

Submissions to the Standing Committee on Justice and Human Rights

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Introduction

My name is Vincent Wong and I am an Assistant Professor of Law at the University of Windsor Faculty of Law as well as a PhD Candidate at Osgoode Hall Law School. Prior to this, I have held a variety of legal and policy research positions at, *inter alia*: the African American Policy Forum, the International Human Rights Program at the University of Toronto, and the Chinese and Southeast Asian Legal Clinic. I was called to the Bar in Ontario in 2014.

My legal research examines the intersection between migrant¹ rights, workers' rights, the increasing nexus between immigration and criminal law, and sex work, particularly within Asian diaspora communities in Canada. I have been involved in numerous Parliamentary Committees on law reform from the perspective of low-income, racialized communities, including the 2018 study of the Standing Committee on Justice and Human Rights Regarding Human Trafficking in Canada.² In 2022, I appeared as intervenor counsel at the Ontario Superior Court of Justice on behalf of the Migrant Workers Alliance for Change in the constitutional case of *Canadian Alliance for Sex Work Law Reform, et al v Canada (AG)*.³ I am also co-author of the report *Caught in the Carceral Web: Anti-Trafficking Laws and Policies and Their Impact on Migrant Sex Workers*, published in 2021.⁴ I provide these written submissions on *Bill S-224, An Act to amend the Criminal Code (trafficking in persons)* to shed light on some of the issues pertaining to the proposed amendments as well as the impacts of carceral approaches to anti-trafficking particularly on migrant workers and communities in Canada.

At its legal core, the proposed amendments of Bill S-224 allow for a much broader range of activities to be potentially criminalized under the trafficking provisions of the *Criminal Code*

¹ “Migrant” in this case pertains directly to the status of “non-citizen”, which has been recognized as an analogous ground of discrimination under s. 15(1) of the *Charter*. Some migrants have permanent residence status, but the vast majority have precarious immigration status such as temporary work visas, refugee claimant status, international study visas, or are excluded from status entirely (undocumented).

² Chinese and Southeast Asian Legal Clinic, “Submissions to the Standing Committee on Justice and Human Rights Regarding Human Trafficking in Canada” (June 2018), online: <https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10006320/br-external/ChineseAndSoutheastAsianLegalClinic-e.pdf>.

³ *Canadian Alliance for Sex Work Law Reform et al v Canada (AG)*, CV-21-00659594-0000, “Factum of the Intervener: Migrant Workers Alliance for Change” (10 August 2022), online: <http://sexworklawreform.com/wp-content/uploads/2022/09/MWAC-Factum-2.pdf> [CAWSWLR].

⁴ Judy Fudge, Elene Lam, Sandra Ka Hon Chu, and Vincent Wong, “Caught in the Carceral Web: Anti-Trafficking Laws and Policies and Their Impact on Migrant Sex Workers” (2021), online: <https://whai.ca/wp-content/uploads/2021/11/MSW-Report-Final-Sept-26.pdf>.

by removing the requirement to prove a reasonable threat of safety.⁵ Further, exploitation under the proposed amendment would be expanded beyond “coercion”, “deception or fraud”, and “abuse of a position of trust, power or authority” to the broadly worded “any other similar act”.⁶

I reiterate the concerns of other groups who flag how the current “reasonable threat to safety” requirement is already broadly defined by caselaw and is overbroad in criminalizing third parties assisting sex workers and migrants, including: colleagues, employers, employees, family members, social service providers, and loved ones.⁷ The broad and vaguely worded proposed amendments will ensure that an even larger set of support and mutual aid activities for migrants (particularly from those who are Black, persons of colour, and working in the sex industry) will be captured under these provisions and subject to threat of harsh sentences – specifically a four-year mandatory minimum sentence, which could result in the removal of status, detention, and deportation for those without citizenship.⁸

Bill S-224 is, in part, motivated by concern over low numbers of charges and convictions for trafficking offences. Despite an arsenal of coercive laws and increased policing, surveillance, and inspection powers, the number of trafficking victims detected and convictions for trafficking charges remains few and far between.⁹ Yet this evidence, rather than creating a reasonable doubt concerning the need for such a thick and wide web of coercive anti-trafficking laws and policing (as it would in other criminal spaces) is turned on its head on the assumption that human trafficking is “hidden” and thus must be “uncovered” in part through higher conviction numbers.

Carceral anti-trafficking initiatives lead to higher frequencies of involuntary encounters between migrants with precarious immigration status and law enforcement, including police and Canada Border and Services Agency (CBSA) officers. As Ann De Shalit, Robert Heynen, and Emily van der Meulen have stated, “the provisions set out in the *Criminal Code* that allow law

⁵ *Bill S-224, An Act to amend the Criminal Code (trafficking in persons)*, ss 1(1)-(2), online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/S-224/third-reading>.

⁶ *Ibid.*

⁷ Butterfly (Asian and Migrant Sex Workers Support Network) and HIV Legal Network, “Submission on *Bill S-224, An Act to amend the Criminal Code (trafficking in persons)*” (7 June 2023), online: <https://www.ourcommons.ca/Content/Committee/441/JUST/Brief/BR12516885/br-external/Jointly1-e.pdf> at 3-4.

⁸ *Criminal Code*, RSC 1985, c C-46, at s 279.01(1)(b).

⁹ Hayli Millar and Tamara 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* 24.

enforcement agents to deem someone “trafficked” even if they do not identify as such, have concretized an emotional anti-trafficking discourse that typically coincides with strict immigration controls and enhanced criminalization and surveillance of migrant and labour of the sex industry.”¹⁰ Such a trafficking “deeming” provision is at the very heart of Bill S-224.

Thus, this submission highlights the existing harms that carceral anti-trafficking approaches have had on migrant workers and their networks (both in sex-related and non-sex-related industries), the likely impacts of Bill S-224, and the necessity of shifting away from carceral approaches in countering the harms of racial, gender, and class-based inequality and exploitation that anti-trafficking initiatives purport to address.

Conflation of sex work and human trafficking

In recent years, there has been an overarching shift in discourse towards conflating sex work with sex trafficking. In Canada, a complex and multiscalar web of laws has been constructed to target sex trafficking. These laws range from federal prohibitions against human trafficking in the *Immigration and Refugee Protection Act* and *Criminal Code*, to provincial anti-trafficking laws, to proliferation of tools to detect alleged traffickers and provide victims with redress, to municipal by-laws that strictly regulate businesses such as massage parlours, body rub salons and holistic centres considered to be at risk of harbouring human trafficking.¹¹

This web of laws is based upon two deeply rooted assumptions: (1) that migrant women are especially vulnerable to trafficking for sexual exploitation, and (2) that the commercial sex sector is inseparable from trafficking. The express goals of this carceral and repressive approach to human trafficking are to protect migrant women who are vulnerable to sex trafficking by prohibiting them from working in any aspect of the sex industry and to reduce demand by making it a crime to purchase, materially benefit from, procure, or advertise sexual services.¹²

Yet rather than protecting the human rights of migrants and other communities who may be vulnerable to labour exploitation and gendered violence, existing laws, policies and law

¹⁰ Ann De Shalit, Robert Heynen, and Emily van der Meulen, “Human Trafficking and Media Myths: Federal Funding, Communication Strategies, and Canadian Anti-Trafficking Programs” (2014) 39 *Canadian Journal of Communication* 385 at 387.

¹¹ Fudge et al, *supra* note 4 at 5.

¹² *Ibid.*

enforcement measures intended to combat human trafficking have stoked moral panic surrounding sex work, intensified profiling of sex workers and racialized communities, and profoundly threatened the safety, security and well-being of migrant sex workers and other migrants caught in the carceral web.¹³

Remunerated, consensual sexual services (i.e., sex work) must not be confused or conflated with human trafficking. However, carceral anti-trafficking laws, policies, and law enforcement practices in effect *build in this conflation at all levels*, leading to numerous harms on migrants targeted by these laws through surveillance, racial profiling, arrest, detention and deportation – all in the name of protecting them from human trafficking. Compare, for instance, the significant overlap between the text of the *Criminal Code* offence that criminalizes sex work procurement (currently under constitutional challenge)¹⁴ with the offence of trafficking:

CC section 286.3 ¹⁵	CC section 279.01 ¹⁶
(1) Everyone who procures a person to offer or provide sexual services for consideration or, <u>for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person</u> , is guilty of an indictable offence...	Every person who <u>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</u> is guilty of an indictable offence...

Given the textual similarities of these offenses, it is unsurprising then that enforcement of these provisions is continually tainted by this harmful conflation. Individuals charged with human trafficking offences are frequently also charged with third party sex work offences and vice versa. Since 2009, 63% of all human trafficking police reports with “secondary violations”

¹³ *Ibid* at 3-4.

¹⁴ CAWSWLR, *supra* note 3.

¹⁵ *Criminal Code*, *supra* note 8 at s 286.3.

¹⁶ *Ibid* at s 279.01.

have also involved a sex work offence, while 34% of human trafficking charges laid are in conjunction with sex work offences, primarily the third-party offences of materially benefiting from others' sexual services, procuring or advertising.¹⁷

Even more nefariously, under this conflation between sex work and trafficking, high-profile anti-trafficking campaigns disproportionately target and profile low-income, racialized, migrant, and Indigenous populations who are wrongly perceived as being involved in trafficking *on account of their very socioeconomic marginalization*. Thus, carceral trafficking discourses perversely increase the frequency of involuntary interactions between law enforcement and marginalized communities, including migrant sex workers and other migrants with precarious status. While the purported justification for targeting migrant sex workers is most often to protect them, interaction with law enforcement frequently results in arrest, detention and/or removal from Canada.¹⁸ This is the broader context by which the proposed *Criminal Code* amendments in Bill S-224 must be understood.

Impacts of anti-trafficking raids on migrant sex workers

Significant resources have been dedicated to law enforcement agencies in order to pursue 'raid and rescue' based initiatives to tackle human trafficking. Many of these raids have been targeting sex work establishments, particularly sex work establishments staffed by racialized workers. Anti-trafficking initiatives that conflate human trafficking with consensual sex work, such as Operation Northern Spotlight, cast an overly broad net and have dire consequences. It has been reported that anti-trafficking raids have resulted in police approaching, detaining, and harassing sex workers in situations where there have been no evidence of coercion, exploitation or human trafficking – a pattern which will be exacerbated by Bill S-224.

Yet for all the attention and resources devoted to combating migrant cross-border human trafficking, between January 1, 2006 and July 13, 2020, the CBSA recorded a total of eight charges laid, with zero convictions.¹⁹ This data suggests that anti-trafficking investigations and raids rarely, if ever, uncover "traffickers" in the context of cross-border migration.

¹⁷ Adam Cotter, "Trafficking in persons in Canada, 2018" (23 June 2020) Juristat.

¹⁸ Elene Lam, "Behind the rescue: How anti-trafficking investigations and policies harm migrant sex workers" (2018) Butterfly, online: https://nswp.org/sites/default/files/behind_the_rescue_june_2_butterfly.pdf.

¹⁹ Fudge et al, *supra* note 4 at 18.

Worse still, these raids push sex workers, particularly migrant sex workers, further into isolation by undermining the already tenuous relationship between sex workers and law enforcement. For Asian sex workers, who may face linguistic barriers, racial discrimination and may have a pre-existing lack of trust with law enforcement, raids and incursions into their homes and workplaces can be especially frightening and traumatic.

This lack of trust is an issue that is borne out by empirical studies: a survey of 60 Asian sex workers in Toronto and Vancouver conducted by the Supporting Women's Alternatives Network (SWAN) revealed that 95% of respondents never seek help from law enforcement - even if they are experiencing violence, abuse, harassment or exploitation. In Toronto, not a single respondent stated that they trusted the police.²⁰ By further alienating sex workers in this way, raid and rescue based initiatives such as Operation Northern Spotlight discourages those in the sex industry from reporting actual cases of human trafficking and criminal violence to police, frustrating the ultimate objective of these campaigns. The following case illustrates these points.

Sun's Story: How Anti-Trafficking Raids are used to target Migrants

Sun's Story [pseudonym], illustrates how anti-trafficking raids can quickly turn into anti-migrant raids. Sun was an indoor sex worker who had worked in Canada for five years and formed deep relationship with friends, clients, and other migrant sex workers in Canada. On Christmas Eve of 2014, Sun and her colleague were raided by several male police officers in their apartment:

One of the officers spoke their language and told them, "Don't be scared. Are you under the control of anyone? Is anyone forcing you to do this? Who is your boss? Sun replied: "No, I'm doing this out of my own volition, I have no boss."

The officer then proceeded to ask her a series of questions including, "How long have you been here?" and, "What is your immigration status?" He then requested that she show him her identification. After an extensive period of questioning that lasted for over an hour, four additional men came into their apartment. Sun had no idea who they were, as they were in plainclothes. Only later did she realize that these were immigration officers.

²⁰ Julie Ham, "Chinese Sex Workers in Toronto & Vancouver" (2015) Zi Teng and Supporting Women's Alternatives Network (SWAN Vancouver), online: <https://swanvancouver.ca/wp-content/uploads/2022/10/Chinese-sex-workers-in-Toronto-Vancouver-Ziteng-SWAN-ACSA.pdf>.

Throughout this process, Sun sent messages to her friends and to Butterfly, seeking their help, and expressing her fear and concern.

The immigration officers brought Sun to [...] CBSA [...] and she was once again put through an interrogation process, after which she was taken to a holding cell.²¹

Sun was detained in immigration holding for over 30 days and was not able to find a lawyer to represent her nor did she understand any of the legal documents that were presented to her in English. Desperate to leave the conditions of imprisonment, she consented to leave Canada, but her request to gathering her belongings before leaving was rejected. After a month of detainment, Sun returned to her country of origin, where she suffered bouts of insomnia and often considered suicide. She was traumatized as her life in Canada abruptly came to an end.²²

Impacts of labour trafficking raids on migrant workers

Anti-trafficking campaigns generally distinguish between two types of focus: sex trafficking and labour (non-sex-related) trafficking. This section focuses on the latter, that is, the impact of carceral approaches to labour trafficking on migrant worker communities. For context, migrant workers, particularly those in occupations deemed “lower-skilled”, often face chronic exploitation and labour rights violations because of immigration programs which tie their contingent status to specific employers, restrict mobility, and provide minimal oversight of working conditions. Migrant workers are forced to choose between speaking up and losing their employment, staying in an exploitative situation, or finding another employer knowing that they will lose their legal status in Canada.²³ These state-sanctioned exploitative labour relations are the conditions by which the worst abuses – understood sometimes as “trafficking” – take place.

Yet as migrant workers organizations and their advocates have highlighted, migrant workers who get “rescued” in anti-human trafficking raids in Canada may find themselves worse off and can even end up getting kicked out of the country or put behind bars.²⁴ Migrants may

²¹ Lam, *supra* note 18 at 6-8.

²² *Ibid* at 8.

²³ Kamala Kempadoo, et al, “Challenging Trafficking in Canada: Policy Brief” (2017) Centre for Feminist Research York University, online: <https://cfr.info.yorku.ca/files/2017/06/Challenging-Trafficking-in-Canada-Policy-Brief-2017.pdf> at 26.

²⁴ Trevor Dunn, “‘Rescued’ Mexican citizens may be worse off after Ontario police raids last month, advocate warns” (19 October 2022), CBC News, online: <https://www.cbc.ca/news/canada/toronto/mexican-citizens-migrant-workers-police-raids-1.6620473>.

find their homes and workplaces raided by police, lose their income, lose their belongings, and lose their visa status.

Labour abuses that occur in the form of wage theft, illegal recruitment fees, violations of health and safety laws, and lodging violations, are fundamentally incapable of redress through the criminal law and border enforcement. For instance, a recent 2023 anti-trafficking investigation in the Greater Toronto Area called Project Norte uncovered several dozen Mexican nationals “living in deplorable conditions, including overcrowding, with dozens of people sleeping on mattresses on the floor, a lack of food, a lack of privacy and bug infestations.”²⁵ Yet migrant worker organizations have been organizing against these rights violations for decades - issues that can only be solved through more effective protection and fulfillment of employment and migrant rights (including status for all) as opposed to police and CBSA-led “rescue” operations that definitionally put migrants in further danger. Unscrupulous recruiters — and the labour exploitation that follows — are ultimately fuelled by an immigration system that provides few routes to permanent residency for workers in low-wage sectors.²⁶

By framing these systemic abuses of migrant workers as “trafficking” in need of rescue through criminal prosecution and law enforcement raids, the role of Canadian law and policy in keeping migrant workers structurally tied to employers, denied the equal rights of permanent status, and fearful of law enforcement, is erased from view.²⁷ Instead, police and border enforcement are falsely positioned as saviours, increasing the risks of surveillance and criminalization of migrant workers. Proponents of the “rescue” approach often point to the existence of limited temporary resident permits for trafficked non-citizens, however migrant worker groups have highlighted their limitations in practice, continued restriction on rights, lack of avenues to permanent status, and continued CBSA practices of detaining and deporting

²⁵ Nicholas Keung and Sara Mojtahdzadeh, “Police announce bust of massive international labour trafficking ring in GTA” (3 March 2023), The Toronto Star, online: <https://www.thestar.com/news/gta/2023/03/03/police-announce-bust-of-massive-international-labour-trafficking-ring-in-gta.html>.

²⁶ *Ibid.*

²⁷ Ann De Shalit, Robert Heynen, and Emily van der Meulen, “Human Trafficking and Media Myths: Federal Funding, Communication Strategies, and Canadian Anti-Trafficking Programs” (2014) 39 Canadian Journal of Communication 385 at 398.

applicants.²⁸ Without status for all, migrants of all sorts will continue to face heightened risk in law-enforcement led anti-trafficking encounters.

Concluding recommendations

This committee must be cognizant of the ways in which our laws and law enforcement practices directly contribute to the conditions of marginalization in which egregious forms of exploitation and trafficking are allowed to occur. These laws force certain groups to hide from law enforcement and impinge on their ability to access critical services, find support, and access employment and human rights enforcement mechanisms. Therefore, the issue of labour exploitation and trafficking cannot be solved without a *labour and human rights-based approach*. This committee should therefore adopt the following recommendations:

1. Reject Bill S-224 in its entirety.
2. Support non-carceral forms of safety, including decent and affordable housing for all, restorative and transformative justice initiatives, and community-based anti-violence programs geared toward preventing gendered violence and supporting survivors.
3. Invest in community initiatives run by and for people working in the sex industry that are non-directive and based in human rights, and not focused on “exiting” sex work. Programs contingent on people stopping or “exiting” sex work or that have eligibility requirements fail to address the complexity of sex workers’ lives.
4. Invest in Indigenous community initiatives, migrant worker community initiatives, and youth-based initiatives that furnish people with networks of community support that undercut the precarity and vulnerability that place people in vulnerable situations.
5. Ensure full and permanent immigration status for all in Canada, without exception.
6. Decriminalize sex work by removing all sex work-specific criminal provisions, including residual section 213 prohibitions and provisions introduced through the *Protection of Communities and Exploited Persons Act*.

²⁸ Canadian Council for Refugees, “Temporary Resident Permits: Limits to protection for trafficked persons” (June 2013), online: <https://ccrweb.ca/sites/ccrweb.ca/files/temporary-resident-permit-report.pdf>.

7. Repeal specific immigration regulations and work permit conditions that prohibit migrant women from working in the sex industry (including repealing the *Immigration and Refugee Protection Regulations* ss. 183(1)(b.1), 196.1(a), 200(3) (g.1) and 203(2)(a)).
8. Immediately cease raids, detentions, and deportations of sex workers.
9. Ensure the CBSA is never involved in anti-trafficking investigations and raids.