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*The Report of the Committee on Sexual
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and
The Report of the Special Committee on
Pornography & Prostitution.*

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Discussion Paper

The Report of the Committee on Sexual
Offences Against Children and Youths

and

The Report of the Special Committee on
Pornography and Prostitution

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Discussion Paper

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I. INTRODUCTION

A. PURPOSE OF THE DOCUMENT

The federal government established a Committee, under the chairmanship of Dr. Robin Badgley, to report on the problem of sexual offences against children. While the Committee was working, its mandate was expanded to include some consideration of the problems of juvenile prostitution and the use of children in, and availability to children of, pornography. Later, a Special Committee was set up under the chairmanship of Paul Fraser, Q.C., to consider the problems of prostitution and pornography with special concentration on adults, but also with regard to young people. The Badgley Committee Report was published in August 1984 and the Fraser Committee Report was published in April 1985.

The purpose of this document is to provide a basis for one element of a systematic process of consultation by officials of the concerned federal government departments with provincial government officials and with representatives of non-governmental organizations, of voluntary sector groups and with private individuals. The two reports together include 160 recommendations, addressed to all levels of government, to the private sector and to members of the public. While the federal government has received some representations from interested groups, this process of consultation will afford an opportunity for those experts in the field and for non-governmental agencies to express their views on the wide range of recommendations which have been made.

The consultation process will provide the federal government with necessary feedback to assist in consideration of which legislative and administrative reforms arising from the two reports should be proceeded with.

B. BACKGROUND TO THE REPORTS

The establishment of the Badgley Committee by the Minister of Justice in December 1980 was contemporaneous with the announcement of proposed changes to the sexual assault laws. The Committee was to enquire into the adequacy of laws in providing protection from sexual offences against children and youths, and it was to make recommendations for improving this protection. The Committee was further to examine the problems of juvenile prostitution and the exploitation of young persons for pornographic purposes.

While the Badgley Committee was working, the problems of pornography and of prostitution became apparently more problematic. To assess these fully the government established the Fraser Committee, in June, 1983. The Fraser Committee was asked to consider the problems of access to, and definition of, pornography. The Committee was to study prostitution and the laws dealing with offences surrounding the activities of prostitutes, and to ascertain public views on the best ways of dealing with these problems.

Since there was some obvious overlap in the ground to be covered by the two Committees, the Fraser Committee had the advantage of considering the Report of the Badgley Committee while it was preparing its own findings. Accordingly, there is a marked degree of similarity in the recommendations of the two reports, although, in a few significant areas, the Committees disagree as to the best way in which to proceed.

C. APPROACH TO THE CONSULTATION

Rather than taking each recommendation of each Committee *seriatim*, an approach based on grouping the subject areas has been adopted. It is hoped that this will permit the process of consultation to proceed expeditiously. Those recommendations directed at the federal government, and which call for fairly technical legislative change to the *Criminal Code*, or to the *Canada Evidence Act*, are not dealt with at length in this document. Of course, should any group or individual wish to raise a particular recommendation in detail, and to make observations upon it, these will be welcome.

It will be noted that the document does not detail any expression of views as to the merits of particular recommendations, or proposed course of action. This is because the federal government has not, as yet, formulated an opinion as to the approach to be taken to the recommendations contained in the reports, apart from those concerning street soliciting, which is the subject of Bill C-49. It is precisely to assist in the determination by the federal government of the appropriate steps to be taken that this process of consultation is being followed.

In referring to the individual recommendations of each Committee by number in this document, the letter B has been prefaced to each numbered recommendation of the Badgley Committee, and the letter F to each recommendation of the Fraser Committee. Naturally, these letters are not found in the reports themselves.

The document poses a series of questions upon which advice and opinion is sought from the groups being consulted. The questions frequently raise complex issues of morality, law, and the balance to be struck between freedom of the individual on the one hand and the role of the state in protecting societal interests on the other. Obviously, to such questions there are no easy answers: the hope is that a consensus can be gathered indicating where, in present-day Canadian society, the balance lies. This is all the more difficult when it is

remembered that there are limits to the extent to which governments can provide resources for particular approaches to the solution of problems. For it is against the present background of responsible fiscal restraint that the best way forward must be chosen.

The Ministers of Justice, and of National Health and Welfare, together with the Solicitor General, are grateful to all who have considered the problems raised in the two reports and who have participated in the consultation process to date.

II. DEALING WITH CHILD SEXUAL ABUSE

The Badgley Committee Report devotes two-thirds of its pages to this important issue. Speaking in general terms, the Committee recommend extensive changes to the criminal law, both by modifying the present law and by removing obsolete offences. In addition, the creation of several new offences is suggested. New arrangements are proposed for the reception by courts of the evidence of children. The collection of statistics and the carrying out of research are advocated. An extensive program of education is suggested. In all, the first forty recommendations of the Committee deal with problems attendant on child sexual abuse.

The recommendations upon which the views of the non-governmental sector organizations and individual experts are sought have been grouped under five headings:

A. CHANGES RECOMMENDED TO THE *CRIMINAL CODE*

1. Creation of new offences

Recommendation B.7.1 proposes the establishment of a new offence of touching for a sexual purpose a young person in the genital or anal region. Under this, 'young person' means under the age of 16, and the consent of the young person or accused's mistaken belief in age would be no defence. Other recommendations propose other new offences involving touching.

Question 1.

From the experience of the consultation group, is this proposal appropriate when it makes criminal the exploratory sexual behaviour found normally among Canadian young people? If so, what would be the likely impact of adopting in legislation the suggested changes? Should the whole law of sexual assault and touching be combined in a single provision?

Normally, in a criminal prosecution, an accused may defend himself against a charge by showing that he made a mistake about some essential fact in the case. An example would be the mistaken belief that the complainant consented to sexual conduct which would constitute an assault in the absence of consent. The age of a complainant is an essential element in prosecutions under s. 146 of the *Criminal Code* for having sexual intercourse with females under the ages of 14 and 16 years. The Crown has to prove the age to be under those limits. The *Code* provides, however, that a mistaken belief in the accused

that the female person in question was over the specified age does not provide a defence to the charge. The Badgley Committee does not recommend that there be any change in this. For several of the new offences the age of the complainant would be material, but the recommendations propose that a mistake as to age would similarly provide no defence. Conduct would be illegal when the person is below the permissible age, whether the accused knew the age or not.

Question 2.

Given the wider range of conduct covered by the Badgley Recommendations, is it appropriate to extend the category of offences for which mistake is not a defence to the new proposed offences?

Following Recommendation B.9.1, if a person in a position of trust commits sexual touching of a young person, he or she should be guilty of an indictable offence, with a maximum penalty of 10 years' imprisonment. Under Recommendation B.9.2 a young person is defined as under 18, and Recommendation B.9.4 further notes that the consent of the young person and mistake as to age are no defence. In Recommendation B.9.5 is found a list of some of the relationships which it is proposed should establish the position of trust.

Question 3.

What would be the likely impact of implementation of this Recommendation? Would it be sufficient to leave the idea of 'position of trust' to the courts to interpret or should a list be added in regulations to the *Criminal Code*? Should voluntary workers in a position of trust be added to the list? Should the age of protection extend to persons under 18 years of age?

2 and 3. Changes to, and deletion of, present offences.

Question 4.

A series of proposals in Recommendation B.14 call for changes to present offences in the *Criminal Code* and for the abolition of some which seem no longer appropriate to modern requirements. Has the consultation group any observations on these proposals?

B. RECEPTION OF THE EVIDENCE OF CHILDREN

Recommendations B.18 to B.27 deal with the question of children's evidence. In particular, B.19 calls for the abolition of the requirement for corroboration of children's evidence.

Question 5.

Would these be seen as appropriate amendments to the law? Furthermore, in addition to the legislative proposals, have organizations or individuals in the private sector any plans to establish child witness preparation programmes? Are there any moves to establish alternative mechanisms for the giving of children's evidence, such as video-taping, closed-circuit television, or one-way mirrors? Would these be valuable?

C. EDUCATION PROGRAMS

It will be recalled that Recommendation B.2 suggests the development of a national program of public education and health promotion. Recommendation F.103 calls for the federal government, with the assistance of provinces and of the private sector, to develop educational programs for children and for those with special responsibility for children. Recommendation F.104 advocates that provinces and territories should give high priority to programs in family life, human sexuality and media literacy at all levels in the school system.

Question 6.

How best may these programs be developed and what might be the role of the private sector in the development and delivery of the programs? Could the police play any part in these programs in relation to aspects of crime prevention? If so, how might this be integrated at the local level? Is there a further role for public legal education? What might this be?

D. HEALTH AND SOCIAL WELFARE PROGRAMS

No questions in this area are included in this document. However, the views of those being consulted on any of the issues raised in the two reports will be reviewed by the Minister of National Health and Welfare.

E. ROLE OF THE PRIVATE SECTOR

Question 7.

How do organizations and individuals in the private sector see themselves as supporting and assisting other mechanisms to deal with child sexual abuse?

III. DEALING WITH PORNOGRAPHY

In Canada at the present time it is apparent that there are certain types of material which it seems the majority of Canadians feel should not be available to anyone no matter what their age and background. Other material, though objectionable to many, may be in the possession of those who wish it. Both the Badgley and the Fraser Committees dealt with the problems of the definition of pornographic materials and with the access by young persons to such materials. Objectionable material may be printed, available in the forms of video-tapes, or it may be broadcast. Methods of beginning to deal with each of these types of publication were suggested.

A further set of considerations must be taken into account when the preparation of such objectionable material is prohibited. The use of young people (or people who apparently are under the age of 18) as models and the infliction of actual harm on anyone is the subject of proposed legislation.

In considering these difficult issues, account must also be had of the constitutional guarantees of freedom of speech and expression contained in the *Canadian Charter of Rights and Freedoms*. Again, an appropriate balance between freedom and control must be struck.

A. CHANGES TO FEDERAL LEGISLATION

The federal legislation in question includes not only the *Criminal Code*, but also the *Customs Tariff*, the *Customs Act* and the *Canada Post Corporation Act*, as well as the *Broadcasting Act* and *Regulations* made thereunder.

1. Definitions of proscribed material

The Badgley Committee provided, in Recommendation B.52, a definition of "visual pornographic materials" which were to be the subject of legislation. These were depictions of vaginal, oral or anal intercourse, bestiality, masturbation, sado-masochistic behaviour, lewd touching of the breasts or genital parts of the body, or lewd exhibition of the genitals. Under B.52 these were to be made inaccessible by sale to young persons under 16. Under B.49 this range of behaviour was classed as "explicit sexual conduct" and the production or possession of such material, in which persons under 18 or apparently under 18 participate in the explicit sexual conduct, is to be made

criminal. The Fraser Committee recommendations on pornography are more detailed. In Recommendation F.5 it is proposed that controls on pornographic material should be organized on a three tier system.

Tier 1 would include representations of persons under 18 participating in explicit sexual conduct, or material advocating the sexual abuse of children, or material produced in such a way that actual physical harm was caused to the person depicted. "Explicit sexual conduct" has the same meaning as given by the Badgley Committee, with the addition of sexually violent behaviour. It would be illegal even to possess this material.

Tier 2 depicts sexually violent behaviour, bestiality, incest or necrophilia. "Sexually violent behaviour" includes sexual assault and physical harm depicted for the apparent purpose of causing sexual stimulation of the viewer, including murder, assault and bondage, or self-infliction of physical harm. It would be illegal to produce or to distribute this material. However, defences of artistic merit and educational or scientific purpose would be available to those charged under the proposed law.

Tier 3 is a depiction of vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or genitals, or lewd exhibition of the genitals. No portrayal of a person under 18 or of sexual violence is included. No criminal sanctions would attach to material in Tier 3 unless it is displayed to the public without a warning as to its nature, or sold or made accessible to persons under 18.

Both committees recommended that there be a new offence created of simply possessing certain pornographic materials. The Badgley Committee would include depictions of young persons apparently under 18 years of age involved in sexually explicit conduct. (See Recommendation B.49.1(ii).) To this the Fraser Committee Tier 1 material adds depictions which present as normal the sexual abuse of children and material which was produced by causing actual physical harm to the persons depicted. (See Recommendations F.72(4) and F.75(4).)

Question 8.

In the view of those consulted, what would be the effect of implementing these recommendations? Should there be prior banning of pornographic material? Should the importation into Canada of pornographic material in Tiers 1 and 2 be prohibited? How may material be categorized as belonging to Tier 1 or Tier 2? Can such laws be effectively enforced?

The Fraser Committee recommendations provide for a second tier of pornographic material, which it would still be unlawful to produce, or to have for distribution or retail, but which it would be lawful to possess. Certain additional defences - artistic merit, educational or scientific value, and a defence of due diligence for retailers - are suggested.

Question 9.

Is it logical to provide penalties for the production and distribution of certain categories of pornography without at the same time prohibiting the simple possession of the materials?

Both committees recognize that there are certain pornographic materials which can be available to adults in the privacy of their own homes. Both committees recommend the prohibition of the exhibition and sale of such materials to young people. The Fraser Committee recommends the provision of prior warnings so that adults who may wish to avoid this material may do so.

Question 10.

In the view of the discussants, should such prior warnings be required in all situations in which permitted erotica is available? Should the age of legal sale be fixed at 16 (Badgley) or at 18 years of age (Fraser)?

2. Hate Literature

The Fraser Committee, in Recommendation F.38, suggested that the definition of "definable group" in s. 281.1(4) of the *Criminal Code* should be broadened to include sex, age, and mental or physical disability, at least insofar as the section applies to s. 281.2, which deals with public incitement of hatred.

Question 11.

Would this extension of the scope of the hate literature provision have any undesirable consequences?

B. THE ROLE OF THE PROVINCES

Both committees regard the provincial role in the control of pornography as vital. The Badgley Committee recommends the development of criteria for film and video classification which conform with the prohibitions recommended to be included in the *Criminal Code*. The Fraser Committee recommends the rejection of a national film review system, preferring the present arrangement of provincial boards. Provinces and the two territories without boards should consider establishing these. However, boards should not be able to prohibit or to cut films which are not contrary to the *Criminal Code*. A similar system of review is called for videos intended for private use. Closer collaboration between provincial boards and the Customs service is required to ensure proper assessment and classification of films and videos.

Besides providing a classification mechanism, the provinces are encouraged to have their human rights commissions review their legislation and jurisprudence on pornography issues. Although a separate pornography-related offence should not be added to human rights codes at this time, a civil course of action is advocated to deal with the promotion of hatred by way of pornography. Observations on these issues may be made by discussants. The provincial government agencies may wish to ask certain questions in this subject area.

C. THE ROLE OF MUNICIPALITIES

Both committees note the importance of the role the municipalities play in regard to control of the display of pornographic material with appropriate by-

laws. In addition, the Fraser Committee notes their role in licensing and in zoning with respect to live shows. Observations on these issues may be made by discussants.

D. THE ROLE OF THE PRIVATE SECTOR

Both committees refer to the extent to which publicity may modify the behaviour of convicted offenders and perhaps deter others from the prohibited behaviour.

Question 12.

The Fraser Committee suggested (Recommendation F.85) that as much publicity as possible should be given to accused found guilty of offences involving child pornography, child prostitution or sexual offences excluding incest. The Badgley Committee recommended a similar provision (B.47) for persons soliciting the services of juvenile prostitutes. Would such a proposal be effective and, if so, how might it best be set in place? Is there a role for the private sector in this?

IV. DEALING WITH PROSTITUTION

A. CHANGES TO FEDERAL LEGISLATION

1. Street Prostitution

The government has introduced Bill C-49 which has as its objective the control of street prostitution and soliciting in public places by both juvenile and adult prostitutes. The Badgley Committee has recommended that juvenile prostitution itself be made criminal. This is discussed later. The Fraser Committee recommendation, dealing with all prostitutes, focused on the public nuisance aspects of the offence. Bill C-49 attempts to provide adequate legal controls of street solicitation.

Question 13

Do the discussants have any observations on Bill C-49? What will be the impact of its passage into law?

2. Making criminal the status of juvenile prostitutes

The Badgley Committee recommended that young prostitutes should be dealt with as criminals by making criminal the status of being a young prostitute. The Fraser Committee recommends against this approach, although it retains the idea that a young prostitute would be subject to some of the same laws as an adult. So, he or she would be subject to arrest for street soliciting, and so forth. However, the Fraser Committee recommends that juvenile prostitutes be specially protected from pimps and that persons under 18 would not be allowed in the prostitution establishments which are to be considered.

Question 14

Are the special measures proposed to protect young prostitutes sufficient, or should more be done, for example, by making the status of young prostitute criminal?

3. Regulating the activities of prostitutes

The Fraser Committee recommends that one or two prostitutes should be able to run their prostitution-related activities from their home. These residential prostitution establishments would be subject to zoning control by municipal authorities. In addition, it is proposed that the provinces begin to consider permitting the establishment of larger houses of prostitution, which

would be subject to provincial licensing. The criminal law dealing with prostitution establishments should be such that neither of these types of prostitution establishment would be illegal.

Question 15

Do the discussants have any observations on these suggestions?

In addition to the proposal to make criminal the soliciting activities of clients seeking prostitution services in a public place, the Fraser Committee recommends (F.99) the creation of a new offence for engaging in, or offering to engage in, sexual activity for money, other consideration, or reward with a person under 18. This would be an indictable offence with a proposed maximum penalty of 5 years' imprisonment. The Badgley Recommendation (B.46) would propose a maximum of two years' imprisonment.

Question 16

Do the discussants have any observations on these suggestions?

B. THE ROLE OF THE PROVINCES

Under the recommendations dealing with prostitution, the provinces are to have a role in the licensing of premises to be used as licensed houses of prostitution, as well as in taking additional measures to deal with prostitutes, by way of enhanced police activity to deal with aspects of the problems surrounding prostitution.

C. THE ROLE OF MUNICIPALITIES

Under the recommendations dealing with prostitution, municipalities are to have a role in the zoning of areas in which premises to be used as larger licensed houses of prostitution would be situated, as well as zoning areas in which premises used as residential prostitution establishments could be located.

Question 17

In the view of the discussants, are these proposals realistic and practical for Canadian society in the coming decades?

D. THE ROLE OF THE PRIVATE SECTOR

Question 18

Is there any particular identifiable role for the private sector in dealing with prostitution-related activities?

V. FURTHER WORK

Following the consultation meeting, the notes that will be taken will be extended to a coherent account of the discussion and returned to participants to ensure that an accurate record of the observations has been made. This element of the national consultation is hoped to be concluded in September 1985. Thereafter, the material will be summarized for the use of the federal Ministers, as they review all of the other relevant material and determine the most appropriate way in which to proceed.

The Ministers of Justice and of National Health and Welfare and the Solicitor General wish again to express their thanks to all who have participated in this most important phase of policy development. The consultation process is an essential step in the determination of government policy to deal with these extremely difficult social problems.

