

**Submission from the Canadian Alliance for Sex Work Law Reform
To the International Commission of Jurists (ICJ)**

For “Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality reproduction, drug use and HIV”

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Background

The Canadian Alliance for Sex Work Law Reform formed in 2012 and is composed of sex worker rights and allied groups and individuals across Canada. Member groups work together to fight for sex work law reform that advances sex workers’ human rights and well-being, including sex workers’ health and equality. We call for the repeal of sex-work specific criminal laws on the grounds that they cause daily harms in the lives of sex workers, violate their rights (including the right to security of person), and undermine their autonomy. We believe it would be helpful for advocates, the courts and policy-makers to refer to a set of authoritative principles from the ICJ when addressing the criminalization of sex work; currently, debates are often driven by ideology not evidence, and sex workers are typically marginalized and discredited in these discussions. Ironically, the Canadian criminal law’s construction of sex workers as agentless victims undermines sex workers’ ability to be heard as authorities of their own experiences. The ability to reference guiding principles from the ICJ would assist sex workers to be heard as legitimate stakeholders.

Human rights concepts to inform use of criminal law

Human rights should underpin all considerations in determining whether the use of criminal law is justified. Criminal law is a blunt — and often ineffective — tool to regulate human behaviour and labour and should be a measure of last resort when there are other regulatory tools at the state’s disposal. Criminal laws should also be based on the best, available evidence. In many cases, criminalizing certain conduct (under the guise of protecting specific moral values or protecting persons involved) is not rationally connected to a legislative objective. For example, a growing body of evidence demonstrates that criminalizing the purchase of sex and third parties in sex work does not reduce exploitation of women (which in many cases, is the purported legislative objective of such criminal laws) but rather results in numerous harms against sex workers, yet states continue to deploy such laws. Nevertheless, *even in cases where criminalizing conduct does appear to satisfy a legislative objective* (e.g., denouncing perceived immoral or harmful conduct), states should always measure the impact of this criminalization on human rights against the supposed benefits of a legislative objective. We support the application of the principles of necessity, proportionality, reasonableness and non-discrimination to this analysis, as outlined in the “Report on the May 2018 Expert Meeting of Jurists¹.” Ample evidence indicates that states should never criminalize consensual sexual conduct in aid of promoting certain moral values or alleged protections because this leads to numerous human rights violations.

Criminal laws pertaining to sex work and their impact

In 2014, Canada adopted the “Nordic” regime of sex work regulation by criminalizing sex work-related activities through the *Protection of Communities and Exploited Persons Act* (PCEPA). We present the following analysis of the PCEPA’s harms as a case study of the detrimental impact of criminalization on the health, equality and human rights of people who sell or trade sex.

The PCEPA defines all sex work as exploitation and frames all sex workers as victims and all clients and third partiesⁱⁱ as criminals. A primary objective of the legislation is to eradicate prostitution, which is constructed as a form of gendered violence. This characterization of all (women) sex workers as inherent victims in need of protection reinforces the gendered stereotype that women are fragile beings incapable of exercising agency or informed decision-making, especially in the realm of sexual activity. We believe that this denial of autonomy infringes on sex workers’ right to substantive equality.

Further, as is evident from the name of the law and the accompanying technical paper,ⁱⁱⁱ the PCEPA has the additional goal of “protecting” communities from an alleged harm to social order and morality stemming from sex work. This risks subjugating sex workers’ human rights, health and equality to ideological and stereotypical assumptions about sex work and its impact on communities and society at large.

Overall, the PCEPA, like other “Nordic” regimes, is premised on the assumption that sex work is inherently harmful; however, this is not demonstrated from the evidence in Canada. Moreover, international human rights experts have concluded that the criminalization of the purchase of sexual services (rather than sex work itself) creates vulnerability to human rights violations.^{iv} Assumptions regarding sex work and its attendant risks tend to draw on more visible street sex work. Although street sex workers have experienced particularly dangerous work conditions as a result of criminal laws and their enforcement, studies across Canada have found that the extent of violence committed by clients or predators against sex workers has been empirically overestimated, and the majority of sex work transactions are not violent.^v When violence does occur, it is more often targeted violence from predators and people posing as clients. The Supreme Court in *Bedford* reaffirmed these findings, concluding that expert testimony about the intrinsic violence of sex work was ideologically motivated and lacked a firm evidentiary basis.^{vi} Further, state responses should not include criminal laws that are demonstrated to create (further) harm and violate the human rights of the people states are purporting to protect.

The PCEPA sets out the following sex work-related offences:^{vii} purchasing sexual services is illegal in all circumstances; communicating to exchange sexual services for money is illegal for clients everywhere and for sex workers in certain public places (i.e., at or in view of a school, playground or daycare); everyone is prohibited from benefiting from another’s sex work in the context of a commercial sexual service enterprise, effectively making all sex work businesses illegal (with a number of limited exemptions); procuring someone to provide sexual services is illegal; and advertising anyone else’s

sexual services — whether by publishing an advertisement in print, broadcasting it, or hosting it online — is illegal.

Advocates of the “Nordic” regime claim that only clients and third parties (not people who sell or trade sex) are targeted by criminal law models such as the PCEPA and that this approach will stop people from engaging in sex work and eventually abolish sex work altogether. Not only are these claims untrue, but evidence illustrates that criminalization in all forms exposes sex workers to multiple and intersecting harms, including impeding their rights to life, health, non-discrimination, self-determination and autonomy, privacy, freedom of association, to be free from violence, labour protections and access to justice.

Sex workers across Canada have reported that the “Nordic” regime under PCEPA has had the following detrimental impacts:

- Sex workers, clients and third parties avoid law enforcement in efforts to reduce the risk of criminal investigations. This displaces sex workers and thereby isolates them from health care and social services. It also diminishes trust in the police and criminal system, resulting in greater vulnerability to exploitation and violence, and reducing the likelihood that crimes against sex workers will be reported. Sex workers’ rights to health, equal access to justice, and security of person are violated;
- Sex workers’ right to be free from violence and enjoy security of person and bodily autonomy are undermined by the prohibition on client communication for the purpose of purchasing sexual services. This restriction hinders sex workers’ capacity to set the terms and conditions of their services, thus allowing their sexual or other boundaries to be disrespected and rendering them vulnerable to violence when a misunderstanding occurs. Sex workers also report that this prohibition undermines safety screening procedures, as clients are unwilling to disclose identifying information for fear of criminal prosecution. Disturbingly, the restriction on communication interferes with the consenting process, which is a legal and ethical requirement for any sexual engagement, commercial or otherwise;
- The criminalization of third party involvement in the context of a commercial sexual enterprise de facto criminalizes the employer-worker relationship. This effectively precludes sex workers from accessing protections under employment standards, labour, occupational health and safety and human rights laws. Sex workers are unnecessarily exposed to health and safety risks and have no recourse to the protective mechanisms available to other working people;
- Encouraged misuse and over application of human trafficking laws across Canada, resulting in the profiling, detention, and deportation of im/migrant sex workers; and
- Increased stigma and discrimination against sex workers in health care, social service, hospitality, transportation and other sectors. Sex workers report avoiding seeking health and social services

because of the intrusive and stigmatizing treatment they encounter as a result of the assumption that they are victims (which is exacerbated by the conflation of sex work and human trafficking).

Disproportionate impact of laws criminalizing sex work on racialized, Indigenous, migrant and Asian sex workers

Sex workers who are disproportionately targeted by law enforcement are those who are over-policed, over-surveilled and racially and socially profiled including but not limited to Indigenous, migrant, Black, racialized, trans sex workers and sex workers who use drugs.

While **Indigenous women** will continue to face police harassment and over-policing 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 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 their isolation and vulnerability to violence. Criminalization also exacerbates already significant barriers to the protection of the justice system for Indigenous people who sell or trade sex. For Indigenous women working in constrained circumstances, 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 assumed to be exploited in sex work and often silenced by sex work-related stigma within their own communities.

Migrant sex workers, particularly Asian women, 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 who were working with irregular status in Canada.^{viii} 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 the province of 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.^{ix} 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.^x

The conflation of sex work and human trafficking

The PCEPA has been accompanied by an aggressive response to human trafficking. This is partially due to the law's construction of sex work as inherently exploitative, which facilitates a conflation of sex work and human trafficking. Law enforcement generally fails to make distinctions between sex work and human trafficking; in fact, police activities make it clear that anti-human trafficking initiatives are driving much of the police repression of sex work. The criminalization of sex work paired with anti-human

trafficking initiatives that conflate sex work and human trafficking results in constant police presence, social and racial profiling, harassment, surveillance, arrest, detention and deportation — all of which contribute to sex workers' isolation and vulnerability to violence. Migrant workers, youth and Indigenous women are disproportionately targeted and negatively impacted by the conflation of sex work and human trafficking.

Topline Recommendations: Moving from criminal regulation to a labour framework

There is no social need for sex work-specific criminal laws, especially given their detrimental impact.

Criminal laws specific to sex work are based on ideological positions that construct sex work as immoral or harmful and have been found to have a detrimental impact and to violate the human rights of the people involved. Even if one were to accept the suppression of sex work as a legitimate state objective, the criminal law is an overly blunt and oppressive tool that causes harms disproportionate to policy goals.

Criminal laws of general application can be used to address violence and abuse against sex workers.

This includes criminal prohibitions against assault, sexual assault, theft, robbery, kidnapping, forcible confinement, extortion, intimidation, criminal harassment, uttering threats of death or physical harm, and trafficking of persons, as examples. While the criminal law is generally an accepted tool for the negative sanction of behaviours whose harms are uncontested, we draw attention to and raise question about the disproportionate representation of racialized or otherwise marginalized peoples in criminal law systems.

Exploitation in the sex trade can be addressed using a labour framework that engages laws related to employment standards, occupational health and safety, and human rights. In criminalized contexts, sex workers are either legally precluded or discouraged from accessing labour and related protections. The absence of criminal laws would allow sex workers to seek employment protections and to engage in labour organizing.

In the absence of criminal law, alternative administrative mechanisms such as those listed above must not be more restrictive or oppressive than those imposed on similar work sectors, and must uphold the human rights, health and equality of people who sell or trade sex.

ⁱ ICJ, *Report on the May 2018 Expert Meeting of Jurists: "Developing principles to address the detrimental impact on health, equality and human rights of criminalization with a focus on select conduct in the areas of sexuality, reproduction, drug use and HIV"*, 2018.

ⁱⁱ Third parties are the people who work, provide services to, or associate with sex workers including: drivers, security, bookers, webmasters, business owners and receptionists of outcall agencies (e.g., escort agencies) or incall establishments (e.g., brothels and massage parlours). Sex workers often act as third parties for other sex workers. Also see, Global Network of Sex Work Projects. *Criminalisation of Third Parties and its Impact on Sex Workers' Human Rights*. 2016. <http://www.nswp.org/resource/criminalisation-third-parties-and-its-impact-sex-workers-human-rights>

ⁱⁱⁱ See Technical Paper: Bill C-36, *Protection of Communities and Exploited Persons Act* available from <http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html>

^{iv} See for example: Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Health A/HRC/14/20 available from

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>; Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers <https://www.amnesty.org/en/documents/pol30/4062/2016/en/>

^vCecilia Benoit and Leah Shumka, *Sex Work in Canada*, May 7, 2015, available 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,

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

^{vii} 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.

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

^{ix} “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# =

^x 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.