

Sex Work and the Legal Environment:

There is considerable misinformation and confusion regarding the legality of sex work in Canada. Therefore, an overview of the various legal environments concerning sex work around the world is provided below^{43,51,78}. The differences are critical because the legal environment affects the health and safety of sex workers in significant ways.

Overview of Legal Environments Regarding Sex Work:

There are four different legal environments concerning sex work around the world.

1. **Criminalization** (can be separated into two types):
 - a. *Prohibition*: where the laws are designed to prohibit all forms of sex work including the buying and selling of sexual services. The United States practices prohibition in most states (except for Nevada) as do more than 30 nations in Africa, more than 25 in Asia and at least 20 in Europe.
 - b. *Toleration*: where the buying and selling of sexual services is legal but there are laws prohibiting a variety of activities related to sex work that are judged to be harmful. *Canada provides an example of this system.*
2. **Partial criminalization**: is when it is legal to sell sexual services but illegal to buy them. Legislation also criminalizes procurement, working indoors, working with others, advertising, and profiting from the sexual labour of others. Sweden practices partial criminalization as do Iceland, Norway and Finland. As such this approach is often referred to as the “Nordic Model”.
3. **Legalization**: is when sex work is regulated – most often through criminal law –and strict requirements are placed on sex workers if they are to work legally. These may include regular screening for sexually transmitted infections (STIs), background checks by police, and drug tests. This is the situation in Germany, Austria, Switzerland, and in the state of Nevada in the USA.
4. **Decriminalization**: is where neither sex work nor activities related to it are subject to criminal law. Instead, Occupational Health and Safety guidelines that recognize labour rights and responsibilities are in place to regulate the sex industry. New Zealand is currently the only country that is decriminalized at the national level, and has been so since 2003. Abel, Fitzgerald, Healy, and Taylor (2010)² provide an overview of how decriminalization was achieved, as well as how it has affected sex workers and New Zealand society as a whole.

In Canada:

The buying and selling of sexual services is legal in Canada. However, the *Canadian Criminal Code* makes almost every other activity related to sex work illegal. Four sections of the *Criminal Code* deal with these activities.

1. Section 210 outlaws “common bawdy houses”. This is any place that someone keeps or occupies for the purposes of prostitution (or for the practice of acts of indecency).

2. Section 211 makes it illegal to take or direct a person to a bawdy house.
3. Section 212 prohibits “procuring” prostitution or “living on the avails” of prostitution. This refers to third party involvement in the buying or selling of sex, and means that someone cannot live off the money a sex worker makes or set up a date between a sex worker and client.
4. Section 213 outlaws “communicating for the purposes of prostitution”. This means that you cannot buy or sell sex in public places (e.g., cars, bars, phone booths).

In addition some sex work related activities and forms of sex work (e.g., exotic dancing, street-based prostitution) leave workers open to changes of obscenity (s.163), engaging in immoral theatrical performance (s.167), performing an indecent act in public (s.173) and public nudity (s.174).

What are the implications of these laws in terms of sex workers ability to work safely and securely?

There have been several recent challenges to the Canadian Criminal Code in relation to these federal prostitution laws. Many sex workers and sex work advocacy groups argue that current laws make it difficult for workers to work safely and securely because the strategies they adopt tend to violate sections of the criminal code. For example:

1. Screening clients over the telephone and negotiating the price/nature of the services beforehand contravenes the communicating law;
2. Maintaining a fixed work location or sharing a work location so as to have security in numbers contravenes bawdy house laws;
3. Sharing/referring clients or working under a manager/employer enhances security and ensures workers get paid but contravenes procuring laws.

Furthermore, working within a quasi-criminal environment tends to stigmatize and further marginalize sex workers^{28,46,48}. It also has a wide ranging impact on their lives and work⁸³ in that it can:

1. Limit access to health services, as workers might not want to disclose that they participate in sex work;
2. Foster economic exploitation at the hands of manager while simultaneously limiting access to labour rights and protections;
3. Jeopardize economic security because “proceeds of crime” legislation hinders the capacity to save or invest;
4. Undermine liberty and freedom of association in that many bail and sentencing conditions prohibit workers from interacting with friends, colleagues in the business, and impedes the ability to travel and cross borders;
5. Reinforce the exploitation of sex workers in that they may feel unwilling to report work-related violence, sexual assault, theft, or property damage for fear of being charged under some section of the criminal code, creating an adversarial relationship between police and sex workers;
6. Make sex workers feel responsible for their own victimization.

Even though prostitution in Canada is not illegal, sex workers are treated like criminals. Criminalisation tends to result in: violence, police harassment, increased HIV and STI risk, reduced access to social services, psychological trauma and poor self-esteem, drug use, loss of family and friends, restrictions on travel, employment, housing, and parenting, and even work-related mortality. Thus, researchers and sex work advocates^{47,62,76,78} among others, indicate that the first step for improving the welfare of sex workers – including street-based sex workers – is to decriminalize sex work. While some argue that sex work constitutes violence against women and that decriminalization will only condone the violence, this position fails to acknowledge the diverse experiences of people working within the sex industry, or the inevitability and legitimacy of sex work³⁰. Others argue that decriminalizing sex work will promote the trafficking of women, or create an increase in drug misuse, organized crime, and STIs, yet there is no research that suggests that sex work causes or exacerbates these issues. Research from New Zealand in fact provides evidence that the above issues do not result from decriminalization of sex work².

In recognition that current federal laws are unconstitutional, Ontario Superior Court Justice Susan Himel struck down three provisions of the criminal code mentioned above (sections 210; 212(1)(j) and 213(i)(c)) in September 2010. Himel found these laws prevented sex workers from taking steps to enhance their safety and reduce the risk of violence. A stay of effect – whereby current laws are suspended – was put in place pending appeal. While sex workers and sex worker advocates have applauded this progressive ruling, the Conservative government appealed to the Ontario Court of Appeal.

The Court of Appeal for Ontario (a panel of five judges, made up of three women and two men) released its decision on March 26, 2012. All five upheld the earlier decision that the Bawdy house provision (s. 210) was unconstitutional but suspended the declaration of invalidity for 12 months.

Section 212 (living on the avails of prostitution) was not struck down but amended. All five agreed to reword the section to say “prohibition applies only to those who live on the avails of prostitution in *circumstances of exploitation*.” The amended living on the avails section of the law takes place 30 days from the release of the decision.

The majority of the court (three judges) determined that section 213 (the prohibition against communicating for the purpose of prostitution) was consistent with the principles of fundamental justice. The dissenting minority agreed with the lower court that the ban was unconstitutional. The communicating provision remains in full force.

Parties have 60 days to appeal and on October 25, 2012, The Supreme Court of Canada announced that it will hear the appeals.

Other considerations:

An important but overlooked part of legal regulation of sex work is municipal licensing and by-laws. Little is known about municipal licensing and by-laws in relation to sex work in Canada, and we aim to explore these issues in our project.

In addition, little is known about how the legal environment's impact varies by the gender of sex workers and their clients. Our project investigates these issues further.