

# **Prostitution: Violating the Human Rights of Poor Women**



Prepared by Shelagh Day  
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## **Foreword**

Shelagh Day is a human rights advocate and expert. She has advised United Nations treaty bodies, governments, and non-governmental organizations on women's social and economic rights. She has published widely on statutory, constitutional and international human rights guarantees, with a particular focus on women's rights to substantive equality and an adequate standard of living.

She is a founder of the Women's Legal Education and Action Fund, the Court Challenges Program, and the Women's Court of Canada, and has held leading positions with the National Action Committee on the Status of Women, the National Association of Women and the Law, and the Canadian Feminist Alliance for International Action. She is currently a Director of the Poverty and Human Rights Centre, and Senior Editor of the Canadian Human Rights Reporter, Canada's only comprehensive law reporter in the human rights field.

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## Executive Summary

For women's organizations that are dedicated to advancing the equality of the poorest and most vulnerable women, this is an important moment to take a position on the law with respect to prostitution. Not only does the ongoing, overwhelming violence of prostitution require a response, but in both political and judicial arenas, Canadian laws on prostitution are under scrutiny.

Two Parliamentary Committees have recently issued reports on prostitution and trafficking in Canada. In addition, two constitutional challenges have been filed in Ontario and British Columbia courts that seek to strike down the sections of the *Criminal Code* that prohibit communicating in public for the purpose of selling or buying sex, living on the avails of prostitution, and keeping a common bawdy house. These constitutional challenges are likely to be heard in 2009. Women's organizations need to be ready to contribute to a renewed debate.

For poor women and girls in Canada, prostitution is a means of obtaining survival income. The central question for any prostitution reform is: what will help women, particularly the poorest racialized women, to escape the violence and inequality of prostitution? There appear to be two different responses to this question in Canada, and in countries around the world. One response is to decriminalize or legalize prostitution; the other is to prohibit men from buying women and to help women to escape from prostitution.

What both sides in this debate seem to agree on is that no social good is served by using the criminal law against women who are in prostitution. Criminalizing poor women for the impact of poverty, racism, early sexual abuse, and the lingering effects of colonization does not seem just.

The disagreement is about how to deal with men who buy sex and with those who profit from the sale of sex – the pimps, brothel owners, and others who control the prostitution industry. Currently, there are two principal approaches. Advocates for decriminalization or legalization say the men who buy women, the pimps and the prostitution industrialists should be decriminalized too. Abolitionists say buyers, pimps and prostitution industrialists should remain criminalized and be barred from profiting from the sale of women's bodies.

In the current discourse, women are being asked to view decriminalization or legalization of prostitution as: a means of showing respect for women in prostitution; liberatory and pro-sex; a means of reducing prostitution's harms; and an acknowledgement that prostitution is a form of work.

To evaluate these claims, Action ontarienne contre la violence faite aux femmes (AOcVF) commissioned a report by Shelagh Day, a leading human rights analyst. *Prostitution: Violating the Human Rights of Poor Women* asks: are prostitution, and the decriminalization or legalization of prostitution, consistent with the human rights of women?

### *Prostitution: Violating the Human Rights of Poor Women*

The report concludes that prostitution, and the decriminalization of prostitution, cannot be squared with women's constitutionally entrenched rights to equality and security of the person.

#### Legal Approaches: Decriminalization, Legalization, Abolition

What is the difference between decriminalization, legalization, and abolition?

Decriminalization is the legal approach espoused by those who have filed the two constitutional challenges. Decriminalization would mean removing sections 210, 212(1)(j) and 213(1)(c) from the *Criminal Code* so that there was no law prohibiting communicating, or living on the avails of prostitution, or running a common bawdy house.

This would have the effect of decriminalizing the women who are in prostitution. But it would also decriminalize the buyers, the pimps, and the prostitution industry as a whole. It would make prostitution activities, and the prostitution industry, legal.

Proponents of decriminalization favour this approach on the grounds that: 1) prostitution is sex between consenting adults and governments should not interfere; and 2) decriminalization will reduce harms to women in prostitution because women will be able to run their own brothels legally and be safer in indoor prostitution than on the street.

Decriminalization is a gender-neutral approach that treats the (mainly) women who sell sexual services and the men who purchase them as though they were the same. It also treats all of those involved in prostitution – the women, pimps, and owners of large and small brothels, massage parlours, strip clubs – as though they were the same, by rendering legal all prostitution-related activities.

Decriminalization and legalization are seen by some to be different approaches. The term 'decriminalization' is used to indicate that the goal is to remove all criminal sanctions on prostitution and prostitution-related activities and to treat it like any other business. Legalization, by contrast, refers to legal regimes that remove criminal sanctions but also regulate prostitution.

In reality, the difference between decriminalization and legalization seems to lie merely in *how much* regulation of health and safety, zoning, licensing, or advertising is put in place after criminal sanctions are removed. In Germany, the state of Nevada, (U.S.A.), some states in Australia, and the Netherlands, which have legalized prostitution, regulation includes any or all of: registration of prostituted women, health and safety regulations, licensing of prostitution-related businesses, controls on the location and size of establishments, and the creation of "tolerance zones". However, in the two jurisdictions that have 'decriminalized' – New Zealand and the state of New South Wales in Australia – governments also license brothels and impose zoning restrictions on where prostitution – indoor and outdoor – can be carried on.

The main feature of both decriminalization and legalization is that prostitution is normalized by making it a legal activity and business.

The alternative legal approach to prostitution is abolition. This approach seeks to end prostitution based on the understanding that prostitution is a form of male violence against women, and an obstacle to women's equality with men. Laws that have abolition as their goal decriminalize women in prostitution, but criminalize the buyers and the prostitution industry.

Sweden's 1998 law is the leading example. Sweden's *Act Prohibiting the Purchase of Sexual Services* makes it a criminal offence to obtain sexual services for payment whether they are purchased on the street, in brothels, or in massage parlours. Having embraced women's right to equality, Sweden's policy seeks to end prostitution, rather than manage or legitimise it.

The AOcVF report shows that, so far, decriminalization and legalization approaches are not achieving their espoused goals – that is, making women in prostitution safer, reducing health risks, and reducing street prostitution.

Jurisdictions that have legalized cannot show that women are safer, or that street prostitution is diminished. On the contrary, at the conclusion of a 2003 comparative study of legal regimes in the state of Victoria in Australia, Ireland, the Netherlands, and Sweden, Julie Bindel and Liz Kelly at London Metropolitan University, warned that legalization leads to an expansion of the sex industry, trafficking increases and organized crime flourishes<sup>1</sup>.

In Canada, the federal all-party Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights rejected legalization as an approach to prostitution law reform and accepted evidence that “legalization has not alleviated violence against individuals selling sexual services – violence may even have increased.”<sup>2</sup> Pimps have not disappeared in jurisdictions that have legalized prostitution; neither has street prostitution<sup>3</sup>.

A new report on New Zealand, one of the two jurisdictions that has decriminalized, seems to show a similar pattern. Street prostitution has not reduced since the introduction of the *Prostitution Reform Act 2003*; the law has had no impact on street-based prostitution, and little effect on the violence that women in prostitution experience<sup>4</sup>.

By contrast, both supporters and critics of Sweden's law agree that street prostitution has been reduced by about 40 per cent since its law was introduced in 1998, and that the number of women trafficked into Sweden is low because the country is not viewed as an attractive destination country.

However, even if the record of decriminalization and legalization were better, the AOcVF report asks: is some reduction in the harms of prostitution an adequate goal, given Canada's commitments to the substantive equality of

women? The report concludes that harm reduction, at bottom, is a position of capitulation. Decriminalization advocates have given up on the fundamental struggle to achieve equality and autonomy for the most vulnerable, racialized, poor women. They have turned instead to a defensive attempt to protect women from the worst harms that prostitution can bring, not by changing the conditions that catapult women into prostitution or by helping them out of prostitution, but rather by, ostensibly, giving them better market conditions in which to be self-employed prostitution entrepreneurs.

## **Violence in Prostitution**

To answer the question about whether prostitution is consistent with women's rights to equality and security of the person, the report examines research on violence in prostitution, and on the factors that influence women's entry into prostitution.

There is little dispute that prostitution is a dangerous activity. Dr. John Lowman, a criminologist, reports that “[M]uch of the available empirical research on commercial sex indicates that at least some sex workers experience high levels of violence, including, but not limited to, physical assaults, sexual assaults, verbal threats or abuse, psychological abuse, robbery and kidnapping...”<sup>5</sup>.

In an authoritative 9-country study, Dr. Melissa Farley, a clinical psychologist, concluded that “... the physical and emotional violence in prostitution is overwhelming”<sup>6</sup>.

Dr. Farley, and a team of researchers, interviewed 854 people currently or recently in prostitution in Canada, Columbia, Germany, Mexico, South Africa, Thailand, Turkey, United States and Zambia. The study concluded that prostitution causes many traumas. 71% of respondents were physically assaulted in prostitution; 63% were raped; and 68% had the clinical symptoms of post-traumatic stress disorder. Of the Canadian women participants, 75% were injured during prostitution. These injuries included: “stabblings and beatings, concussions, broken bones... Half of the Canadian women suffered traumatic head injuries as a result of violent assaults with baseball bats, crowbars or from having their heads slammed against walls or against car dashboards”.

Women in prostitution also have other prostitution-related health problems, including high rates of HIV and sexually transmitted diseases (stds), and increased risk for cervical cancer and chronic hepatitis.

Those who advocate for decriminalization claim that indoor prostitution is safer than outdoor prostitution. However, physical violence also occurs frequently in indoor settings in the form of rape, threatened rape and threats with a weapon,

and the experience of psychological trauma is comparable in both types of prostitution<sup>7</sup>.

This violence - assaults, rape, verbal abuse, etc. - must be seen as *in addition* to the inherent violence of prostitution itself. Prostitution itself is a form of sexualized male violence.

Women around the world, over the last three decades in particular, have worked – with some success – to establish an understanding that non-consensual or coerced sex constitutes violence against women. The right of women to make decisions about when and whether to have sex, and with whom, is understood to be integral to women’s equality with men, and to their autonomy and dignity as human persons.

The bargain inherent in prostitution is that women have unwanted sex with men they do not know, and feign enjoyment, in exchange for money. Calling this sex between consenting adults ignores the fundamental inequality in the sexual and human transaction for the women and the men. This is not a transaction in which a woman and a man together, voluntarily, seek to give and receive sexual pleasure. Prostitution is a transaction in which women provide commodified sexual services to men, in exchange for money. It is a form of social and sexual subordination.

### **Which women are in prostitution?**

There are also important facts about *which* women are in prostitution today. The Farley 9-country study shows that 47% of participants entered prostitution before age 18; 63% had been sexually abused as a child; 75% had been, or were, homeless; and 89% wanted to leave prostitution.

Being abused as a child appears to be a kind of training course for prostitution, a preparation for treatment as a non-present being. Also, almost half - in the Canadian cohort, more than half – enter prostitution while they were still children.

Poverty is a significant coercive factor. Women usually enter prostitution to survive – to pay the rent, support kids, because they have run away from home, or because they are not eligible for welfare.

In Canada, and in Vancouver in particular, there are disproportionate numbers of Aboriginal women in prostitution. The Aboriginal Women’s Action Network, which rejects decriminalization as a prostitution reform strategy, says that Aboriginal women “have a long, multi-generational history of colonization, marginalization, displacement from our Homelands, and rampant abuse that has forced many of our sisters into prostitution”<sup>8</sup>.

The proposition that prostitution is a choice for women like any other does not ring true when so many coercive factors are present. Given the facts about prostitution, and women in prostitution, prostitution should be recognized as 1) a form of violence in itself; and 2) a violation of women's right to equality.

## **Prostitution As Work**

Advocates for decriminalization believe that women in prostitution should be recognized as workers like any other workers in the society; 'sex workers' is now a preferred term. This claim assumes that prostitution, were it decriminalized, could fit itself within existing regulatory frameworks for work.

This report concludes that prostitution cannot meet one of the core labour rights that is recognized internationally and domestically - the right to non-discrimination. Employing women to provide sexual services to men constitutes discrimination against women because it perpetuates their sexual subordination to men and exploits their economic vulnerability. Also, the essence of the prostitution offering, which is that men can select which women will provide sexual services to them based on age, race, and gender-related characteristics (attractiveness, breast size, etc.), is antithetical to anti-discrimination principles.

Prostitution businesses cannot be made to fit within the framework of anti-discrimination law. If prostitution were decriminalized in Canada, legislators could be faced with a conundrum: try to amend human rights laws so that prostitution could fit within the anti-discrimination framework, to the detriment of all women; or set prostitution outside the parameters of human rights law, contrary to the goals of the decriminalization advocates.

## **Conclusions and Recommendations**

If prostitution is, by its nature, a form of male violence against women, harmful to health, and discriminatory, and if women mainly enter it because of poverty, racism, homelessness, previous sexual abuse, and lack of social supports, should women's advocates accept harm reduction as a sufficient goal?

Prostitution is fundamentally an issue of the equality rights of the poorest and most vulnerable women. For both practical and conceptual reasons, this report concludes that abolition is the best strategy for women's equality advocates to adopt; it is the only approach to prostitution law reform that is consistent with the legal concept of substantive equality and with feminist understandings of violence against women. The report recommends that women's organizations: engage in concerted advocacy to change the conditions that cause women and girls to enter prostitution; design and support new exit strategies to assist women to leave prostitution; and plan collaborative strategies and public education campaigns to work towards the elimination of prostitution.

The report concludes that women's organizations should repudiate any devaluation of the rights of poor, Aboriginal, or racialized women. When defending and promoting the human rights of women, the rights of the poorest women must be central, and the fight for the poorest women to enjoy equality belongs to everyone.





## Introduction

For women's organizations that are dedicated to advancing the equality of the poorest and most vulnerable women, this is an important moment to take a position on the law with respect to prostitution. The murder and disappearance of more than 500 Aboriginal women across Canada - some of whom were in prostitution, the prospect of increased sexual exploitation of poor women posed by the upcoming 2010 Olympics, the likelihood of more women and girls being trafficked into Canada to satisfy demand, and the ongoing, overwhelming violence of prostitution require a response from women's advocates that is thoughtful and well-considered.

The basic question is: what will help women, particularly the poorest racialized women, to escape the violence and inequality of prostitution? There appear to be two different responses to this question in Canada, and in countries around the world. One response is to decriminalize or legalize prostitution; the other is to prohibit buying women and to help women to escape from prostitution.

What both sides in this debate seem to agree on is that no social good is served by using the criminal law against women who are in prostitution. As this article explains, women are in prostitution mainly because of poverty, early sexual abuse, racism and the lingering effects of colonization. Criminalizing poor women for the impact of poverty and racism does not seem just.

The disagreement is about how to deal with men who buy sex and those who profit from the sale of sex – the pimps, brothel owners, and others who control the prostitution industry. Pro-prostitution advocates say the men who buy women, the pimps and the prostitution industrialists should be decriminalized. Abolitionists say buyers, pimps and prostitution industrialists should be criminalized and barred from profiting from the sale of women's bodies.

Two Parliamentary Committees have recently issued reports on prostitution laws and trafficking in Canada.<sup>9</sup> In addition, the sections of the *Criminal Code* which prohibit communication in public for the purpose of selling or buying sex, living on the avails of prostitution, and keeping a common bawdy house are the subject of two constitutional challenges, which were filed in the Ontario and British Columbia courts in 2007, and will probably be heard in 2009.<sup>10</sup> In both political and judicial arenas, Canadian laws on prostitution are under scrutiny. Because of these developments, this is an important moment for those who are committed to advancing the equality of women to address the issue of the decriminalization or legalization of prostitution.

The moment is also a crucial one because, as Canada's social safety net is eroded by governments, prostitution is being turned to as a survival strategy by Canada's poorest and most vulnerable women<sup>11</sup>.

Currently, women are being asked to view decriminalization or legalization of prostitution as: a means of showing respect for women in prostitution; liberatory and pro-sex; an acknowledgement that prostitution is a form of work; and a means of reducing prostitution's harms<sup>12</sup>.

This paper evaluates the claims made for decriminalization or legalization and measures them against the human rights of women that Canada has underwritten politically and legally. The paper asks: what human rights entitlements do women have? What human rights do poor and racialized women have? Are prostitution, and decriminalization or legalization of prostitution, consistent with these rights? How should we understand the pro-prostitution lobby in light of the human rights of poor women? The paper concludes that decriminalization or legalization of prostitution will not advance the human rights of poor women.

# Part I: Framing the Debate

## The Historical and Legal Context

In the fifty years from the end of World War II to the mid-1990s, Canada created a ‘social union’, through creating pan-Canadian social programs and policies. This ‘social union’ emerged from a basic agreement that those who live in Canada would share resources (in the form of tax dollars) in order to take care of each other’s basic needs. This reflected an understanding that the people of Canada are unified by more than living within national borders and sharing political institutions; we also share social values, and a common recognition of the basic human requirements for a decent life. Everyone needs adequate food, clothing and housing; fair, safe and non-discriminatory conditions of work; access to education; a degree of income security throughout his or her lifetime; and medical services and care. This ‘welfare state’ “removed certain matters from the play of market forces... or regulated the market”<sup>13</sup>, in order to minimize or share the risk of being old, disabled, unemployed, pregnant, or without income for some other reason, by providing public health care, unemployment insurance, public pensions, and social assistance. It created a Canadian society in which there were entitlements to basic supports, provided, not as a matter of charity, but as incidents of social citizenship<sup>14</sup>.

The major social programs in the areas of health and welfare that developed in the postwar period lie at the heart of this political understanding of social citizenship. But Canada’s social programs are also a means of giving reality to the human rights norms that are articulated in the constitutional rights to equality<sup>15</sup> and security of the person<sup>16</sup>, and in international human rights treaties which Canada has ratified<sup>17</sup>.

During the same 50-year period in which Canada developed its social safety net, it also developed a framework of human rights commitments — statutory, constitutional and international. That is, at the same time that Canada was creating a social safety net to ensure that the basic needs of all Canadians for health, education, and income security would be met, it was also engaged, both at home and abroad, in articulating a framework of human rights that guaranteed to people in Canada the exercise and enjoyment of civil, political, economic, social and cultural rights. This is hardly accidental, as the social union and the human rights framework have overlapping content and values, and are vitally connected.

Central to the human rights framework is the commitment to substantive equality, now expressed in section 15 of Canada’s *Charter of Rights and Freedoms*. Substantive equality refers to the recognition that inequality is not just an individual phenomenon. Rather, inequality is disproportionately experienced by groups in the society that are vulnerable to marginalization and discrimination, in particular, women, Aboriginal people, people of colour and people with disabilities. The deeply rooted social inequality of women, and of

racialized and disabled women in particular, cannot be resolved by enacting laws that are merely non-discriminatory on their face. Remedial measures are required that directly, and over time, address the material conditions of disadvantage that systemic discrimination creates.

For women, the creation of Canada's social safety net introduced liberty and opportunity that did not exist in earlier decades. Shifting the burden of caregiving from women's shoulders to the state, as public social programs tend to do, made new openings for women to enter the paid workforce and public life, and to seek higher education. There is a tight connection between the invention of public social programs and the advancement of women's equality in Canada<sup>18</sup>.

Seen through a *Charter* lens, Canada's social programs are a central means of meeting the goals of substantive equality and of security of the person for everyone in Canada. It is through concrete programs and services that governments can ameliorate the conditions of inequality and insecurity experienced by disadvantaged individuals and groups, and protect basic social and economic security.

The international human rights treaties that Canada has ratified are another important part of Canada's human rights framework. The *Charter* guarantees of equality and security of the person are connected to, and their meaning is illuminated by rights set out in the *International Covenant on Economic, Social and Cultural Rights*. These rights include the right to freely chosen work (Article 6), just and favourable conditions of work (Article 7), fair and non-discriminatory wages (Article 7(a)(i) and (ii)), safe and healthy working conditions (Article 7(b)), social security (Article 9), an adequate standard of living, including adequate food, clothing and housing (Article 11), the highest attainable standard of physical and mental health (Article 12), and education (articles 13 and 14)<sup>19</sup>.

*Charter* guarantees are also illuminated by rights set out in the *Convention on the Elimination of Discrimination Against Women*, including equal pay for work of equal value (Article 11(1) (d)), maternity leave with pay (Article 11(2)(b)), supports for parenting, including child care (Article 11(2)(c)), reproductive health care services, including family planning (Article 12(1)) and equality in marriage and family relations (Article 16).

Since *Charter* rights and international treaty rights are interconnected, the Supreme Court of Canada has held that *Charter* rights must be interpreted in light of Canada's human rights treaty obligations<sup>20</sup>.

In short, Canadian governments have made significant legal commitments, in the form of *Charter* rights and international treaty rights, whose implementation requires the establishment and maintenance of social programs and services<sup>21</sup>.

However, despite the layers of commitment made over time, governments seem to be, increasingly, ignoring these human rights undertakings. Since the early 1990s, social programs have been cut and narrowed as governments have embraced the view that individual needs should be satisfied to a greater extent through market participation. The collective values of ‘sharing and caring’ have been pushed aside by market values, and the social citizen of the 1940 – 1990 era is being transformed into a “market citizen”<sup>22</sup>. According to legal academic and social policy expert Janet Mosher, this market citizen’s primary responsibility is to “maximize his private self-interest as a buyer or seller in market exchanges”<sup>23</sup>.

It is in this marketized environment that prostitution can be treated as a rational choice for poor women. As social supports diminish,<sup>24</sup> and as the market, and consumption, are idealized, the implicit message to poor women is: if sex is the commodity you have, learn to live by selling it<sup>25</sup>. Should women’s advocates accept this?

## **Legal Approaches: Decriminalization, Legalization, Abolition**

What is the difference between decriminalization, legalization, and abolition? In Canada currently, there are three principal prostitution-related activities which are prohibited in the *Criminal Code*: keeping a common bawdy house (s. 210); living on the avails of prostitution (s. 212(1)(j)) and communicating in public (s. 213(1)(c)) - that is, in public, offering or requesting the performance of a sexual act in exchange for money. Actually performing sexual acts for money is not a prohibited activity in Canada’s *Criminal Code*. It is nonetheless misleading to say that prostitution is legal in Canada, since prostitution laws criminalize most acts that are related to prostitution<sup>26</sup>.

### **a) Decriminalization**

There is legitimate criticism of the enforcement of Canada’s current laws. Although the prohibition against communicating, which was introduced in 1985, applies equally to the women offering to sell sex and to the men seeking to purchase it, it is more often women who have been charged, and mostly women who have served jail time. Men who are charged rarely go to jail<sup>27</sup>. And those who are “in business” - running escort services, massage parlours, peep shows, strip and lap dance clubs - are rarely prosecuted<sup>28</sup>. In other words, communication laws have been more harshly enforced against women than men<sup>29</sup>, and prostitution laws have been more often enforced against street prostitution than indoor prostitution. In practice, the enforcement of Canada’s current prostitution laws is gendered and punitive for women<sup>30</sup>.

Prostitution-related activities have been criminalized, because like other activities prohibited in the *Criminal Code* - rape, assault, kidnapping, murder - to prostitute another person, and to make money from prostituting them, is considered to be an egregious harm.

Prostitution-related activities have also been criminalized because prostitution has been considered damaging to society as a whole and to the maintenance of civil and respectful relations among its members.

However, by now, many people recognize that women in prostitution are not the perpetrators of any harm. Rather, if anything, they are the victims of it. It is cruel and ineffective to criminalize women who are engaged in prostitution because of poverty, and because of the effects of racism and child sexual abuse. Charging women, giving them criminal records, jailing them for breaching conditions or failure to appear, does nothing to address the conditions which make women enter or stay in prostitution. It simply makes their lives more miserable, and more marginal. If the goal is to stop the harm to women, criminalizing the women is a flawed strategy.

Decriminalization, as the term is used in Canada currently, would mean removing sections 210, 212(1)(j) and 213(1)(c) from the *Criminal Code* so that there was no law prohibiting communicating, or living on the avails of prostitution, or running a common bawdy house. This would have the effect of decriminalizing the women who are in prostitution. But it would also decriminalize the buyers, the pimps, and the prostitution industry as a whole. It would make these prostitution activities, and the prostitution industry, legal. Decriminalization, as it is currently proposed, makes no distinction between the women who are purchased for sex and the men who purchase them.

Proponents of decriminalization argue in favour of this approach on two grounds: 1) that prostitution is sex between consenting adults, and governments should not interfere with the liberty or freedom of expression of adults by criminalizing or otherwise placing restrictions on sexual activity; and 2) that decriminalization will reduce harms to women in prostitution because: women will be able to run their own brothels; live on the avails of their prostitution openly; have partners, pimps, and children who live on the avails of their prostitution without hiding; and have better control over their physical surroundings and transactions with male buyers. Proponents also claim that decriminalization will reduce street prostitution because women will be able to prostitute indoors legally.

Decriminalization claims to address issues confronting women in prostitution. But, it is, at bottom, a gender-neutral approach, which does not recognize the profound differences between women's and men's social and economic conditions, or between women's and men's positions in the prostitution transaction. It treats the (mainly) women who sell sexual services and the men who purchase them as though they were the same. It also treats all of those involved in prostitution – the women, pimps, and owners of large and small brothels, massage parlours, strip clubs – as though they were the same, by rendering legal all of their prostitution-related activities.



Both decriminalization and legalization – discussed further below - are based on an assumption that prostitution is a permanent, inevitable human activity that cannot be stopped. Jurisdictions that have decriminalized or legalized in recent years do so with the stated intent of improving the lot of women by removing the stigma of prostitution, and making prostitution safer for women because they do not need to hide their activity, and can more easily seek assistance from police when they are assaulted. For example, New Zealand’s 2003 law - which passed in Parliament by only one vote - claimed to “safeguard the human rights of persons selling sexual services and to protect them from exploitation, to promote their welfare and occupational health and safety, to bolster public health, and to prohibit the commercial sexual exploitation of children”<sup>31</sup>.

In Canada, advocates of decriminalization or legalization argue that these strategies will better protect the women, particularly Aboriginal women in street prostitution in Canada, who are at risk of being murdered by violent men. In western Canada, the advocacy for decriminalization and legalization has been fueled by deeply-felt community outrage about the disappearance and murder of dozens of women in the Downtown Eastside of Vancouver over the last two decades. It has also been fueled by the stunning negligence of the police, who for years did not investigate thoroughly reports made by family members and friends about women who were missing. Those who invoke the language of harm reduction state that their desire is to remove stigma and improve the conditions in which prostitution is carried out.

They also argue that prostitution is a form of work, and that women in prostitution should be treated no differently from workers in other marginal industries, who also consent to carrying out poorly paid or demeaning tasks. From this perspective, decriminalization and legalization are efforts to improve the “working conditions” and “occupational safety” of vulnerable “workers”.

### ***b) Is there a difference between decriminalization and legalization?***

Decriminalization advocates argue that decriminalization is different from legalization. However, this does not seem to be the case. The principal result of decriminalization and legalization is the same, since decriminalization, like legalization, would make pimping and brothel-owning and other sex service businesses into legitimate, legal enterprises.<sup>32</sup>

Decriminalization advocates seem to prefer to call their approach ‘decriminalization’ because it is more civil libertarian, or simply more libertarian – that is, it is more clearly a position that stands for ‘freedom from government interference’. Legalization, by contrast, can be seen to be calling for government to control the prostitution industry by setting the rules for it, and to make profits from it, a position that from a libertarian perspective, is at best, less attractive.

In reality, the difference between decriminalization and legalization seems to lie merely in *how much* regulation of health and safety, zoning, licensing, or advertising is put in place. In Germany, the state of Nevada, (U.S.A.), some states in Australia, and the Netherlands, which have legalized prostitution, regulation includes any or all of: registration of prostituted women, health and safety regulations, licensing of prostitution-related businesses, controls on the location and size of establishments, and the creation of “tolerance zones”. However, in the two jurisdictions that have ‘decriminalized’ – New Zealand and the state of New South Wales in Australia – governments also license brothels and impose zoning restrictions on where prostitution – indoor and outdoor – can be carried on. In New Zealand, which decriminalized prostitution in 2003 “in an attempt to accept the reality that prostitution exists and to minimize the harm involved...”<sup>33</sup>, local districts are now responsible for the regulation of indoor prostitution, and for zoning, licensing and advertising. Certificates of operation are required to operate a brothel where more than four individuals work for a third party. Local districts are also responsible for the regulation of street prostitution, which according to the City of Manukau, the second largest city in New Zealand, quadrupled after decriminalization in 2003<sup>34</sup>.

Whether the legal approach is called decriminalization or legalization it legitimizes and normalizes prostitution<sup>35</sup>, and then, invariably, brings in a spectrum of measures designed to control or regulate certain aspects of it, to lesser or greater degrees.

Decriminalization advocates also want to distinguish their goal from legalization because legalization has not produced good results for women. For example, Susan Thompson writes about legalization in the state of Nevada: “Instead of providing women with a degree of control and personal autonomy over their lives, the system of legalization ensures that prostitutes have no input over their lives and livelihood. This lack of choice and control, leaves women fully dependent on the government for every aspect of their work. Once a prostitute is licensed to work in the legal brothel, she automatically gives up her freedom to choose who her customers are, when to work, and how much she will receive for her services. A brothel prostitute typically works fourteen hour shifts, everyday, for a three-week period. During that time, a brothel prostitute may see at least ten to fifteen men a day. Prostitutes have no control over the clients they see so they have no right to refuse or deny a customer service... Additionally, prostitutes’ movements outside of the brothel are strictly controlled”<sup>36</sup>. Melissa Farley describes women in legal brothels in Nevada confined in prison-like settings<sup>37</sup>, which are ringed by barbed wire or electrical fencing. Not surprisingly, legalization is viewed by many as oppressive for women in prostitution – despite the claims that have been made that legalization provides safer, healthier venues.

In Canada, the federal all-party Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights accepted evidence that “legalization has not alleviated violence against individuals selling sexual



services – violence may even have increased.”<sup>38</sup> Pimps have not disappeared in jurisdictions that have legalized prostitution; neither has street prostitution.<sup>39</sup> Mary Sullivan and Sheila Jeffreys writing about two decades of legalization in Australia call it a failure. The intent was to minimize harm to women and give them more control, but the Australian experience dispels the idea that legalization empowers women, as sex industrialists now dominate.<sup>40</sup>

Also, increased numbers of children have been noted in prostitution in Amsterdam, as well as increased numbers of foreign women, which seems to indicate that legalization has made the Netherlands a more attractive destination for traffickers.<sup>41</sup> Reportedly, “more than 75 percent of Amsterdam’s 8,000 to 11,000 prostitutes...[are] from Eastern Europe, Africa and Asia.”<sup>42</sup> Amsterdam city officials now say that there is new evidence “that criminal gangs, including East Europeans and Russians, have encroached on [Amsterdam’s red light district], making it meaner, more violent and more in the grip of the underworld of international sex traffickers.” In 2000 when the Dutch legalized prostitution, they intended “to make the sex trade more transparent and protect women by giving them work permits.”<sup>43</sup> Job Cohen, the mayor of Amsterdam now says: “We realize that this hasn’t worked, that trafficking in women continues. Women are now moved around more, making police work more difficult”<sup>44</sup>.

A comparative study of legal responses to prostitution, produced in 2003 by Julie Bindel and Liz Kelly at London Metropolitan University<sup>45</sup>, examined legal regimes in the state of Victoria in Australia, Ireland, the Netherlands, and Sweden.

Despite the stated aspirations of politicians to reduce harm, those jurisdictions that have legalized cannot show that women are safer, or that street prostitution is diminished. On the contrary, at the conclusion of their study, Bindel and Kelly warn that legalization leads to an expansion of the sex industry – both the illegal and legal sectors. They also found that in legalized jurisdictions, trafficking increases and organized crime flourishes<sup>46</sup>. In the long term, the beneficiaries of legalization appear to be the owners and operators of brothels and other prostitution businesses. Decriminalization has no distinguishing feature that promises to make its results different from legalization.

### **c) Abolition**

The alternative legal approach to prostitution is abolition. This is the only legal approach which decriminalizes the women in prostitution, but criminalizes the buyers and purveyors of sexual services – the johns, the pimps, brothel owners, and the prostitution industry. Sweden’s 1999 law is the leading example. Sweden’s law makes it a criminal offence to obtain sexual services for payment whether they are purchased on the street, in brothels, or in so-called massage-institutes. The law is focussed on criminalizing those who demand sexual services not those who supply them.<sup>47</sup> It treats prostitution as male violence against women, and an obstacle to gender equality. As Bindel and Kelly report: “Since moving towards gender equality is a fundamental priority for Sweden, logically its

policy must be based on an approach that seeks to end prostitution, rather than manage/legitimise it”<sup>48</sup>. Gunilla Ekberg, a Canadian lawyer who was Special Advisor on Issues Regarding Prostitution and Trafficking in Human Beings to the Government of Sweden, testified before the Standing Committee on the Status of Women in May 2005. She reported that the number of individuals in prostitution had dropped to half since the enactment of the law, with about 1,500 persons selling sexual services in Sweden at that time and no more than 350 to 400 involved in street prostitution.

The Guardian reported on January 5, 2008 that supporters and critics of Sweden’s law now agree that street prostitution has been reduced. “Agneta Borg, who has run Stockholm’s social services project working with prostitutes for 11 years, estimates street prostitution is now 55% or 60% of what it was.” 500 men were prosecuted in the first few years after the law was introduced in 1999<sup>49</sup>. A further 575 have been prosecuted because of a major investigation into “a trafficking gang that advertised on the Internet”<sup>50</sup>. Sweden appears to be the only jurisdiction where there is evidence of a reduction in street prostitution<sup>51</sup>, and where the number of trafficked women is low. Between 400 and 600 women are trafficked into Sweden every year, mainly from the Eastern European countries such as Estonia and Lithuania, as well as from Russia. Trafficked women number in the thousands in neighbouring countries<sup>52</sup>.

Bindel and Kelly conclude their comparative study by saying: “The most coherent approach in terms of philosophy and implementation is that adopted by Sweden, and interestingly it is the only one where no one who sells sex is subject to the criminal law”<sup>53</sup>.

These legal approaches – decriminalization or legalization on the one hand and abolition on the other - capture the polarities in the current debate.

It is important to note that the most appealing claim that decriminalization/legalization advocates make - which is that they are interested in harm reduction for the women - is nonetheless a position of despair, a position of capitulation. Proponents have given up on the fundamental struggle to achieve equality and autonomy for women, particularly for the most vulnerable, racialized, poor women. They have turned instead to a defensive attempt to protect women from the worst harms that prostitution can bring, not by getting the women out of prostitution, but rather by, ostensibly, giving them better market conditions in which to be self-employed prostitution entrepreneurs<sup>54</sup>.

Given the right of women to substantive equality in Canadian society, the question must be: is this enough?

## Charting the Positions

The principal arguments made by the two sides in the debate can be viewed like this:

<b>Women's Equality/Abolition</b>	<b>Civil Liberties/Legalization</b>
Prostitution is not sex between consenting adults or a kind of work. It is, by definition, violence against women.	Prostitution is sex between consenting adults. Prostitution is a kind of work.
Women are coerced into prostitution by various factors: poverty, racism, a history of previous sexual abuse, drug addiction, lack of adequate housing.	Women choose to engage in prostitution.
Prostitution can be stopped.	Prostitution is inevitable.
Decriminalization/legalization are incapable of eliminating the harm that is inherent in the prostitution transaction. Also, evidence from various jurisdictions does not show that decriminalization/legalization makes women safer in indoor prostitution or that it reduces street prostitution. Decriminalization/legalization creates a legal climate favourable for trafficking.	Decriminalization or legalization can reduce the harms of prostitution by: making it easier for women to call police when johns are violent; by bringing it indoors; by giving women greater control.
<b>Values</b>	<b>Values</b>
Substantive equality for women	Gender neutrality
Meaningful autonomy for women	"Choice"
Sexual liberation for women	Sexual liberty for men
Positive obligation on State to protect women and to assist them to achieve equality/ public interest in an egalitarian society	Freedom from State interference/ privacy



## **Part II: Harms to Women**

### **Violence In Prostitution**

There is little dispute that prostitution is a dangerous activity. John Lowman, one of Canada's leading advocates for decriminalization/legalization, reports that "[M]uch of the available empirical research on commercial sex indicates that at least some sex workers experience high levels of violence, including, but not limited to, physical assaults, sexual assaults, verbal threats or abuse, psychological abuse, robbery and kidnapping..."<sup>55</sup>.

In an authoritative 9-country study, Melissa Farley and other researchers concluded not only that some women in prostitution experience violence, but that "...violence is the norm for women in prostitution...sexual harassment, verbal abuse, stalking, rape, battering, and torture are points on a continuum of violence, all of which occur regularly in prostitution"<sup>56</sup>.

Farley interviewed 854 people currently or recently in prostitution in Canada, Columbia, Germany, Mexico, South Africa, Thailand, Turkey, United States and Zambia to inquire about their "current and lifetime history of sexual and physical violence" and to determine whether the participants in the study were suffering from posttraumatic stress disorder (PTSD). Most of those in the study were women. They had been, or were, involved in commercial sex businesses, such as street prostitution, massage brothels, escort services, strip clubs, lap dancing, phone sex, pornography, trafficking and prostitution tourism<sup>57</sup>.

### ***Farley's Conclusions***

Farley states:

We found that prostitution was multitraumatic: 71% [of respondents] were physically assaulted in prostitution; 63% were raped; ...68% met the criteria for PTSD<sup>58</sup>.

One hundred women from Vancouver's Downtown Eastside were a part of this study by Farley. 52% of these Canadian participants were Aboriginal. Their data, extracted from the overall study, is shown in the following table:

<b>Canada (100 respondents)</b>	
Threatened with a weapon in prostitution	67% (66)
Physically assaulted in prostitution	91% (91)
Raped in prostitution	76% (76)
(Of those raped) raped more than five times	67% (51)
Experienced attempts to make them do what had been seen in pornography	64% (63)
Pornography made of her in prostitution	67% (64)
PTSD Diagnosis	74% (72)

\*The number in brackets indicates the number of the total respondents who answered each question.

75% of the Canadian women participants were injured during prostitution. These injuries included: “stabblings and beatings, concussions, broken bones (broken jaws, ribs, collar bones, fingers, spines, skulls). Half of the Canadian women suffered traumatic head injuries as a result of violent assaults with baseball bats, crowbars or from having their heads slammed against walls or against car dashboards. Not surprisingly, they experienced memory problems, trouble concentrating, headaches, vision problems, dizziness, and trouble with balance or walking”<sup>59</sup>.

In addition to the physical injury common for those in prostitution, of 315 respondents, including some from Canada, 88% reported being verbally abused in prostitution<sup>60</sup>.

Women in prostitution also have other prostitution-related health problems, including high rates of HIV and Sexually Transmitted Diseases (STDs), and increased risk for cervical cancer and chronic hepatitis<sup>61</sup>.

The Farley researchers assessed whether the participants in the study had the symptoms of PTSD, which are: “(1) traumatic re-experiencing of events, or flashbacks; (2) avoidance of situations which are reminiscent of the traumatic events, and a protective emotional numbing of responsiveness; and (3) autonomic nervous system hyperarousal (e.g. jittery irritability, being super-alert, insomnia)”. They found that 68% of the participants had PTSD, and that the severity of their PTSD symptoms were “in the same range as treatment-seeking combat veterans, battered women seeking shelter, rape survivors, and refugees from state organized torture.”<sup>62</sup>

Farley states: “Our findings from 9 countries on 5 continents indicate that the physical and emotional violence in prostitution is overwhelming.” Some commentators contest these findings. For example, Ron Weitzer argues that Farley, and other researchers who have made similar findings, are radical feminists guilty of essentialism and universalism,<sup>63</sup> who claim that victimization and exploitation are “inherent, omnipotent and unalterable.” He considers this research biased, and criticizes it because of a lack of comparison groups, and reliance on unrepresentative samples<sup>64</sup>. Weitzer is a proponent of indoor prostitution, and he argues that “neither psychological harm nor physical violence is intrinsic to or pervasive in consensual indoor prostitution”<sup>65</sup>.

It is important to legalization/decriminalization advocates to show that indoor prostitution is less violent, or safer than outdoor prostitution, since the harm reduction argument rests on the premise that legalization/decriminalization permits women to move indoors and be safer because it legalizes owning and running brothels and living on the avails of prostitution. As noted above, however, in legalized jurisdictions street prostitution persists, and *illegal* prostitution businesses - that is, brothels and escort services that do not comply with any licensing, zoning or public health regulation - proliferate.

In addition, the studies of indoor prostitution offer a different picture. One study, for example, measured the prevalence of violence that customers, managers, pimps and intimate partners perpetrated against 222 women in indoor and outdoor prostitution in Chicago, Illinois. The results showed that violence occurred in all of the prostitution activities, although it differed in frequency and severity. This study shows that women across prostitution venues are often victims of violence and that it is inaccurate to depict indoor prostitution as harmless, consensual entertainment<sup>66</sup>. High levels of certain types of violence in indoor venues, such as rape, threatened rape, and threats with a weapon, caution against making blanket statements about the relative lack of violence in indoor prostitution venues and argue against making strict demarcations among different sex trade activities in terms of violence<sup>67</sup>. Farley also replied to Weitzer that while outdoor prostitution may subject women to more physical violence, physical violence also occurs frequently in indoor settings, and the experience of psychological trauma is comparable in both types of prostitution<sup>68</sup>.

## **Prostitution is Violence Against Women**

While the prevalence of physical and emotional violence in prostitution may be statistically measurable, and there may be variations in frequency and severity of violence between indoor and outdoor prostitution, this violence - assaults, rape, verbal abuse, etc. - must be seen as *in addition* to the inherent violence of prostitution itself. Prostitution itself is a form of sexualized male violence. This conclusion is inescapable.



Women around the world, over the last three decades in particular, have worked – with some success – to establish an understanding that non-consensual or coerced sex constitutes violence against women. The right of women to make decisions about when and whether to have sex, and with whom, is now legally recognized in many jurisdictions and is understood to be integral to women’s equality with men, and to their autonomy and dignity as human persons. But this is not undisputed terrain. Women’s right to live free from unwanted sexual relations, that is, from sex that is coerced by physical force or the threat of it, by intense psychological, emotional, and financial pressure, by tradition or social expectation, or by a fear of social consequences, is still being fought for.

The bargain inherent in prostitution is that women have unwanted sex with men they do not know, and feign enjoyment, in exchange for money. By some, this is called sex between consenting adults. The B.C. Civil Liberties Association, for example, says: “...Many people – male, female and transgendered – choose to support themselves by selling sexual services...The exchange of money for sex should be viewed as a private matter – a personal choice made by consenting adults – rather than a question of criminal law. Members of the world’s oldest profession should not be punished for offending the moral values or aesthetics of the status quo”<sup>69</sup>.

This civil libertarian approach fails to deal with prostitution as a question of women’s equality. It ignores the fundamental inequality in the sexual and human transaction between the women and men involved, as well as the very disparate nature of the act for the two parties. This is not a transaction in which a woman and a man together, voluntarily, seek to give and receive sexual pleasure. Prostitution is a transaction in which women provide commodified sexual services to men, in exchange for money. It is a form of social and sexual subordination<sup>70</sup>.

Farley states:

A Canadian woman told us: “What rape is to others, is normal to us.” A Thai woman said, “I hate that I have to have sex with someone I don’t like or love.” For the vast majority of the world’s prostituted women, prostitution and trafficking are experiences of being hunted down, dominated, sexually harassed, and assaulted. Women in prostitution are treated like commodities into which men masturbate, causing immense psychological harm to the person acting as receptacle.

Diane Guilbault quotes a former prostitute:

A man pays to penetrate you, and after him, another, and another. You feel reduced to only your body orifices. It’s no fun to be penetrated by so many men, in the vagina, in the mouth and in the anus. It’s disgusting to feel his semen running down the corner of your mouth and making you nauseous. Sometimes they insult you. Other times they hit you. During



all this, you're expected to pretend both enjoying and loving it.

Now and then, you think one of them is being gentle, because he hasn't pissed all over you, because he says you're beautiful, because he hasn't demanded to lower the price because you don't have a perfect face. But at the same time, you know he is just like everyone else, he pays because he doesn't give a damn about you, because he pays to have access to your body for his own enjoyment and you're supposed to pretend loving it<sup>71</sup>.

The loss of dignity and personhood that the prostitution bargain entails, the dissociation from feeling and sense of self that it requires, renders it intrinsically a violation of women's equality.

### **Which women are prostituted in Canada today?**

The Farley study provides some important information about which women are in prostitution. The 9-country summary shows that 47% of participants entered prostitution before age 18; 63% had been sexually abused as a child; 75% had been, or were, homeless; and 89% wanted to leave prostitution<sup>72</sup>. For the Canadian participants these figures were higher: 54% said they entered prostitution before age 18; 84% reported being sexually abused as a child; 86% had been or were homeless; and 95% wanted to leave prostitution<sup>73</sup>.

When asked what they needed, the participants responded<sup>74</sup>:

<b>Needs</b>	<b>9-countries (854)</b>	<b>Canada (100)</b>
Leave prostitution	89% (699)	95% (93)
Home or safe place	75% (618)	66% (63)
Job training	76% (600)	67% (64)
Drug/alcohol treatment	47% (356)	82% (78)
Health care	61% (480)	41% (39)
Peer support	51% (393)	41% (38)
Individual counseling	56% (431)	58% (54)
Self-defense training	45% (340)	49% (47)
Legal assistance	51% (366)	33% (31)
Legalize prostitution	34% (251)	32% (30)
Physical protection from pimp	23% (157)	4% (4)

\*The numbers in brackets indicate the number of the total respondents who answered each question.

Being abused as a child appears to be a kind of training course for prostitution, a preparation for treatment as a non-present being. Also, almost half - in the Canadian cohort, more than half - enter prostitution while they are still children. Poverty is also a significant coercive factor. According to Amber Hollibaugh "...[prostitution] always begins as survival; - the rent, the kids, the drugs, pregnancy, financing an abortion, running away from home, being undocumented, having a 'bad' reputation, incest - it always starts at trying to get by"<sup>75</sup>.

The limited range of options for poor women calls up Joseph Raz's image of the "hounded woman", who is on a desert island and constantly pursued by a flesh-eating animal. "This woman is free to go anywhere on the island and do anything she pleases, but she is also quite unfree. If she wants not to be eaten, she must devote all her talents and material resources to avoiding the beast. She exercises the outer forms of human agency, but she has no real choices."<sup>76</sup>

In Canada, and in Vancouver in particular, there are disproportionate numbers of Aboriginal women in prostitution, and their presence there is inescapably linked to poverty, homelessness, racism and the many harsh impacts of colonialism on their Aboriginal communities and families<sup>77</sup>.

Jacqueline Lynne, the Canadian researcher for Farley's nine-country study, describes this history. She says:

I'd like to begin by talking about prostitution of First Nations women in Canada. There has never been a time in Canadian history since European contact that First Nations women have not been sexually exploited in prostitution. In its earliest days, when Canada functioned primarily as a military and commercial outpost of Great Britain, the Hudson's Bay Company prohibited European women from immigrating to Canada. European men demanded sexual accessibility to First Nations women, so Canada's first brothels were established around military bases and trading posts. First Nations women were used in prostitution from first contact, and ... present-day prostitution of First Nations women is a ... sexual and violent legacy of colonialism.

There are two essential ideas we need to know in order to understand how First Nations women are prostituted in Canada today. Firstly, we need to know that the supply side of prostitution requires a devalued class of women. Secondly, we need to know that colonialism, through its powerfully oppressive and interlocking forces, subjugated first nations women and produced such a class.

Most of the urgent needs that First Nations people are trying to heal today as a result of being colonized, such as poverty, childhood sexual abuse, childhood physical abuse and neglect, husband violence, family

addictions, and alcoholism, are the same issues that render first nations women highly vulnerable to being recruited into prostitution<sup>78</sup>.

Joseph Raz's sense of 'no real choice' is echoed by the Aboriginal Women's Action Network (AWAN) which recently issued a statement in Vancouver repudiating efforts to decriminalize prostitution in the name of helping Aboriginal women, and, in particular, refuting the claim that Aboriginal women and girls choose to be in prostitution. AWAN wrote:

We, the Aboriginal Women's Action Network, speak...in the interests of the most vulnerable women - street prostitutes, of which a significant number are young Aboriginal women and girls. We have a long, multi-generational history of colonization, marginalization, displacement from our Homelands, and rampant abuse that has forced many of our sisters into prostitution. Aboriginal women are often either forced into prostitution, or trafficked into prostitution... Given that the average age at which girls enter prostitution is fourteen, the majority with a history of unspeakable abuses, we are also speaking out for the Aboriginal children who are targeted by johns and pimps. Aboriginal girls are hunted down and prostituted, and the perpetrators go uncharged with child sexual assault and child rape. ... While we are speaking out for the women in the downtown eastside of Vancouver, we include women from First Nations Reserves, and other Aboriginal communities, most of whom have few resources and limited choices ...

Jacqueline Lynne says that most of the Canadian prostituted women she has spoken to - half of whom were of First Nations ancestry - do not want to be in prostitution, and that there are few services available to help them leave<sup>79</sup>.

If women in prostitution, as a group, had adequate incomes, decent housing, all the education they wanted, and the possibility of careers as pharmacists, judges, electricians, engineers, or teachers, the assertion that prostitution is a "choice" would be more objectively credible.

However, given what we know about prostitution, and women in prostitution, it has to be recognized as 1) a form of violence in itself; and 2) a violation of women's right to equality. The proposition that prostitution is a choice like any other for the many women who are in it simply does not stand up to scrutiny when so many coercive factors are present<sup>80</sup>.

While some women in prostitution claim that it is a "choice", the question is whether the few women who do so should be permitted to shape public policy for the many women for whom it is not a choice, and who want to leave prostitution.

Public policy about prostitution clearly needs to be formulated to assist the most disadvantaged women. Whatever solutions are put forward, it is important that they are ones that will work effectively for those women and girls who are most disadvantaged by poverty, racism, and abuse. Otherwise, strategies will do the least for those who are the most at risk.

## **The Broader Social Harm**

Prostitution has broader social harms too. Most commonly discussed is the nuisance of prostitution in neighbourhoods. Politicians and police have been concerned about parents being able to protect children from exposure to street prostitution, about the presence of used condoms in school yards, and about the noise and disruption caused by women in prostitution, buyers, and pimps on the street. Interestingly, this social reality has received more attention than the more important social harm that prostitution poses to equality in relations between men and women generally.

Prostitution harms women who are not in prostitution, as well as those who are. It does so because the inherent inequality of the relationship between women and men in prostitution becomes an overlay, or reference point, for sexual relations between women and men generally, as well as for women and men in their non-sexual relations. The maintenance or protection of a sphere where men are permitted to treat women as property, to be sold, bought and used, militates against women's struggle for equality with men everywhere else - in public life, in workplaces, and in the family. Prostitution becomes a social paradigm, and its acceptance, through decriminalization/legalization, normalizes sex inequality.

## **Part III: Should Women in Prostitution Be Recognized As ‘Workers’?**

While a pro-labour, pro-union argument is often assumed to be a socially progressive one, there is an unmistakable neo-liberal, or market liberal, refrain in the decriminalization/legalization discourse about work.

Decriminalization/legalization advocates claim that women are harmed by restrictions on their right to “market their resources” and urge that “women be allowed to use their bodies...to greatest personal advantage, especially when women around the globe have few other economic opportunities and their need is great”<sup>81</sup>.

Advocates for decriminalization/legalization believe that women in prostitution should be recognized as workers like any other workers in the society; ‘sex workers’ is now a preferred term. In part, this is an effort to remove the stigma of prostitution from the women who are in it. In part, it is a claim that, if prostitution was decriminalized or legalized, women in prostitution could have the same protections that are afforded other workers by labour standards legislation, labour codes, occupational health and safety regulation, workers’ compensation schemes, and human rights legislation. This claim assumes that prostitution could fit itself within existing regulatory frameworks for work and that being inside this framework would improve the conditions of women in prostitution.<sup>82</sup>

Jenn Clamen, a member of the Coalition for the Rights of Sex Workers in Montreal stated in an interview: “‘Sex work’ is a discourse made and created by sex workers to describe their work. It is partly because the word ‘prostitution’ has so many negative connotations. But the phrase ‘sex work’ also brings all the different kinds of work into the same category. It lets us say ‘we have something in common; we are fighting for the same thing, and it is work.’ We want to promote that sex is work...When we start to see it as work, then we can talk about labour rights, we can talk about occupational health and safety standards, we can talk about human rights. We can say ‘ok fine, yes there is exploitation in the industry; let’s go back to the labour code and see where we can counteract that’”<sup>83</sup>.

However, as legal scholar Janine Benedet says, “merely calling something work, because it is something that you do to earn income, tells us nothing about the desired legal status of that activity...Calling something work does not immunize it from regulation or prohibition”<sup>84</sup>.

In fact, there is a great deal of international and domestic law that defines work, acceptable conditions of work, and the rights of workers. If the ‘prostitution as work’ discourse is taken seriously, there are two central issues: 1) can prostitution be considered work that fits within agreed upon definitions of

acceptable work; and 2) can women in prostitution gain from the application of current domestic laws and regulations about work?

### **a) Can prostitution be considered work?**

Stigmatizing women in prostitution is in no one's interest. Like criminalizing them, stigmatizing women in prostitution does nothing to assist in solving the real problems they face. Women in prostitution are not less worthy or less valuable human beings because they are in prostitution. However, the claim that Canada, and other countries, should decriminalize/legalize in order to remove stigma from women in prostitution conflates the institution of prostitution and those who are the victims of it. It is a claim for recognition of women in prostitution or 'sex trade workers' as a disadvantaged group, rather than an engagement with, or interrogation of, the inherent nature of prostitution itself, and the impact of it on women and society at large. Pro-prostitution advocates argue for embracing the institution of prostitution in order to de-stigmatize the women in it. But there are legitimate reasons for rejecting the institution of prostitution, while respecting the worth and the lives of the women who are in prostitution.

Over the last five decades, the international community has agreed that there are some forms of work that are not acceptable for human beings. Slavery and slavery-like practices (including debt bondage, forced marriage, and sale of women and girls into marriage or servitude), and forced labour are prohibited by international conventions and International Labour Organization instruments that have been ratified by many states around the world.<sup>85</sup>

In addition to prohibitions against forms of work that are coercive or exploitative, there is international recognition that some kinds of work should be prohibited because of the level of harm that they cause to the health of workers. For example, asbestos kills 100,000 workers annually. The International Labour Organization and the World Health Organization are now trying to stop asbestos-related deaths by stopping people from working with asbestos and encouraging countries to put in place 'Just Transition' programs that will retrain workers and place them in alternative work that is not threatening to their lives<sup>86</sup>. Under the *International Covenant on Economic, Social and Cultural Rights*, every person has the right to "just and favourable conditions of work", and to "work that is freely chosen". These rights are overlaid by the right not to be discriminated against because of sex, race and other characteristics, and by the right of women to enjoy their human rights on an equal footing with men.

The International Labour Organization's 1998 *Declaration of Fundamental Principles and Rights at Work* identifies four "core" human rights related to labour. Two of these "core" rights are: 1) the right to be free from forced or compulsory labour; and 2) the right to be free from discrimination<sup>87</sup>. Given the depth of development of labour and human rights standards, it is difficult to



claim that prostitution is a form of freely chosen work, capable of being carried out under just and favourable conditions, that meets human rights standards<sup>88</sup>. If it is slavery-like, harmful, or discriminatory, it cannot meet international norms for acceptable work, and it is valid to prohibit men from purchasing women for sex.

The ‘prostitution as work’ discourse is also another way of claiming that prostitution is a consensual activity of autonomous adults. It is the free making of a contract for labour, like contracts for other services, such as cleaning, sewing, and nursing, services which are provided by one person to another in exchange for wages. But this characterization obscures the essential sexual subordination of women that is inherent in prostitution. The sale of access to one’s body involves a sale of “so much of a woman’s self” that the contract by its nature denies dignity and humanness to the seller, contrary to her rights to equality and security of the person<sup>89</sup>. Because of this, prostitution may reasonably be viewed as a slavery-like relationship, not labour, because it sells ‘the person’ or essential elements of a woman’s personality or personhood, rather than simply skills or human energy<sup>90</sup>.

Clearly, some women in prostitution are living in slavery-like conditions. In PIVOT Legal Society’s report entitled *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform*, one of the participants described her situation this way:

He said I can live there and he will buy me clothes. He won’t charge me clothes; he won’t charge me food, and stuff like that. I can stay there. All I have to do is working. I live there and he supplies drugs for me...With two girls and he buys all the clothes, he pays the rent, and all you have to do is work for him. And he charge those guys around \$180. But...he will make a list of how many drugs I do because...I have to make money... So everybody is doing heroin. And what happened, it’s like he introducing me to rock [crack cocaine]. I do not really know that. But I starting to find out what rock is and this is how he control us. Cause rock is really addictive...

This does not fit within any conception of acceptable work.

Amartya Sen argues that respect for personhood requires conditions that allow human beings to maximize their human capabilities. From this perspective, “work that harms or exhausts the body or spirit, that diminishes the person, or that impairs fundamental human activities, such as rest/restoration, practical reason/learning, or intimacy,” is work that is dangerous and exploitative<sup>91</sup>. The inherent threats to mental and physical health and safety (assaults, post-traumatic stress disorder, health risks of sexually-transmitted diseases and HIV), by themselves, argue that prostitution should be considered exploitative and harmful work.

Perhaps the highest hurdle to clear for those who advocate for dealing with prostitution as work is the right to non-discrimination. Race and gender discrimination are intrinsic to prostitution. It is a concrete, sexualized acting-out of women's subordination to men, and the continuation of the history of men's treatment of women's bodies as property. Worldwide, as noted earlier, the sellers of sex are mainly women (and children) and the purchasers of sex are mainly men. Nor can it be overlooked that women are poorer than men worldwide, and that prostitution is the face of poverty for women. Prostitution is not non-discriminatory work.

It seems clear that prostitution cannot meet standards for acceptable work, and cannot be made to meet those standards, by improving the 'working conditions' that surround it. As long as poverty, racism, and child sexual abuse are determinants of entry into prostitution, it cannot be accepted as freely chosen work. Also, a high level of violence and serious harms to health appear to be intractable characteristics of prostitution. Just and favourable conditions cannot be created for work that is inherently harmful. Finally, prostitution simply fails the test of non-discrimination. It is reasonable, then, to refuse to recognize prostitution as 'work'.

## **b) Can existing employment laws help women in prostitution?**

As PIVOT's report *Beyond Decriminalization* demonstrates, fitting prostitution into existing labour legislation is not easy to do. First of all, for women in street prostitution, the work paradigm offers only a change of name - from 'prostitute' to 'sex trade worker'. Women in street prostitution engage in individual transactions with many different men, and have no employer-employee relationship that can be mediated or regulated by labour standards or a labour code.

Further, among the women in prostitution whom PIVOT interviewed for their study, many do not wish to be "employees" but rather to be independent entrepreneurs, setting their own working conditions, and making their own rules. Even among those who work in settings like massage parlours, where, for some purposes, they might fit into a legal definition of "employee", many still seem to prefer to be considered "independent contractors." Some say they would like better pay, safer conditions in which to prostitute, access to employment-related benefits like employment insurance and Canada Pension Plan (CPP) benefits. But many also have strong reservations about losing the "privacy" and "independence" that goes with street prostitution or more irregular relationships with owners of massage parlours or escort agencies where they work. This reluctance to lose anonymity and to declare involvement in prostitution has shown itself in the Netherlands where prostitutes who register are eligible for pensions, employment insurance and other social benefits. Only 4% of Netherlands prostitutes are registered.



But if women were in employer-employee relationships in legal brothels or escort agencies, it is not clear how much women in prostitution would benefit from existing laws regarding work. Labour standards legislation in Canada, for example, requires payment of a minimum hourly wage, statutory holiday pay, and overtime pay for hours worked in excess of defined regular hours. It is hard to see how this regulatory scheme could assist women in prostitution.

In Australia, occupational health and safety regulations have been designed to apply to brothels and massage parlours specifically<sup>92</sup>. However, as Australian scholar Mary Lucille Sullivan indicates, the thrust of this regulation has been to protect the health of male clients (public health) through emphasis on safe sex practices, and, in some Australian jurisdictions, mandatory health testing for the women. However, occupational health and safety regulations cannot fully or adequately protect women from the health and safety hazards that are an inherent feature of prostitution. The underlying assumption of occupational health and safety regulation is that the work is not inherently harmful or dangerous, or, at least, that the dangers can be eliminated or contained. Yet, as Sullivan points out, women in prostitution are at risk of contracting AIDS, other sexually transmitted infections (STDs), having unwanted pregnancies, and being assaulted and raped. No other category of workers has to accept contracting STDs as a highly likely, rather than an accidental, consequence of going to work.<sup>93</sup> A male client’s refusal to use condoms, or condom breakage or slippage, is recognized by advocates for women in prostitution as “a severe health risk, which can cause death or disability”<sup>94</sup>. “Defining [STDs] as an occupational health hazard” says Sullivan “does nothing to ameliorate the physical and psychological harm they cause to prostituted women”<sup>95</sup>.

The central problem that Sullivan identifies with the occupational health and safety regime in Australia is that guidelines are premised on the notion that a woman in prostitution can control her customers, and can negotiate safe sex, or negotiate her way out of a violent situation. The inequality of the relationship between a prostituted woman and her client, which makes her often unable to negotiate safe sex, or safety, has been obscured, rather than recognized. Where prostitution is legalized, responsibility for managing the risks of prostitution, and ameliorating its harms, still rests mainly with the women<sup>96</sup>.

Unionization is another labour protection considered desirable by decriminalization/legalization advocates.<sup>97</sup> But in countries that have legalized or decriminalized, the rate of unionization appears to be low. In the Netherlands, there is a support organization, de Roode Draad, and there is some unionization in the United States, Germany, and Australia, but unionization is an occasional, not an established, feature of the legalized prostitution industry. Unionization has been difficult, in part because many women in prostitution do not wish to be named or identified, which unionization requires, or because women see their involvement in prostitution

as temporary<sup>98</sup>.

Notably, the issue of discrimination is rarely addressed in the ‘sex work’ discourse<sup>99</sup>. In addition to international human rights standards about non-discrimination in work, in every jurisdiction in Canada, statutory human rights codes prohibit discrimination in employment, in hiring and firing, in employment-related advertising and employment interviewing, and in terms and conditions of work. Human rights codes also prohibit sexual and racial harassment.

In Canadian law, whether two parties are in an employment relationship is a question that can arise in a wide variety of legal contexts, including those of labour standards, labour codes, workers’ compensation schemes and employment insurance, and the answers can vary. However, human rights legislation would likely apply to prostitution businesses if they were legalized, even if the women working in them understood themselves to be “independent contractors”<sup>100</sup>. The terms “employer” and “employment” have been interpreted broadly by human rights adjudicators and courts in Canada. Factors in determining whether an entity is an “employer” for the purposes of human rights legislation include whether the employer “utilized” or gained a benefit from the employee in question, and whether the employer controls conditions of work<sup>101</sup>.

But prostitution businesses cannot conform to human rights legislation; their business is providing venues for, and making women available for, gender-based discrimination. It is clear that these businesses discriminate on the basis of age, race, gender-related characteristics (attractiveness, breast size, etc.) and disability at the outset – that is, in the selection of employees. Legal brothels like the Daily Planet in Australia advertise on the internet using the race and breast size of the women who work there as ‘come-ons.’ For example, one of the women available for purchase at the Daily Planet on February 20, 2008 is Yumiko who is described as an “Asian porn star in her late 20s, slim, size 8, dd bust and full pouty lips, hot.hot.hot”<sup>102</sup>. If it is a term or condition of working at the Daily Planet to have your age, race, and physical characteristics posted on the internet so that clients can make their selections, this is a discriminatory practice. Women in some venues are required to line up in front of male buyers for selection, or to wear sexualized clothing, or little or no clothing. These are also discriminatory practices, within the framework of human rights laws.

It is well established in human rights jurisprudence that an employer discriminates if he permits a customer to exercise a preference about whom he is served by on the basis of sex, race, age, disability and other protected characteristics<sup>103</sup>. Yet a sex business takes for granted that a customer can choose from among the women on the basis of race or age, or other physical characteristics. This is the essence of the prostitution offering, but it is

antithetical to anti-discrimination principles.

Centrally, as noted already, employing women to provide sexual services to men has to be understood to be discrimination in and of itself, given the historical, social and economic context of women's disadvantage and subordination to men. The inherent nature of the activities for which women are employed would bring employers into violation of human rights legislation.

And what can we say about sexual harassment? That women who work in prostitution consent to sexual harassment, or are required to accept unwanted touching and sexual comments and abuse and pretend to like it because that is the nature of the employment, while women who work in other businesses are protected from it?<sup>104</sup>

Anti-discrimination law is also an issue when thinking about unionization, since, in Canada, human rights codes have been made an implied term of collective agreements. The law is clear that employers and employees cannot contract out of human rights law<sup>105</sup>. This means that any negotiated collective agreement, whether its terms explicitly say so or not, is understood to carry with it all the anti-discrimination protections of the human rights law in the relevant jurisdiction (provincial or federal). It is not clear how prostitution businesses and unions could negotiate, in good faith, a collective agreement that was compliant with human rights legislation.

It is important when considering this issue to think beyond the women in prostitution. The decriminalization/legalization advocates have not addressed the potential impact of deeming prostitution to be 'work' on the norms for work that have been established over the last 30 years through human rights law. These norms have been developed both through a growing body of legal protections and through the jurisprudence of courts and tribunals. How do we square prostitution as a form of work with the norms and rules that protect women from sexual harassment in the workplace and from stereotypes and subordination related to their sex? If women in prostitution are 'workers', it becomes difficult to maintain that *all* women workers have the right to be free from sexualized conduct by men, and from being hired and fired because of their 'attractiveness' or willingness to comply with sexual demands<sup>106</sup>. The workplace norms that women have fought hard to achieve can be eroded if they apply only in some workplaces, not in all.

The Australian example indicates that applying employment laws, such as occupational health and safety standards, can have the effect of normalizing the harms to women, rather than mitigating or eliminating them. And prostitution simply cannot be made to fit within the framework of anti-discrimination law.



## Part IV: Latest Developments: Parliamentary Committee Reports and Constitutional Challenges

### Parliamentary Reports

In December 2006 the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights issued a report on Canada's prostitution laws, and in February 2007 the Parliamentary Committee on the Status of Women issued a report on trafficking. Reviewing these reports helps illuminate the tenor of debate, the positions taken by Canada's different political parties (or at least by their members on these Committees), and the current lobbying opportunities and obstacles.

### *The Report on Prostitution Laws*

On the issue of prostitution, the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights could not find a consensus<sup>107</sup>. There was a divergence of views among the members of the Committee and among the 300 witnesses who appeared before it. The Committee wrote: "The divergence of views is philosophical. One [group] sees prostitution as a form of violence against women – a form of exploitation in and of itself. The second sees prostitution among consenting adults as a form of work. ... Any made-in-Canada solution will necessarily have to choose between these views, and from that, derive a legal and social model tailored to the needs of our society"<sup>108</sup>.

Subcommittee members agreed that the *status quo* was unacceptable, since in Canada today, the *Criminal Code* provisions which prohibit communicating, living on the avails of prostitution, and keeping a common bawdy house are mainly enforced against women in street prostitution. Since section 213, which prohibits communicating, was introduced in 1985, it accounts for 90% of the prostitution-related offences reported by the police<sup>109</sup>. Between 1986 and 1995 almost half (47%) of all persons charged with communicating were male, but women were sentenced more harshly than men. 39% of women were imprisoned compared to only 3% of men<sup>110</sup>. The Subcommittee recognized that the practices of law enforcement have created a two-tiered system, with street prostitution receiving the attention of police officers while indoor prostitution – in massage parlours, strip clubs, escort agencies, etc. - operates quasi-legally. Street prostitution is estimated to be between 5 and 20% of the prostitution in Canada.

The Subcommittee acknowledged that the criminalization of communication, and the enforcement of it against women in prostitution in particular, has negative effects for the women. John Lowman argues that because police officers tend to enforce the law by forcing women in prostitution to locate their

strolls away from residential or business areas, they isolate the women and increase their risk<sup>111</sup>.

However, having studied the legal approaches to prostitution taken in other jurisdictions, the Subcommittee could not agree on an approach. Many witnesses supported decriminalization of prostitution activities and businesses. But the Committee found that there was little information available to persuade them that decriminalization in New Zealand and the state of New South Wales in Australia - the only two jurisdictions that have taken this approach - is making conditions better for women or reducing street prostitution. On the other hand, they found the evidence on the impact of legalization - in Netherlands in particular - dismaying, because it appears to have increased prostitution activities overall, including street prostitution. The Subcommittee rejected legalization as a possible approach, as did most witnesses. The Committee did not believe that there was enough evidence available on the effectiveness of Sweden's approach - that is, criminalizing the purchasers of sexual services and those who profit from prostitution, but not the women in prostitution - to choose this path, although this was the other approach favoured by many witnesses. In short, the Committee found that the evidence did not show that decriminalization was effective; showed that legalization is bad; and was inadequate about the impact of Sweden's approach.

The Committee as a whole made six recommendations:

- Ensure that the commercial sexual exploitation of minors remains a serious crime;
- Ensure that victims of trafficking are provided with adequate assistance, while traffickers are brought to justice;
- Recognize that the *status quo* with respect to Canada's laws dealing with prostitution is unacceptable and that the laws that exist are unequally applied;
- Develop education campaigns and programs to prevent people from entering prostitution, and work with other levels of government, institutions and non-governmental organizations to develop exit strategies for those involved in prostitution;
- Fund research on prostitution in Canada and on legal and social approaches to prostitution in other countries;
- Co-ordinate research through the Department of Justice.

A seventh recommendation was agreed to by the members of the Subcommittee from the Liberal, NDP and Bloc Quebecois parties. They recommended that:

- Concrete efforts be made immediately to improve the safety of individuals selling sexual services and assist them in exiting prostitution if they are



not there by choice. In addition, these members said: “the federal government should consider increasing transfer payments to the provinces to enable them to provide significant resources for income support, education and training, poverty alleviation, and treatment for addictions, while respecting provincial areas of jurisdiction.”

Subcommittee members from the Liberal, NDP and Bloc parties also took the position that “sexual activities between consenting adults that do not harm others, whether or not payment is involved, should not be prohibited by the state...The approach proposed by these members is premised on the idea that it is preferable to concentrate our efforts on combating exploitation and violence in the context of prostitution, rather than criminalizing consenting adults who engage in sexual activities for money.”

The Conservative Party (not the Committee member) put in a minority report. It said: “...the Conservatives ...believe that all prostitution has a social cost, and that any effort by the state to decriminalize prostitution would impoverish all Canadians - and Canadian women in particular - by signaling that the commodification and invasive exploitation of a woman’s body is acceptable....such a notion violates the dignity of women and undermines efforts to build a society in which all members are respected equally, regardless of gender.”

Not surprisingly, in view of this minority report, when the minority Conservative government responded to the Standing Committee’s report in July 2007, it stated: “This Government condemns any conduct that results in exploitation or abuse, and accordingly does not support any reforms, such as decriminalization, that would facilitate such exploitation.”

## **The Report on Trafficking**

The report of the Standing Committee on the Status of Women on trafficking is a more progressive report<sup>112</sup>. In part, this is due to the fact that the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)*, which supplements the United Nations *Convention Against Transnational Organized Crime*<sup>113</sup>, contains a provision stating that the consent of a victim of trafficking is irrelevant. Canada ratified the *Trafficking Protocol* in 2002<sup>114</sup>.

A person cannot consent to being trafficked for the purposes of sexual exploitation. Adopted in 2000, Article 3(a) of this new Protocol says that “trafficking in persons” mean[s]:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat of use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or by the giving or receiving of payments or benefits to

achieve the consent of a person having control over another person, for the purpose of exploitation.

Article 3(b) says:

The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used<sup>115</sup>.

The Standing Committee on the Status of Women saw an inextricable link between prostitution and trafficking. It accepted that the vast majority of the 700,000 to 4 million people who are trafficked every year are women and children, and more than 90% of them are trafficked for the purposes of sexual exploitation.<sup>116</sup> The Committee stated: “We believe that prostitution is a form of violence and a violation of human rights. The Committee feels that the prostitute’s consent is irrelevant, because you can never consent to sexual exploitation”<sup>117</sup>. Because prostitution or sexual exploitation is the end goal of most trafficking, and because international law is clear that consent on the part of a victim of trafficking is irrelevant to determining whether a person has been trafficked, this Committee concluded that consent to prostitution is also irrelevant.

The Committee accepted that trafficking for the purposes of sexual exploitation is principally a problem of gender equality, and that it will continue “as long as men can buy, sell and sexually exploit women and children by forcing them into prostitution”<sup>118</sup>.

This Committee recognized poverty as a leading cause of women being vulnerable to trafficking and sexual exploitation. It also recognized that Aboriginal women are trafficked internally in Canada, and that their poverty, poor conditions on reserves, and abuse in their communities cause Aboriginal women to be Canada’s most vulnerable victims. The Committee recommended that the federal government develop a national framework to address poverty, and, in addition, a national framework to address Aboriginal poverty. Leading among this Committee’s recommendations was that women in prostitution and purchasers of sexual acts be treated differently by Canada’s criminal law. It recommended decriminalizing the women, and creating a new criminal offence of “purchasing a sexual service”<sup>119</sup>.

Other recommendations of this Committee include: mount a national communications campaign to sensitize the public to the objectification and commodification of human bodies, prostitution and trafficking; ensure that police have sufficient resources to deal with sex tourism; improve co-ordination with and participation of NGOs in the development and implementation of support strategies for victims of trafficking; establish a national rapporteur to collect and analyze data on trafficking; enhance training and awareness for



RCMP and provincial and municipal police forces; increase resources for dedicated, multi-jurisdictional police units to investigate potential trafficking offences; provide training for prosecutors and judges; provide additional funds to the provinces and territories to support victims of trafficking; raise the age of consent to sex from 14 to 16; review the barriers to immigration that contribute to the increased vulnerability of women to being trafficked; ensure that the immigration pre-removal risk assessment process specifically deals with victims of trafficking as people who are at risk; provide funding for housing, legal advice, counseling and other supportive services for victims of trafficking; review the length of time that victims of trafficking can hold a temporary resident permit.

In June 2007, the Government of Canada issued a generally supportive response to this report, although it did not respond to the specific recommendations<sup>120</sup>.

As the reports of these two Committees show, there is some tension between the approach to trafficking and the approach to prostitution. By some a distinction is made between “forced” and “voluntary” prostitution. This distinction is made by the Subcommittee on Solicitation Laws but not by the Standing Committee on the Status of Women. It is important to note that Members of Parliament from the same parties take different positions in these two reports. Members of the NDP and Liberal parties on the Subcommittee on Solicitation Laws supported decriminalizing “sex between consenting adults, whether or not payment is involved”, while members of the NDP and Liberal parties on the Status of Women Committee supported criminalizing the purchase of sexual services. The Bloc Quebecois members are apparently split also<sup>121</sup>. It appears that only the Conservative Party has a party position on prostitution.

The distinction between forced and voluntary prostitution is a difficult one to maintain. In common parlance, trafficking is understood to mean that a woman or child has been recruited, transported across a border, and exploited in prostitution, but in fact the transport may be internal to the country, or there may be no transport at all<sup>122</sup>. It is still trafficking if a woman has been recruited through deception, or in circumstances where she is vulnerable and there is an imbalance of power.

In international law, the first instrument dealing with trafficking and prostitution was the 1949 *Convention for the Suppression of the Traffic in Persons*. This Convention does not make a distinction between prostitution and trafficking, and it takes an abolitionist position. It says: “...prostitution and ...traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person”. It requires States parties to “punish any person who, to gratify the passions of another: (1) procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) exploits the prostitution of another person, even with the

consent of that person; or... (3) keeps or manages...a brothel”<sup>123</sup>. In this Convention, it is clear that the problem is the buyers and exploiters of women in prostitution, and that women’s consent to prostitution is not a defense. However, after 47 years 71 countries are signatories to this Convention<sup>124</sup>, and some states have taken the position expressed by Australia. Australia said:

...although this Convention does not require that acts of prostitution be criminalized, several of its provisions have the indirect effect of making the practice of prostitution illegal. ...these provisions ... blur the distinction between voluntary and coerced prostitution. To consider voluntary sex work and coercive prostitution as the same issue, and therefore demand the outlaw[ing] of prostitution per se, is to view prostitution as a moral issue and to consider sex workers as people unable to make informed decisions on their life. Such a view is paternalistic and raises serious human rights implications<sup>125</sup>.

In international arenas, just as in Canada, arguments for the legitimization of so-called ‘voluntary’ prostitution are now being made, and are having some success. The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), which was adopted in 1979, requires States parties to “take all appropriate measures to suppress all forms of traffic in women and the exploitation of the prostitution of women”, but the Beijing Platform for Action, negotiated in 1995, condemns only forced prostitution<sup>126</sup>. The U.N. Special Rapporteur on Violence Against Women has written that “some women become prostitutes through the exercise of ‘rational choice’ [while] others become prostitutes as a result of coercion, deception or economic enslavement”<sup>127</sup>.

Interestingly, this voluntary/forced prostitution distinction was substantially repudiated by the United Nations Special Rapporteur on the human rights aspects of the victims of trafficking in persons, Sigma Huda, in her 2006 report to the United Nations Human Rights Commission.<sup>128</sup> She wrote:

The Protocol does not necessarily require States to abolish all possible forms of prostitution. It does, however, require States to act in good faith towards the abolition of all forms of child prostitution and all forms of adult prostitution in which people are recruited, transported, harboured, or received by means of the threat or use of force, or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of one person having control over another, for the purpose of exploiting that person’s prostitution.

*For the most part, prostitution as actually practised in the world usually does satisfy the elements of trafficking. It is rare that one finds a case in which the path to prostitution and/or a person’s experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity*

and poverty. Put simply, the road to prostitution and life within “the life” is rarely one marked by empowerment or adequate options. (Emphasis added)

Thus, State parties with legalized prostitution industries have a heavy responsibility to ensure that the conditions which actually pertain to the practice of prostitution within their borders are free from the illicit means delineated in ...the Protocol definition, so as to ensure that their legalized prostitution regimes are not simply perpetuating widespread and systematic trafficking. As current conditions throughout the world attest, States parties that maintain legalized prostitution are far from satisfying this obligation<sup>129</sup>.

In other words in her view, countries that decriminalize/legalize prostitution will have a hard time maintaining that they are complying with the *Trafficking Protocol*.

Huda also rejects the characterization of prostitution as “sex work”. She says:

The Protocol’s definition of trafficking implicitly rejects the terminology of “sex work”, “sex worker” and “clients”...

The Protocol casts an extremely wide net in defining trafficking, one which arguably captures every present manifestation of prostitution. The terms “sex work”, “sex worker” and “client” wrongly suggest that prostitution, as currently practised, does not typically fall within the category of trafficking. The Special Rapporteur believes that this reflects a profound misinterpretation of the current practice of prostitution throughout the world. Based on her experience and investigations as Special Rapporteur, she finds it evident that most prostitution is accomplished by one or more of the illicit means outlined in subparagraph (a) of the Protocol and therefore constitutes trafficking<sup>130</sup>.

The Standing Committee on the Status of Women seems to be in agreement with Sigma Huda in seeing no bright line between trafficking and prostitution. It also therefore appears to be in agreement with the 1949 *Convention*, which rejected consent, or voluntariness, as a defense for any sexual exploitation of women<sup>131</sup>.

## Constitutional Challenges

At the time of writing, there are two constitutional challenges to the provisions of the *Criminal Code* regarding prostitution, one in Ontario and one in British Columbia. Neither of these challenges seeks only decriminalization of women in prostitution. Both seek removal from the *Criminal Code* of the provision banning communication for the purposes of prostitution - which would affect both women in prostitution and male purchasers of sexual services - and, in addition, the removal of the prohibitions against living on the avails of

prostitution and running a common bawdy house. If they are successful, these challenges will make prostitution businesses legal in Canada.

### ***Terri Jean Bedford, Amy Lebovitch, and Valerie Scott v. Her Majesty the Queen***

This constitutional challenge will be heard in the Ontario Superior Court. Professor Alan Young of York University's Osgoode Hall Law School, who is spear-heading this legal challenge to Canada's prostitution laws, cites the Willie Pickton trial and the murder of prostituted women in the Downtown Eastside as justification for sweeping decriminalization<sup>132</sup>. Young is quoted as claiming that decriminalization will provide prostituted women with safer environments by allowing them to work inside, and giving them more control.<sup>133</sup> The plaintiffs seek an order from the court declaring that sections 210 (bawdy house), 212(1)(j) (living on the avails) and 213(1)(c) (communication) violate sections 7 and 2(b) of the *Charter of Rights and Freedoms* and are therefore of no force and effect. Section 7 guarantees to everyone the right to life, liberty and security of the person, and section 2(b) guarantees the right to freedom of thought, belief, opinion and expression.

The three plaintiffs describe their circumstances in the statement of claim.

- Terri Jean Bedford was in the sex trade in the late 1970s and in the 1980s. Since 1993 she has worked as a dominatrix. She has been convicted of keeping a common bawdy house. She experienced violence when she was working on the streets, but never in indoor locations or when working as a dominatrix. She wishes to resume work as a dominatrix but is not willing to risk further criminalization.
- Valerie Scott was in the sex trade in the 1980s. She is now the Executive Director of Sex Professionals of Canada. She wishes to return to work in the sex trade by opening a safe indoor location but is not willing to do so because of the criminal prohibitions on keeping a bawdy house.
- Amy Lebovitch has been a sex trade worker since 1997. She has worked on the streets but now chooses to work from home because of her fear of violence on the streets. She feels safer indoors but fears the legal consequences for herself and her live-in partner if she engages in prostitution in her home.

These plaintiffs claim that the *Criminal Code* provisions violate their section 7 right to liberty by exposing them to the risk of imprisonment, and by exposing them to greater physical and psychological harm because they are constrained from working indoors.

## ***Downtown East Side Sex Workers United Against Violence Society v. Her Majesty the Queen***

The British Columbia challenge is different. The plaintiff in this case is a non-governmental organization called the Downtown East Side Sex Workers United Against Violence Society, which is supported by PIVOT Legal Society and the B.C. Civil Liberties Association. The Downtown East Side Sex Workers Society lists its goals as: improving working conditions for women in the sex trade; working against all forms of violence against sex workers; working against poverty – with the understanding that poverty is a driving force in many women’s entry into the sex trade; working against racism, homophobia, transphobia and other forms of oppression that are major factors in creating danger and violent working conditions for women. The Society states that its members are in the sex trade or recently were in it, and that some members of the group live in poverty, are Aboriginal, and have experienced violence in the sex trade.

The Society claims not only that the prostitution laws violate sections 7 and 2(b) of the *Charter*, but also that they violate section 15. However, the Society is not focussed on the sex equality of women in prostitution, but on the equality of the group ‘sex workers’, which, the Society says, is composed of women, men, and transgendered persons. Because members of this group are also racialized, poor, and have disabilities, the Society claims that ‘sex workers’ are a disadvantaged group that is discriminated against on the grounds of sex, gender, race, disability, occupation, and poverty, as separate and intersecting grounds.

The Society argues that the prostitution laws single out sex workers for differential treatment because:

- Sex workers are treated differently from their clients;
- On-street sex workers are treated differently from sex workers who work indoors;
- Sex workers are treated differently from people who have consensual sexual relationships that do not involve the exchange of money;
- Sex workers are treated differently from others who perform other personal services for pay.

The Society also claims that the adverse effects of the prostitution laws include creating barriers to sex workers accessing protections and rights under labour legislation and human rights legislation.

The Ontario challenge takes a traditional civil libertarian position. The liberty of the plaintiffs to be engaged in prostitution without government interference and constraints on how or where they do so is the key issue.

In the B.C. challenge, the claim is that the equality rights of “sex workers” are being violated by laws that treat them differently from other workers, from clients, and from those who have sex without exchanging money.

In a constitutional challenge, the Government of Canada usually defends its own laws. Unfortunately, in its defense of the laws, the government may not make distinctions between the application of the law to women in prostitution and to purchasers of sexual services, and may simply defend the current prostitution laws as they are. From an abolitionist position defending the criminalization of procuring, pimping, and keeping a common bawdy house is appropriate. Defending the criminalization of women for communicating is not. How the government will defend the prostitution laws, and how well it will defend them, must be a concern now.



## Part V: Taking a Position

### Reviewing the Human Rights Framework

The most important rights that are applicable here are:

- The right to equality before and under the law, equal protection and benefit of the law, without discrimination (section 15 of the *Charter*);
- The right to life, liberty and security of the person (section 7 of the *Charter*);
- The right to equality before the law, equal protection of the law and to protection from discrimination (Article 26, *International Covenant on Civil and Political Rights*);
- The right to have governments take “in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women...” (Article 3, *Convention on the Elimination of All Forms of Discrimination Against Women*);
- The right to have governments “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women” (Article 6, *Convention on the Elimination of All Forms of Discrimination Against Women*);
- The right not to be discriminated against in employment and services (human rights legislation in all jurisdictions in Canada);
- The right to an adequate standard of living, including adequate food, shelter and clothing (Article 11, *International Covenant on Economic, Social and Cultural Rights*);
- The right to work, which includes the right of everyone to the opportunity to gain her living by work which she freely chooses or accepts (Article 7, *International Covenant on Economic, Social and Cultural Rights*);
- The right to just and favourable conditions of work (Article 8, *International Covenant on Economic, Social and Cultural Rights*);
- The right not to be trafficked into prostitution (*Trafficking Protocol*).

Careful consideration of these rights leads to the following conclusions about prostitution.

#### ***The equality of women***

Prostitution is incompatible with the legal concept of substantive equality. This concept of equality rejects the idea that sex equality consists merely in same treatment of men and women in any particular circumstance. It recognizes instead that women as a group are not equal to men politically, economically, socially, or legally, and requires that this inequality be taken into account

when assessing the validity of laws and policies. It posits also that the concept of equality requires governments to take measures that will, over time, dismantle women's entrenched disadvantage.

Women have been working for some centuries now to deconstruct the patriarchal notion that women are secondary, of lesser importance than men and subordinate to them, and of significance to men primarily as sexual commodities and bearers of children. In particular, women's enjoyment and use of their own bodies and expression of their own sexuality has not been free. Women's choice of pleasures and partners has been constrained by male desires, by male control and male violence, and by male-defined social expectations. Prostitution is the epitome of unfree sexual relations between women and men, and a manifestation of women's subordination to men. Prostitution concretizes women's commodified relationship to men. It is a transaction in which women lack personhood, lack equality.

In effect, prostitution is a denial of the equality of women, and the purchase of a woman for sex, or the sale of her by another for sexual purposes, are violations of a woman's right to equality.

## **Consent**

### **a) Do women in prostitution consent?**

Some of this debate turns on whether individual women in prostitution are consenting to sex with the individual men who pay them. The idea of consent appears to be based on the notion that the governing paradigm is not the law of equality, but the law of contract. When there is an exchange of a "service" for pay, decriminalization/legalization advocates seem to take this as evidence that there is consent by both parties. But an agreement to accept pay in exchange for providing a "sexual service" cannot be understood to be a proxy for consent to sex. There is also the sexual assault framework, which is based on the understanding that consent is not present unless a woman wants to have a particular kind of sex with a particular partner, and there is no form of coercion involved, including money. A woman in prostitution may be said to consent to a sexual transaction for money, but not to sex that she wants and chooses for her own interest or pleasure.

So the bargain, as stated earlier, is non-consensual sex, with the pretense of pleasure for the gratification of the clients, in exchange for money. This can only be understood as coerced sex - sex coerced by financial need. The fact that few wealthy women are involved in prostitution reveals one important element of the coercion. Prostitution is for poor women. Wealthy women can choose when and with whom to have sex; they do not need to sell their bodies in order to support themselves and their kids



Few women in prostitution claim that they are having acts of sex for their own interest or pleasure. Mainly, women in prostitution say that they are involved in sexual transactions because they need money, and that these transactions are too often violent, abusive and threatening to their health.

### **b) Is consent relevant?**

Even if we say that women consent to prostitution, does this matter? If women consent, or contract, to be treated as less than full, equal human beings, this consent has no legal or moral force<sup>134</sup>. Both international and domestic laws declare that women are equal persons and ban discrimination in law and practice. As the *Trafficking Protocol* makes clear, exploitation that was consented to is still exploitation.

### ***Prostitution as Work***

This paradigm does not fit prostitution, for two reasons already discussed. First of all, there are human rights norms about 'freely chosen' work and 'just and favourable conditions of work'. Work that does not fit within these norms is exploitative work and abolition of it is appropriate. Prostitution, which regularly involves coercion and abuse, as well as high levels of risk of injury and harm to mental and physical health, does not fit within the human rights norms of acceptable work - that is freely chosen, and capable of being carried out in conditions that are just and favourable.

Secondly, prostitution cannot fit within either international or domestic norms of non-discrimination. The nature of the business itself, the ordinary practices of prostitution businesses, and the requirements on women in prostitution are inconsistent with prohibitions against discrimination. Non-discrimination is a foundation of international, and domestic, human rights law. Further, it is clearly established in Canadian jurisprudence that no one can contract out of human rights law.

### ***The Rights of the Poorest Women***

Women are in prostitution because of sex, race, poverty, and previous sexual abuse. Women's poverty is a significant coercive factor, and it is one that society can do something about. Although poverty is certainly acknowledged and both Parliamentary Committees make recommendations on this subject, the focus of advocacy remains on changing the criminal law, not on getting poor women out of prostitution, nor on getting poverty out of the prostitution equation. This focus on changing the criminal law permits conditions, freedoms, and equality to remain lesser, for poor, racialized women than for others.

The Supreme Court of Canada has made the concept of dignity central to its determinations of whether the right to equality is being respected.

But dignity can be dishonoured in different ways. Importantly, the dignity of a person is dependent on material conditions that permit her to participate in social, political, and economic life in her society as an equal member and to make choices about her life, including sexual and reproductive choices, as an autonomous person.

Otherwise she is excluded, and marginalized; she is an outsider. Some material conditions, therefore, have to be seen as essential to dignity, as, minimum conditions for a dignified life. Adequate food, shelter, and clothing are among these foundational conditions.<sup>135</sup> They are foundational conditions for equality for women.

Women's poverty is a manifestation of entrenched, societal discrimination against them. Their rates of poverty are higher than men's and their incomes are lower because women earn less when they work outside the home, and they carry more of the unpaid work of care for others. When their poverty, which is caused by discrimination, also coerces them into further subordination, into prostitution or survival sex, their right to equality is doubly violated.

This picture of women's poverty is complicated, and its effects are exacerbated by racialization, and by the history of colonial oppression of Aboriginal peoples. While pro-prostitution advocates claim that women's agency should be respected, it is not respectful of the history of Aboriginal women, and of the realities of their oppression, to accept that prostitution is Aboriginal women's choice, and an acceptable way for them to survive in 21<sup>st</sup> century Canada. If we do so, we accept continuing oppression and call it equality. This point is made by AWAN when it says: "[Aboriginal women] have a long, multi-generational history of colonization, marginalization, ...displacement from our Homelands, and rampant abuses, that has forced many of our sisters into prostitution."

The six women whom Willie Pickton was found guilty of murdering were all living marginally. They were sometimes homeless, and never had stable housing. They were receiving inadequate social assistance, which was paid out to them in small amounts on a daily or occasional basis. Police were a regular part of their lives – because they were being questioned as witnesses to assaults or robberies, or because of their own involvement in petty crime. They had health problems and drug problems. They did not have an adequate standard of living, or equality<sup>136</sup>.

While pro-prostitution advocates wish to rely on ideas of "choice" and "consent", the presence of consent can never be accurately measured until poverty and racism are taken out of the equation. Addressing women's poverty, homelessness and inadequate housing – aggressively – is essential to any fully respectful approach to prostitution. Women need adequate rates of social

assistance, the removal of barriers to getting on welfare, safe and stable housing, childcare, drug rehabilitation programs, training and supports, so that they are not forced into prostitution, and so that they can get out of it with real alternatives before them. Women who are coerced into prostitution by poverty and homelessness are not equal.

### **Harm Reduction**

The thrust of the ‘harm reduction’ approach is civil libertarian. It is an attack on any constraints on a woman’s right to market her body and make money from the sale of it. While this approach claims to be most concerned about reducing the harms to women in prostitution, including poor, racialized women, the essential effect will be to make buying women, and profiting from prostitution, easier.

The evidence from countries that have decriminalized/legalized does not support the conclusion that this approach leads to lesser harms for women, or a reduction in street prostitution. The logic offered is that if women can prostitute legally inside, they will, because it is safer. But, in jurisdictions like Netherlands and Australia, the effect of legalization has been the opposite. Legalization encourages and normalizes prostitution, and increases the numbers of women in prostitution both inside and outside. It also makes the countries that legalize more attractive destinations for traffickers. Jurisdictions that have decriminalized or legalized do not show the results that advocates of this legal approach seek.

The women who are the most disadvantaged are the ones whose conditions are least likely to be improved by a harm reduction strategy. The women who are homeless or marginally housed, racialized, or addicted to drugs are not likely to move into indoor prostitution. The indoor/outdoor dichotomy relied on by pro-prostitution advocates to argue for decriminalization/legalization seems faulty. If the legal status of prostitution really influenced women’s behaviour, women would move indoors now because they are so much less likely to be criminalized, since bawdy house laws in Canada are rarely enforced. But women who are in street prostitution do not move inside. They cannot because they are addicted, or do not want to because their prostitution is occasional, or understood by them to be temporary. Harm reduction strategy is not likely to touch them.

Even if decriminalization/legalization did result in more women moving to indoor prostitution, would that make this approach good enough?

Harm reduction is a neo-liberal, market strategy. It supports prostitution businesses, and normalizes the fact of women being for sale. As pointed out earlier, it is a strategy of capitulation. Advocates seem to have given up on obtaining equality for poor women. They seek to make some reduction in the violence in prostitution. But decriminalization or legalization cannot do this.

Only a major effort to claim the human rights of the poorest women, and to change their economic and social conditions, can.

### ***Abolition***

For both practical and conceptual reasons, abolition is the best position for women's equality advocates. Eliminating prostitution, by preventing women and girls from entering it, by helping them out of it, and by prohibiting the purchase of women or the sale of them by others, is the only approach that is consistent with the legal concept of substantive equality and with feminist understandings of violence against women. It is also the only legal approach that appears to have any record of reducing the harms of prostitution.

## **Part VI: Recommendations for Action**

- Work with other women's organizations to develop a broader understanding of prostitution, and wider agreement on an abolitionist position.
- Develop popular education materials for women's shelters and other women's organizations about the realities facing women in prostitution and about the two basic legal approaches: Decriminalization/legalization and abolition.
- Develop a popular education campaign to inform Canadian women about the record of decriminalization/legalization in other countries.
- Form alliances with women's organizations concerned with homelessness and inadequate housing for women, which contributes to entry into, and staying in, prostitution.
- Develop a model for an aggressive exit strategy to support women leaving prostitution. What would a 'Just Transitions' program for women exiting prostitution in Canada look like?
- Develop a lobbying strategy for each political party.
- Support interventions by equality-seeking women in constitutional challenges to prostitution laws.



## **Conclusion**

Prostitution is fundamentally an issue of the rights of the poorest women. What do we, as a society, think is acceptable? Do we believe in the equal rights of the poorest women? Or will Canadians accept that the poorest women, here and around the world, can be treated as sexual commodities, marketed on a scale not seen before, for the sexual gratification of men? Will we accept a devalued class of women – devalued because they are poor, because they are Aboriginal, because they are racialized? When defending and promoting the human rights of women, the rights of the poorest women must be central, and the fight for the poorest women to enjoy equality belongs to everyone.





# Endnotes

- 1 Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden” *Routes Out Partnership Board* (2003), online: Network of Sex Projects <http://www.nswp.org/pdf/BINDEL-CRITICAL.PDF>.
- 2 House of Commons, Standing Committee on Justice and Human Rights, “The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws” in *Report of the Subcommittee on Solicitation Laws*, (December 2006), online: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=190754>.
- 3 Melissa Farley, “Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized” *Prostitution Research and Education* (7 September 2004), online: Prostitution and Research Education <http://www.prostitutionresearch.com/FarleyVAW.pdf>.
- 4 Prostitution Law Reform Committee, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (2008) online: Government of New Zealand <http://www.justice.govt.nz/prostitution-law-review-committee/publications/plrc-report/index.html>
- 5 Chris Atchison & John Lowman, “Men Who Buy Sex: A Survey in the Greater Vancouver Regional District” (2006) 43.3 CRSA/RCSA 281.
- 6 Ann Cotton, Melissa Farley, Jacqueline Lynne, *et al*, “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder” (2003) 2(3/4) *Journal of Trauma Practice* 33 at 35, online: Prostitution Research and Education <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>
- 7 Melissa Farley, “Prostitution Harms Women Even If Indoors: Reply to Weitzer” (2005) 11(7) *Violence Against Women* 950.
- 8 Aboriginal Women’s Action Network, *Aboriginal Women's Statement on Legal Prostitution, Canada* (2007) online: Prostitution and Research Education <http://www.prostitutionresearch.com/racism/000153.html>.
- 9 House of Commons, Standing Committee on Justice and Human Rights, “The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws” in *Report of the Subcommittee on Solicitation Laws*, (December 2006) [Challenge of Change]; Canada, House of Commons, Standing Committee on the Status of Women, “Turning Outrage Into Action to Address Trafficking for the Purpose of Sexual Exploitation In Canada” (February 2007) [SCSW Trafficking Report].
- 10 The two constitutional challenges are: *Terri Jean Bedford, Amy Lebovitch, Valerie Scott v. Her Majesty the Queen*, (23 April 2007), Toronto, 07-CV-329807PD1, (ONSC); *Downtown Eastside Sex Workers United Against Violence Society v. Her Majesty the Queen*, (3 August 2007), Vancouver, S075285 (B.C.S.C.) [Constitutional Challenges].
- 11 Gwen Brodsky, Melina Buckley, Shelagh Day & Margot Young, “Human Rights Denied: Single Mothers on Social Assistance in British Columbia” *Poverty and Human Rights Centre*, (2006) at 31-35, online: Poverty and Human Rights Centre <http://www.povertyandhumanrights.org/docs/denied.pdf>; Seth Klein & Jane Pulkingham, “Living on Welfare in British Columbia: Experience of Longer Term ‘Expected to Work’ Recipients” *Canadian Centre for Policy Alternatives* (April 2008) at 11-12, 59, online: Canadian Centre for Policy Alternatives [http://www.policyalternatives.ca/documents/BC\\_Office\\_Pubs/bc\\_2008/bc\\_LoW\\_full\\_web.pdf](http://www.policyalternatives.ca/documents/BC_Office_Pubs/bc_2008/bc_LoW_full_web.pdf)

One fifth of the women in this study reported engaging in prostitution/survival sex at some point during the study period.

- 12 These are the positions taken in the constitutional challenges referred to at note 2, and by some Canadian organizations, including Stella, PIVOT Legal Society, and the B.C. Civil Liberties Association, as described below.
- 13 Janet Mosher, “Welfare Reform and the Re-Making of the Model Citizen” in Margot Young, Susan Boyd, Gwen Brodsky and Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) at 120.
- 14 Canada’s undertaking to maintain a social union in which basic needs are met is set out in section 36 of the *Constitution Act, 1982*, which commits federal and provincial governments to “promoting equal opportunities for the well-being of Canadians” and “providing essential public services of reasonable quality to all Canadians.” See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 36.
- 15 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter]. Women’s constitutional rights to equality are contained sections 15 and 28 of the *Charter*:
  15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
  - (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability
  28. Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.
- 16 *Charter, supra* note 7. Section 7 of the *Charter* states: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- 17 Key international human rights treaties that Canada has ratified are: *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 4 January 1969) [CERD]; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR]; *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31, 19 I.L.M. 33 (entered into force 3 September 1981) [CEDAW]; *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 (entered into force 2 September 1990) [CRC].
- 18 For further discussion of the connection between social programs, human rights and women’s advancement see: Gwen Brodsky & Shelagh Day, “Women and the Equality Deficit: The Impact of Restructuring Canada’s Social Programs” *Status of Women Canada* (March 1998), online: Government of Canada Depository Services Program <http://dsp-psd.pwgsc.gc.ca/Collection/SW21-32-1998E-1.pdf>; Gwen Brodsky & Shelagh Day, “Women and the Canada Social Transfer: Securing the Social Union” *Status of Women*

Canada (March 2007) at 5-10, online: Status of Women Canada [http://www.swc-cfc.gc.ca/pubs/pubspr/0662460909/200703\\_0662460909\\_e.pdf](http://www.swc-cfc.gc.ca/pubs/pubspr/0662460909/200703_0662460909_e.pdf) .

- 19 Some commentators consider social and economic rights to be “soft rights”, that is, they believe these rights are aspirational, statements of goals, rather than “real rights”, like civil and political rights, which are legally enforceable. However, this division of civil and political rights from social and economic rights, and the treatment of social and economic rights as secondary, is losing credibility in international arenas. A sign of the shift to an understanding that social and economic rights are also enforceable rights is the current drafting at the United Nations of an Optional Protocol to the ICESCR, *supra* note 9. This Optional Protocol will provide a complaint mechanism, permitting residents of countries that have ratified the ICESCR and the Protocol to seek adjudication of claims that their country has violated one of the rights in the Covenant, such as the right to an adequate standard of living. The ICCPR and the CEDAW, *supra* note 9, already have such complaint mechanisms. For further discussion of the history of the development of social and economic rights, their division from civil and political rights, and their implications for interpretations of *Charter* rights to equality and security of the person, see Gwen Brodsky & Shelagh Day, “Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty” (2002) 14 C.J.W.L. 184-219, online: Poverty and Human Rights Centre <http://www.povertyandhumanrights.org/html/centrepubs/11-DAY%20&%20BRODSKY.pdf> .
- 20 *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 860-862; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, L’Heureux-Dube J. at 365; *United States v. Burns*, [2001] 1 S.C.R. 283.
- 21 As stated above, Canada has made legal commitments to provide social programs in section 36 of the Constitution, as well as in the open-textured language of the *Charter* rights to equality and security of the person, and by ratifying international human rights treaties, which are cast in more concrete and particularized terms. While the ICESCR and CEDAW rights are not directly enforceable in Canadian courts, these treaties nonetheless obligate Canada to provide specific protections and programs that will fulfill the rights in these human rights instruments. Nonetheless, Canada is currently getting bad reviews from all of the treaty bodies to whom it reports due to its inadequate implementation of international human rights obligations. A consensus is emerging that Canada is failing significantly, particularly with regard to providing adequate programs and measures to address poverty, homelessness and inadequate housing, and measures to address the poverty of vulnerable groups of women. See “Human Rights Treaty Implementation: The Consensus on Canada” *Poverty and Human Rights Centre* (June 2007), online: Poverty and Human Rights Centre [http://www.povnet.org/files/pov\\_hr\\_centre/PHR\\_june07\\_v3.pdf](http://www.povnet.org/files/pov_hr_centre/PHR_june07_v3.pdf) . Ensuring that rights, including international human rights, have concrete, material meaning in women’s lives is an ongoing project, which requires political action, as well as action in the courts and in international venues.
- 22 See Mosher, *supra* note 5 at 122.
- 23 *Ibid.*
- 24 For example, social assistance schemes across Canada, which are so important to women, are in disarray. See the reports of the National Council of Welfare, the federal government’s advisory body on welfare for 2004 and 2005. “Severe cuts...by the federal government a decade ago have resulted in severe and enduring cuts to welfare incomes”. “From Poverty to Prosperity” *National Council of Welfare Presentation to the Standing Committee on Finance* (27 October 2005), online: National Council of Welfare [http://www.ncwcnbes.net/documents/publicstatements/FederalBudgets/2005\\_NCWPresentationENG.pdf](http://www.ncwcnbes.net/documents/publicstatements/FederalBudgets/2005_NCWPresentationENG.pdf) Welfare incomes were far lower in most provinces and territories in 2005

than they were a decade before, and in many provinces and territories benefits were at their lowest since 1986. Cuts in welfare rates have also been accompanied in many provinces by narrowed eligibility rules so that fewer people qualify for welfare. The National Council of Welfare calls Canadian welfare policy over the past 15 years “an utter disaster.” See “Welfare Incomes 2004” *National Council of Welfare Reports* (Spring 2005), online: National Council of Welfare

[http://www.ncwcnbes.net/documents/researchpublications/ResearchProjects/WelfareIncomes/2004Report\\_Spring2005/ReportENG.pdf](http://www.ncwcnbes.net/documents/researchpublications/ResearchProjects/WelfareIncomes/2004Report_Spring2005/ReportENG.pdf) at 87.

- 25 See Richard Poulin, *Abolir la prostitution: manifeste*, (Montréal : Éditions Sisyphe, 2006) at 43. Poulin writes that prostitution is worsening under the influence of neo-liberal globalization, and the number of young women, children or feminized persons being offered as instruments of pleasure to men is increasing. While the normalization of prostitution spreads, at the same time, women and children’s enjoyment of human rights is diminishing, except for one new “right” - the “right” to prostitute oneself.
- 26 Some argue that since prostitution itself is not illegal, it is not appropriate to criminalize the activities that facilitate it. But prostitution laws are not dissimilar from laws about driving or gun-owning. Neither driving nor gun-owning is illegal in Canada. Nonetheless, there are numerous laws about who can drive and how a person can drive, as well as numerous laws about who can own a gun and how a gun can be used.
- 27 Doreen Duchesne, “Street Prostitution in Canada” *Canadian Centre for Justice Statistics*, Vol. 17, no. 2. (Ottawa: Statistics Canada, 1997) Catalogue no. 85-002-XPE [Duchesne].
- 28 *Ibid.* In 1995, 92% of prostitution incidents reported by the police involved communicating. Only 5% involved procuring and only 3% were bawdy house offences.
- 29 *Ibid.* This is the historical pattern of enforcement of the communication law. But practices may have changed recently in some jurisdictions. For example, Vancouver police now say that they have a policy of not charging women with communicating offences except as a last resort.
- 30 Challenge of Change, *supra*, note 1 at 66 – 67.
- 31 *Ibid.* at 77 – 78.
- 32 Decriminalization does not mean that no law would apply to prostitution. As noted below, in New Zealand, for example, local councils have been put in the position of regulating street prostitution, as well as zoning and licensing brothels.
- 33 Challenge of Change, *supra* note 1 at 77-78.
- 34 “Report of Manukau City Council on Street Prostitution Control” *Manukau City Council* (July 2005), online: Manukua City Council [http://www.manukau.govt.nz/uploadedFiles/manukau.govt.nz/Publications/Plans\\_& Policies/mcc-report-on-street-prostitution-aug-2005.pdf](http://www.manukau.govt.nz/uploadedFiles/manukau.govt.nz/Publications/Plans_& Policies/mcc-report-on-street-prostitution-aug-2005.pdf) .
- 35 On the distinction between decriminalization and legalization, see Lee Lakeman, “Abolishing Prostitution through Economic, Physical and Political Security For Women” forthcoming in Marjorie Griffin Cohen & Jane Pulkingham, eds., *Public Policy For Women: The State, Income Security and Labour Market Issues*, (Toronto: University of Toronto Press, 2009) [Lakeman].
- 36 Susan E. Thompson, “Prostitution – A Choice Ignored” (2000) 21 *Women’s Rights Law Reporter* 217 at 243.
- 37 Melissa Farley, *Prostitution and Trafficking in Nevada: Making the Connections* (San Francisco: Prostitution Research and Education, 2007) at 16 - 17.



- 38 Challenge of Change, *supra*, note 1 at 83.
- 39 Melissa Farley, “Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized” *Prostitution Research and Education* (7 September 2004), online: Prostitution and Research Education <http://www.prostitutionresearch.com/FarleyVAW.pdf> at 1099. Melissa Farley notes that: “No research has demonstrated that legal prostitution decreases illegal (street and brothel) prostitution. Following legalization of prostitution in Victoria, Australia, although the number of legal brothels doubled, the greatest expansion was in *illegal* prostitution. In 1 year (1999), there was a 300% growth of illegal brothels.”
- 40 Sheila Jeffreys & Mary L. Sullivan, “Legalization: The Australian Experience” (2002) 8 *Violence Against Women* 1140 at 1142.
- 41 Challenge of Change, *supra* note 1 at 83.
- 42 Marlise Simons, “Amsterdam Tries Upscale Fix for Red-Light District Crime” *New York Times* (24 February 2008) at 10.
- 43 *Ibid.*
- 44 *Ibid.*
- 45 Julie Bindel and Liz Kelly, “A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden” *Routes Out Partnership Board* (2003), online: Network of Sex Projects <http://www.nswp.org/pdf/BINDEL-CRITICAL.PDF> [Bindel and Kelly].
- 46 *Ibid.* at 28 – 29.
- 47 Government of Sweden, *The Act Prohibiting the Purchase of Sexual Services* (1998) 408; See also Challenge of Change, *supra* note 1 at 73-74; Bindel and Kelly, *supra* note 37 at 23-27.
- 48 *Ibid.* at 24.
- 49 Rachel Williams, “How Making the Customers the Criminals Cut Street Prostitution: Sweden's Law Against Buying Sex Views Women Involved as Victims of Male Violence” *The Guardian* (5 January 2008), online: The Guardian <<http://www.guardian.co.uk/politics/2008/jan/05/uk.world>>.
- 50 Bindel and Kelly, *supra* note 37 at 25.
- 51 A 2004 report on Sweden by Marie de Santis states: “In the capital city of Stockholm the number of women in street prostitution has been reduced by two thirds, and the number of johns has been reduced by 80%. There are other major Swedish cities where street prostitution has all but disappeared. Gone too, for the most part, are the renowned Swedish brothels and massage parlours, which proliferated during the last three decades of the twentieth century when prostitution in Sweden was legal... No other country, nor any other social experiment, has come anywhere near Sweden’s promising results.” Marie de Santis, “Sweden Treating Prostitution as Violence Against Women” *Sisyphé* (20 December 2004) online: Sisyphé [http://sisyphe.org/article.php3?id\\_article=1424](http://sisyphe.org/article.php3?id_article=1424) .
- Critics of the Swedish approach say that it has forced prostitution underground, and that while there may be a reduction in street prostitution, there is more prostitution on the internet. Nonetheless, Sweden’s record stands out.
- 52 See: Summary of Speech by Gunilla S. Ekberg, Co-Executive Director, Coalition Against Trafficking in Women (CATW), at a conference organized by the Coalition Against Trafficking in Women Asia-Pacific, April 25, 2008, Manila, the Philippines, at 5. See also Bindel and Kelly, *supra* note 37 at 25.

53 *Ibid.* at 30.

54 Decriminalization advocates sometimes seem to be saying that women should be allowed to sink or swim in an unregulated marketplace, unprotected by any laws. However, when they argue that sex is work, they claim that labour and human rights laws should apply to prostitution, although, as discussed below, this poses serious conceptual and practical problems.

55 Chris Atchison & John Lowman, “Men Who Buy Sex: A Survey in the Greater Vancouver Regional District” (2006) 43.3 CRSA/RCSA 281 at 289.

56 Ann Cotton, Melissa Farley, Jacqueline Lynne, *et al*, “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder” (2003) 2(3/4) *Journal of Trauma Practice* 33 at 35, online: Prostitution Research and Education <http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf> [Farley].

57 *Ibid.* at 34.

58 *Ibid.*

59 *Ibid.* at 59.

60 *Ibid.* at 44.

61 *Ibid.* at 56, 58.

62 *Ibid.* at 56.

63 That is, feminists are accused of making broad and fixed generalizations about women that do not reflect the diversity of women’s experience or allow room for the possibility of change.

64 Ronald Weitzer, “Flawed Theory and Methods in Studies of Prostitution” (2005) 11 *Violence Against Women* 934 at 937.

65 Ronald Weitzer, “Rehashing Tired Claims about Prostitution: A Response to Farley and Raphael and Shapiro” (2005) 11 *Violence Against Women* 971 at 974.

66 It is also important to note that in some legalized jurisdictions “outcall” prostitution is increasing. The indoors/outdoors dichotomy is faulty because some of what is called “indoor” prostitution is “outcalls”, that is, women going to hotel rooms or apartments, where they are alone with a customer. This is extremely dangerous. Scholar Sheila Jeffreys reports in conversation that a recent government report “estimates that 75% of prostitution in Queensland is composed of ‘outcall or escort services...’”

67 Jody Raphael and Deborah L. Shapiro, “Violence in Indoor and Outdoor Prostitution Venues” (2004) 10(2) *Violence Against Women* 126.

68 Melissa Farley, “Prostitution Harms Women Even If Indoors: Reply to Weitzer” (2005) 11(7) *Violence Against Women* 950.

69 “BCCLA Updated Position on Sex Work Laws” *B.C. Civil Liberties Association* (January 2005), online: B.C. Civil Liberties Association <http://www.bccla.org/positions/privateoff/05sex%20work.htm>

70 Farley, *supra* note 48 at 60.

71 Diane Guilbault, “A Trip Into the Absurd” (May 2007), quoting from Ana Popovic and Carole Lizée, *Au-delà du discours sur la prostitution, la vie réelle des femmes prostituées* (Beyond the speech on prostitution, the real life of prostituted women), online: Sisyphe [http://sisyphe.org/sisypheinfo/article.php3?id\\_article=111](http://sisyphe.org/sisypheinfo/article.php3?id_article=111) ; see also Jacqueline Lynne,

- “Prostitution of First Nations Women in Canada” *Sisyphé* (17 May 2005), Presentation to the Subcommittee on Solicitation Laws, online: Sisyphé [http://sisyphe.org/article.php?id\\_article=1803](http://sisyphe.org/article.php?id_article=1803) [Lynne].
- 72 Farley, *supra* note 48 at 43 and 51. At 57, Farley discusses child abuse as a form of “preparation” for prostitution. See below.
- 73 The evidence about poverty, age of entry to prostitution, and former sexual abuse is confirmed by other studies. It is widely accepted as fact. See Martin A. Monto, “Female Prostitution, Customers and Violence” (2004) 10(2) *Violence Against Women* 160 at 162. [Monto]
- 74 Farley, *supra* note 48 at 51.
- 75 Berta E. Hernandez-Truyol and Jane E. Larson, “Sexual Labor and Human Rights” (2006) 37 *Colum. Human Rights L. Review* 391 at 424, [Hernandez and Larson] citing Amber Hollibaugh, “On the Street Where We Live” (1988) 1 *Women’s Review of Books* 1, (book review).
- 76 Joseph Raz, *The Morality of Freedom* (Oxford University Press: New York, 1986) at 374.
- 77 Farley, *supra* note 48 at 63.
- 78 Lynne, *supra* note 63.
- 79 *Ibid.*
- 80 See Monto, *supra* note 65 at 160.
- 81 Hernandez and Larson, *supra* note 67 at 402.
- 82 See *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (PIVOT Legal Society June 2006) at 109 – 131. [PIVOT]
- 83 “Turn up the Heat: Coalition for the Rights of Sex Workers demands healthy and safe working environments” *The Canadian Women’s Health Network Magazine* 7 (Summer/Fall 2004), online: Canadian Women’s Health Network <http://www.cwhn.ca/network-reseau/7-23/7-23pg5.html>
- 84 Conversation with Janine Benedet (8 May 2008).
- 85 See Office of the High Commissioner for Human Rights, *Fact Sheet No. 14, Contemporary Forms of Slavery*, OHCHR-UNOG (1991) online: United Nations <http://www.unhcr.ch/html/menu6/2/fs14.htm> . For a recent discussion of the relationship between forced labour, slavery and poverty see Roger Plant, “Forced Labour, Slavery And Poverty Reduction: Challenges For Development Agencies” (Presentation to the UK High-Level Conference To Examine The Links Between Poverty, Slavery And Social Exclusion, London, 30 October 2007). ILO Special Action Programme to Combat Forced Labour.
- 86 “Just Transition” Labour Environmental Alliance Society, online: <<http://leas.ca/Just-Transition.htm>>.
- 87 International Labour Organization, *ILO Declaration on Fundamental Principles and Rights at Work*, 86th Sess., (June 1998), online: International Labour Organization [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONTEXT](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT) .
- 88 Hernandez and Larson, *supra* note 67 at 428. It should be noted that there is some uncertainty about the ILO approach to prostitution. A 1998 report of the ILO called for recognition of the “sex sector”. While stopping short of calling for legalization of

prostitution, this report recommends official recognition of the economic contribution that the “sex sector” makes to the GDP of some states. See Janice Raymond, “Legitimizing Prostitution as Sex Work : UN Labour Organization (ILO) Calls for Recognition of the Sex Industry (Part One)” (2003), [http://sisyphe.org/article.php3?id\\_article=689](http://sisyphe.org/article.php3?id_article=689)

89 Hernandez and Larson, *supra* note 67 at 405.

90 *Ibid.* at 419.

91 *Ibid.* at 442, citing Amartya Sen, *Development as Freedom* (New York: Random House, 1999) at 293.

92 Mary Lucille Sullivan, *Making Sex Work: A Failed Experiment with Legalized Prostitution*, (Melbourne: Spinifex Press, 2007) at 244 – 280 [Sullivan].

93 *Ibid.* at 278.

94 *Ibid.* at 275.

95 *Ibid.* at 278-279.

96 *Ibid.* at 317. See also Sheila Jeffreys, “Making Abuse Visible: Combating the Normalization of Prostitution” (2006) C(1) *Moderna Sprak* 64.

97 PIVOT, *supra* note 74 at 131 - 138.

98 Sullivan, *supra* note 84 at 118. See also Gregor Gall, “Sex Worker Unionisation: An Exploratory Study of Emerging Collective Organisation”(2007) 38 *IRJ* 70.

99 But see PIVOT, *supra* note 74 at 181-190.

100 Sheila Jeffreys notes in correspondence with the author that women in brothels in Australia are not considered employees, but rather independent contractors, with brothels taking a percentage of what women earn. This is also true in other countries where prostitution has been legalized. Brothel owners do not want to be employers within the meaning of labour or human rights legislation. They provide the space and women pay for everything else – towels, condoms, rent, sheets, cleaning. Given Canadian human rights jurisprudence, however, women working in legalized brothels in Canada would be less likely to be treated as falling outside the scope of human rights legislation, and some women currently working in strip clubs and escort services may be employees within the meaning of human rights legislation, but no human rights complaint has tested this point.

101 See: *Crane v. British Columbia (Ministry of Health Services)*, (2005) 53 C.H.R.R. D/156, 2005 BCHRT 361; overturned, but not on this point by *British Columbia (Ministry of Health Services) v. Emergency Health Services Comm.*, (2007) B.C.J. No. 681, 2007 BCSC 460. (QL) For example, Canadian human rights tribunals have ruled that taxi drivers who own and drive their own cars, keep their fares, and pay rent to a taxi company for dispatching, are employees of a taxi company, because the company controls their conditions of work, and sets policies for conduct and dress. See: *House-Borden v. Corner Taxi Ltd.*, (2002) 44 C.H.R.R. D/240, [2002] N.H.R.B.I.D. No. 6 (QL); *Pannu v. Prestige Cab Ltd.*, (1986), 8 C.H.R.R. D/3909 (Alta. Q.B.), [1986] A.J. No. 463, 28 D.L.R. (4th) 268 (QL).

102 Online: <http://www.dailyplanet.com.au>

103 See, for example: *Hajla v. Nestoras and Welland Plaza Restaurant* (1987), 8 C.H.R.R. D/3879 (Ont. Bd. Inq.) at para. 30731.

104 The PIVOT report, *supra* at note 74, argues that women in prostitution should be protected by prohibitions against sexual harassment in human rights legislation. Women in prostitution, they contend, should be able to determine in each transaction what is



wanted and what is unwanted sexual touching or sexual comments; what women define as unwanted sexual touching or comments should be considered sexual harassment. While it is clear that women in prostitution, like all other women, have the right to say “no” or to withdraw consent from any particular sexual activity, it is also true that human rights adjudicators take for granted that *any* touching of a woman’s breasts or genitals or buttocks in the workplace by a male supervisor or co-worker or client is *unwelcome* sexual conduct. The law expects male supervisors, co-workers or clients to know this. Practically speaking, it would be difficult, if not impossible, for an employer of women in prostitution to create a harassment-free workplace, within the meaning of human rights law.

- 105 *Winnipeg School Div. No. 1 v. Craton*, [1985] 2 S.C.R. 150.
- 106 ‘Sex work’ advocates might say that women who are prostitutes should only have to comply with those sexual demands that they agree to. But it is an inherent condition of their “work” that they comply with *some* sexual demands in order to stay employed. The anti-discrimination norm is that women are not required to comply with any sexual demands in order to be, or stay, employed.
- 107 Members of this Subcommittee were: John Maloney (Chair) (Liberal); Patricia Davidson (Conservative); Hedy Fry (Liberal); Real Menard (Bloc Quebecois); Libby Davies (New Democratic Party); and Art Hanger (Conservative).
- 108 Challenge of Change, *supra* note 1 at 71.
- 109 *Ibid.* at 62.
- 110 Duchesne, *supra* note 19.
- 111 John Lowman, “Street Prostitution Control: Some Canadian Reflections on the Finsbury Park Experience” (1992) 32 *Brit.J.Criminol.* 1
- 112 The members of this Committee were: Yasmin Ratsani (Chair) (Liberal); Irene Mathysen (Vice-Chair) (New Democratic Party); Joy Smith (Vice-Chair) (Conservative); Patricia Davidson (Conservative); Nicole Demers (Bloc Quebecois); Johanne Deschamps (Bloc Quebecois); Nina Grewal (Conservative); Helena Guergis (Conservative); Maria Minna (Liberal); Anita Neville (Liberal); Bruce Stanton (Conservative); and Belinda Stronach (Liberal). Maria Mourani (Bloc Quebecois) and Judy Sgro (Liberal) also participated in the consideration of this issue.
- 113 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, GA Res. 25, UNODC, 55th Sess., UN Doc. A/55/383 (2000), online: UNODC [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention%20traff_eng.pdf) . [Trafficking Protocol]
- 114 The date of Canada’s ratification of the *Trafficking Protocol*, 13 May 2002, is posted online: Heritage Canada [http://www.pch.gc.ca/progs/pdp-hrp/docs/treat-trait/un\\_e.cfm#table18](http://www.pch.gc.ca/progs/pdp-hrp/docs/treat-trait/un_e.cfm#table18) .
- 115 Trafficking Protocol, *supra* note 106 at Articles 3 (a) and (b).
- 116 SCSW Trafficking Report, *supra* note 1 at 1.
- 117 *Ibid.* at 5.
- 118 *Ibid.* at 11, citing Richard Poulin, Professor, Department of Sociology and Anthropology, University of Ottawa.

- 119 The Bloc Quebecois put in a dissenting opinion indicating that it did not agree with the recommendation regarding criminalizing the purchasers of sex. See SWC Trafficking Report at 58. The Bloc also removed Maria Mourani from her position as Women's Critic after she participated in the Status of Women Committee deliberations on trafficking and supported the resolutions that would criminalize purchasers of sex and sex industrialists. See Lakeman, *supra* note 26 at footnote 2, p. 252.
- 120 "Government Response to the 12th Report of the Standing Committee on Status of Women, "Turning outrage into action to address trafficking for the purpose of sexual exploitation in Canada" (Presented to the House of Commons, 15 June 2007), online: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=10477&Lang=1&SourceId=212908> .
- 121 See footnote 112 above.
- 122 Commission on Human Rights, *Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children*, UNESC U.N. Doc. E/CN.4/2006/62, (2006) at para. 44. [Special Rapporteur on Trafficking]
- 123 *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, GA Res. 317(IV), UNHCR, Art. 24, UN Doc. A/317 (1949) at 1 and 2 online: <http://www.unhchr.ch/html/menu3/b/33.htm> .
- 124 Canada has not ratified this Convention.
- 125 Report of the Secretary General, *Advancement of Women: Traffic in Women and Girls*, GA, 51st Sess., UN Doc. A/51/309, (1996) at 26.
- 126 Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, 15 September 1995, A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) at, for example, para 114(b).
- 127 Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45, E/CN.4/1995/42 at para. 205.
- 128 Special Rapporteur on Trafficking, *supra* note 115 at para 41.
- 129 *Ibid.* at para 43.
- 130 *Ibid.* at para 47-48.
- 131 The current distinction between trafficking (forced) and prostitution (voluntary) is reminiscent of the early political struggles over slavery. Initially, it was easier to gain public support for condemnation of the slave trade than for condemnation of slavery itself. People's outrage could be aroused by the conditions in which slaves were being transported from Africa to the West Indies, packed into slave ships in chains, without adequate food or water or sanitation – conditions in which many died. At the same time, they still accepted slavery *per se*. This changed over time, as more people came to understand and reject the basic injustice of treating some people, because of their race, as though they were not fully human. Similarly, at the present moment, the general understanding of trafficking is that it involves transport – although this is not in fact required by the Protocol definition – and it seems to be easier to persuade people that women who have been transported to prostitute somewhere else should be assisted to exit prostitution, while those who were not transported are simply in prostitution and are considered to have chosen it.
- 132 Jonathan Spicer, "Unsafe' Canada prostitution law to be challenged", *Reuters* (9 July 2007, online: Ottawa Citizen

<http://www.canada.com/ottawacitizen/news/story.html?id=49c53413-3bdf-4e4e-875e-1a4129e110b7&k=79852> .

- 133 Allison Hanes, “Prostitutes challenge validity of laws”, *National Post* (22 March 2007).
- 134 See Richard Poulin, *supra* note 17 at 70. Poulin says: “...consent or the lack of consent in prostitution is not a pertinent question. Like slavery, it is the very existence of this institution that is at the root of the problem.” [translation]
- 135 See Denise Reaume, “Dignity, Equality, and Second Generation Rights”, in Margot Young, Susan Boyd, Gwen Brodsky, and Shelagh Day, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) at 287-290.
- 136 See: *Her Majesty the Queen and Robert William Pickton*, New Westminster Registry File NBo. XO65319, Admissions of Fact, Dates on Which the Victims Were Last Known to Be Alive.