IX. PROSTITUTION

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The proposed amendments to section 195.1 of the Criminal Code[1] relating to prostitution are deceptively brief and apparently insignificant. In fact, the two "minor" amendments have significant repercussions and fail to address the real issues surrounding street prostitution.

Section 195.1 of the Criminal Code presently reads:

> Every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction.

Clause 48 of Bill C-19[2] proposes adding the following subsection:

> (2) In this section, "prostitution" includes obtaining the services of a prostitute; "public place" includes a motor vehicle located in or on a public place.[3]

These amendments clarify the present law and are intended to make prosecutions of street prostitution easier.

The expanded definition of prostitution is intended to resolve the question as to whether a customer seeking the services of a prostitute can also be guilty of soliciting, affirmatively. This amendment would overrule the British Columbia Court of Appeal decision in *R. v. Dudak*[4] and uphold the Ontario Court of Appeal decision in *R. v. DiPaola*.[5]

The definition of public place, amended in such as way as to include motor vehicles, would overrule the *obiter dicta* in *Hutt v. The Queen*.[6]

At first blush, rendering potential customers who solicit prostitutes as liable for their conduct as the prostitutes themselves is simply fair; similarly, encompassing soliciting that occurs within motor vehicles is simply a response to the reality of modern city life. Be that as it may, these amendments utterly fail to address the real issues associated with street prostitution, further marginalize a class of persons who suffer enough from their involvement with the "sex trade" and pave the way for more hypocrisy, and more unequal enforcement of the law.

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[1] R.S.C. 1970, c. C-34, s. 195, *as amended by* S.C. 1972, c. 13, s. 15.

[2] Criminal Law Reform Act, 1984, Bill C-19, 32nd Parl., 2d sess., 1983-84 (1st reading 7 Feb. 1984) [hereafter cited as Bill C-19].

[3] Sub. 195.1(2), as proposed in Bill C-19, cl. 48.

[4] 41 C.C.C. (2d) 31, [1978] 4 W.W.R. 334 (B.C.C.A.), *aff'g* 38 C.C.C. (2d) 172, [1978] 1 W.W.R. 217 (B.C. Cty. Ct. 1977).

[5] 4 C.R. (3d) 121, 43 C.C.C. (2d) 199 (Ont. C.A. 1978), *rev'g* 3 C.R. (3d) 62, 43 C.C.C. (2d) 197 (Ont. H.C. 1977).

[6] [1978] 2 S.C.R. 476, 38 C.C.C. (2d) 418.

The prostitution amendments in Bill C-19 are a response to the frustration felt by some urban communities over the nuisance caused by street prostitution and to the efforts of police forces to get broader powers to use against prostitutes. The very real nuisance factor of prostitutes plying their trade and customers in great numbers indiscriminately looking for sex at all hours of the day and night has to be recognized; it must also be understood, however, that there are reasons for the increase in this seamy traffic.

The decision of the Supreme Court of Canada in *Hutt*,[7] on the meaning of "solicit" is often pointed to as the cause of the "problem"; police forces insist that the decision ties their hands in their efforts to control street sex traffic. An analysis of the decision itself belies this proposition. Mr. Justice Spence, for the majority, points out that:

> Section 195.1 is enacted in Part V which is entitled "Disorderly Houses, Gaming and Betting." Offences in reference to all three of these subject matters are offences which do contribute to public inconvenience or unrest and again I am of the opinion that Parliament was indicating that what it desired to prohibit was a contribution to public inconvenience or unrest.[8]

In finding that a smile and a brief, private conversation did not constitute pressing and persistent conduct, and therefore was not soliciting, the Court clearly did not prevent law enforcement agencies from making arrests for the type of intrusive, irritating and offensive conduct described by those citizens who are so anxious to remove hordes of "hookers" from their doorsteps. Conduct described by Mr. Justice Ritchie in his concurring judgment as "co-operation" rather than solicitation is not the conduct that is causing the present concern. Amendments that scoop more people into the net, and which render a person's motor vehicle a "public place", may encourage police officers to return to arresting prostitutes, thus satisfying residents who are being harassed and inconvenienced, but they do not address the reason so many prostitutes are working on the streets in the first place.

The answer to that question is found in provisions of the Code relating to bawdy houses, and the manner in which these provisions are enforced. Subsection 179(1) of the Criminal Code defines "common bawdy house" as a place (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".

Keepers, inmates and persons "found in" a common bawdy house are all guilty of offences. The Ontario Court of Appeal in *R. v. Worthington*,[9] closed the door on prostitutes who used their own homes to practise their occupation, by rejecting the English law which requires that more than one prostitute must use or occupy the premises before it

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[7] *Id.*

[8] *Id.* at 484, 38 C.C.C. (2d) at 424.

[9] 22 C.R.N.S. 34, 10 C.C.C. (2d) 311 (Ont. C.A. 1973).

becomes a "bawdy house". The effect of this decision, coupled with vigorous campaigns against small hotels, massage parlours, and the like, has been to force prostitutes onto street corners and into cars as these are the only places to practise their trade. More recently, even a parking lot, resorted to on more than one occasion, was found to be capable of being a bawdy house by the Ontario Court of Appeal in *R. v. Pierce*.[10] These decisions, together with "clean-up" campaigns, guarantee that prostitutes will be out in public. Some street prostitution will always exist; the present volume, however, is the product of outmoded bawdy house laws and a well-thought-out exercise of police discretion, which ensures that public outrage will continue unabated.

The solution must surely lie in actual decriminalization of prostitution, and not in the present hypocritical position, which would pave the way for municipalities to re-enact by-laws which are presently *ultra vires* as encroaching upon federal criminal law powers. A case presently reserved in the Supreme Court of Ontario may add some impetus to this proposal. Mr. Justice Ewaschuk will decide, on 18 September 1984, whether the conviction of Peggy Miller for practising prostitution in her own home, and thus keeping a common bawdy house, was an invasion of her privacy and thus offended the Charter of Rights. Recent Ontario provincial court decisions on the same question that rely instead on the Charter's guarantee of employment rights are less likely to be upheld; however they do highlight the absurdity of laws which literally force prostitutes onto street corners.

In the final analysis, penalizing individuals who for whatever reason seek to purchase sexual services, and defining as a public place something which is clearly not one, *i.e.* a motor vehicle, is an inappropriate and ill-conceived response to the problems associated with street prostitution, and is an example of the dangers associated with piecemeal, *ad hoc* amendments to the criminal law.

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[10] 37 O.R. (2d) 721, 66 C.C.C. (2d) 388 (C.A. 1982).