

SYNOPSIS

When consenting adults engage in sex work, it is work. Those who engage in sex work, whether they be service providers or clients, should receive the same protections under the law as all people do. Their conduct should not be criminalized.

Through our own independent observations at PACE Society, we have concluded that the current criminal scheme as it relates to sex work, embodied by the *Protection of Communities and Exploited Persons Act (PCEPA)*, harms those who engage in sex work. It is particularly harmful to sex workers. This conclusion has been supported by peer-driven research and data collected by other sex worker driven organizations throughout the country.

PCEPA is unconstitutional as it jeopardizes the safety and well-being of sex workers. It does this on the basis of their chosen profession.

PCEPA creates more dangerous working conditions for sex workers, including migrant sex workers. Sex workers are at a greater risk of violence, exploitation, discrimination, harassment and trafficking as a result of *PCEPA*. For this reason, *PCEPA* is contrary to sex workers protected *Charter* rights as it offends the *Charter* under section 7. It is not saveable under section 1.

The scheme should be repealed altogether and a more holistic approach should be adopted for future law reform.

ABOUT PACE SOCIETY

PACE Society is a non-profit sex worker led organization. We are for sex workers, by workers. We have provided peer-driven support services to sex workers in Vancouver, British Columbia since 1994.

At our core, we are a low-barrier service provider to sex workers. We operate under a harm reduction model. We meet sex workers where they are and provide them with the self-identified care that they require, when they require it.

PACE Society provides peer-driven support for members, who are disproportionately impoverished and marginalized. We offer a variety of services and programs. This includes one-to-one support, drop-in services and outreach programs designed for sex workers, by sex workers. We provide services such as peer mentorship and support, crisis management, health navigation, employment assistance, criminal justice support, gender self-determination, legal advocacy, family reunification, child apprehension support and social service referrals.

Of all of our programs, PACE Society's longest running program is the violence prevention program. This program is funded by the City of Vancouver and consists of eight-weeks of occupational health and safety workshops. These workshops are designed to promote violence

prevention strategies that assist sex workers in creating a safer work environment and minimizing their risk of violence.

Aside from front-line service work, PACE has also acted as an intervener in *Bedford v. Canada* and were involved in parallel legal challenges to Canada's former Sex Work laws in conjunction with both Pivot Legal and Sex Workers United Against Violence (SWUAV).

While much of our work involves sex workers who work and reside in Vancouver's infamous Downtown Eastside, our demographics have recently expanded to include an increasing number of indoor and online sex workers.

We also provide services to all genders and have experienced an increasingly large number of sex workers who access our services and identify as LGBT2Q. In 2016, thirty per cent of our members identified as transgender, two spirit or gender non-binary.

Our low-barrier, evidence-based services have been demonstrated to help improve overall health and social outcomes for sex workers living in some of the most marginalized conditions in this country.

THE PROBLEMATIC SECTIONS OF PCEPA AS THEY RELATE TO SEX WORK

The following sections of *PCEPA*, which now form a part of the *Criminal Code of Canada*, are the most problematic for sex workers and other people who voluntarily and freely engage in the sex trade:

Communication to provide sexual services for consideration

s. 213(1.1) – everyone is guilty of an offence punishable on summary conviction who communicates with any person - for the purposes of offering or providing sexual services for consideration - in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.

Obtaining sexual services for consideration

s. 286.1(1) – everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of (a) an indictable offence or (b) an offence punishable on summary conviction.

Material benefit from sexual services

s. 286.2(1) everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection s286.1(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Procuring

s. 286.3(1) – everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term not more than 14 years.

Advertising sexual services

s. 286.4 – everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of (a) an indictable offence or (b) an offence punishable on summary conviction.

Immunity

s. 286.5 – (1) no person shall be prosecuted for (a) an offence under s. 286.2 if the benefit is derived from the provision of their own sexual services; or (b) an offence under s. 286.4 in relation to the advertisement of their own sexual services (2) no person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of s. 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

As these sections of the *Criminal Code* are unlikely to withstand a *Charter* challenge, they should be repealed by government.

HOW THESE PORTIONS OF THE *CRIMINAL CODE* NEGATIVELY AFFECTS SEX WORKERS

PACE Society's Research

Through our hands-on, front-line work with sex workers in Vancouver, we have independently concluded that the current criminal scheme negatively affects sex workers in a myriad of ways. These findings have come to PACE Society's attention by way of direct interaction with sex workers, all of whom voluntarily and confidently engage with us and seek our services.

In 2016, over 500 sex workers accessed our drop-in services and booked 1,200 one-to-one appointments with support workers. Each of these sex workers had a unique perspective and an individual experience to share.

The sex workers that access services through our organization are adults who have entered the profession of sex work voluntarily. They do not report trafficking to be an issue that they encounter.

The sex workers that access services at PACE Society tell us that *PCEPA* has compromised their safety, security, autonomy and dignity in the following ways:

- Decreases their ability to screen clients, thereby putting them at an increased risk of violence and abuse
- Creates an inability for them to establish free and public forums to share vital information amongst themselves, which could significantly improve their overall safety and security
- Creates more limited ability to access police protection, whether in reality or in perception due to fear to stigmatization and criminalization of both themselves and their clients
- Creates barriers to establishing safe, indoor working spaces
- Increases isolation and creates more dangerous working conditions for stress-based sex workers
- Reduces willingness on the part of clients to contact police in relation to situations of sex worker exploitation or trafficking where such concerns may arise
- Decreases ability of law enforcement to effectively identify and intervene in situations of exploitation, abuse and trafficking
- Creates rushed negotiations between sex worker and clients due to fear of prosecution, which leads to increased misunderstandings between parties with respect to expectations
- Decreases sex workers ability to negotiate and establish ground rules for safer sex practices
- Creates an environment where sex workers are less likely to seek out and hire protection and enforcement agents, such as drivers, body guards, spotters or booking agents
- Decreases the ability to access stable housing, which is coupled with an increased fear of being evicted by landlords should they discover the sex workers profession
- Increases the fear of children being removed from the home if community members discover the sex workers profession
- Increases barriers to accessing services at sex work specific organizations due to fear of being “outed” as a sex worker and facing the social ramifications thereof
- Increases discrimination in accessing health care

It is PACE’s conclusion that *PCEPA* has done nothing to increase the safety, security or dignity of sex workers and that, in fact, it achieves the opposite.

As a result of *PCEPA*, sex workers have been forced to work in more isolated and dangerous conditions. They cannot communicate openly and freely with one another or with their clients. When they do experience violence, abuse, exploitation or trafficking, they are more hesitant to contact authorities. Sex workers are increasingly distrustful of police and other authority figures as they worry that both their and their clients’ dignity, security and privacy could be compromised if they come forward with issues or concerns.

This is ultimately harmful to sex workers and does not protect them or the communities in which they live and work.

Other Research

There is ample external evidence to suggest that our findings in this respect are consistent throughout Canada and that *PCEPA* does nothing to improve the safety of sex workers, or to decrease the rate at which adults enter into and engage with sex work.

A recent study¹ involving Chinese migrant sex workers, which was conducted in both Toronto and Vancouver, confirmed that *PCEPA* creates an increased risk of harm for already marginalized individuals working in the sex trade.

Sex workers who took part in this study expressed increased fear of arrest, detention and ultimately deportation if authorities were to discover their occupation under the current legislative scheme. These are factors that ultimately weighed into their vulnerability on a whole.

As a result of the stigma associated with sex work, which is perpetuated by *PCEPA*, this study concluded that sex workers are forced to work in more dangerous conditions, which can increase their risk of violence and their vulnerability to traffickers.

Another study², that was recently conducted in Toronto, found that racialized women are more likely to fall victim to violence, abuse and trafficking within the context of sex work. Due to the fact that race appears to be a compounding factor in marginalization, racialized sex workers are placed in a more vulnerable position relative to their non-racialized counterparts and are less likely to seek help from authorities when they experience dangerous or violent encounters.

Some of the enforcement methods adopted by police since *PCEPA* has been enacted have contributed to the marginalization and isolation of sex workers throughout Canada. Deeply flawed and problematic law enforcement strategies like Operation Northern Spotlight have only increased sex workers distrust towards police and authority figures. Sex workers across the country have publicly denounced this initiative.³ By improperly focusing police resources on sex

¹ Ham, J. (2015) *Chinese Sex Workers in Toronto & Vancouver*, available at <http://swanvancouver.ca/wp-content/uploads/2015/05/Chinese-sex-workers-in-Toronto-amp-Vancouver-Zitend-SWAN-amp-ACSA.pdf>

² Toronto Network Against Trafficking in Women, Multicultural History Society of Ontario, Metro Toronto Chinese and Southeast Asian Legal Clinic, *Trafficking in Women including Thai Migrant Sex Workers*, Status of Women Canada, Canada, 2000, available at <http://ccrweb.ca/en/trafficking-women-including-thai-migrant-sex-workers-canada>

³ Turn off the Spotlight: Sex Workers and Allies Urge an End to Operation Northern Spotlight, available for download at <http://www.aidslaw.ca/site/turn-off-the-spotlight-sex-workers-and-allies-urge-an-end-to-operation-northern-spotlight/?lang=en>

work as an inaccurate haven for trafficking, not only are sex workers harmed, but the real victims of labour trafficking are overlooked and forgotten about.

The conflation of sex work and trafficking is harmful to sex workers, and to legitimate victims of forced labour and labour trafficking. Individuals who are most at risk of trafficking in this country are working in industries like agriculture, construction, manufacturing, domestic service and in food and beautification industries⁴. They are largely migrant workers who are vulnerable, isolated and in desperate need of employment⁵.

THE CURRENT LEGISLATIVE SCHEME AS IT RELATES TO SEX WORK IS UNCONSTITUTIONAL

The Scheme Breaches Section 7

Section 7 of the *Canadian Charter of Right and Freedoms* protects an individuals' autonomy and personal legal rights from actions of the government. There are three enunciated grounds of protection within this section. These are the right to (1) life, (2) liberty and (3) security of the person.

The on-going criminalization of sex work results in harassment, surveillance, social and racial profiling, increased police presence, arrest, detention, isolation, vulnerability and violence.

This conclusion is supported by the Supreme Court of Canada's decision in *Bedford*, which held that the criminalization of sex work leads to violations of sex workers' right to life, liberty and security of person being violated. In that decision, the Court found that the laws prevented sex workers from engaging in a legal activity from taking steps to protect themselves and reduce their risks in doing so. The current legislative scheme has not alleviated this, and in fact, appears to only have made it worse.

For this reason, and for the reasons as expressed by sex workers as outlined throughout our brief, it is our view that the current legislative scheme criminalizing sex work is in violation of s. 7.

This Breach is Not Saveable Under Section 1

Section 1 allow for reasonable limits on protected *Charter* rights. It allows the government to pass laws that infringe on an individuals' protected rights so long as it does so in a reasonable manner.

⁴ The Canadian Centre to End Human Trafficking, *Labour Trafficking*, available at <http://www.canadiancentretoendhumantrafficking.ca/labour-trafficking/>

⁵ Brazao, Dale, (2008) *Exploited Workers Canada's 'Slave Trade'*, The Toronto Star, available at https://www.thestar.com/news/investigations/2008/08/30/exploited_workers_canadas_slave_trade.html

Once a breach is found, it is up to the government to show that it is justifiable under s. 1 and therefore permissible in a free and democratic society.

In order to do so, the government must meet the requirements as expressed in the *Oakes*⁶ test. They must show that: (1) the measures adopted were carefully designed to achieve the objective in question and are rationally connected to it, (2) the measures are minimally impairing on the right or freedom in question and (3) proportional between the effects of the measure on the right or freedom and the objective identified.

It is our view that the government will be unable to pass even the first hurdle as outlined in the *Oakes* test. The measures adopted in *PCEPA* do not achieve the objective of properly protecting communities and increasing the safety of vulnerable populations, like sex workers.

However, even if they are able to do this, it is highly unlikely that the offending sections will be able to pass the second and third hurdles of the *Oakes* test. Given the serious safety concerns, they cannot be properly said to be minimally impairing on s. 7 rights, nor can they be said to be proportional.

RECOMMENDATIONS

A *Charter* challenge will be costly and time consuming. Sex workers and other vulnerable populations will suffer as we await a decision of the court.

Instead of delaying any further, *PCEPA* should be repealed by government. It should be repealed as it is contrary to section 7 *Charter* rights and is not saveable under section 1.

Consenting adults who wish to engage in sex work, whether they be sex workers or clients, should be able to do so without the fear of prosecution, punishment and penalty.

Providing those who freely and voluntarily engage in sex work with the same legal protections as all labourers in this country will better protect sex workers and will allow authority figures to better identify and aid legitimate victims of trafficking.

Rather than criminalizing sex work, a holistic approach to law reform should be adopted.

This approach should not only repeal and reform federal criminal law, but also examine the interplay between immigration and employment law, and provincial laws around public health, occupational health and safety and employment standards. This will provide the comprehensive response necessary to better support sex workers while also tackling the issue of trafficking in our country.

Our communities will not be properly protected until sex workers are.

⁶ *R. v. Oakes* [1986] 1 SCR 103

