

Canadian Alliance for
Sex Work Law Reform

Alliance Canadienne pour
la Réforme des Lois sur
le Travail du Sexe

**Submission on *Bill S-224, An Act to amend the Criminal Code*
(*trafficking in persons*)**

Canadian Alliance for Sex Work Law Reform

June 14, 2023

Introduction

Over the past two decades, significant shifts have occurred in the anti-human trafficking landscape. Driven by moral panics related to sex work, many prosecutors, police, and policymakers define sex work as sexual exploitation and conflate it with human trafficking, regardless of circumstances. This focus on sex work has obscured anti-trafficking efforts and has brought added and unwelcomed surveillance and monitoring of those who sell or trade sex. Police efforts include surveilling sex work spaces, regardless of whether exploitation exists or has been reported. This framing of all sex work as exploitation has resulted in law enforcement categorizing and naming more cases of human trafficking: according to the most recent Statistics Canada report, most police-reported cases of human trafficking have focused on cases involving the sale or exchange of sex the majority of which were reported after the passage of the *Protection of Communities and Exploited Persons Act* (PCEPA) in 2014.¹ The conflation of sex work and human trafficking is intentional: the definition of human trafficking in the *Criminal Code* mirrors the definition of “procuring,” despite not all cases of procuring involvement elements of exploitation.

Section 279.01 of the *Criminal Code*, which defines human trafficking, requires a person “who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person” to do so *for the purpose of exploiting them or facilitating their exploitation*. This requires prosecutors to prove an accused’s intent to exploit, which is triggered, according to s. 279.04(1):

... if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, **could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened** if they failed to provide, or offer to provide, the labour or service.

(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused

- a) used or threatened to use force or another form of coercion;
- b) used deception; or
- c) abused a position of trust, power or authority.

Bill S-224 would amend section 279.04 (1) as follows:

For the purposes of sections 279.01 to 279.03, a person exploits another person if they engage in conduct that
(a) causes the other person to provide or offer to provide labour or a service; and

¹ Shana Conroy and Danielle Sutton, *Trafficking in persons in Canada, 2020*, Canadian Centre for Justice and Community Safety Statistics. Between 2010-2020, there were 2,087 police-reported *Criminal Code* human trafficking incidents, of which 1866 occurred between 2014-2020.

(b) involves, in relation to any person, the use or threatened use of force or **another form of coercion**, the use of deception or fraud, the **abuse of a position of trust, power or authority**, or **any other similar act**. [emphasis added]

(2) Subsection 279.04(2) of the Act is repealed.

As summarized below, our various concerns with these proposed amendments will be addressed in this brief:

1. **The removal of the requirement that the conduct “could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened” allows a far broader range of conduct to be captured by the human trafficking prohibition and will capture cases where no exploitation exists.**
2. **Coercion is ill-defined and risks capturing non-exploitative relationships.**
3. **Defining exploitation based simply on “a position of power or authority” could be applied to many or virtually all employers in commercial settings, particularly when the reference to “any other similar act” is also frighteningly vague. This vagueness is especially dangerous in a sex work context.**
4. **The amendments risk capturing all third parties in the sex industry, including those who provide supportive services to sex workers, including sex workers themselves.**
5. **These amendments deny the personal and sexual agency and increase surveillance of the most marginalized sex workers in our community, including migrant, Black and Indigenous sex workers. They reproduce much of the historical and continued violence against these communities, when other government and social supports should be implemented.**

1. **The removal of the requirement that the conduct “could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened” allows a far broader range of conduct to be captured by the human trafficking prohibition and will capture cases where no exploitation exists.**

Arguments to remove the complainant or victim from the criteria to prosecute human trafficking are often based on the reality that it is difficult to obtain direct evidence from a potential complainant, because of her fear of repercussions and retaliation from the accused. However, removing the “threat to safety” requirement also gives power to law enforcement and prosecutors to further determine and define human trafficking pursuant to a vague legal definition. This determination is often driven by assumptions rooted in racism, colonialism, and misogyny and driven by stereotypes, racism, and assumptions about women and sexuality. Sweeping powers are conferred to law enforcement and social service actors to define — and often wrongly define — violence and exploitation for communities. In the case of sex work, violence and exploitation is often assumed.³

Without the “threat to safety” requirement, determinations of coercion or exploitation are made through biased perspectives of the sex industry.

When all sex workers are seen as victims of human trafficking, sex workers who seek to improve exploitative working conditions are misinterpreted as claiming the work itself, rather than the conditions, are exploitative.²

The way that courts have interpreted the requirement for prosecutors to prove an accused’s intent to exploit (i.e., “if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service”) is already overly expansive, holding that:

- the definition of exploitation does not require proof that a complainant was actually afraid;
- the term “safety” is not limited to the state of being protected from physical harm, but also extends to psychological harm that includes deception or psychological pressure;
- a person’s safety need not actually be threatened, and courts can find human trafficking occurred despite a complainants’ subjective belief that their safety was not threatened;³ and
- a finding of actual exploitation is not an essential element of the offence, and prosecutors need to merely prove an “intent” to exploit.⁴

Accordingly, the current provision merely requires prosecutors to prove that a “reasonable person,” in those circumstances would believe that either their physical or their psychological safety would be threatened if they failed to do what was being required of them. Prosecutors can therefore dispense with proving an alleged human trafficking victim’s subjective, *actual* experience of fear for safety, denying women’s agency and problematically privileging the views of police and prosecutors. Removing the assessment of fear for safety altogether will compound the harms of the human trafficking provisions.

2. Coercion is ill-defined and risks capturing non-exploitative relationships.

The proposed inclusion of “coercion” as an element of human trafficking risks vague and overbroad interpretations by police and prosecutors. In a context where anti-trafficking efforts already conflate human trafficking with sex work, definitions of coercion can be expected to be equally broad and capture non-exploitative relationships.

Introducing criminal offences that capture “coercion” invites police and law enforcement into the lives of people and communities who are already oversurveilled by police, notably Indigenous and Black communities who are unjustifiably presumed to be violent. This has the adverse effect of discouraging reporting and addressing violence in communities.

² Chris Bruckert and Stacey Hannem, “To Serve and Protect? Structural Stigma, Social Profiling, and the Abuse of Police Power in Ottawa,” in *Selling Sex: Experience, Advocacy, and Research in Canada*, eds. Emily van der Meulen, Elya M. Durisin and Victoria Love. (Vancouver, BC: UBC Press, 2013): 297-313.

³ See *R. v. A.A.*, 2015 ONCA 558 (Ontario Court of Appeal).

⁴ See *R. v. Gallone*, 2019 ONCA 663 (Ontario Court of Appeal).

Creating new criminal offences cannot be the “go to” response for this government who should focus instead on community-based supports, education and other resources to address violence in our communities.

3. Defining exploitation based simply on “a position of power or authority” could be applied to many or virtually all employers in commercial settings, particularly when the reference to “any other similar act” is also frighteningly vague. This vagueness is especially dangerous in a sex work context.

Work in all settings involve people who hold authority. This authority is typically accepted — and required — in most sectors but is assumed to be exploitative in sex work. Employers in all sectors are given broad powers to control the movements, schedules, and income of their staff. The concept of employers’ “right to manage” is well-established, while workers’ rights are primarily captured under labour standards, employment legislation, occupational health and safety regulations and human rights codes. These laws offer employees non-criminal recourse to stop abuse, preserve employment, challenge discrimination, and obtain compensation if wronged. Because sex work is criminalized, sex workers are excluded from these protections, which should be the first line of defence against abuses of power by employers. What is considered exploitation under employment and labour standards (e.g. paying below minimum wage, excessive overtime, dangerous working conditions) should not become a criminal matter when better systems exist to right those wrongs and offer substantive protections and recourse.

When analyzed within the context of sex work, exploitation is often assumed for sex workers living and working in poverty, public space, or for sex workers who use drugs. This simplistic narrative denies the agency of people in the sex industry who are, through their sex work, seeking out resources and finances to survive the poverty they are enduring. **The poverty itself is exploitative, but not the sex work.** In the context of this work, sex workers will work with or seek out third parties to help with finding clients, setting terms and conditions, protection, and other supports. This relationship is often misconstrued as “exploitative” because of the assumed “authority” of this third party. These relationships are vital to sex workers — particularly those working in marginalized contexts (e.g. on the street) — or for migrant, Black and Indigenous sex workers who often need those community and third party supports more than other sex workers. This amendment risks capturing those important third party supports.

4. The amendments risk capturing all third parties in the sex industry, including those who provide supportive services to sex workers, including sex workers themselves.

As a United Nations Office of Drugs and Crime (UNODC) study on the concept of ‘exploitation’ found, the term in the context of trafficking is ambiguous and provides legal practitioners with high levels of interpretive discretion that contributes to

discrepancies in the application of law.⁵ This is most clearly demonstrated in relation to sex work, whereby those who see all sex work as exploitative equate it with trafficking.⁶

In conversations with law enforcement, sex workers across the country have been consistently told that any third-party involvement with sex workers suggests exploitation that warrants investigation. Similarly, Scholar Katrin Roots has documented how third party actors in Canada have long been thought to be associated with exhibiting control over sex workers through violence, threats, and psychological manipulation, and how police script sex workers' stories, pressuring them to take on the "victim of trafficking" label despite sex workers' rejection of this label.⁷ Those who profit from the sexual labour of others are misconstrued as parasitic, exploitative, and misogynistic, rooted in a stereotype of the third-party manager as a 'pimp' — an often-racialized image of a predatory male who exploits women. According to Jeffrey and MacDonald, despite some sex workers' provision of a more nuanced account of the role of third parties as protectors and intimate partners, police and prosecutors have continued to insist that 'pimping' was a major problem, focusing their attention on racialized men.⁸ In particular, Black men have been framed as 'pimps' and traffickers who exploit their own intimate and business partners, and Roots' research shows that young, poor, and racialized men are the primary targets of anti-trafficking efforts in Canada.⁹

Additionally, many sex workers who work in public space and/or indoors take on third party roles of renting space, advertising, and seeking clients for other sex workers. These sex workers are captured by these broad definitions — a harm that will be exacerbated by the proposed amendments. Migrant, Black and Indigenous communities who sell or trade sex rely on family members and community for protection, to help seek clients, and for work support in general: these family and community members are often swept up in anti-trafficking efforts even when those relationships are not exploitative. The broad assumption that any third party is exploitative relegates sex workers to work in isolation with inadequate supports.

5. These amendments deny the personal and sexual agency and increase surveillance of the most marginalized sex workers in our community, including migrant, Black and Indigenous sex workers. They reproduce much of the historical and continued violence against these communities, when other government and social supports should be implemented.

Anti-trafficking investigations have been found to negatively affect racialized, migrant, Black and Indigenous sex workers who are wrongly perceived as being involved in trafficking because of their perceived "vulnerabilities" and susceptibility to exploitation — justifying the interventions of law enforcement. In a 2018 report produced by Alliance member group Butterfly Asian and Migrant Sex Workers Support Network many migrant sex workers reported their experiences of human

⁵ United Nations Office of Drugs and Crime (UNODC), Issue Paper: The Concept of 'Exploitation' in the Trafficking in Persons Protocol, 2015. Online: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/unodc_ip_exploitation_2015.pdf.

⁶ Katrin Roots, *The Human Trafficking Matrix: Law, Policy and Anti-Trafficking Practices in the Canadian Criminal Justice System*, PhD dissertation, June 2018.

⁷ Roots, *ibid*.

⁸ Leslie Ann Jeffrey and Gayle MacDonald, *Sex Workers in the Maritimes Talk Back*, 2006 (UBC Press. Vancouver. BC).

⁹ Roots, *ibid*.

rights violations at the hands of investigators.¹⁰ While in their custody, migrant sex workers reported experiencing harassment and discrimination and being subject to inhumane and degrading treatment. Some migrant sex workers were prevented from accessing legal representation and support, and many lost their immigration status and were deported. In another 2018 study by Butterfly of Asian migrant massage and holistic centers in Toronto, more than one-third reported having been abused or harassed by bylaw enforcement or police officers during anti-trafficking investigations.¹¹ Out of 61 workers, the study found no instances of trafficking or forced labour. As a result of these experiences, most of the massage and holistic center workers surveyed reported that they were less likely to seek help from law enforcement in future.

Research further suggests that law enforcement officers commonly associate Black women with sex work and harass them on that basis, while Black sex workers have themselves been accused of human trafficking when they work collectively.¹² The extension of law enforcement powers also facilitates the racial profiling of Black men. For example, Millar and O'Doherty found that after PCEPA's passage, anti-trafficking prosecutions steadily increased and Black and Caribbean men comprised at least 40% of primary or co-accused in trafficking cases prosecuted between 2006 and 2017.¹³ A study by Roots also found that the primary target of human trafficking investigations in Canada has become the prototypical "Black pimp," a figure easily resurrected and redeployed as part of Canada's anti-human trafficking efforts.¹⁴ For Black women who are involved in sex work, policing has not only failed to provide support but been the source of harm.

Correspondingly, the assumption that all Indigenous women who sell or trade sex are trafficked has blurred the reasons people sell sex and deflects attention from historical and ongoing colonial practices that are the source of violence against Indigenous women and girls. Indigenous women who identify their sex work in terms of decision-making or agency are heavily silenced by the "victim narrative" that is imposed on them, and they risk rejection from their community and families if they are visible about their sex work. Indigenous women are often accused of having a "false consciousness" in relation to the decisions they make to sell or trade sex in the context of poverty and colonialism.¹⁵ As the Vancouver Sex Workers Rights Collective, a "diverse collective of Indigenous individuals who participate or participated in sex work or trade or provide

¹⁰ E. Lam, *Behind the Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers*, Butterfly, Toronto, April 2018. Online: https://www.nswp.org/sites/nswp.org/files/behind_the_rescue_june_2_butterfly.pdf.

¹¹ E. Lam, *Survey on Toronto Holistic Practitioners' Experiences with Bylaw Enforcement and Police*, Butterfly, Toronto, May 2018. Online: https://576a91ec-4a76-459b-8d05-4ebbf42a0a7e.filesusr.com/ugd/5bd754_6d780ceba3cb4f6c85de4d3e9e0b7475.pdf.

¹² HIV Legal Network, *The Perils of Protection: Sex Workers' Experiences of Law Enforcement in Ontario, 2019*. Online: <http://www.hivlegalnetwork.ca/site/the-perils-of-protection/?lang=en>; R. Maynard (2017). *Policing Black lives: State violence in Canada from slavery to the present*. Fernwood Publishing; and Ontario Human Rights Commission (2003). *Paying the price: The human cost of racial profiling*. Online: <https://www.ohrc.on.ca/en/paying-price-human-cost-racial-profiling>

¹³ H. Millar & T. O'Doherty, (2020) "Racialized, gendered, and sensationalized: An examination of Canadian antitrafficking laws, their enforcement, and their (re)presentation," *Canadian Journal of Law and Society*, 35(1), 23-44.

¹⁴ K. Roots, (2022). *Domestication of human trafficking: Law, police and prosecution in Canada*. University of Toronto Press.

¹⁵ Canadian Alliance for Sex Work Law Reform, *Moving Backwards in the Fight Against Human Trafficking in Canada: An analysis of and response to the report of the Standing Committee on Justice and Human Rights*, February 2019.

sexual services in Downtown Eastside of Vancouver,”¹⁶ submitted to the National Inquiry into Missing and Murdered Indigenous Women and Girls:

The use by academics, activists, the media and governments of human trafficking as *the* framework or lens through which responses to murdered and missing Indigenous women and girls are considered is inappropriate, ineffective and harmful. The focus on human trafficking shifts attention away from the systemic colonial factors that created and maintain the circumstances and structures of violence. This approach focuses resources and responses to violence into increased policing and away from programs and services that may help individuals that are facing specific types of violence that are conflated into human trafficking (child exploitation, sexual exploitation or violence experienced when participating in sex work). Police attention on individuals who participate in sex work reclassified as victims in the human trafficking framework puts these individuals at risk.¹⁷

Moreover, there is strong evidence that policing is ineffective in combating human trafficking and supporting those who have been trafficked. In a 2019 study authored by Alliance member group the HIV Legal Network, law enforcement interventions provided “extraordinary control over sex workers’ lives” and threatened a host of *Charter*-protected rights, including their rights to work, privacy, equality and non-discrimination, security of the person, health, freedom of expression, freedom of peaceful assembly, freedom from unreasonable search and seizure, and freedom from arbitrary detention and imprisonment.¹⁸ Sex workers shared how over-policing, over-surveillance, arrest and deportation from human trafficking initiatives deepened antagonism between law enforcement and sex workers, which isolated sex workers from mainstream supports, and made sex workers more vulnerable to violence, exploitation, and other human rights violations. As a result, sex workers did not seek assistance from police in actual situations of violence or exploitation because of their past negative experiences of human trafficking investigations.

Conclusion

As UNAIDS, the United Nations Development Programme (UNDP), and the United Nations Population Fund (UNFPA) stress, “Anti-trafficking efforts should not justify or result in criminal prosecution or other coercive measures against adults who engage in sex work on a consensual basis, either as sex workers or clients . . . Any conflation of voluntary, adult sex work with trafficking in persons is an abuse of sex workers’ human rights, and greatly increases the risk of HIV and violence for both sex workers and trafficked women and girls, by driving it to be further hidden ‘underground’.”¹⁹

Sex workers, as people who have been singled out both as trafficking victims and as harbourers of trafficking victims, are vital to discussions and efforts to address exploitation and abuse. Because of profound stigma, in addition to fear of law enforcement, discrimination, violence and exclusion, people who sell or exchange sex are more likely to turn to sex workers

¹⁶ Vancouver Sex Workers Rights Collective Written Submission: National Inquiry into the Murdered and Missing Indigenous Women and Girls Dec 14, 2018, pg 2. Online: <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Van-Sex-Worker-Rights-Collective-Final-written-submission.pdf>

¹⁷ Vancouver Sex Workers Rights Collective 2018, *ibid* 45, pg. 8

¹⁸ HIV Legal Network, *Supra*.

¹⁹ https://www.ohchr.org/Documents/HRBodies/CEDAW/GRTrafficking/UNAIDS_UNDP_UNFPA.docx

and sex worker organizations for support. Sex workers and sex worker rights organizations are in constant contact with people who sell or exchange sexual services and are best placed to support them and provide services that are safe, relevant, and accessible to other sex workers who experience human rights violations.

Importantly, most of the violence and exploitation experienced by sex workers is often conflated with a wide range of other human right violations, criminal offences, targeted violence, socio-economic realities, systemic discrimination, and the realities of working without access to the same labour protection as other sectors. The removal of text in Bill S-224 requiring a reasonable expectation that conduct “cause the other person to believe that their safety or the safety of a person known to them would be threatened” will undoubtedly result in an interpretation of exploitation driven by racism, stigma and misconceptions of the sex industry, and consequently capture any third party who may incur a financial profit in the context of sex work. Stigma, racism, and criminalization associated with sex work fuels the demonization of these services and associations — services that are not only acceptable and encouraged in other labour markets but are fundamental to sex workers’ physical and economic security.

Bill S-224 would have multiple, adverse impacts on sex workers and particularly racialized, migrant, Black, and Indigenous sex workers by increasing barriers to safe work and further alienating sex workers from health, social and legal supports, *without meaningfully addressing human trafficking*. As we detail above, **the criminal law and policing are not effective responses to exploitation and other human rights abuses for people who sell or exchange sexual services**.

As such, we urge the government to reject Bill S-224 and adopt a human rights-based approach to human trafficking that centers labour rights, migrant rights, and sex workers’ rights and addresses the numerous structural barriers including poverty, precarious immigration status, anti-Black racism, colonialism, and lack of access to affordable housing, health and social services that contribute to the risks of exploitation and abuse.

This requires governments to:

- Provide resources and support to sex workers and sex worker rights organizations to address human rights violations, improve social support systems, and furnish people with networks of community support that undercut the precarity and vulnerability that place people in vulnerable situations;
- 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 or other pre-determined outcomes;
- Invest in Indigenous community initiatives, Black community initiatives, migrant sex worker initiatives, and youth-based initiatives that seek to address homelessness, poverty and provide services directed by sex workers; and
- Implement harm reduction approaches that require authorities to use the least intrusive approach towards communities with an emphasis on preserving their community and upholding their rights.

Moreover, one cannot address human trafficking without also addressing the criminal and immigration laws relevant to sex work that deny sex workers access to employment, labour, occupational health and safety and human rights protections increase sex workers’ contact with police, and mandate police to monitor sex workers and workspaces. **This requires the federal government to:**

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- Decriminalize sex work by removing all sex work-specific criminal provisions, including residual s. 213 prohibitions and provisions introduced through the *Protection of Communities and Exploited Persons Act*;
- Repeal immigration regulations and work permit conditions that prohibit migrants from working in the sex industry;
- Stop raids, detentions, and deportations of sex workers;
- Ensure the Canada Border Services Agency is never involved in anti-trafficking investigations; and
- Ensure full and permanent immigration status for all in Canada, without exception.

Recommendations for Bill S-224:

- Reject Bill S-224 in its entirety.

Alternatively, amend Bill S-224 as follows:

1. Add a preamble that acknowledges the problematic conflation of sex work with human trafficking, as follows:

Whereas the Parliament of Canada recognizes the harms the conflation of sex work with sexual exploitation causes sex workers;

Whereas the Parliament of Canada recognizes the harms of human trafficking initiatives that equate sex work with human trafficking;

Whereas the Parliament of Canada is committed to upholding the human rights of people who sell or exchange sexual services, and particularly the most marginalized sex workers, who have borne a disproportionate impact of the harms of human trafficking investigations;

Whereas it is important to ensure that human trafficking investigations are based on evidence and center the subjective experiences of victims; and

Whereas the Parliament of Canada wishes to encourage those who experience abuse and exploitation to be able to report those incidents and access supports;

2. Amend s. 279.04(1) of the *Criminal Code* so that prosecutors must prove a complainant's subjective concern for their safety, as follows:

... if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, ~~could reasonably be expected to~~ **causes** the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service. 10