IN HIS ESSAY 'ON LIBERTY', JOHN STUART MILL (1975, P. 15) STATED:

The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

The debate on controlled prostitution has been simplified into a basic policy choice of prohibition versus regulation. Those who would advocate a more tolerant attitude to prostitution are faced with the constant barrage of over-simplified arguments of those who favour suppression. By reducing the debate to black and white, the issues reach such an over-simplification as to become meaningless.

Vice can probably best be defined as the things that people like doing that do not harm others but offend their sensibilities. It is those sensibilities that eventually decide how people will vote and, therefore, in dealing with policy and vice, politicians have to take into consideration the sensibilities of their electorate and whether or not the person or the party will be re-elected and will be able to carry out the reforms for which, supposedly, they have entered politics. The Shorter Oxford English Dictionary defines 'vice' as:

Depravity or corruption of morals; evil, immoral, or wicked habits or conducts; indulgence in degrading pleasures or practices. 2. A habit or practice of an immoral, degrading or wicked nature.

Such definitions are invariably laden with value judgments. Morality, depravity and corruption are about such judgments, and the values of one group or one person's moral attitudes, which they are attempting to inflict on others. There is a point at which the society
has a right to inflict their moral view, and that is most clearly expressed in the above quote of John Stuart Mill.

The politics of vice is about the suppression of people doing things that they like doing which do not harm others. The only reason that can be seen for people wishing to inflict their moral judgments on others is the desire to exercise the power of their group over other people. This power encourages a lack of tolerance and a lack of understanding; it fosters bigotry and the marginalisation of groups.

Where there is no risk in harming others, whether to legislate in terms of morals becomes a question about sensibilities. With reference to prostitution, however, we have clear evidence that there can be a major risk to harming more than sensibilities. That evidence can be identified through a study of prostitution in Thailand, Myanmar and other places in South-East Asia where the spread of the AIDS virus is rapidly reaching epidemic proportions through a lack of legislation and policing. The matter of public health is, potentially, the harm associated with prostitution—harm to members of our community through the spread of HIV and other sexually transmitted diseases (STDs). In resolving such problems the community must weigh up public health against moral sensibilities.

The Politics of Vice

In originally proposing the Select Committee on HIV, Illegal Drugs and Prostitution to the Australian Capital Territory (ACT) Assembly, the author was approached by members of all political persuasions and asked what was the point of raising such an unpalatable political issue as prostitution and illegal drugs—and that it was political hari kari. At the introduction of this motion to establish the Committee it was commented: ‘We have a responsibility to do what we can to avoid this epidemic’.

The introduction of the Committee to the Assembly was an uncustomary step in a number of ways. Firstly, a Social Policy Committee already existed which was a Standing Committee that could have taken this responsibility. Secondly, the Committee took on a role to raise the issues and the level of public debate about prostitution, illegal drugs and the AIDS virus.

It is a normal approach for a Parliamentary Committee to contain the content of reports to the end. This Committee was able to say, prior to bringing down its report, there will be no surprises as far as the report goes because the committee had made its direction and intention very public.

The role of the Committee in fostering public debate was a most critical function in the light of public perceptions. The Canberra community, the Canberra media, and, in particular, the journalists who reported on these issues deserve congratulations. The Canberra Times (3 February 1991, editorial) stated:

It is perhaps a measure of the maturity of the Canberra community that public debate surrounding this inquiry has been conducted in such sensible and low key language.

When dealing with politicians and public policy, a question still remains: What is it that motivates politicians? At the most cynical level it could be said being re-elected, power and self-interest motivates politicians—and there is some truth in that. The majority of politicians, however, fit into the range of personalities that could be found in any community organisation. There are those who are interested in the power and are primarily self-interested—and perhaps we have a greater proportion of those in politics—but there are many who are working hard for what they believe to be in the best interests of the community.
For instance, in Queensland at the moment, the Labor Government is moving slowly towards law reform in the area of prostitution. One cannot help but recognise that the Government is not prepared to reform laws which the community is not yet ready for. And that is appropriate. The issues need to be debated at length, the community needs to be involved, and the debate needs to be carried on in a moderate way so that there are no surprises for the community. Over-reaction to the shock that suddenly people are going to find themselves or their children or their streets exposed to prostitution is usually a result of misunderstanding of the issues. If moral sensibilities are not going to be offended, the methodology has to be measured, public, and open. No doubt there are innumerable ways of achieving such an open debate, but the role of the Committee in the ACT could well establish a model for politicians dealing with issues that are sensitive and difficult.

Community Values

Throughout history some groups have attempted to force their own moral values and moral standards on other members of the community, particularly with reference to sexual conduct. Sexuality ought to be subjected to the same morality as other human endeavours and human conduct. There should be no such thing as a special sexual morality: sexual morals are about sensibilities rather than about ethics.

For example, one of the most formidable applications of enforcement of human sexual morality on a western community was the pre-Vatican II Catholic Church's attitude towards masturbation. This attitude did not even deal with a sexual act between consenting adults, but rather an individual's sexual act in their own privacy. The Catholic Church of the time used its ultimate penalty on the 'sin' of masturbation. It was considered a mortal sin and as such the penalties were greater than capital punishment. In fact, the penalty was eternal damnation—burning in hell for all eternity. At that stage, one sector of society attempted to influence others over actions that were carried out in private by an individual. The Church attempted to enforce, as part of its influence and power, a special sexual morality. Of course, the power of the Catholic Church was extended by encouraging children from an early age to confess their sins to the priest. The system was not so much about morality as about surrendering personal power to the priest and, through him, the Church hierarchy.

In the Inquiry into Prostitution, Summary of Final Report, Marcia Neave (Victoria 1985, p. 9) states:

Prostitution is now the only sexual activity between consenting adults which is punished by the criminal law.

The criminal law, with regards to prostitution, has no role to play from a morality perspective. In the Prostitution in the ACT: Interim Report (Australian Capital Territory 1991), criminal sanctions for street prostitution were advocated. It could well be argued that such sanctions illustrate an inconsistency. However, no inconsistency exists in the report because the Committee perceived that street prostitution provided the greatest potential for the spread of HIV in the community. As such, the question revolved around public health, not around morality. The Committee accepted that what consenting adults do in private when there is no risk of harm to others is not the forum for legislation. The matter of public health adds another dimension which will be discussed later.

One of the ironies of the politics of vice is that the vast majority of criticisms about a tolerant attitude to prostitution has come from the fundamentalists. The mainstream churches in the ACT presented quite a tolerant view to the Committee. Bishop George of the Anglican Church presented the following view:
As a necessary evil it should be accepted and controlled. That control should be by way of decriminalisation not legislation. The Church would, I do not think ever, come out in favour of the legalisation of prostitution, but I think we could cope with decriminalisation. (Australian Capital Territory 1991, pp. 46-7).

And Bishop Power of the Catholic Church (Australian Capital Territory 1991, pp. 46-7) expressed the following point of view:

The distinction . . . between decriminalisation and legislation is a good one for the reasons stated earlier, the path of decriminalisation appears to be the better course to follow, otherwise the way is open for prostitution becoming legal, respectable and more widespread.

Submissions received from fundamentalists and discussions with them presented a far less tolerant attitude than those expressed by the Bishops. It is ironic when reading the New Testament, Christ's relationship with the prostitute Mary Magdalen was indeed one of tolerance and understanding. It is difficult to understand why Christians who purport to follow the teachings of the Bible do not attempt to model their own behaviour on that of Christ. If that were the case they would befriend sex workers, attempt to understand them, while perhaps attempting to influence their ideas. Tolerance in our society is a far more important moral issue than sexuality.

Civil liberties

Whilst any group can be marginalised in the way that the gay community, intravenous drug users and prostitutes have been marginalised, there is a grave risk to civil liberties. That risk was aptly described to the Committee in the way that the Australian Federal Police (AFP) dealt with prostitution. On the whole, our Committee congratulated the AFP for the way in which they had handled prostitution in the ACT within the confines of being committed to anti-brothel legislation, while at the same time being told by the Director of Public Prosecutions that no prosecution would take place unless aggravating circumstances were involved. Aggravating circumstances included the presence of drugs, minors or aliens, being in a residential area or being associated with organised crime.

One method the police used to assist in the control of brothels was to record the names and details of workers and to retain this information at headquarters in a filing system. The AFP claimed that there was limited access to this filing system, and it was not on computer. However, the Committee was informed that the information had been made available on a number of occasions. In addition, police working from those files, indicated there were some 400 prostitutes working in the ACT. Other information obtained by the Committee indicated that at any given time there were only 150 prostitutes working in the ACT. The discrepancy in those figures indicates that when a person stopped working as a prostitute, unless they put a request to the police to remove their name, their card remained on file. This discrepancy includes 250 people. The recording of such information is a clear infringement of civil liberties.

The Committee recommended, under Recommendations 28 and 29, that:

- the records kept by the AFP identified in paragraph 233 of the *Interim Report* be destroyed; and

- the Assistant Commissioner of Police (ACT Region) notify the Assembly through the Minister when the records have been destroyed.
This issue illustrates that, once one section of the community has been marginalised, it is far easier and far more acceptable for the community as a whole to deprive them of their civil liberties without any real justification.

Women as objects

The Committee found a dichotomy in its basic position. On the one hand the Committee could not support the continuance of a practice which made women the objects of sexual pleasure for men. Such a practice was recognised as a fact in our society and not one capable of prohibition. Accordingly, the position that this idea must be regulated in some manner was adopted. Prostitution was seen as a social problem, endemic to the fundamentally sexist nature of our society. To resolve this idea of women as sexual objects, society needs to attack the fundamental position of sexism.

So often the advocates of suppression are also the advocates of sexism, which is in itself another form of oppression. To advocate the suppression of prostitution does nothing to resolve the basic sexist nature of our society. Grappling with the sexist nature of our society must be the first step in finding a resolution to the problems associated when men see women purely as objects of sexual pleasure or for sexual gratification. It is for economic reasons why some women choose to take advantage of that situation.

Public health and morality

The spread of infectious disease has long been associated with prostitution. The advent of HIV has followed a long line of other sexually transmitted diseases—for example, chlamydia, herpes, gonorrhoea, syphilis and hepatitis B. In discussing law reform options such as decriminalisation or legalisation of prostitution, it is critical that any harm associated with prostitution be considered. The ethics of the issue are no longer about the conduct of two consenting adults which may offend others' moral sensibilities. The issue is that these activities may become the vehicle for the spread of disease and the vehicle for the decline in the public health.

The simple solution under these circumstances seems to be to put the onus for public health on the worker. Rarely in the laws regulating prostitution has there been any attempt to control the conduct of the client. Many would argue that clients are from a dominant power group (men), while the workers are from a marginalised group, devoid of power (women sex workers).

In looking at the plight of young people, it is important to assess whether they are forced into prostitution. The Assistant Director of the Open Family Foundation told our Committee that young people engage in 'street prostitution':

It may not be commercial in the sense that dollars and cents pass, but quite often they will give sex for a roof over their head, for a feed, and that must be made very clear because that is prostitution (Australian Capital Territory 1991, p. 20).

This view was reiterated by the Working Party on Alcohol and Other Drug Issues of the ACT Women's Health Network who provided evidence:

More likely it is for a bed, it is for a roof over your head, it is for a few drinks. I often find it pitiful how cheap sex actually comes in that environment (Australian Capital Territory 1991, p. 20).

The Committee chose to define prostitution as commercial sexual activity and distinguished commercial sexual activity from sexual exploitation of disaffected young
people, both by their peers and by rapacious adults. Whilst it is important for the community to deal with the issue of the exploitation of young people in this way, the debate on prostitution regulation and legalisation can only become clouded by attempting to include the exploitation of young people with the debate on the decriminalisation or legalisation and regulation of prostitution.

**Decriminalisation and Legalisation**

The over-simplification of the debate has also touched on the notion that there is a choice between decriminalisation and legalisation. Such a choice does not really exist and it would be far better if people spoke in terms of law reform rather than those two possibilities.

By using the term, reform, we acknowledge that legislative change is only one aspect of change. Social reform, attitudinal change and change in enforcement policy are equally important.

On one end of the scale . . . decriminalisation involves the repeal of all legislation specific to prostitution. The industry would then be subject to controls that apply to any other businesses such as planning, health and nuisance laws.

At the other end of the scale is legalisation where a special set of laws are established to regulate the sex industry. This means the government formally recognises sanctions and monitors the industry. The monitoring could be done in a number of ways, such as by registering workers or brothels, restricting ownership, management or location, or making health checks compulsory (Australian Capital Territory 1991, p. 127).

In looking at law reform, one of the interesting pieces of legislation that applied in the ACT was the *Police Offences Act 1930*. Under Section 34 of the Act:

> Every person who has or keeps any house, shop, room or place of public resort wherein provisions, liquor, or refreshments of any kind are sold or consumed (whether they are kept or retained therein or procured elsewhere), who—

> (c) knowingly permits or suffers prostitutes or persons of a notoriously bad character to meet, to gather and remain therein shall be guilty of an offence.

> Penalty $10.

No-one has ever been convicted under this section of the Act. However, it does illustrate quite clearly that law reform is required, and that decriminalisation or the removal of laws has a most important role within the sex industry. Here, the civil liberties of a person go well beyond what would be considered acceptable to any thinking member of a free society. There is a range of other laws that fit into this category and, therefore, there is clear justification for decriminalising the laws. In fact, the Committee has recommended the repeal of all laws in the ACT that refer to prostitution and, at the same time, it has recommended the establishment of a Prostitution Regulation Act in order to regulate prostitution.

In a press conference following the tabling of the Committee's *Interim Report*, a *Canberra Times* reporter challenged the Chairman of the Committee to say that this, in fact, is a report that legalises prostitution, rather than decriminalises it. What we must attempt to convey to the community is that there is no choice between legalisation and decriminalisation. The two sit on a continuum. A far better term to apply is that of 'law
reform' because the term law reform clearly sets out that changes to legal and administrative responses to prostitution are necessary.

**Law Reform**

In order to establish law reform in the ACT, the Committee recommended the decriminalisation and regulation of prostitution. It also made some recommendations with reference to public health, sexually transmitted disease, and on broader social issues.

**Decriminalisation**

In seeking to decriminalise the activity of prostitution the Committee made a series of recommendations. Firstly, that control of prostitution in the ACT be exercised through one enactment only, the Prostitution Regulation Act. The *Interim Report* applied the following definitions to the Prostitution Regulation Act:

- brothel—premises used for the purpose of commercial sexual activity;
- commercial sexual activity—providing sexual services for monetary or material reward based on a normal commercial transaction;
- escort service—the provision of commercial sexual services, other than on the premises of a licensed brothel;
- prostitute—a person providing commercial sexual services for monetary or material reward; and
- prostitution—engaging in commercial sexual activity (Australian Capital Territory 1991, pp. 103-4)

The Committee then went on to recommend that a series of quite specific sections of Acts be repealed. They apply to the Police Offences Act, as well as common law. Further, the Committee recommended:

That the Australian Federal Police have no special and/or specific powers in respect of brothels or escort agencies for which the Licensing Board has issued a licence to own and operate (Australian Capital Territory 1991, p. 104).

**Regulation**

Having applied a decriminalisation process within its concept of law reform, the Committee then went on to establish a series of regulations. These regulations were based around the establishment of a Licensing Board which would be able to grant, reissue, transfer and monitor licences to own and operate a brothel and/or an escort agency. That licensing board should consist of three part-time members appointed by the Minister for terms of two years, although members be eligible for re-appointment for one further term, and at least one member of the Board be a woman.

Considering that the prostitution industry in the ACT is primarily formed of women, it is preferred that the whole licensing board be entirely women. The Minister, of course, does have the power to ensure that at least a majority of that committee be made up of women.
The functions of the licensing board under the Committee's recommendations to regulate prostitution would be to:

- hear and determine applications for the grant of a licence to own and operate a brothel and/or an escort agency;
- hear and determine applications for the reissue for transfer of licences to own and operate a brothel and/or an escort agency;
- cancel licences to own and operate a brothel and/or an escort agency;
- hear and determine complaints, other than criminal proceedings, against licence holders;
- monitor the adherence to licence provisions; and
- maintain a register of licences granted, reissued or transferred.

The licensing board also would have power to issue and collect fines imposed for breaches of licence conditions—although decisions of the licensing board should be appealable to the Administrative Appeals Tribunal.

The Committee was aware of some of the difficulties in the attempts to regulate prostitution in Victoria and debated at length as to how to avoid these problems. The Victorian experience is one of the reasons the recommendation that there be two classes of licence to own and operate a brothel and/or an escort agency was made. The first class of licence to allow for employment of up to ten people, and the second class to allow for the employment of eleven and up to forty people. Under the recommendations of the Committee, no brothel or escort agency in the ACT should employ more than forty workers at any given time.

Members debated the possibility of restricting the number of brothels or the size of brothels according to the numbers of beds. It was finally decided that the best compromise in attempting to avoid the problems experienced in Victoria was to restrict the number of workers in any given brothel or escort agency. There is, however, no restriction under our recommendations, for a licensee to operate two or three brothels if they consider that appropriate.

Other regulating mechanisms adopted by the Committee include taking into account any indictable offence under the law of the ACT or any other state or territory punishable by imprisonment for three years or more; or a previously held licence to own and operate a brothel and/or an escort agency which had been cancelled within the preceding three years. Any person in such circumstances ought not be granted a licence. Similarly, a licensee should be a resident of the ACT—although in additional comments from one member of the Committee, it was made clear that that member did not support the residency recommendation, because of the belief that it is against the principles of free trade.

Other regulatory recommendations which risk the loss of licence under the recommendations include employing minors; foreign persons who do not have a current work permit issued by the Commonwealth Department of Immigration, Local Government and Ethnic Affairs; or failure to comply with conditions set out under the regulations of the Act. Recommendations were also made with reference to publishing advertisements in either print or electronic media, and in respect of the criminal law.
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The criminal law

Under the criminal law, the Committee recommended the continued ban on street prostitution in the ACT with penalties to be imposed equally upon the prostitute and the client. The criminal law also applies in cases of threats or inducements, or threaten to assault in order to intimidate any person to take part in any acts of prostitution, and to the employment of young people in prostitution.

Health and safety issues

The prime justification for law reform in prostitution has been health issues. The Committee has made a series of recommendations with reference to sexually transmitted diseases, with the responsibility being placed primarily on the shoulders of the licensee. However, the Committee has recommended that there be no health cards introduced for prostitutes, or that no legal provision mandatorily require prostitutes to undergo regular medical examination. The responsibility for medical examinations is to be the responsibility primarily of the licensee.

The main argument against compulsory health checks and medical examinations is that such a health check, or such a certificate, is really only as good as the next customer. It is far more important that brothels, escort agencies and all prostitutes employ universal preventive methods—primarily safe sex practices. With that in mind, the Committee recommended that it would be an offence under the Prostitution Regulation Act for a person who holds a current licence to own and operate a brothel or an escort agency issued by the licensing board to—expressly or implied—discourage the use of condoms in a brothel or escort agency. And, similarly, that it be an offence for anyone working in a brothel or escort agency in any encounter with a client involving vaginal or anal penetration by any means without using a condom. The penalty for offences against the provision dealing with the use of condoms be no greater than $5,000.

The difficulty with this recommendation is that it deals with a consenting act between two adults in private. The Committee felt it critical to emphasise the importance of the use of condoms, and believed that it would be possible for evidence to be taken from either a worker or a client to indicate that there was a repeated abuse of that regulation. It seems that of all ninety recommendations of the Committee, this recommendation is the one most open to question and debate. The Committee, as an oversight, failed to suggest the penalties apply equally to worker and client.

The Committee also recommended that regulations be made under the Prostitution Regulation Act with respect to:

- the cleanliness of brothels;
- the provision, use and laundering of towels and other items of linen;
- hygiene standards for swimming pools, spa baths and sexual aids;
- provision of, and hygiene standards for, showers, washing and toilet facilities;
- the disposal of used condoms;
- the inspection of premises;
- the provision of information relating to sexually transmitted diseases to prostitutes employed by the brothel or escort agency and to clients; and
• safeguarding the health of clients, and people employed by, the brothel or escort agency.

The funding of the licensing board was perceived by the Committee to be budget neutral in that the charge for the licences would cover the obligations of the Committee. Matters of occupational health and safety, superannuation, workers' compensation and the like would also now become a matter for all licensees to comply under normal business regulations. The Committee envisages problems with these in the transition period, and made recommendations on educating managers and workers about their rights and responsibilities.

Finally, the Committee also recommended the prostitutes collective in the ACT—Workers In Sex Employment (WISE)—receive appropriate funding and guarantees of funding be provided for the workers in that respect.

Conclusions

If we follow the path of law reform, what are we hoping to achieve? The answer falls primarily into three categories: improve the rights and working conditions of the workers; we, as a community, arm ourselves for the fight against the spread of infectious diseases, particularly HIV; and we become a more tolerant and understanding society.

The rights and conditions of workers

In dealing with improving rights and conditions of sex workers, one must first of all ensure that the activity in which they are participating is not a criminal activity—that is the role of the process of decriminalisation. It is then important to follow the path of regulation in order to protect those workers.

One of the recommendations of the Committee—although there was a dissenting comment from one member—was that sex workers would gain some benefits of being a member of an appropriate union. It was also considered by the Committee that involvement of a union would add significantly to the monitoring of the operations of brothels and escort agencies. Unionism in Australia has been the mainstay of workers rights. There is no reason why that should not continue in the situation with sex workers.

It is interesting to note the reaction of various organisations to that recommendation. The Miscellaneous Workers Union hardly embraced the suggestion with enthusiasm, and Fiona Patten of WISE in the ACT suggested that the most appropriate union would be the Social Workers Union.

Occupational health and safety issues are the subject of new legislation in the ACT. Under the recommendations provided by the Committee, the brothels currently operating in the ACT who have more than twenty workers would be required to establish designated work groups. Those work groups would be responsible for the occupational health and safety of the workers. Clearly, there are some major disadvantages under the recommendations of the Committee to the licensees of brothels: health regulations, safety regulations, workers' compensation, paid holiday leave, sick leave provisions, workers' compensation, set hours of work, established rates of pay or remuneration, established working conditions and industrial representation are just a few of the extra issues the owners and workers will need to learn about.

The spread of sexually transmitted diseases

That the community will be armed for the fight against the spread of infectious diseases is also an important factor. Although it is quite clear that the educative process in brothels has
been highly successful, and that the use of safe sex practices seems to be widespread by decriminalising and regulating the industry, the community can be more certain that safe sex practices are part and parcel of working conditions in brothels. Clients can understand that they also have a responsibility to ensure they are using safe sex practices.

A more tolerant and understanding society

The final category advantage that has been mentioned is the establishment of a more tolerant and understanding society. Sexism, bigotry and violence are often established due to a lack of tolerance of the views and rights of others, and prejudice is fed by intolerance. When a group is marginalised they can easily become victims of this type of attitude. In speaking of censorship, the National Committee on Violence suggested a number of strategies for dealing with sexism in our society. Those same strategies apply to dealing with bigotry and prejudice:

The Committee deplores sexism and the denigration of women. It feels, however, that values such as these, no less than other anti-social thoughts, are best combated not by censorship but by criticism, censure, and stigmatisation in the market place of ideas (National Committee on Violence 1990, p. 211).

Throughout the report of the Committee and throughout this paper prostitution has been neither condoned nor condemned. Before we look at criticism, censure and stigmatisation, we need first to be able to deal with those ideas in a logical and rational way. Once we have achieved that part of the debate, it will be time to look at the role of women in prostitution, sexism in our society, and how best to deal with these issues by a helping approach rather than an intolerant condemnation of prostitution.

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