

Submission Regarding Bill S-224: An Act to amend the Criminal Code (trafficking in persons)
44th Parliament, 1st session

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We are a group of criminologists and socio-legal scholars who are considered experts on Canada's laws regarding trafficking in persons (hereinafter "anti-trafficking laws"). We have been independently researching Canada's immigration and criminal anti-trafficking offences for over five decades combined, longitudinally monitoring the creation, amendment, enforcement, and effects of these laws in compliance with the United Nations' adoption of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (hereinafter "Palermo Protocol") that Canada signed in 2000 and ratified in 2002.

We have shared our expertise in two previous parliamentary studies of trafficking in persons (JUST 2019; FEWO, 2023) and the parliamentary review of the *Protection of Communities and Exploited Persons Act* (PCEPA) (2022). Our work has been cited by the Supreme Court of Canada (*R. v. Kirkpatrick*, 2022 SCC 33, para 165), we have been consulted by legal practitioners, and we have served as expert witnesses in criminal constitutional court proceedings (*R v. Kloubakov*, 2021 ABQB 960). Together, we have published numerous peer-reviewed books, edited collections, book chapters, journal articles, and technical papers on this topic, and several of us teach senior-level university courses about trafficking in persons and/or sex work.

We are among the only academics who have conducted research precisely on the *Criminal Code* definition of trafficking and its interpretation in court decisions since the inception of anti-trafficking provisions. As such we would like to draw the Standing Committee's attention to our profound concerns about Bill S-224: *An Act to amend the Criminal Code (trafficking in persons)*. Our research illuminates not only the deficits and harms caused by the existing legal definition of human trafficking, but also how Bill S-224's proposed amendments will undoubtedly exacerbate the negative social, health, and other outcomes that arise from overzealous human trafficking investigations, criminal charges, and attempted prosecutions.

Firstly, we contend that there is no clear evidentiary basis for the proposed amendments to the *Criminal Code* section 279.04 definition of exploitation.

Bill S-224 represents the fifth proposed legislative change to the section 279.01 trafficking in persons *Criminal Code* offence regime since it was first created in 2005. As criminologists and legal scholars, we are unaware of other *Criminal Code* offences so frequently amended over such a short time, especially by way of Private Members' bills.¹ All five legislative amendments — Bill C-268 in 2010, Bill C-310 in 2012, Bill C-36 in 2014, Bill C-452 in 2015 given royal assent via Bill C-75 in 2019, and the now proposed Bill S-224 — appear ideologically driven and are absent of any evidence-informed or human rights-based analyses (for a summary of the four previous legislative amendments, see Millar & O'Doherty, 2020a, pp. 113-114; Roots, 2022, pp. 27-47; Sibley & van der Meulen, 2022, pp. 415-417).

Consistent with carceral feminism, a term used to describe failed attempts of increasing punishment for gender-based violence offences, the net effect of the four previous amendments has been to solidify an already expansive definition of what constitutes trafficking in persons, to lower the evidentiary bar to secure a conviction (e.g., a constitutionally questionable section 279.01(3) rebuttable presumption of exploitation), and to increase the severity of the penalties the courts can impose against convicted persons. One of the enacted changes (section

¹ Nor are we aware of Criminal Code offences, other than the now legislatively and jurisprudentially conjoined sections 286.1-4 commodification of sexual activity, that provide the pretext for such an extensive web of surveillance or the invasive law enforcement tactics of sting operations and combined (police, border services, and bylaw enforcement) raids and "rescues" based on a particular discursive narrative.

279.05), although not yet in force, would require judges to impose consecutive sentences raising additional constitutional concerns (see Roots, 2022, pp. 45-48). Like the previous four amendments, it remains unclear what empirical or legal evidence is propelling the Bill S-224 proposed changes to the definition of exploitation other than a conservative ideological agenda (current and former Conservative and Bloc Québécois Members of Parliament and Senators have sponsored all the section 279.01-.05 legislative amendments, including Bill S-224).

We respectfully request the Committee to fully engage with the existing research evidence documenting the many adverse effects of Canada's current anti-trafficking and anti-sex work laws. For your ease and consideration, we have appended a brief bibliography of highly pertinent sources (Annex B) as well as excerpts from three of our particularly relevant publications (Annexes C, D, and E). The available research evidence, along with careful attention to human rights and a non-partisan consultation process, should inform any further legislative changes to the trafficking in persons offence regime. We further request this committee to adopt transparent standards comparable to those of our constitutional courts (see, e.g., *Canada (Attorney General) v. Bedford*, 2014 SCC 72) when assessing the relative weight or merit they assign to expert witnesses and evidence, and preference empirical anti-trafficking scholarship when proposing amendments to anti-trafficking laws.

Secondly, we contend that Canada already has an expansive definition of trafficking in persons which does not comply with the Palermo Protocol definition. Thus, the proposed amendments will further and unnecessarily broaden the definition of exploitation in ways that will intensify already existing labour, gender, racial, non-citizenship, and other political, economic, social, and health inequities without a clearly articulated rationale for why our current regulatory framework requires a more expansive definition.

Despite various legislative amendments, the *Criminal Code* definition of trafficking in persons remains largely the same as when first enacted (Sibley & van der Meulen, 2022, p. 414). Importantly, the *Criminal Code* definition departs in significant ways — making it easier to charge, prosecute, and secure a conviction — from the more rigorous Palermo Protocol definition which requires the act *and* the means *and* the purpose. As Roots (2022, p. 24) observes, the *Criminal Code* definition reflects only two parts (the act or *actus reus* and the purpose or *mens rea*) of the internationally agreed definition.

Specifically, the *Criminal Code* offence and its judicial interpretation does not require (forcible) cross-border movement or otherwise, nor does it require a connection to (transnational) organized crime, nor an essential illicit means component of force, fraud, deception, coercion, abuse of a position of trust, or giving or receiving payment, although section 279.04(2) permits the courts to take some of these means into account when assessing whether there is exploitation. Instead, the provision only requires that an accused intended to exploit, which is problematic given the overbroad definition of exploitation. The *Criminal Code* definition also differs by importing broader language from Canada's historical anti-sex work laws in relation to the *actus reus* component that extends well beyond the more limited means specified by the Palermo Protocol to also include “exercising control, direction or influence over the movements of a person,” as well as receiving, holding, and concealing a person (see Roots, 2022, pp. 23-25).

As you will observe in our appended publication excerpts, the superior and appellate courts have supported an equally expansive interpretation of the anti-trafficking offence where the *actus reus* element is to be read disjunctively capturing a broad array of conduct and where the *mens rea* element does not require actual exploitation; intent to exploit is sufficient to secure a criminal conviction (Millar & O'Doherty, 2020a, pp. 60-69; Roots, 2022, pp. 23-30; Sibley & van der Meulen, 2022, pp. 415-420). Problematically, for the reasons Sibley and van der Meulen (2022, pp. 421-425) suggest, the current “apprehension of fear” criterion has been judicially interpreted by the appellate courts as an objective rather than subjective test, erasing the subjective experience of the victim/complainant and replacing it with the trier of fact who “can objectively assess vulnerability and threat to personal safety” in order to secure a conviction.

Rather than more closely aligning Canada with the Palermo Protocol definition, the proposed Bill S-224 amendments will legislate an incredibly expansive definition of what might constitute trafficking in persons. It will do this by (1) further broadening the language of what constitutes exploitation, (2) removing the “apprehension of fear” criterion, and (3) including the phrase “or any other similar act” (see Annex A below summarizing the proposed definitional changes).

Our research studies clearly demonstrate that the trafficking in persons offence is legislatively and jurisprudentially conflated with sex work based on a particularly unempirical and historically outdated ideology that all commercial sex work is inherently exploitive and that any third parties (e.g., employers, support personnel, work colleagues, family members) are parasitic racketeers. As a result, the trafficking in persons offence is overwhelmingly used to charge and prosecute individuals who work in the commercial sex sector in Canada, especially as third parties offering any form of assistance, and in cases involving the provision of sexual services by persons under 18 years of age. In fact, the vast majority of anti-trafficking prosecutions involve co-charges for section 286.1-4 commodification of sexual services offences, provoking significant concerns about overcharging and respect for the principles of fundamental justice (see Millar & O’Doherty, 2020a, pp. 90-97; Roots, 2022, pp. 39-42).

Our research additionally shows that section 279.01 is already used by police and prosecutors as a catch-all category that is misapplied in some cases (e.g., cases involving primarily incest/child sexual exploitation, sexual assault, abduction/forcible confinement, intimate partner violence), and in ways that amplify the number of criminal charges against an accused person. Troublingly, our research on prosecuted cases reveals that the trafficking in persons offence is rarely and unsuccessfully used to prosecute criminal exploitation in the context of any cross-border movement or (transnational) organized crime or the continuum of exploitation that takes place in many other (non-sexual) labour contexts.

There is a wealth of Canadian and international scholarship documenting the myriad adverse effects of anti-trafficking laws and their enforcement by police, border control, and bylaw officers (see Annex B Bibliography below). Contributing to this body of evidence, our research reveals that anti-trafficking laws are used to disparately target one labour sector (sex work), racialized people, and non-citizens who face deportation both as convicted persons *and* as victims/complainants. We and others have carefully documented that the enforcement and judicial interpretations of Canadian anti-trafficking laws are highly gendered in ways that ignore the agency of women, girls, and gender diverse people through a saviour/rescuer paradigm (see Sibley & van der Meulen, 2022, pp. 421-425). At the same time, the enforcement of the trafficking in persons offence is also heavily racialized, including disproportionately targeting young Black men as criminally accused persons who allegedly traffic young white women (see Millar & O’Doherty, 2020a, pp. 7-9, 12, 29-31, 41-44; Roots, 2022, pp. 43, 48, 53).

A more expansive legal definition of exploitation will almost certainly contribute to intensifying existing political, economic, social, and health inequities, which seems counter to the Government of Canada’s expressed intention to address systemic discrimination in the legal system. We strongly encourage the Standing Committee to consider only legislative amendments that are evidence-informed and human rights-based and that would align Canada more closely with the narrower and more rigorous Palermo Protocol definition while also ensuring that Canada fully complies with the UN Recommended Principles on Human Rights and Human Trafficking, our other international human rights commitments, and our constitutional and human rights laws.

Thirdly, we contend that removing 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,” otherwise referred to as the “reasonable apprehension of fear criterion,” will contribute to even greater unwanted and unwarranted police surveillance and criminal legal interventions.

The “reasonable apprehension of fear,” or fear for safety requirement, which Bill S-224 is proposing to repeal in its entirety, and which we assert should not only be retained but legislatively amended to require a more rigorous

subjective apprehension of fear assessment from the perspective of the complainant for the reasons that Sibley and van der Meulen (2022, pp. 412-427) articulate, is a unique and important feature of the *Criminal Code* definition of exploitation. This criterion is in place to ensure there is an appropriately high *mens rea* standard to secure a conviction for what is regarded as a very serious criminal offence with correspondingly severe penalties of imprisonment, equally severe ancillary orders (e.g., in the form of sex offender registration, DNA registration, firearms/weapons prohibitions, internet bans, communications prohibitions, victim surcharges), and in some cases substantial fines or restitution the courts impose and notwithstanding several successful constitutional challenges striking down the mandatory minimum penalties in some provinces (see Millar & O'Doherty, 2022, pp. 44-50, 115-116; Roots, 2022, pp. 48-52).

Like the Butterfly and the HIV Legal Network (2023, p. 7) brief submitted to your Committee, we strongly encourage you to retain and 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."

In conclusion, we are deeply troubled by definitional expansionism in view of the wide range of conduct that is already captured by the offence, and especially given the serious minimum and maximum penalties that apply to persons who have been convicted, primarily in the post-PCEPA era where there has been a paradigmatic increase in the severity of the sentences the courts impose (see Millar & O'Doherty, 2020a, pp. 48-59, 115-116; Roots, 2022, pp. 48-52).

We urge the Standing Committee to reject Bill S-224 and to instead focus on the human and labour rights of sex workers and migrants, especially those who are non-status, racialized, and/or low income and are thus already at risk of criminalization and over-policing. Considerably more effective strategies to identify and reduce coercion, violence, and exploitation in labour contexts include: strengthened workplace rights and protections; accessible legal representation and supports; increased funding for sex worker- and migrant-run advocacy organizations; guaranteed minimum income and higher minimum wages; affordable housing and improved tenant rights; a human and labour rights oriented overhaul of the Temporary Foreign Worker Program; and easier access to permanent resident status. Comparable recommendations were made by many organizations and individuals submitting briefs and providing testimony as witnesses to the 2023 FEWO study on the human trafficking of women, girls, and gender diverse people, the 2022 parliamentary review of PCEPA, and the 2019 Standing Committee on Justice and Human Rights study of human trafficking. We also strongly encourage you to carefully consider the 2019 National Inquiry into Missing and Murdered Indigenous Women and Girls Calls for Justice.

Signed:

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Annex A: Summary Table of the Bill S-224 Proposed Amendments

Current 279.04 Definition of Exploitation [proposed cuts to the existing exploitation definition]	Bill S-224 Proposed Amendments [new added phrasing highlighted in red]
Exploitation 279.04 (1) 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. Factors (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.	Exploitation 279.04 (1) 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.

Annex B: Selective Bibliography of Canadian Anti-Trafficking Research

(excerpts from the BLUE citations are to follow)

- Butterfly (Asian and Migrant Sex Workers Support Network). (2018). *Behind the rescue: How anti-trafficking investigations and policies harm migrant sex workers*.
https://www.nswp.org/sites/default/files/behind_the_rescue_june_2_butterfly.pdf
- Durisin, E. M., & van der Meulen, E. (2020). Sexualized nationalism and federal human trafficking consultations. *Journal of Human Trafficking*, 7(4), 454-475.
- Fudge, J., Lam, E., Chu, S. K. H., & Wong, V. (2021). Caught in the carceral web: Anti-trafficking laws and policies and their impact on migrant sex workers. HIV Legal Network. <https://www.hivlegalnetwork.ca/site/caught-in-the-carceral-web-anti-trafficking-laws-and-policies-and-their-impact-on-migrant-sex-workers/?lang=en>
- Hunt, S. (2015). Representing colonial violence: Trafficking, sex work, and the violence of law. *Atlantis: Critical Studies in Gender, Culture & Social Justice*, 37.2(1), 25-39.
- Kaye, J. (2017). *Responding to human trafficking: Dispossession, colonial violence, and resistance among Indigenous and racialized women*. University of Toronto Press.
- Kaye, J. & Hastie, B. (2015). The Canadian Criminal Code offence of trafficking in persons: Challenges from the field and within the law. *Social Inclusion*, 3(1), 88-10.
- Lam, E., & C. Gallant. (2022). Rights not rescue: Defending migrant sex workers from policing. In S. Pasternak, K. Walby, & A. Stadnyk (Eds.), *Disarm, defund, dismantle: Police abolition in Canada* (pp. 118-130). Between the Lines.
- Lam, E., & Lepp, A. (2019). Butterfly: Resisting the harms of anti-trafficking policies and fostering peer-based organizing in Canada. *Anti-Trafficking Review*, 12(12), 91-107.
- Maynard, R. (2015). Fighting wrongs with wrongs? How Canadian anti-trafficking crusades have failed sex workers, migrants, and Indigenous communities. *Atlantis: Critical Studies in Gender, Culture & Social Justice*, 37.2(1), 40-56.
- Millar, H., & O'Doherty, T. (2020a). *Canadian human trafficking prosecutions and principles of fundamental justice: A contradiction in terms? International centre for criminal law reform*.
<https://icclr.org/publications/canadian-human-trafficking-prosecutions-and-principles-of-fundamental-justice-a-contradiction-in-terms/>

- Millar, H., & O'Doherty, T. (2020b). 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.
- Millar, H., O'Doherty, T. & Roots, K. (2017). A formidable task: Reflections on obtaining legal empirical evidence on human trafficking in Canada, *Anti-Trafficking Review*, 8, 34-49 .
- Raguparan, M. (2023). "Is it because I'm not young and white with blue eyes?": Canadian police response to sex workers of colour's experiences of exploitation and trafficking. In K. Kempadoo & E. Shih (Eds.), *White supremacy, racism, and the coloniality of anti-trafficking* (pp. 170-186). Routledge.
- Roots, K. (2013). Trafficking or pimping: An analysis of Canada's human trafficking law and its implications. *Canadian Journal of Law and Society*, 28, 21-40.
- Roots, K. (2022). *Domestication of human trafficking: Law, policing and prosecution in Canada*. University of Toronto Press.**
- Sibley, M., & van der Meulen, E. (2022). Courting victims: Exploring the legal framing of exploitation in human trafficking cases. *Canadian Journal of Law and Society*, 37(3), 409-429.**
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Annex C: Excerpt from Hayli Millar and Tamara O'Doherty (2020a). *Canadian human trafficking prosecutions and principles of fundamental justice: A contradiction in terms?* International centre for criminal law reform.

Executive Summary. Pages 7-9.

Human trafficking is a grave human rights violation and a serious crime. It is internationally recognized and defined as a process involving some form of forced, fraudulent, or coerced movement or recruitment (and in the Canadian context exercising control, direction, or influence over someone's movements) with the express purpose of exploiting or facilitating the exploitation of that persons' labour or services. Human trafficking should be internationally and domestically condemned, criminalized and punished. However, as critical legal scholars, we argue that application of the law, and particularly the application of laws that have serious consequences for the liberty and equality interests of those against whom the law is applied, ought to be guided by evidence-informed practices that respect basic human dignity and give primacy to human rights, consistent with the Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking. We take exception to the conflation of human trafficking with commercial sex work, and migration, and the use of mainstream antitrafficking discourses as a pretext to over and under-police oppressed and racialized communities and to further restrict the mobility rights of women and girls.

With this report, we offer what we think is an important contribution, *inter alia* considering some of the known adverse and heightened impacts of the COVID-19 pandemic for racialized and migrant communities and those working in precarious employment, including sex work. Specifically, we update our 2015 report findings by extending our longitudinal analysis of police-reported charges and prosecuted trafficking cases across now two datasets (2006-2014) and (2015-2018) of 92 prosecuted trafficking in persons cases. We provide a more in-depth examination of some of the legal issues emerging from these cases. Additionally, we discuss the implications of these data and list recommendations for consideration by various audiences in different realms, including those who create and enforce criminal and immigration laws, the mainstream media, and the public, non-profit and private sectors. Given longstanding systemic racism in the USA and Canada disproportionately targeting Black, Indigenous and other People of Colour that has become highly visible and impossible to ignore during the pandemic and because our data offer some qualified empirical support that anti-trafficking and anti-prostitution laws are being enforced and publicized along racialized, gendered, and sensationalistic lines in a context of over-surveilling some populations while under-protecting other groups (particularly Indigenous, Black and other racialized persons, im/migrants, same-sex and gender diverse sex workers), in making our recommendations we recognize we are at a watershed moment and join various other critical race and feminist scholars, activists, and

legal and human rights entities in calling for transformational change to end systemic racism and ensure a fully equitable and just Canadian society and criminal justice system.

We organize the report to firstly provide a basic descriptive statistical analysis of the enforcement of anti-trafficking laws in Canada. In this section, we provide a descriptive analysis of the government reported data on police charging practices and our two datasets of 92 prosecuted immigration and criminal trafficking cases. We secondly provide a legal analysis of the judicial interpretation of the trafficking in persons offences, including a discussion of important evidential issues, constitutional challenges, and appeals emerging from the cases. We thirdly provide a preliminary analysis of what we perceive as potential legal implications of the current state of the law as they relate to core principles such as the rule of law, arbitrary state action, and *res judicata*, alongside the reproduction of harmful and outdated stereotypes about commercial sex work.

Throughout the report we highlight the problematic effects of conflating trafficking with prostitution and commodification offences—through law itself, judicial pronouncements, police-led campaigns, and media coverage. Here we are attentive to the changed post-PCEPA (Protection of Communities and Exploited Persons Act, 2014) legal landscape and the fact that in both anti-commodification and anti-trafficking cases the courts are now bound by the PCEPA legislative objectives and its preambular claims that prostitution is inherently exploitive and violent and causes social harm by objectifying the human body and commodifying sexual activity. These findings, together with our previous research on what appears to be the racialized and gendered enforcement of Canadian anti-trafficking laws around an overly simplistic villain-victim-rescuer narrative, demonstrate a troubling trend towards increasing barriers to justice for migrant communities and sex workers based on carceral protectionism and lay bare the intersecting effects of crimmigration, the stigmatization of commercial sex, and inequality in labour rights. If reducing labour exploitation is a legislative goal, we must address the structural causes for precarious working conditions while working to improve access to equality and justice for sex workers, im/migrants, asylum seekers, and refugees.

Annex D: Excerpt from Katrin Roots (2022). *Domestication of human trafficking: Law, policing and prosecution in Canada*. University of Toronto Press.

Chapter 1: Legal Regimes. Section on ‘Fear for Safety Component’. Pages 32-34.

The determination of exploitation in Canadian law is established through a two-stage process. The first is to prove the accused’s intent to exploit, as discussed above. The second is to demonstrate the reasonable expectation on the part of the complainant that if they did not provide the labour or service requested, their safety or the safety of their loved one(s) would be threatened (UNODC 2013, 47). At the outset, the fear of safety requirement in Canadian law was subjective, necessitating that the complainant indicate to the police and in court that they feared for their safety. While complainants’ declarations that they did not fear for their safety was treated with suspicion by police and legal practitioners, it nonetheless had to be respected under the law. For instance, Canada’s first convicted trafficker, Imani Nakpangi, was charged with human trafficking in 2007 after his involvement in two young women’s engagement in sex work was unveiled by an undercover police operation (R. v. Nakpangi 2008). However, because the second complainant insisted that she had not feared for her safety, Nakpangi could only be convicted of one account of trafficking, forcing the court to acquit him of the second trafficking charge (ibid.). The reluctance of complainants to admit to, or their failure to feel fear and thereby testify against the accused, created a problem for the successful prosecution of early trafficking cases in the courts (Roots 2011, 99; 2013). Consequently, Criminal Code amendments enacted in 2012 added section 279.04, which revised the wording of the law to make the fear of safety standard an objective one. Based on this new standard, it no longer matters whether complainants actually feared for their safety. What matters is whether it can be reasonably expected that a person in their situation would do so (CCC. S. 279.04). According to the Ontario Court of Appeal in R. v. A.A. (2015), for there to be exploitation, “the accused’s conduct must give rise to

a reasonable expectation of a particular state of mind in the victim” (para. 70). Consequently, Parliament has placed the determination of fear of safety in the hands of the courts since complainants, the vast majority of whom are women, are seen as unable to determine their own risk levels. This is summed up by a Crown attorney I interviewed:

often times it can be like a domestic violence type situation in that sense. So, they might say they’re not afraid even though they’re getting beat up on a somewhat regular basis. That’s what AA [referring to R. v. A.A. (2015)] was about. There was actual violence, but she wasn’t afraid that he was going to do something bad to her if she didn’t do what he wanted. But the reality is from an outside observer perspective, the court said it’s pretty clear that there would have been fear there. Or that that was his intention, for her to be afraid. He was achieving that through actual violence. (participant 10)

This objective standard makes it far easier to charge and prosecute suspected offenders since the Crown no longer requires the complainant’s admission that they feared for their own safety or that of their family. The UNODC found that the fear of safety component in Canada’s human trafficking law has been broadly interpreted by courts and is not just limited to physical harm but, as noted earlier in this chapter, also includes mental, psychological, and emotional harm (2013, 47). This direction, as the Crown notes in her submissions in R. v. A.A. (2015), “to interpret the term exploitation in a broad way to include threats to, not only physical but also emotional and psychological well-being, was intended by the Parliament” (Submission made on December 2014). In the end, Canadian laws against human trafficking have departed radically from their progenitors at the international level. They have become increasingly centred around the nebulous concept of exploitation that does not actually have to take place. It is premised on the victim’s purported fear of safety that they subjectively do not have to feel (since this is an objective standard), thus creating an apparition of sorts, the existence of which can only be established through the court’s evaluation of the offender’s state of mind with respect to their intent to exploit. Chuang has labelled this approach in relation to human trafficking as “exploitation creep,” arguing that it is an effort to “expand previously narrow legal categories ... in a strategic bid to subject a broader range of practices to a greater amount of public opprobrium” (2014, 611). Given the challenges with understanding the components that legally define human trafficking, it is unsurprising that police and Crown and defence attorneys, but also judges and legislators, vary in their understandings of what human trafficking means and how, if at all, it varies from procuring offences under section 286.3.

Excerpt from Chapter 3: Policing Trafficking. Section on ‘Investigating Trafficking Cases.’ Pages 97-98.

In the context of trafficking, criminal justice actors go to great lengths to convince (mostly) women and girls that they are indeed victims of trafficking. Interviews with criminal justice actors and analyses of trafficking trial proceedings reveal that the girls and women who are identified by the criminal justice system as victims are pressured and scripted by police so that they will stand up in court and perform as a victim. In many cases, this means they must first be convinced that they are a victim. As summed up by one interviewed officer, “if you have a victim who says she is consenting, you’re not going to get a conviction. You need him or her to say they were taken against their will” (participant 9).

[...] As summed up succinctly by one police officer, “these girls are the crux of our investigation. Without that girl testifying, we’re screwed. If they don’t come and testify, we’re never going to get a conviction” (participant 1). Yet getting cooperation from those labelled as victims is difficult. According to one criminal justice actor, “We know this is going on, it seems to be awfully difficult for the police to some-how investigate, get the witnesses, and get a prosecution. Cause the witnesses are so often damaged goods, damaged people, damaged young women” (participant 9). Police officers also understand the difficulty with obtaining trafficking convictions as stemming from unreliable witnesses: “with this [trafficking], the victims we have ... they’re [victims] so broken that ... from the time we get a hold of them, from the time we take that statement to a court process that takes two and a half to three years – is very very hard” (participant 1). Given these circumstances, police go to great lengths to ensure the cooperation and eventual testimony of the labelled victim. The pressure placed on the complainants by police was captured by the comment of one defence attorney in reference to a case he dealt

with: “I know things were said to those girls [complainants], I know because the girls would say to my client what they had been told [by the police]” (participant 14). Another defence attorney describes the scripting of the suspected victim’s narrative that took place in one of her cases: “Right in the interview with the police, it’s him scripting her towards this: ‘Do you feel exploited? Did he take your money?’.... I would call that scripting” (participant 12).

Annex E: Excerpt from Marcus Sibley and Emily van der Meulen (2022). Courting victims: Exploring the legal framing of exploitation in human trafficking cases. *Canadian Journal of Law and Society*, 37(3), 409-429.

Section on ‘Rendering (and Gendering) the Victim.’ Pages 422-424.

The distinction between the subjective and objective view of exploitation is at odds in trafficking cases. In the constitutional challenge in *Stone and Beckford* (2013), the court notes that, “The Crown takes the position that ‘for the purpose’ requires a subjective state of mind directed at the prohibited consequence—the exploitation or facilitation of the exploitation of the person. This requires both intent and knowledge” (para 39). The court goes on to state, “This, I find, is in keeping with the high degree of mens rea required in order for the offence to be committed, and eliminates the risk of punishing individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to the trafficking of persons” (para 40). In this framing, the subjective state of mind of the accused is what ensures the constitutional validity and high degree of mens rea of the offence. This is further complicated by the ruling in *A.A.* (2015), which holds that “for there to be exploitation, an accused’s conduct must give rise to a reasonable expectation of a particular state of mind in the victim” (para 70). The question remains: how does criminal law view and constitute exploitation?

Since the scope of the offence is to criminalize the intent to exploit, courts and juries are required to use an objective standard for assessing whether a complainant could have subjectively feared for their safety. In other words, the trier of fact must objectively assess how a complainant might interpret the conduct of the accused. While the court in *A.A.* recognizes the viewpoint of the complainant, it suggests that findings of exploitation arise from the objective facts and not necessarily the subjective viewpoint of how the victim internalizes or experiences those circumstances:

In cases where exploitation, as defined in s. 279.04, arises from the facts, inferring that the accused’s purpose was to exploit the victim will usually be a relatively straightforward task. In cases where the facts do not lend themselves to a finding of actual exploitation, the definition of exploitation in s. 279.04 informs the court’s analysis of whether the accused was acting with the requisite purpose when he or she committed one of the listed acts. However, it does not become an essential element of the offence. (paras 86–87)

In this legal dynamic, the court must decide whether the accused acted with the intent to exploit, even if the accused was unsuccessful in effectuating exploitation. Accordingly, the appellate court in *A.A.* ruled that the trial judge erroneously found that the complainant had not been exploited because the trial judge had viewed exploitation through the lens of whether the complainant linked the abuse and deception to forced labour. For example, while the complainant G.M.S. had stated that she could leave at any time, she also noted: “it was more psychological [reasons] that kept me” (para 75). The trial judge also stated that the complainant never testified that she danced because she felt her safety was threatened—she continued to dance “because she was deceived”—and that the threats made to her safety were if she were to talk to the police, not if she ceased dancing (para 75). In addition, the trial judge made findings that the physical abuse G.M.S. endured in her relationship with A.A. was not a result of refusing to dance, but rather a result of confronting the accused about his behaviour. The assertion that the complainant was deceived, despite not framing it as such herself, is just one of the ways complainants are rendered (and gendered) by the courts as agency-less victims in need of rescue.

In recent case of Sinclair (2020), the Ontario Court of Appeal considered whether the trial judge should have explicitly mentioned notions of “serious bodily harm” or “subjective fear for safety” as part of the definition of safety articulated in the jury instructions. At trial, the judge posed the following to the jury:

So the evidence related to this question is: [the complainant] testified that she felt she had to go to work as a prostitute, because she was afraid of Mr. Sinclair, in other words that her safety was threatened. She said he did punch her on one occasion and tipped her out of a chair on another occasion when he was angry. You will recall that she also said they had numerous arguments in which he insulted her. She said he threw the fact that her children were taken by the CAS in her face. Remember what I said about “safety” including “psychological safety” as well as “physical safety.” (Sinclair 2020, para 23)

The Court of Appeal held that these instructions were adequate since the word “safety” inherently includes a person’s physical or psychological well-being, and that it was clear that an objective standard had been expressed when framing the issue to the jury by focusing on whether the accused’s conduct could be reasonably expected to cause the complainant to believe that her safety was threatened (para 24).

When considering the totality of the events, the fact finder is required to stand in for the victim, and to assess whether the context could lead to a finding of guilt based on the fact that a person may have been counselled, encouraged, or forced to provide sexual services and that they could fear for their safety. The retelling of abuse or exploitation is what complicates matters. The events outlined in both A.A. and Sinclair blur whether a complainant experienced intimidation or fear in the context of providing their labour, or that they had been working in the sex trade while also in controlling or abusive relationships. Since the importance of this question is de-emphasized in the context of trafficking in favour of assessing the potentiality to exploit, the link between abuse and labour is not especially central to the question of trafficking.

As noted, given that most prosecutions involve cases of sex trafficking with female victim-complainants and male accused, there is an inherently gendered component to the ways trafficking is conceptualized, which must be understood in conjunction with how women in the sex trade are discursively framed (Bernstein 2019; Durisin and Heynen 2015; De Shalit, Heynen, and van der Meulen 2014). Indeed, the standards of reasonableness and objectivity obfuscate how law actively constructs the concept of exploitation. It obscures and blurs how exploitation is constituted outside of law as something that is shaped by power, gender, race, class, and other intersecting facets of identity and social location. At the same time, it constructs (the mostly male) legal actors as the standard of reasonableness, leaving room to label the experiences of (the mostly female) complainants as “subjective,” fallible, and incapable of recognizing exploitation (or calling it something else), even in cases when they might directly experience it. Though race is not explicitly referenced in the cases discussed above, Millar and O’Doherty (2020b) show that the enforcement of human trafficking also tends to reproduce narratives of the racialized “trafficker” who exploits young white female victims, which in turn continue to inform how sex trafficking is constituted through a racialized and gendered lens. Such constructions reproduce the now widely debunked nineteenth and twentieth-century panic around so-called “white slavery,” in which legal and policy interventions sought to rescue young white women from racialized and immigrant men who were purportedly trafficking them (Doezema 1999).