



Submission to the House of Commons Standing Committee on Justice and Human Rights National Consultation on Human Trafficking

Submitted June 7th, 2018

Introduction

This submission expresses our concern about the over-representation of Indigenous women, girls, trans, and 2-Spirit people involved in human trafficking and survival sex-work and the additional harms and dangers that they face as a direct result of current legislation and approaches based in the criminal law.

Aboriginal Legal Services (ALS) is a multi-service non-profit legal organization that was incorporated to assist Aboriginal people gain access to, and control over, justice related issues that affect them. ALS only serves Aboriginal people and families. ALS has extensive experience addressing systemic discrimination against Indigenous peoples since it was established in 1990 including intervening in 22 Supreme Court of Canada cases.

Aboriginal Legal Services is guided by several core principles:

- Indigenous individuals require equitable treatment in the justice system, access to legal and related resources within the justice system as well as an understanding of the system and their options.
- The support required includes advocacy in all areas of the law as well as alternatives which can break the cycles of recidivism and dependency which is all too prevalent.
- These alternatives are more effective when they are community controlled and are based on the traditional cultural norms and values of the Aboriginal community.
- It is necessary to re-introduce community controlled and culturally based justice alternatives by ensuring community involvement in the process and by integrating justice related services with complementary programs within the Aboriginal community.

ALS appeared before the Supreme Court in *R. v. Bedford*, made submissions on this issue to the United Nations in Geneva at both Canada's Periodic review by the Committee on the Elimination

of Discrimination Against Women and the Committee to End Racial Discrimination. We maintain that a genuine understanding of the issues facing trafficking victims and sex workers can only be obtained by listening to the concerns and experiences of these individuals and through the kind of direct engagement that comes from doing front line support work. Our position is informed and shaped by our involvement in this kind of work for many years.

Our Concern

With respect to human trafficking and Indigenous people in Canada, our primary concern is for those who may have little or no control over their involvement in the exchange of sex for money (trafficking victims) as well as those who exercise some control but are severely constrained by social and economic marginalization (survival sex workers). It is important that we don't conflate people from these two groups with each other, or with those who decide for themselves to engage in sex-work, since doing so paints with too broad a brush, and delegitimizes or ignores the personal agency of sex workers by labelling all of those in the sex-trade as victims; even where some of these individuals themselves would reject such a label. Moreover, conflating these different groups of people in such a way threatens to undermine a clear understanding of what it means to be a trafficking victim or a survival sex-worker which can, and has, led to ineffective and harmful laws and policies.

The Destructive Legacy of Colonialism

What is most troubling to us at ALS, is that both of the groups that we identified as having minimal or virtually no agency or control over their situation are disproportionately composed of Indigenous people. These individuals are at an increased vulnerability due to the destructive historical and ongoing legacy of colonialism—the consequences of which have meant that Indigenous people in Canada widely experience: extreme poverty, barriers to education and healthcare, a higher likelihood of being victims of violence or being in violent and exploitative relationships, living with inter-generational trauma, and/or living with other mental illness or addictions issues. These experiences are widespread among Indigenous peoples who have historically been, and continue to be, targeted by colonialist state policies, practices, institutions, and ideology—the collective goal of which has been the elimination of Indigenous peoples. Although that objective has not been met, the actions committed by the state and its representative institutions towards that end have had devastating effects upon Indigenous communities, pushing many people to the margins.

Because of that violent and ongoing colonial legacy, Indigenous communities have a well-founded distrust of police and a well-founded fear of child welfare organizations. In *R. v. Gladue*, the Supreme Court described how Aboriginal people are estranged from the criminal justice system. This distrust and estrangement are warranted given the crisis of over-representation of Indigenous people in jail and the number of Indigenous children taken into child welfare each year. With respect to the over-representation of Indigenous people in jail, the worst numbers are for women and girls. Indigenous females account for 38% of female admissions to provincial and territorial sentenced custody¹, whereas Indigenous female youth account for 43% of all female youth admitted to

¹ <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14700-eng.htm>

correctional services² and yet, Indigenous people make up less than 5% of the population.³ And the numbers are just as stark in child welfare.

Our Recommendations

Given the reality of the above mentioned situation, we have two urgent recommendations. The first recommendation concerns the most effective use of resources and the second concerns the proposed presumption of exploitation in s. 279.01(3). Starting with our first recommendation, if the work of this committee is truly aimed at helping victims who are being exploited, then it should not be exclusively looking for solutions in the blunt tools of policing and the justice system. Instead, this committee should recognize the strength of the Indigenous community to support its most vulnerable members. This recognition should result in strengthened support for Indigenous agencies providing front-line services. Part of what compels us to make this suggestion is our recognition of the fact that, for the most part, when the criminal law and Indigenous people come into contact, no matter how well intentioned the law may be, the outcome is generally not good for Indigenous people.

Indeed, even when Indigenous people are the victims, they frequently end up criminalized and facing further violence at the hands of the state. Over the years we have experienced countless examples of these failings of the justice system. For one example: a 27 year old victim of a serious sexual assault testified at a preliminary inquiry even though she was not subpoenaed; she was remanded into custody even though there was no evidence that she was a flight risk; she was detained over the weekend and brought to court in shackles, testified, and was again remanded before being transported in the same van as her abuser.⁴ Given that this is how Indigenous women are treated, it's no surprise that those who may be victims of sexual exploitation don't tend to come forward to the police for help.

Due to our familiarity with myriad similar abuses as the one mentioned above, Aboriginal Legal Services maintains that solutions are not to be found by giving more resources to police and law enforcement. Indeed, doing so can often cause more harm and add to the stigma of those who are already most marginalized. Moreover, increasing resources and training for police and prosecutors does not address the root causes of the problem—it does not increase housing or provide support, it just adds more stress, scrutiny, stigma and surveillance and thus more harm and disruption into the lives of people who need support and stability. As such, it represents a high cost for a low positive impact. Instead, our suggestion is to increase the capacity of and empower Indigenous organizations that have experience working with the community and who are trusted by the community. In our experience, those who are able to extricate themselves from oppressive or exploitative situations do so not by being saved by police or prosecutors, but through their own resilience and the support of their community. The kind of strengthening of community supports that we are advocating is far more likely to yield a greater positive impact while avoiding the kinds of increased stigma, marginalization, and mistreatment that comes from additional policing.

² <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14702-eng.htm>

³ <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm>

⁴ This example was drawn from the Independent Report on the Incarceration of Angela Cardinal:
<https://justice.alberta.ca/publications/Documents/IndependentReportIncarceration-AngelaCardinal.pdf>

Another serious concern has to do with measuring success against human trafficking solely by the number of prosecutions. Prosecutions are important, but the criminal code already has provisions to prosecute many of the kinds of illegal activity that constitute human trafficking – anything involving for example: minors, kidnapping, forcible confinement – so increases in trafficking prosecutions that coincide with a decrease in the prosecution of other crimes does not necessarily result in an increase in safety, and in fact does not substantively change the situation on the ground in any way—it merely changes the label. In other words, such a result would not be an effective way of reducing the occurrence of human trafficking. And this is a point that often gets missed by those who would argue that more laws and policing are the only ways to combat human trafficking.

A second point of concern for ALS has to do with the proposed presumption of exploitation in s. 279.01(3); the section which claims that anyone living with or spending time with a trafficking victim is presumed to be exploiting them. The 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. The goal of this provision is an aim to make it easier for prosecutors to prove the trafficking offence, and allow victims to avoid court appearances. However, ALS is concerned that this amounts to the same sort of reasoning that led the Supreme Court to find the previous “living off the avails” provision to be overboard and unconstitutional. In the Bedford ruling, the Court held that because the impugned legislation caught “non-exploitative relationships,” it could have a negative effect on the security and safety of the most vulnerable people who exchanged sex for money. Therefore, although the intention to reduce the need for victims to come to court may be a laudable goal, in practice, it can lead to undesirable and harmful consequences. For instance, consider a scenario wherein two or more sisters or cousins live together because the apartment they can afford together is the only place where they don’t have to exchange sex for a bed to sleep in. If one of them is found to be a trafficking victim, then the others are presumed to be exploiting that person and they would have to go to court to explain that they are merely sharing a living space. Again, given the systemic discrimination against Indigenous people, we can’t assume that this type of outcome wouldn’t happen.

Conclusion

In order for the safety of those who are engaged in sex-work, survival sex-workers, and victims of human trafficking to be treated as paramount, we must first listen to their voices and acknowledge their experiences and needs. Approaches that aim to flatten any differences between the experiences and needs of these different groups of people do further violence to the already vulnerable and marginalized. Approaches to addressing their needs and safety that fail to understand the harmful ways in which the state and its institutions may continue to operate as oppressive colonial powers does violence to our community and to a shared vision of justice.