evolution and Human Rights Impacts of Anti-Trafficking Laws in Canada*, 2015; and Kaye & Hastie.

³¹ Kaye & Hastie, *supra*, note 28, p. 8-9.

³² Millar & O’Doherty, *supra*, note 30, p. 56.

³³ *Ibid*, p. 57

residents or citizens.³⁴ As a result, premises that employ them are subject to increased surveillance, including joint raids by police, immigration officials, and bylaws enforcement officers. In some cases, sex workers are encouraged to keep safer sex materials like condoms off-site to prevent their seizure as evidence.³⁵

Raids can lead to arbitrary detentions, as women who are not charged with any crime are held for questioning and ostensibly for their own protection. Not infrequently, raids also result in deportation of migrants for contravening the terms of their visas, even though this means loss of potential witnesses if these situations were to result in trafficking charges.

Sex workers fear police with good reason. Anti-trafficking investigations give police more justification for entering the spaces where sex workers live and work. Sex workers have reported that they have been sexually, verbally, and physically assaulted by police. Four women in contact with Butterfly have had personal savings in amounts ranging from \$2,000 to \$50,000 seized as part of anti-trafficking investigations.

Examples of Raids on Indoor Establishments

Various operations and raids in the name of rescuing victims of trafficking are undertaken quite regularly in Canada. These raids have the unintended consequences of placing sex workers in antagonistic relationships with police and moving further underground. In particular, undocumented sex workers are even more fearful of police because so many of these efforts to protect result in detainment and deportation.

In 2006, police in Vancouver raided 18 massage parlours to identify victims of trafficking. None of the 78 women arrested were reported to have been trafficked.³⁶

In 2014 and 2015, Operation Northern Spotlight mobilized police forces across Canada to search for trafficking victims. One sex worker in Ottawa described her experience of unwanted visits from police during the operation as intimidating and a breach of privacy. A police officer disguised as a client booked an appointment with her and entered into her workspace. After he identified himself as an officer, she felt threatened by his presence. Despite her insistence that she was not trafficked, he indicated he was imminently expecting the arrival of three other officers. The officers took her name and requested to see her ID, and according to her they were menacing and harassing. In their attempts of what they claimed would “make her feel safe”, she became more suspicious of consequent clients and experienced increased stress on the job, which decreased her capacity to ensure safety and security.³⁷

In the context of a separate visit from police under the guise of protection, Butterfly -- the Migrant and Asian Sex Worker Support Network -- retells the story of an im/migrant sex worker

³⁴ SWAN Vancouver Society, *Im/migrant Sex Workers, Myths and Misconceptions: Realities of the Anti-Trafficked*, 2015.

³⁵ S. Anderson, A. Krusi, J. Li, J. Chettiar, S. Goldenburg, K. Shannon, “Condoms and Sexual Health Education as Evidence: Impact of Criminalization of Sex Work Managers and In-Call Venues on Migrant Sex Workers’ Access to HIV/STI Prevention in a Canadian Setting,” *AIDS & Behaviour*, 2015.

³⁶ “18 massage parlours raided, 100 arrested,” Vancouver Sun, 9 December 2006, cited in A Clancey, N Khushrushahi & J Ham, “Do Evidence-based Approaches Alienate Canadian Anti-Trafficking Funders?” *Anti-Trafficking Review*, Issue 3, 2014, p. 87-108.

³⁷ Story of “Quinn,” as told to the Canadian Alliance for Sex Work Law Reform.

who was detained for two weeks by police as a “trafficked person”, despite her insistence that she was working voluntarily. Although she was never criminally charged, her phone was seized as evidence, and she was forbidden from making calls to anyone, including legal counsel. Police seized \$10,000 of her money as evidence and as part of their “ongoing investigation,” and it has not been returned. After a search of her hotel room, the police came across a photo of her and a friend, and swiftly arrested her friend. Although she was eventually released, the woman also lost her housing. During the process, the woman told police that she had recently been sexually assaulted and robbed. No investigation was undertaken.³⁸

Anti-Trafficking Enforcement Deters Reporting of Exploitation and Violence

Anti-trafficking enforcement makes it more difficult for sex workers and clients to report labour exploitation, since sex workers risk loss of their income and arrest of their clients. Fear that they will be exposed as sex workers dissuades many migrant sex workers from accessing vital services such as health care and makes them disinclined to seek protection under the justice system when they are victims of crimes, including theft, which occurs commonly.

Butterfly has documented cases in which one sex worker reported being robbed four times in a week, and another sexually assaulted three times in one week.³⁹ In a survey conducted by Butterfly in 2015, more than 60% of respondent migrant sex workers said they had experienced different forms of violence, but felt that they were unable to call police for fear that they or their co-workers would be arrested or subjected to increased police surveillance, loss of income, and possible deportations.⁴⁰

Anti-trafficking actions and policies reinforce existing racial stereotypes of Asian women as vulnerable and easily exploited, rather than resilient and resourceful. Sex work provides employment and a source of income to many racialized women who are excluded from the job market or relegated to doing poorly paid work in conditions that provide them with few labour protections. Because of racism, lack of formal education, limited English proficiency, disability, or university or childcare responsibilities, sex work may be the best available option to some im/migrants in terms of the flexibility, working conditions, and remuneration it offers. As such, it should be recognized as a form of resistance to oppression, not oppression itself.

Indigenous Women and Girls Experience Heightened Violence – But Not Necessarily Domestic “Trafficking”

As is the case with migrant women, claims that large numbers of Indigenous women and girls are being trafficked in Canada (in the sense that they are coerced or that they do sex work in fear for their safety) are not supported by empirical data or by the experiences of sex worker-serving organizations.

³⁸ “Migrant Sex Workers Live Under Constant Police Threat,” (Part 5 of Series) *Ricochet*, accessed at: https://ricochet.media/en/1421/migrant-sex-workers-live-under-constant-police-threat?post_id=1485165438479137_1677972789198400#_=_

³⁹ Butterfly Asian and Migrant Sex Workers Support Network, *The Journey of Butterflies*, 2016, accessed at: http://media.wix.com/ugd/5bd754_b53167612529491a8b30dae89f71bf55.pdf, p. 4.

⁴⁰ *Ibid.*

Indigenous self-identified women and two-spirit people are overrepresented in street-based sex work across Canada, although they also participate in indoor sex work, particularly as independent workers, and informally exchange sex for transportation and other necessities in Northern areas with poor infrastructure.⁴¹ Indigenous activists argue that the direct criminalization of Indigenous persons in street-based sex work is an act of continued oppression,⁴² and that the racist stereotypes of Indigenous women's sexuality underpinning the law serve to normalize violence against Indigenous women.⁴³

In the vast majority of situations, Indigenous women do sex work independently and voluntarily. The focus in government and media stories on "traffickers" deflects attention from the systemic causes of Indigenous women's migration from home communities to urban settings, rooted in colonization and racist cultural assimilation policies: substandard education on reserve, extreme poverty, insufficient and insecure housing, inadequate health care, lack of vocational opportunities, violence, intergenerational trauma caused by Canada's residential school program, and forcible removal of Indigenous children from their families through so-called "child protection" programs into abusive foster care and adoption situations.⁴⁴

For Indigenous women working in constrained circumstances, especially those who use substances to cope with physical and psychological trauma,⁴⁵ removing their source of income by criminalizing their clients does not make them safer, help meet their immediate needs, or increase their future options. At present, Indigenous sex workers are also often silenced by stigma within their own communities. In the words of Indigenous sex work activist and academic Dr. Sarah Hunt, "We must reconcile the reality that Indigenous people continue to engage in sex work within the context of colonial violence in Canada."⁴⁶ A decolonizing and decriminalizing approach would affirm Indigenous sex workers' rights to safety, protection and control over their bodies, while acknowledging their agency as a way to re-frame their relationships to their respective Indigenous communities and society more broadly.⁴⁷

It is unquestionable that Indigenous women face violence at much higher rates than the rest of the population, and that Indigenous street-based sex workers experience extraordinary

⁴¹ Sarah Hunt, "Decolonizing Sex Work: Developing an Intersectional Indigenous Approach," *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada*, Emily van der Muellen, Elya M. Durisin and Victoria Love, eds. (Vancouver: UBC Press, 2013), p. 92.

⁴² N. Sayers, *Canada's Anti-prostitution Laws: A Method for Social Control*, 2013, accessed at: <http://kwetoday.com/tag/canadas-anti-prostitution-laws/>.

⁴³ S. Hunt, *Colonial Roots, Contemporary Risk Factors: a cautionary exploration of the domestic trafficking of Aboriginal women and girls in British Columbia, Canada* (Bangkok: Global Alliance Against Trafficking in Women, 2010), p. 27.

⁴⁴ Some activists have referred to the Government's role in displacing Indigenous women and girls through both inadequate and misguided "service provision", child apprehensions, and land seizures for natural resources exploitation as a form of trafficking: Colleen Hele, Naomi Sayers and Jessica Wood, *What's Missing from the Conversation on Missing and Murdered Indigenous Women and Girls*, accessed at <http://the-toast.net/2015/09/14/whats-missing-from-the-conversation-on-missing-and-murdered-indigenous-women/>.

⁴⁵ Brittany Bingham, Diane Leo, Ruth Zhang, Julio Montaner and Kate Shannon, "Generational Sex And HIV Risk Among Indigenous Women In A Street-Based Urban Canadian Setting," *Culture, Health & Sexuality Journal*, 2014: 16(4), 440-452, accessed at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4038328/>

⁴⁶ Hunt, 2013, supra note, 41, p. 92.

⁴⁷ Ibid, p. 96.

violence, further evidence that they are devalued by society.⁴⁸ Coercion or violence is not necessarily directly occasioned by participation in sex work; often it occurs in the context of a woman's relationship with an intimate partner or drug dealer.⁴⁹ In some cases, interventions using the ordinary provisions of the *Criminal Code* (for example, concerning assault, stalking, or extortion, or applications for restraining orders) are appropriate.

Structural inequities arising from poverty and colonization intensify vulnerabilities to violence and are not remedied with the blunt tool of criminal law. Indigenous members of Sex Workers United Against Violence, who staunchly support decriminalization, advocate for social programs including higher income assistance rates, better housing, access to detox facilities, appropriate health care, and support systems and policy development grounded in Indigenous traditions, as more meaningful and lasting supports.⁵⁰

Recommendations

We urge the Government to:

- Stop using anti-trafficking programs to justify the intrusion of law enforcement in places where sex work is taking place, including indoor sex work establishments.
- Discourage the partnership between law enforcement and Canadian Border Service Agency from entering into indoor sex work establishments under the guise of anti-trafficking measures.
- Create Immigration, Refugees and Citizenship Canada policies that prevent people selling sex from being deported as a direct result of raids or anti-trafficking initiatives.
- Review existing anti-trafficking policies and programs that equate sex work with human trafficking, and revise policies to remove assumptions that sex work, absent coercion, is a form trafficking, sexual exploitation, or violence.
- Ground policy development in data and the voiced concerns of people working in the sex industry. Evidenced-based research is necessary to inform “anti-trafficking” mandates and to address the use of biased and unsubstantiated information about human trafficking as a basis for government programs.
- Provide federal support for municipal Access Without Fear/Sanctuary City policies⁵¹ that allow migrants to report violence against them and receive essential services such as health care without fear of deportation.
- Increase funding to Indigenous communities for self-administered education and vocational training, housing, income assistance, employment programs, and health and addictions programs, based in Indigenous traditions.

⁴⁸ *Forsaken*, supra, supra note 10.

⁴⁹ Bruckert & Law, supra note 20, p.12.

⁵⁰ Suggestions presented by Sex Workers United Against Violence to Justice Minister Jody Wilson-Raybould, August 18, 2016, at Vancouver, BC.

⁵¹ See <http://toronto.nooneisillegal.org/dadt>.

Prohibition of Employment of Foreign Women in “Sexually Exploitative” Industries

Current restrictions visas for foreign women entering Canada proscribe their employment choices relative to Canadian citizens, permanent residents, and immigrants. Section 30(1.4) of the *Immigration and Refugee Protection Act*⁵² empowers the Minister of Immigration, Refugees and Citizenship to enact regulations or issue instructions to “protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation.”

On July 14, 2012, the Minister issued instructions that came into effect December, 2013, prohibiting immigration officials from issuing work permits, including for independent contractors and self-employed workers, in cases where there are reasonable grounds to expect a risk of sexual exploitation. Strip clubs, bars or clubs where exotic dancing is performed, escort services, and massage parlours are explicitly listed as businesses where such reasonable grounds exist, even though these businesses operate legally in Canada.⁵³ Additionally, all open work permits are now required to have the additional condition that they are “*Not valid for employment in businesses related to the sex trade such as strip clubs, massage parlours or escort services,*” including in self-employment or contract services, in accordance with subsection 185(b)⁵⁴ of the *Immigration and Refugee Protection Regulations*.

An employer operating a business in any of these sectors who hires a holder of an open work permit is potentially in violation of section 124 of the *Immigration and Refugee Protection Act* for employing “a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed.” The penalty for such a violation is a fine of up to \$50,000 or imprisonment for a term of up to two years.

These provisions, particularly as they apply to independent contractors and self-employed workers, are infantilizing and do not recognize the agency of women who choose to engage in these occupations.

Recommendations

We urge the Government to:

- Recognize that women are capable of making their own decisions about what constitutes suitable employment; and repeal s. 30 of the *Immigration and Refugee Protection Act* to remove the restriction on open work permits that prevents women from working legally in strip clubs, massage parlours, and escort services.

⁵² S.C. 2001, c. 27.

⁵³ <http://www.cic.gc.ca/english/resources/tools/temp/work/vulnerable.asp>.

⁵⁴ Section 185 empowers immigration officers to impose conditions on temporary residents in terms of their length of stay, type of work, studies, travel within Canada, and times and places for reporting