May 5, 2023

To: The House of Commons Standing Committee on the Status of Women

Re: Human Trafficking of Women, Girls, and Gender Diverse People

I am an Assistant Professor in the Faculty of Law at Queen's University. Since 2014, my research has focussed on law and policy responses to the commercial exchange of sexual touching in Canada. Drawing on my research, this brief provides evidence relevant to your study about Canada's current policy approach to the activity of prostitution, the links between the commercial sex market and human trafficking reflected in that policy choice, and the limitations of existing evidence about the commercial sex market and the extend of human trafficking that occurs in it.

The Commercial Exchange of Sexual Touching is Unlawful in Canada

The commercial exchange of sexual touching (the activity historically known as prostitution) has been unlawful in Canada since the *Protection of Communities and Exploited Persons Act* was enacted in 2014. Section 286.1 of the *Criminal Code* makes it on offence to obtain sexual services for consideration. Selling or providing sexual services for consideration is not "decriminalized." Those who provide their own sexual services for consideration (meaning, sexual touching for consideration) are parties to the s286.1 offence (as aiders and abetters pursuant to section 21 of the *Criminal Code*). This is true whether they provide sexual touching by choice, as a result of third-party coercion or exploitation, or because of a lack of choice. Those who provide sexual services for consideration are immunized from prosecution by section 286.5 of the *Criminal Code*. This framework, where providers remain parties to the offence but immune from prosecution, was carefully constructed to ensure that the activity of prostitution itself was clearly unlawful in Canada for all involved, whenever and however it takes place.

◊ See Debra M Haak, "The Initial Test of Constitutional Validity: Identifying the Legislative Objectives of Canada's New Prostitution Laws" (2017) 50:3 UBC Law Review 657

With *PCEPA* Parliament Recognized Exploitation as a Central Feature of the Commercial Sex Market

The offences enacted by Parliament with *PCEPA* aim to respond to the exploitation that occurs in the commercial sex market. Parliament recognized the commercial exchange of sex itself as a form of exploitation that disproportionately impacts women and girls. Two distinct kinds of exploitation occur in the commercial sex market. The first is structural or systemic; the commercial exchange of sex occurs in a context of significant and intersecting inequalities based on sex, age, race, Indigeneity, and socioeconomic status. These inequalities are exploited by purchasers and third parties, even if a provider or seller agrees to the exchange. The second kind of exploitation is individual; some sellers are coerced or exploited by third parties into providing sexual services for consideration. Parliament acknowledged both kinds of exploitation, and the link between a commercial sex market and human trafficking, when it enacted *PCEPA*. *PCEPA* harmonized the penalties imposed for human trafficking and prostitution-related conduct to ensure a consistent response to these practices that Parliament accepted as linked. In the preamble, Parliament pointed

to the exploitation that is inherent in prostitution. Parliament decided that the best way to respond to the exploitation in the commercial sex market is to expose as few people to it as possible.

◊ See Government of Canada, Fact Sheet - Prostitution Criminal Law Reform: Bill C-36, the *Protection of Communities and Exploited Persons Act*

There is no Consensus over How to Respond to the Exploitation and Harms Associated with the Commercial Sex Market

The application judge in *Bedford* (the case that propelled Parliament to enact *PCEPA*) began her decision by acknowledging that there is no consensus over how to respond to the commercial exchange of sex. With *PCEPA* Parliament tried to balance the overall objectives of addressing the inequalities and exploitation occurring in the commercial sex market with the specific safety related interests of continuing adult sex workers identified by the Supreme Court in its decision in *Bedford*. They did this by including exceptions from criminal sanction for certain kinds of activities and by including the immunity from prosecution discussed above.

Some of the evidence you have heard has focussed on the distinctions between consensual sex work, sexual exploitation, and human trafficking (and the claim they not be "conflated"). In 2014, Parliament decided not to treat these forms of participation in the commercial sex market as distinct. Consistent with the policy approach now taken in all of Sweden, Norway, Iceland, Northern Ireland, France, the Republic of Ireland, and Israel, Canada's current policy approach accepts that the commercial sex market cannot be separated into voluntary and involuntary sectors (and that human trafficking occurs in the commercial sex market). In April 2014, the Council of Europe recommended that member and observer states, which includes Canada, consider criminalizing the purchase of sexual services, as the most effective tool for preventing and combating human trafficking. With *PCEPA*, Parliament decided that the best way to avoid prostitution's harms (including the harms associated with human trafficking) was to attempt to bring an end to its practice.

◊ See Government of Canada, Technical Paper: Bill C-36, *Protection of Communities and Exploited Persons Act*

It is Not Possible to Know the Size of the Commercial Sex Market in Canada or the Amount of Human Trafficking that Occurs in It

Data about the commercial sex market is hard to gather. Due to the hidden nature of the market, it is not possible to generate a representative or statistically relevant sample of those who do or have participated in the market. Data about the incidence of human trafficking and about the experiences of those involved in it are particularly hard to obtain. A prominent US scholar suggests that estimating the size of the trafficking problem, for example, is only possible at the micro level if at all.

Researchers from Georgetown University undertook a study for the United States National Institute of Justice to identify and analyze the state of empirical research on human trafficking there, noting the importance of this information for both policy discussions and programming for victims of trafficking. They concluded that despite increased interest in human trafficking, little systematic,

empirically grounded research has been done on the issue; methodologies to study human trafficking are in their infancy, and the need to deepen knowledge about this topic is urgent.

◊ See Debra M Haak, "The Good Governance of Empirical Evidence about Prostitution, Sex Work, and Sex Trafficking in Constitutional Litigation" (2021) 46:2 Queen's Law Journal 187

Dr Debra M Haak
Assistant Professor
Queen's University, Faculty of Law