

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

PREPARED FOR STANDING COMMITTEE
ON JUSTICE AND HUMAN RIGHTS

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Executive Summary

Ontario Native Women's Association (ONWA) has an interest in any legislative change that will improve Indigenous women's safety and access to justice in Ontario and Canada. However, ONWA's position is that Bill S-224 is unnecessary, will create further barriers to access to justice, and will not address the systemic factors that render Indigenous women in Canada at greater risk of trafficking and sexual exploitation, nor will it create the safety within the policing and legal systems that is required for Indigenous women to come forward to seek justice. ONWA is concerned that if passed, the Bill will eliminate recent advancements in case law and result in delays to prosecutions which could adversely impact Indigenous survivors of human trafficking who might otherwise have sought justice through the court system.

ONWA acknowledges the bravery, wisdom, and leadership of all survivors as they are the experts, and their advice and lived experience informs all aspects of our anti-human trafficking work. Indigenous women have the fundamental right to participate in and lead the responses to the exploitation and trafficking of Indigenous women and girls. This fundamental right is supported by the United Nations Declaration on the Rights of Indigenous Peoples, which affirms that Indigenous women have a right to participate in decision-making processes in matters which affect them and their rights.¹ **It is not clear how Indigenous women, human trafficking survivors and survivor-leaders have been involved in the development of Bill S-224, nor how the Bill responds to the unique needs of Indigenous women who are over-represented as human trafficking survivors in Canada.**

About the Ontario Native Women's Association (ONWA)

The Ontario Native Women's Association (ONWA) is the oldest and largest Indigenous women's organization in Canada. Established in 1971, ONWA empowers and supports Indigenous women through research, advocacy, policy development and programs and services that focus on local, regional, and provincial needs. ONWA's programs and service delivery models focus on Indigenous women and family-centered approaches that are built on the foundation of culture, strength-based and trauma-informed practices. ONWA specializes in survivor-led engagements, program development, and wrap-round services such as targeted programming that addresses Indigenous women's unique needs related to domestic violence, sexual violence, trauma, and grief and loss and how these intersect with human trafficking and Missing and Murdered Indigenous Women and Girls (MMIWG).

ONWA is both an association with 13 Chapters (incorporated Indigenous women's organizations providing front-line services) and 21 Councils (grassroots Indigenous women's groups) and a direct, front-line service provider delivering culturally enriched critical services for Indigenous women and their families in 10 sites across the province.

ONWA applies a trauma-informed, Indigenous Gender-Based Analysis (IGBA) to our work that looks at the intersectionality of all issues which impact Indigenous women and girls. ONWA's IGBA was

¹ United Nations Declaration on the Rights of Indigenous Peoples, Article 18.

developed to address the harmful practices of applying non-Indigenous methodologies, approaches and analyses to Indigenous women, their lives, and the issues impacting them. It is designed to identify and address systemic factors that cause and uphold violence against Indigenous women by applying a culturally relevant lens and centering the intersectional realities, such as race and gender, of Indigenous women's lived experiences.

The Normalization of Violence Against Indigenous Women

The marginalization, racism and violence Indigenous women and girls face are part of the legacy of colonialism. Colonialism has resulted in previously strong, self-sustaining Indigenous communities being eroded. Economic bases, lands, governments, cultures and religious practices have been systematically undermined. The resultant intergenerational trauma, coupled with more recent constructs including Indigenous residential and day schools, has fostered poverty, substance abuse and violence within Indigenous communities. These issues are exacerbated by the failure of the non-Indigenous community to understand the underlying reasons for what is happening. These circumstances combine to create an environment ripe for the development of human trafficking. Physical, emotional, psychological violence, and financial vulnerability create an environment where Indigenous women are targeted.

Indigenous women have long been uniquely impacted by colonial laws, policies and practices based on their gender. Research indicates that Indigenous women across Canada face considerable barriers to health and wellness, including gendered racism, violence, poverty, single motherhood and low rates of educational attainment and employment.² Direct links have been drawn between the disproportionate rates of violence that Indigenous women continue to face today and the paternalistic policies emerging from colonization that have dismantled Indigenous women's leadership, roles, and responsibilities.³ Indigenous women in Canada experience higher than average rates of violent victimization including homicide,⁴ sexual assault,⁵ and family violence.⁶ A 2019 report notes that most adult Indigenous domestic homicide victims were female (73%), and that 80% of Indigenous child victims (age 17 years and younger) were female.⁷

Constant violence perpetrated against Indigenous women and girls has contributed to the “normalization of violence” which teaches young Indigenous women and girls to accept this as part of their lives. **Colonialism, intergenerational trauma, the normalization of sexual violence against Indigenous women, coupled with systemic racism and the societal devaluation of Indigenous women, all work together to create a situation in which Indigenous women and girls are**

² Halseth, R. (2013). *Aboriginal Women in Canada: Gender, Socio-Economic Determinants and Health, and Initiatives to Close the Wellness Gap*. National Collaborating Centre for Aboriginal Health.

³ ONWA. (2016). *Sex Trafficking of Indigenous Women in Ontario*.

⁴ Statistics Canada. (2016). *Homicide in Canada, 2016*. <https://www.statcan.gc.ca/daily-quotidien/171122/dq171122b-eng.htm>

⁵ Statistics Canada. (2014). *Self-reported sexual assault in Canada, 2014*. <https://www.statcan.gc.ca/pub/85-002-x/2017001/article/14842-eng.htm>

⁶ Burcycka, M. and Conroy, S. (2017). *Family Violence in Canada: A statistical profile, 2015*.

⁷ Statistics Canada. (2021). *Juristat: Trafficking in persons in Canada, 2019*. <https://www150.statcan.gc.ca/n1/pub/85-005-x/2021001/article/00001-eng.pdf>

disproportionately victimized by sexual violence, lured and groomed for sexual exploitation and human trafficking, and are more likely to go missing or be murdered.

ONWA's Leadership to Address the Human Trafficking of Indigenous Women

Ontario continues to be a hub for human trafficking. While Ontario represented 39% of the Canadian population in 2020, between 2010 and 2020 it accounted for 65% of police-reported human trafficking incidents nationally.⁸

Since 2012, ONWA has engaged with women who have lived experienced of human trafficking to honour their voices, recognize their expertise as survivors, and build a knowledge base of survivor experiences and needs. Women who have survived human trafficking should be empowered to inform strong policy development, and mechanisms should be implemented to ensure that survivor expertise is heard. This survivor engagement and expertise has allowed ONWA to make effective recommendations on policy development, as well as program design, delivery and evaluation.

In 2018, ONWA engaged over 3,360 community members and service providers, including 250 self-identified Indigenous human trafficking survivors. The truth, honesty, and courage of their storytelling resulted in the creation of ONWA's report, *Journey to Safe Spaces*, which provides clear recommendations and a comprehensive strategy to address the needs of Indigenous women and girls who are survivors, or are at risk, of human trafficking.⁹ **It is important to note that changes to Canada's Criminal Code was not identified as an issue by any of the survivors, community members or service providers who were engaged through this process.**

ONWA's *Courage for Change* program is the largest Indigenous-led anti-human trafficking program in Canada and supports Indigenous women at risk of human trafficking or leaving a situation of trafficking. It is a strengths-based cultural intervention program designed to meet the specific needs of Indigenous women through a continuum of culturally-based, trauma-informed interventions and healing practices that honour the courage and resilience of those who have experienced sexual exploitation and human trafficking. The human trafficking response teams based in Thunder Bay, Toronto, Ottawa, Hamilton, Sioux Lookout, Midland, and Niagara provide services twenty-four hours a day, seven days a week. Since the program's inception in 2017, 856 Indigenous women and youth have been supported to successfully exit from human trafficking.

⁸ Statistics Canada. (2022). *Juristat: Trafficking in persons in Canada, 2020*.

<https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00010-eng.htm>

⁹ ONWA. (2019). *Journey to Safe Spaces*.

https://www.onwa.ca/files/ugd/33ed0c_1a2b7218396c4c71b2d4537052ca47cd.pdf

Analysis of Bill S-224

Implications for Existing Case Law

ONWA is concerned that the proposed amendments to the *Criminal Code* stem from a misunderstanding of the law. Ontario's Court of Appeal has interpreted the current human trafficking offence and definition of "exploitation" in a manner that is already consistent with Bill S-224's intention. **Repealing the existing definition of exploitation as currently set out in Canada's Criminal Code will eliminate significant common law advancements** made in recent years in Ontario's appellate courts – advancements which are of benefit to Indigenous women.

One of the stated intentions of Bill S-224 is to facilitate convictions against those who participate in human trafficking by putting the onus on the perpetrator rather than the survivors, specifically through the removal of the requirement to establish a victim's fear. However, under existing case law, the Crown does not need to prove whether the complainant feared for their safety, only whether the accused's conduct could reasonably be expected to cause a person to fear for their physical or psychological safety.¹⁰ **The focus is already on the accused's conduct, not on the effect that the accused's conduct had on the victim.**

The Handbook for Criminal Justice Practitioners on Trafficking in Persons from the Department of Justice makes it clear to prosecutors that establishing that the accused's conduct could reasonably be expected to cause the complainant to fear for their safety "does not require the victim to assert that they feared for their safety...or for the safety of someone known to them. Instead, it requires evidence that demonstrates objectively that a reasonable person, standing in the shoes of the victim, would be afraid having regard to all of the circumstances including the age, gender and other considerations specific to the victim".¹¹

ONWA is concerned that Bill S-224 will make it more difficult to prosecute human trafficking cases because it would effectively **narrow "the means" by which the offence can be committed** in comparison to the existing provision as it has been interpreted by the courts. Furthermore, **altering the wording of "exploitation" in the Code would render previous decisions that interpret the wording of the existing provision inapplicable.** This includes recent decisions from the Ontario Court of Appeal which clarify that:

- Coercion is not limited to physical acts but also includes emotional and psychological harm.¹²
- Influence can be exerted while still allowing free will to operate, and includes anything done to induce, alter, sway or affect the will of the victim.¹³
- The accused person does not have to actually exploit the victim to be guilty of human trafficking – the accused person must *intend* to engage in the prohibited conduct (e.g. recruiting, harbouring or exercising control direction or influence over the complainant's

¹⁰ *R. v. A.A.*, ONCA 558 (2015).

¹¹ Department of Justice. (2015). *A Handbook for Criminal Justice Practitioners on Trafficking in Persons*. <https://www.justice.gc.ca/eng/rp-pr/cj-jp/tp/hcipotp-gtpupjp/hcipotp-gtpupjp.pdf>

¹² *R. v. Beckford and Stone*, ONSC 653 (2013).

¹³ *R. v. Gallone*, ONCA 663 (2019).

movements) and *act with the purpose of exploiting or facilitating the exploitation of that person*.¹⁴

- A wide range of circumstances can be applied when determining whether the accused's conduct could reasonably be expected to cause a victim to fear for their physical or psychological safety, including:
 - 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 victim
 - the nature of the relationship between the accused and the victim
 - directive behaviour
 - influence exercised over the nature and location services provided
 - limitations on the victim's movement
 - control of finances
 - financial benefit to the accused, and
 - use of social media to assert control or monitor communications with others.¹⁵

Considerations of vulnerability due to personal circumstances is of particular relevance for Indigenous women and girls, who, as a result of paternalistic colonial policies and systemic racism, are at higher risk of human trafficking due to social or economic disadvantages (including precarious housing, unemployment, unstable employment and low working wages, lack of access to services such as healthcare, child welfare system involvement) and higher than average rates of violent victimization. Indigenous women and girls are disproportionality represented as survivors of human trafficking; yet, **there is no wording related to an abuse of position of vulnerability in Bill S-224**. The inability to apply previous case law which calls for consideration of such vulnerability could have a negative impact on human trafficking prosecutions where complainants are Indigenous.

Implications for the Legal System

ONWA is concerned about the impact that the proposed amendment will have on the legal system and the impact this will have on survivors. Police and prosecutors would be required to learn new laws and the courts would need to interpret new provisions, all of which could lead to **delays in prosecuting traffickers and create additional barriers to justice for Indigenous women**.

The existing human trafficking offence as written into the *Criminal Code* has been found to be constitutional in Ontario.¹⁶ ONWA is concerned that the amendments, particularly the use of broad and vague language ("or any other similar act"), could result in constitutional challenges. While the courts determine the constitutionality of the new provisions, current cases may be dismissed, police may be unable to bring human trafficking charges and prosecutors may be unable to prosecute

¹⁴ *R. v. A.A.*, *supra*.

¹⁵ See *R. v. Sinclair*, SCC 35 (2020) at para 15 for full list.

¹⁶ *R. v. Beckford and Stone*, *supra*; *R. v. D'Souza*, ONSC 2749 (2016).

human trafficking offences. Such uncertainty will serve only to further discourage survivors from coming forward.

Need for Systemic Change and Specialized Support for Survivors

Prosecutors' inability to prove fear is not the issue. Through existing case law, prosecutors already have at their disposal the tools which Bill S-224 is attempting to create. The survivors who participated in ONWA's 2018 engagements described the extreme levels of fear they experience: "physical, emotional, psychological violence and financial vulnerability create an environment of constant fear."¹⁷ It is this fear, in addition to the lack of safety that survivors feel when interacting with the police, justice system and professional helpers, that ultimately leads to the low conviction rates for human trafficking offences. When survivors do find the courage to seek help from services in the community, they are often met with disdain or disbelief. They encounter barriers of judgemental attitudes and presumptions that they are not worthy of services or equal treatment before the law.¹⁸

ONWA continues to hear from Indigenous women that fear of judgement and mistreatment by first responders like police prevent them from getting supports they need.¹⁹ Services are not designed to meet the unique needs of Indigenous people and so Indigenous survivors of human trafficking are understandably reluctant to access services. ONWA's [Journey to Safe Spaces](#) report describes the lack of safety that survivors experience within services designed to protect people, which are too often unresponsive or judgemental of Indigenous women. "Many survivors shared deeply concerning stories of mistreatment and stigma they experienced...Women shared that sometimes police have preconceived notions that the women are not to be believed and are not worthy of being treated with the same respect shown to others."²⁰

The proposed Bill, though well intentioned, will not address the reasons why Indigenous women who are being trafficked are reluctant come forward to the police, nor will it address the underlying systemic factors that contribute to the overrepresentation of Indigenous women as human trafficking survivors.

Rather than amending the *Criminal Code*, which already facilitates the stated intention of Bill S-224, ONWA calls for:

- The creation of **dedicated human trafficking prosecution teams** in all provinces/territories, such as those in Ontario, Nova Scotia, and Manitoba, composed of specialized Crown prosecutors who are responsible for handling human trafficking cases, providing legal advice to police and prosecutors, and delivering enhanced education and training within the justice sector.
- **Specialized Indigenous victim services workers for Indigenous survivors** who appear in court; when charges are laid against a trafficker, survivors need to be supported by

¹⁷ ONWA. (2019). *Journey to Safe Spaces*. p.6

https://www.onwa.ca/files/ugd/33ed0c_1a2b7218396c4c71b2d4537052ca47cd.pdf

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid. p.19.

specialized, trauma informed services. Survivor safety must be prioritized throughout legal processes including protecting survivors from re-victimization in providing witness testimony.

- **Sustainable programs and services that address survivor-specific needs** – including wraparound 24-hour services for survivors of human trafficking in cities across the country, with specialised staff providing trauma informed care with an understanding of sexual exploitation and the realities of Indigenous women who are trafficked. Survivor perspectives and expertise must inform the development, implementation and evaluation of services.
- **All police forces across Canada** to review and implement the recommendations from the 2018 report, *Broken Trust: Indigenous People and the Thunder Bay Police Service* and/or **conduct their own inquiry into their organization's behaviour around systemic racism**; and all police forces develop and maintain procedures and processes for criminal and general investigations related to human trafficking.
- **Standard procedures for police which increase the priority rating for women and children who are chronically missing.**
- The **involvement of Indigenous women, human trafficking survivors and survivor leaders** in decision-making on matters that impact them, including legislative change.
- **All levels of government to work together with Indigenous women's organizations to transform the systems to perpetuate violence against Indigenous women**, and support Indigenous women to take up their leadership roles in their family, community and nations.
 - To prevent the human trafficking of Indigenous women and girls, we must first **address the risk factors that create the conditions that make them more vulnerable and targeted by human traffickers.**
 - The women who have been supported through ONWA's Courage to Change program identify numerous intersectional social and economic factors which led to their subsequent sexual exploitation, such as the child welfare system, poverty, intergenerational trauma, lack of safe housing, mental health and addictions.
 - The Final Report of the National Inquiry into MMIWG similarly identifies various factors that undermine Indigenous women's right to safety, including systemic issues within the criminal justice system and socio-economic barriers faced by Indigenous women. These socio-economic barriers include a lack of adequate housing, poverty, poorer health status and treatment in health care systems, experiences in the child welfare system and inadequate supports, particularly surrounding addictions.²¹
 - Indigenous women are less likely to experience regular access to health care, more likely to experience lower quality housing, poorer physical environment, decreased access to education, fewer employment opportunities and higher rates of poverty, than non-Indigenous women. These conditions are due to the prevalence of systemic racism at all levels of society and make Indigenous women and girls more vulnerable to sexual exploitation and human trafficking.
- **Invest in programs targeted towards preventing children involved in the child welfare system from being trafficked.** The system designed to protect children continues to place

²¹ *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. (2019). pp. 656-669. https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf

Indigenous and non-Indigenous children and youth at higher risk of being trafficked. As federal and provincial governments seek to transform child welfare services, new funding models must support organizations and programs that can reduce the risk of children and youth becoming trafficked.

For more information and to learn about the numerous recommendations that ONWA has put forward to improve support for survivors and effect systems change across the colonial systems that Indigenous women interact with, see ONWA's [Journey to Safe Spaces](#) (2019) and [Reconciliation with Indigenous Women](#) (2020) reports.²²

"If we want sustainable change then we need to deconstruct the current systems and reconstruct Indigenous women's leadership, their voices, their honour and empowerment."

– Cora McGuire-Cyrette, Chief Executive Officer, ONWA

"As a person with lived experience of being sex trafficked, I am acutely aware of the lack of progress in preventing this violent form of abuse. We need to ensure legislation and policies create safe access to justice, rather than more barriers. We need systemic change to systems rather than new legislation that may create more harm."

– Jennifer Richardson, Senior Director of Strategy and Communications, ONWA and
First Director of Ontario's Human Trafficking Strategy

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²² ONWA. (2019). *Journey to Safe Spaces*.

https://www.onwa.ca/files/ugd/33ed0c_1a2b7218396c4c71b2d4537052ca47cd.pdf

and ONWA. (2020). *Reconciliation with Indigenous Women*:

https://www.onwa.ca/files/ugd/4eaa9c_be059fe0cd844671839aef58558d893d.pdf