

**The Prostitution Debates in Canada: Competing perspectives presented to the
Subcommittee on Solicitation Laws**

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Index

Introduction	p. 1
Chapter 1 A framework for understanding the competing perspectives	p. 9
Chapter 2 Socio-economic considerations	p. 25
Chapter 3 Legal considerations and perspectives	p. 42
Chapter 4 Reflections on perspectives advanced in the prostitution debates	p. 74
Appendix A Criminal Code of Canada	p. 89
Appendix B Recommendations of the Subcommittee on Solicitation Laws	p. 92
Appendix C Recommendations of the Fraser Committee	p. 94
Bibliography	p. 96

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Introduction

Prostitution is one of the most hotly contested topics of our time. It intersects with violence against women, feminism, women's inequality, gender,¹ racism,² poverty,³ patriarchy⁴, pornography,⁵ employment,⁶ neoconservative economics,⁷ rights,⁸ international migration, trafficking of women and children,⁹ community interests, public nuisance, and other dialogues.¹⁰ The 'hot contest' is primarily framed between the poles

¹ For discussion of violence against women, feminism, women's inequality and gender see generally Catherine A. MacKinnon, *are women human? and other international dialogues* (Cambridge: The Belknap Press of Harvard University Press, 2006). Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987). Lee Lakeman, *Obsession, With Intent: Violence Against Women* (Montreal: Black Rose Books, 2005). Nancy J. Hirschmann, *Subject of liberty: toward a feminist theory of freedom* (Princeton University Press, 2003). Judith Butler, "Contingent Foundations: Feminism and the Question of 'Postmodernism'" (1995) *Feminist Contentions* 35.

² See generally Amnesty International Canada. *Stolen Sisters: Discrimination and violence against indigenous women in Canada*. Index Number: AMR 10/001/2004. October 2, 2004. Available at <http://www.amnesty.org/en/library/info/AMR20/001/2004>.

³ See generally Lakeman, *Obsession, supra* note 1.

⁴ See generally Gerda Lerner, *The Creation of Patriarchy* (New York: Oxford University Press, 1986).

⁵ See generally Catherine A. MacKinnon, *are women human? and other international dialogues* (Cambridge: The Belknap Press of Harvard University Press, 2006).

⁶ See generally Rachel Kahn-Hut, Arlene Kaplan Daniels & Richard Colvard *Women and Work: Problems and Perspectives* (New York: Oxford University Press, 1982). Pat Armstrong and Hugh Armstrong *Theorizing Women's Work* (Toronto: Garamond Press, 1990).

⁷ See generally Nancy Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989). Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (London: Routledge, 1997).

⁸ See generally Shelagh Day, "The Indivisibility of Women's Human Rights" (Fall 2000) Vol. 3, 20 *Canadian Woman Studies*, at 11-14. International Committee for Prostitutes' Rights, "World Charter and World Whores' Congress Statements" in Frédérique Delacoste and Priscilla Alexander, eds., *Sex Work: Writings by Women in the Sex Industry*, 2d ed. (San Francisco, Calif.: Cleis Press, 1998).

⁹ See generally Kamala Kempadoo, "Victims and agents of crime: the new crusade against trafficking" in Julia Sudbury ed., *Global Lockdown*, (New York: Routledge, 2005). Jyoti Sanghera, "Unpacking the trafficking discourse" in K. Kempadoo, J. Sanghera & B. Pattanaik, eds., *Trafficking and Prostitution Reconsidered* (Boulder, Co: Paradigm Publishers, 2005). Angela Miles, "Prostitution, trafficking and the global sex industry: A Conversation with Janice Raymond" (Spring/Summer, 2003) Vol. 3 & 4, 22 *Canadian Woman Studies*, at 26-37.

¹⁰ On intersectionality generally, see Gayle MacDonald, Rachel L. Osborne & Charles C. Smith, *Feminism, Law, Inclusion: Intersectionality in Action* (Toronto: Sumach Press, 2005).

of prostitution as violence against women and sex work as legitimate employment.

Proponents of the former argue that prostitution should be abolished; proponents of the latter argue that prostitution should be decriminalized. Canada's 'solicitation laws'¹¹ are currently the subject of two legal challenges¹², which eventually will make their way to the Supreme Court of Canada, based on arguments that the laws infringe rights guaranteed to prostitutes under the Charter of Rights and Freedoms.

Arguably, adult prostitution has always been legal in Canada. However, I think it is more helpful, and more accurate, to consider it as quasi-legal or quasi-criminal. Some say it is legal, others say it is effectively illegal. This stems from the dilemma presented by the 'solicitation laws' that almost every action taken in pursuit of the purchase and sale of sexual services is illegal, except the act itself. Section 210 prohibits keeping, or being the owner, lessor, tenant, or occupant of, a "bawdy house." A common bawdy house is defined in section 197 as a place that is kept, occupied or resorted to for the purpose of prostitution or the practice of acts of indecency. Section 211 prohibits transporting or directing anyone to a bawdy house. Section 212 prohibits procuring or living off the

¹¹ This is the term applied to the collection of laws touching on communication, bawdy houses, living off the avails of prostitution, procurement and others contained in the *Criminal Code of Canada* (R.S. 1985, c. C-46), sections 197 (1), 210 – 213. See Appendix A for reference to the full text of these sections [*Criminal Code*].

¹² *Downtown Eastside Sex Workers United Against Violence (SWUAV) and Sheryl Kiselbach v. Attorney General (Canada)*, Vancouver Registry S075285. An application by Canada to dismiss this case was heard in October 2008. The issue was whether SWUAV or the personal plaintiff had private or public interest standing. The Court ruled that neither plaintiff has standing to seek the relief set out in the statement of claim. See, 2008 B.C.S.C. 1726, 90 B.C.L.R. (4th) 177, [2009] 5. W.W.W. 696, 305 D.L.R. (4th) 713. The decision was appealed. The BC Court of Appeal heard argument in January 2010 and reserved decision. Also, *Bedford v. Canada (Attorney General)*, Toronto Registry 07-CV-329807PD. An application was made by three organizations who sought intervenor status. A decision rendered by the Ontario Superior Court of Justice on July 2, 2009, was appealed to the Court of Appeal who overturned the lower court decision and granted intervenor status. See, 2009 ONCA 669.

avails of prostitution. Section 213 prohibits communicating in a public place for the purpose of engaging in prostitution.

Many practices that, arguably, could lend harm reduction, health and safety to prostitutes – such as working together, negotiating terms, getting to know a client before committing to go with him – are illegal. The section 213 ‘communicating’ offence is the most problematic because it ensures that prostitution is hidden, isolated, and negotiated quickly, frequently under cover of darkness. It is not surprising in those circumstances that there is reported lack of health and safety for prostitutes. Violence goes undetected and unreported due to the clandestine and illegal aspects of the work.

Notwithstanding the political and philosophical polarities I referenced above, there are areas of agreement on the need to address issues that disproportionately affect women and children in our society. These include equal treatment and employment opportunities for women, the effects of colonization on Aboriginal and First Nations communities, child sexual abuse, drug and alcohol addiction and their effects, as well as other socio-economic issues such as poverty and homelessness.

My project in this paper is to examine some of the major points raised in the prostitution debates in Canada. Primarily, my interest is to understand the perspectives and analyses underlying the advocacy for decriminalizing prostitution and the advocacy for abolishing prostitution. During the course of my research, I have been predominantly interested in the issues as they affect women and children. There are aspects of male prostitution that present similar issues but I do not touch on those. Prostitution is about

the male sex demand and, primarily, men being sexually serviced by women and girls. The focus of my study has been women and prostitution.

In October 2003, the federal Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness established the Subcommittee on Solicitation Law Reform (SSLR). After only five meetings, the committee was prorogued with Parliament. It was re-established in November 2004, subsequently named the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights.¹³ The SSLR produced a report in December 2006.¹⁴

I examine the prostitution debates in Canada primarily by reviewing some of the major points of contention and agreement raised in the submissions to the SSLR. I have chosen the SSLR as my major research focus because the submissions offer a unique opportunity to canvas views on prostitution/sex work and related issues. Between January 31 to May 30, 2005, plus the five days in 2003, the SSLR conducted meetings in Toronto, Montreal, Halifax, Vancouver, Edmonton and Winnipeg, and received written and oral submissions from approximately 300 witnesses. These included representatives of the three levels of government, police officers, individuals representing the views of neighbourhoods in which street prostitution is prevalent, Aboriginal organizations, women's crisis shelters and health clinics, health sector workers, university professors, sex workers organizations and service providers, organizations and individuals providing

¹³ The original acronym, SSLR, is commonly used so I have retained it.

¹⁴ Report of the Standing Committee on Justice and Human Rights; Report of the Subcommittee on Solicitation Laws. *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Communication Canada – Publishing, Ottawa, Canada, December 2006), at 2. Also available on the Parliamentary Internet Parliamentaire: <http://www.parl.gc.ca> [SSLR Report].

outreach services for prostitutes, legal support and advocacy groups, Amnesty International, representatives of gay and lesbian interests, religious organizations, and international bodies including representation from Sweden and Australia.

The mandate of the SSLR was, “to review the solicitation laws in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex-trade workers.”¹⁵ It is apparent that the committee members accepted this mandate to include exploring related laws and public policies. Implicit in the mandate was the acknowledgement that sex trade workers face violence, injury, disappearance and death. Also implicit was the view that the solicitation laws do not protect sex trade workers from violence and that reform is necessary. Accordingly, the views presented by the witnesses to the SSLR included proposals for reform of the legal and social framework of Canada’s sex trade.

A large part of the SSLR’s report is a survey of the evidence they received on what is known about prostitution in Canada. The report outlined the demographics of the sellers of sexual services and their clients, issues around drug and alcohol addictions, and discussed pimps, organized crime and trafficking in persons. The overview of the development of the ‘solicitation’ laws examined the important role that public nuisance complaints have had in lobbying for and structuring those laws. The report discussed the current laws, how they are enforced and why some laws are not enforced. The SSLR spotlighted how the laws have been enforced against the women sellers of prostitution services with little or no enforcement against the male buyers. Additionally, it painted a

¹⁵ *Ibid* at 2.

picture of two-tiered prostitution enforcement whereby street workers are easily targeted and frequently arrested whereas indoor workers are not targeted for enforcement. I look at many of these aspects through the testimony presented to the SSLR.

The bulk of my research is from the SSLR evidence and report. As a disclaimer, I have attempted to gather the most relevant and pertinent points I saw during my reading of the transcripts and the briefs. With 300 witnesses and briefs it is impossible in a work of this size to include them all. Although it may seem that there are a finite number of issues and perspectives on a topic such as prostitution, it appears that is not the case. Each individual has a perspective that in some way may accord with a major theme, but also is personal and demands its own space. My focus is on the presentations by women's organizations, academics and legal advocates rather than the presentations by municipalities, neighbourhoods and religious groups.

The SSLR report clearly asserted that violence against women involved in prostitution is a major concern and documents some statistics.¹⁶ Unfortunately, the SSLR did not come to any unanimous resolution on how to combat the violence. While the SSLR recommended "that the Government of Canada recognize that the status quo of the Criminal Code is unacceptable, and that the laws that exist are unequally applied,"¹⁷ the report did not arrive at any legal reform recommendations. The SSLR did not present any unanimous recommendations for specific socio-economic measures.

¹⁶ *Ibid.* at 17 – 22.

¹⁷ *Ibid.* Recommendation 3, at 87. See Appendix B to this paper for the full text of the Recommendations.

In 1983, another federal government committee, Fraser Committee, toured Canada taking submissions on problems associated with pornography and prostitution. The Committee produced a two volume report in excess of 700 pages,¹⁸ with 108 Recommendations. The Committee's mandate was "to study the problems associated with pornography and prostitution and to carry out a program of socio-legal research in support of its work." A number of witnesses appeared before both the Fraser Committee and the SSLR of these national committees. As part of my research to understand the perspectives and analyses presented to the SSLR, I reviewed the Fraser Committee Report. It provided a comprehensive analysis of issues which, in many instances, were much the same as those presented to the SSLR. In this paper, I refer to the Fraser Committee for information and, to a limited degree, for comparison to the SSLR.

Throughout the SSLR submissions and deliberations, there is reference to, and considerable interest in, decriminalization of prostitution in New Zealand which took effect in June 2003. As I was finalizing my research and writing, the New Zealand Department of Justice released a five year review.¹⁹ I analyzed that report *vis a vis* the concerns raised in the Canadian context.

¹⁸ Paul Fraser, *Pornography and Prostitution in Canada*, Report of the Special Committee on Pornography and Prostitution, Canadian Government Publishing Centre, Supply and Services Canada, 1985 [Fraser Committee].

¹⁹ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, May 2008. Available at <http://www.justice.govt.nz/prostitution-law-review-committee/publications/plrc-report/index.html> [PLRC report].

My Project

In Chapter 1, I provide a framework for understanding the perspectives and debates. I look at issues around the concepts of ‘choice’ and ‘consent’, terminology, and types and categories of prostitution/sex work.

In Chapter 2, I examine some socio-economic issues, what witnesses say about the issues that drive prostitution and, correspondingly, proposals for social reform. The bulk of the evidence before the SSLR related to street prostitution; thus most of the social reform proposals are directed to reducing violence in the street trade. However, there is also increasing evidence of the indoor trades, through university-based research, community outreach organizations, current and former sex trade workers, and sex worker organizations.

In Chapter 3, I explore legal issues presented to the SSLR through an in-depth examination of the reform proposals that were made to the SSLR. I pay particular attention to the competing perspectives for and against decriminalization and abolition of prostitution. I provide an analysis of the Recommendations contained in the SSLR report and outline the Recommendations from the Fraser Committee. In this chapter, I also provide my analysis of the New Zealand experience with decriminalization relative to the concerns raised before the SSLR.

In the final chapter, I consider some of the major themes and issues that have informed my understanding of the perspectives and analyses behind the advocacy for decriminalization and abolition of prostitution. I weigh evidence in order to draw some conclusions on how to address the violence that was the mandate of the SSLR.

Chapter 1: A framework for understanding competing perspectives

In my approach to the very broad and nuanced topics around prostitution and sex work, I found it necessary first to understand some of the tensions underlying the terms and concepts. In this chapter, I explore some terminology and fundamental concepts, including the concepts of ‘consent’ and ‘choice’ and varying perspectives on how women ‘consent’ or ‘choose’ to enter, remain in, and exit the sex trade. The discussion that follows is based on issues that arose in many submissions and recommendations to the SSLR¹ and these will be considered in later chapters.

An introduction to terminology, concepts and perspectives

Prostitution/Sex work

The language employed in the *Criminal Code of Canada*² includes the terms prostitute, prostitution, illicit sexual intercourse, common bawdy house, procuring a person for the purposes of prostitution, and living off the avails of prostitution. One of the fundamental differences in perspectives is reflected in terminology – *prostitution* and *sex work*. Generally speaking, the term *prostitution* is used by the proponents of abolition who view prostitution as violence against women and do not accede to any aspect of it being normalized as employment. The terms *sex work*, *sex worker*, and *sex trade or industry* are used predominantly although not invariably by those who support

¹ In October 2003, the federal Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness established the Subcommittee on Solicitation Law Reform (SSLR). After only five meetings, the committee was prorogued with Parliament. It was re-established in November 2004, subsequently named the Subcommittee on Solicitation Laws of the Standing Committee on Justice and Human Rights. The original acronym, SSLR, is commonly used so I have retained it [SSLR].

² *Criminal Code of Canada* (R.S. 1985, c. C-46). Sections 197(1), 210 – 213 are commonly referred to as the “solicitation laws”. See Appendix A for reference to the full text of these sections [*Criminal Code*].

decriminalization of prostitution, normalization of the occupations as legitimate forms of employment, and the establishment of rights for those engaged in the occupations. I use the terms prostitution and sex work interchangeably, usually reflecting the views of the particular witness.

The most visible sector of prostitution has always been the women working on the streets. However, historically, it has included indoor venues, such as brothels, escort agencies, massage parlours, 'strip' clubs, and steam baths. There are considerable differences between conditions in the various indoor venues and considerable differences in the issues affecting women who work indoors and outdoors as the following definitions illustrate.

Jennifer Clamen,³ a pro-decriminalization witness before the SSLR described 'prostitution' as one aspect of 'sex work'. Her definition of 'prostitution' was "the exchange of sexual services for financial compensation." John Lowman, also a pro-decriminalization witness, testified that he uses the term 'prostitution' "to distinguish direct contact commercial sexual services from other forms of sex work, and the terms 'sex worker' and 'prostitute' to refer to a person who sells direct contact sexual services."⁴ Lowman spoke of three categories of prostitution: *sexual slavery*, defined as someone forcing another to prostitute; *survival sex*, defined as prostitution necessitated by immediate financial need; and *sex work*, defined as prostitution that is chosen because

³ Jennifer Clamen, member, Coalition for the Rights of Sex Workers, SSLR meeting March 16, 2005, at 1150 hours.

⁴ John Lowman, "Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness" February 21, 2005, at 1. Available at: <http://mypage.uniserve.ca/~lowman/>

of the rewards available, not out of desperation or coercion. In each instance, he uses 'prostitution' to define aspects of sex work.

Raven Bowen, in her testimony on behalf of the Prostitutes Alternatives Counselling and Education Society (PACE) before the SSLR, submitted the following:

The PACE Society makes the distinction between sex work and survival sex. Sex work is known to you as prostitution. We define survival sex as the lack of opportunity to consistently exercise the right to refuse customers in any given circumstances. So basically, if you're in a situation where you have to take that date, you are a survival sex worker. Sex work is then defined as the exchange of sexual services for remuneration, where both parties consent and negotiate the details of a transaction.

As survival sex is embedded within larger social issues of poverty, racism, tiered systems within education, labour market skill development, and health services, we argue that section 213 creates forced-labour-like practices. Poverty, desperation, and criminalization or the threat thereof force sex workers to accept any and all customers to avoid pain. Avoiding pain for an individual who's addicted means avoiding withdrawal. Avoiding pain for women or individuals who don't have sustainable incomes means starving or not being able to feed their children. For women who are pimped or owned by organized crime, avoiding pain means making that quota so they don't get beaten up.

Also, section 210 unfortunately guarantees that sex workers who are not marketable or who do not choose to be involved in organized-crime-run or city-licensed venues remain plying their trade outdoors.⁵

This selection of definitions indicates language and perspectives, and speaks to some of the issues addressed in the prostitution debates. The abolition proponents did not use

⁵ Raven Bowen, Coordinator, Prostitution Alternatives Counselling and Education Society (PACE), and BC Coalition of Experiential Women (BCCEW), SSLR meeting March 29, 2005, at 0900 hours.

the terms sex work or sex worker because their perspective was that prostitution should not become normalized as employment.⁶

The 'two-tiered' sex trade

The above quotations also begin to shed light on some of the distinctions between indoor and outdoor prostitution. As Bowen's remarks attest, street sex trade workers are among the most marginalized persons in our society. The illegal trade in drugs, drug addiction and associated violence are commonly associated with street prostitution. Communities cite issues of increased traffic, fear of walking on local streets, unwanted solicitation, harassment by prostitution clients, the litter of used condoms and injection needles, among other dangers and nuisances.⁷ Bowen's remarks also speak to some of the issues for women working indoors, such as organized crime.

The sex trade is often referred to as *two-tiered*. This frequently refers to the differences between indoors and outdoors – the difference in conditions, the differences in the women attracted to each, the fact that the indoor trades are almost invisible, and other comparisons and contrasts. It was referred to in the SSLR report in relation to the enforcement of the criminal laws and the fact that enforcement is almost non-existent in the indoor venues. In fact, in some jurisdictions, indoor brothels are effectively licensed by the municipal authorities, despite section 210 of the *Criminal Code*.

⁶ For an overview of the perspective, see Janice G. Raymond, "10 Reasons for Not Legalizing Prostitution," March 25, 2003, available at http://action.web.ca/home/catw/readingroom.shtml?x=32972&AA_EX_Session=8dd0658c4a0326c1e5a65739e67c4cb4

⁷ Report of the Standing Committee on Justice and Human Rights; Report of the Subcommittee on Solicitation Laws. *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*. (Communication Canada – Publishing, Ottawa, Canada, December 2006), at 29. Also available on the Parliamentary Internet Parliamentaire: <http://www.parl.gc.ca> [SSLR Report].

In his submission to the SSLR on February 21, 2005,⁸ John Lowman provided a document he produced in September 1997, entitled “Vancouver’s Prostitution Licensing By-laws”. In his submission, he stated that the by-laws remained much the same in 2005. The by-laws set out business licence fees for dating services, escort services, massage parlours, health enhancement centres and body-rub, body painting and model studios. Lowman asserted, through his interpretation of the by-laws, that the City attempts to restrict prostitution to body-rub parlours and escort services. He noted that prostitution is specifically prohibited in the health enhancement centres but not in the body-rub parlours. In body-rub parlours women are allowed to provide services to men. The regulatory definition: “‘Body-rub’ includes the manipulating, touching or stimulating by any means, of a person’s body or part thereof, but does not include medical, therapeutic or cosmetic massage treatment given by a person duly licensed “(Vancouver License By-law, p. 2).” The by-law prohibits the advertising of ‘sexual entertainment’ but not actual sexual entertainment. The business licence fees for body rub parlours are in excess of \$6,500 per annum, compared to \$104 for dating services, \$172 for massage parlours, etc. Body rub parlours, according to Lowman’s research, are the third most expensive business licence, following the Pacific National Exhibition and the horse race track.

Lowman’s view of the licensing and permitted activities in Vancouver accords with my understanding of the lack of enforcement of section 210 in the City of Victoria where escort services and other sexual services advertise and are known to provide prostitution

⁸ *Supra* note 4.

services. While I was on the Board of Directors of PEERS,⁹ there were frequent discussions about local brothels. I had occasion to meet two owners of escort agencies who were frank about their services and lack of police enforcement.

'Stigma' associated with the sex trade

A common concern raised by women working indoors and outdoors is that *stigma* attaches to prostitution. Some believe the stigma attached to the women is a major contributor to violence – that men believe these women are less than human, unworthy, disposable,¹⁰ and vulnerable – and that changing societal views of sex work is vital to ending the violence.¹¹ There is also the *stigma* that attaches to clients. This is not spoken of much but it is an issue that floats in the background of other issues. For example, in *Sex Workers in the Maritimes Talk Back*,¹² Leslie Jeffrey and Gayle MacDonald suggested that one approach to help remove the stigma, to change views of sex work, was for clients to speak openly about their experiences. One can appreciate that men may be reluctant to have their spouses, children, family and friends know about this activity because they fear being judged less worthy themselves. The authors of *Talk Back* argued

⁹ Prostitutes Empowerment Education and Resources Society [PEERS]. I served on the Board of Directors from 2004 to 2007, following many years of supporting the Society.

¹⁰ In British Columbia, the murder trial of R. v. Pickton, New Westminster Registry X065319, has been a graphic and constant reminder that some men do see women, literally, as disposable. The accused was convicted of murdering six women who went missing from the downtown eastside of Vancouver and whose DNA and body parts were found at Pickton's pig farm.

¹¹ For some discussion of stigma, see SSLR meeting February 7, 2005, testimony of Yolande Geadah, Independent Author and Researcher. Dr. Frances Shaver, Department of Sociology & Anthropology, Concordia University. Mrs. Valérie Boucher, Coordinator for the XXX Forum, Stella, As Individual. See also, SSLR meeting March 30, 2005, testimony of Ellen Woodsworth, Councillor, City of Vancouver. Deputy Chief Doug Le Pard, Vancouver Police Department. Janine Stevenson, Registered Nurse, As Individual. Melissa Farley (Prostitution Research and Education).

¹² Leslie Ann Jeffrey and Gayle MacDonald, *Sex Workers in the Maritimes Talk Back* (Vancouver: UBC Press, 2006).

that this is because of the stigma, which can be erased through developing a healthier view of sex work.¹³

'Categories' of prostitution

The 'categorization' of prostitution constitutes, perhaps, the most significant division between the proponents of abolition and decriminalization. Recall that John Lowman¹⁴ spoke of three categories of prostitution: *sexual slavery*, defined as someone forcing another to prostitute; *survival sex*, defined as prostitution necessitated by immediate financial need; and *sex work*, defined as prostitution that is chosen because of the rewards available, not out of desperation or coercion. In each instance, he used the term 'prostitution' to define aspects of sex work. These categories of prostitution are expressed and accepted by the proponents of decriminalization, who argued that prostitution must be viewed through an employment lens. The categories were not accepted by the proponents of abolition who view all prostitution as violent, and who argue that prostitution must be viewed through the lens of violence, hence criminalization.

In one respect, the definitional categories are used to indicate the degree to which individual prostitutes may be said to be voluntarily involved in the industry, as opposed to being coerced or engaged in survival sex. So, there is a spectrum of *choice* in prostitution. In another respect, although very much related, the divisions are used to ascribe varying levels of violence and victimization. So, there is a spectrum of *violence* in prostitution. Another way to view this would be in terms of one spectrum of prostitution

¹³ *Ibid.* See general discussion of stigma in Chapter 2 at 29.

¹⁴ *Supra* note 4.

with the categories ranging from sexual slavery through to ‘bourgeois prostitution’,¹⁵ and choice and violence being plotted on the same spectrum. Either way, the idea is that there is a gradation of types of prostitution, degrees of choice and levels of violence . (The spectrum could include different types of sex work venues along with the definitional categories.)

One reason behind the definitional categorizations is to demonstrate that the further one moves along the spectrum from sexual slavery and survival sex, the sex trade becomes more benign. This then becomes a base for arguing that prostitution can be made safe and healthy by changes to law and policy across all three levels of government, and for calling for the ‘work’ to be legitimized.

The abolition advocates rejected the notion of the spectrum asserting that the very acts of prostitution are violations of women. They also advanced the high percentage of women who would leave, regardless of what type of prostitution they are engaged in, as an indicator that prostitution is bad for women, is not a desirable occupation and should not be legitimized and enshrined in Canada’s social fabric for generations of women to come.¹⁶

¹⁵ To the best of my knowledge, this term was coined by John Lowman. It appears in his testimony before the SSLR on May 30, 2005, and refers to high-end prostitution.

¹⁶ See e.g. Janice Raymond, Co-Executive Director, Coalition Against Trafficking in Women, International, SSLR meeting April 4, 2005. Diane Matte, Coordinator, World March of Women, SSLR meeting March 16, 2005. Melissa Farley, Prostitution Research and Education, SSLR meeting March 30, 2005. Jaqueline Lynn, Prostitution Researcher, SSLR meeting March 30, 2005.

Agency, choice, consent and victimization

Early on in my quest to understand the perspectives behind the prostitution debates, I realized that issues of consent and choice were fundamental to understanding the perspectives. A central and defining debate among prostitution/sex work advocates is whether prostitution is violence against women or whether sex work is legitimate employment that women choose and consent to. It is common to hear that ‘women choose to be in the sex trade’, and equally common to hear that ‘it is not a real choice’. These statements raise concepts of ‘agency’ that were not familiar to me, so I undertook a course of study to inform myself.¹⁷ The dialogues around women’s agency tie in with perspectives, issues and debates around violence against women which, from an academic approach, was another new area of study for me.¹⁸ In these studies, I looked at approaches to such issues as agency, consent, choice, victimization, male domination and similar dialogues.

¹⁷ In order to develop an understanding of the tensions underlying the concepts of agency, I examined Kathryn Abrams’ analyses of the views expressed during the pornography debates of the 1980s and the anti-*dominance feminism* debates of the 1990s. These analyses are helpful in situating concepts of agency, autonomy, choice and consent in the prostitution/sex work debate. Abrams’ work led me to examine how some Western liberal theorists and some feminist theorists grapple with defining women’s agency. I examined the ‘sex wars’ debates around pornography and their attention to women’s agency which emerged as the germinal debate within the feminist movement in the 1980s. See Kathryn Abrams, “The sex wars redux: agency and coercion in feminist legal theory” (1995) 95 *Columbia Law Review* 304. See also Kate Sutherland, “Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade” (2004) 42 *Osgoode Hall L.J.* 139. See generally, Patricia Mann, *Micro-politics: Agency in a Post-feminist Era* (Minneapolis: University of Minnesota Press, 1994). I also examined theories of women’s agency as reflected in Eastern and Western attitudes toward ‘veiling’ of women. See generally Nancy J Hirschmann, “Western Feminism, Eastern Veiling, and the Question of Free Agency” (1998) Volume 5, 3 *Constellations* 345, 1998. Fatima Mernissi, *Beyond the Veil: Male-Female Dynamics in Muslim Society*, rev. ed. (London: Saqi Books, 2003). Valentine M Moghadam, ed., *Identity Politics and Women: Cultural Reassertions and Feminisms in International Perspective* (Bolder, San Francisco, Oxford: Westview Press, 1994).

¹⁸ See generally Catherine A. MacKinnon, *are women human? and other international dialogues* (Cambridge: The Belknap Press of Harvard University Press, 2006). Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987). Lee Lakeman, *Obsession, With Intent: Violence Against Women* (Montreal: Black Rose Books, 2005). Nancy J. Hirschmann, *Subject of liberty: toward a feminist theory of freedom* (Princeton University Press, 2003).

In popular usage, ‘agency’ is frequently used synonymously with freedom or autonomy, and is intended to convey the ‘choosing self’ who is capable of autonomous self-definition and self-direction. Within the Western context, agency is understood primarily in terms of the liberal ideal of the individuated self as a self-governing ‘autonomous’ agent. It is also understood as comprising elements that are both internal, as a will to choose (self-definition), and external, as the ability to act accordingly (self-direction).¹⁹ Despite the central role accorded to ‘agency’ in philosophy, political science and law, there are divergent views of what it means or, at least, considerable variance in the way it is defined. In part this is due to the attempt to delineate the internal and external aspects of ‘freedom’ and differences of opinion on the way those aspects are affected by social interrelations and circumstances. The practical effect of these divergent views is disagreement over whether, or the extent to which, women’s freedom and autonomy are curtailed socially and economically and whether, or how, that reduces their choices.

It is my view that the primary ideological and philosophical perspectives that drive a wedge between those working to end the violence and exploitation of women in prostitution are those that inform our thinking on women’s agency. I find Kathryn Abrams’ concept of ‘partial agency’²⁰ is compelling. It fits within the ideological and philosophical perspectives of dominance feminism. Put simply, the structure of our male-

¹⁹ See generally Kathryn Abrams, “From autonomy to agency: feminist perspectives on self-direction.” (1999) 40 *William and Mary Law Review* 805. Hirschmann, *Subject of Liberty*, *ibid.* Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988). Diana T Meyers, *Self, Society, and Personal Choice* (New York: Columbia University Press, 1989). Diana T Meyers, “Personal Autonomy and the Paradox of Feminine Socialization” (1987) 84 *J. Phil.* 619. Nancy Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989).

²⁰ Abrams, *Sex wars redux*, *supra* note 17.

dominated society restricts women's choices socially and economically and, unless and until women's choices are unrestricted, it is a fallacy to attribute to women the ability to exercise full agency, autonomy, choice and consent. The 'partial agency' theory rejects liberalist theories that are based on the assumption that full agency is possible within the existing system, either through an implicit denial of women's oppression or through the view that women can overcome oppression on an individual basis.

Some examples of the discussion of agency before the SSLR

I find that one of the most hotly contested issues in the debates is who has correctly characterized and reported the attitudes of prostitutes - whether they want to be involved in prostitution, whether they see themselves as victimized, and whether they would leave if they had alternative viable employment. Decriminalization proponents claim that prostitutes see themselves as capable of making decisions whether to be in the trade or not, that they resent being termed victims, and that there is a lot of 'job satisfaction'.²¹ Abolitionist proponents point to research studies that show that the majority of prostitutes interviewed, nationally and internationally, say they would leave the trade immediately, if they could.²² They also say that because they work with prostituted women on a daily basis, their views are incorporated into their work and strategies for combating violence, and they are able to accurately represent their views.²³

²¹ See e.g. Pivot Legal Society Sex Work Subcommittee (2004), "Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws" at 8. Available at <http://www.pivotlegal.org/Publications/Voices/1short2.pdf> [Pivot Report]. Sex Trade Advocacy and Research, "Safety, Security and the Well-Being of Sex Workers: A Report Submitted to the House of Commons Subcommittee on Solicitation Laws (SSLR)", June 2005 [STAR report].

²² See e.g. Janice Raymond, *supra* note 16. Melissa Farley, *supra* note 16.

²³ See e.g. Lee Lakeman, Canadian Association of Sexual Assault Centres, SSLR meeting May 30, 2005, at 1140 hours.

The SSLR received submissions from former and current prostitutes. Some of that testimony was taken in private so we are not privy to all of the submissions. In its report, however, the SSLR indicated that some women enter prostitution for reasons other than dire financial need:

Finally, it should be noted that the prostitutes we met are not all poorly educated or without work experience. Some of the women who appeared before the Subcommittee in private hearings were university graduates and/or had a number of years of experience in various lawful occupations, such as government, law or social work. They had chosen prostitution of their own will after assessing the pros and cons. Some said that the work gave them the opportunity to meet interesting people, work flexible hours and earn decent wages.²⁴

Here, the SSLR is considering the economic demographic. The STAR report,²⁵ which was presented to the SSLR, referred to the high-stroll and the low-stroll and Lowman referred to high end bourgeois prostitution.²⁶ These economic distinctions are clear. Also, it is apparent that there are some women who enjoy providing sexual services and who have other options should they want to leave. The STAR report stated that high-stroll and off-street trades do not experience the level of victimization of the low-stroll. The import of the testimony from various witnesses was that the higher one proceeded up the economic spectrum, the lower the levels of violence and victimization.

Lee Lakeman, for CASAC,²⁷ acknowledged that there are women who say they choose to work in prostitution. However, she and others²⁸ also maintained that these women are very much in the minority, that they do not necessarily remain physically,

²⁴ *Supra* note 7 at 11.

²⁵ *Supra* note 21.

²⁶ *Supra* note 15.

²⁷ *Supra* note 23.

²⁸ See e.g. Yolande Geadah, Independent Author and Researcher, SSLR meeting February 7, 2005. Janice Raymond, *supra* note 16. Melissa Farley, *supra* note 16. Janine Benedet, "Six Myths About Prostitution (and a Rebuttal): Submission to the Subcommittee on the Reform of Solicitation Laws," May 19, 2005.

mentally and emotionally healthy, and that violence and murder occur in the indoor venues, quite apart from the violation that is inherent in the acts prostitution.

The decriminalization advocates criticized abolitionists for treating women as victims, refusing to recognize their agency to make choices, and not respecting their choices. Sometimes it was suggested that they are people who have “never turned a trick in their lives,”²⁹ that their perceptions were not based in reality and that they positioned prostitutes as victims even though they say they are not. Some suggested that the abolition advocates treat women with disrespect when they try to ‘save’ them from the choices they have made.³⁰

For many advocates, if a woman indicates that she wants the ‘right’ to engage in prostitution, she should be supported. Further, there is an argument that the fact that women are in prostitution is indicative that they have chosen to be there and their decisions should not be challenged or undermined by any suggestion that they are not there by choice. According to some analyses of agency, the fact that women make decisions every day on a variety of subjects belies any suggestion that they do not have freedom or full agency. A contrary view takes into account the undisputed fact that many prostitutes say they want to leave and would if they had viable economic options and that there are very few women in the sex trade who have economic options. Advocates for decriminalization and abolition agree that if women choose to leave prostitution, they should be supported by agencies and programs with exit strategies.

²⁹ Jennifer Clamen, SSLR meeting May 30, 2005, at 1230 hours.

³⁰ See e.g. John Lowman, SSLR meeting May 30, 2005.

Richard Poulin said his research indicates a variety of reasons that women do not want to remain in the industry. “Some say that they do not have the choice, that they practice survival prostitution and that if they had other means of survival, they would not practice it. In the case of others, it is their physical and moral integrity that is affected.”³¹ If they have a criminal record, they will not be able to get an ordinary job. Many witnesses attested to these types of responses from women on the street and in escort and massage parlours. Poulin submitted that in Canada “we do everything to prevent these women from getting out rather than helping them escape” and, in reference to ‘choices’ he said:

There are psychological, economic and social constraints that push one into prostitution. In society, no one wants to be marginalized and even less to be stigmatized. This is not a choice one makes just like that. There are constraints that push people into making that choice. There are all sorts of constraints in our lives that lead us to the choices we make.³²

That sentiment was expressed by a number of witnesses including Lowman who phrased it as “we make choices not in conditions of our choosing.”³³ The Pivot report, which was submitted to the SSLR, took as an underlying premise that, “difficult choices made under constrained conditions are still choices and, indeed, many of the sex workers that worked on this project felt insulted by the repeated accusation that they are not capable of making “‘real’ choices.”³⁴ As Professor Benedet put it: “All human actions and decisions are made along a spectrum of coercion and constraint.”³⁵ Benedet took the analysis of choice further. Based on research reported in 2003 by Melissa Farley,

³¹ Professor Richard Poulin, Department of Sociology, University of Ottawa, SSLR meeting May 30, 2005, at 1240 hours.

³² *Ibid.* at 1240 hours.

³³ SSLR meeting February 21, 2005, at 1825 hours.

³⁴ *Supra*, note 21. This quotation raises a question about how this tension is posed because here the umbrage may be taken at not being ‘capable’ as opposed to not having ‘real choices’.

³⁵ *Supra* note 28 at 5.

showing that 89% of women in nine countries indicate a desire to leave prostitution immediately,³⁶ Benedet observed that “staying in prostitution is not an ongoing choice for the vast majority of women, however they might have got there in the first place.”³⁷ In Farley’s testimony before the SSLR she stated that 95% of the women interviewed in Canada said they wanted to leave prostitution: “not illegal or outdoor prostitution; they said they wanted to escape all prostitution.”³⁸

From my reading of the evidence before the SSLR, the statistics presented by the abolitionists on the number of women who would like to exit immediately are not seriously contested. There are questions raised about whether a particular study included participants from the indoor venues, as this was a common difficulty in the early days. For example, Richard Poulin referred to the statistic of 92% from a Status of Women study in the 1990s. John Lowman suggested that it only canvassed street prostitutes. Professor Poulin, nonetheless, remained confident that the statistic had not been seriously challenged. I venture to say that, at this point, the statistics are fairly consistent across studies and that not less than 85% of those interviewed indicated a desire to leave the sex industry immediately.

I set out to provide some basic background terminology and perspectives for considering the submissions that were made to the SSLR. The categories and the spectrum of prostitution/sex work play an important role in understanding the interests of the advocates making submissions. It is the stark violence and degradation of street

³⁶ *Supra* note 16 at 1095 hours.

³⁷ *Supra* note 28 at 6.

³⁸ *Supra* note 16 at 1235 hours.

prostitution – survival sex trade - that propelled the formation of the SSLR and informed its mandate. In every day of testimony, there were heartfelt submissions that show deep concern for the welfare of women and children. In considering reform of laws and social structures, the witnesses and the committee members addressed economic inequality and proposals for economic redistribution, health reform, issues that are unique to Aboriginal communities, rights and recognition, employment law concerns and a host of other issues. Throughout those discussions, issues of agency, choice, consent and victimization were raised over and over. These are the issues that, in my view, inform people's thinking on how to approach reform.

Chapter 2: Socio-Economic Considerations

While law reform is important, profound social and economic changes will be needed to change the environment in which people make the decision to prostitute.¹

Social and economic policy is the key to solutions to the harms secondary to the sex trade.²

There are a number of ways that social and economic considerations factor into the discussions and planning around prostitution reform. The above quotations from submissions to the SSLR indicate two predominant views of what causes people to be involved in prostitution, and how to eradicate the harms caused by prostitution. In this chapter, I look at the demographics of people involved in prostitution and I explore, through the submissions to the SSLR, some of the factors reflected in the above quotations including age of entry into the sex industry, violence and exploitation, stigma, and some principles around harm reduction. I also outline the recommendations made to the SSLR with discussion of some of the tensions between the protagonists.

1) Demographics - Gender, race and class

Most witnesses before the SSLR recognized that gender, race and class are issues in prostitution. In his submissions, Prof. Lowman reported that women constitute between 75% and 80% of outdoor prostitution.³ With few exceptions,⁴ the submissions

¹ John Lowman, "Submission to the Subcommittee on Solicitation Laws of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness", May 23, 2005, at 4. Available at: <http://mypage.uniserve.ca/~lowman/>

² Ann Pollach, British Columbia Civil Liberties Association, SSLR meeting March 20, 2005, at 1345.

³ John Lowman, SSLR meeting February 21, 2005.

⁴ See e.g. Report of the Standing Committee on Justice and Human Rights; Report of the Subcommittee on Solicitation Laws. *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*. (Communication Canada – Publishing, Ottawa, Canada, December 2006) at 11. Also available on the

acknowledged that it is people without access to money or reasonable employment options who engage in prostitution. When I was on the Board of Directors at PEERS,⁵ a brothel owner told the Board that 80% of the women who provided services for her business were single moms who had other primary employment. The fact that women resort to prostitution on a part time basis to supplement other income in order to adequately care for their children did not come as a surprise. In my review of the SSLR submissions, I found that no protagonists in the prostitution debate denied that socio-economic forces feed prostitution.

There was evidence before the SSLR of disproportionately high numbers of Aboriginal women in the urban sex industry, with an estimate of 70% in Winnipeg.⁶ Maurganne Mooney of the Aboriginal Legal Services of Toronto reported to the SSLR that 47.2% of the Canadian Aboriginal population receives less than \$10,000 per year, compared with 25% of the Canadian population.⁷ Beverley Jacobs of the Native Women's Association of Canada (NWAC) reported that of the 70 women who were reported missing in the downtown eastside of Vancouver, at least one-third were Aboriginal. Most were poor women involved in the sex trade who struggled with drug and alcohol addictions, the effects of Fetal Alcohol Syndrome, and many were victims of

Parliamentary Internet Parliamentaire: <http://www.parl.gc.ca>, reporting on some witnesses who appeared before the SSLR in private. [SSLR Report] See also Sex Trade Advocacy and Research, "Safety, Security and the Well-Being of Sex Workers", A Report Submitted to the House of Commons Subcommittee on Solicitation Laws (SSLR), June 2005. Available at http://web2.uwindsor.ca/http://web2.uwindsor.ca/courses/sociology/maticka/star/pdfs/safety_and_security_report_final_version.pdf [STAR report].

⁵ Prostitutes Empowerment Education and Resources Society [PEERS].

⁶ Amnesty International Canada. "Stolen Sisters: Discrimination and violence against indigenous women in Canada", October 2, 2004. Index Number: AMR 10/001/2004. Available at <http://www.amnesty.org/en/library/info/AMR20/001/2004>; Cheryl Hotchkiss, Amnesty International Canada, SSLR meeting April 11, 2005; See SSLR Report, *supra* note 4 at 12.

⁷ SSLR meeting May 30, 2005, at 0920 hours.

childhood sexual abuse. Jacobs also reported that between the time that her community started the Sisters in Spirit campaign in March 2004 and her testimony at the SSLR in April 2005, 32 Aboriginal women had gone missing or been found murdered.⁸

2) *Age of entry*

The age at which most people enter prostitution is hotly contested in part because of disagreements around issues of agency, consent and coercion. The SSLR noted the controversy over this point and found simply that the entry age is between 14 and 18.⁹ Professor Poulin's statistics indicate that the average entry age in the United States is 13 years old and 14 years old in Canada.¹⁰ Professor Frances Shaver¹¹ provided statistics which indicated an average entry age of 16 to 18 years old in Canada. Regardless, it seems clear that most people enter prostitution before they reach the age of majority.

3) *Violence and exploitation*

The condition that is most notorious to prostitution and that underlies the mandate of the SSLR is the violence and abuse. As stated in the SSLR report: "People who engage in prostitution, particularly street prostitution, are faced with many different types of abuse and violence, ranging from whistles and insults to assault, rape and murder. The violence comes from clients, pimps, drug pushers, members of the public, co-workers and even

⁸ SSLR meeting April 11, 2005; see also Amnesty International Canada, "Stolen Sisters" *supra* note 6.

⁹ *Supra* note 4 at 10.

¹⁰ SSLR meeting May 30, 2005, at 1240 hours.

¹¹ Department of Sociology and Anthropology, Concordia University, *Ibid.* at 0930 hours.

police officers.”¹² Statistics provided from the Canadian Centre for Justice Statistics, showed that of 79 prostitutes murdered between 1994 and 2003, 95% of those murdered were women, and most killers were clients.¹³ John Lowman’s research revealed that three-quarters of the prostitutes he interviewed reported violence by clients within the past six months.¹⁴ Lowman’s study also revealed that 90% reported at least one bad date within the past six months.¹⁵

The protagonists for abolition maintain that prostitution itself is violence whether it is on-street or off-street prostitution, although the violence on the streets is more visible.¹⁶ Since the abolitionists see all prostitution as violence, they do not accept John Lowman’s distinctions between sexual slavery, survival sex and voluntary sex work.¹⁷

Although witnesses were not able to give evidence on the extent of violence against off-street prostitutes, a number of witnesses report that it is less than on the street.¹⁸ In the brief presented by STAR,¹⁹ the authors maintained that the high-stroll and off-street trades do not experience the level of victimization of the low-stroll. In reference to that, they said: “Recognizing this is a key component for developing policies to improve the

¹² *Supra* note 4 at 17.

¹³ Roy Jones, SSLR meeting May 16, 2005.

¹⁴ John Lowman and Laura Fraser, “Violence Against Persons Who Prostitute: The Experience in British Columbia” (1995), Research, Statistics and Evaluation Directorate Policy Sector, Department of Justice Canada. Available at <http://mypage.uniserve.ca/~lowman/>

¹⁵ *Ibid.*

¹⁶ See e.g. Lee Lakeman, SSLR meeting May 30, 2005.

¹⁷ *Supra* note 1 at 1. See also SSLR meeting May 30, 2005, at 1045 hours.

¹⁸ See e.g. Dr. Frances Shaver, SSLR meeting February 7, 2005; Professor Leslie Anne Jeffrey, Department of History and Politics, University of New Brunswick, SSLR meeting March 23, 2005; Professor Collette Parent, Department of Criminology, University of Ottawa, SSLR meeting March 9, 2005.

¹⁹ Sex Trade Advocacy and Research, “Safety, Security and the Well-Being of Sex Workers”, A Report Submitted to the House of Commons Subcommittee on Solicitation Laws (SSLR), June 2005 [STAR report].

safety and security policies of *all* sex workers.”²⁰ On the other hand, Melissa Farley provided some quotations from Safety Guidelines for sex workers in brothels in legalized and decriminalized regimes which indicate to a shocking degree the extent of the violence that needs to be guarded against. For example, the Guidelines recommend that, since a pillow can be used as a weapon, there should not be any pillows in the room; it is important to check under the bed for weapons and to ensure there is a security alarm in the room.²¹

4) *Stigma*

There are two types of stigma associated with the sex industry as I identified in Chapter One.²² The one we hear about most often, and which is my subject here, is the stigma experienced by those providing sexual services.

In the briefs and the testimony before the SSLR, submissions directed to stigma were raised predominantly by those advocating for decriminalization. Those advocates argued that as long as the law criminalizes prostitution activities, the negative social stigma will continue. The purport of the submissions is that the criminal laws “reflect and then reinforce”²³ social stigma, suggesting that sex workers are aberrant. This leads to abuse and harassment. Stigma also leads to low self-esteem among prostitutes and is partially responsible for their marginalization.

²⁰*Ibid.* at 8.

²¹ Melissa Farley, “Bad for the Body, Bad for the Heart: “Prostitution Harms Women Even if Legalized or Decriminalized” (2004) 10 *Violence Against Women* 1087.

²² See Chapter 1 at 14.

²³ Kara Gillies, President, Maggie’s: the Toronto Prostitutes’ Community Service Centre, SSLR meeting May 2, 2005, at 1825 hours.

Viewed from another perspective, the Prostitutes Awareness and Action Foundation of Edmonton (PAAFE), submitted that decriminalization would have the opposite effect:

Decriminalization of prostitution laws not only turns a blind eye to the murder, violence, and other harms inflicted on prostituted people but sends a message to prostituted people, prostitution offenders, pimps, drug dealers, organized criminals, and other members of the community (and larger society) that the state does not care about or even condones harms that are perpetrated on prostituted people. This condoning or apathy leads to a decrease in respect for the individual rights and communal values pertaining to acts related to prostitution and an increase in harm to prostituted people.²⁴

References to stigma and proposals for ways of attempting to eradicate it arise in various contexts. Later, I outline some calls for education campaigns directed to society at large as well as those involved in the justice system, to provide better understanding of prostitution and sexual services. These types of education initiatives could ease the harms that underlie the issues around stigma.

5) *Harm reduction principles*

I have never been quite sure what harm reduction is supposed to mean. I suppose it means different things for different people. I have learned through personal experience that it is much more political than it sounds. One of the main arguments raised in favour of decriminalization is that prostitution will never go away; therefore, society should try to make it as safe as possible. While I was on the board at PEERS I followed with interest the ongoing debate between a couple of board members about whether harm reduction was a good or bad tactic. One board member believed that offering harm reduction

²⁴ Prostitution Awareness and Action Foundation of Edmonton, “A Proposal to Reform Section 213 of the *Criminal Code of Canada*” (paper presented to the SSLR April 27, 2005); PAAFE representatives testified before the SSLR on March 31 and May 30, 2005.

amounted to perpetuating lifestyles that really needed to be reformed. Offering harm reduction neither helped the individual move forward, nor pressured governments into providing the necessary funding or services to assist the individual to move forward. The other board member took the view that anything we can do to keep people safe, such as clean needles, is a valuable social service. I think this discussion presents fairly common views of harm reduction. I detect, both in my personal experiences and in reading the SSLR submissions, a presumption in favour of harm reduction principles, without analysis or explanation of how a particular 'harm reduction' action might impact or inform long range policy planning.

In reading the SSLR submissions, I had an eye open for discussions of harm reduction principles but found it was not mentioned very often. I like the way that Kate Quinn²⁵ framed it during the last day of testimony. She spoke of harm reduction as 'coping' strategies:

PAAFE's stance is that we want to create hopeful strategies, not just coping strategies. We want to challenge the common response that prostitution has been around for a long time, you'll never get rid of it, just try to make it safer.

...

I really wish that as Canadians we would focus more on the barriers to women being able to achieve their integrity and their dreams for themselves, and less on what I would call coping strategies. I see some of what we're talking about as being more coping strategies than.... We always have to have harm reduction, but we can't stay only with harm reduction.²⁶

Quinn provides a nice frame for considering what can be done within the bounds of harm reduction and she challenges herself and others to go further. Many witnesses, such as Quinn, reject the negative view that prostitution will never go away. In her submission

²⁵ Kate Quinn is a member of Prostitution Awareness and Action Foundation of Edmonton.

²⁶ SSLR meeting, May 30, 2005, at 0950 hours and at 1215 hours.

to the SSLR, Professor Janine Benedet²⁷ also rejected that view, pointing to Sweden as an example of a country that has turned the tide on the prostitution industry. As I understand her view, she sees decriminalization as being a harm reduction proposal in itself, or a series of harm reduction proposals, which cannot fulfill either of the primary goals – those of reducing the amount of prostitution and reducing the harm. Rather, decriminalization would have the opposite effect of allowing prostitution to flourish, along with the violence that is inherent to it.²⁸

In its brief to the SSLR, the Canadian Association of Sexual Assault Centres (CASAC) stressed the underlying condition of poverty and called upon the government to address this issue, rather than looking to prostitution as the economic answer for women and children:

We must not tolerate the conditions of the reserves, the destitution imposed on women and children around Prince George for instance, and then claim that prostitution will always be with us and therefore our responses must be shifted to so called harm reduction strategies. Across BC as across Canada we have lost the reliable access to welfare. Land claims and restitution to aboriginal communities has been stalled.²⁹

The Pivot report³⁰ suggested that its conclusions reflect the principle of harm reduction and that means taking action to reduce harm to sex workers. Specifically, Pivot

²⁷ Janine Benedet, Osgoode Hall Law School of York University. As of July 1, 2005, Professor Benedet joined the Faculty of Law, UBC as an Associate Professor.

²⁸ Benedet, Janine, “Six Myths About Prostitution (and a Rebuttal)”, Submission to the Subcommittee on the Reform of Solicitation Laws, May 19, 2005.

²⁹ Canadian Association of Sexual Assault Centres, “Submission to the Subcommittee on Solicitation Laws of the Standing Committee on the Justice, Human Rights, Public Safety and Emergency Preparedness”, May 30, 2005, at 3 [CASAC brief].

³⁰ Pivot Legal Society Sex Work Subcommittee (2004), “Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws” at p. 8. Available at <http://www.pivotlegal.org/Publications/Voices/1short2.pdf> [Pivot Report].

argued that this meant tackling poverty and social inequality.³¹ That is a broad application of ‘harm reduction’ beyond making the current conditions safer.

This survey from the submissions indicates some views of ‘harm reduction’ ranging from the short term band-aid approach through broad societal reform. For me, it underscores the importance of being clear on what is meant by ‘harm reduction’ and being aware of the possible repercussions. If we look at the goals expressed by the SSLR – prevention of prostitution and prevention of exploitation to name a couple³² – it is apparent that the way to tackle these is by systemic reform. Attempting to meet these goals through harm reduction may simply prolong and deepen the problems by propping up the system that fosters them.

6) *Specific issues and recommendations raised before the SSLR*

Some of the social and economic issues raised before the SSLR included lack of access to money, housing, child care, health care, and alternate employment; medical conditions including alcohol and drug addiction, mental illness, post traumatic stress disorder, and disease; and isolation, stigma, shame, lack of self esteem. The non-legal recommendations from various witnesses³³ included:

- far reaching economic reforms to balance the inequities between men and women, and to alleviate poverty;

³¹ *Ibid.* at 8.

³² See Chapter 3, *infra* at 63, for my list of the consensual goals expressed in the SSLR Recommendations.

³³ Many witnesses spoke to various aspects of these recommendations. See e.g. Pivot Legal Society, represented before the SSLR by Katrina Pacey on March 29 and May 30, 2005 [Pivot]. Beverly Jacobs for the Native Women’s Association of Canada, SSLR meeting April 11, 2005 [NWAC]. Ann Pollack, Board of Directors, and Micheal Vonn, Policy Director, British Columbia Civil Liberties Association, SSLR meeting March 30, 2005. Richard Poulin, *supra* note 10. John Lowman, *supra* note 3.

- far reaching social and economic reforms to improve sex workers' safety and security;
- providing resources for women and children so that they will not have to resort to prostitution;
- ensuring adequate and appropriate housing including reintegration houses for those leaving prostitution;³⁴
- funding community organizations so they can provide resources for people on the street and people who want to exit prostitution;³⁵
- programs and services to assist with finding alternative employment;
- ensuring there are adequate medical services available, particularly drug and alcohol rehabilitation facilities;³⁶ and
- public education.³⁷

Most of the witnesses specifically addressed the need for ongoing work to develop policies, programs, and legislation at all three levels of government and for consultation with sex trade workers in any and all of those discussions. Some of the submissions stressed the importance of ensuring a leadership role for sex workers in these discussions.³⁸

The SSLR reported that most witnesses viewed street level prostitutes more as victims than criminals and urged better support in the form of emergency shelters and

³⁴ Richard Poulin spoke specifically of reintegration housing and programs in his submission on February 9, 2005, at 1900 hours.

³⁵ See e.g. PAAFE, SSLR meetings March 31, 2005 and May 30, 2005. STAR report, *supra* note 19; CASAC brief, *supra* note 29.

³⁶ See e.g. SSLR meeting on March 30, 2005 for considerable discussion of public health by witnesses and the SSLR panel.

³⁷ Many witnesses addressed the need for public education geared either to prevention of people entering prostitution or geared to erasing the stigma associated with prostitution. Some recommended both; see e.g. Pivot, *supra* note 33.

³⁸ See e.g. PIVOT Legal Society, Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 29, 2005. Available at http://cmte.parl.gc.ca/cmte/committeelist.aspx?lang=1&parlres=381&jnt=0&selid=e21_&com=9243. STAR report, *supra* note 19.

addiction treatment programs. Some neighbourhood organizations and individuals recommended that drug treatment programs would have the greatest impact on reducing street prostitution.³⁹

The following are examples of some recommendations from four organizations. Generally speaking, Pivot and STAR presented positions in support of the decriminalization of the solicitation laws; Native Women's Association of Canada (NWAC) and Canadian Association of Sexual Assault Centres (CASAC) presented positions in support of the abolition of prostitution.

The Pivot report focused on the concerns of marginalized prostitutes working in the Downtown Eastside of Vancouver and on issues of poverty and homelessness for women as a whole. The Pivot report was concerned both with the prevention of prostitution and improving conditions within the sex trade. "A true harm reduction approach requires that the underlying concerns of poverty and social inequality be addressed as part of the harm that sex workers experience."⁴⁰ One of Pivot's demands of all three levels of government was to take action to:

... direct funding toward the economic supports for sex workers and women living in poverty, recognizing that inadequate income levels may be a major factor in the decision to engage in sex work. This includes earmarked and adequate transfer payments from the federal government to the provinces and territories through the Canada Social Transfer. This also includes providing an adequate standard of living through provincial and territorial financial assistance programs. Recognizing the deeply personal choice involved in engaging in sex work, prohibit provincial social assistance programs from compelling recipients to engage in sex work rather than continuing to receive benefits; ...fund public education

³⁹ *Supra* note 4, at 34.

⁴⁰ *Supra* note 30 at 6.

campaigns that promote sex workers' social citizenship and human rights.⁴¹

The submissions made by Professors Maticka-Tyndale, Jacqueline Lewis, Frances Shaver and by Kara Gillies⁴² (subsequently provided to the SSLR in a report authored by STAR⁴³) were based on a health promotion framework and considered legal, social and cultural influences on sex work, with an emphasis on human rights considerations. The STAR report was based on a study that looked at "how public policies influence the lives, conditions of work, and the health, safety and well-being of sex workers operating in diverse venues."⁴⁴ The starting premise is that sex work is legitimate work that requires recognition through laws and public policy, to provide the array of benefits and protections afforded other employment. Their proposals were directed to off-street work, the application of labour standards legislation, victims of crime legislation, and so forth. They did not address issues of poverty or homelessness and, in fact, those words were not mentioned in the report. The report was primarily directed to the interests of indoor sex workers who want to remain in the trade. There was no discussion of those who want out except for passing references to community organizations providing resources for alternate or additional employment.

The STAR report highlighted that legislative change will not be sufficient to address the problems that face sex trade workers. The authors noted that public attitudes and the stigma attached to sex work negatively affect the 'safety, security and well-being' of sex

⁴¹ *Ibid.* at 35.

⁴² SSLR meetings, February 2, May 2, and May 30, 2005.

⁴³ *Supra*, note 19.

⁴⁴ *Ibid.* at 8.

workers, that “social and economic changes are also necessary to improve sex workers safety and security,”⁴⁵ and that community organizations are well positioned to provide education, advocacy and support. Along with calling for education directed to those involved in the criminal justice system, police, and the community, the authors called upon all three levels of government to provide funding for education materials and seminars for sex workers related to sex work laws, health and safety risks, economic security issues, rights as citizens, options available when rights are violated; to provide funding for education, support and advocacy services for sex work and sex workers; and to provide programs and support for sex workers wanting alternative or supplementary jobs.

Beverly Jacobs, for NWAC, stressed the importance of a holistic approach to issues of poverty, self-esteem, lack of skills, addictions, gang involvement, socio-economic issues and violence against Aboriginal women. She called for implementation of health services and social services for Aboriginal women, among other recommendations:

Aboriginal communities, families, and individuals need culturally based counselling, and they need resources. We also need our elders to be recognized as our traditional teachers and utilized as our resources. Sometimes mainstream counselling does not work. There also has to be increased advocacy within cabinet and by politicians to support aboriginal women's initiatives; to support and fund programs; to assist aboriginal peoples, and women, specifically, to get off the street; to assist them with their self-esteem and their whole identity, because that's what this is about, ensuring that they have a positive identity and pride in where they come from.

We also need to look at supporting and funding safe houses for aboriginal communities, aboriginal women.

⁴⁵ *Ibid.* at 32.

It is important that the socio-economic marginalization and violence be adequately addressed for real change in aboriginal women's lives. We demand basic human rights for our women and children.⁴⁶

Lee Lakeman, representing CASAC, called for the provision of many services. In their recommendation #7, CASAC called for money, support services, education and training, jobs, and housing including emergency housing; exit services including provision and maintenance of aboriginal services, transition houses and anti-rape centres. In recommendation #8, they called for prevention services by reducing the demand for prostitution services through censuring clients and those who profit, and by reducing the vulnerability of women and children.⁴⁷

I have provided representative samples from the decriminalization and abolition lobbies. The practical result of their divergent views is seen not only in their proposals respecting the criminal laws, but also in the nature of the socio-economic reforms proposed by each group. There are two types of reforms that emerge – those directed to prevention, to alleviating the poverty and other issues that push women into prostitution; and those directed to improving conditions and normalizing prostitution as sex work. The abolitionists promote the former but not the latter. Most of the proponents of decriminalization support both. I say ‘most’ because the emphasis for STAR and its representatives is clearly on normalizing sex work, not on prevention aspects.

⁴⁶ *Supra* note 8 at 1745 – 1755 hours.

⁴⁷ SSLR meeting May 30, 2005, at 0955 hours.

7) ***Integration of socio-economic and legal reform recommendations***

Many of the decriminalization advocates before the SSLR did not propose immediate repeal of the criminal code provisions. They recommended other programs, guidelines, regulations, provincial or municipal legislation to accompany decriminalization.

Establishing programs, either with or without decriminalization as part of the strategy, would necessitate committees or working groups to formulate policies. Most of the proposed reform work would involve considerable collaboration between the three levels of government. For example, Deborah Brock⁴⁸ described decriminalization as a long process that would require agreements between municipal, provincial and federal governments and implementation of labour law models across the country. John Lowman, in his brief of May 23, 2005, addressed the issues of decriminalizing ‘bawdyhouses’ and regulating sex work establishments. He recommended the establishment of a sex work governance council that includes sex workers, their customers (if any agree) and community representatives. “Once the governance council has agreed to the details of legislation pertaining to sex-work establishments, the bawdyhouse laws should be repealed in their entirety.”⁴⁹

In the SSLR hearing on May 2, 2005, Professor Maticka-Tyndale also referred to the work that needs to be done in advance of legislative changes: “In our recommendation, we don't say immediately move to a particular model or set of laws. What we recommend

⁴⁸ Associate Professor of Sociology, York University, SSLR meeting February 9, 2005.

⁴⁹ *Supra* note 1 at 3.

is that a working group be struck to develop a Canadian model, ...”⁵⁰ On behalf of PEERS Vancouver, Kyla Kaun stated: “I think we just want to make sure it's not a matter of removing the law and then having all of these people fall through the cracks, and then no longer having the support services available to them if they do choose to try to change their lives, ...”⁵¹

Not all the submissions were as clear as these on how social and legal reforms needed to be integrated and developed, but the general tenor was that considerable work would need to be done before a new legislative scheme could be contemplated or implemented. A lot of that pertains to social and economic change as reflected in the opening quotations in this chapter and the recommendations outlined. The programs that have been identified as necessary, either in the context of decriminalization or abolition, require the coordination of policies and action at all three levels of government.

In my view, the socio-economic issues and reform proposals offer an opportunity for collaboration across diverse perspectives. I believe that there is considerable agreement over the need to tackle poverty. That issue has been at the forefront of all the reform proposals since the Fraser Committee and before that. The associated issues of housing, health, child care and so forth have also been highlighted. Regardless of one's view of the legal structure, I think most people who are concerned about the welfare of women and sex workers would agree that these issues are paramount. As Pivot pointed out in its report “A true harm reduction approach requires that the underlying concerns of poverty and social inequality be addressed as part of the harm that sex workers experience. Pivot

⁵⁰ At 1830 hours.

⁵¹ PEERS Vancouver, represented by Kyla Kaun, SSLR meeting March 29, 2005 at 1045 hours.

advocates harm reduction principles as a *key point of unity* among people who are concerned about the interests of sex workers.”⁵² [my emphasis]

Poverty, power imbalance and violence against women affect all women, not just prostitutes/sex workers. But prostitution is one of the major symptoms of those injustices. Through the vehicle of the SSLR, Canadian society had the opportunity to view these injustices through the prostitution lens. The evidence before the SSLR is an amazing collection of voices and heart-felt emotions and opinions of what can be done to alleviate the harms of prostitution. There are many individuals who work daily to alleviate the conditions of women struggling under the weight of poverty and violence. There are also multiple organizations. Organizations like CASAC and NWAC are engaged in strategizing at a national level to end violence against women and to advance women’s social and economic rights.

What the SSLR evidence indicates is a prevalent desire to prevent people entering prostitution as a result of lack of options, or through coercion, and to eliminate the violence. The evidence also indicates that will not happen without relieving intense poverty and associated concerns. Pivot suggests building unity around poverty and social inequality. Perhaps, through the process of dialogue, the proponents would better understand the interests of ‘others’ and be able to develop common strategies. There may have been some hope that the Report from the SSLR would provide a map to show how to make that happen. Unfortunately, the SSLR’s recommendations, as I discuss in the next chapter, did not achieve that.

⁵² *Supra* note 30 at 6.

Chapter 3: Legal considerations and perspectives

In this chapter, I set out the current criminal law framework, outline the legislative reform submissions to the SSLR and review the Recommendations made in the SSLR report.¹ I also outline the recommendations contained in the 1985 Fraser Committee report² because they continue to have significance and offer an additional framework for viewing the issues. Woven into my discussion is some insight into the people and communities whose voices were heard before the SSLR and the Fraser Committee. I also comment on the results of New Zealand's decriminalization of prostitution based primarily on the government's five-year report.³

*The Criminal Code of Canada prostitution framework*⁴

Arguably, adult prostitution has always been legal in Canada. However, I think it is more helpful, and more accurate, to consider it as quasi-legal or quasi-criminal. Some say it is legal, others say it is effectively illegal. This stems from the dilemma presented by the 'solicitation laws' that almost every action taken in pursuit of the purchase and sale of sexual services is illegal, except the act itself. Section 210 prohibits keeping, or being the

¹ Report of the Standing Committee on Justice and Human Rights; Report of the Subcommittee on Solicitation Laws. *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*. (Communication Canada – Publishing, Ottawa, Canada, December 2006), at 2. Also available on the Parliamentary Internet Parliamentaire: <http://www.parl.gc.ca> [SSLR Report].

² Paul Fraser, *Pornography and Prostitution in Canada*, Report of the Special Committee on Pornography and Prostitution, Canadian Government Publishing Centre, Supply and Services Canada, 1985 [Fraser Committee].

³ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, May 2008. Available at <http://www.justice.govt.nz/prostitution-law-review-committee/publications/plrc-report/index.html> [PLRC report].

⁴ *Criminal Code of Canada* (R.S. 1985, c. C-46), sections 197(1), 210 – 213. See Appendix A for reference to the full text of these sections [*Criminal Code*].

owner, lessor, tenant, or occupant of, a “bawdy house.” A common bawdy house is defined in section 197 as a place that is kept, occupied or resorted to for the purpose of prostitution or the practice of acts of indecency. Section 211 prohibits transporting or directing anyone to a bawdy house. Section 212 prohibits procuring or living off the avails of prostitution. Section 213 prohibits communicating in a public place for the purpose of engaging in prostitution.

Many practices that, arguably, could lend harm reduction, health and safety to prostitutes – such as working together, negotiating terms, getting to know a client before committing to go with him – are illegal. The section 213 ‘communicating’ offence is the most problematic because it ensures that prostitution is hidden, isolated, and negotiated quickly, frequently under cover of darkness. It is not surprising in those circumstances that there is reported lack of health and safety for prostitutes. Violence goes undetected and unreported due to the clandestine and illegal aspects of the work.

Legal Reform Proposals before the SSLR

The legal reforms that were proposed to the SSLR fall into four categories:

- i. legalize/regulate prostitution;
- ii. decriminalize prostitution;
- iii. criminalize procurers and clients of prostitution services (referred to in the SSLR report as ‘the Swedish Model’; referred to by its proponents as ‘abolition’);⁵ and

⁵ The categories for legal change presented to the Fraser Committee were almost the same as those presented to the SSLR. However, I draw attention to this third option which features prominently in the current public dialogues as ‘abolition’, ‘partial criminalization’ or ‘the Swedish model’. A modified version of that perspective was quite new at the time of the Fraser Report, and is reported as ‘penalize only the customer’. It was articulated by law students at the University of Western Ontario and presented to the committee by Professor Constance Backhouse and supported by some women’s groups.

- iv. an option within a criminalization model to strength the current laws which would also target sex trade workers, but few witnesses supported that model and the SSLR did not address it as a serious contention.

i) *Legalization/Regulation*

The SSLR report described legalization/regulation as a meeting point between criminalization and decriminalization. Legalization sanctions but regulates prostitution/sex work. The most famous legalization regime is the Netherlands. Other ‘legalization’ jurisdictions are Germany, Nevada and parts of Australia. The SSLR reported that the Netherlands’ legislative regime requires any adult European Union residents who sell sexual services in the Netherlands to register, whether they are salaried or self-employed; all social, legal and labour conditions apply as they do to any other employment. Local governments regulate licensing, health and safety, tolerance zones, location and size of brothels.⁶

The SSLR found that the evidence of the impact of the law in the Netherlands is conflicting. Some evidence suggests there has been an increase in large brothels, in drug abuse, in exploitation of children and in organized crime. It appears that the SSLR accepted the evidence that there has been a “massive expansion of prostitution –

⁶ The SSLR referred to a report of the Netherlands Ministry of Foreign Affairs, “Dutch Policy on Prostitution: Questions and Answers 2004” 2004, available at <http://www.mfa.nl.contents/pages/743/prost.pdf>. Witnesses addressing legalization models included Kara Gillies, President, Maggie’s: the Toronto Prostitutes’ Community Service Centre, SSLR meeting May 2, 2005. Yolande Geadah, Independent Author and Researcher, SSLR meeting February 7, 2005. Janice Raymond, Executive Coordinator, Coalition Against Trafficking in Women, SSLR meeting April 4, 2005.

particularly unregulated prostitutes operating in the underground industry.”⁷ The mandatory registration has failed and only 4% of sex trade workers are registered. The ‘tolerance zones’, created to protect workers have not always proved effective; in Amsterdam, the city council decided to close its tolerance zone because the workers were being targeted by organized crime. Some witnesses suggested that violence against sex trade workers may have increased, that there has been an increase in the number of children exploited through prostitution, and that there has been an increase in the numbers of non-Dutch sex trade workers.⁸

In their joint submissions, Eleanor Maticka-Tyndale and Jacqueline Lewis, of the University of Windsor, and Kara Gilles⁹ testified that legalization creates a two-tiered system, excludes many including the most marginalized, does not protect labour conditions and violates civil liberties. They submitted that the legalization models in Nevada, the Netherlands, and the State of Victoria, Australia, have not alleviated violence or improved human rights significantly. They referred to the New Zealand legislation as the closest model to decriminalization, which they promoted for the Canadian context.¹⁰

Many other advocates of decriminalization also opposed legalization because it attempts to control prostitutes and it amounts to state pimping. The SSLR concluded: “Based on this evidence, individuals selling sexual services, academics, law enforcement

⁷ *Supra* note 1 at 82.

⁸ The statistics reported by the SSLR, *ibid.*, are contained in the submission by Yolande Geadah, *supra* note 6 at 1700 who provided details on reports and studies of the results of legalization in Australia and the Netherlands.

⁹ *supra* note 6.

¹⁰ SSLR meeting May 2, 2005.

agencies, and others appearing before the SSLR almost uniformly condemned the possibility of looking to the legalization/regulation model for a made-in-Canada solution.”¹¹

ii) Decriminalization

A significant number of witnesses¹² supported this model for reasons I discuss below. There are two models of decriminalization referred to in the SSLR report: New Zealand which enacted legislation in 2003 and New South Wales, Australia, which enacted legislation in 1995. The SSLR report provided a survey of the characteristics of both of these regimes and observed that there is conflicting evidence on the impact of the legislation in both jurisdictions.¹³

Proponents of decriminalization submitted that there is nothing intrinsically wrong with the exchange of sex for money between consenting adults provided there is no exploitation. They called for repeal of the Canadian solicitation laws, with the possible exception of s. 212 respecting the protection of children, and for effective enforcement of other criminal code provisions for crimes against sex trade workers, including assault, sexual assault, kidnapping, forcible confinement, intimidation, uttering threats, robbery, theft, extortion, and trafficking in persons. Organizations such as Pivot Legal Society and

¹¹ *Supra* note 1 at 84 [footnotes omitted].

¹² See for example, Jennifer Clamen, Coalition for the Rights of Sex Workers, SSLR meetings March 16 and May 30, 2005. Eleanor Maticka-Tyndale, Jacqueline Lewis, and Kara Gilles, *supra* at 10. Katrina Pacey, Pivot Legal Society, SSLR meetings March 29 and May 30, 2005 [Pivot]. Frances Shaver (Professor, Department of Sociology and Anthropology, Concordia University), SSLR meetings February 7 and May 30, 2005.

¹³ *Supra* note 1 at 77 to 80.

the BC Civil Liberties Association, calling for decriminalization, argued that the current laws violate Charter rights and that any law that would criminalize customers would also be a violation of Charter rights, including the rights of sex workers.¹⁴

The following are some of the arguments raised in favour of decriminalization:

1. Some women *do choose* the trade. Some women profess to enjoy the work and express satisfaction in their work. The right to control one's body includes the right to prostitute.¹⁵
2. Most of the available data relates to street-based prostitution which is a small part of the total picture. Conditions are not as bleak as typically portrayed, sex work is complex, and it is important to attempt to gain more information about indoor workers, and other venues.¹⁶
3. Many sex workers have other employment and varied experience outside the trade.¹⁷
4. A major point raised by the advocates of sex work is that they oppose the characterization of sex workers as 'victims' and argue instead that they are demonstrating agency by choosing the trade.¹⁸
5. The current laws are responsible for much of the violence and abuse.¹⁹
6. There are other laws that could be uniformly applied to protect sex workers and to bolster efforts to eliminate the stigma and marginalization of sex workers.²⁰

¹⁴Pivot, *supra* note 12. Ann Pollack, Board of Directors, and Micheal Vonn, Policy Director, British Columbia Civil Liberties Association, SSLR meeting March 30, 2005.

¹⁵ See discussion of Agency in Chapter 1 at 17.

¹⁶ See e.g. Prof. Francis Shaver, *supra* at 12.

¹⁷ See e.g. SSLR Report, *supra* 1 at 11.

¹⁸ *Supra* note 15.

¹⁹ See e.g. Prof. John Lowman who submitted that the 'communication laws' resulted in a profound increase in violence, SSLR meeting, February 21, 2005, at 1800 hours.

7. Criminalization and stigmatization are the cause of many of the harms related to prostitution including the violence, exploitation, low self-esteem, community and nuisance. The criminal laws are a reflection of the stigma associated with sex work; they reinforce the stigma and that leads to abuse and harassment. A major step in the direction of eliminating the stigma is to decriminalize prostitution.²¹
8. Decriminalization should be integrated with social reform and education programs to address the underlying issues of violence, poverty, education, alternate employment, dependency issues, and health issues, which are indicative of broader problems within and outside the sex trade.²²
9. A final point is the reiteration of the age-old arguments – prostitution is the oldest profession, it is not going away, and men will always buy sex. Tied to this are the notions that sex is central to the human condition and that not everyone is able to access it in a non-commercial manner.

These submissions are very similar to the concerns reported by the Fraser Committee.²³

²⁰ See e.g. Maticka-Tyndale and Lewis, *supra* note 12.

²¹ See discussion of Stigma in Chapter 1 at 14 and in Chapter 2 at 29.

²² See discussion of Integration of socio-economic and legal reform recommendations in Chapter 2 at 38.

²³ *Supra* note 2 at 518. In addition to similar submissions, the Fraser Committee reported the view that removing legal impediments to prostitution “would provide an opportunity to address the far more important objective of removing the causes of prostitution and providing support systems for both active and reformed prostitutes.” This was tied in with using the other provisions of the *Criminal Code* to combat prostitution related problems, however, the authors of the report cautioned that this is not a very optimistic goal given the past lack of enforcement. The Report also referred to the concerns raised about regulating under a decriminalized regime – replacing regulation for proscription was not favoured by the proponents. However, the report suggested there would be a need for the application of existing legislation covering labour standards, public health, business licensing and zoning, and special provisions to address the unique concerns of prostitution.

iii) *Abolition or partial-decriminalization – “The Swedish Model”*²⁴

This is the alternative philosophical model which calls for an end to prostitution on the premise that all prostitution is violence against women. There are two ways to approach the elimination of prostitution: by strengthening the current legislation or by changing the law to target pimps and clients. The SSLR reported that very few witnesses supported the former avenue. The latter proposal, supported by a significant number of witnesses, is based on the model adopted in Sweden in 1999.

The Swedish law was enacted in conjunction with other legislation designed to curb violence against women, in the recognition that there could not be equality between men and women as long as violence, particularly domestic violence, continued. It was also enacted within the philosophical frame that all prostitution is exploitation and is a violation of human rights akin to slavery.²⁵ As with the other international models, the SSLR found that there is conflicting testimony on the impact of the Swedish law.

Proponents of Abolition

The abolition proponents argued that the very nature of prostitution is violent, degrading, dehumanizing, racist, and gendered female, and that it is not reasonable or rational to suggest that anyone would willingly choose it as employment if alternatives were available. The proponents offered the following arguments:

²⁴ Throughout the SSLR report, the abolition model is referred to as the ‘Swedish Model’.

²⁵ See e.g. Gunilla Ekberg, Special Advisor, Issues Regarding Prostitution and Trafficking in Human Beings, Government of Sweden, SSLR meeting May 4, 2005. Also, SSLR report, *supra* note 1 at 71.

1. Very few women *choose* prostitution²⁶.
2. Most sex workers enter the trade when they are around 14, through the coercion of men or for reasons of sustaining a street life style.²⁷
3. Many women become drug addicted as a result of being in the trade.²⁸
4. Even with the indoor trade, women are often not permitted by their employers to decline customers and they are subjected to factory-like conditions.²⁹
5. A world without prostitution is possible just as it was possible to end slavery and apartheid. To argue otherwise is unnecessarily defeatist.³⁰
6. Normalization of prostitution adversely affects all women and all women are then viewed as prospective prostitutes. Normalizing prostitution entrenches it in society, establishing it as an expected role for women. In Germany, any woman under 55 who has been out of work for more than one year can be forced to take any job, including in the sex industry.³¹
7. A final point ties in with the previous one: proponents argue that there is little difference between legalization, which has proven disastrous for women, and decriminalization, which will not happen without regulation.³²

²⁶ *Supra* note 15.

²⁷ See discussion of Age of Entry in Chapter 2 at 27. Also, see e.g. Ross MacInnis, Street Teams Initiatives, SSLR meeting May 11, 2005.

²⁸ See e.g. SSLR report, *supra* note 1, discussion of Drug Abuse and Prostitution, at 15.

²⁹ See e.g. Colette Parent, Professor of Criminology, University of Ottawa, SSLR meeting March 9, 2005.

³⁰ See e.g. Kate Quinn, Prostitution Awareness and Action Foundation of Edmonton, SSLR meeting May 30, 2005. Prof. Janine Benedet, Osgoode Hall Law School of York University, SSLR meeting, May 19, 2005.

³¹ Professor Richard Poulin, Department of Sociology, University of Ottawa, SSLR meeting February 9, 2005, at 1840 hours. Raymond, *supra* note 6 at 1740; Gwendolyn Landolt, National Vice-President, REAL Women of Canada, SSLR Meeting February 14, 2005, at 1800. For an explanation of how this situation developed in Germany, see the submission of Janice Raymond, "Subcommittee on Solicitation Laws", dated March 9, 2005, point 6.

³² See e.g. Raymond, *supra* note 6. see also Janice G. Raymond, "10 Reasons for Not Legalizing Prostitution" March 25, 2003, available at http://action.web.ca/home/catw/readingroom.shtml?x=32972&AA_EX_Session=5fa69be567764f5de25ae0473fc3248a.

I indicated above that a modified version of this model was introduced to the Fraser Committee through Professor Backhouse and her students. The rationales behind the proposal were that prostitution should not be presumed, and the law should tackle the male demand for sexual services which is the root cause of prostitution and the attendant exploitation of prostitutes.³³ The proposal called for removing the proscriptions against prostitutes and “making it an offence to purchase or offer to purchase the services of a street prostitute, to stiffen the penalties for operating a bawdy house, and living on the avails, and to remove the corroboration and time limitation requirements from the procuring offences.”³⁴

The Fraser Committee, 1985

The report of the Fraser Committee was in evidence before the SSLR and Paul Fraser, who chaired the committee, testified before the SSLR.³⁵ The Fraser Report was based on the most comprehensive study in Canada and requires consideration if only for reference purposes. It is trite to say that there have been significant changes in society since the Fraser Report and those changes would likely result in different recommendations today. However, it is also likely that some of the conditions have not changed and that the recommendations have currency today.

³³ *Supra* note 2 at 362.

³⁴ *Ibid.* at 520.

³⁵ SSLR meeting February 2, 2005.

Of the 108 recommendations the Fraser Committee generated, twelve specifically addressed prostitution.³⁶ Five recommendations specifically addressed economic and social issues. The Committee spoke of eradicating economic disparity and discrimination in employment, in conjunction with other advancements in women's status. Additionally, the Committee believed that improving women's status would signal "an acceptance of a greater commitment to equality in our society, that will affect all minority groups and will assist in their full participation in Canadian society, again decreasing the likelihood of prostitution being seen as the only viable career."³⁷ The Committee also signaled the dangers of cuts in social services and programs which would result in more women and children turning to prostitution for their livelihood and fewer prostitutes being able to leave the industry.³⁸

The Fraser Committee's recommendations, reprinted in Appendix C, include:

- moral and financial commitment to removing the economic and social inequalities between men and women and discrimination on the basis of sexual preference;
- adequate social programs to assist women and young people in need;
- research into and implementation of educational programs on human sexuality;
- funding of community groups to provide programs and counselling services for practicing and reformed prostitutes; and
- further research on prostitution to deal effectively with its adverse impact on those who are or who have been involved.

The Fraser Committee made concrete legal proposals in their Recommendations 55 through 57 effectively calling for decriminalization. With that, the Committee also

³⁶ *Supra* note 2, at Section IV. Chapter 40 contains the recommendations. A copy of the Recommendations is contained in Appendix C.

³⁷ *Ibid.* at 526.

³⁸ *Ibid.* at 527.

provided draft legislation regarding soliciting and street prostitution (*Recommendation 58*), procuring (*Recommendation 59*), financial support from prostitution including enticing juveniles (*Recommendation 60*) and bawdy house offences (*Recommendation 61*). The purport of the proposed amendment to the *soliciting law* was to provide greater certainty in addressing nuisance issues. As a result of the Fraser Report, this section was replaced with the ‘communicating’ offence which criminalized public communication for the purposes of engaging in prostitution and made buyers and sellers equally culpable.³⁹ The Committee recommended an exemption to the ‘prostitution establishment’ offence for up to two adults who use their own residence for prostitution, and that licensing and operation be under provincial legislation.

The Findings and Recommendations of the SSLR

I have outlined here the proposals that were the primary legal recommendations before the SSLR. For each recommendation, there was much discussion and debate over the 33 days of SSLR hearings. There was a decided tension between two perspectives – decriminalization and abolition – throughout the hearings. In December 2006, the SSLR released its findings and recommendations; the latter are included in Appendix B. The report clearly asserted that violence against women involved in prostitution is a major concern and documented some statistics.⁴⁰ The mandate of the SSLR made it clear that the government understood the level of violence and the need to protect women.

Unfortunately, the SSLR did not come to any unanimous resolution on how to combat the

³⁹ It is widely suggested that this change to the ‘communication laws’ resulted in a profound increase in violence. See e.g. John Lowman, SSLR meeting February 21, 2005, at 1800 hours.

⁴⁰ *Supra* note 1 at 17 – 22.

violence. Also, the SSLR did not make any legal reform recommendations or any substantive recommendations to immediately alleviate the socio-economic concerns underlying prostitution.

The report contained six unanimous recommendations, one majority recommendation (#7) and a separate section outlining the perspective of the Conservative Party.⁴¹ The first two unanimous resolutions related to minors and trafficking. Recommendations 3 through 6 recognized the problems with the current legislation, the need for education programs to prevent people entering prostitution because of lack of choice or coercion and the need to assist people who wish to leave the trade, and the need for further research. The majority recommendation 7 included concern for the safety of prostitutes, exiting programs and alleviation of the conditions underlying prostitution. The perspective of the Conservative Party was to reduce all forms of prostitution and encourage exiting programs for all prostitutes.

In **Recommendation 1**, the SSLR recommended that the commercial sexual exploitation of minors remain a serious criminal offence, with severe penalties, and that sufficient resources and training be provided to enforcement agencies.

Recommendation 2: “trafficking in persons remains a priority so that victims are provided with adequate assistance and services, while traffickers are brought to justice.”

The SSLR emphasized the need to provide resources and training to law enforcement personnel and services and assistance to victims.

⁴¹ *Ibid.* note 1 at Chapter Seven: “Difficulties in Achieving Consensus – Recommendations and Conclusions”.

In the preamble to **Recommendation 3**, the SSLR found that “the social and legal framework pertaining to adult prostitution does not effectively prevent and address prostitution or the exploitation and abuse occurring in prostitution, nor does it prevent or address harms to communities. This framework must therefore be reformed or reinforced.”⁴² Further, under the application of the existing criminal laws, the SSLR found:

- there is a two-tiered sex trade;
- the indoor trades operate with virtual impunity;
- the street trade, mainly Aboriginal persons, marginalized people, transsexual and transgendered persons and drug addicts, are targeted for law enforcement;
- the communication offence, Section 213, is the main instrument of enforcement and the other provisions of the solicitation laws are not pursued; and
- although street prostitution accounts for only 5% to 20% of all prostitution related activities, it accounts for approximately 90% of the enforcement rate.

As a result of these findings, the SSLR recommended that the government ‘recognize’ that the status quo is unacceptable, and that the laws are unequally applied. I suggest that most of that information was well known before the SSLR hearings and does not present any new considerations. However, the *public policy statements* may present greater value than the actual recommendation. The SSLR was *unanimous* in saying that:

- prostitution must be prevented;
- the exploitation and abuse occurring in prostitution must be addressed and prevented; and
- the harms to communities must be addressed and prevented.

⁴² *Ibid.* note 1 at 86.

The primary legal models placed before the SSLR to tackle these requirements were abolition and decriminalization. The SSLR said the social and legal framework must be reformed or reinforced, but did not select a legal model.

The basic premise underlying **Recommendation 4**, as I read the preamble, was that the need to tackle the underlying concerns of poverty, social inequality and sexual exploitation is *desperate*. To tackle those concerns, the Government of Canada was called upon to take initiatives to:

- prevent exploitation;
- prevent people from entering prostitution due to lack of choice or coercion;
- protect people against exploitation;
- assist people in regaining control of their lives through exit strategies; and
- reduce the incidence of survival sex.

The initiatives the SSLR identified to achieve these goals were education campaigns and programs specifically directed to reducing the incidence of people entering prostitution because of lack of choice or coercion, and to raising awareness of the risks of being coerced into prostitution. Additionally, the SSLR recommended that the government work with other levels of government, institutions, and non-governmental organizations to develop exit strategies.

Again, I see that the value of **Recommendation 4** lies in the *public policy statements* on which the SSLR was unanimous, in particular that the need to tackle the underlying concerns of poverty, social inequality and sexual exploitation is *desperate*. Although the

SSLR spoke of reducing the incidence of survival sex through ‘various social programs and services’, it did not suggest concrete programs to tackle poverty and violence.

In **Recommendation 5** the SSLR addressed its concern over the lack of evidence concerning organized crime, the drug trade and trafficking in persons for the purposes of prostitution. The recommendation was for funding research into prostitution activities, associated problems and the needs of people involved in those activities. The intention was that research would delve into the causes and impacts of prostitution in order to fashion policies and programs. It is apparent from this recommendation that the SSLR found the evidence presented through the various research studies of the witnesses to be inadequate.

Recommendation 6 was concerned with the lack of legal analysis surrounding the solicitation laws and other laws of general application, such as kidnapping, extortion, sexual exploitation and assault, which are rarely used in relation to prostituted related offences. The SSLR noted that although police officers testified that they would like to tackle the demand (clients) rather than the supply (prostitutes), the evidence shows that clients are not prosecuted. Additionally, the SSLR found that the evidence from other jurisdictions was incomplete and contradictory and that there was insufficient information on trafficking in persons and the sexual exploitation of women and children. Therefore, the SSLR recommended coordinated research with other levels of government, institutions, non-governmental organizations and persons selling sexual services, to include an examination of best practices in Canada and abroad.

The majority **Recommendation 7** is premised on the view of prostitution as a **public health matter**, not only a criminal law issue.⁴³ In the preamble, the majority proposed a pragmatic approach that recognized the importance of prevention, education, treatment, and harm reduction measures for all persons involved in the many forms of sexual services, from sexual slavery and survival sex, to the exchange of sexual services between consenting adults; and harm reduction strategies to address the underlying concerns of poverty and social inequality, and the health and safety of prostitutes.

The majority called for immediate concrete efforts to improve the safety of individuals selling sexual services and assist them exiting if they are not there by choice. The majority also recommended that, while respecting provincial areas of jurisdiction, “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.”⁴⁴

Most of the *public policy* discussed here reflects the earlier unanimous recommendations although they were developed more thoroughly. Recommendation 7 is not stand alone and must be read in context with the other unanimous recommendations.

The departure points are the policy directed to assisting practising prostitutes and the

⁴³ Using a public health model was raised at various times in the SSLR meetings. Janine Stevenson, registered nurse with the street nurse program, addressed the SSLR on March 30, 2005, using a public health plan model. The Hon. Hedy Fry acknowledged that she saw prostitution as a public health issue: “... the Canadian Medical Association has called this the number one crisis in public health of our time. And it's a comprehensive way of looking at public health issues. It's not just one thing. It's not just enforcement. It's starting all the way from prevention to harm reduction, to dealing with enforcement, if necessary, and, where necessary, dealing with treatment and all of that” (at 1120 hours).

⁴⁴ *Supra* note 1 at 89.

suggestion for federal transfer payments. The transfer payment proposal, which was proposed in the Pivot report,⁴⁵ provides a concrete proposal and some direction for moving forward to tackle the *desperate* poverty.

The call for immediate concrete efforts to improve the safety of individuals selling sexual services reflects the universal concern raised throughout the hearings. Some of the witnesses, in addition to voicing the concern, presented their own ‘concrete proposals’ directed to legal and socio-economic reforms which were, by and large, directed to the indoor trades.⁴⁶ The majority did not refer to any submissions or specific proposals, so it is difficult to know what they contemplated by ‘concrete efforts to improve safety’.

The majority commented on the contradictory nature of the current solicitation laws and said “since adult prostitution is legal in Canada, the conditions under which it can be practised must be stipulated.”⁴⁷ The majority found that the existing laws cause more harm than good by marginalizing and isolating prostitutes and that, because of the law, prostitutes fear reporting abuse and violence.⁴⁸

⁴⁵ *Supra* note 14.

⁴⁶ See e.g. Sex Trade Advocacy and Research, “Safety, Security and the Well-Being of Sex Workers”, A Report Submitted to the House of Commons Subcommittee on Solicitation Laws (SSLR), June 2005 [STAR report]. John Lowman, “Submission to the Subcommittee on Solicitation Laws of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness”, May 23, 2005. John Lowman, SSLR meetings February 21, 2005 and May 30, 2005.

⁴⁷ *Supra* note 1 at 89.

⁴⁸ *Ibid.*

The Liberal and New Democratic Parties expressed their view that law reform is required, “thus allowing criminal sanctions to focus harmful situations.”⁴⁹ There was no explanation of why the Bloc Quebecois disassociated from their colleagues on this point.

Under a section entitled “Striking a Balance without Judging”, the majority clearly stated the belief that *adult consensual sexual activities that do not harm others*, with or without payment, should not be prohibited. “They feel that it is essential to strike a balance between the safety of those selling sexual services – without judging them – and the right of all citizens to live in peace and safety.”⁵⁰ To this end, the majority believed that *Criminal Code* provisions of general applicability to exploitation, nuisance, public disturbance, indecent exhibition, coercion, sexual assault, trafficking in persons, extortion, kidnapping, etc. (the applicable sections of the *Criminal Code*, with explanatory comments, are contained in Appendix D to the SSLR report) should be relied on. This approach would concentrate on combating the exploitation and abuse, rather than criminalizing consenting adults.

I have attempted to analyze this Recommendation with a view to the competing submissions made concerning abolition and decriminalization. It is my view that the majority are saying they find greater comfort in the idea of non-prohibition (perhaps they would say ‘decriminalization’ if pressed?) of some aspects of prostitution – between consenting adults and the aspects that do not harm others - than in criminalizing all prostitution. Added to that, is their belief that the provisions of general applicability are

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* at 90.

sufficient to protect both prostitutes and neighbourhoods.⁵¹ Their final statement is clear – use the laws to combat the violence and abuse not to criminalize consenting adults. Earlier, based on the premise that prostitution is legal in Canada, the majority said the conditions under which it could be practiced must be stipulated. Putting these together, I would say they rejected the idea of criminalization of consenting adults but wanted to see regulations or definitions around what conditions are permissible and wanted to see enhanced enforcement against violence and abuse. The fact that the majority did not advocate a particular legal model is consistent with the unanimous proposals for further research and greater understanding of the issues.

The Conservative Party was not similarly undecided. Those representatives included their own perspective, based on their view that prostitution is a form of violence, that it is a “degrading and dehumanizing act”⁵² that victimizes women and children. “They believe that the most realistic, compassionate and responsible approach to dealing with prostitution begins by viewing most prostitutes as victims.”⁵³ They challenged the notions that prostitution is harmless and consensual. They said 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 signalling that the commodification and invasive exploitation of a women’s body is acceptable.”⁵⁴

⁵¹ Of interest on this point is that Professor Lowman, at page 2 of his May 23, 2005 brief, made the point that he had changed his mind on this and was now of the opinion that the laws of general applicability are insufficient to protect against sexual slavery. As a result, he adopted the Fraser Committee Recommendations 59 and 60 (see Appendix C to this paper), in principle, but with an amendment that would make it an offence to coerce anyone to engage in *any paid employment*.

⁵² *Supra* note 1 at 90.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

Regarding community impact, the Conservatives said that it would be unethical for a government to increase prostitution, john and pimp traffic because of the negative effects.

The Conservative Party views are influenced by the Swedish experience that “decriminalization had in fact entrenched the very problems it was expected to resolve.”⁵⁵ They cited Richard Poulin’s testimony concerning the increase in adult and child prostitution following decriminalization in both the Netherlands and Australia.⁵⁶ They cited the evidence of Professor Poulin, Yolande Geadah and Julie McNeice⁵⁷ that organized crime exerts stronger control in decriminalized regimes.

The Conservative Party approach would use legal and social reforms to reduce all prostitution. They proposed criminal sanctions against johns and pimps – “the abusers.” They would improve the ability of prostitutes – “the victims” – to quit. They also proposed that heavy fines (a deterrent effect) be levied against the abusers and the proceeds used for rehabilitation and support for the victims. Concerning criminal sanctions for prostitutes, they proposed lenience and assistance exiting, for first time offenders and those forced or coerced into prostitution. However, those who seek to benefit should be held fully accountable “for the victimization which results from prostitution as a whole”⁵⁸ and the law must be enforced against prostitution in all venues.

⁵⁵ *Ibid*, at 91.

⁵⁶ *Supra* note 31.

⁵⁷ *Ibid*. and Poulin, SSLR meeting May 30, 2005. Geadah, *supra* note 6. McNeice, SSLR meeting March 31, 2005.

⁵⁸ *Supra* note 1 at 91.

The Conservative Party members acknowledged that the solicitation laws could be improved. However, they rejected the suggestions that marginalization is caused by the criminal laws and they said that the laws of general application are inadequate protection for either prostitutes or communities. Instead, they found that marginalization is caused by attempts to circumvent the laws. In their view, the solicitation laws are tools to “separate communities from prostitution, and prostitutes from exploitation and abuse.”⁵⁹ They agreed that there is a public health component to prostitution, but rejected the majority Recommendation 7,

insofar as it enables prostitutes to remain in a dangerous and degrading lifestyle. The Conservative Party calls for the establishment of far-reaching educational strategies and programs that are focused on the reduction of all forms of prostitution, and encouraging all prostitutes towards exit programs.⁶⁰

In the final short passage of their report, the SSLR addressed the problems of reaching consensus with respect to “the appropriate legal and social response to prostitution, probably reflecting the conflicting views of Canadians more broadly.”⁶¹ Nonetheless, it is apparent that they did come to some areas of consensus - in some findings and in their *public policy statements*. Here are some of those consensus points:

- prostitution must be prevented;
- the exploitation and abuse occurring in prostitution must be addressed and prevented;
- the harms to communities must be addressed and prevented;
- there is a desperate need to tackle the poverty, social inequality and sexual exploitation;
- people must be assisted in regaining control of their lives through exit strategies;

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.* at 92.

- we need education campaigns and programs to prevent people from entering prostitution because of lack of choice or coercion;
- we need education campaigns and programs to raise awareness of young people, children, and society to the risks of being coerced into prostitution; and
- the two-tiered effects of the present laws must be addressed.

Commentary on the SSLR Report

I am struck by the fact that the words ‘Aboriginal’, ‘woman’ and ‘women’ are not mentioned in the SSLR recommendations. In the whole of the recommendations and conclusions chapter, the word ‘Aboriginal’ is mentioned once in reference to the two-tiered enforcement regime. The words ‘woman’ and ‘women’ occur only in the “Conservative Party’s Perspective” and in the final section of the chapter, in reference to the perspective of prostitution as violence against women. Given the notoriously racist and gendered structure of prostitution, it is virtually impossible to speak about prostitution without mentioning women and Aboriginal communities. The task of the SSLR was to tackle violence in prostitution – the violence against Aboriginal women is tragic.⁶² The majority of the SSLR contorted the language of prostitution by cleansing it of reference to its primary victims.

I find particular fault with the work of the SSLR in their failure to make definitive findings about the economic conditions facing Aboriginal communities, women and children, and in their failure to propose concrete recommendations for alleviating those conditions. In particular, Recommendation 4 offered an opportunity to advance strategies

⁶² See Chapter 2 at 26.

to address poverty, gender power imbalance and sexual exploitation. It is difficult to conceive that the SSLR would need more detailed evidence or research than was presented through this formidable array of witnesses. In my view, the Committee failed in its task because it neglected to tackle the fundamental pressures that drive women and children into prostitution, which I maintain were contained in the evidence presented over those five months of hearings. This failure is highlighted by comparison with the thorough analysis, reporting and recommendations of the predecessor Fraser Committee.

The mandate of the SSLR was “to review the solicitation laws in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex-trade workers.”⁶³ In my view, the SSLR ducked its responsibility. There are no recommendations for changes; only recommendations for education campaigns and further research.

Report from the Prostitution Law Review Committee (PLRC), New Zealand

The New Zealand Prostitution Reform Act 2003 (PRA) took effect in June 2003 with a primary purpose of decriminalizing prostitution. As has been the case in other national contexts, this was a hotly debated issue that passed the New Zealand legislature by a one vote margin. The Prostitution Law Review Committee (PLRC), charged with reporting within three to five years, issued its report in May 2008.⁶⁴ The purposes of the PRA, set out in the PLRC’s executive summary, was to:

⁶³ *Supra* note 1 at 2.

⁶⁴ *Supra* note 3.

- 1) decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use);
- 2) create a framework to safeguard the human rights of sex workers and protect them from exploitation;
- 3) promote the welfare and occupational health and safety of sex workers;
- 4) contribute to public health; and
- 5) prohibit the use in prostitution of persons under 18 years of age.

Under the PRA, prostitution is divided into three sectors: street-based, private indoor and managed. The former two are independent operators and the latter usually refers to brothels under the control of an operator. A major aspect of the PRA was the establishment of a certification regime for brothel operators with four or more workers, which was intended to ensure that operators are ‘suitable for the role’.⁶⁵

In the report, the PLRC acknowledged that research is difficult, that it has relied on research completed by two other organizations, CSOM and CJRC⁶⁶ and that the scope of the research and report is limited. A lot of the research results came from Christchurch. The CRJC results were based on research from five cities.

Overall, the PLRC report supported the PRA and the certification regime that was instituted with its passage. In the Conclusion and Further Review section, the PLRC stated: “On the whole, the PRA has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are

⁶⁵ *Ibid.* at section 6 “The Brothel Operator Certification System”.

⁶⁶ Christchurch School of Medicine (CSOM) and Victoria University’s Crime and Justice Research Centre (CJRC)

better off under the PRA than they were previously.”⁶⁷ While this statement is certainly reflective of the *tone* throughout the report, I find that it does not ring true with many of the *findings* of the committee. My analysis of the report reveals that the negative findings far outweigh the positive findings and that the findings that the PLRC put forward as positive are questionable.

Viewing the New Zealand PLRC Report from the Canadian perspective

In reviewing the PLRC report, I have been primarily interested in whether the report sheds light on the pros or cons of decriminalization. Some of the issues that have been highlighted in the Canadian context are:

- a) will violence against prostitutes be alleviated?
 - b) can a two-tiered system of legal and illegal brothels be avoided?
 - c) will decriminalization prevent or reduce the amount of prostitution?
 - d) is there evidence of an increase in organized crime?
 - e) can the industry be adequately supervised and enforced to ensure that sex workers are not being abused or violated?
- a) *Violence against prostitutes*

“The majority of sex workers interviewed felt that the PRA could do little about violence that occurred, though a significant minority thought there had been some

⁶⁷ *Supra* note 3 at Section 14 “Conclusion and Future Review “.

improvement since the enactment of the PRA.”⁶⁸ The PRLC reported that “adverse incidents” had occurred in all sectors over the past year, with the most abuse occurring among street workers. The report also indicated that workers in all sectors are reluctant to report incidents to the police, and that stigma plays a significant role in this reluctance.

b) *Can a two-tiered system of legal and illegal brothels be avoided?*

The PLRC reported that there is no evidence that uncertified (illegal) brothels have developed, as it has in Victoria, Australia.⁶⁹ The number of new brothel applications has dropped each year. It appears that the PLRC accepted this evidence as indicative that brothels are not setting up.⁷⁰ The PLRC looked for evidence of possible illegal operations outside the certification regime. To this end, they received a report from Immigration Service New Zealand that “no situations involving trafficking in the sex industry have been identified (Department of Labour, 2007).”⁷¹ Based on this and reports from NGOs about street prostitution, the PLRC was satisfied that trafficking for the purposes of prostitution is not occurring in New Zealand.

⁶⁸ *Ibid.* in the “Executive Summary”. The PLRC did not make any recommendations for addressing violence.

⁶⁹ *Ibid.* at 6.4.1 “Information from Brothel Operators”.

⁷⁰ *Ibid.* at 6.4.5 “Numbers of Operator Certificates Issued”. The Recommendation was to extend the validity period of certificates from one to three years. I looked through the CSOM study on the PLRC website and did not find any mention of illegal brothels. However, that study did not look at the certification system. I reviewed the CJRC study relied on by the PLRC. That study looked at the certification system but I did not find any reference to research on illegal brothels.

⁷¹ *Ibid.* at Section 13 “Trafficking”.

I attended a presentation on October 24, 2007,⁷² by Gillian Abel and Lisa Fitzgerald, from the School of Medicine and Health Sciences (CSOM), University of Otago, Christchurch, New Zealand. They were part of the research team working on the review of the PRA. In response to a question about evidence of illegal brothels, Abel and Fitzgerald replied that there are immigrants from Thailand and China operating and working in illegal parlours. They did not have access to either the owners or the women working there. This is consistent with the evidence before the SSLR from Janice Raymond⁷³ that trafficking continues. It seems abundantly clear that there are illegal brothels and a corresponding increase in the amount of prostitution although this not reflected in the official report because there is no ability under the enforcement regime to access the illegal brothels.

c) *Amount of prostitution, certification regime & illegal brothels*

The PLRC reported that the amount has neither increased nor decreased. This is one of the areas where they reported difficulty with research and said that Christchurch was the only place where pre- and post- estimates were possible. The report of no increase or

⁷² “The implementation of the decriminalisation of the sex industry in New Zealand: perspectives and experiences of the first four years” (paper presented at the University of Victoria, October 24, 2007) [unpublished]. Abel and Fitzgerald spoke on the impact of decriminalization in New Zealand and provided some early observations on health and safety within the work environments. Their comments were largely reflected in the PLRC report. However, they were quite candid about the difficulties of conducting inspections due to lack of information on the addresses of the brothels (information not provided by the registry) and lack of funding for the inspection program.

⁷³ Janice Raymond reported to the SSLR that many groups reported trafficking had not diminished in New Zealand and that there was evidence that child prostitution was on the rise. See SSLR meeting, April 4, 2005, at 1835 hours.

decrease was based on estimates in Christchurch in 1999 and 2006.⁷⁴ As just discussed, those doing research in New Zealand report there are illegal brothels and a corresponding increase in prostitution.

d) *Organized Crime*

The PLRC had access to a police report that indicated links between organized crime and the sex industry prior to the PRA; that the police did not currently have a structured ability to collect information from the sex industry; and the police suggested the relationship between prostitution and criminal activity had not changed. After some further explanation of the police report, the PLRC concluded that there was no “evidence of a specific link between crime and prostitution.”⁷⁵ Before the Canadian SSLR, Melissa Farley reported that there had been a massive increase in organized crime in the year and half since prostitution was decriminalized.⁷⁶ It is to be remembered that the PLRC was reporting based on a small geographic sample and this could affect the reliability of its results.

e) *Supervision and Enforcement of brothel operations*

The PLRC report contained a lengthy section entitled: “The Brothel Operator Certification System”. Under “Does the Current System Work”, the PLRC said that the

⁷⁴ The SSLR referred to a 2005 report from Manukau City, the second largest city in New Zealand (not one of the five target locations used in the PLRC research), in which it was estimated that street level prostitution had quadrupled since the PRA was implemented. SSLR report, *Supra* note 1 at 81. See also Raymond, *ibid*.

⁷⁵ *Supra* note 3 at Section 11.2 “Links with Crime and Gangs”.

⁷⁶ Psychologist, Prostitution Research and Education, SSLR meeting March 30, 2005, at 1240 hours.

fitness test to ensure operators are “suitable for the role” was robust. Earlier, in the same document, they reported operators saying that obtaining certificates was too easy, with no training or interview process.⁷⁷ The PLRC reported that the certification system had no attributes that would enable it to meet the criterion of protecting sex workers. There was no enforcement procedure, and no way of checking the welfare and occupational health and safety of the sex workers. The PLRC considered these to be major failings.

To answer the question for the Canadian context, it would have to be said that it would be *possible* to ensure adequate supervision but that requires government motivation to ensure that sex workers are being afforded conditions that meet health and safety standards. The message from New Zealand, certainly, is that it has not been a government priority.

Those involved in research and policy and many witnesses before the SSLR have been waiting for the results of the New Zealand decriminalization. It has been heralded as a promising new regime. It is unfortunate that the report is so full of inconsistencies. I said earlier that the *tone* of the report is favourable to the legislation and the decriminalization regime, but the *findings* do not necessarily bear that out. Overall, my impression of the New Zealand decriminalization, based on the information contained in the PLRC report, the presentation by Abel and Fitzgerald⁷⁸ and the evidence before the SSLR, is that decriminalization has NOT improved the situation for the majority of sex

⁷⁷ *Supra* note 3 at Section 6 “The Brothel Operator Certification System”, and at 6.5 “Does the Current System Work?”

⁷⁸ *Supra* note 72.

workers. It appears to be working well for the brothel operators although they are also voicing concerns.

Specifically, my analysis indicates that there has been no funding, no enforcement, no teeth to the brothel operator certification, no oversight of three specified human rights⁷⁹ including minors, no adequate research for the five year report, and no attempt to address the violence and abuse on the street or *off-street*. The PLRC acknowledged that the purposes of the PRA for promoting welfare, and occupational health and safety of sex workers “cannot be fully realised in the street-based sector”⁸⁰ which causes danger to street-based workers and causes upset to communities. In my view, this is a pretty bleak report that suggests decriminalization is a free-for-all, and should alert everyone studying this issue to look very carefully at why the New Zealand legislation has not resulted in positive results.

In this chapter, my primary goal was to examine the legal reform proposals presented to the SSLR and the perspectives behind them. The perspectives flow also through the discussions in Chapter 2 on the socio-economic considerations. I have set out what I consider to be some of the more compelling arguments raised by the proponents of

⁷⁹ The PLRC identified three basic human rights – the combined right not to be coerced into prostitution and to refuse to provide services, the right not to be subject to exploitative, degrading employment practices and the right for those under 18 not to be used in sex work.

⁸⁰ *Supra* note 3, Executive Summary. The Committee believed sex workers should be encouraged to move off the streets into safer venues, or to leave prostitution totally. Also, in part 8 “Street-Based Sex Workers”, the Committee surveyed various other regimes and concluded that for New Zealand the best model was that “street-based prostitution should be managed through proactive measures taken by local councils (the provision of lighting and street cleaning), Police (Police presence to discourage disorderly or anti-social behaviour), and NGOs (providing support services).

decriminalization and abolition of prostitution.⁸¹ I have also looked at the SSLR Recommendations and offer my view that the SSLR did not meet the responsibility of its mandate. Additionally, I have provided a brief analysis of the New Zealand experience with decriminalization and my view that it has failed to protect or promote the health and safety of prostitutes. In the following chapter, I look at some of the perspectives and submissions in more detail.

⁸¹ There is a plethora of data, perspectives and recommendations from the 33 days of SSLR hearings, all of which is available on the Government of Canada website. Available at: <http://www2.parl.gc.ca/committeebusiness/CommitteeMeetings.aspx?Cmte=SLR&Language=E&Mode=1&Parl=38&Ses=1>

Chapter 4: Reflections on perspectives advanced in the prostitution debates

I began this project in an attempt to understand the perspectives and analyses underlying the advocacy for decriminalizing prostitution and the advocacy for abolishing prostitution. From a personal point of view, I came to understand two important perspectives through this research project. The first is that the logical result of calling for decriminalization is the legitimization of prostitution as employment for women, a proposition that does not appear to be widely understood. The second is that legalization regimes, such as in The Netherlands,¹ have not been successful in addressing the underlying violence and other issues associated with prostitution and legalization as a model was not supported by any of the witnesses before the SSLR.² In spite of the recognition of the myriad of ways legalization has failed, there are many proponents of decriminalization and regulation. I see very little difference between the two models in the practical impact on women working in the sex industry. In fact, some very knowledgeable people in this field use the terms legalization and decriminalization interchangeably.³

¹ The legalization models represented in testimony before the SSLR include The Netherlands, Germany, the State of Nevada, USA, and some jurisdictions in Australia including the States of Victoria and Queensland, the Northern Territory and the Australian Capital Territory. For a general overview, see the SSLR Report, *infra* note 2 at 81. The decriminalization models represented in testimony before the SSLR include New South Wales, Australia, and New Zealand. For a general overview, see the SSLR Report, *supra* note 2 at 77.

² Report of the Standing Committee on Justice and Human Rights; Report of the Subcommittee on Solicitation Laws. *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws*. (Communication Canada – Publishing, Ottawa, Canada, December 2006), at 84. Also available on the Parliamentary Internet Parliamentaire: <http://www.parl.gc.ca>. [SSLR Report]. The SSLR said that legalization/legalization as an option was “almost uniformly condemned.” In my review, I did not find any witnesses who supported it.

³ See e.g. John Lowman, SSLR meeting February 21, 2005, at 1835 hours. Janice Raymond, SSLR meeting April 4, 2005, at 1745 hours. See also Professor Poulin's testimony on February 9, 2005 in relation to a comparison between France, the Netherlands and Germany.

New Zealand is usually referred to as a decriminalization model. I reviewed the New Zealand five year review in Chapter 3. There is nothing in that report that suggests successful results in the areas of violence against women, human rights, control of organized crime, conditions of work, stigma, and generally, health and safety. For me, it seriously raises the question whether there is any difference between the results in New Zealand and the legalization regimes which were “almost uniformly condemned”⁴ by witnesses in SSLR meetings.

I have found that one of the defining distinctions between legalization and abolition is that the former is advanced on behalf of a *minority of sex workers* – the sex workers who say they have choices – and who, therefore, would not be harmed by an abolition model; the latter is advanced on behalf of *all women*. In my view, given the condemnation of legalization and the similar results of decriminalization, there is an immense gamble proposed that endangers the lives of women in order to satisfy the demands of a minority who have other employment options.⁵

One of the driving arguments behind the pro-prostitution/decriminalization lobby is that prostitution will never go away so we need to figure out how to prevent men from murdering women. I find this negative perspective to be of little assistance. Some reported results from Sweden indicate that prostitution can be substantially curbed

⁴ *Supra* at note 2.

⁵ See e.g. Éline Audet, “The need for a public debate on prostitution and its social consequences”, May 25, 2005. Available at: http://sisyphe.org/article.php3?id_article=1635. At 2, “Is it necessary to pass legislation that binds the whole of society to the individual demands of a minority that portrays prostitution as a freely made lifestyle choice? Instead, when an international study has shown that 92% of female prostitutes would leave the trade if they could, should we not be questioning such assertions?”

through criminalizing the procurers and the clients.⁶ There are some positive perspectives coming from the pro-prostitution/decriminalization lobby, primarily Pivot's proposals for economic redistribution and restructuring.⁷ As with the Recommendations from the SSLR, these proposals are directed to eliminating poverty and other issues that drive women into prostitution and they have currency without being attached to a call for decriminalizing prostitution.

From my reading of the submission, I find that it is not widely known or appreciated that decriminalization of prostitution logically leads to the legitimization of prostitution as employment for women. I think it is important to take a closer look at that in my concluding observations. I also think it is important, from the testimony before the SSLR, to have a look at some of the strategies advanced for reducing violence in the sex trade.

Would decriminalization lead to the legitimization of prostitution? Is this to be feared?

I did not know when I started examining the prostitution debates that legitimizing prostitution as an occupation for women was a presumed result of decriminalizing. I knew from my Women's Studies courses that some people spoke of it in this way. However, when I discussed it with friends I found that they were unaware of this

⁶ See e.g. Gunilla Ekberg, Special Advisor, Issues Regarding Prostitution and Trafficking in Human Beings, Government of Sweden, SSLR meeting May 4, 2005. See also Yolande Geadah and Michèle Roy, SSLR meeting February 7, 2005. *Contra* see Frances Shaver, SSLR meeting February 7, 2005, referring to a study by Petra Ostergren in 2004.

⁷ Pivot Legal Society Sex Work Subcommittee (2004), "Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws" at p. 8 [Pivot Report]. Available at <http://www.pivotlegal.org/Publications/Voices/1short2.pdf>

undertow, and they indicated shock and opposition to this ever happening. When I spoke with colleagues around PEERS, including those who supported and promoted decriminalization, they were unaware of this intended result and were opposed to the idea of developing prostitution as legitimate employment. They wanted harm reduction for the women caught in prostitution and thought that decriminalization would be more benevolent, particularly because the current ‘solicitation laws’ do not protect women. At the same time, they firmly believed that women needed options to avoid prostitution.

What is of great significance to me coming from the SSLR submissions is that legitimization and normalization of the sex industry is precisely what is intended by those who base their call for decriminalization on a thorough analysis of what would be required to accompany the criminal law reform. Here I am thinking particularly of the STAR report and Professor Lowman’s submissions. These are among the submissions with the most advanced proposals for advancing a regime of decriminalization. Although they include in their proposals the need to ensure that women are not forced into prostitution, they are nonetheless promoting this as normalized employment.

Proposals like these raise the question of how laws could be structured to ensure that people are not forced into the sex trade either through domestic or criminal coercion, or through social welfare or employment coercion. There has been a general tendency, both in the submissions before the Fraser Committee and the SSLR to presume that enforcement of the laws of general applicability could provide the answer on the criminal violence front and that labour laws would provide the answer on the social welfare and

employment fronts. In order to ensure appropriate structures for the latter, there are proposals for committees and consultations between all levels of government, advocates and people involved in the sex trade.⁸ This is very complex and would, of course, require commitment of time, resources and funding.

During the course of his submissions to the SSLR, Professor Lowman rethought his view on the ability of the current laws of general application to protect against sexual slavery and he decided they were insufficient. Therefore, he proposed that it would be necessary to make it an offence to coerce anyone to engage in *any paid employment*.⁹ During his testimony on May 30, 2005, he did not draw attention to this proposal, and there were no questions raised by the SSLR panel. On the face of it, this seems to involve considerations touching on criminal law and some major reform to the policies and program relating to employment and social welfare programs generally, not just with respect to prostitution. This proposal would be one of many on the table in the consultations. In the SSLR report, there is no mention of Professor Lowman's proposal. In the Recommendation by the majority of the SSLR, it is proposed that to combat exploitation and abuse, there should be reliance on the *Criminal Code* provisions of general applicability to exploitation, nuisance, public disturbance, indecent exhibition, coercion, sexual assault, trafficking in persons, extortion, kidnapping, etc.

⁸ This consultative approach was adopted by the SSLR in Recommendation 6 for continuing research and to include an examination of best practices in Canada and abroad.

⁹ Lowman, John. "Submission to the Subcommittee on Solicitation Laws of the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness", May 23, 2005, at 2. His proposal was to adopt the Fraser Committee Recommendations 59 and 60 (see Appendix C) but with an amendment that would make it an offence to coerce anyone to engage in *any paid employment*.

As is apparent from the mandate of the SSLR and the evidence presented, there has not been success in the past in relying on the laws of general applicability and, if Professor Lowman's view is logical and justified, they cannot be relied on in the future at least with respect to procurement and coercion into prostitution. Looking at this from a procedural angle, these proposals do not offer any hope of immediate relief and, depending on whether governments ever agree to convene a consultative process, they may never result in success.

One of the questions that has arisen for me over and over is why would society want to normalize an occupation that is so fraught with danger that it requires exemption from the general employment and social welfare regulations. Reading the SSLR transcripts, I found an interesting question about the 'legitimatization' by the Honourable Member Hedy Fry, which raises a related concern:

Then, we've heard from a lot of people who are concerned, saying that what you do by decriminalizing is legitimize. I don't necessarily buy into that argument, but there has to be an answer for those people who say then that what you say to everyone is that this is an okay thing for you to do, and therefore they might think, 'I'm going to choose to do this as my profession one day'.¹⁰

Unfortunately, none of the witnesses addressed her question in the way she framed it. However, in response, Professor Jacqueline Lewis referred to using the criminal laws of general application to protect sex workers and Kara Gillies discussed the opportunity for the development of national sex worker associations and unions.

¹⁰ SSLR meeting May 2, 2005, at 1949 hours.

Their comments point to legitimizing. Although Member Fry says she does not necessarily buy into the assumption that decriminalization will result in legitimizing prostitution, the advocates of decriminalization very much do buy into that and promote legitimization. The way the witnesses responded was intended to give comfort that sex workers will be protected. However, they are speaking on behalf of the minority of women who profess to enjoy the work. Dr. Fry was raising was the spectre of young girls and women being lured into the industry on the assumption that it is benign because it has been given legitimacy. As a health professional, Dr. Fry knows about the health dangers and she reported that the Canadian Medical Association has declared prostitution the number one crisis in public health of our time.¹¹ There are no models of decriminalized or legalized prostitution that allay the fears underlying Dr. Fry's question. Prostitution is far from benign and she has good reason to be concerned about legitimizing it.

In the SSLR report, there is unanimity in saying that prostitution must be prevented. That is the clear and unequivocal message coming from the months of testimony. There is no room in that message for legitimizing prostitution as employment. Given that legitimization is the logical result of decriminalization, there is no room in that message for decriminalization.

Would decriminalization address the violence that was the mandate of the SSLR?

One of the primary arguments in favour of decriminalization is that by removing the restrictions of the 'solicitation law' women will be in a better position to protect themselves. Lee Lakeman's response to this suggestion:

¹¹ SSLR meeting, March 30, 2005.

... to create the illusion that women can negotiate their own safety as individuals by having prostitution called something else just seems to me to be utterly ridiculous. The reason violence against women succeeds in street prostitution is that women are overpowered, and they require the intervention of their community and their state to increase their safety.¹²

Kara Gillies, supporting decriminalization, acknowledged that it will not improve the lives of street prostitutes other than removal of the illegality:

As we've discussed already, certainly there are groups of individuals who, in addition to working in the sex trade, are facing other challenges in their living circumstances--people who are street involved, people who have substance use issues, and so forth. So certainly there is going to be a small percentage of people for whom some of these strategies will not immediately result in an improvement in their lives, except that they won't have to be constantly fleeing from the police, spending time in jail, losing their housing, losing their income, and having their lives disrupted through the process of criminalization.¹³

According to Gillies' view, street involved prostitutes and others are segregated from the larger issue of how to regulate prostitution and, in my opinion, she dismissed them from the discussion.¹⁴ Yet, these are predominantly the people the SSLR was mandated to work for. These are the women who go missing in large numbers, who are found murdered and butchered in the pig farm.¹⁵

Melissa Farley, a psychologist who has conducted extensive research including the recent survey involving 854 interviewees, appeared before the SSLR on March 30, 2005. She testified that there is no appreciable difference in the psychological harm to

¹² SSLR meeting May 30, 2005, at 1025 hours.

¹³ SSRL meeting May 2, 2005, at 2004 hours.

¹⁴ The STAR report is a detailed submission on enhancing working conditions for sex workers in off-street venues. See Chapter 1, at 12, for further information on that report.

¹⁵ See Chapter 1 note 10.

prostitutes who work on the street or inside. She described her view of the indoor prostitution situation:

In practice, what indoor prostitution does is increase the john's safety and comfort, but it does nothing to decrease psychological trauma for the prostituted woman. In fact the social invisibility of indoor prostitution may actually increase its danger.¹⁶

I have spoken of the tension between the advocates about who speaks for the prostitutes and sex workers who did not attend the hearings.¹⁷ I think this is an important consideration because it affects the weight of the evidence. In large part, the import of this evidence is how prostitutes/sex workers view the sex trade and how they position themselves, for example, in the discussions about agency.¹⁸ This can affect one's determination of whether it can be enjoyable and benign, or whether it amounts to violence and violation. It is frequently used to gauge whether a majority or minority think prostitution should be decriminalized.

There were a number of academic research studies presented the SSLR. In her testimony on February 7, 2005, Frances Shaver distinguished between research that catches women in crisis, such as the depiction from social services agencies, and academic research such as hers:

We've gone out into the field and done rigorous sampling, not only on the street, where I've done a lot of my research; we've also used appropriate sampling techniques for those who are escorts, those who are dancers, and those who are involved in other parts of the industry. What happens when you do that kind of research is that you capture some sex workers who are in crisis, but the majority of sex workers you capture are those who are not in crisis. They have not come to

¹⁶ At 1235 hours.

¹⁷ See Chapter 1 at 19.

¹⁸ *Ibid.* at 17. See also Chapter 2 at 29.

the attention of the social service agencies. They often aren't coming to the attention, on a regular basis, of the police or the courts.¹⁹

Similarly, most of the street involved prostitutes Gillies refers to who are in crisis²⁰ would not be included in the academic studies. This is not to deny that evidence of women in crisis is part of the general research, but it is minimal in the academic research.

Melissa Farley testified that 95% of the people in her Canadian sample said they would leave prostitution immediately if they could.²¹ The Honourable Member Libby Davies challenged Farley on her statistics, pointing to the number of sex workers who had appeared before the SSLR. If I have correctly followed Member Davies' logic, her point is – how could there be such a high incidence of sex workers wanting out, when we have so many coming forward saying it should be decriminalized.²² The speaker cut off the conversation at this point so we did not have the benefit of Farley's response.

However, Member Davies raised a similar question with Lee Lakeman on May 30, 2005:

I would say that we've heard from many feminists and organizations who believe in equality and rights but don't hold an abolitionist opinion. I know you represent a certain point of view, but I think there are many other feminists who have gone beyond that, and partly because of those voices [sex workers] that have been heard. So how is that to be reconciled?²³

In her reply, Lakeman first noted that all transition houses and rape crisis centres see women who have been prostituted on a regular basis. She herself has worked in transition houses since 1973, “and I remain a front-line worker. I have not had a week of my life in

¹⁹ At 1850 hours.

²⁰ *Supra* at 13.

²¹ *Supra* at 16.

²² The Honourable Libby Davies, SSLR meeting, March 30, 2005 at 1305 hours.

²³ SSLR meeting, May 30, 2005, at 1140 hours.

that time when I was not working with women who have been violated in prostitution... Those who have escaped prostitution are saying quite clearly something very different.”²⁴

I think Lakeman is signaling a couple of things here. First, it is not novel to hear the voices of prostituted women. She had heard them weekly for 30 years as of the date of her testimony. Those voices are part of the deliberations of organizations like those involved in CASAC in forming their policy decisions on strategies for combating violence against women. Second, in assessing the testimonies and drawing conclusions, it is imperative to recognize which voices are speaking, and which ones are not. Thus Frances Shaver’s comment about the academic research catching primarily those who are not in crisis is an important point. If those are the voices – through research and direct testimony - heard at the SSLR, then they would differ considerably from the women in crisis who Lakeman and others see regularly. I think it is apparent from these comments that it was extremely important for the SSLR to pay heed to the voices represented by Lakeman and the host of other organizations involved in rape crisis centres, transition houses, Aboriginal women’s organizations, outreach workers, and so forth.

Further in the discussions of May 30, 2005, both Jennifer Clamen²⁵ and John Lowman²⁶ made derogatory remarks about the attitudes, supposedly of people like Lee Lakeman and Kate Quinn,²⁷ towards sex workers, particularly in regard to issues of

²⁴ *Ibid.*

²⁵ At 1230 hours.

²⁶ At 1320 hours.

²⁷ Representing Prostitution Awareness and Action Foundation of Edmonton (PAAFE), SSLR meetings March 31 and May 30, 2005. PAAFE’s brief “A Proposal to Reform Section 213 of the *Criminal Code of Canada*” was presented to the SSLR April 27, 2005.

agency and victimization. Clamen seemed exasperated by hearing from people who had not experienced the trade first hand. However, as Lakeman's remarks make clear, and as Quinn attested both in her brief and in the hearing, their work is front-line work. Their organizations help women through outreach programs, drug and alcohol counselling, exiting services, etc. I think that most proponents in these debates would agree that those who work with women involved in the sex trade are an important asset because of their perspectives based on what they see, and from working to end the violence against women wherever it occurs. There were many organizations represented before the SSLR who have expertise in the issues surrounding violence against women. Their clients are women who know violence from prostitution and other sources. The women who work in those organizations have made it their lives' work to improve the conditions of women in our society. In the SSLR hearings, they were experts and advocates representing their clients' voices. None of that in any way derogates the importance of the first hand testimony of prostitutes, current or former; street-based or indoor-based.

All of the above is directed to the point of what the women involved in prostitution are saying about levels of violence and whether they would 'exit' if they could. There is also the important principle of ensuring that women's voices are being heard. However, in the end, what did the voices say about violence? There are no denials of violence in the sex trade. There are submissions of a gradual lessening of violence as one moves along the spectrum from survival sex to the 'bourgeois'²⁸ trade. There is also anticipation from some that violence would lessen under a decriminalized regime, as per the above discussion.

²⁸ See discussion of the 'Categories' of prostitution in Chapter 1 at 15.

There was considerable interest and discussion before the SSLR about the New Zealand decriminalized regime. There, after five years of decriminalization of prostitution, the Prostitution Law Review Committee (PLRC) reported²⁹ that there is little if anything that the *Prostitution Reform Act* (PRA) can do to stop the violence on the street, or *off-street*. Additionally, there is no ability to ‘promote the welfare and occupational health and safety of sex workers’ in street prostitution. Preventing violence and promoting welfare and occupational health and safety were both stated purposes of the New Zealand legislation.

The PLRC reported that there has been a failure to implement all three basic human rights – the combined right not to be coerced into prostitution and to refuse to provide services, the right not to be subject to exploitative, degrading employment practices and the right for those under 18 not to be used in sex work. While there has been some reported success with all three, the state has not secured those rights where they are most needed, in the marginalized sectors. Therefore, we see that in New Zealand, the experiment everyone has been waiting to hear from, women are still being coerced into prostitution and violence continues.

Would decriminalization help to alleviate the violence women face in the sex industry? The New Zealand experience indicates the answer is ‘no’. There were some witnesses before the SSLR who thought it could. They were not clear in the reasons often

²⁹ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, May 2008. Available at <http://www.justice.govt.nz/prostitution-law-review-committee/publications/plrc-report/index.html> [PLRC report].

simply saying that the current criminalization³⁰ is not working so the laws need to be repealed.³¹ The clearest answer seems to be that addressing poverty and social inequality is the only way to ensure that women will not have to resort to prostitution.

Conclusion

My reading of the submissions to the SSLR leaves no doubt in my mind that prostitution is a vicious industry. The SSLR report is a castigation of prostitution and its effects on women and children. The very high levels of abuse and violence are well documented and were spoken to in the hearings. The picture of a more benign ‘sex work’ that was presented by some witnesses is, by and large, based on the indoor trade. It is also based on a ‘rights’ argument that is going to be played out before our courts.³² It is promoted within the framework of calling for decriminalization of prostitution, removing it from the Criminal Code, and putting some form of regulation in place. In my view, it is dangerous to call for a regime of decriminalization given the other failed experiences.

The SSLR report and many witness spoke to more than the just the ill-effects of prostitution when they underscored the need for social reform. This is indicative of my opening observations that prostitution intersects with multiple other issues. As attested to by many witnesses, it is a combination of intersecting factors that create the conditions

³⁰ Characterizing Canada’s ‘solicitation laws’ as ‘criminalization’ is erroneous and misleading. At best, Canada’s regime is quasi-criminal or quasi-legal. Referring to it as criminalized suggests that criminalization has failed, whereas, in fact, it has not been tried.

³¹ See e.g. Professor Deborah Brock, Department of Sociology, York University, SSLR meeting February 9, 2005, at 1815 hours.

³² See Introduction note 12.

that bring women and children into the prostitution industry. The proposals for social and economic reform focus on interests of women as a whole. Many individuals and organizations continue to strategize on how to reconstruct our legal and social frameworks to ensure that the conditions responsible for the desperate poverty, social inequality and sexual exploitation are eliminated. The answers lie in positive reforms that will remove “the barriers to women being able to achieve their integrity and their dreams ...”³³

³³ Kate Quinn, SSLR meeting May 30, 2005. For the full quotation see Chapter 2 at 31.

APPENDIX A

Criminal Code of Canada (R.S. 1985, c. C-46)

Part Vii

Disorderly Houses, Gaming And Betting

Interpretation

Definitions

197. (1) In this Part,
common bawdy-house
"common bawdy-house" means a place that is
(a) kept or occupied, or
(b) resorted to by one or more persons
for the purpose of prostitution or the practice of acts of indecency;

Bawdy-houses

Keeping common bawdy-house

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Landlord, inmate, etc.

(2) Every one who
(a) is an inmate of a common bawdy-house,
(b) is found, without lawful excuse, in a common bawdy-house, or
(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,
is guilty of an offence punishable on summary conviction.

Notice of conviction to be served on owner

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

Duty of landlord on notice

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

R.S., c. C-34, s. 193.

[Transporting
person to
bawdy-house](#)

211. Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.
R.S., c. C-34, s. 194.

[Procuring](#)

Procuring

212. (1) Every one who

- (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
- (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
- (c) knowingly conceals a person in a common bawdy-house,
- (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
- (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
- (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,
- (g) procures a person to enter or leave Canada, for the purpose of prostitution,
- (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,
- (i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or
- (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Idem

(2) Notwithstanding paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Aggravated
offence in
relation to
living on the
avails of
prostitution of a
person under

(2.1) Notwithstanding paragraph (1)(j) and subsection (2), every person who lives wholly or in part on the avails of prostitution of another person under the age of eighteen years, and who

- (a) for the purposes of profit, aids, abets, counsels or compels the person under that age to engage in or carry on prostitution with any person or generally, and
- (b) uses, threatens to use or attempts to use violence, intimidation or

the age of eighteen years	coercion in relation to the person under that age, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years but not less than five years.
Presumption	(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).
Offence -- prostitution of person under eighteen	(4) Every person who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. (5) [Repealed, 1999, c. 5, s. 8] R.S., 1985, c. C-46, s. 212; R.S., 1985, c. 19 (3rd Supp.), s. 9; 1997, c. 16, s. 2; 1999, c. 5, s. 8.

Offence in Relation to Prostitution

[Offence in
relation to
prostitution](#)

213. (1) Every person who in a public place or in any place open to public
view

(a) stops or attempts to stop any motor vehicle,

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or
egress from premises adjacent to that place, or

(c) stops or attempts to stop any person or in any manner communicates or
attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services
of a prostitute is guilty of an offence punishable on summary conviction.

Definition of
"public place"

(2) In this section, "public place" includes any place to which the public
have access as of right or by invitation, express or implied, and any motor
vehicle located in a public place or in any place open to public view.

R.S., 1985, c. C-46, s. 213; R.S., 1985, c. 51 (1st Supp.), s. 1.

APPENDIX B

Recommendations of the Subcommittee on Solicitation Laws

RECOMMENDATION 1

The Subcommittee recommends that the Government of Canada ensure that the commercial sexual exploitation of minors (under 18 years of age) remains a serious crime subject to severe penalties and that law enforcement authorities be provided with sufficient resources and training to ensure the full punishment under the law of those who use and sexually exploit children and youth through prostitution.

RECOMMENDATION 2

The Subcommittee recommends that the Government of Canada ensure that the problem of trafficking in persons remains a priority so that victims are provided with adequate assistance and services, while traffickers are brought to justice.

RECOMMENDATION 3

The Subcommittee recommends that the Government of Canada 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.

RECOMMENDATION 4

The Subcommittee recommends that the Government of Canada establish and develop education campaigns and programs to prevent people from entering prostitution because of lack of choice or coercion, and to raise the awareness of young people, children, and society to the risks of being coerced into prostitution. The government must also work with other levels of government, institutions, and non-governmental organizations to develop exit strategies to assist those involved in prostitution who wish to leave in regaining control of their lives.

RECOMMENDATION 5

The Subcommittee recommends that the Government of Canada fund research on prostitution to obtain a clearer picture of prostitution activities in the country, the associated problems, and the needs of people involved in those activities. The Subcommittee believes that a better understanding of the causes and impacts of prostitution is essential to the implementation of policies and programs that will have a positive impact on the lives of individuals engaged in prostitution and communities in general.

RECOMMENDATION 6

The Subcommittee recommends that the Department of Justice coordinate research on prostitution on a priority basis with other levels of government, institutions, and non-governmental organizations, as well as persons selling sexual services. This research should include an examination of best practices adopted in Canada and abroad.

RECOMMENDATION 7

The majority of the Subcommittee calls for concrete efforts to 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, 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.

APPENDIX C

Recommendations of the Fraser Committee

Recommendation 50: The government of Canada in conjunction with the governments of the provinces and territories should strengthen both their moral and financial commitment to removing the economic and social inequalities between men and women and discrimination on the basis of sexual preference.

Recommendation 51: The government of Canada in conjunction with the governments of the provinces and territories should ensure that there are adequate social programs to assist women and young people in need.

Recommendation 52: The government of Canada, in co-operation with the provinces and territories, should provide financial support for both research into and the implementation of sensitive and relevant educational programs on human sexuality for use in the country's schools; in particular the governments should jointly fund a National Centre and Program in Sexuality and life Education to bring together the leading scholars and clinicians in the field to conduct research and formulate program and pedagogical models.

Recommendation 53: The government of Canada in conjunction with the governments of the provinces and territories should undertake the direct funding or indirect financial support of community groups involved in the care and welfare of both practicing and reformed prostitutes, so that adequate social, health, employment, educational and counselling services are available to them

Recommendation 54: The government of Canada in co-operation with the provinces and territories should commission further research on prostitution as a means of informing attempts to address it as a social phenomenon, and to deal effectively with its adverse impact on those who are or who have been involved.

Recommendation 55: The prostitution related activities of both prostitutes and customers should be removed from the Criminal Code, except in so far as they contravene non-prostitution related Code provisions, and do not create a definable nuisance or nuisances.

Recommendation 56: In the Criminal Code provisions dealing with exploitative conduct other than running a prostitution establishment [terminology adopted to replace 'bawdy house'], the concern of the criminal law should be confined to conduct which is violent or which threatens force; special police details or units should be established, and adequately funded, where required, to investigate and prosecute violent and abusive procurers and pimps; any prostitution business

which operates without contravening the Criminal Code should be subject to municipal regulation.

Recommendation 57: The criminal law relating to prostitution establishments should be drawn so as not to thwart the attempts of small numbers of prostitutes to organize their activities out of a place of residence, and so as not to prevent provinces from permitting and regulating small scale, non-residential commercial prostitution establishments employing adult prostitutes.

Following the direction of Recommendations 55 through 57, the Committee provided draft legislation regarding

- soliciting and street prostitution (*Recommendation 58*),
- procuring (*Recommendation 59*),
- financial support from prostitution including enticing juveniles (*Recommendation 60*) and
- bawdy house offences (*Recommendation 61*).

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