

# Canadian Sex Work Policy for the 21<sup>st</sup> Century: Enhancing Rights and Safety, Lessons from Australia

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## Abstract

*This paper reviews the current problematic state of public policy addressed to the sex trade in Canada. It explores the recent parliamentary inquiry into the sex trade and suggests that the Canadian polity needs to set in train a clear program for reform in this area. A particular priority of these reforms should be to enhance the safety and rights of sex workers. At present the Canadian polity is mired in philosophic, moral and political divisions over the acceptability of sex work and this is limiting the search for practical ways of addressing urgent social problems. We argue that this search needs to be wide and continuing and that some practical 'lessons' can be learned from Australia where prostitution law reform has been in place for a considerable period of time.*

## Introduction

The past several years have seen renewed pressure to re-visit Canada's laws on sex work. This has been fuelled by a number of inter-related concerns - the murder and disappearance of sex workers in various parts of the country, new concerns about migrant sex work and/or sex trafficking, and the ongoing frustration of municipal governments and residents about the 'unworkability' of current laws. Between 2003 and 2006, the Canadian parliament undertook an extensive inquiry into these and other issues related to the sex trade. The committee visited Ottawa, Toronto, Montreal, Halifax, Vancouver, Edmonton and Winnipeg, and heard from approximately three hundred witnesses. Their report, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* was released in December 2006. To say the least, it was a disappointment. Its recommendations were minimal and, despite being the fourth official inquiry into sex trade law and policy since the 1980s, it provided little in the way of new leadership. So in the face of some urgent social problems – particularly the lack of safety and rights for sex workers – no way forward has been mapped.

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This paper reviews the current problematic state of public policy addressed to the sex trade in Canada. It explores the background of the recent parliamentary inquiry, offers a brief critique of the report and suggests that the Canadian polity needs to set in place a clear program for law and policy reform in relation to the sex trade. We argue that reform is particularly needed to enhance the safety and rights of sex workers. At present the Canadian polity is mired in philosophic, moral and political divisions over the acceptability of sex work and these are limiting the search for practical ways of addressing urgent social problems. We argue that this search needs to be wide and continuing and that some practical lessons can be learned from other national arenas – particularly Australia - where a wide range of different reform strategies have been in place for some time.

### **Prostitution Law and Policy in Canada**

Canada's legal treatment of the sex trade is laid out in the Federal Criminal Code, sections 210 through 213. While prostitution is not technically illegal, it is nearly impossible to carry out any activity associated with the trade without being in breach of the law. So there are sanctions on owning, managing or being found in a 'bawdy house' (any place habitually used for prostitution), procuring a person to work in the trade and 'living on the avails' of prostitution (pimping). In 1985, street level solicitation for the purposes of prostitution was further criminalized via a proscription on "communicating for the purpose of prostitution" (S.213).

The street trade is the most frequent target for law enforcement officials and has been the subject of much policy angst over the last two decades. However, the indoor trade is in effect tolerated in many areas of the country; a number of municipalities regulate "dating", "escort" or "massage" businesses on the grounds that these businesses do not actually involve sexual services (Lowman 2005a; Lowman 2005b; Bruckert et al, 2003; Lewis and Maticka-Tyndale, 2000). Thus, in reality, Canada has a "two-tiered" system for managing the sex trade (Lowman 2005a) - it is criminalized *and* tolerated/regulated.

Despite this, there has been little government interest in resolving this policy contradiction. The result has been the worst of both worlds: the criminalization of the street trade has contributed to increased difficulties, most notably a very high risk of violence for people who work in the street trade, and has failed to either reduce the number of people working on the street or to resolve the complaints of residents (except by moving the trade from one neighbourhood to another). For many sex workers, working indoors is preferable to the street because of greater safety and anonymity and it has been estimated that over 80% of the sex trade actually takes place indoors (Shaver 1993: 157). Indoor prostitution generates much less public complaint than street work and it is therefore mostly left alone by police forces (unless sudden public or political opposition or suspicion of other criminal activities such as drug trafficking or sex trafficking generates a raid). While the quasi regulation and unofficial toleration of the indoor sex trade has given workers some space to operate it has also left them without any protections as workers. Sex workers who work in indoor locations often complain that they have little ability to control their conditions of work or rates of pay (see Jeffrey and MacDonald, 2006). Workers also have no official channels for demanding workplace rights and cannot address key issues related to health and safety (Bruckert et al, 2003: 30-31). Studies have shown that the failure to address working conditions in indoor locations is one of the reasons why some workers continue to ply their trade

on the street despite the increased physical dangers here (Jeffrey and MacDonald, 2006; Benoit and Millar, 2001).

Although it is only a small part of the sex trade, street-based sex work has been the focus of most police enforcement and policy debate over a long period. When a 1978 Supreme Court ruling limited the ability of police to arrest sex workers for solicitation, complaints from residents, city officials and police about the growing nuisance of street level prostitution led the government to appoint a committee (the Fraser committee) to investigate the sex trade and recommend appropriate legal responses. While those concerned about the public nuisance posed by street-based sex work argued for increased police powers and harsher penalties, feminist groups, sex workers and civil libertarians focussed more on the need to address gender inequalities and to avoid moral regulation by the state.

The Fraser Committee report responded to both these sets of concerns by recommending a partial decriminalization of sex work; street work was to remain illegal but one or two workers were to be permitted to work together indoors (Canada, Special Committee, 1985: 545-553). However, just weeks before the Fraser Committee released its final report, the new Conservative government introduced legislation that criminalized both clients and sex workers who engaged in “communicating for the purpose of prostitution”. The government argued that this new law would address street level problems by giving police greater powers and would also address gender inequality by allowing for the arrest of clients as well as sex workers.

It was soon apparent that the new communications law was having little effect on the ‘nuisance’ associated with street-level prostitution and that it was not being applied equally to women and men (Shaver, 1993; Cler-Cunningham and Christensen, 2001; PIVOT, 2004). Police and municipalities continued to complain that they had insufficient tools for dealing with the sex trade and police ‘sweeps’ in response to complaints from residents merely pushed the trade into other neighbourhoods. The new law was also clearly doing little to protect sex workers from violence and exploitation as the rates of violence against sex workers began to rise after the introduction of the anti-communications law (Canada, 1990: 42:19; Lowman and Fraser, 1995; Fleischman 1996). While the federal government hesitated to change its approach for fear of appearing to endorse prostitution, provinces and municipalities experimented with various measures. In addition to the attempts to regulate massage parlours and escort agencies discussed above, some provinces and municipalities have introduced a range of “anti-client” legislation (for example, using the Motor Vehicles Act to impound vehicles or establishing john-schools as alternative forms of sentencing for convicted clients) although the legality and effectiveness of these are doubtful (van Brunschot, 2003; Wortley et al, 2002). It is also clear that anti-client legislation does not address violence against sex workers and may indeed make the situation worse – for example, by rendering the trade more secretive, by chasing away well-behaved clients and by compounding the stigma associated with the trade.

### **Moral quandary or practical problem?**

It was the issue of violence against sex workers – particularly the murders of street-based women in Vancouver - that pushed prostitution back onto the policy agenda in the early 2000s. In 2002 Robert Pickton was arrested and charged with the murder of 26 of the 63 sex workers

'missing' from Vancouver's Downtown Eastside. The MP for Vancouver East, Libby Davies, had repeatedly raised the issue of the lack of investigation into the missing women in Vancouver and asked for a public inquiry into the failure of law enforcement to tackle this issue head on (*Hill Times*, 14 Oct 2002). With the heightened media attention brought on by Pickton's arrest, Davies brought forward a motion in the House of Commons in November 2002 asking that "a special committee of the House be appointed 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 and violence against sex-trade workers" (Canada, 2002). A committee was indeed struck in 2003, and despite changes in government, it was reconstituted and its report was issued just weeks before Pickton's trial finally began.

The report made only six unanimous recommendations. These were that commercial sexual exploitation of minors (children and youth) "remains a serious crime"; that trafficking "remains a priority"; that the Government of Canada recognizes "the status quo with respect to Canada's laws dealing with prostitution is unacceptable, and that the laws that exist are unequally applied"; that programs be developed to prevent people from entering prostitution and to assist exit from prostitution; that more research on prostitution be funded - and co-ordinated - by the Canadian government and this "should include an examination of best practices adopted in Canada and abroad" (Canada, 2006: 85-88).

So the first two recommendations were simply to maintain the status quo. While the other three measures address important concerns, it is shameful there was no unanimous agreement on measures specifically designed to improve the safety and rights of sex workers (except in insofar as they were prevented from entering and assisted from exiting the sex trade). The final recommendation of the Report did engage, in a very general way, with safety issues but it was not supported by the governing Conservative party. The Liberals, NDP and Bloc Quebecois called 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 (Canada 2006:89).

Thus even the opposition failed to push for reforms beyond very tepid "support and prevention" measures.

Part of the problem is that the discussion of 'models for reform' in Canada began by dividing the debate into "two broad conflicting perspectives...concerning the basic nature of prostitution". This was said to be necessary because "All of the important prostitution reform initiatives that have taken place around the globe can be traced back to one or the other of these competing philosophical views". Any Canadian proposals for law reform "will necessarily have to choose between these views, and from that, derive a legal and social model tailored to the needs of our society" (Canada 2006:71). The only two options available suggest:

- That prostitution is a form of violence against women, "a form of exploitation in and of itself" or,

- That prostitution among consenting adults can be seen as a form of work

Consequently, there are only two possibilities for law reform. Either Canada needs to adopt the 'Swedish Model' (prohibiting the purchase but not the sale of sexual services) or one that involves 'Taking Consensual Adult Prostitution Out of the Criminal Context' (decriminalization and/or legalization of prostitution) (Canada, 2006: 71).

Now the discussion of philosophic approaches to prostitution is certainly widespread in the literature but it is not at all clear that the debate can be so neatly divided into these two philosophic perspectives.<sup>1</sup> As we demonstrate in the next section of this paper, it is also patently false to claim that only two sorts of reform initiatives have been tried elsewhere in the world. In terms of leadership, the report certainly failed to offer any new leadership and may indeed have activated implacable moral interests in a way that makes policy change almost impossible (see also Canadian HIV/AIDS Legal Network 2007).

## **The Australian Situation**

In Australia there has been significant law and policy reform addressed to the sex trade over the last three decades. This experience has already had an impact in other national arenas, most notably in the neighbouring country of New Zealand where a decriminalisation<sup>2</sup> of prostitution was implemented in mid- 2003. Some early research on the effects of this change in New Zealand has recently been published (New Zealand Government 2008)<sup>3</sup>. However, Australian reform strategies continue to be significant; they encompass a range of different approaches (with several varieties of legalisation<sup>4</sup> and decriminalization) and have been in place for much longer than the reforms in New Zealand. Australia also provides a good comparative study for Canada because of its similarity in terms of British legal heritage, its federal, Parliamentary political system and familiar political culture. While the Australian experience with prostitution law reform was acknowledged at the recent Canadian parliamentary inquiry into prostitution<sup>5</sup>, very little in the way of substantive information or evidence was presented. In what follows, we first sketch out the main legal changes in Australian law and policy addressed to the sex trade before examining some 'lessons' that might be drawn from the experience here.

In Australia, like Canada, there is a federal system of government with a constitutional division of responsibilities between national and regional levels of government. However, unlike Canada, in Australia the criminal law is a designated responsibility of the states and territories so there are eight different jurisdictions for criminal law. Until the late 1970s prostitution law in all Australian jurisdictions was similar (and similar to current Canadian prostitution laws). So, while the act of prostitution itself was not illegal, most prostitution-related activities were illegal including keeping a brothel, living on the earnings of the prostitution of another, and soliciting in a public place for the purposes of prostitution. In two jurisdictions –Tasmania and South Australia – the law still looks mostly like this.

From the late 1970s onwards, however, significant changes in the criminal law addressed to prostitution started to be put in place in parts of Australia. The reasons for these changes were complex and numerous (see B. Sullivan 1997) underlining the importance of multiple/local deployments of power.<sup>6</sup> The reforms that were implemented certainly varied a good deal

between different jurisdictions although two main strategies of reform have been utilised - *legalization* and *decriminalization*. The strategy of legalization was evident from the mid 1980s onwards as some aspects of the sex trade (brothels or escort agencies) became legal - and regulated - in Victoria, Queensland, the Northern Territory, the Australian Capital Territory and Western Australia. However, a total ban on street based prostitution remained in force in all these jurisdictions. In Queensland and Victoria, for example, the owners and operators of brothels were subject to licensing. This involved a police review of the background, criminal history, financial resources and associates of the applicant plus payment of a substantial annual licensing fee. The location of a brothel also has to be approved by the local (municipal) council and most licensed brothels are therefore located in industrial or commercial zones. Individual sex workers are not subject to licensing (unless they also operate a brothel<sup>7</sup>) although they do have to undertake regular sexual health examinations and both workers and clients are required by law to use prophylactics (condoms) during commercial sex transactions.

A different approach – involving a gradual (and only partial) *decriminalization* of prostitution - has been implemented in New South Wales (NSW). Public soliciting for the purposes of prostitution was removed from the criminal law in NSW in 1979 and, although some restrictions were replaced in 1983, it is still not a criminal offence to solicit at a distance from residences, churches, schools and hospitals in that state.<sup>8</sup> Brothels were also decriminalized in NSW in 1995 and there is no licensing of owners or any licensing fees. Brothels do, however, have to obtain consent under planning laws from municipal councils.

We suggest that a number of ‘lessons’ can be drawn from these Australian experiences with sex trade law and policy:

- 1. Prostitution law reform initiatives in Australia have not been based on a comprehensive philosophy but on the search for rational/pragmatic solutions to concrete problems.**

As suggested above, in Canada there has been a significant focus on the search for a philosophical perspective, a wholesale ‘solution’ that will address all the problems and concerns seen to be associated with prostitution. In Australia, philosophical issues have not been absent or without a significant – and limiting - impact on debates about the sex trade (see Mendes 2004). However, in jurisdictions where reform has been introduced governments have tended to emphasize that making space for legal prostitution does not imply a moral approval of the trade; reform was simply a rational/practical way of addressing problems associated with the sex trade. In the 1980s, for example, public concerns arose about the spread of HIV/AIDS via prostitution. Harm reduction measures were implemented and sex worker organizations received government funding for the provision of peer outreach services to sex workers. While these programs were very successful (Harcourt, Egger and Donovan, 2005), they also had effects on the law reform process. Sex worker organizations became strong and active participants in the political process. They pointed out the negative health effects of criminalisation and lobbied for decriminalization. While a range of different laws were eventually set in place, the prevention of HIV/AIDS remained a key concern of law and policy makers and reform was represented as integral to that process. Similarly, in at least two Australian jurisdictions, the main driving force for prostitution law reform has been a concern to address organised crime and police corruption.

In both Queensland and NSW, high level official inquiries found evidence of organised crime and police corruption associated with *illegal* prostitution. Consequently, reforms were adopted that allowed for more legal prostitution – and less direct police involvement in the regulation of the sex trade - in order to prevent racketeering and corruption.

It is notable in the Australian context that protecting the safety and rights of sex workers has not been a *primary* concern of law and policy makers<sup>9</sup>. However, concerns about the safety and (less often) rights of sex workers have made an appearance in reform agendas. In Queensland, for example, the “guiding principles” of the 1999 laws that legalized brothels included “ensuring quality of life for local communities”, to “safeguard against corruption and organised crime”, “ensure a healthy society” and (finally) “promote safety”. Sex workers and their advocates have been able to draw on this last principle to ensure at least some official focus on the safety of sex workers in ongoing debates about governing prostitution.

## **2. Prostitution law reform in Australia has not led to some of the problems anticipated in the Canadian context – for example an increase in trafficking or child prostitution**

A particular set of claims about the consequences of prostitution law reform – derived from radical feminist ideology – were regularly repeated by witnesses at the Canadian inquiry. These claims included that legalising or decriminalizing the sex trade would lead to more trafficking, more child prostitution and an overall expansion of the sex industry. However, there is no evidence that any of these scenarios have appeared in Australia in the wake of policy reform.

Mary Sullivan (2007, 139) has recently published a radical feminist analysis of the situation in Victoria and she argues that legalization in that state has created a “massive expansion of prostitution”. But the ‘evidence’ she uses to support this claim is drawn from a set of independent business publications<sup>10</sup> that provide no sources or research-based references and no information about how their figures were actually obtained. As the publication also contains some glaring inaccuracies in its description of the sex trade it cannot be regarded as a reliable source. Other publications have used unsubstantiated assertions (see CATWA, 2005), newspaper commentary (see Mary Sullivan and Sheila Jeffreys, 2002) or cited increases in criminal prosecutions and/or the number of legal brothels as ‘evidence’ of an ‘expansion’ of the sex trade.<sup>11</sup>

In relation to trafficking Mary Sullivan (2007, 219-27) argues that the reforms in Victoria have created a “growing market for sex trafficking victims” - as legalization fuels men’s “demand” - and that there is a “connection” between the incidence of trafficking and the “tolerance” of prostitution in domestic policy which has exacerbated the problem of dealing with trafficking. But the whole field of trafficking research suffers from a number of now well-known problems including widely varying definitions of trafficking and the conflation of (forced) trafficking with sex work (B. Sullivan 2003). Di Nicola (2007:49) has recently argued that much trafficking research is “weak”, the data collected (even for official statistics) is of dubious quality and “based more on emotions, political or dogmatic bias than on strong and substantiated research work.” Mary Sullivan certainly presents no substantive evidence to support her claims of a link between legal prostitution and trafficking. Moreover, in the Australian context, there is good evidence which tends to call her claims into question. While there are certainly migrant sex workers

working in Australia this is not a new phenomenon (Frances, 2004) and most are not trafficking victims who have been coerced or duped into sex work (Scarlet Alliance, 2008; Brockett and Murray, 1994). In Queensland, the Crime and Misconduct Commission (CMC) (2004: 47) found no evidence of sex trafficking in legal brothels. In NSW, Pell et al (2006: 152) reviewed the situation of migrant Asian sex workers between 1993 and 2003 and found that *fewer* were debt bonded in 2003 than in 1993. The Global Alliance Against Trafficking in Women has recently published a report on wide-ranging research undertaken in eight countries. In Australia they found:

Trafficking numbers are low primarily due to the geographical isolation of the country, combined with very strict immigration and border control. There are legal channels for migration into the sex industry<sup>12</sup>, which reduced the need for migrants to depend on organized crime syndicates or traffickers (Global Alliance, 2007).

The United Nations Office on Drugs and Crime has described Australia as having a 'high' incidence of reporting as a destination country for trafficking victims (UNODC 2006: 20). But Canada is also 'high' and the United States (with a fully criminalized approach to prostitution) is listed in the 'very high' category. So it is not at all clear how domestic prostitution laws relate to trafficking flows. In terms of combating the exploitation of migrant sex workers, research in NSW and Queensland suggests that peer based sex worker organizations may offer the best avenue for reaching women who have been trafficked into the sex trade or who are debt bonded (Meaker, 2002; Brockett and Murray, 1994).<sup>13</sup>

### **3. The safety and rights of sex workers can be protected via law and policy reform even when this reform process is quite limited.**

As suggested above, there are many different legal and policy mechanisms in place around Australia for dealing with the sex trade. There is no jurisdiction where the safety and rights of sex workers has been the main priority in a reform process or where there are no current problems for sex workers (see below). However, it is also apparent that even very limited reform processes can open new possibilities for protecting the safety and rights of sex workers. There are clear benefits that flow to workers from the availability of more legal prostitution the most obvious of which is having the right to work without the fear of legal penalties. It is no small thing for sex workers to be less vulnerable to arrest, prosecution, fines, and imprisonment, to not have to be concerned about the life long impact of a criminal record or the removal of their children in the wake of criminal proceedings. As sex workers themselves have pointed out (SWOP, undated), the criminalization of prostitution leads to a 'costly legal merry-go-round' for many sex workers; they are arrested and fined but are unable to pay these fines without returning to sex work. So criminalization really ramps up the consequences for women engaged in sex work and this makes them more vulnerable to coercion by third parties. It is perhaps not surprising then, that Australian research suggests pimp-controlled prostitution may be less common in NSW (see Harcourt et al, 2001 18-19).

The availability in Australia of legal *indoor* work – particularly in brothels – significantly increases the safety of sex workers. As all the available evidence makes clear (PLA, 2004; Perkins, 1991;



Brents and Hausbeck, 2005), sex workers in brothels are much less vulnerable to violence and sexual assault because of the presence of other staff, increased possibilities for screening clients, and the provision of alarms. Where brothels are legal and subject to the normal requirements of operating a business, additional safeguards will also be in place as operators are required to pay attention to maximising the occupational health and safety of workers - for example via the provision of adequate lighting, private areas for workers, and personal protective equipment such as condoms.<sup>14</sup>

Opening the legal space for sex work in Australia has also had a positive impact on public perceptions that sex workers are entitled to the same rights as others (as human beings, citizens and workers) and on sex worker advocacy in defence of these rights. Legal sex trade workers are more likely than their counterparts in illegal businesses to take assault and sexual assault complaints to the police (PLA, 2004; 68-9). Legal sex trade workers in Australia have also demonstrated a willingness to use anti-discrimination law to protect their rights. In a recent case in the ACT, sex workers brought about changes in the (discriminatory) policy of the local newspaper which charged more for their advertisements than for those in other categories. In Queensland, where the law prohibits discrimination against a person engaged in 'lawful activity as a sex worker'<sup>15</sup>, there have also been cases where individual sex workers have successfully defended their right to equal, non-discriminatory, treatment in areas such as banking and accommodation.

#### **4. The mode of regulation matters; decriminalization is better than legalization in terms of advancing the safety and rights of sex workers**

The evidence from Australia suggests that the way the sex trade is regulated matters a great deal. In this section of the paper we demonstrate some of the drawbacks associated with legalization and some of the advantages associated with decriminalization particularly in terms of ensuring safety and protection of rights for sex workers.

Many of the problems associated with legalization are evident in the Queensland context since reforms introduced in 1999. As indicated above, the main priority of these was the elimination of organised crime from the sex trade. The Queensland Crime and Misconduct Commission has recently claimed this has been achieved – at least for licensed brothels (CMC, 2004: xii). While this development may carry some benefits for sex workers<sup>16</sup>, the costs in terms of workers' rights have been high. The main focus of the regulatory regime has been the vetting of brothel owners and managers and there would appear to be little capacity in this system for attention to some of the important workplace issues encountered by sex workers as licensed brothels have been established. While workers can complain to the Prostitution Licensing Authority (PLA), there is little evidence that the PLA is able to respond to these complaints.<sup>17</sup> This is a significant and ongoing problem as one of the legacies of working in a formerly illegal industry is that there are no established 'normal' working conditions. As most workers in the prostitution industry are young, casual and non-unionised this has meant that the regulatory regime in Queensland has handed significant power over workers to the PLA and to brothel operators. One group of sex workers in Queensland – SSPAN, the Sexual Service Providers Advocacy Network - has recently described licensed brothels as "oppressive work environments" (2006:2). They are paid as independent 'sub-contractors' rather than as 'employees' which means they do not have access

to normal employment entitlements like sick leave, recreation leave, or employer contributions to pensions. Sex workers are also responsible for paying their own tax and thus, for complying with the complex requirements of being an independent business operator. However, despite their status as 'sub contractors', owners and managers of licensed brothels impose a wide range of controls on sex workers including "the hours they can work, what they can wear to work and the prices they may charge for their services" (SSPAN, 2006: 2-3). Workers are subject to compulsory health examinations that are not reasonable<sup>18</sup> and which contribute to the stigma – and thus violence and lack of rights – experienced by many sex workers (B. Sullivan 2008; Metzenrath, 1999). Workers who refuse to see particular clients or who "commit other forms of 'misbehaviour' in the brothel owners' eyes are subject to sanctions" which include being given quiet shifts with fewer opportunities to earn money or even being removed from the roster altogether. Brothels owners will threaten dismissal if workers decide to take a shift at another licensed brothel or if they conduct (legal) private work outside the brothel (SSPAN, 2006:3). At the same time, the high cost and onerous procedure<sup>19</sup>, for becoming the licensee of a legal brothel tends to preclude workers from developing their own businesses.

The only other legal option for sex trade workers in Queensland is private work. Sex workers can work legally on their own from private premises but they cannot employ a receptionist or driver (for escort work)<sup>20</sup> and co-operative arrangements between private workers are prohibited. Consequently, while private work is legal it is not as safe as working in a brothel. Also, private workers in Queensland presently face heavy surveillance from police and the PLA (Perkins and Lovejoy, 2007: 156). This development underlines the formation of new bureaucratic interests in the sex trade in the wake of legalization as well as new alliances between police and licensing authorities. It is notable that police and the PLA have recently supported stronger controls on private workers (See CMC, 2006: 15-17). At the same time, both SSPAN (2006) and Scarlet Alliance (2005) have questioned the wisdom of giving police such a big role in the new regulatory regime especially as much of the 'organized crime' that formerly existed in the Queensland sex industry involved police (see B. Sullivan, 1997: 154).

Since the introduction of licensed brothels, workers in the illegal sex trade in Queensland have also seen a significant decline in their situation particularly as the penalties for working in an unlicensed brothel and for public soliciting have dramatically increased. When the licensing of brothels was proposed by the government, it was argued that the availability of legal indoor work would encourage women to leave the street and illegal establishments. In fact, however, licensed brothels offer only a small amount of employment in the sex trade. The cost and difficulties associated with developing a legal brothel in Queensland has led to only a small number being established. Moreover, licensees have tended to employ only 'marketable' women leaving many other sex trade workers (women who are less 'marketable', men, transgender people, workers with drug addictions) without the possibility of jobs in licensed brothels. For street workers in Queensland the situation is particularly dire – with violence and the reluctance to report violence a continuing problem. A report recently commissioned by the PLA has indicated that conditions for street based sex workers may have deteriorated in the aftermath of legalization particularly as police have intensified their efforts in relation to the street trade (Woodward et al, 2004: 55). Problems faced by all sex workers in Queensland are compounded by the fact that they have no direct voice in the regulatory regime. Under the 1999 Act, a Prostitution Advisory Council was established that included a representative of sex workers. However, this was formally dissolved in 2003 and many of its functions were transferred to the PLA. There is no sex worker representative on the board of the PLA.

As indicated above, a very different regime for controlling the sex trade as been instituted in NSW where brothels and some street based sex work has been decriminalized. The evidence in NSW is that decriminalization has advantages for sex workers particularly in terms of improving safety and protecting rights. This includes street based workers. All the international, Canadian and Australian evidence (Perkins, 1991; Perkins and Lovejoy, 2007; Harcourt and Donovan, 2005; Jeffrey and MacDonald, 2006; PIVOT, 2004; McKeegan and Bernard, 1996) points to street based sex workers as the most vulnerable to violence. In NSW, however, some real new possibilities have opened for street-based sex workers. In the first place, they are less likely to sustain the criminal fines that tend to drive them back into street work (B. Sullivan, 1999; Egger and Harcourt, 2004). Also, some new avenues for safer street work have emerged. For example, street workers can legally solicit for clients and then take them to the local 'safe house brothel'. Two of these currently operate in East Sydney in areas adjacent to where street-based work is occurring and close to both health services and safe injecting premises. The safe house brothels are privately owned premises and do not receive any public funding. They operate legally (that is, with Council consent) in houses in a mixed residential and commercial precinct. Each safe house brothel has 4 to 5 rooms available for short term rental by street-based workers. The rental is cheap (\$15 per half hour) and clients pay the management directly. The rooms have a bed, fresh linen, a waste can, lighting and a monitored intercom. There is a single entrance to the brothel controlled by the manager. There are also separate staff areas where workers can securely keep their belongings, shower, prepare food, talk to each other, and access notice boards with health and other information; outreach visits are made by a number of local health and welfare organizations. Like other legal brothels in NSW, the owners are required to provide safe sex equipment to workers.

A number of researchers (NSW Health, 2000: 20) and service providers have confirmed the efficacy of safe house brothels in terms of increased health and safety for street workers.<sup>21</sup> There are several reasons why safe house brothels are not widespread in NSW (most notably, opposition by local councils and residents; safe house brothels also require dedicated staff and are not highly lucrative businesses). However, the two operating in East Sydney point to the real possibilities of what can be achieved in a decriminalized system particularly in terms of improving the safety of street workers.

There is also evidence in the NSW context that decriminalization makes it more possible for sex workers, including street workers, to protect their rights. A recent article by Rachel Wotton (2005) is suggestive in this regard. Wotton was an outreach worker with a sex worker organization in Sydney. She describes a project undertaken with street based sex workers in a suburban area with 'escalating' problems. The workers complained of police discrimination, contempt for workers and not responding to complaints of crimes. Workers were being arrested for soliciting although they were not soliciting illegally under NSW law (see also Edwards, 1999). Wotton says:

The police were predominantly arresting the women and not the clients. If clients were arrested they were given on the spot fines or a summons to go to a court while the women were taken to the police station and kept there for up to four hours (Wotton, 2005)

The workers were also often given unreasonably stringent bail conditions and many of them pleaded guilty just to get rid of these.

A pro bono lawyer was introduced and workers were encouraged to contest soliciting charges. One worker who was charged with soliciting 'within view' of a church (even though the religious group involved had moved away from the premises a month before) agreed to contest the charges. The sex worker was granted bail but taken into custody again the next morning when she was seen having breakfast in the bail condition area. With the solicitor's help, and after four days in jail, the worker was eventually released and the charges were pursued into a higher court. Police then withdrew the charges. No more workers have since been charged with soliciting in this area. In the aftermath of the failed prosecution, workers obtained a commitment that police would "take a more objective approach to policing of this area" and "remain courteous and polite to the women just like they would with any other citizen" (Wotton, 2005). Police also agreed to undertake specific training and to produce a pamphlet which all police could use that described the law in this area and mapped the legal working area. Wotton says:

Discussion has also taken place around the idea of identifying specific locations in this industrial area for workers and their clients to park, in order to do the jobs without causing any disturbance or offence for the surrounding community (Wotton, 2005).

We think this story demonstrates how even in a regime that is only partially decriminalized (as in NSW), sex workers and their advocates can act to protect the rights of even the most vulnerable workers in the sex trade.<sup>22</sup>

In relation to indoor prostitution, a diverse range of sex working environments have been established in NSW in the wake of decriminalization. Ideally, this diversity would be sufficient to allow sex workers to choose between working in larger brothels (with the option of being either an employee or sub-contractor), in smaller businesses, establishing their own brothels or escort agencies (including co-operatives), or working privately. The availability of different working environments would then allow workers to optimise their situation and thus to both maximise their safety and protect their rights. However, the situation is far from ideal in NSW. To operate legally, brothels have to conform to local council planning laws (and this includes private workers and home-based businesses). Councils may designate certain areas where brothels are permitted and ban them from other areas (for example, residential zones) although they cannot adopt a blanket prohibition. Council guidelines also designate the conditions under which an approved sex industry premise can operate and set standards on a range of other issues including the provision of safe sex equipment and amenities for workers. Some local councils have led the way in terms of establishing clear policies on brothels and guidelines for safe and healthy working conditions (see for example, City of Sydney, 2008). However, many councils in NSW have been reluctant to develop these (or have gone no further than restricting brothels to industrial zones) and have increased their efforts to close down brothels operating without council consent.<sup>23</sup> In June 2007 the NSW government passed legislation that significantly enabled local councils to close brothels operating without council consent (see Scarlet Alliance, 2007). While this was a popular move, it represented a step away from the decriminalization framework (by treating sex businesses differently from other businesses). For sex workers, one effect of local council activities has been a restriction of their employment options; as Red and Saul (2003) so cogently argue, sex workers have been forced out of home-based businesses and into larger brothels.<sup>24</sup> It is notable that clear evidence of the corruption of council officers responsible for planning decisions involving sex businesses has also appeared in recent years (ABC, 2007).

Decriminalization has, however, enabled the development of vibrant and diverse sex worker organizations in NSW. Some of these are government funded and play a key role in protecting the safety and rights of sex workers via the provision of outreach services, training and networking. Many are also involved in political advocacy and a few have been able to achieve a real presence in national and local debates about the regulation of the sex industry.<sup>25</sup> The development of advocacy groups, working to support the safety and rights of sex workers, is an important indicator of the positive impact that decriminalization can have.

## **Conclusion**

Clearly, the Australian experience indicates reform does not require a massive sea change in public opinion over morality issues or the selection of a philosophical position; law reform can begin from much more limited practical concerns. Moreover, even limited changes in policy can improve the situation of sex workers and may be used to develop new approaches that positively protect their safety and rights. The Australian experience indicates that the mode of regulation is important in any reform process; legalization has some inherent problems and decriminalization produces clear benefits particularly in terms of protecting the safety and rights of sex workers. At present, the Canadian system does not work well at all in this regard and a more pragmatic approach that provided even the beginnings of “legal spaces” for sex workers would be a leap forward for Canada. Future research that investigates why a country as similar to Canada as Australia managed to change its laws, at least in a number of states, while Canada remains resistant to such legal reforms, could give us important insights into how such change might be effected.<sup>26</sup>

Perhaps most importantly however, the Australian experience shows us that support for sex worker organization and empowerment is absolutely key to creating a just system. Where a policy system maximizes this ability, as it did more effectively in NSW than in Queensland, it also maximizes sex workers’ safety and rights.<sup>27</sup> Even in a decriminalized system, sex workers, like other workers, continue to face workplace challenges and it is their ability to organize and effectively participate in and challenge policies and practices that creates the possibility for justice within the system. This is a particularly important lesson to learn in the face of new policy challenges, such as concerns over trafficking and child prostitution, that lend themselves to more top-down, restrictive and controlling sex-trade policies in the name of “protecting” women. It is clear from the lessons presented here that if Canada is to reduce the harm faced by sex workers, it needs to move away from unproductive moral debates, and away from concerns to “protect” and “control,” and instead focus on whether particular policy decisions empower sex workers to both participate in and challenge policy and practice. Only then can injustices against sex workers be effectively prevented and challenged in any policy system.

## Endnotes

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- <sup>1</sup> Some conservatives and religious adherents, for example, would argue that neither of these approaches capture the moral danger (for men, women, families, communities and nations) that they perceive in prostitution. So conceptualising prostitution as either a form of violence against women or as work would not adequately represent some important viewpoints including in the Canadian context. Even some feminists – who might find the classification advocated in the report more familiar – would suggest ‘consensual adult prostitution’ can be work *and* exploitation (B. Sullivan, 2004b).
- <sup>2</sup> *Decriminalization* involves the removal of criminal penalties for prostitution; this does not mean the sex trade is completely uncontrolled as, under decriminalization, prostitution is still subject to the same regulatory requirements as other occupations and businesses (for example in relation to occupational health and safety, municipal planning etc).
- <sup>3</sup> Decriminalization in New Zealand appears to have enhanced sex workers’ sense of well-being, increased willingness to report violence and somewhat improved conditions. At the same time it has not led to an increase in numbers or to trafficking (See New Zealand Government, 2008; Abel et al 2007). The New Zealand case reflects a number of the lessons presented here – in particular, close involvement in policy making by sex workers themselves resulted in a law that has enabled sex workers to effectively challenge laws and practices that infringe on their rights (See Jeffrey and B. Sullivan, 2007).
- <sup>4</sup> *Legalization* involves new laws being putting in place that are specifically designed to mark out and manage ‘legal’ prostitution (for example, brothels) usually via the implementation of a licensing scheme (see Crofts and Summerfield 2006). Under a legalization regime, significant criminal penalties will usually remain in place for other/’illegal’ prostitution practices (for example, public soliciting).
- <sup>5</sup> Several of those who gave verbal evidence to the Canadian inquiry raised the Australian experience with prostitution law reform.
- <sup>6</sup> These include the attitudes and activities of feminist movements; in Australia many feminists supported prostitution law reform from the 1970s onwards – see B. Sullivan 2004a. Other important local factors included: the strength of trade union politics and campaigns for civil liberties; local concerns about controlling organised crime and police corruption; local applications of neo-liberal policies designed to rationalise the sex industry (See B. Sullivan 1997).
- <sup>7</sup> It is notable here that the definition of what constitutes a ‘brothel’ varies considerably between different jurisdictions. In Victoria, one sex worker operating alone from her own premises is regarded as operating a brothel (and she must therefore be licensed to operate legally). In Queensland a single sex worker, operating alone from her own premises, is not regarded in law as operating a brothel (so she does not need to be licensed).
- <sup>8</sup> However, public acts of sex (including in a vehicle) are illegal. Street sex workers may also be fined for loitering under council by-laws and are subject to police directions that they ‘move on’ (Bligh and Asaiah, 2001).
- <sup>9</sup> An exception here is the decriminalization in NSW in 1979 of public soliciting for the purposes of prostitution which was clearly a measure designed to restore civil rights to sex workers. It enabled sex workers to have the same rights to the use of public places as other citizens (See B. Sullivan 2004a).
- <sup>10</sup> Publications by IBISWorld Business Information Pty Ltd – including *Sexual Services in Australia* (May 2006).
- <sup>11</sup> Of course, increased prosecutions represent increased policing rather than real changes in the size of the sex trade. Similarly, in licensing regimes like Queensland and Victoria, increases in the number of legal brothels indicates increased applications and/or regulatory activity and may bear no relation to changes in the size of the industry.
- <sup>12</sup> The legal channels referred to here include student visas which permit holders to work legally (including in the legal sex industry) for up to 20 hours a week.

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- <sup>13</sup> In relation to child prostitution, Mary Sullivan argues that “two decades of legalized prostitution (in Victoria) have not eliminated the child prostitution trade” (2007: 225). This is true in the same way that laws against murder have not eliminated murder. While there is certainly some child prostitution in Australia, especially involving homeless youth, there is no evidence that this is any higher in jurisdictions where prostitution has been legalized (or any higher than in other countries including Canada). One of the main international non-government organizations active against child prostitution has recently found that Australia meets international standards and has taken “solid” policy and legislative steps to counter child prostitution; this has ensured increased prosecutions (ECPAT, 2006: 11-22). Although ECPAT’s report is detailed and extensive - and presents some clear criticisms of Australian policy - it makes no argument whatsoever about a link between legalized prostitution and child prostitution.
- <sup>14</sup> See for example, WorkCover NSW, 2001
- <sup>15</sup> The Queensland Anti-Discrimination Commission gives two examples of where discrimination might be illegal in this area: when a bank refuses credit when the occupation of an individual employed in legal sex work becomes known, despite a stable financial history; when a real estate agent refuses to rent an individual private accommodation when the occupation is revealed (see <http://www.adcq.qld.gov.au/Brochures07/LSA.pdf>)
- <sup>16</sup> The benefits for sex workers in ‘eliminating organised crime’ from the trade should not, however, be assumed. Sex workers report they want workplaces where they are treated well and have a sense of control over their work (Jeffrey and MacDonald, 2006). These qualities may be lacking in the highly regulated licensed brothels in Queensland. They might also be present in illegal brothels controlled by organized crime. A Canadian sex worker reported in interviews with both authors of this paper that the best place she ever worked was a massage parlour controlled by a motorbike gang.
- <sup>17</sup> In its most recent Annual Report, the PLA does not indicate the percentage of complaints it has received from workers in licensed brothels or the results of any interventions it has undertaken. Workers are instructed that they must first raise complaints with brothel owners and are referred to a general Queensland government web site for advice about industrial issues.
- <sup>18</sup> Compulsory health examinations for sex workers are ‘unreasonable’ in the Queensland context because other vulnerable workers (doctors, nurses and dentists) are not subject to similar compulsion and because sex workers right around Australia presently have a very low incidence of sexually transmitted infections (Harcourt et al, 2005).
- <sup>19</sup> See Prostitution Licensing Authority, 2007, “Establishing a Brothel”, PLA website at: <http://www.pla.qld.gov.au/licencesCertificates/brothelApplication.htm>
- <sup>20</sup> The only exception is a licensed security guard.
- <sup>21</sup> This claim is based in interviews with health providers conducted by one of the authors in 2006.
- <sup>22</sup> Ideally, of course, any decriminalization of street based prostitution should also be combined with a range of harm minimisation techniques (for example, safe house brothels, injecting rooms, police liaison officers, etc) as well as adequate funding of peer outreach and other services specifically developed for street based sex workers (for example, sexual assault counselling). One of the services street workers most need is more and better access to drug detoxification *and* rehabilitation programs. None of these services are sufficiently available at present in NSW.
- <sup>23</sup> Part of the pressure to shut down brothels operating without Council consent comes from “legal” brothels seeking to limit competition. The Adult Business Association in NSW has campaigned for the re-criminalisation of non-compliant brothels (i.e. brothels operating without Council consent) and has publicly released the locations of hundreds of allegedly non-compliant premises (Scarlet Alliance, 2007). Similarly in Queensland, licensed brothel owners have lobbied for outcall/escort services to be limited to licensed brothels (only private workers are presently allowed to provide outcall/escort services) and for the registration of private workers (Scarlet Alliance and SSPAN, 2006, 12). In decriminalized or legalized systems, politicians need to consider that part of the demand to limit the

industry comes from self-interested business concerns rather than campaigns around moral or nuisance issues.

- <sup>24</sup> Home based workers are often reluctant to apply for planning consent because of the personal disclosure involved. Smaller brothels, including home-based businesses (with one or more workers), may also be unable to conform to local planning requirements about the location of brothels and therefore, unable to acquire planning consent. In the Sydney area many businesses like this have operated for a long time, often without any complaints from neighbours.
- <sup>25</sup> This was evident in the debate in 2005 about Australia's trafficking laws as well as in the recent debate in NSW about council regulation of brothels (see Cubby, 2007).
- <sup>26</sup> A number of possibilities could be explored here: cultural differences such as Australian 'pragmatism' versus Canadian 'puritanism'; institutional differences in the structure of federalism that gives Australian states more room to manoeuvre on criminal law; differences in the character of the Canadian and Australian feminist movements, or the 'political opportunity structure' that presented itself at the different historical moments in which the two countries confronted challenges to the law.
- <sup>27</sup> Future research on the impact of the reforms in New Zealand, where sex workers' rights have been more extensively expanded, will enable us to test this thesis further.

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