

EVALUATING CANADA'S SEX WORK LAWS:

The Case For Repeal



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Executive Summary

It is time for Parliament to reform Canada's laws on sex work. The *Criminal Code* provisions introduced by the *Protection of Communities and Exploited Persons Act* (PCEPA) are unconstitutional and should be repealed. This report provides a history of the litigation that struck down previous laws and the approach taken in drafting the PCEPA. It gives an overview of the impacts that the PCEPA is having on sex workers across Canada and why the law is unconstitutional. Finally, it draws from advocacy by sex workers to make key recommendations for creating laws that respect and promote the human rights of sex workers.

Background

In December 2013, after a lengthy legal battle initiated by Canadian sex workers, the Supreme Court of Canada (SCC) issued its landmark decision in the case of *Canada (Attorney General) v. Bedford, Lebovitch, and Scott (Bedford)*. The SCC struck down the *Criminal Code* provisions that prohibited sex workers from communicating with clients in public and working from fixed locations, and prohibited others from receiving sex workers' earnings. These provisions were found to be unconstitutional, because they violated sex workers' rights to security of the person under Section 7 of the Charter. On the whole, the SCC concluded that working indoors from known locations was safer for sex workers.

It has never been illegal to sell sex in Canada, but the *Criminal Code* provisions at issue in *Bedford* together made it virtually impossible to engage in sex work without breaking the law. In the face of the SCC's unanimous decision, the federal government was left with two choices: either remove the sections that had been found to be unconstitutional from the *Criminal Code* or introduce new criminal laws that could withstand constitutional scrutiny. Although sex workers, public health experts, and human rights groups argued for the first approach, the federal government committed to drafting new criminal laws almost immediately.

The resulting PCEPA introduced a host of new *Criminal Code* provisions aimed at sex workers, their clients, and third parties involved in the sex industry. Most notably, for the first time in Canadian history, the new bill outlawed paying for sex. There are now five broad categories of sex work-related offences in Canada's *Criminal Code*:

- paying for sexual services
- communicating to exchange sexual services
- profiting as a third party from someone else's sexual services
- procuring (hiring or inducing) someone to provide sexual services
- third party advertising to provide sexual services

Along with new *Criminal Code* provisions, the PCEPA introduced a new rationale for laws regulating sex work. According to the federal government, the legislation “reflects a significant paradigm shift away from the treatment of prostitution as ‘nuisance,’ as found by the Supreme Court of Canada in *Bedford*, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls.” The PCEPA is a variant of asymmetrical criminalization, also known as the “Nordic model,” which ostensibly aims to eliminate prostitution by making it illegal without punishing sex workers themselves, who are considered to be the “victims” of prostitution.

Findings

The PCEPA has been mischaracterized as targeting only those who harm or exploit sex workers, without criminalizing sex workers and others who may enhance their safety. Analysis of the *Criminal Code* provisions in the PCEPA shows that the legislation has resulted in sweeping criminalization of the sex industry, threatening the physical and economic security of sex workers, even though they are immunized from prosecution in certain circumstances. The PCEPA violates sex workers' rights to freedom of expression and association, security of the person, and equal treatment under the law.

Sex Workers Continue to Fear Arrest

The PCEPA retains provisions on communicating that specifically target some of the most vulnerable street-based sex workers, who continue to be harassed by police in many communities.

Sex Workers Focus on Avoiding Detection Instead of on Safety

As a result of increased police surveillance on sex workers and clients, sex workers are still working in isolated and unsafe conditions. Street-based sex workers are under pressure to work in less populated areas and to get into cars before they have properly screened prospective clients. With clients focused on avoiding police detection, indoor sex workers are also motivated to work in more hidden locations.

Fear of Enforcement Inhibits Sex Workers' Access to the Justice System

Prohibiting the purchase of sexual services means that sex work remains a clandestine activity and that sex workers actively shun police contact. This increases sex workers' vulnerability to violence from predators posing as clients, who target sex workers precisely for this reason.

Sex Workers Cannot Legally Negotiate Consent to Conditions of Sexual Services

A principle tenet of Canadian sexual assault law is the importance of voluntary and affirmative consent to any sexual act. Because of broad restrictions on communicating, it is impossible to engage in discussions to establish the acts that sex workers are willing to perform – and those they are not – without breaking the law.

Laws are a Barrier to Working Indoors and Working Collectively

The material benefit and procuring provisions of the PCEPA have been framed as capturing relationships of exploitation, yet in reality they criminalize managers, receptionists, bouncers, and other security personnel who screen clients onsite at sex work businesses. They also effectively prevent any business offering sexual services from operating legally. These restrictions, coupled with the prohibition on advertising, make it more difficult for sex workers to work indoors and with the support of others.

Sex Workers are Excluded from Workplace Protection Regimes

Sex workers employed at indoor businesses frequently complain of unfair labour practices: unpaid wages, fines for arbitrary workplace rules, sexual harassment, and shifts longer than employment laws permit. Criminalization of sex work as an industry excludes sex workers from the workplace protections and remedies available to other workers in Canada.

Sex Workers Continue to Experience Stigma and Discrimination

The PCEPA inculcates stigma and cuts sex workers off from legal protections, perpetuating conditions that have allowed predators to murder, rape, and abuse sex workers with impunity.

Conclusion

Despite the PCEPA's avowed aim of protecting vulnerable people from exploitation, bans on purchasing sex, communicating for the purposes of selling or purchasing sex, working collectively, and advertising sexual services replicate many of the dire consequences for sex workers' health and safety identified in *Bedford*. There is little doubt that the PCEPA is unconstitutional and actively prevents people who sell or trade sexual services from exercising their fundamental *Charter* rights.

Recommendations

Laws prohibiting the exchange of sex for compensation between consenting adults are not the way to end endemic violence against women or to address inequality and systemic poverty. Instead, we urge lawmakers and police to work with sex workers to take the following steps to create a safer sex industry:

Repeal the Laws that Criminalize Sex Work

Ensuring that sex workers' rights are protected requires the repeal of the PCEPA and all criminal laws that prohibit the purchase of sexual services and prevent adults selling sex from working with others in non-coercive situations. Changing the law would not just make sex work safer; it would be a first step towards undoing the stigma experienced by people who do sex work.

Use Existing Laws to Prosecute Perpetrators of Violence

Instead of a being governed by a separate legal regime that sets them apart, sex workers need to be able to access the police and to enjoy the full benefit of legal

protections theoretically available to everyone in Canada, including *Criminal Code* provisions to punish perpetrators of violence.

Work with Sex Workers to Ensure Access to Provincial Employment Protections and Create Appropriate Municipal Bylaws

Decriminalizing sex work would not necessarily mean that there are no restrictions on sex work – however, any regulations should be developed together with sex workers, who are the experts in their own business. Sex workers should have access to the protections afforded all other workers by provincial employment standards and occupational health and safety legislation. They should be engaged in the drafting of any local bylaws governing where and how sex work occurs.

Invest in Supports for Low Income Sex Workers

Using criminal laws to eliminate people's sources of income is not the way to ensure their genuine autonomy. Low-income sex workers need access to more substantial income assistance benefits, safe and affordable housing, and culturally appropriate educational opportunities and health services. Non-judgmental services and resources need to be made available to those who require them most, whether they want to continue in sex work or to pursue other work.

Don't Conflate Sex Work and Trafficking

The human trafficking provisions in the *Criminal Code* and the *Immigration and Refugee Protection Act* can and should be applied in bona fide situations of coercive labour. At the same time, law enforcement and government must recognize that sex work is not trafficking. The misuse of anti-trafficking laws to investigate sex work businesses and individuals endangers sex workers by making them wary of accessing health care services and reporting crimes such as robbery to police.

Learn from Other Jurisdictions

New Zealand fully decriminalized adult sex work in 2003 and instituted a system that puts much of the responsibility for regulating sex work in the hands of local municipalities in cooperation with sex workers. New Zealand's sex workers report much greater confidence in police protection, as well as access to employment protections.

Work on Undoing the Stigma that Surrounds Sex Work

The greatest commonality between sex workers in Canada is the stigma they face. Although more education is needed, changing the federal law would be a first step towards undoing the stigma and treating people who do sex work as full members of our communities.

Sex workers remain hopeful that the current federal government will repeal the PCEPA and other laws that criminalize sex work. In the event that this does not happen, Canadian sex workers are prepared to bring a new constitutional challenge to this legislation.