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## LEGISLATIVE SUMMARY



### **Bill C-38: An Act to amend An Act to amend the Criminal Code (exploitation and trafficking in persons)**

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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.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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*Legislative Summary of Bill C-38*  
(Legislative Summary)

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# LEGISLATIVE SUMMARY OF BILL C-38: AN ACT TO AMEND AN ACT TO AMEND THE CRIMINAL CODE (EXPLOITATION AND TRAFFICKING IN PERSONS)

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## 1 BACKGROUND<sup>1</sup>

Bill C-38, An Act to amend An Act to amend the Criminal Code (exploitation and trafficking in persons), was introduced in the House of Commons on 9 February 2017 by the Minister of Justice and Attorney General of Canada, the Honourable Jody Wilson-Raybould.<sup>2</sup>

The bill implements most of the provisions contained in former Bill C-452, An Act to amend the Criminal Code (exploitation and trafficking in persons),<sup>3</sup> a private member's bill introduced in the House of Commons on 16 October 2012 by Maria Mourani, MP. That bill was amended by the House of Commons Standing Committee on Justice and Human Rights and then reinstated in the 2<sup>nd</sup> Session of the 41<sup>st</sup> Parliament on 16 October 2013. It received Royal Assent in June 2015 and was, as a result, enacted as *An Act to amend the Criminal Code (exploitation and trafficking in persons)*<sup>4</sup>, but it has not yet been brought into force.

In an effort to bolster the *Criminal Code's*<sup>5</sup> provisions dealing with trafficking in persons, Bill C-38 brings into force the provisions of the former Bill C-452 that:

- create a presumption with respect to the exploitation of one person by another, easing the burden of proof for prosecutors;
- add the offence of trafficking in persons to the list of offences to which the reverse onus forfeiture of proceeds of crime provisions apply; and
- correct a technical discrepancy between the French and English definitions of “exploitation for the purposes of trafficking in persons.”

The bill does not, however, immediately implement the provision of the former Bill C-452 that required sentences for offences related to trafficking in persons to be served consecutively.

### 1.1 TRAFFICKING IN PERSONS IN CANADA

Over the past 20 years, trafficking in persons has become recognized as a pressing issue in global migration policy, and an area of concern for those seeking to combat exploitation through prostitution and forced labour at the domestic level. The term “trafficking in persons” refers to the recruitment, transportation and harbouring of a person for the purposes of forced service.

In the Canadian context, cross-border trafficking may involve individuals brought into the country – legally or illegally – to work in the entertainment industry or as nannies, construction workers or farm labourers. Although some trafficked persons may have been abducted outright, many enter the country of their own volition. The problem arises once they arrive at their destination, when these individuals are forced into exploitative situations involving the sex trade or other forms of labour or service.

The trafficking of Canadians within national borders is also an issue of concern, particularly trafficking connected with the sex trade. Individuals from across Canada – many from poorer communities and many Indigenous women and girls, as well as at-risk youth and runaways – leave their homes only to later find themselves in the sex trade in urban areas.<sup>6</sup> They may have been enticed by a person offering them a job or other opportunities, or they may have been picked by someone seeking out vulnerable individuals. Other scenarios involve a “boyfriend” who exploits his partner through prostitution or exotic dancing. A 2010 Royal Canadian Mounted Police (RCMP) threat assessment notes that those trafficked domestically are for the most part recruited by an acquaintance or through the Internet.<sup>7</sup> Law enforcement agencies and service organizations are increasingly aware that trafficking of Canadians exists in major urban centres across the country, and that it is particularly significant among Indigenous women and girls.<sup>8</sup> As of 2012, 90% of all human trafficking convictions in Canada were domestic in nature, involving victims who were Canadian citizens or permanent residents – a significant majority of whom were trafficked for the purposes of sexual exploitation.<sup>9</sup> Between 2009 and 2014, 93% of reported trafficked persons were female and nearly three-quarters of them were under 25.<sup>10</sup>

In June 2012, the Government of Canada launched a National Action Plan to Combat Human Trafficking in an effort to consolidate its initiatives in this area and to “introduce aggressive new initiatives to prevent human trafficking, identify victims, protect the most vulnerable, and prosecute perpetrators.”<sup>11</sup> A Human Trafficking Taskforce led by Public Safety Canada oversees implementation of the action plan, coordinates the federal government’s response to trafficking issues and produces an annual report on progress. As one component of this initiative, the RCMP’s Human Trafficking National Coordination Centre serves as a focal point for law enforcement agencies combatting human trafficking.

## 1.2 THE LEGISLATIVE FRAMEWORK

Currently, sections 279.01 to 279.04 of the *Criminal Code* contain the criminal law provisions that specifically target trafficking in persons.<sup>12</sup> These provisions first came into force in 2005 and have been revised in subsequent years.<sup>13</sup> They outline three main prohibitions:

- a global prohibition on trafficking in persons;
- a prohibition on an individual benefiting economically from trafficking in persons; and
- a prohibition on withholding or destroying documents in order to facilitate trafficking in persons.

The primary prohibition concerns trafficking in persons, which is defined as the recruitment, transport, transfer, receipt, holding, 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 (section 279.01 or section 279.011, in the case of minors). Key to this definition is the aspect that the criminal offence of trafficking in persons 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 or tissue.

A victim's consent to trafficking is never a valid defence because of the exploitation that is inherent in the trafficking offence (sections 279.01(2) and 279.011(2)). Exploitation is defined in section 279.04 as causing another person to provide, or offer to provide,<sup>14</sup> labour or a service by engaging in conduct that could reasonably be expected to cause the other person to fear for his or her safety or the safety of someone known to the individual if he or she fails to comply. Thus, the trafficking offence does not require direct exploitation, but could include coercion to induce an offer of service. Section 279.04(2) lists the factors that a court may consider when determining whether exploitation was intended or has taken place. 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 (section 279.04(3)). This primary trafficking offence is punishable by a maximum of 14 years' imprisonment or life imprisonment under aggravated circumstances (with a range of mandatory minimum sentences, depending on the circumstances).

The second prohibition targeting trafficking in persons can be found in section 279.02 of the *Criminal Code*. It prohibits a person from benefiting economically from trafficking in persons and carries a maximum penalty of 10 years' imprisonment (14 years' imprisonment for offences involving children, with a mandatory minimum sentence of two years). This offence covers persons who do not necessarily engage in actual recruitment or transportation, such as those who harbour a victim of trafficking for a fee, or an "end-user" of a sexual service or other forced labour who is aware that the person was trafficked.

Finally, the third prohibition outlaws withholding or destroying identity, immigration or travel documents to facilitate trafficking in persons. This offence carries a maximum penalty of five years' imprisonment – 10 years for offences involving children – with a mandatory minimum sentence of one year (section 279.03).

The offences listed in sections 279.01 to 279.03 of the *Criminal Code* are included on the list of offences committed outside Canada for which Canadian citizens or permanent residents may be prosecuted in Canada (the extraterritoriality clause is found in section 7(4.11)).

In addition, the trafficking-related provisions in the *Criminal Code* ensure that trafficking may form the basis of a warrant to intercept private communications and to take bodily samples for DNA analysis; permit inclusion of the offender in the sex offender registry; and allow an individual to be labelled a dangerous or long-term offender (in the latter case, for offences involving children). A number of witness protection provisions also apply to human trafficking offences.

Beyond these trafficking-specific provisions, a number of generic provisions in the *Criminal Code* are used to combat trafficking in persons by targeting forms of exploitation and abuse that are inherent in trafficking. These include prostitution-related offences and other offences related to physical harm, abduction and confinement, intimidation, and organized crime.<sup>15</sup>

In the 10 years between the coming into force of human trafficking provisions in 2005 and August 2015, 90 cases involving 117 offenders had ended in convictions using these trafficking-specific and other more generic *Criminal Code* provisions.<sup>16</sup> As of 2014, a majority of cases using the trafficking-specific offences end with the charges stayed or withdrawn – approximately one-third result in a guilty finding. Of those guilty findings, 23% lead to a sentencing involving custody, and 21% to a sentence of probation.<sup>17</sup> According to a 2015 survey, sentences for convictions that included trafficking-specific offences ranged from three years and one day of probation to five and a half years in custody (net sentence after credit for time served).<sup>18</sup>

## 2 DESCRIPTION AND ANALYSIS

Section 5 of former Bill C-452, An Act to amend the Criminal Code (exploitation and trafficking in persons) provided that the Act would come into force on a day to be fixed by order of the Governor in Council. Because that date was never established, the Act did not come into force.

Bill C-38 contains one clause that amends section 5 of the Act to bring different sections of that Act into force in different ways. Clause 1 states that sections 1, 2 and 4 of the Act will come into force on the day that Bill C-38 receives Royal Assent and that section 3 will come into force on a day to be fixed by order of the Governor in Council.

### 2.1 PROVISIONS THAT WILL BE BROUGHT INTO FORCE UPON ROYAL ASSENT

Provisions in the Act that will be brought into force on the day that Bill C-38 receives Royal Assent are those that:

- create a presumption with respect to the exploitation of one person by another;
- add the offence of trafficking in persons to the list of offences to which the reverse onus forfeiture of proceeds of crime provisions apply; and
- correct a technical discrepancy.

#### 2.1.1 PRESUMPTION OF EXPLOITATION

Section 1 of the Act creates a presumption of exploitation for the purposes of the primary trafficking prohibition (section 279.01). New section 279.01(3) stipulates that any person who is not exploited who lives with, or is habitually in the company of, a person who is exploited, shall be presumed to be exploiting or facilitating the exploitation of that person, in the absence of evidence to the contrary. By doing so, it will become easier for prosecutors to prove the trafficking offence, allowing victims to avoid court appearances.<sup>19</sup>

#### 2.1.2 FORFEITURE OF PROCEEDS OF CRIME PROVISIONS

Section 4 of the Act adds offences involving procuring or trafficking in persons to the offences to which expanded *Criminal Code* forfeiture of proceeds of crime provisions apply, putting the onus on convicted offenders to prove that property is not proceeds of crime. Sections 462.37(2.01) to 462.37(2.07) of the *Criminal Code* provide the



courts with expanded jurisdiction to order forfeiture of property that is not directly connected to the crime of which the accused has been convicted in specific situations<sup>20</sup> that now include procuring and trafficking (new section 462.37(2.02)(c) of the *Criminal Code*).

### 2.1.3 CORRECTION OF A TECHNICAL DISCREPANCY

Section 2 of the Act amends the French definition of “exploitation” contained in section 279.04(1) of the *Criminal Code* to bring it into line with the English version, since the French currently refers only to providing labour or services, and not to offering to provide them.

## 2.2 PROVISION THAT WILL BE BROUGHT INTO FORCE ON A DAY TO BE FIXED BY THE GOVERNOR IN COUNCIL

The provision in the Act that creates a consecutive sentencing regime will come into force on a day to be fixed by order of the Governor in Council.

### 2.2.1 CONSECUTIVE SENTENCES

Section 3 of the Act amends the *Criminal Code* (new section 279.05) to require that a sentence for any of the trafficking in persons offences (sections 279.01 to 279.03) be served consecutively to any other punishment imposed for an offence arising out of the same series of events.<sup>21</sup>

In tabling Bill C-38, Minister Wilson-Raybould made it clear that this consecutive sentencing provision will not be brought into force at this time. In 2014, the previous government’s prostitution law reform initiative, Bill C-36,<sup>22</sup> added mandatory minimum sentences to the human trafficking offences in the *Criminal Code*.<sup>23</sup> The current government has expressed concern that the proposed consecutive sentences, combined with the existing mandatory minimum sentences, could lead to disproportionate sentences that violate section 12 of the *Canadian Charter of Rights and Freedoms*<sup>24</sup> (the right not to be subjected to any cruel and unusual treatment or punishment).<sup>25</sup>

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## NOTES

1. Much of the material in this section is taken from Laura Barnett, [Trafficking in Persons](#), Publication no. 2011-59-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 15 January 2016.
2. [Bill C-38, An Act to amend An Act to amend the Criminal Code \(exploitation and trafficking in persons\)](#), 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament.

3. [Bill C-452, An Act to amend the Criminal Code \(exploitation and trafficking in persons\)](#), 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament, (Maria Mourani, MP). The bill substantially reproduced the content of previous private member's bills introduced by the same sponsor: [Bill C-602, An Act to amend the Criminal Code \(trafficking in persons\)](#), 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament; and [Bill C-612, An Act to amend the Criminal Code \(trafficking in persons\)](#), 3<sup>rd</sup> Session, 40<sup>th</sup> Parliament. Bill C-452 did not include the extraterritoriality clause from these bills, as it had already been added to the *Criminal Code* through [Bill C-310, An Act to amend the Criminal Code \(trafficking in persons\)](#), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament (S.C. 2012, c. 15).
4. [An Act to amend the Criminal Code \(exploitation and trafficking in persons\)](#), S.C. 2015, c. 16.
5. [Criminal Code](#), R.S.C. 1985, c. C-46.
6. Public Safety Canada, [National Action Plan to Combat Human Trafficking: 2014–2015 Annual Report on Progress](#), 2016, p. 4.
7. Royal Canadian Mounted Police, [Human Trafficking in Canada](#), March 2010, p 2.
8. For information specific to trafficking of Indigenous women and girls, see Anette Sikka, [Trafficking of Aboriginal Women and Girls in Canada](#), Aboriginal Policy Research Series, Institute on Governance, Ottawa, May 2009; Native Women's Association of Canada, [Sexual Exploitation and Trafficking of Aboriginal Women and Girls: Literature Review and Key Informant Interviews](#), Report commissioned by the Canadian Women's Foundation, Task Force on Trafficking of Women and Girls in Canada, Toronto, March 2014; and Red Willow Consulting Inc., Yvonne Boyer, Peggy Kampouris, [Trafficking of Aboriginal Women and Girls](#), Report prepared for Public Safety Canada, May 2014.
9. Government of Canada, [National Action Plan to Combat Human Trafficking](#), 2012, p. 8; and United States Department of State, "[Canada](#)," *Trafficking in Persons Report: June 2016*, Washington, D.C., pp. 123–125.
10. Maisie Karam, "[Trafficking in persons in Canada, 2014](#)," *Juristat*, Statistics Canada, 12 July 2016.
11. Government of Canada (2012), p. 9. Although the Action Plan expired in March 2016, "budgets have been maintained and federal departments and agencies continue anti-trafficking work and efforts guided by its foundation." The Minister of Public Safety is currently conducting an evaluation of the Action Plan. Department of Justice Canada, "[Combating Human Trafficking and Supporting Victims](#)," Backgrounder, 9 February 2017.
12. Other provisions dealing specifically with cross-border trafficking are outlined in sections 118 to 123 of the [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27.
13. [An Act to amend the Criminal Code \(trafficking in persons\)](#), S.C. 2005, c. 43; [An Act to amend the Criminal Code \(minimum sentence for offences involving trafficking of persons under the age of eighteen years\)](#), S.C. 2010, c. 3; [An Act to amend the Criminal Code \(trafficking in persons\)](#), S.C. 2012, c. 15; and [An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts](#), S.C. 2014, c. 25.
14. "Offer to provide" used to be included in the French version of the *Criminal Code*, but it was dropped in Bill C-310, An Act to amend the Criminal Code (trafficking in persons), 1<sup>st</sup> Session, 41<sup>st</sup> Parliament (Joy Smith, MP). The former Bill C-452, however, restores the wording as described in section 2.1.3 of this Legislative Summary.
15. For example, sections 210, 211, 213 and 286.1 to 286.4 (prostitution); sections 265 to 269 and 271 to 273 (physical harm); section 279 (abduction and confinement); and sections 467.11 to 467.13 (organized crime) of the *Criminal Code*.
16. Public Safety Canada (2016), p. 4.

17. Karam (2016).
18. Hayli Millar and Tamara O'Doherty, [\*The Palermo Protocol & Canada: The Evolution and Human Rights Impacts of Anti-trafficking Laws in Canada \(2002–2015\): Key Findings\*](#), 15 October 2015, p. 50.
19. This amendment is similar to the presumption of living on the avails of prostitution now contained in section 286.2(3) of the *Criminal Code*.
20. This list of offences includes certain criminal organization offences under the *Criminal Code* and drug offences under the [\*Controlled Drugs and Substances Act\*](#), S.C. 1996, c. 19.
21. The consecutive sentencing provisions that already exist in the *Criminal Code* relate to the possession of explosive substances in connection with a criminal organization (section 82.1); using firearms or imitation firearms in the commission of an offence (section 85(4)); some terrorism offences (sections 83.02 to 83.23); and participation in criminal activities involving a criminal organization (section 467.14).
22. [Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts](#), 2<sup>nd</sup> Session, 41<sup>st</sup> Parliament.
23. See Lyne Casavant and Dominique Valiquet, [Legislative Summary of Bill C-36: An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts](#), Publication no. 41-2-C36-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 July 2014.
24. [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
25. Department of Justice Canada, [Bill C-38: An Act to amend An Act to amend the Criminal Code \(exploitation and trafficking in persons\) – Tabled in the House of Commons, February 9, 2017](#), Charter statement; “[Proposed amendments to An Act to amend the Criminal Code \(exploitation and trafficking in persons\)](#),” Backgrounder; “[Government of Canada introduces legislation to strengthen human trafficking laws](#),” News release, 9 February 2017; [Strengthening Human Trafficking Laws](#); and [An Act to amend An Act to amend the Criminal Code \(exploitation and trafficking in persons\) – Questions and Answers](#).