



PACT-Ottawa

Persons Against the Crime of Trafficking in Humans
Personnes en Action Contre la Traite des Personnes

31 May 2012

Response to Bill C-310: An Act to Amend the Criminal Code (Trafficking in Persons)

Respectfully presented to the Members of the
Senate Standing Committee on Legal and Constitutional Affairs

The members of PACT-Ottawa commend the Honourable Joy Smith, Member of Parliament for Kildonan-St. Paul, the Sponsor of the proposed legislation, for her initiative and untiring commitment to resolving the problem of human trafficking. PACT-Ottawa supports this legislative initiative.

The law of human trafficking is situated at the intersection of human rights and criminal law. PACT-Ottawa respectfully urges all Parliamentarians to engage in the development of legal provisions to protect the human rights of trafficked persons, in addition to provisions that facilitate the prosecution of traffickers.

PACT-Ottawa has formulated its response to Bill C-310 based upon two central aspirations:

1. Protection of trafficked persons; and
2. Clarity and consistency in Canadian law.

For ease of reference, the recommendations follow the order of the Clauses in Bill C-310. Explanatory notes follow.

Recommendation 1 – Sex Offender Registry

Clause 1 of Bill C-310 proposes a new subsection 7(4.11) to add offences in relation to trafficking in persons to the list of extraterritorial offences that may be prosecuted in Canada.

PACT-Ottawa recommends a consequential amendment to include the new subsection 7(4.11) in the list of offences at section 490.011(1)(b) (Sex Offender Information); i.e. that subsections 490.011(1)(b)(i) and (i.1) be replaced by the following:

490.011(1)(b)
(i) section 7(4.11) (offences in relation to trafficking in persons),
(i.1) section 162 (voyeurism),
(i.11) section 173(1) (indecent acts),

The desired effect of Recommendation 1 would be to ensure that when the court imposes a sentence for the new extraterritorial offence in s. 7(4.11), the prosecutor will have the opportunity to apply for an order requiring the offender to comply with the *Sex Offender Information Registration Act*, if the prosecutor establishes beyond a reasonable doubt that the person committed the s. 7(4.11) offence with the intent to commit one of the sexual offences designated at section 490.011(1)(a), (c), (c.1), (d) or (e). This

consequential amendment would maintain consistency in Canadian law, since offences inside Canada relating to trafficking in persons (sections 279.01 and 279.011) are already included in the list at s. 490.011(1)(b).¹ Inclusion of the offender's name in the Sex Offender Registry may assist to prevent further exploitation of the complainant and other victims.

Recommendation 2 – Definition of Exploitation

Clause 2 of Bill C-310 proposes a new subsection 279.04(2) to add an evidentiary aid² that would assist decision-makers to identify criminal exploitation in the context of human trafficking cases.³

In its submission to the House of Commons Standing Committee on Justice and Human Rights dated 13 March 2012, PACT-Ottawa recommended that the language “abused a position of trust or authority” be used in the evidentiary aid. We are delighted that the House of Commons has passed a version of Bill C-310 that includes this language. PACT-Ottawa reiterates its recommendation that the phrase “or a relationship of dependency” be added also, i.e.

279.04(2)

(c) abused a position of trust, power or authority, or a relationship of dependency.⁴

The Ontario Court of Appeal has concluded, and other courts have agreed, that the intention of Parliament in adding “relationship of dependency” to s. 153(1) (sexual exploitation) of the *Criminal Code* was to add a class of relationship where there was dependency by a young person on the accused, even though the accused may not have been in a position of trust or authority with respect to the victim.⁵

The desired effect of Recommendation 2 would be to acknowledge this additional class of relationship, and to further clarify that psychological forms of violence may constitute criminal exploitation, as well as the physical forms.⁶ Ultimately, these clarifications should result in more numerous and successful prosecutions of traffickers and should extend protection to a greater number of trafficked persons.

Recommendation 3 – Mitigating Factors

PACT-Ottawa recommends that Parliamentarians consider a mechanism by which to identify mitigating factors in the culpability or the sentencing of certain individuals for trafficking in persons offences. For instance, where the offender is a child or where the offender is a former victim of human trafficking, the Court should be able to take notice of these facts and decide accordingly. This will ensure the protection of those trafficked persons and children who have engaged in human trafficking purely as a means of survival. For example, one articulation of this idea might be:

279.05

(1) When a court imposes a sentence for an offence referred to in section 279.01, 279.011, 279.02, 279.03 or 279.04, it may consider as a mitigating circumstance that the offender was a victim of human trafficking before the commission of the offence if that circumstance was relevant to or contributed to the commission of the offence.

(2) The court shall cause to be stated in the record the aggravating and mitigating circumstances it took into account when determining the sentence.⁷

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Explanatory Notes

¹ For comparison, the extraterritorial offence in subsection 7(4.1) (sexual offences against children) is listed in s. 490.011(1)(a) alongside its counterparts that take place inside Canada: section 151 (sexual interference), 152 (invitation to sexual touching), 153 (sexual exploitation), 155 (incest), subsection 160(2) (compelling the commission of bestiality) or (3) (bestiality in presence of or by a child), section 163.1 (child pornography), 170 (parent or guardian procuring sexual activity), subsection 173(2) (exposure) or subsection 212(4) (obtaining prostitution of person under age of eighteen).

² Such evidentiary aids have been useful to refine the interpretation of two existing sections of the Criminal Code. The aid in section 153(1.2) made a difference to the interpretation of section 153(1) (sexual exploitation) in: **R. v. M. (P.)**, 2011 CarswellOnt 8292, 2011 ONCJ 401, **R. v. Anderson**, 2009 CarswellPEI 7, 241 C.C.C. (3d) 432 (P.E.I.C.A.) and **R. v. Cape**, 2009 CarswellBC 3200, 2009 BCSC 1631. The aid in section 467.11(3) made a difference to the interpretation of section 467.11(1) (participation in activities of criminal organization) in **Duguay v. R.**, [2009] Q.J. No. 5834, 2009 QCCA 1130 and **R. v. Beauchamp**, 2009 CarswellOnt 7195 (Ont. S.C.J.).

³ There has been some concern that the *Criminal Code* does not align with the obligations that Canada has undertaken by ratifying the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention Against Transnational Organized Crime (Protocol)*. It is true that the *Criminal Code* does not directly parallel all of the aspects of the *Protocol*. For example, the *Criminal Code* does not detail the means by which recruitment and related activities must be carried out. Rather, the *Criminal Code* places its emphasis on the means of exploitation. The proposed evidentiary aid complements --and gives more detailed language to illustrate-- the means of exploitation. To the extent that the evidentiary aid borrows concepts or language from the *Protocol*, it should be noted that in the *Protocol* these are means of recruitment etc. rather than means of exploitation.

⁴ The phrases “position of trust or authority” and “relationship of dependency” are used in *Criminal Code* section 153 (sexual exploitation) and section 718.2(a)(iii) (sentencing principles). As such they already have meaning in Canadian jurisprudence e.g. **R. v. Audet**, [1996] 2 S.C.R. 171 and **R. v. Galbraith** (1994), 30 C.R. (4th) 230; (1994), 90 C.C.C. (3d) 76 (Ont. C.A.); [1994] O.J. No. 808. In addition, they capture the spirit of the language used in the *Protocol* (e.g. “abuse of power or a position of vulnerability”), albeit language used in the *Protocol* to describe the means of recruitment rather than the means of exploitation (see note 3).

⁵ **R. v. Galbraith** (1994), 30 C.R. (4th) 230; (1994), 90 C.C.C. (3d) 76 (Ont. C.A.); [1994] O.J. No. 808, cited in **R. v. Anderson**, 2009 CarswellPEI 7, 241 C.C.C. (3d) 432 (P.E.I.C.A.).

⁶ Section 279.04 (exploitation) requires that the victim of human trafficking “believe that their safety or the safety of a person known to them would be threatened”. This language is modeled on that in section 264 (criminal harassment). It is settled law in Canada that in section 264 “safety” includes “emotional or psychological well-being”: **R. v. Skoczylas**, 1997 CarswellBC 2553, 99 B.C.A.C. 1, citing *inter alia* **R. v. McCraw**, [1991] 3 S.C.R. 72, **R. v. Sillipp** (1995), 99 C.C.C. (3d) 394 (Alta. Q.B.), **R. v. Ryback** (1996), 71 B.C.A.C. 175 and **R. v. Gowing**, [1994] O.J. No. 2743.

⁷ The principle that mitigating circumstances should reduce a sentence is articulated in section 718.2 (sentencing principles). The proposed language is modeled on that in subsections 380.1(2) and (3) (fraud - sentencing). The vulnerability of trafficked persons to be influenced or coerced into non-compliance with the law is recognized in section 245 of the *Immigration and Refugee Protection Regulations*.