A submission by **Jamie Liew** to the **Standing Committee on the Status of Women (FEWO)**
Harm of Anti-Trafficking Policies on Migrant & Non-Citizen Sex Workers (April 12, 2023)

My name is Jamie Liew, and I am a lawyer, the Director of the Institute of Feminist & Gender Studies (University of Ottawa), and an Associate Professor at the Faculty of Law in the University of Ottawa. I am an expert in immigration law and have intimate knowledge on the ways in which Canadian laws affect migrants and non-citizens. I wish to submit three points:

1. Understand the intersection of immigration & criminal law in the context of sex work

The non-citizen status of some sex workers means that this subgroup is not only subject to criminal law, but an additional legal regime, namely the immigration law regime. Where a non-citizen sex worker has merely been identified in a criminal investigation, faces criminal charges, or has been convicted, they (and their family) are subject ***to immigration law consequences*** including immigration status denied or taken away, deportation, and a bar from Canada.

Sections 33-44 of the *Immigration and Refugee Protection Act* (*IRPA*) provide an inadmissibility regime that bars both permanent residents and foreign nationals from obtaining or keeping immigration status and from entry and continued residence in Canada. While there are ten grounds of inadmissibility, non-citizen sex workers are often found inadmissible on the grounds of criminality, serious criminality, and organized criminality (ss. 36 & 37). The standard of proof for findings of fact for ss. 36 & 37 is "reasonable grounds to believe" which has been interpreted as "somewhere between 'mere suspicion' and the balance of probabilities," a standard ***lower*** than both the criminal law and civil law standards.

Under ss. 36(1)(a) of the *IRPA* ("serious criminality"), both permanent residents and foreign nationals are inadmissible for having been convicted of an offence within Canada punishable by a maximum term of imprisonment of at least 10 years, regardless of the sentence imposed. Subsection 36(1)(a) also renders a permanent resident or foreign national inadmissible for being sentenced to a term of imprisonment of more than six months in Canada, regardless of the potential maximum term of imprisonment. Under ss. 36(2)(a) ("criminality"), a foreign national may be found inadmissible if they are convicted of an indictable offence or two summary offences not arising out of a single occurrence. An offence may be deemed an indictable offence even if it was prosecuted summarily.

Section 37(1) renders both permanent residents and foreign nationals inadmissible for being members of "an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment." The Supreme Court of Canada has interpreted the meaning of "organized criminality" for purposes of ss. 37(1)(a) in line with ss. 467.1(1) of the *Criminal Code*, which defines "criminal organization" as a group of three or more persons whose main purpose is the facilitation or commission of serious offences that would likely result in the direct or indirect receipt of a material or financial benefit.[1]

[1] *B010 v Canada,* 2015 SCC 58 at para 42 [*B010*].

Depending on the provision, non-citizen sex workers can be found inadmissible if charged, convicted, or there are reasonable grounds to believe they engaged in acts currently described in the *Criminal Code* as recruiting (ss. 286.3(1)), permitting purchase (ss. 286.1(1)), receiving a material benefit (ss. 286.2(1)), advertising (ss. 286.4), publicly communicating (ss. 286.1(1)) and impeding traffic (ss. 213(1)). Depending on the inadmissibility provision, permanent residents as well as foreign nationals can be implicated. In some cases, a conviction is not even necessary.

The consequences are severe including an issuance of a deportation order, removal from Canada, and in some cases, a lifetime ban on return without Ministerial permission. While some may seek recourse at the Immigration Appeal Division (IAD), depending on the ground of inadmissibility, some are precluded from filing such an appeal. While some may file an application for permanent residence on humanitarian and compassionate grounds, such an application does not stay a removal and an individual can be deported pending a decision. Further, as per ss. 42(1)(b) of the *IRPA*, ***any*** accompanying family member could also be found inadmissible as well. This may include the sex worker's spouse and children.

Canada Border Services Agency (CBSA), overseen by the Minister of Public Safety (Minister), enforces the *IRPA* and has the power to arrest, detain and in some cases, determine the outcome of admissibility proceedings. CBSA works with police to identify non-citizens, and gather evidence related to inadmissibility. Once a person has been identified as potentially inadmissible, an immigration officer may issue a s. 44 (*IRPA*) report alleging the reasons. The Minister or an immigration officer will determine if the report is well founded, or the Minister will forward it to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing. A finding of inadmissibility leads automatically to the issuance of a removal order. Once the removal order comes into force, the non-citizen loses their immigration status and must leave Canada immediately. If they do not comply, they face further sanctions, including detention. The CBSA can arrest and detain a non-citizen, in some circumstances, without a warrant, at any time where there are reasonable grounds to believe any grounds of inadmissibility apply, and where the person constitutes "a danger to the public" or is unlikely to appear for a future immigration proceeding.

2. Do not conflate sex work with human trafficking

It is important to understand how any law or policy that conflates sex work with trafficking may inadvertently make it easier for non-citizen sex workers to be subject to collateral harms from immigration law. Racialized, migrant, non-citizen, sex workers are often assumed to have been trafficked because some traveled to Canada at some point and because they may interact with persons who share ethnic, linguistic, and cultural ties. However, the fact of travel and association with community should not subject this group of sex workers to additional scrutiny or sanction. The movement, transportation of people or the assistance given to people on the move or migrating, is sometimes perceived as nefarious or illegal. Law makers should be careful to distinguish travel and mutual aid from exploitive and abusive activities or behaviour (which are criminalized already). Similarly, working in collectives or groups should not be presumed to be criminal organization or trafficking. Law makers should be careful to distinguish mutual aid

and collaborative work from poor working conditions or exploitative and/or abusive situations. Indeed, the Supreme Court grappled with this distinction and was careful to highlight that the law should not overreach in cases involving "human smuggling".[2]

3. Collateral immigration law harms flow from anti-trafficking law and policy

Any anti-trafficking measures could subject non-citizen sex workers to ***severe collateral harm***. It is important to understand that "organized criminality" in ss. 37(1)(a) of the *IRPA* does not require a criminal charge or conviction for non-citizen sex workers to be caught under this ground of inadmissibility. Just being found by immigration authorities to have engaged in "organized criminality" is sufficient. This means that even if persons do not face criminal charges or convictions, they may nevertheless face significant immigration law consequences following any interaction with (investigative or otherwise) or arrest by police. All is needed is "reasonable grounds to believe" they are a member of a criminal organization. For example, two sex workers employed by the same person could be deemed a criminal organization. A finding of inadmissibility under ss. 37(1)(a) cannot be appealed to the IAD and leads automatically to the issuance of a deportation order and a lifetime ban on return unless they obtain exemption from the Minister (which is illusory given such relief can take five to ten years to get a response from the Minister). As well, individuals inadmissible under this provision are barred from filing an application for permanent residence on humanitarian and compassionate grounds and therefore barred from raising considerations such as the best interests of any child affected. They are ineligible to file a refugee claim, and while they may file a pre-removal risk assessment, this does not confer status in Canada but only prevents a removal to their country of origin where they can show they are at risk of torture, death, or cruel and unusual punishment. If they cannot meet this requirement, they are deportable, even if they face persecution as defined under refugee law.

Sex workers know this; their greatest fear is deportation.[3] ***They will take measures to avoid surveillance and identification by police and CBSA and go underground into unsafe conditions***.

IN CONCLUSION, the Committee should consider how immigration law is implicated and experienced with and against any potential anti-trafficking law or policy. In my expert opinion, further criminal, municipal or other regulatory measures meant to address anti-trafficking will inevitably lead to harm to migrant and non-citizen sex workers. It will drive workers underground to avoid detection by CBSA and police and expose them to the very exploitation and abuse targeted (activity already criminalized). To create more laws or policies would not improve conditions for sex workers but subject them to greater risks of ***punitive collateral harm in immigration law***, ones in which the Supreme Court has held could have a more significant impact than criminal sanction itself.[4]

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[2] *R v Appulonappa,* 2014 SCC 59; *B010, ibid*.
[3] See https://www.butterflysw.org/ and https://swanvancouver.ca
[4] *R v Wong,* 2018 SCC 25 at 72.