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Dear Members of Parliament:

Re: House of Commons Standing Committee on Justice and Human Rights
PCEPA and Impact on Migrant Sex workers

My name is Jamie Liew and I am an immigration lawyer but also an associate professor at the Faculty of Law and the Director of the Institute of Feminist & Gender Studies, University of Ottawa. I have practiced immigration law since 2006 and been an academic since 2011. I write, research and teach on immigration, refugee and citizenship law. It is from this place of expertise that I offer my legal opinion below on how PCEPA harms migrant sex workers.

To begin, I refer to the term migrant to refer to any person without citizenship to Canada. A migrant may include a permanent resident and anyone with temporary or no status. It may include international students, visitors, refugee claimants, refugees, stateless persons and those with work permits.

I want to draw the committee's attention to the intersection of criminal law and immigration law and invite the committee to examine the intertwined but layered and multiple effects and consequences that flow from this intersection. I specifically refer to the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) and the inadmissibility regime under sections 33-44 of the *IRPA.* Inadmissibility bars a person from obtaining or keeping immigration status and from entry or continued residence in Canada.

Inadmissibility arises with a report by the Canada Border Services Agency (CBSA) which is responsible for enforcing the *IRPA* and is overseen by the Minister of Public Safety and Emergency Preparedness. They work with police to arrest, detain and determine the outcomes of many immigration enforcement proceedings.

Once a person has been identified by CBSA as potentially inadmissible, an Officer may issue a section 44 (*IRPA*) report identifying the grounds and reasons why inadmissibility m ay apply to a particular individual. In certain circumstances, the Minister of their delegate has the power to make the finding of

inadmissibility where it is determined that the section 44 report is well-founded. In other circumstances, the Minister may forward the report to a board member of the Immigration Division of the Immigration and Refugee Board for an admissibility hearing.

The CBSA can arrest and detain a noncitizen without a warrant at any juncture of an admissibility proceeding where there are "reasonable grounds to believe" any grounds of inadmissibility apply, and/or where that person constitutes "a danger to the public" or "is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or for a proceeding that could lead to the making of a removal order".[1] The standard of "reasonable grounds to believe" is a low threshold for enforcement officers to arrest and detain.[2] A CBSA officer or the ID may also impose conditions, including periodic reporting to an enforcement officer.[3]

A finding of inadmissibility by either the Minister or the ID leads to the issuance of a removal order.[4] Once a removal order comes into force, a permanent resident will revert to foreign national status[5] and a temporary resident will lose their status.[6] In general, once a removal order is issued, the individual must leave Canada "immediately" and the order is to be enforced "as soon as possible".[7] If the individual does not comply with the removal order, they can face further sanctions, including detention.

Different inadmissibilities come with different consequences, which will be explained further below. However, on a general level, an individual who is found inadmissible is barred from obtaining or keeping immigration status and from entry or continued residence in Canada. In some instances, inadmissibility can only be overcome via an application for a discretionary exemption issued by the Minister of Citizenship and Immigration[8] or by appealing an admissibility decision to the Immigration Appeal Division ("IAD") of the IRB.[9]

A finding of inadmissibility does not only result in the loss of immigration status and the removal of an individual. Other long-lasting immigration law implications may arise. Once found inadmissible and removed from Canada, a person will not be allowed to re-enter Canada or obtain immigration status for periods ranging from one year to life without Ministerial authorization, depending on the ground of inadmissibility that applies.[10] This means that inadmissibility can lead to long-term separation from one's home and family and difficulty in obtaining any kind of immigration status for the individual concerned and their dependents during the imposed period.

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[1] *IRPA*, s 55(1).
[2] *Ibid*, s 55(1); See *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114.
[3] *Ibid*, ss 44(4)-(5).
[4] *Ibid*, s 44(2) and 45(d).
[5] *Ibid*, s 46(1)(c).
[6] *Ibid*, ss. 46(1)(c) and 47(b).
[7] *Ibid*, s 52(1).
[8] *Ibid*, ss 25(1) and 42.1. However, s 25(1) does not apply where inadmissibility arises out of ss 34, 35, 37.
[9] *Ibid*, s 62. However, under s 64(1), no appeal can be made to the IAD by a foreign national or permanent resident if they were found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. Further, under s 64(3) no appeal to the IAD can be made in respect of a finding of inadmissibility on the ground of misrepresentation unless the foreign national is the sponsor's spouse, common law partner or child.
[10] *Ibid*, s 36(3); *Immigration and Refugee Protection Regulations*, (SOR/2002-227), s 18(2) [*IRPR*].

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While there are ten grounds of inadmissibility set out at sections 34-42 of the *IRPA*, the most applicable in the context of sex work are criminality, serious criminality, and organized criminality (*IRPA* ss. 36 and 37), the latter two of which are some of the most serious types of inadmissibility under the *IRPA*.

Section 33 of the *IRPA* sets out the standard of proof for findings of fact for sections 34 to 37. Section 33 provides, "The facts that constitute inadmissibility under sections 34-37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, or are occurring or may occur."[11] This standard has been interpreted as "somewhere between 'mere suspicion' and the balance of probabilities,"[12] meaning a standard lower than both the criminal law and the civil law standards.

It is worth noting that foreign nationals and permanent residents face different and overlapping forms of inadmissibility when it comes to involvement in sex work, which means that the impugned provisions particularly affect permanent residents and certain classes of foreign nationals.[13] This is largely because permanent residents, unlike foreign nationals, do not need a work permit in order to engage in employment in Canada.[14]As a result, permanent residents and, in certain circumstances, foreign nationals, can face very serious immigration consequences if they engage in sex work as a result of the interaction between the impugned provisions and sections 36 and 37 of the *IRPA*.

Under subsection 36(1) of the *IRPA* ("serious criminality"), both permanent residents and foreign nationals may be found inadmissible for having been convicted of an offence within Canada that is punishable by a maximum term of imprisonment of at least 10 years, regardless of the sentence actually imposed. Subsection 36(1) also applies to convicted persons who are sentenced to a term of imprisonment of six months or more in Canada, regardless of the potential maximum term of imprisonment.

Pursuant to subsection 36(2) ("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. Subsection 36(3) provides that where an offence may be prosecuted either summarily or by way of indictment, it is deemed to constitute an indictable offence even if it was prosecuted summarily. These two subsections of the IRPA – 36(1) and 36(2) – interact with the impugned *Criminal Code* provisions in various ways. Permanent residents and foreign nationals can be found inadmissible under subsection 36(1)(a) of the *IRPA* if they are convicted under subsection 286.3(1) of the *Criminal Code* (recruiting provision) since the upper end of the sentencing range for this offence is 14 years. Also pursuant to subsection 36(1)(a) of the *IRPA*, anyone who receives a sentence of six months or more if convicted under any of the following impugned provisions may be found inadmissible for serious criminality, even though the maximum term of imprisonment is less than 10 years: subsections 213(1) (impeding traffic provision); 213(1.1) (public communication provision); 286.1(1) (purchasing provision); 286.2(1) (material benefit provision); or 286.4 (advertising provision).

If the sentence imposed is less than six months, a conviction for any of the following hybrid offences could lead to inadmissibility for criminality pursuant to subsection 36(2)(a) of the *IRPA*: subsections

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[11] *IRPA*, *ibid*, s 33.
[12] *Almrei (Re)*, 2009 FC 1263 at paras 91 and 94. See also *Mugesera*, *supra* note 22 and *Jaballah (Re)*, 2010 FC 79.
[13] *IRPA*, *supra* note 4, s 2(1): The *IRPA* defines a foreign national as someone who is not a Canadian citizen or a permanent resident and includes a stateless person.
[14] *Ibid*, s 4(1).

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286.1(1) (public communications provision); 286.2(1) (material benefit provision); and 286.4 (advertising provision). Similarly, regardless of the length of the sentence imposed, if an individual is convicted of s. 213(1) (impeding traffic provision) or s. 213(1.1.) (public communication provision)), she can be found inadmissible pursuant to s 36(2)(b) if she is convicted of two or more these offences not arising out of a single occurrence, despite the fact that they are summary offences.

Subsections 37(1)(a) and (b) of the *IRPA* are also both relevant to the application of the impugned provisions to migrant sex workers. Subsection 37(1)(a) renders a permanent resident or a foreign national inadmissible for "being a member 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".[15]

The Supreme Court of Canada has interpreted the meaning of "organized criminality" in the context of inadmissibility under subsection 37(1)(a) in line with subsection 467.1(1) of the *Criminal Code*, which defines "criminal organization" as a group composed of three or more persons whose main purpose or activities is the facilitation or commission of serious offences that would likely result in the direct or indirect receipt of a material or financial benefit.[16]

Given that the impugned *Criminal Code* provisions criminalize many activities related to sex work, and that paid sexual services can be interpreted as involving the receipt of material or financial benefit, any migrant sex worker or person working directly or indirectly with a sex worker, could be rendered inadmissible pursuant to subsection 37(1)(a). For example, two sex workers employed by the same person are considered an organization of three persons for purposes of subsection 37(1)(a).

The application of subsection 37(1)(a) is particularly problematic given that many migrant sex workers report that they act as third parties for one another, collaborating in all aspects of the work, including renting space, purchasing supplies, advertising, coordinating with clients to book appointments, and making client referrals. As sex worker organizations have observed, many migrant workers benefit from working in a collective environment, where they can learn from and support one another, including sharing best practices and information and safety practices.

Section 37 renders migrant sex workers vulnerable to the most serious immigration law consequences (deportation and a lifetime ban from returning to Canada) for carrying out their activities in mutually supportive and collective environments.

It is important to bear in mind that no criminal conviction is necessary for an individual to be found inadmissible pursuant to subsection 37(1)(a). This means that even if migrant sex workers do not face criminal sanctions as a result of their work, they may nevertheless face significant immigration law consequences. Thus, while section 286.5 of the *Criminal Code* appears to prevent sex workers themselves from being prosecuted under subsections 286.2(1) (material benefit provision) and 286.4 (advertising provision), they may nevertheless suffer significant repercussions under the *IRPA* if there are "reasonable grounds to believe" they are a member of a criminal organization as per subsection 37(1)(a).[17]

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[15] *Ibid*, s 37(1)(a).
[16] *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 42.
[17] *IRPA*, *supra* note 4, s 33.

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The consequences of inadmissibility pursuant to sections 36 and 37 of the *IRPA* are severe: both sections result in a lifetime ban on return to Canada. If a permanent resident or a protected person (i.e. someone who has been granted refugee status) is found inadmissible pursuant to section 36, she can file an appeal to the IAD where they can raise humanitarian factors only where the resulting sentence was six months or less.[18] Where the sentence is more than six months, they are precluded from filing such an appeal. A foreign national does not have recourse to the IAD. An individual found inadmissible pursuant to section 36 can also file an application for permanent residence on humanitarian and compassionate grounds.[19] However, such an application does not comport a statutory stay, and the individual in question can therefore be deported pending a decision.

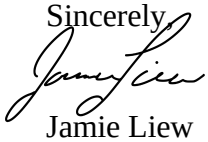
In order to overcome section 36 admissibility, the person concerned must seek a record suspension, and one becomes eligible for this after a period of five to ten years.[20]

As for an individual found inadmissible pursuant to subsection 37(1), the only relief available is via an application for ministerial relief,[21] an illusory remedy given that assessment of an application for ministerial relief can take, on average, five to ten years,[22] during which time the individual is usually deported from Canada, leading to separation from friends, family, and community.

One should also take note that subsection 42(1)(b) of the *IRPA* renders *any* accompanying family member (meaning those persons that are attached to a principal applicant's immigration application), such as a spouse or children, inadmissible by association.[23] In other words, if a migrant is found inadmissible, then their children and spouse are inadmissible as well.[24] Additionally, pursuant to subsection 42(1)(a) of the *IRPA*, if the migrant is an accompanying family member and is found inadmissible, they can render their principal applicant family member (i.e. spouse) inadmissible as well.[25] The application of the impugned provisions to migrant sex workers therefore has rippling effects through families who may have spent years working towards a new life in Canada.

I hope that this brief introduction to the intersection of immigration law and the provisions you are reviewing give you a sense of the differential, additional and harmful consequences that migrant sex workers experience as a result of the existence of the law. While I don't have space to delve into this deeply, it is important to consider the interaction of these legal frameworks and how they inform the choices migrant sex workers make in working underground, and working in unsafe conditions in order to avoid police surveillance and detection. The consequences flowing from immigration law are separate and distinct but yet intricately linked to the sex worker provisions under review.

Sincerely,



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[18] *Ibid*, s 64(2).
[19] *Ibid*, s 25(1).
[20] *Criminal Records Act*, RSC, 1985, c C-47, s 4.
[21] *IRPA*, *supra* note 4, s 42.1.
[22] *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1337 at para 9.
[23] *IRPA*, *supra* note 4, s 42(1)(b).
[24] *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2019 FCA 169.
[25] For example, *Brar v Canada (Minister of Citizenship and Immigration)*, 2016 FC 542.

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