

To: Standing Committee on Justice and Human Rights

Re: Review of the *Protection of Communities and Exploited Persons Act*

Date: 18 February 2022

From: Drs. Tamara O’Doherty and Hayli Millar

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## **Introduction**

Together, we have co-authored six publications related to human trafficking law and its enforcement in Canada. These publications are based on our ongoing longitudinal (2013-2022) research into human trafficking law, as well as each of our general expertise in the context of Criminology as faculty members in university criminology programs in British Columbia (Simon Fraser University and the University of the Fraser Valley), holding doctoral degrees in Criminology or Law. In addition to our work in this specific subject area, Dr. O’Doherty has extensive research experience related to victimization in the context of commercial sex and Dr. Millar has conducted comparative international research and published on gender, migration and human trafficking in South Asia, and so-called “modern slavery laws” regulating child and forced labour in the context of global supply chains. Our most recent collaboration [Technical Report], from which we draw the majority of our submission below, is available in full at: <https://icclr.org/publications/canadian-human-trafficking-prosecutions-and-principles-of-fundamental-justice-a-contradiction-in-terms/>

Together, we submit that the *Protection of Communities and Exploited Persons Act* (herein, *PCEPA*) fails to protect those vulnerable to victimization; instead, the *PCEPA*, which conflates human trafficking and commercial sex, exacerbates precarity, stigmatization, and marginalization, contributes to increased criminalization and penalization of sex work and sex workers, increases inequality in labour rights, and creates barriers to accessing justice for sex workers. Our research has led us to conclude that the *PCEPA* is fundamentally flawed, especially in its conflation of commercial sex and human trafficking. Further, the enforcement of the trafficking and commodification laws demonstrates deeply troubling trends that function to sustain systemic racism and gender bias while failing to protect vulnerable individuals from violence. These latter trends are especially concerning given the Supreme Court of Canada’s landmark decision in *Bedford* recognizing the safety rights of sex workers, Canada’s obligations to ensure and respect its international and domestic human rights and labour law commitments, and the federal government’s expressed intention to reduce gender bias and systemic racism in the legal system.

## **Key Findings**

Since enacting the criminal trafficking offence in 2005, Canada has legislatively conflated trafficking in persons with “prostitution” and the commodification of sexual services by deliberately importing phrasing and elements from these other offences. Subsequent amendments, especially the *PCEPA*, have amplified this legislative conflation, with several alarming consequences:

1. There is a **net widening effect**: the criminal trafficking offence is overwhelmingly used to police domestic commercial sex work, especially cases involving procuring (pimping and living on the avails) and the commercial sexual exploitation of female persons under the age of eighteen years. This **legislative expansionism** and the convergence of federal criminal and immigration laws and their enforcement (so-called “cimmigration”) to regulate commercial sex work are reinforced and augmented by a variety of other laws (family laws, municipal bylaws, residential tenancy laws, taxation laws, and provincial anti-trafficking laws) that are also being used to punitively regulate those who work in the commercial sex sector. Legislative expansionism is accompanied by increased surveillance of “at-risk” communities through preventive policing—especially police enforcement-based and protectionist undercover sting operations and workplace “raid and rescue” campaigns, and progressively more technological surveillance. There is questionable empirical evidence about the effectiveness of these campaigns and frequently adverse consequences for those subject to intensified legal intervention, as evidenced by the Supreme Court of Canada granting leave to appeal in both *R v Haniffa* 2021 ONCA 326 and *R v Dare*, 2021 ONCA 327 on the doctrine of entrapment. Crucially, this legislative conflation and expansionism serve to invisibilize the many other forms of criminal exploitation, including same-sex and gender non-binary sex trafficking, and a range of other labour and human rights violations that occur in other (especially precarious and migrant) labour sectors and global supply chains. Also, in view of the presumed primary intent of the *UN Trafficking Protocol*, which is tied to a parent convention to prevent and suppress transnational and organized crime by encouraging international legal cooperation, it remains mystifying that Canada has prosecuted so few transnational cases or cases involving organized crime.<sup>1</sup>
2. There is at least the perception if not the reality that the *PCEPA* amended trafficking and commodification laws **contribute to violations of sex worker’s human rights**, especially freedom of expression (contrary to section 2(b) of the *Charter*), freedom of association (contrary to section 2(d) of the *Charter*) and the right to personal security (contrary to section 7 of the *Charter*), as evidenced by several *Charter* challenges arguing these grounds to contest the constitutionality of these offences, sometimes successfully.<sup>2</sup>
3. There are **intersectional inequities** in the enforcement of human trafficking and commodification offences, where human trafficking offences, in particular, appear to be enforced in ways that are

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<sup>1</sup> *Statistics Canada* suggests an increasing number of cross-border charges under the *IRPA*, but we have been unable to independently verify these charges through corroborating case law. See, e.g., our Technical Report at pp. 33-36, 44, especially Table 8: Type of Trafficking Offence, Case Datasets (2015-2018; 2006-2014) p. 36 and Table 10: Summary of the Prosecuted Trafficking Cases (2006-2018) p. 44.

<sup>2</sup> For example: *Ahmed and Ngoto*, 2019; *Anwar*, 2020; *D’Souza*, 2016; *Kloubakov*, 2021; *MacDonald*, 2021; *Maldonado*, 2021; *Ng*, 2006; *N.S.*, 2021; *Stone and Beckford*, 2013; *Williams*, 2021.

racialized, gendered and sensationalized.<sup>3</sup> These patterns have been found across many research studies, including in O’Doherty’s 2015 study on victimization in off-street commercial sex.<sup>4</sup>

4. There are **geographic disparities** in the enforcement of human trafficking and commodification offences, suggesting their enforcement is highly politicized.<sup>5</sup>
5. There are **economic incongruities** in the enforcement of human trafficking and commodification offences where seemingly vast federal and provincial/territorial resources are being deployed to police these offences, often using controversial investigation and surveillance strategies as noted above, which continue to constitute a *very small fraction* of police-reported crimes and/or charges.<sup>6</sup>
6. **Legislative conflation has produced the judicial conflation** of case precedents where so-called “pimping” or “pimping plus” offences are viewed as interdependent and indivisible, not only in interpreting elements of the trafficking offence but also in sentencing.<sup>7</sup> Troublingly, the legal framework has **reproduced the application of outdated stereotypes** about commercial sex work despite an emerging body of case law and government inquiry evidence challenging the problematic use of discredited yet pervasive and deeply harmful sexist, racist and misogynistic myths and stereotypes about sexualized violence in the criminal law, especially in relation to Indigenous and racialized women and sex workers.<sup>8</sup>
7. Legislative amendments, including those through the *PCEPA*, have **increased the penalty** of anti-trafficking (and commodification) laws. This includes the 2010 and 2014 introduction of

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<sup>3</sup> See, especially, Millar, Hayli & Tamara O’Doherty. (2020). ‘Racialized, Gendered, and Sensationalized: An Examination of Canadian Anti-Trafficking Laws, their Enforcement, and their (Re)Presentation’ 35:1 *Canadian Journal of Law and Society* 23-44. See also Kaye, Julie. (2017). *Responding to Human Trafficking: Dispossession, Colonial Violence, and Resistance among Indigenous and Racialized Women*. Toronto: University of Toronto Press; Lam, Elene (2018). *Behind the Rescue How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers*. Toronto: Butterfly Asian and Migrant Sex Workers Support Network; Maynard, Robyn (2017). *Policing Black Lives: State Violence in Canada from Slavery to the Present*. Halifax: Fernwood Publishing; Sterling, Andrea and Emily van der Meulen. 2018. ‘We Are Not Criminals’: Sex Work Clients in Canada and the Constitution of Risk Knowledge.’ 33:3 *Canadian Journal of Law and Society* 291-308.

<sup>4</sup> See also O’Doherty, T. & Waters, I. 2019. Gender, victimization, and commercial sex: A comparative study. *Atlantis*, 40(1), 18-29.

<sup>5</sup> See, e.g., our Technical Report at pp. 20-29, especially Table 2: Trafficking in Persons Offences, Total Persons Charged by Province and Territory (2006-2018) p. 23 and Table 3: Prostitution-Related Offences, Total Persons Charged by Province and Territory (2006-2018) p. 24.

<sup>6</sup> For example, in 2020, there were 342 alleged incidents of human trafficking resulting in 200 persons being charged. For the same year, there were 758 alleged incidents of sexual services offence violations with 331 persons charged. For that same year, there were more than 2.2 million alleged incidents reported to the police with more than 567,000 persons charged. Data retrieved from Statistics Canada, Incident-based crime statistics, by detailed violations, Canada, provinces, territories and Census Metropolitan Areas <<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510017701>> 12 February 2022. As select examples of the extensive government investments in anti-trafficking interventions post-*PCEPA*, the federal government committed \$75 million over six years in its National Strategy To Combat Human Trafficking 2019-2024, while the Ontario government committed an unprecedented \$307 million to combat human trafficking and child exploitation (2020-2025).

<sup>7</sup> See, e.g., our Technical Report at pp. 19, 32, 54-61.

<sup>8</sup> See, e.g., our Technical Report at pp. 92-94, 98-104; see also O’Doherty, 2015.

highly contentious mandatory minimum sentences that are argued to perpetuate systemic racism (and which the current government is now seeking to repeal for some offences via *Bill C-5: An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*). These mandatory minimum sentences have been challenged, often successfully, in several trafficking and commodification cases as violating a defendant’s right not to be subjected to cruel and unusual punishment (contrary to s. 12 of the *Charter*).<sup>9</sup>

8. There is now a troubling prospect for **over-charging and multiple convictions** for basically the same offence given the significant overlap between the phrasing and key elements of some of the new commodification offences—especially procuring and financially or materially benefiting from sexual services—and the criminal trafficking in persons offences. When the accused are dually charged for trafficking and procuring or for materially benefitting, it raises potential legal questions about *res judicata* (double jeopardy) and being punished twice for what is essentially the same offence, potentially contravening various laws and legal principles.<sup>10</sup>

For Canada, these legislative and enforcement patterns provoke vexed legal questions about the arbitrariness of the law and its enforcement. When combined with an examination of the deeply harmful ways that the judicial discourse sustains a false unidimensional narrative about consent, racist and gendered depictions of deserving and undeserving victims, and harmful stereotypes about sex workers and third parties, it is clear that we must change these practices if we are serious about our legal commitments to upholding human rights and labour rights and ensuring access to justice. Accordingly, we call on Canadian legislators and policymakers to consider taking the following immediate actions:

1. **Prioritize an independent assessment of the criminal trafficking law**—in its creation, its enforcement, and its application— with a particular focus on its intended and unintended consequences, especially for Black and Indigenous persons and People of Colour, gender and sexual minorities, and im/migrants who work in commercial sex.
2. **Adopt an evidence-informed and rights-based approach to regulating commercial sex work** based on meaningful consultations with those who work in commercial sex and by consulting a substantial and growing body of Canadian empirical evidence on the many harms of asymmetric and other criminalization models.<sup>11</sup> Canada cannot continue to “criminalize” and “punish” its way out of highly complex social problems that are driven by historical and ongoing systemic inequities and injustices, as the reform of other laws, especially those relating to the “war on drugs”, suggests.

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<sup>9</sup> For example: *Abara and Kulafofski*, 2018; *Ahmed and Ngoto*, 2019; *Antoine*, 2020; *Charboneau*, 2019; *Chisholm*, 2018; *Farougi*, 2020; *Finestone*, 2017; *J.G.*, 2021; *Jean*, 2020; *Joseph*, 2020; *Kassongo*, 2019; *J.L.M.*, 2017; *Lopez*, 2018; *Mercer*, 2017; *Robitaille*, 2017; *Safieh*, 2018; *Strickland-Prescod*, 2019; *Webber*, 2019. See our Technical Report at pp. 44-60, especially Table 11: Minimum and Maximum Imprisonment Sentences Pre- and Post-*PCEPA* p. 46 and Appendix D: Global Imprisonment Sentences Pre- and Post-*PCEPA* p. 115.

<sup>10</sup> See our Technical Report at pp. 94-97.

<sup>11</sup> See O’Doherty, 2011 and 2015 for more detail on the impacts of indirect and direct forms of criminalization on sex workers.

3. **Disentangle human trafficking from sex work offences by repealing the *PCEPA***, which is ideologically rather than empirically based reflecting the beliefs of a select group (especially radical feminists) and focus on preventing and combating the (criminal) exploitation and other egregious human rights violations that occur in many other (especially precarious and migrant) labour sectors and the global supply chains of Canadian businesses and their affiliates operating abroad.
4. **Address differential access to rights and remedies, including restitution, for victims of human trafficking or other violence**, especially the starkly different access to justice experienced by Black and Indigenous persons and People of Colour, gender and sexual minorities, and im/migrants. Canada should take immediate steps to fully implement the recommendations of international bodies and multiple government commissions of inquiry, especially those on violence in policing, systemic racism in the criminal justice system, truth and reconciliation, and missing and murdered Indigenous women and girls.
5. **Begin (and invest in) the far more complex work of addressing the root structural causes of inequity and exploitation**, including prioritizing action on labour exploitation across occupations and the exploitation of migrant persons (especially temporary workers and international students), vis-a-viz internationally recognized concepts of coerced, forced, and unfree labour and the right to decent work.

## Appendix A: List of Trafficking Publications

- Millar, H. & T. O'Doherty. Technical Report: Canadian human trafficking prosecutions and principles of fundamental justice: A contradiction in terms? (Vancouver: International Centre for Criminal Law Reform, June 2020). Available: <https://icclr.org/wp-content/uploads/2020/06/Millar-and-ODoherty-Technical-Report-on-Canadian-Human-Trafficking-Prosecutions-1.pdf?x37853>
- Millar, H. & T. O'Doherty. 'Racialized, Gendered, and Sensationalized: An Examination of Canadian Anti-Trafficking Laws, their Enforcement, and their (Re)Presentation'. (2020) 35:1 Canadian Journal of Law and Society 23-44. DOI: <https://doi.org/10.1017/cls.2020.2> Also available via CanLII [https://www.canlii.org/en/commentary/doc/2020CanLIIDocs3672?zoupio-debug#!fragment/\(hash:\(chunk:\(anchorText:"\),notesQuery:",scrollChunk:!,searchQuery:'racialized,%20gendered%20and%20sensationalized',searchSortBy:RELEVANCE,tab:search\)\)](https://www.canlii.org/en/commentary/doc/2020CanLIIDocs3672?zoupio-debug#!fragment/(hash:(chunk:(anchorText:)
- Kaye, J., H. Millar & T. O'Doherty. 'Exploring Human Rights in the Context of Enforcement-Based Anti-Trafficking in Persons Responses' in J. Winterdyk and J. Jones (eds.) *The Palgrave International Handbook of Human Trafficking*. Palgrave International (July 2019). Available: [https://link.springer.com/referenceworkentry/10.1007%2F978-3-319-63192-9\\_36-1](https://link.springer.com/referenceworkentry/10.1007%2F978-3-319-63192-9_36-1)
- O'Doherty, T., H. Millar, A. Clancey, & K. Mackenzie. 'Misrepresentations, Inadequate Evidence, and Impediments to Justice: Critical Reflections on the Human Rights Impacts of Canada's Anti-Trafficking Legal Efforts' in Durisin, E.M., van der Muelen, E. and Bruckert, C. (eds.), *Red Light Labour: Sex/Work: Regulation, Agency, and Resistance*. UBC Press. pp.104-120. (2018).
- Millar, H., T. O'Doherty & K. Roots, 'A Formidable Task: Reflections on Obtaining Legal Empirical Evidence on Human Trafficking in Canada', *Anti-Trafficking Review* No 8 (2017): Special Issue—Where's the Evidence? Available: <https://www.antitraffickingreview.org/index.php/atrjournal/article/view/225>
- Millar, H. & T. O'Doherty in collaboration with the SWAN Vancouver Society, *Key Findings: The Palermo Protocol & Canada: The Evolution and Human Rights Impacts of Antitrafficking Laws in Canada* (2002-2015). International Centre for Criminal Law Reform and Criminal Justice Policy, 2015. Available: <https://icclr.org/publications/the-palermo-protocol-canada-the-evolution-and-human-rights-impacts-of-anti-trafficking-laws-in-canada-2002-2015/>

## **Appendix B: List of Additional Commercial Sex-Related Publications**

O'Doherty, T. & Waters, I. (2019). Gender, victimization, and commercial sex: A comparative study. *Atlantis*, 40(1), 18-29.

O'Doherty, T. 2015. Victimization in the Canadian Off-Street Sex Industry. Doctoral Dissertation, School of Criminology, Simon Fraser University.

O'Doherty, T. (2011). Criminalization and Off-Street Sex Work in Canada. *Canadian Journal of Criminology and Criminal Justice*, 53(3), 217- 245.

O'Doherty, T. (2011). Victimization in Off-street Sex Work. *Violence Against Women*. 17(7), 1-20.