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

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Introduction

Butterfly Asian and Migrant Sex Workers Support Network ("Butterfly") was formed by sex workers, social workers, legal and health professionals to provide support to, and advocate for, the rights of Asian and migrant sex workers. Butterfly was founded upon the belief that sex workers are entitled to respect and human rights. Regardless of their immigration status, Asian and migrant sex workers should be treated like all other workers.

The HIV Legal Network promotes the human rights of people living with HIV or AIDS and other populations disproportionately affected by HIV, punitive laws and policies, and criminalization, in Canada and internationally. We do this through research and analysis, litigation and other advocacy, public education, and community mobilization. Since our inception, the HIV Legal Network has worked in collaboration with sex workers to defend their human rights.

Together, we make this written submission on *Bill S-224, An Act to amend the Criminal Code (trafficking in persons)*.

Overview

Currently, section 279.04 (1) of the *Criminal Code* provides:

> For the purposes of sections 279.01 to 279.03, a person exploits another person 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.
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> (2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused
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> 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
> (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.

(2) Subsection 279.04(2) of the Act is repealed.

Bill S-224 thus removes 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," thus allowing a far broader range of conduct to be captured by the human trafficking prohibition. The amendment to section 279.04(1) would capture everyone who engages in "coercion" (which is not

defined anywhere in the *Criminal Code*), those who "abuse … a position of power or authority," or "any other similar act."

Given the persistent conflation of sex work and human trafficking in law enforcement practice, these amendments risk capturing all third parties in the sex industry, including those who provide supportive services to sex workers.

Prosecutorial and police practice

Canada's human trafficking laws have a long history of effectively being anti-sex work laws.[1] Today, prosecutors, police, and policymakers continue to primarily understand human trafficking as sex trafficking, and sex work is often seen as trafficking, regardless of circumstances. According to the most recent Statistics Canada report, most police-reported cases of human trafficking have focused on sex trafficking.[2] Between 2010 and 2020, more than 2,000 incidents of *Criminal Code* human trafficking offences were reported by police services in Canada, almost 90% of which were reported after the passage of the *Protection of Communities and Exploited Persons Act* (PCEPA) in 2014.[3] Frequently, people accused of human trafficking are also charged with third party sex work offences.[4] Since 2009, for example, close to two-thirds (63%) of all human trafficking police reports with "secondary violations" have also involved a sex work offence, while more than one-third (34%) of human trafficking charges *actually laid* are in conjunction with sex work offences, primarily those related to materially benefiting from others' sexual services, procuring or advertising.[5] Notably, the *Criminal Code* definition of human trafficking mirrors the *Criminal Code* definition of "procuring"— the primary difference being the purpose element related to exploitation.

As per section 279.01, 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.* As per subsection (2) of the provision, "No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid" while subsection (3) reverses the burden of proof of exploitation in cases where a person "who is not exploited lives with or is habitually in the company of a person who is exploited is," thus providing prosecutors great latitude in pursuing human trafficking charges.

Still, under the current definition of human trafficking, prosecutors are required 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."

Already, courts have interpreted s. 279.04(1) very expansively, holding that:

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[1] For example, Canada's first immigration legislation banned Chinese sex workers, while international trafficking conventions which Canada have ratified prohibited procuring sex work and brother-keeping.

[2] S. Conroy and D. Sutton, *Trafficking in persons in Canada, 2020*, Canadian Centre for Justice and Community Safety Statistics.

[3] Ibid. Between 2010-2020, there were 2,087 police-reported *Criminal Code* human trafficking incidents, of which 1866 occurred between 2014-2020.

[4] See, for example, Peel Regional Police, "Project Pacific: Results of Collaborative Human Trafficking Investigation," May 31, 2023. Online: Media Releases - Peel Regional Police (peelpolice.ca).

[5] A. Cotter, *Trafficking in persons in Canada, 2018*, Juristat, June 23, 2020.

- 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;[6]

- a person's safety need not actually be threatened, and courts can find human trafficking occurred despite a complainant's subjective belief that their safety was not threatened;[7] and

- a finding of actual exploitation is not an essential element of the offence, and prosecutors need to merely prove an "intent" to exploit.[8]

As such, courts can dispense with an alleged human trafficking victim's subjective experience of fear for safety, basing this instead on an "objective" assessment that denies women's agency. 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.[9] This is most clearly demonstrated in relation to sex work, whereby those who see all sex work as exploitative equate it with trafficking.[10] As a result, anti-human trafficking efforts have involved the problematic mischaracterization of third parties as traffickers.[11]

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.[12] 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.[13] 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.[14]

Because the 'threat to safety' criteria is already broadly defined, colleagues, employers, family members, and even sex workers are often mistakenly identified as traffickers, and third parties – who provide an important support system and play important roles to help organize income, communicate

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[6] See *R. v. A.A.*, 2015 ONCA 558 (Ontario Court of Appeal).
[7] Ibid.
[8] See *R. v. Gallone*, 2019 ONCA 663 (Ontario Court of Appeal).
[9] 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.
[10] K. Roots, *The Human Trafficking Matrix: Law, Policy and Anti-Trafficking Practices in the Canadian Criminal Justice System*, PhD dissertation, June 2018.
[11] 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.
[12] Roots, *ibid*.
[13] LA Jeffrey and G. MacDonald, *Sex Workers in the Maritimes Talk Back*, 2006 (UBC Press. Vancouver. BC).
[14] Roots, *ibid*.

with clients, offer additional security precautions, or advertise sex workers' services – are criminalized.[15] In conversations with law enforcement, Butterfly and the HIV Legal Network have been consistently told that any third party involvement with sex workers suggests exploitation that warrants investigation. As a result, Butterfly members have been charged with third party sex work offences (i.e. prohibitions on procuring, advertising, and materially benefiting from sex work) for merely assisting with client communication, scheduling, advertising, and screening.

Under Bill S-224, whereby exploitation could be construed merely on the basis of "a position of power or authority" or "any other similar act," even more third parties will undoubtedly be captured. Yet, virtually all employers in commercial settings exercise "power or authority," and this authority is typically accepted — and required — in most industries. In the context of the sex industry, however, this is assumed to be exploitative, denying the agency of sex workers. Moreover, defining exploitation to also include "any other similar act" will allow police and prosecutors limitless discretion to pursue human trafficking charges for all third parties, irrespective of any actual evidence of exploitation.

While the sanctions for a third-party sex work conviction are severe, none of these offences are subject to a mandatory minimum penalty. Under a far more expansive definition of human trafficking under Bill S-224, third parties convicted of human trafficking are subject to a four-year mandatory minimum sentence, which could result in the removal of status, detention, and deportation for those without Canadian citizenship status.

Law enforcement-led human trafficking initiatives

As Statistics Canada describes, the increase in police-reported incidents could "be the result of enhanced efforts by police to detect, investigate and lay or recommend human trafficking charges,"[16] fueled by high-profile anti-human trafficking campaigns such as "Operation Northern Spotlight," a yearly initiative undertaken by the RCMP, the Ontario Provincial Police and numerous other police forces that has involved police posing as clients and targeting sex workers in their workplaces. Yet, there is strong evidence that policing is ineffective in combating human trafficking and supporting those who have been trafficked. While some law enforcement may be motivated in these scenarios by a desire to "rescue" victims of human trafficking, sex workers have opposed such measures as ineffective at best, and a profound violation of their human rights in most cases.[17]

Already, under the current definition of human trafficking, anti-trafficking investigations have been found to negatively affect racialized, migrant, and Indigenous sex workers who are wrongly perceived as being involved in trafficking because of their perceived "vulnerabilities," and which justify the actions of law enforcement to intervene because they are more susceptible to exploitation and must be saved. In a 2018 report produced by Butterfly, many sex workers reported their experiences of human rights

[15] J. Kaye & B. Hastie (2015) "The Canadian Criminal Code Offence of Trafficking in Persons: Challenges from the Field and within the Law," *Social Inclusion.* 3(1): 88-102; J. Kaye (2017) *Responding to Human Trafficking: Dispossession, Colonial Violence, and Resistance among Indigenous and Racialized Women* (University of Toronto Press: Toronto, ON); H. Millar & T. O'Doherty (2020). "Racialized, Gendered, and Sensationalized: An Examination of Canadian Anti-Trafficking Laws, their Enforcement and Their (Re)presentation," *Canadian Journal of Law and Society*, 35(1): 23-44.

[16] S. Conroy and D. Sutton, ibid.

[17] See, for example, Canadian Alliance for Sex Work Law Reform, *Press Release: Operation Northern Spotlight,* October 2018. Online: https://sexworklawreform.com/press-release-operation-northern-spotlight-october-2018/.

violations at the hands of investigators.[18] Migrant sex workers were subjected to inhumane and degrading treatment, arbitrary arrests and detention, and false evidence was used against them to justify their ongoing detention (in some cases, for as long as three months). While in the custody of anti-trafficking investigators, many reported experiencing harassment and discrimination. 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.[19] Out of 61 workers surveyed, 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.

In a 2019 study authored by 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.[20] As sex workers shared, over-policing, over-surveillance, arrest and deportation from human trafficking initiatives have deepened antagonism between law enforcement and sex workers. This has had the effect of isolating sex workers from mainstream supports, and made sex workers more vulnerable to violence, exploitation, and other human rights violations – further alienating sex workers from police in actual situations of violence or exploitation because of their past negative experiences of human trafficking investigations.

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'."[21]

According to the Canadian Alliance for Sex Work Law Reform, "The vast majority of violence and exploitation experienced by sex workers is not human trafficking," yet trafficking is often conflated "with a wide range of other human right violations, criminal offences, targeted violence, socio-economic realities, systemic discriminations and the realities of working without access to the same labour protection as other industries."[22] The removal of text requiring a reasonable expectation that the conduct "cause the other person to believe that their safety or the safety of a person known to them

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[18] 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.
[19] 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.
[20] HIV Legal Network, ibid.
[21] UNAIDS, UNDP & UNFPA, *Joint submission to CEDAW on trafficking in women and girls in the context of global migration*, 18 February 2019. Online: https://www.ohchr.org/Documents/HRBodies/CEDAW/GRTrafficking/UNAIDS_UNDP_UNFPA.docx.
[22] 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.

would be threatened" will undoubtedly be interpreted to capture any third party who may incur a financial profit in the context of sex work. Stigma, racism, and criminalization associated with the sex industry fuels the demonization of such employment 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.

By removing the need to demonstrate a threat to one's safety and drastically expanding the definition of exploitation, Bill S-224 would further entrench a view that all sex work is exploitation and promote this false narrative, while increasing surveillance, policing, and punishment for the most marginalized people in the sex industry. When sex workers are seen as victims, the demands of sex workers who seek to improve the conditions of their work are inconsequential as all sex work is considered inherently problematic.[23]

Conclusion

Sex workers, as people situated within the industry 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 in the sex industry. Sex workers and sex worker rights organizations are in constant contact with people working in the sex industry and are best placed to support sex workers and provide services that are safe, relevant, and accessible to other sex workers who are experiencing human rights violations.

While we share concerns about the exploitation of vulnerable people, meaningfully addressing such exploitation requires a clearer understanding of the underlying issues. These harms are rooted in unfair labour, gender, and class relations and a web of discriminatory laws and policies, and should be addressed through labour protections — not by casting the net of criminalization even wider. Bill S-224 would have multiple, adverse impacts on sex workers and particularly racialized, migrant, 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*. This is not what sex workers — including those who experience exploitation and abuse — need and have been directly asking for.

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, and lack of access to affordable housing, health and social services that contribute to the risks of exploitation and abuse.

Recommendations

- Reject Bill S-224 in its entirety.

- 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.

[23] C. Bruckert and S. 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.

- 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.

- 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.

- Ensure full and permanent immigration status for all in Canada, without exception.

Alternatively, amend Bill S-224 as follows:

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

   Preamble

   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 sex workers, 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 report those incidents;

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.

Moreover, one cannot address exploitation and abuse in the sex industry without also addressing the criminal laws that mandate police and other law enforcement to monitor sex workers and their work spaces and criminalize their labour. This requires:

- Decriminalizing 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.*

- Repealing specific immigration regulations and work permit conditions that prohibit migrant women from working in the sex industry (including repealing the IRPR ss. 183(1)(b.1), 196.1(a), 200(3) (g.1) and 203(2)(a)).

- Stopping raids, detentions, and deportations of sex workers.

- Ensuring the Canada Border Services Agency is never involved in anti-trafficking investigations.