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**A Fresh Approach? A Critique of the Criminal Law Revision
Committee's Working Paper on Offences Relating to
Prostitution and Allied Offences. [1]**

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It is only fair to begin this critique by setting out the perspective from which it is written. The author's membership of P.R.O.S. — Programme for Reform of the Law on Soliciting — with its primary aim of the abolition of imprisonment for offences of soliciting and loitering for the purposes of prostitution, and her research into prostitutes' working conditions,[2] have led her to the following conclusions argued in detail elsewhere:[3]

Heterosexual prostitution is a sad reflection on our society. Its roots lie in women and men's social relations. Women are mainly attracted to working as prostitutes because of the better earnings it offers compared to those commonly available to them from other sources. Part-time or casual prostitution which represents the way in which many women work as prostitutes is also seen by them as compatible with domestic and childcare responsibilities. These are still generally viewed as primarily women's concern. Once engaged in prostitution, women may be able to exert some control over their working conditions but in the main men control their work through their purchasing power as customers, the greater capital at their disposal to be entrepreneurs such as "bent" sauna owners and through the institution of pouncing resting on violence, the idea that women "need" men and on the acceptability of men's expropriation of the cash value of women's work. While working as prostitutes, women are also at risk of physical violence from their male customers, mirroring women's more general vulnerability to male violence.

The circumstances in which men go to prostitutes both reflect men's dominant position in society and the way in which their sexuality and emotions are cramped and distorted by existing social conditions. Men turn to prostitutes in vastly greater numbers than women do. This is on the basis that it is right or natural that the satisfaction of men's sexual urges should take pride of place, that men have the money to spend on themselves in this way and that it is appropriate to obtain women's sexual services in return for the outlay of money or goods. On the other hand, the majority of prostitutes' clients are married men who are going to prostitutes usually in conditions of secrecy, because they see marriage as failing to meet their sexual and emotional needs but want to cling to the various forms of security it provides. Meanwhile a substantial number of prostitutes' clients

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are seeking escape from conventional “macho” forms of sexual expression, wanting instead more passive or feminine forms of sexual experience.

If the roots of prostitution lie in these conditions it is unlikely that it will fade away until they change. The tag that prostitution “is the oldest profession”, overlies the fact that prostitution is so enduring because such conditions are. Indeed the history of attempts at eradication, suppression and control of the volume of prostitution by licensing indicate that at most prostitution can be driven underground and that the determination of its scale is beyond the reach of the law.[4] This standpoint leads the author to the view that prostitution should be decriminalised and that meanwhile one should attempt to address the problem that the criminal law itself in relation to prostitution can be a source of injustice. While measuring the proposals of the Criminal Law Revision Committee against these criteria, it is important to address the specifics of what is discussed. The most feasible outcome of the Committee’s deliberations is that either certain of their proposals will be incorporated in subsequent legislation or will be disregarded.

Controlling Women

The Criminal Law Revision Committee (henceforward the Committee) addresses both the issue of poncing i.e. others living on the earnings of prostitution and the issue of pimping — arranging a contract for prostitution. In relation to poncing, it correctly identifies some of the most troublesome elements of the problem.[5] Poncing can involve duress, coercion, blackmail and violence, which irrespective of their connection with prostitution are reprehensible and may rightly be viewed as of concern to the criminal law. Alternatively while “living off immoral earnings” can attract substantial penalties of imprisonment, it may represent an agreement or informal activity freely undertaken by a prostitute whereby she puts some of her money into “the housekeeping” or treats it as her income to be spent as she likes, including on “her man” or with her man on items they will both make use of. Then again, if the law is relaxed in this area there is the threat of exploitation by commercial interests being made easier. The committee advances two main responses to this conundrum. First, with the express aim of curbing commercial exploitation by business enterprises such as escort agencies and saunas they propose an offence of directing or controlling a prostitute.[6] It is doubtful whether what amounts to a rewording of existing law[7] will prove an effective means of controlling a situation where there is by now a well established illegal sauna, escort agency and club trade[8] — with a constant supply of customers, with an equally constant supply of women anxious to earn money — and entrepreneurs keen to have a further outlet for capital acquired by shady means. The further point to be made is that the best way to enable women working as prostitutes to be free from being exploited by others may well be to make it possible for them to organise themselves as other workers have done. To suggest this is not to condone prostitution nor

profit-making from prostitution. What it does require is that attempts to regulate prostitution through the criminal law are ended and that unless activities connected with prostitution infringe other areas of the criminal law, they are seen as lying in the sphere of commercial and business activity. If this were to happen, the proposals put forward by P.R.O.S. could start to come into being. They might provide for women's security while "employed" in prostitution far more effectively than the operation of the criminal law which currently leaves them totally unprotected as workers:

We believe those who employ prostitutes in saunas etc. should be bound by the rules applicable to employers in other spheres regarding basic conditions of service and rates of pay. If prostitutes were in a position to organise themselves into Trade Unions, Co-ops or Professional Associations then they could improve their conditions and pay. In the long term we believe that only if prostitutes can organise themselves in this way will they ever succeed in limiting the ability of others to exploit them.[9]

Regarding their further proposal directed at poncing, most of the Committee consider it unnecessary to penalise poncing specifically if other offences cover the same ground, such as "the offences of blackmail and assault and the offence proposed in our Report on Offences against the Person of threatening to cause serious injury",[10] although a minority concern is expressed that an offence of living on a prostitute's earnings should be retained as a minor offence, in the interest of severing the relationship involved.[11] Redrafting the law to concentrate on what is done as opposed to responding to a stereotyped identity would solve the problem of the injustice of non-exploitative "ponces" coming within its net. Furthermore, as the numbers of men dealt with for living on prostitutes' earnings seem small — "Between 1960 and 1977 inclusive, the average annual rate of conviction for men living on immoral earnings was 243"[12] it would be hard for the police to maintain that they have such a hold on the problem of poncing that tightening the criteria for bringing charges would have a very significant effect.

Unfortunately the recorded division of opinion within the Committee on offences related to poncing amounts to a weak enunciation of the principle that the criminal law should respond to women's actual experience of violence or exploitation rather than the assumptions of others about its existence. It is a pity that the Committee did not produce a stronger declaration of this approach. If they had done so it would have underlined the point that notice should be taken of women's definition of what constitutes violence against them, whatever the setting. Support for this guiding principle would have lent weight to the efforts of those who have been trying to register the seriousness of such phenomena as domestic violence in the face of assumptions that they are of no consequence.[13]

The Committee are further divided over the scholastic intricacies of whether or not it should be legal for prostitutes' services to be advertised. At present for example it is an offence for a man knowingly to advertise the services of a prostitute in return for payment from her. It is not an offence

when a man publishes a directory of prostitutes, gaining his financial reward not from the prostitutes but from the potential clients who buy such a directory.[14] Should this or should this not continue to be the case? Should it or should it not also be an offence for a prostitute to advertise her services by say placing a red light or a doll in her window? Making the advertisement of prostitutes' services legal would cut through these and certain other problems at a stroke. Such advertising would still have to be in keeping with the general code for advertisements and would need not to fall foul of existing laws regarding obscenity and pornography. The author's contact with working prostitutes suggests that if they were legally able to pay to advertise in say contact magazines or telephone directories then more would choose to do so as opposed to making contact with clients on the streets. Going on from this, if it were easier for prostitutes to advertise their own services and no longer an offence for them to solicit, there would be far less need for others to make contact with prostitutes' clients on their behalf. Headwaiters, porters, taximen and more full-time pimps would have a leaner time and pimping as a practice would be likely to decline.

Where e're they work

Whether or not you support legislation against brothels turns around whether or not you consider it right to use the criminal law against prostitution. If you consider it right to do so, then the maintenance of provisions regarding the illegality of brothels logically follows. Otherwise such provisions could be abolished and premises where prostitution is carried out would simply become subject to more general laws and regulations, concerning the safety and suitability of premises for particular purposes. The Committee does not present its deliberations on the question of the law in relation to brothels in quite such a clear cut manner but that is the fundamental choice before the public.

Embedded in its discussion of brothels is a proposal which deserves to be taken very seriously, although at first sight it might seem of limited significance. This is that it should no longer be illegal, i.e. constitute a brothel, for two prostitutes to work together. The majority of prostitutes do work indoors as opposed to soliciting and servicing their clients on the streets. Many who do so work in their own homes or rooms. From contact through the P.R.O.S. campaign with women working as prostitutes and while engaged in research on the question of prostitutes' working conditions, I formed the impression that substantial numbers of women would most like to work with a trusted friend indoors — sharing a flat or room or in one another's house. This was seen quite realistically as enhancing their personal safety. If the law were changed to permit this it would do a very great deal to cut down the risk of sometimes very grave violence to women working as prostitutes.

Street offences

By the time the Committee came to publish its findings on the law relating to soliciting and loitering for the purposes of prostitution it was faced with a mopping up operation. As a result of the efforts of P.R.O.S., cross-party support had been gathered for the abolition of imprisonment for these offences and an amendment to this effect had been accepted as part of the Criminal Justice Bill. This became law in January 1983. Within the Committee support for the abolition of imprisonment for these offences was evenly divided as it makes evident. However, the other aspects of the law relating to soliciting and loitering need to be seen in the context of the abolition of imprisonment, something which the Committee's working paper does not seem to have grasped clearly

As yet there has been no research specifically commissioned into the outcome of removing imprisonment for the offences of soliciting and loitering.[15] The following points can reasonably be made, however, all of which indicate that imprisonment is unlikely to be restored for this offence. No sudden deluge of prostitutes onto the streets has been reported as a result of this change in the law. Nor is it likely that one will come about. Only a minority of prostitutes solicit on the streets. Although a number may be tempted to do so now the risk of imprisonment has been removed, the majority are likely to continue to prefer the comparatively greater comfort and security of working indoors. There is evidence that imprisonment did not act as a consistent deterrent because women were well aware of the risk they ran while soliciting but saw the need to earn money as of paramount importance. Therefore its removal is unlikely to have a dramatic effect. A detail examination of the statistics relating to the striking decline in convictions from before to after the introduction of more substantial prison sentences under the 1959 Act, indicates that this owed more to police activity determining arrest rates than to the introduction of heavier penalties.[16] The police might intensify arrest rates to assert greater policing control over the streets, thereby precipitating a crisis which might usher in a demand for the re-introduction of imprisonment. This is not so likely to happen in the context of strong public support for reducing the penalties attaching to soliciting and loitering as evidenced by the passing of the Criminal Justice Act.

If imprisonment for offences of soliciting and loitering for the purposes of prostitution is genuinely considered inappropriate, then there is little point in retaining or imposing such high fines as penalties for these offences that considerable numbers of women are sent to prison in default of their payment. Figures are not yet available to indicate whether or not such a dubious pattern is setting in. Nevertheless, it would be in keeping with the views of a substantial number of the Committee on the abolition of imprisonment, if either the Bench were urged to moderation in relation to the imposition of fines or a reduction was recommended in the current maxima of £50 for a first offence and £200 for a second or third offence. These sums

represent considerable amounts of money to working class women soliciting on the streets probably charging £5 — £10 a client.[17]

The Committee's hesitancy about moving towards decriminalisation is further revealed in its treatment of other aspects of the offences of soliciting and loitering apart from the penalties involved. It is doubtful about ending the procedure whereby a woman receives two cautions before her first court appearance, when she is referred to as "known to be a common prostitute".[18] It is also hesitant about removing the use of the term prostitute while acknowledging the insulting nature of "common". It is not in favour of abolishing the offence of loitering for the purpose of prostitution, nor of inserting a requirement of proof of nuisance or annoyance before a charge of soliciting or loitering is brought. The problem with retaining all these measures is that they unjustly serve to inflate the gravity of what is involved in an act of soliciting. If a woman not designated as a prostitute were to be brought to court on the ground that on one occasion she had been observed to be standing or walking in an area known for prostitution — or even if she had been observed by the police to engage in conversation with a man with a view to prostitution but not to the proven annoyance or nuisance of any specific individual — one might be forgiven for wondering why the full panoply of the court process was being invoked. However, such an appearance accompanied by the revelation of a previous "record" (possibly two cautions), together with being referred to as a "common prostitute" and the public shaming involved combines to produce a false aura of heinousness. Moreover, unless the practice of bringing a woman to court on the basis that she is a known prostitute is retained, it also becomes extremely difficult to sustain the offence of loitering for the purpose of prostitution. This is because it hangs on an alleged intention to solicit rather than a proven act.[19]

If the Committee is concerned that mayhem on the streets might result from decriminalising the offence of soliciting or loitering for the purpose of prostitution, it might consider the intermediate step of introducing a provision for proof of annoyance or nuisance to specific individuals in order for a charge to be brought. The situation could be kept under review and further tightening or relaxation of the law be considered in the light of the number of arrests that arose.

Still on the subject of nuisance in the streets, the Committee considers the possibility of introducing legislation specifically designed to punish kerb crawlers. They suggest three possible forms for the offence:

First where by such conduct he puts a woman in fear he should we think, be guilty of a criminal offence, but it should be recognised that it may be difficult to prove guilt without calling the woman as a witness. Secondly, a lesser offence of accosting a woman from a motor car for sexual purposes . . . Thirdly . . . an offence simply of accosting a woman from a car for the purpose of prostitution.

In the last two offences also the Committee comments that it would be difficult to prove guilt without calling the woman as a witness.[20] The author would support the first proposal — that it should be a criminal

offence for a man to put a woman in fear by his behaviour towards her and that such an offence should require the woman concerned to give evidence. However, as work within the Woman's Movement has indicated[21] it would be a gross under-representation of the scale of sexual harassment to construct an offence aimed principally at kerb crawlers. Such an offence if it were to be worth having, would instead need to be defined and administered with a view to the general problem of men menacing women with attendant sexual implications. The further danger of drafting an offence specifically aimed at kerb crawlers is that it carries with it the implication that all kerb crawlers create nuisance or menace. In reality some do, but others are simply intent on obtaining the services of a particular woman working as a prostitute and confine their attentions to that. An offence aimed at kerb crawlers would run the risk referred to in connection with loitering for the purposes of prostitution, that one would be penalising individuals for what they are, rather than what they do.

The Committee also considers the question of homosexual soliciting and comes to the conclusion that it should constitute an offence when carried out for the purposes of homosexual relations more generally and not simply male prostitution. They also put forward the view that the present penalty of imprisonment is fixed too high at two years.[22] It is difficult for the author to comment on this section of the Committee's proposals as homosexual prostitution has not been her field of study. However, the following observations can be made. More systematic analysis of homosexual prostitution along the lines of that carried out in relation to heterosexual prostitution might indicate that in its case also the public nuisance incurred is slight.[23] In this way the case for keeping prostitutes out of prison becomes stronger. The Committee's recommendation that non-prostitute homosexual soliciting should continue to be punishable by law seems strange, given that homosexual relations in private — the presumed consequence — are now legal. Their reference to this point also seems to contain a strange and unjust idea: that the burden of proof of innocence of prostitution should rest on the "offender" and because it is going to be so difficult for him to establish this, that it is appropriate for him to be assumed to be guilty:

Such evidence as we have received suggests that it would often be difficult to prove that a soliciting male was in fact a prostitute or that he was seeking reward on a particular occasion. Our provisional recommendation therefore is that there should continue to be an offence penalising all forms of male homosexual soliciting.

Finally, the Committee rejects proposals to designate red light areas or adopt a system of licensing to control prostitution.[24] In arguing against red light areas it is in accord with academic studies on the subject to the effect that it is not possible to contain prostitution in this way.[25] Its argument against licensing is that proper management would not mean that prostitution ceased to be repugnant to the general public, therefore it amounts to no solution to the "problem" of prostitution.[26] This may lie in the realms of conjecture. What is on record is that simply establishing

licensed brothels as a means of organising prostitution results in inhumane working conditions for prostitutes and that they should therefore be rejected on those grounds.[27]

Conclusions

The Committee put forward the following provisional conclusions — that “the law should continue to discourage prostitution but not to penalise prostitutes simply for practising their trade; should continue to minimise the nuisance caused by the practice of prostitution and to keep under control those who exploit prostitutes”. They go on to argue that in occupying this position they are accepting the policy of the law as it has been for the last hundred years.

An examination of the Committee’s proposals has suggested that strong doubts can be cast on the feasibility of each of these conclusions. The law may set out to discourage prostitution but does not tackle its roots as a social problem. Its operation leads to prostitutes being penalised and offers no real defence against their exploitation. Finally, laws specifically drafted to deal with the “nuisance value of prostitution” emerge as superfluous in the context of other existing laws. The position amounts to one where the criminal law emerges as neither appropriate nor effective as a means of controlling prostitution. This has also been demonstrably the case for the last hundred years.[28] Decriminalisation combined with work towards establishing women’s equality might be a less familiar solution to the problem of controlling prostitution, but as has been argued here it would seem to be a surer one. This critique represents an invitation to those involved in the Committee’s deliberations to move beyond the dubious tradition of the criminal law in this field and to put their weight behind ending prostitution as we know it.

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- [4] M. A. Jennings, “The Victim as criminal — a consideration of California’s Prostitution Law” (1976) 64 *California Law Rev.* 1235–1284; S. Khalaf, *Prostitution in a Changing Society* (1966); B. Yondorf, “Prostitution as a legal activity — the West German experience” (1979) 5 *Policy Analysis* 417–433.
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- [6] *Ibid* paras. 2.6–2.9.

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- [8] E. McLeod (1982) ch. 1.
- [9] Programme for Reform of the Law on Soliciting, *Comments to the Criminal Law Revision Committee* (December 1982).
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