

**BILL C-49: AN ACT TO AMEND THE CRIMINAL CODE
(TRAFFICKING IN PERSONS)**

**Laura Barnett
Law and Government Division**

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LEGISLATIVE HISTORY OF BILL C-49

HOUSE OF COMMONS

Bill Stage	Date
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print**.

Legislative history by Peter Niemczak

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BILL C-49: AN ACT TO AMEND THE CRIMINAL CODE
(TRAFFICKING IN PERSONS)*

INTRODUCTION

Introduced in the House of Commons on 12 May 2005, Bill C-49 proposes amendments to the *Criminal Code*⁽¹⁾ to specifically prohibit trafficking in persons in Canada. The bill is part of the government's commitment to the protection of vulnerable persons and ongoing strategy to combat human trafficking.

Currently, the *Criminal Code* contains no provisions to specifically prohibit trafficking in persons, although a number of offences – including kidnapping, uttering threats, and extortion – play a role in targeting this crime. In 2002, the *Immigration and Refugee Protection Act*⁽²⁾ brought Canada's first anti-trafficking legislation into force. Section 118 prohibits bringing anyone into Canada by means of abduction, fraud, deception, or use or threat of force or coercion.

Bill C-49 adds to this legislation by going beyond the focus on immigration and making trafficking in persons a criminal offence. The bill contains three prohibitions. The first contains the global prohibition on trafficking in persons, defined as the recruitment, transport, transfer, receipt, concealment or harbouring of a person, or the exercise of control, direction or influence over the movements of a person, for the purpose of exploitation. The second prohibits a person from benefiting economically from trafficking. The third prohibits the withholding or destroying of identity, immigration, or travel documents to facilitate trafficking in persons.

* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) R.S.C. 1985, c. C-46, as amended.

(2) S.C. 2001, c. 27.

Bill C-49 also ensures that trafficking may form the basis of a warrant to intercept private communications and to take bodily samples for DNA analysis, and permits inclusion of the offender in the sex offender registry. Finally, Bill C-49 expands the ability to seek restitution to victims who are subjected to bodily or psychological harm.

BACKGROUND

A. The International Context

1. The Problem

In today's transnational world, the problem of trafficking in persons has become one of the most pressing topics in global migration policy. The issue has become central to national and international security concerns since the 1990s, particularly given the apparent prominent involvement of organized crime⁽³⁾ – drawn to the industry due to the enormous profits to be made and the relatively low risk of detection. Responding to such concerns, the international community has condemned trafficking as an abhorrent form of modern-day slavery and a fundamental human rights abuse.

The term “trafficking in persons” essentially refers to the recruitment, transportation and harbouring of a person for the purposes of forced service. Victims are often women and children forced into the sex industry, but also include men, women and children exploited through farm, domestic, or other labour. In some countries, trafficked children may be forced into work as beggars or child soldiers.

Trafficking can occur through a variety of means, from organized criminal groups that operate large-scale transnational networks with political and economic contacts in both sending and receiving countries, to small-scale operations that traffic only one or two people at a time. Trafficked persons are often duped into their new profession, deceived with seemingly legitimate employment contracts or marriages abroad. Others may be abducted outright. Upon arrival at their destination these individuals are put to work, subject to debt bondage that can take

(3) However, it is important to note that some researchers see the larger problem as one of migration control, rather than a response to criminal justice issues. See Christine Bruckert and Colette Parent in a report commissioned by the Royal Canadian Mounted Police, *Organized Crime and Human Trafficking in Canada: Tracing Perceptions and Discourses*, Ottawa, 2004.

years to repay.⁽⁴⁾ Victims of trafficking are often subjected to physical, sexual and emotional abuse. Because of the extraordinarily clandestine nature of the activity, accurate data are difficult to obtain, but the United Nations estimates that 700,000 people are trafficked annually worldwide, generating annual global revenues approaching US\$10 billion. Other estimates are much higher.⁽⁵⁾

International attention to the issue of trafficking goes beyond deterrence to deal with victim protection as well. However, the status of the victim is often complex. Although some are universally recognized as victims – for example, children who are exploited through the sex trade – others are often perceived as illegal migrants or criminals. Women trafficked into the sex trade are sometimes seen as simply violating immigration or criminal laws relating to prostitution. Because of these perceptions, and because of threats from traffickers, many victims are reluctant to turn to the police for protection. The social stigma of prostitution is also a problem: women trafficked internationally who are returned to their home countries may be ostracized within their communities and families.

2. The Trafficking Protocol

The international community's strongest attempt to deal with the problem of trafficking in persons is through the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations *Convention Against Transnational Organized Crime*. Adopted by the UN General Assembly in November 2000, and ratified by Canada in May 2002, one of this Protocol's primary goals is to maintain a careful balance between law enforcement and victim protection.

Article 3 of the Protocol defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall

(4) Janie Chuang, "Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Concerns," *Harvard Human Rights Journal*, Vol. 11, 1998, pp. 69-70.

(5) Tim Riordan, *Human Trafficking*, PRB 04-25E, Library of Parliament, Ottawa, 14 October 2004, p. 1; Department of Justice, Background, "Trafficking in Persons: A Brief Description," 12 May 2005, available at: http://canada.justice.gc.ca/en/news/nr/2005/doc_31486.html.

include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

This definition is intended to include a wide range of cases where individuals are exploited by organized criminal groups, or where there is an element of duress with a transnational aspect.⁽⁶⁾ The Protocol specifically provides that the consent of a person to exploitation is irrelevant if there has been any coercion or deception involved, or any benefit granted by the trafficker. Although the definition does not specifically require cross-border movement, this is clearly the focus of the Protocol, given its context within the *Convention Against Transnational Organized Crime* and its focus on border control.

Beyond defining and condemning trafficking, the Protocol also:

- outlines states' obligations to criminalize trafficking through domestic law, including corollary trafficking offences such as attempt, accomplice, and conspiracy;
- expands the scope of protection and assistance to trafficking victims;
- calls for states to ensure confidentiality and protect victims from their traffickers;
- encourages states to enact measures to ensure victims' civil remedies and social benefits;
- deals with immigration status, holding that states must consider laws that would allow victims of trafficking to remain, either temporarily or permanently, in appropriate cases, and ensuring that sending states agree to facilitate the repatriation of their own nationals; and
- deals with national and international prevention, cooperation and other measures to combat trafficking.

Essentially the Protocol is an important model for national legislation, indicating conduct that should be sanctioned, the appropriate severity of punishment, and effective measures to combat and prevent trafficking.⁽⁷⁾

3. Other International Instruments

In addition to the Trafficking Protocol, several other international instruments deal with the problems of trafficking. The International Labour Convention has a number of instruments touching on forced labour and minimum ages for employment. The *Convention on*

(6) United Nations Office on Drugs and Crime, "The Protocol to Prevent, Suppress and Punish Trafficking in Persons" (summary), available at: http://www.undcp.org/trafficking_protocol.html.

(7) United Nations Office on Drugs and Crime, "Trafficking in Human Beings," available at: http://www.undcp.org/trafficking_human_beings.html.

the Elimination of All Forms of Discrimination Against Women deals with issues specific to the exploitation of women. Finally, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* outlines measures designed to enhance international cooperation to combat international trafficking in children. It requires State Parties to criminalize trafficking offences against children, including transferring a child's organ for profit, or the engagement of a child in forced labour. Canada signed the Optional Protocol in November 2001, but has yet to ratify it. Domestic consultations are ongoing to deal with the overlap between federal and provincial responsibilities; the government expects to ratify the Protocol in the near future.

B. National Initiatives

At the national level, Canada has been dealing directly with the problem of smuggling and trafficking in persons since approximately 600 Chinese migrants were dropped off the British Columbia coast in 1999. Since then, Canada has been recognized as both a destination and a transit country (often to the United States). Although there are no clear statistics, the Royal Canadian Mounted Police estimates that 600 foreign women and girls are coerced into the sex trade in Canada each year. This number would rise to 800 if it were to include those trafficked into Canada for other kinds of forced labour. Estimates also indicate that 2,000 people are trafficked from Canada into the United States every year.⁽⁸⁾

Canada is recognized as a relatively strong force in terms of the laws and resources in place to combat trafficking. However, a recent U.S. report on trafficking criticized Canada's limited ability to catch perpetrators, emphasizing that the government must use its laws "vigorously to increase investigations, arrests, prosecutions, and convictions of traffickers, especially those who may be abusing visa waivers and entertainment visas."⁽⁹⁾

Beyond proposed amendments to the *Criminal Code*, Canada already has some mechanisms in place for dealing with and studying trafficking in persons: the *Immigration and Refugee Protection Act* (IRPA), other general provisions in the *Criminal Code*, and an interdepartmental working group.

(8) Jim Brown, "Cotler Ignores Liberal Crisis, Tables Bill to Combat Human Trafficking," Canadian Press Wire, 12 May 2005.

(9) United States Department of State, *Trafficking in Persons Report*, June 2005, p. 79, available at: <http://www.state.gov/g/tip/rls/tiprpt/2005/>.

1. *Immigration and Refugee Protection Act*

The IRPA came into force in June 2002, introducing Canada's first specific legislation against trafficking in persons. Section 118 of the IRPA creates the offence of trafficking – to knowingly organize one or more persons to come into Canada by means of abduction, fraud, deception, or the use of force or coercion. This offence includes the recruitment, transportation, receipt, and harbouring of such persons. The maximum sentence is life imprisonment. Enhancing the effectiveness of section 118 is the fact that for the purposes of sentencing, a court will consider aggravating factors, such as: bodily harm or death; involvement of a criminal organization; whether the offence was committed for profit; and whether the trafficked person was subjected to humiliating or degrading treatment, including sexual exploitation. The first-ever charges under section 118 were laid in April 2005.

Sections 122 and 123 outline the additional offence of using travel documents to contravene the IRPA, as well as the buying or selling of such travel documents. The maximum sentence for this offence is 14 years' imprisonment.

2. *Criminal Code*

Without the amendments outlined in Bill C-49, other provisions in the *Criminal Code* can currently be used to combat trafficking in persons by targeting specific forms of exploitation and abuse that are inherent to trafficking. These include offences such as fraudulent documentation, prostitution-related offences, physical harm, abduction and confinement, intimidation, conspiracy, and organized crime. While this list is not exhaustive, these are the key provisions that can be, and have been, used to combat trafficking through the *Criminal Code*. A case law review undertaken for the period between March 2004 and February 2005 shows that at least 31 individuals were charged with such trafficking-related offences, resulting in 19 convictions, while 12 cases remain ongoing.⁽¹⁰⁾

3. Interdepartmental Working Group on Trafficking in Persons

The government has established an Interdepartmental Working Group on Trafficking in Persons that is co-chaired by the departments of Justice and Foreign Affairs and

(10) Matthew Taylor, Department of Justice, Pacific Northwest Conference on International Human Trafficking, Vancouver, 19 May 2005.

includes many other federal departments and agencies. The Working Group's goal is to coordinate federal efforts to address trafficking in persons and to develop a federal strategy, in keeping with Canada's international commitments. The Working Group reviews existing laws, policies and programs that may have an impact on trafficking with a view to identifying best practices and areas for improvement.⁽¹¹⁾ It has already developed and distributed an anti-trafficking pamphlet and poster available in multiple languages to Canadian missions and NGOs abroad and within Canada to warn potential victims of the dangers of trafficking. Numerous conferences, seminars, and public outreach sessions have also been held to discuss best practices and research, and to raise awareness in communities.

DESCRIPTION AND ANALYSIS

A. Definition and New Offences

Bill C-49 goes beyond the issue of immigration and makes trafficking in persons a criminal offence that does not need movement across an international border to be triggered. The bill situates the new trafficking in persons offence following section 279 of the *Criminal Code*. Clause 2 adds trafficking by changing the heading before section 279 to include "Kidnapping, Trafficking in Persons, Hostage Taking and Abduction." Clause 3 lays out the details of the specific trafficking prohibitions in sections 279.01 to 279.04: trafficking, material benefit, and the documentary offence.

1. Trafficking in Persons

The new section 279.01(1) outlines the primary trafficking offence, using a similar definition of trafficking in persons to that found in the 2000 UN Protocol. Every person who *recruits, transports, transfers, receives, holds, conceals or harbours* a person, or who *exercises control or influence over the movements* of a person, *for the purposes of exploiting* them or facilitating their exploitation, commits an indictable offence and is liable to imprisonment for up to 14 years, or imprisonment for life if the accused kidnaps, commits an aggravated assault or sexual assault against, or causes death to the victim during commission of the trafficking offence.

As also highlighted in the UN Protocol, a victim's consent to trafficking is never a valid defence (section 279.01(2)) because of the exploitation that is inherent in the trafficking

(11) Department of Justice, Backgrounder (2005).

offence. Unlike smuggling, which is a form of illegal migration involving the organized transport of a person across the border, usually in exchange for a sum of money and sometimes in dangerous conditions; the offence of trafficking involves the exploitation and the deprivation of liberty of the person being recruited or transported. While one may consent to being smuggled across a border, even in dangerous conditions, one can never consent to the exploitation that arises from a trafficking offence. The new section 279.04 defines exploitation: a person exploits another if he or she *causes them to provide, or offer to provide, labour or a service* by engaging in conduct that could reasonably be expected to cause the other person to *fear for their safety or the safety of someone known to them if they fail to comply*. Thus, the trafficking offence does not require direct exploitation, but could include coercion to induce an offer of service.⁽¹²⁾ Exploitation also includes situations where, by means of deception or the use or threat of force, a person causes another to have an organ or tissue removed.

As a result, the new proposed trafficking offence prohibits any situation where a person is moved or concealed and is forced to provide or offer to provide labour, a service, or an organ/tissue. This situation thus covers not only kidnapping or recruitment in order to force a person into prostitution, but also other exploitative labour situations such as those involving domestic or seasonal farm workers. It is important to note that, unlike the trafficking and smuggling offences contained in the *Immigration and Refugee Protection Act*, the *Criminal Code* trafficking offence does not require any movement across Canadian borders. The prohibition appears to cover any kind of forced movement, and could include interprovincial, inter-city, and even intra-city movement.

2. Profiting from Trafficking

The new section 279.02 outlines the accompanying offence of benefiting economically from trafficking in persons. Every person who receives a financial or other material benefit, knowing that it results from trafficking in persons, is guilty of an indictable offence and liable to imprisonment for up to 10 years. This includes those who do not necessarily engage in actual recruitment or transportation, such as those who harbour a victim of trafficking for a fee.⁽¹³⁾ Since the 1990s, trafficking in persons has become one of the most

(12) Taylor (2005).

(13) *Ibid.*

profitable industries in the world, close behind the arms and drug trade.⁽¹⁴⁾ Unlike smuggling, where the major source of revenue for smugglers is the fee paid by the migrant, the major source of revenue in human trafficking – and hence the economic drive for the offence – is the proceeds derived from the exploitation of victims through forced labour and sexual exploitation.⁽¹⁵⁾ This prohibition is thus an attempt to attack that profit at its source.

3. Withholding or Destroying Documents

The new section 279.03 outlines the accompanying offence of withholding or destroying identity, immigration, or travel documents to facilitate trafficking in persons. Every person who, for the purposes of committing or facilitating trafficking in persons, conceals, removes, withholds or destroys any travel document that belongs to another person or that establishes or purports to establish another person's identity or immigration status, is guilty of an indictable offence and is liable to imprisonment for up to 5 years. For the purposes of this offence, it does not matter whether the document is either genuine or Canadian. This new offence responds to the fact that in many trafficking cases, the traffickers remove the victim's documentation in order to maintain increased control over the victim's movements, thus enhancing his or her vulnerability.

B. Listed Offences

In addition to these primary offences, Bill C-49 also includes the trafficking offences as listed offences in various other aspects of the *Criminal Code* to ensure more efficient enforcement of the provisions and more effective monitoring of offenders. These listed offences may form the basis of warrants to intercept private communications and to take a bodily sample for DNA analysis; they may also be offences for which an offender may be included in the sex offender registry.

(14) Susan W. Tiefenbrun, "Sex Sells But Drugs Don't Talk: Trafficking of Women Sex Workers," *Thomas Jefferson Law Review*, Vol. 23, 2001, pp. 199 and 209.

(15) *Human Trafficking: Reference Guide for Canadian Law Enforcement*, University College of the Fraser Valley Press, Abbotsford, 2005, p. 11.

1. Invasion of Privacy

Clause 1 of Bill C-49 amends section 183 of the *Criminal Code* to include the three trafficking offences as listed offences which may form the basis of a warrant to intercept private communications or a warrant for video surveillance under section 487.01(5), where: there are reasonable grounds to believe that the trafficking offences have been or will be committed; it is in the best interests of the administration of justice; and there is no other legislation that would permit such a warrant. This amendment will facilitate police investigations into trafficking offences – an area that is particularly clandestine and difficult for police to monitor, and where it is hard to gather evidence.

2. DNA Analysis

Clause 5 of Bill C-49 amends section 487.04 of the *Criminal Code* to include the primary trafficking offence as an offence which may form the basis of a warrant to take a bodily sample for forensic DNA analysis, where: there are reasonable grounds to believe that the trafficking offence has been committed; a bodily substance has been found in association with the offence; the person was a party to the offence; forensic DNA analysis will provide identifying information; and it is in the best interests of the administration of justice. This amendment will facilitate police investigations into trafficking offences and the gathering of evidence.

3. Sex Offender Database

Finally, clause 6 of Bill C-49 ensures that the primary trafficking offence is included as an offence for which an offender may be included in the sex offender registry under section 490.011(1) of the *Criminal Code*. In cases that warrant registering a trafficking offender in the sex offender database, this new provision will facilitate effective monitoring of that person's activities and whereabouts in order to prevent further offences.

C. Restitution

In order to enhance victim protection, Bill C-49 also expands the ability to seek restitution to victims who are subjected to bodily or psychological harm. While section 738(1)(b) of the *Criminal Code* currently allows a sentencing court to require an offender to pay

restitution to a victim of bodily harm, clause 7 of Bill C-49 extends such restitution also to victims subjected to psychological harm. Restitution ensures that a victim who is harmed as a result of the commission of the offence, or the arrest or attempted arrest of the offender, may be awarded a sum that does not exceed the pecuniary damages suffered, such as loss of income, where the amount is readily ascertainable. Such an expansion ensures that victims of trafficking who were not physically injured but who were threatened or otherwise psychologically coerced have the opportunity to be compensated for any monetary loss resulting from that harm.

D. Coordinating Amendments and Protection of Vulnerable Witnesses

Clause 4 of Bill C-49 provides for enhanced witness protection, an issue of primary importance for the international human rights community and for those enforcing the law against trafficking. This clause expands a judge's ability to exclude the public from the courtroom where a witness is under 18 in proceedings where the accused is charged with any trafficking offence (section 279.01 to section 279.03). The clause also expands the ability of a judge to allow a witness who is under 18 to testify outside the courtroom or behind a screen so as not to see the accused, where the accused is charged with any trafficking offence. These witness protection provisions attempt to shelter marginalized and vulnerable victims of trafficking from the direct and indirect influence of their exploiters, as well as facilitating their testimony within the often intimidating and rigid environment of Canada's justice system. Such provisions may also assist law enforcement agencies in convincing unwilling witnesses to testify.

Clause 4 attempts to accomplish many of the same goals as Bill C-2, An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, which was introduced in the House of Commons on 8 October 2004. As a result, clause 8 of Bill C-49 outlines the coordinating provisions depending on which bill is passed first. If Bill C-2 comes into force before Bill C-49, clause 4 of Bill C-49 will be repealed and the trafficking offences will be added into the new victim protection sections 486(3) and 486.4(1)(a)(i) of the *Criminal Code*.

COMMENTARY

Bill C-49 appears to have all-party support, given the pressing nature of the issue and the perceived need to live up to Canada's international commitments with respect to trafficking in persons. Similarly, media reports have been supportive of the bill and the goal of combating trafficking.⁽¹⁶⁾ Given the recent charges laid under section 118 of the IRPA and the June release of the U.S. *Trafficking in Persons Report*, much media attention has focused on the scope of the problem in Canada and the need to enhance Canada's laws.

Comments by parliamentarians with respect to Bill C-49 have focused on the need to ensure that any legislation introduced must provide strong criminal and witness protection measures backed by the necessary resources in order to ensure effective prosecutions and a real deterrent against trafficking. Parliamentarians have also discussed the need for accurate statistics concerning the scope of trafficking at home and abroad.⁽¹⁷⁾

Some criticism has been expressed by the non-governmental organization community that provides services to victims of trafficking. Some organizations feel that the provisions are not practical and do not respond to the realities faced by individuals who are exploited for their labour and services in Canada.⁽¹⁸⁾ These organizations point to the fact that many women initially enter willingly into labour situations that are ultimately exploitative, and are consequently reluctant to voice their complaints. This fact is often forgotten in legislation that relies on clear forms of exploitation for effective prosecution.

(16) Brown (2005); "Minister Sprints to Table Human Trafficking Bill," *The Gazette* [Montréal], 13 May 2005, p. A13.

(17) Christin Schmitz, "Bill to Fight Trafficking of Humans Misses Boat," *Ottawa Citizen*, 10 May 2005, p. A5.

(18) Pacific Northwest Conference on International Human Trafficking, Vancouver, 19 May 2005.