

HIV Legal Network

Submission to the UN Committee on the
Elimination of Discrimination against Women:
Review of Canada at 89th Session (October 7-25, 2024)
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INTRODUCTION

The HIV Legal Network (“Legal Network”) make this submission to the Committee on the Elimination of Discrimination against Women (“CEDAW Committee”) in advance of its review of Canada’s periodic report, detailing our concerns about Canada’s implementation of the Convention on the Elimination of All Forms of Discrimination against Women (“Convention”) with respect to the rights of: (i) sex workers; (ii) women who use drugs; and (iii) women living with HIV.

SEX WORKERS

In 2016, the CEDAW Committee expressed concern about the “potentially increased risk to the security and health of women in prostitution” brought about by the Protection of Communities and Exploited Persons (PCEPA) and recommended that Canada “[f]ully decriminalize women engaged in prostitution.” Ten years since PCEPA’s passage in 2014, sex workers in Canada continue to risk criminal prosecution for working in public space and have been prosecuted for offences related to third-party benefits and trafficking when they work with, gain material benefits from, or assist other sex workers to enter or work in Canada. In particular, Indigenous, Black, and migrant women face targeted violence, stigmatization, hyper-surveillance, and over-policing under PCEPA.

Numerous studies have concluded that PCEPA’s prohibition on purchasing sexual services has contributed to increased risk of violence against sex workers, who are forced to work in isolation and insecure locations and to rush negotiations with potential clients for fear of police detection. In a study involving 299 sex workers from Vancouver, B.C., 26% reported negative changes after PCEPA’s passage, including reduced ability to screen clients. These experiences are more pronounced for racialized, migrant workers given immigration prohibitions on sex work.

Additionally, research in Canada has shown that criminalizing third parties who work with, for, or employ sex workers, forces sex workers to work in isolation, away from support networks and without proven safety mechanisms such as work environments that allow women to work together and promote access to health and support services. Third parties often provide essential supports for sex workers who have limited means. Laws that subject all third parties to criminal sanction without evidence of abuse drives sex work underground where labour exploitation can flourish and deters sex workers from the legal system when they experience violence because they fear charges for themselves and the people with whom they work.

Moreover, since PCEPA’s passage, criminalizing sex work has been deemed a central strategy to protect women from human trafficking — enabling law enforcement to intensify surveillance and other initiatives against sex workers. As migrant sex workers have reported, racial profiling and surveillance associated with anti-trafficking campaigns has heightened their risk of arrest, detention, and deportation, contributing to their further marginalization while increasing their mistrust of law enforcement.

Correspondingly, greater surveillance of Indigenous women has undermined their relationships with family members or others who may offer them safety or support, including in circumstances where they may sell sex. As the National Inquiry into Missing and Murdered Indigenous Women and Girls concluded, Indigenous women in sex work who experience violence face risks in reaching out to police, including the risk of being charged themselves. In a 2021

study, 36.36% of Indigenous sex workers reported that they were unable to call emergency services due to fear of police detection of themselves or third parties. The Inquiry thus recommended “recognizing and honouring the agency and expertise held by women” and providing “access to safe spaces to engage in sex work.”

Criminalizing and otherwise prohibiting sex work discriminates against women and fuels their exploitation in sex work, in contravention of Articles 2, 6, and 11 of the Convention. Decriminalizing sex work is in line with recommendations made by UNAIDS, UNDP, the Global Commission on HIV and the Law, the UN Special Rapporteur on the right to health, the UN Working Group on discrimination against women and girls, and UN Women. Following his 2023 mission to Canada, the Special Rapporteur on contemporary forms of slavery expressed serious concern “that anti-trafficking rhetoric and implementation of antitrafficking efforts have had a negative impact on the human rights of sex workers,” concluded sex workers’ situation had worsened under PCEPA, and recommended fully decriminalizing sex work in law and practice.

Similarly, a federal Parliamentary Committee studying PCEPA concluded in a 2022 report that PCEPA “causes serious harm to those engaged in sex work by making the work more dangerous.” It recommended that Canada repeal prohibitions on public communication and advertising of sex work as well as prohibitions against migrant sex work, which “put migrant sex workers at elevated risk of violence and danger by making them unable to report these incidents without fear of deportation.”

CANADA MUST:

repeal all sex work–specific criminal offences;

repeal all immigration prohibitions on migrant sex work;

critically review anti-trafficking approaches and programs that conflate sex work with trafficking and undermine sex workers’ attempts to protect themselves and counter violence;

fund and support culturally appropriate programs and services that are developed by people who have lived experience selling sex, including:

safe spaces to engage in sex work; and

access to health care, counselling, legal services, income support, housing, childcare, education, training, and support for substance use.

women WHO USE DRUGS AND GENDER-BASED VIOLENCE

Violence against women (VAW) is among the “most pervasive health risks to women and gender-diverse people” in Canada. Since 2019, the country has seen increasing rates of femicides — borne disproportionately by certain populations, including Indigenous women and women who use drugs. This is in the context of an unprecedented overdose crisis in Canada that has claimed almost 45,000 lives since 2016, with Indigenous women particularly affected.

Despite increasing recognition of the need to provide shelter and supports to women who use drugs, several provinces continue to mandate zero-tolerance among their shelters or link drug use to dangerous behaviour. As a result, women are often barred from admission if they are noticeably intoxicated or are forced to leave for having or using drugs. A 2021 national survey found that, among 500 women and gender diverse people, those who used drugs were barred from shelters at a rate that was three times higher than those who did not.

Unsurprisingly, most shelters do not meet the needs of women who use drugs. In a survey of 203 low-barrier women’s shelters, 79% of shelters reported that it was a “major challenge” to serve women who use drugs. Consequently, women are dying in shelters.

A major barrier to accessing shelter for women who use drugs is the criminalization of people who use drugs, which fuels stigma towards drug use and prevents women from seeking or obtaining protection. Blanket bans on substance use in shelters are justified on discriminatory and unfounded beliefs that people who use drugs are inherently dangerous to staff, other shelter participants, and children, or on the perceived need to minimize criminal liability for permitting prohibited drugs on site.

Following her 2018 visit to Canada, the Special Rapporteur on VAW called on Canada to establish an adequate number of, and sustainably fund, shelters and services for women fleeing violence, considering the needs of women belonging to vulnerable groups. At the time, there were 553 VAW shelters, which the Special Rapporteur concluded was insufficient. The Special Rapporteur also called on Canada to ensure that women are not criminalized when they seek protection. As of 2020-2021, there are only 557 shelters, with hundreds of people turned away from shelters each day, and three in ten returning to the home in which their abuser lives.

Failing to provide shelter to women who use drugs represents a clear violation of Article 2 of the Convention. During its 2016 review of Canada, the CEDAW Committee recommended that Canada “reduce the gap in health service delivery related to women’s drug use, by scaling-up and ensuring access to culturally appropriate harm reduction services.” Moreover, the CEDAW Committee has previously concluded that States Parties had breached their Convention obligations because they did not have sufficiently accessible VAW shelters, including for women who use drugs.

CANADA MUST:

increase funding to all shelters for women fleeing violence;

ensure that women are not barred from shelters on the basis of drug use;

fund, scale-up, and ensure access to gender-sensitive and culturally appropriate harm reduction services for women who use drugs such as supervised consumption services, including in shelters;

decriminalize the possession of all drugs for personal use and the sharing or selling of drugs for subsistence, to support personal drug use costs, or to provide a safer supply.

women living with hiv

In Canada, approximately 225 people have been charged for not disclosing their HIV-positive status to sexual partners. Most cases involve men who had sex with women, and a significant number of cases where women were charged involved Indigenous women.

In cases of non-disclosure, people living with HIV are usually charged with the offence of aggravated sexual assault, which carries harsh penalties including life imprisonment and sex offender registration. Prosecution can occur without HIV transmission, without any intent to harm, and where reasonable precautions were taken to avoid transmission.

Some Canadian jurisdictions provide prosecutorial guidance to limit criminalization, including where a person has a suppressed viral load. However, the law is applied inconsistently across Canada, fuelling fear of continued threats of criminalization for people living with HIV.

Criminalization is a blunt and punitive approach to HIV prevention that does little to protect women from HIV infection, violence, or coercion. It exacerbates fear around disclosure and can be instrumentalized as a tool of coercion or revenge, particularly against women facing socioeconomic precarity or abusive relationships.

HIV criminalization violates Article 2 of the Convention. The CEDAW Committee has previously denounced the “concerning application of harsh criminal sanctions (aggravated sexual assault) to women for non-disclosing their HIV status to sexual partners,” and like many other international expert bodies, recommended that Canada “limit the application of criminal law provisions to cases of intentional transmission of HIV/AIDS.” The UN Committee on Economic, Social and Cultural Rights has also called on states “to reform laws that impede the exercise of the right to sexual and reproductive health” including laws criminalizing “HIV non-disclosure, exposure and transmission.”

Despite repeated acknowledgments from the Canadian government that HIV criminalization is problematic and requires legal reform, as of August 2024, no concrete legislative action has been taken to resolve this issue.

CANADA MUST:

remove HIV non-disclosure from the ambit of sexual assault law and restrict criminal penalties to cases of actual, intentional transmission;

ensure that the criminal law does not apply in circumstances where there is no significant risk of transmission, such as sex with a condom, oral sex, or sex with a low or suppressed viral load;

review past convictions, allowing for a conviction to be expunged if it does not fit within new limitations on the scope of criminalization;

invest in culturally appropriate and gender-sensitive supports that reduce the vulnerability of women living with HIV to gender-based violence, including universal basic income, housing assistance, paid sick leave, childcare, legal services, violence against women shelters, and harm reduction services.