

**Canadian Alliance for
Sex Work Law Reform**

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

Issues Prior to Reporting: Canada's Compliance with the *Convention on Elimination of All Forms of Racial Discrimination*

Submission to the United Nations Committee on the Elimination of Racial Discrimination

On behalf of the Canadian Alliance for Sex Work Law Reform

with special input from member groups

Butterfly (Asian and Migrant Sex Workers Network)

and

Migrant Sex Workers Project (Toronto)

93rd Session, 31 July – 25 August 2017

The Canadian Alliance for Sex Work Law Reform is composed of 24 sex worker rights and allied groups and individuals in 17 cities across Canada: Calgary, Edmonton, Hamilton, London, Longueuil, Montreal, 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.

Our members include:

- Angel's Angels (Hamilton)
- Action Santé Travesties et Transsexuel(le)s du Québec (ASTTeQ) (Montréal)
- BC Coalition of Experiential Communities (Vancouver)
- Butterfly Asian and Migrant Sex Workers Network (Toronto)
- Canadian HIV/AIDS Legal Network (Toronto)
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- Stop the Arrests! (Sault Ste. Marie)
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- West Coast Cooperative of Sex Industry Professionals (WCCSIP) (Vancouver)
- Sex Workers of Winnipeg Action Coalition (Winnipeg)

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List of Issues Prior to Reporting: Canada’s Compliance with the *Convention on Elimination of All Forms of Racial Discrimination*

Submission to the United Nations Committee on the Elimination of Racial Discrimination

93rd Session

Introduction

The manner in which sex work is criminalized, regulated and enforced in Canada is a profound violation of sex workers’ human rights, including a number of human rights that Canada has a legal obligation to uphold pursuant to the *International Convention on the Elimination of All Forms of Racial Discrimination*. These include the right to equal treatment before the tribunals and all other organs administering justice (Article 5(a)); the right to security of person and protection by the State against violence or bodily harm (Article 5(b)); the right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, and to just and favourable remuneration (Article 5(i)); the right to freedom of peaceful assembly and association (Article 5(d)(ix)); the right to public health, medical care, social security and social services (Article 5(iv)); and the right to access any place or service intended for use by the general public (Article 5(f)). Indigenous women who sell or trade sex and racialized and migrant sex workers, in particular, are deprived of these rights, as outlined below. Our recommendations promote a series of actions and policy reforms that need to be taken by our government to respect and fulfill the rights within the convention, including but not limited to decriminalization of sex work – the removal of all criminal provisions that criminalize sex workers, clients and third parties. Decriminalization is part of a holistic response that needs to be accompanied by other measures that address economic, social, colonial, and historical oppression for Indigenous, racialized and migrant communities.

Criminalization of sex work and its impact on Indigenous women who sell or trade sex and racialized and migrant sex workers

On December 6, 2014, the *Protection of Communities and Exploited Persons Act* (PCEPA) came into force. The PCEPA was the federal government’s response to a unanimous Supreme Court of Canada decision in *Canada (Attorney General) v. Bedford, Lebovitch and Scott (Bedford)*.¹ Prior to *Bedford*, neither paying for nor selling sexual services was illegal, although many of the activities associated with sex work were. In *Bedford*, Canada’s Supreme Court struck down three *Criminal Code* 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’ right to security of the person under Canada’s constitution, the *Charter of Rights and Freedoms*, by preventing those engaged in a “risky -- but legal” business from legally employing safety-enhancing practices, and could not be justified in the name of preventing nuisance. The federal 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 invalidated *Criminal Code* provisions, but also add new offences that magnify the difficulties of doing sex work safely.

The PCEPA 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 women assumed to be

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

“exploited,” particularly racialized sex workers who work on the street and migrant sex workers, they are also being used to investigate indoor independent sex workers who were previously virtually ignored by law enforcement, but who make up the majority of sex workers.² As is evident from the name of the law, 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 on the Nordic or “end demand” regime. It sets out five primary sex work-related offences,³ 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.

Independently, each of these provisions 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.

The criminalization of our work comes with a constant police presence, social and racial profiling, harassment, surveillance, arrest, detention and deportation — all of which contribute to our isolation and vulnerability to violence. Some members of our communities face police harassment regardless of their participation in sex work, particularly Indigenous women and youth, people who are im/migrants (particularly racialized women) and trans people (especially trans women). The criminalization of the sale or exchange of sexual services gravely exacerbates their stigmatization and marginalization.

Indigenous Women Who Sell or Trade Sex

While it is difficult to generalize about how sex work laws impact Indigenous people selling or trading sex because of their diverse experiences, on the whole Indigenous people in Canada experience discrimination, over-surveillance and profiling by police, and involvement with the criminal justice

² According to the 2006 report by Canada’s Standing Committee on Justice and Human Rights, street-based or outdoor sex work is 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.

³ 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.

system and incarceration at much higher rates than most of the population. Much of the violence against Indigenous women who sell or trade sex is mis-categorized and conflated with “trafficking” — which has grossly inflated estimates of the number of “trafficked” Indigenous women and girls in Canada, and misdirected efforts to address violence against Indigenous women who sell or trade sex. This categorization of Indigenous women as victims without agency has led to prioritizing of funding for law enforcement strategies that increase over-policing in Indigenous communities. This is a troubling development in light of the significant over-representation of Indigenous people in prison populations.⁴

Alliance member organizations from across Canada have reported the following experiences of Indigenous women who sell or trade sex, since the introduction of PCEPA:

- **Laws that criminalize the purchase of sexual services and ban public communicating about sexual services push Indigenous sex workers into isolated and dark areas where they are more vulnerable to predators**, who rely on sex workers’ distrust of police and the justice system’s dismal response to sexual assault and violence against Indigenous women generally, for immunity. This violates the rights of Indigenous people who sell or trade sex to security of person and protection by the State against violence or bodily harm, to work and to just and favourable conditions of work, to free and peaceful assembly and association, and to access public space.
- This **vulnerability is intensified for two-spirit and transgender sex workers, who experience extreme levels of violence, including murder**. “Stings” targeting clients do not make sex workers safer; instead, they drive away “good” clients, leaving sex workers out on the street for longer and encouraging them to take riskier dates — a violation of the right to security of the person and to State protection against violence or bodily harm.
- **Police surveillance on strolls can also work to break down the sense of community and camaraderie between sex workers**, which has been shown to significantly enhance sex workers’ health and ability to resist exploitation. This violates the rights of Indigenous people who sell or trade sex to security of person, to work and to just and favourable conditions of work, to free and peaceful assembly and association, and to access public space.
- Indigenous sex workers may rely more heavily on family members to perform safety enhancing roles, like providing rides to and from other regions or jurisdictions. **The material benefit provisions of the *Criminal Code* have the potential to criminalize these personal relationships, even when they are not exploitative**, for example, if the parties share drugs or alcohol. When sex workers work for escort agencies or for nightclubs that employ security protocols, their co-workers are automatically criminalized, resulting in a deprivation of their right to security of the person, to work and to just and favourable conditions of work, and to free and peaceful association.
- The focus on trafficking, like the presumption that Indigenous women cannot exercise choice and are therefore victims, has deeply influenced the initiatives government and non-profit organizations take to address violence against Indigenous women. **It has led to prioritizing of**

⁴ Government statistics indicate that Indigenous adults accounted for one-quarter of admissions to provincial/territorial correctional services and 22% of admissions to federal correctional services in 2014/2015, while representing about 3% of the Canadian adult population. Statistics Canada. Adult correctional statistics in Canada, 2014/2015. <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14318-eng.htm>; [Annual Report of the Correctional Investigator 2014-2015. http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx](http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx)

funding for law enforcement strategies that increase over-policing in Indigenous communities, instead of investing in peer-led programs that allow Indigenous people selling or trading sex to exchange knowledge and support each other. Some programs offered by non-profit organizations require that those accessing supports identify as “victims” or pressure participants not to engage in sex work in order to access services. These strategies are not supportive of Indigenous women and do not respect that they are best placed to determine their own life choices. Indigenous people who sell or trade sex are thus deprived of the right to health, medical care and social services.

Although Indigenous women and youth will continue to face police harassment regardless of the laws regulating sex work, the criminalization of the sale or exchange of sexual services gravely exacerbates their stigmatization and marginalization. The ongoing criminalization of sex work has resulted in a constant police presence, social and racial profiling, harassment, surveillance, arrest and detention of Indigenous women who sell or trade sex — all of which contribute to isolation and vulnerability to violence. Criminalization also exacerbates already significant barriers, and makes access to the protection of the justice system even more difficult for Indigenous people who sell or trade sex. According to the Native Youth Sexual Health Network, an organization by and for Indigenous youth working across Canada and the United States, while decriminalization of sex work “does not adequately address the systemic racism and classism as well as a fundamental power imbalance and issues of inequality, which are realities for Indigenous youth in Canada,” it is still a step they identify as crucial. As they acknowledge, **“decriminalization is one of the many steps that the courts and lawmakers must take to respect the self-determination of Indigenous sex workers.”**⁵

For Indigenous women working in constrained circumstances, especially those who use substances to cope with physical and psychological trauma,⁶ 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.”⁷ In this context, a response to Indigenous women who sell and trade sex needs to be comprehensive. Hunt adds, “Although decriminalization may have an impact on the ability of sex workers to seek police protection, Indigenous women’s relationship with Canadian law will continue to frame their relationship to justice. Therefore, decolonizing sex work must go beyond debates about decriminalization, as legal responses can go only so far in providing justice and safety for Indigenous sex work.”⁸

Racialized and Migrant Sex Workers

Aside from the harms of criminal law, sex work provides economic opportunities for people who work within informal labour markets and street economies; communities of racialized and im/migrant sex workers experience less employment opportunity because of continued racism in Canada. But like Indigenous people who sell or trade sex, im/migrant communities are made particularly vulnerable by the

⁵ Native Youth Sexual Health Network. 2010. “Decriminalization of sex work and Indigenous youth and communities – Response from the Native Youth Sexual Health Network”

<https://inciteblog.wordpress.com/2010/10/18/decriminalization-of-sex-work-and-indigenous-youth-and-communities-response-from-the-native-youth-sexual-health-network/>

⁶ 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/>

⁷ Sarah Hunt, “Decolonizing Sex Work: Developing an Intersectional Indigenous Approach,” *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada*, Emily van der Muelen, Elya M. Durisin and Victoria Love, eds. (Vancouver: UBC Press, 2013), p. 92.

⁸ *Ibid*, p. 96

criminalization of sex work. The threat of police involvement, surveillance, and deportation increases their vulnerability to violence and limits their ability to come forward as victims of violence. Migrant sex workers have been targeted by law enforcement who often work hand in hand with Canada Border Services Agency (CBSA). For example, in 2015, the Ottawa Police Service released information about a raid on massage parlours that led to the deportation of 11 women.⁹ Trying to avoid detection increases im/migrant sex workers' isolation and dramatically reduces their access to health and safety resources. Im/migrant workers who are victims of violence do not report it for fear of being arrested and deported. Butterfly, an organization that provides support to migrant sex workers throughout Ontario, 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.¹⁰ 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 deportation.¹¹

Because it is difficult to prosecute and convict individuals for trafficking offences, third parties may be more commonly charged with sex work-related offences. The ambiguity of sex work-related criminal offences can end up capturing a range of people and behaviours that are not exploitative. As a result, migrant sex workers may continue to face economic and situational risks if the people they work with are criminalized.

Alliance member organizations from across Canada have reported the following experiences of migrant sex workers, since the introduction of PCEPA:

- Criminalization of sex work increases sex workers' susceptibility to violence. **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 recognize actual trafficking.** This is reflected in the relatively low number of trafficking convictions, including in exploitative labour, and deprives migrant sex workers of the right to security of person and protection by the State against violence or bodily harm, as well as the right to work and to just and favourable conditions of work.
- **Sex workers' physical and economic security is threatened when sex work establishments are raided by law enforcement in order to arrest third parties,** all of whom are assumed to be exploitative under PCEPA. Racialized people are often assumed to be traffickers or trafficked victims. Unnecessary and unwarranted law enforcement raids violate migrant sex workers' rights to security of person and to work, including under just and favourable conditions.
- Although the federal government has claimed that the new laws would not be used against sex workers, **migrant sex workers have been disproportionately arrested and detained under the sex work offences,** violating their right to equal treatment within the criminal justice system.

⁹ <http://news.nationalpost.com/news/canada/migrant-sex-workers-caught-up-in-ottawa-sting-facing-deportation-further-exploitation-activists>

¹⁰ "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-policethreat?post_id=1485165438479137_1677972789198400#_

¹¹ 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.

- **Sex workers, including migrant sex workers, may be prosecuted under the offences related to third party benefits and trafficking when they work with, gain material benefits from, and assist other sex workers to enter or work in Canada.** This represents a deprivation of their rights to work and to just and favourable conditions of work and to freedom of peaceful association.
- The Canadian government claims that the *Immigration Act* restrictions that prohibit people who obtain temporary work permits and people who have open work permits from working in strip clubs and massage parlors are in order to prevent trafficking. However, it unnecessarily **limits employment options for migrant, and particularly racialized migrant, communities,** discriminating against them and depriving them of the right to work.
- **CBSA may arrest and deport migrant sex workers who do not have legal permission to work in Canada.** Sex workers who receive “Departure Orders” must leave voluntarily within 30 days, depriving them of the right to work and to equal treatment before the law. Failure to do so may result in forcible removal from the country, even if sex workers are simultaneously identified as victims in an investigation.
- Partnership investigations between Canada’s federal police agency, the Royal Canadian Mounted Police (RCMP), municipal bylaw enforcement and CBSA can often result in **racial profiling or the targeting of racialized sex workers or any sex worker who is not perceived to be a ‘local’.** Law enforcement are thus violating migrant sex workers’ right to equal treatment.

The harmful impacts of criminalizing sex work go beyond the violence of arrest and incarceration. Police repression is a significant factor in creating vulnerability to violence and poor working conditions. A context of repression makes it difficult for sex workers to report human rights violations and other crimes and for police to investigate acts of targeted violence against sex workers by predators, who commit such violence in a context of impunity. Legal and social constructions of sex work as exploitation contribute to a climate of stigma and disdain for sex workers and sex work, which also promotes violence and discrimination. Like with other vulnerable communities, **the decriminalization of sex work is a crucial first step to reduce instances of violence and provide meaningful assistance to im/migrant sex workers. By decriminalizing sex work, migrant sex workers would be able to benefit from labour protections, including employment standards and occupational health and safety laws, that are afforded to all other workers.** These are far more effective measures to promote migrant sex workers’ human rights, including labour rights, than criminal and anti-trafficking laws.

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 Canada 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 policies 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

Specific Recommendations for legislation:

- 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.