

SUBMISSION TO THE HOUSE OF COMMONS COMMITTEE ON JUSTICE AND HUMAN RIGHTS ON BEHALF OF ONTARIO RE: BILL S-224

Overview of Ontario's Position

Bill S-224 is unnecessary and, if passed, would eliminate the common law advancements made over the past eight years in Ontario, cause uncertainty in the law, and result in protracted constitutional litigation, all of which will have a negative impact on human trafficking prosecutions and public safety.

Ontario has Extensive Experience with the Human Trafficking Provisions

Crown counsel in Ontario have considerable experience with the *Criminal Code* human trafficking provisions in s. 279.01-279.04, both at the trial and appellate levels. Almost all of the appellate caselaw that has interpreted the human trafficking provisions, including the meaning of “exploitation” in this context, has been decided by the Ontario Court of Appeal. Ontario is the only province in Canada that has a specialized team of prosecutors – 15 in total located in every region of the province - who are dedicated to human trafficking and sex trade offence prosecutions. Formed in 2017, Ontario's Human Trafficking Prosecution Team also provides education and training to police, prosecutors, community organizations and other justice system participants, collaborates with community service providers to support survivors throughout the criminal court process and provides advice to police and prosecutors across the country upon request.

The Current Human Trafficking Offence is Constitutional in Ontario – Legislative Changes will Bring Constitutional Uncertainty

The existing *Criminal Code* human trafficking offence has been found to be constitutional in Ontario.ⁱ If passed, the constitutionality of the proposed amendments will most certainly be challenged, resulting in time-consuming constitutional litigation that will take years to settle. In the interim, depending on how the constitutional challenges unfold, cases may be thrown out, police may not be able to lay human trafficking charges and prosecutors may not be able to prosecute human trafficking cases. All of these possible scenarios would adversely affect victims of human trafficking and public safety, as traffickers will evade justice and not be deterred from committing the same crime again.

The Current Interpretation of the Human Trafficking Offence in Ontario is Already Flexible and Does Not Require Actual Fear for Safety

Bill S-224 is unnecessary because it is premised on a misunderstanding of the law. In order to prove the human trafficking offence, the Crown does not have to prove that the

complainant actually or subjectively feared for her safety. Exploitation as defined in s.279.04 only needs to be proven in relation to the accused's purpose in acting the way they did. The complainant does not have to testify that she was afraid in order for the human trafficking offence to be made out. In some human trafficking cases, the complainant is fearful, and in such cases the court need not assess whether the complainant's fear was reasonable in all of the circumstances when determining whether the offence has been proven.

The first appellate decision in Ontario to interpret the current human trafficking offence and definition of "exploitation" in s. 279.04 was decided in 2015: *R. v. A.A.* This case established that the complainant does not have to be afraid or fear for her safety in order for a conviction for human trafficking to be registered. The court also clarified that "safety" in s. 279.04 is not limited to protection from physical harm, but also extends to psychological harm.ⁱⁱ

Courts have recognized that Parliament intended the human trafficking offence to apply to various different types of conduct including deception, coercion and other forms of psychological pressure.ⁱⁱⁱ In the first Ontario decision that upheld the constitutionality of the human trafficking provisions in 2013, the court recognized that a previous amendment to the provision was meant to clarify that coercion was not to be limited to physical acts but to include emotional and psychological harm.^{iv}

The A.A. decision also established that an accused person does not have to actually exploit the victim to be guilty of human trafficking. An accused person who engages in the prohibited conduct in s. 279.01 or s. 279.011 (for example, recruiting, harbouring or exercising control direction or influence over the complainant's movements, otherwise known as the *actus reus*) must also satisfy the fault element of the offence (otherwise known as the *mens rea*) to be found guilty. The fault element is two-pronged: (1) the accused must *intend* to engage in the prohibited conduct and (2) must *act with the purpose of exploiting or facilitating the exploitation of that person*.^v

In 2020, the Ontario Court of Appeal heard an appeal of another human trafficking conviction: *R. v. Sinclair*.^{vi} In dismissing the appeal, the court identified a number of circumstances that may be relevant to assessing whether conduct could reasonably be expected to cause a complainant to fear for their safety^{vii}:

- the presence or absence of violence or threats
- coercion, including physical, emotional or psychological
- deception
- abuse of trust, power, or authority
- vulnerability due to age or personal circumstances, such as social or economic disadvantage and victimization from other sources
- isolation of the complainant
- the nature of the relationship between the accused and the complainant
- directive behaviour
- influence exercised over the nature and location services provided

- control over advertising of services
- limitations on the complainant's movement
- control of finances
- financial benefit to the accused, and
- use of social media to assert control or monitor communications with others

This guidance permits trial judges and juries to consider a wide variety of circumstances in determining whether the human trafficking offence has been proven. The proper legal analysis is not whether *the victim* feared for her safety, it is whether the *accused's* conduct *could reasonably be expected* to cause a complainant to fear for her physical or psychological safety. The focus is on the accused's conduct and intention, not on the effect the accused's conduct actually had on the complainant.

In Ontario, prosecutors have relied on *A.A.* and *Sinclair*, as well as other jurisprudence from the Ontario Court of Appeal, to obtain convictions for human trafficking and to have those convictions upheld on appeal.^{viii} Traffickers have been found guilty even in circumstances where the victim did not subjectively fear for her safety. Examples from caselaw where exploitation based on psychological harm has been found by the court include where a complainant's concern about her child is used to exert psychological pressure,^{ix} the drug addict-supplier relationship,^x the desire to please or be loved,^{xi} affection being dependent on sex trade work,^{xii} and exploitation of the complainant's financial vulnerability.^{xiii}

Courts in other provinces have also applied *R. v. Sinclair*, resulting in convictions for human trafficking.^{xiv} Earlier this year, the British Columbia Court of Appeal applied *R. v. A.A.* and *R. v. Gallone*, 2019 ONCA 663 in upholding convictions relating to an offender who ran an escort agency.^{xv}

The Supreme Court of Canada will have the opportunity to provide guidance to lower courts about the proper interpretation of the human trafficking offence and the elements of the offence in an appeal from Nova Scotia: *R. v. T.J.F.*, 2023 NSCA 28. The Nova Scotia Crown relied on the Ontario appellate jurisprudence including *A.A.*, *Sinclair* and *Gallone* before the Nova Scotia Court of Appeal. The Supreme Court may take the opportunity to comment on these decisions and potentially adopt them, which would bind trial courts across the country. Amending the provision now, when the Supreme Court of Canada is set to decide the issues in the near future, risks introducing uncertainty into the law and destroying the progress that has been made to date through common law advancements.

The Enactment of S-224 is Potentially Harmful to the Investigation and Prosecution of Human Trafficking Offences

Enacting S-224 would have the effect of eradicating all of the common law advancements and caselaw precedents that have been decided over the last 8 years, including *A.A.*, *Sinclair* and *Gallone*, because if the wording of “exploitation” is changed the decisions that interpret the existing provision would no longer apply to the new provision. This would mean that law enforcement and prosecutors would have to start all over again with education and training of police and prosecutors and with developing new litigation strategies at the same time as they deal with the multitude of complex constitutional challenges that will be launched. This would divert efforts from actual prosecutions and supporting victims of human trafficking to arguing constitutional challenges.

The proposed wording of S-224 will make it harder for prosecutors to prove the human trafficking offence because the listed means by which the offence can be committed is more narrow than the current provision, as interpreted by courts in cases like *A.A.* and *Sinclair*. Furthermore, the language “or any other similar act” which is not defined anywhere in S-224 is so vague that it will result in legal argument about the meaning of this phrase and constitutional litigation regarding overbreadth.

Although the existing provision does not mimic Article 3 of the Palermo Protocol, in that the *means by which* the offence is committed are not listed as an element of the offence, this actually makes it easier to prove the human trafficking offence. The existing provision has been interpreted as being consistent with the protocol.^{xvi} The court in *R. v. D’Souza* commented that our current *Criminal Code* provision is better than the Palermo Protocol.^{xvii}

For the reasons set out above, Bill S-224 unnecessary and, if passed, would put human trafficking investigations and prosecutions at risk, cause uncertainty in the law for years to come and result in time being diverted away from holding offenders accountable and helping victims rebuild their lives to instead, arguing constitutional challenges, all of which will have a negative impact on the safety of our communities and vulnerable victims of human trafficking.

ⁱ *R. v. Beckford and Stone*, [2013] O.J. No. 371; *R. v. D’Souza*, 2016 ONSC 2749

ⁱⁱ *R. v. A.A.* 2015, ONCA 558 at paras. 70-71 and 76.

ⁱⁱⁱ *R. v. A.A.*, *supra*, at paras. 72 and 73.

^{iv} *R. v. Beckford and Stone*, *supra* at para. 18.

^v *R. v. A.A.*, *supra*, at paras. 82, 84-87.

^{vi} *R. v. Sinclair*, 2020 ONCA 61 at paras. 6, 10-13.

^{vii} *R. v. Sinclair*, *supra*, at para. 15.

^{viii} See for example *R. v. S.M.*, 2023 ONCA 417; *R. v. Burton*, 2023 ONCA 44, *R. v. Wilson*, 2022 ONCA 857, *R. v. Alexis-McLymont*, 2021 ONCA 858, *R. v. Dylan Hird*, 2021 ONCA 881, *R. v. D.J.*, 2019 ONCA 607, *R. v. Senoubari Abedini*, 2020 ONCA 520, *R. v. Taylor*, 2023 ONSC 1101, *R. v. Amdurski*, 2023 ONSC 1476, *R. v. Downey*, 2023 ONSC 767, *R. v. Barreau*, 2023 ONCJ 210, *R. v. Dak* (unreported, May 5, 2023, Kennedy J. OCJ), *R. v. Weidendorf* (unreported, June 9, 2023 Loignon J. OCJ), *R. v. Augustin*, 2022 ONSC 5901, *R. v. K.P.*, 2022 ONSC 7135, *R. v. Musara et al*, 2022 ONSC 2835, *R. v. Campbell et al* (unreported, October 4, 2022 Nightingale J. SCJ), *R. v. M.D.*, 2022 ONSC 265, *R. v. T.T.*, 2022 ONSC 722, *R. v. Nasurick* (unreported, November 29, 2022 Pockele J. OCJ), *R. v. Clayton* (unreported, June 9, 2021 Dumel J. OCJ), *R. v. Jeffers* (unreported, February 20, 2019, Duncan J. OCJ), *R. v. Clayton* (unreported, June 9, 2021 Dumel J. OCJ).

^{ix} *R. v. Antoine*, 2019 ONSC 3842

^x *R. v. Antoine*, *supra*.

^{xi} *R. v. A.A.*, *supra*.

^{xii} *R. v. Tekin*, 2022 ONCA 740

^{xiii} *R. v. McEwan*, 2022 ONSC 4298

^{xiv} See for example *R. v. Chahinian*, 2022 QCCA 499, *R. v. Losse*, 2021 QCCQ 5226, *R. v. Bedard*, 2022 QCCQ 5399, *R. v. Rose*, 2022 QCCQ 12837 and *R. v. P.O.*, 2021 ABQB 318.

^{xv} *R. v. Mohsenipour*, 2023 BCCA 6

^{xvi} *R. v. A.A.*, *supra* at para. 73.

^{xvii} *R. v. D'Souza*, *supra* at paras. 147-148.