Submission to the Standing Committee on Justice and Human Rights

National Consultation on Human Trafficking in Canada

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I am writing in response to the National Consultation on Human Trafficking, and the proposed Bill C-38, which would bring into force some of the provisions of the former Bill C-452.

I am Professor of Law at the University of British Columbia's Allard School of Law. I have been a law professor since 1999. My scholarship focuses on legal responses to sexual violence, in particular sexual assault, prostitution, pornography and sexual harassment. I am an Associate Editor of the *Criminal Reports* and participate regularly in judicial education on sexual assault law. I am also a lawyer who represents women's groups *pro bono*. I appeared as intervenor counsel at the Ontario Court of Appeal and Supreme Court of Canada in the *Bedford v. Canada (A.G.)* litigation on behalf of the Women's Coalition for the Abolition of Prostitution.

I am writing today about trafficking for sexual exploitation, which is the topic on which I am able to offer insight based on my scholarly expertise. While I recognize that labour and organ trafficking share some features with sex trafficking, it is sex trafficking that is profoundly gendered in its operation and impact, and which is part of the continuum of male violence against women.

In considering Bill C-452 and the broader question of effective responses to human trafficking for sexual exploitation in Canada, I would ask that the Committee also consider the following:

Canada's definition of "human trafficking" is unduly narrow and not in compliance with our international obligations.

The Criminal Code defines human trafficking in s. 279.01 as committed by someone who "recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation." Exploitation is defined in s. 279.04 as causing someone to provide a service, "by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service." Evidence of force, coercion, deception or the exercise of authority is relevant to this analysis and consent is not a defence.

Defining "exploitation" in terms of a threat to physical safety is unduly narrow and makes the offence extremely difficult to prove.

The 2000 *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (the "*Palermo Protocol*") to which Canada is a signatory, recognizes that exploitation includes "the abuse of … a position of vulnerability" (art. 3(a)), which could include poverty, dependence on the trafficker for drugs, lack of legal status in the country, looking to escape an abusive foster home or other factors rooted in sexism and other intersecting inequalities. Bringing the *Criminal Code* definition of human trafficking in line with our international obligations would be much more effective than an evidentiary presumption designed to reduce the likelihood that the victim will have to testify, because it will actually extend the law's protection to the large numbers of victims who are not covered by this offence.

The male demand for prostitution creates the market that human traffickers seek to fill. Laws that target demand are an essential component of combating human trafficking.

The male demand for prostitution creates a market for the traffic in human beings for sexual exploitation. Traffickers benefit from the decriminalization of the purchase of sex, since this increases male demand from both local men and men who travel from other jurisdictions where this activity is illegal. Where the demand exists and there is money to be made, traffickers will operate to exploit the vulnerabilities of marginalized women and girls. The *Palermo Protocol* recognizes this in art. 9(5) which states that "States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking."

Section 286.1 of the *Criminal Code,* which makes it an offence against the person to offer to purchase sexual services, is an essential part of combating human trafficking. The trafficking laws do not apply to buyers, only to traffickers. Without s. 286.1, it would be legal to purchase a trafficked woman in Canada. A provision that would criminalize only the purchase of trafficked women would be wholly ineffective, since the accused would in almost every case be able to argue that he did not have knowledge of that fact. It would also feed into the false dichotomy between free and forced prostitution that fails to recognize how inequalities can operate even where no third party is involved.

Human trafficking prosecutions often depend on prostitution offences to secure any convictions for traffickers.

Not all prostitution is trafficking. People often make the mistake of thinking that trafficking requires movement of the victim. This is not required. Or they think that the distinction between prostitution and trafficking is based on lack of consent. This is also untrue. Consent is not a defence to trafficking and does not remove the conduct of the accused outside of the trafficking definition. The real distinction is based on the presence of third parties. A person cannot traffic themselves. Once third parties are involved, the potential for exploitation is very high. These individuals can make large amounts of money from multiple prostitutes and have an incentive to

both recruit girls and women into prostitution who can be controlled to maximize profit, and to keep those girls and women from exiting prostitution.

Because the definition of exploitation in Canada requires proof of a threat to safety, most prosecutions against third party pimps and other profiteers proceed under the prostitution offences, including procuring and the former living on the avails/present material benefit offence. These offences have proven to be much more useful and durable than the trafficking offences themselves. In many cases trafficking charges are laid but later dropped in favour of these other offences.

It is true that an evidentiary burden similar to the one in Bill C-38 was upheld by the Supreme Court of Canada in 1992 in *R. v. Downey* by a narrow 3:2 majority. It may be that the same result will follow with the proposed burden here. But it is also worth noting that an identical evidentiary burden is placed on the accused by the material benefit offence in s. 286.2(3), subject to several exceptions that reflect the existing case law, including the Supreme Court of Canada's decision in *Bedford v. Canada*. The federal government needs to actively defend this provision, and the other provisions that target the demand for prostitution, as part of a coordinated and comprehensive effort to fight trafficking, but also to promote sex/gender equality and combat male violence against women. If the federal government declines to intervene and defend these laws when they are challenged in court, discourages their enforcement, fails to provide comprehensive alternatives to prostitution or moves to repeal them and to legalize the demand for paid sex, it will completely undermine its opposition to human trafficking.

The strengthening of human trafficking laws should not be used as a pretext to legalize men's purchase of women in prostitution.

I am deeply concerned that the present consultations arising from minor amendments to the current human trafficking law will be used as a pretext to justify the decriminalization of sex buyers, by claiming that Canada has moved to strengthen its trafficking laws and so no longer needs the provisions that criminalize sex purchase and third party profiteering and procuring. This would be contrary to Canada's international obligations, the emerging international trend (Sweden, Norway, Iceland, France, Ireland, Northern Ireland, and the European Parliament have all adopted/endorsed a model of criminalization of demand) and the fundamental human rights of women to equality and security of the person. There will be strong opposition from women's groups should this be the outcome of these consultations.

Recommendations

1. Amend s. 279.04 of the *Code* to define exploitation as "engaging in conduct that, in all the circumstances, (i) could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service; or (ii) abuses a position of vulnerability of the other person." The *Code* could further provide a non-exhaustive list of factors that must be considered

in determining whether a position of vulnerability exists, including financial dependence, the cultivation of emotional dependence, perceived control over the ability to stay in the country, blackmail, and any other inequalities between the parties.

2. Defend the amendments enacted in 2014 by Bill C-36 against constitutional challenge and publicly commit the government of Canada to supporting this legislative approach as necessary to combat trafficking and to create a society in which men and women are free and equal in dignity and rights.

3. Support this commitment with public education to deter sex purchase and comprehensive supports that provide real alternatives to prostitution.

I would be pleased to answer any questions that the Committee may have about these submissions.