



Institute On
Governance

Institut sur
la gouvernance



Policy Brief

Addressing the Trafficking of Aboriginal Girls: Child Welfare and Criminal Justice Responsibilities

– May 2009

by

*Anette Sikka
University of Ottawa*

Acknowledgements

This policy brief is part of the Aboriginal Policy Research Series, which focuses on public policy issues affecting Métis, non-status Indians, and other Aboriginal peoples residing off-reserve. The series is produced in a partnership between the Institute On Governance (IOG) and the Office of the Federal Interlocutor for Métis and Non-Status Indians (OFI).

The contents of this paper are the responsibility of the author and do not necessarily reflect a position of the IOG, its Board of Directors, or the Office of the Federal Interlocutor for Métis and Non-Status Indians.

*For further information on the Aboriginal Policy Resesarch Series
contact John Graham at the Institute On Governance.
tel.: (1 613) 562 0092 ext. 231; e-mail: jgraham@iog.ca*

Introduction

The attention that law enforcement and governmental departments have focused on international trafficking has given rise to a number of victim support programs. However, these programs are only accessible to select types of victims. Although these services are formally made available to “internally trafficked” victims as well as those who are internationally trafficked, Aboriginal women and girls are rarely seen as “victims” and are thus excluded from being identified as “trafficked.”

This brief aims to clarify the concept of “trafficking in persons” in order to highlight the ways in which trafficking of Aboriginal women and girls in the Prairie Provinces is taking place. It points to the various factors leading to Aboriginal girls’ entry into exploitative engagement with the sex trade, including the role the child welfare system has played as an entry point for girls into prostitution and other criminal activity, and identifies particular forms of this exploitation as trafficking. Recommendations are then made for measures that can be implemented within the criminal justice and child welfare system, which will assist in recognizing Aboriginal girls as victims and preventing further trafficking.

Trafficking in Persons

Until now, various definitions of the term “trafficking” have been used in different arenas, and this has contributed not only to a confusion around who is or is not a victim of “trafficking” but also an inability to quantify the kinds of trafficking taking place in Canada in any constructive way. Currently, there are three legal definitions that affect Canadian law and policy. First, Canada ratified the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons*,

*Especially Women and Children*¹ (Protocol) in 2003, which defines trafficking 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 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 (Article 3).

Since the focus of most Canadian governmental and NGO activity has been on cross-border trafficking, in much of the literature available for educational and promotional purposes, this definition is used.² Persons working on anti-trafficking initiatives are frequently not aware that this definition only applies in Canada insofar as it guides Canada’s overall response and is not applicable as a prosecution tool against any one individual. Thus, Canada introduced the concept of trafficking into its immigration legislation through section 118 of the *Immigration and Refugee Protection*

¹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 14 December 2000, G.A. Res. 25 (II), UNGAOR, 55th Sess. Supp. No. 49, UN Doc. A/45/49 (Vol. I) (2001) Entered into force December 25, 2003 [Protocol].

² See Department of Justice Canada, *Don’t Become a Victim of the Illegal Trade in People* (Government of Canada), <http://canada.justice.gc.ca/eng/fs-sv/tp/pub/brochure/eng-ang/eng-ang.pdf>. See also People’s Law School, *Human Trafficking in Canada* (Vancouver: People’s Law School, 2007), http://www.publiclegaled.bc.ca/snapfiles/Publications/2007_Human_Trafficking.pdf.

Act³ using a definition that is similar, but slightly broader, than the Protocol's definition (IRPA): "**118(1)** No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion."

Then, in 2005, Canada introduced the offence of trafficking in persons into the Canadian *Criminal Code*, using yet another definition:

279.01(1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence ...

279.04 For the purposes of sections 279.01 to 279.03, a person exploits another person if they

(a) cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service⁴

There are significant differences between the acts, motives and subjective responses required for a circumstance to be considered "trafficking" in each piece of legislation, and these differences may have contributed to the current difficulty in Canada with respect to identification of trafficked persons. However, much of the difficulty stems from differences in the interpretation of all three pieces of legislation and the policies stemming from them. The underlying sentiment of the anti-trafficking *movement* was really about protecting vulnerable people in dire economic

circumstances from having their labour exploited.⁵ It was meant to address situations where individuals prey on another's economic circumstances or background such that they can induce the person to perform labour that they cannot refuse. These are the key concepts identified in anti-trafficking work and it is these concepts that should guide the interpretation of our own laws and definitions.

However, rather than interpreting the various pieces of legislation in light of the types of activities anti-trafficking measures were designed to address, attention has instead been focused on including or excluding particular groups of "victims" into the wording of the offences. Through some of current debates regarding prostitution it becomes apparent that advocates for particular definitions of trafficking may in fact be presupposing a particular image of the trafficked "victim," even in interpreting existing definitions. The quintessential image of the "victim" has developed from international trafficking reports, film, and media highlighting Russian organized crime and exotic Eastern European women who are meek, subdued, usually bruised and beaten, and thrilled to be saved from their captors. Given the dearth of legal interpretation on Canadian trafficking offences, the justice and immigration systems have unwittingly relied on these images as a source of reference in interpreting legislation.

Aboriginal women and girls and the sex trade in the Prairies

Aboriginal women and girls rarely fall within this "victim" ideal. Historical representations of the Aboriginal woman have often been linked to sexual availability

³ *Immigration and Refugee Protection Act, Statutes of Canada 2001, c. 27 [IRPA].*

⁴ *Criminal Code, RSC 1985, c. C-46, s. 279.01.*

⁵ Janie Chuang, "Beyond a Snapshot: Preventing Human Trafficking in the Global Economy," *Indiana Journal of Global Legal Studies* 13, no.1 (2006), 137 at 141.

and criminal activity and these images are further compounded by the current overrepresentation of Aboriginal women and girls in the visible sex trade.⁶ Thus, the things that happen to those who are involved in prostitution in any way are not viewed as exploitation or trafficking in persons but rather as a natural consequence of the life that they have chosen to occupy. Given the history of Aboriginal peoples in Canada and the resulting economic and cultural circumstances in which many Aboriginal women find themselves, some of the exploitation of their labour or sexuality can be framed as trafficking. However, it is imperative to understand that the trafficking that takes place against Aboriginal women and girls in Canada is unique and particular, and the individuals involved do not tend to fit the stereotypical “victim” or perpetrator categories. It is one subset of a greater body of exploitation being perpetrated against Aboriginal women and girls and must be viewed in this context.

Aboriginal girls are recruited into the sex trade through a variety of means, including force and familial ties, but quite often the entry point is through involvement with drugs or other criminal activity. The child welfare system has had particularly detrimental effects on Aboriginal children and youth as there are a disproportionate number of Aboriginal youth in care and they are removed from their homes at a higher rate than non-Aboriginal children. Many girls in care become “chronic runaways,” given the inability of their care facilities to address their specific needs, and they are made extremely vulnerable to persons who seek to exploit them during these periods. Individuals lure girls into the sex trade by developing intimate relationships with them or by introducing them to drugs and facilitating their addiction. Girls are also often introduced to the criminal justice

system through charges made against them while in care facilities. Girls in care facilities may display aggressive behaviour, commit assaults and damage property, and charges based on these activities can be their first entry point into the criminal justice system. While in holding facilities or in juvenile detention, girls have been recruited by girls already working in the sex trade and may become exploited by the gang members or other individuals with whom the girl is connected. Entrenchment in criminal behaviour makes exiting the sex trade less likely and can lead to addiction issues, which give rise to the need to continue engaging in prostitution.

Aboriginal girls in the Prairie Provinces are sometimes also recruited into the sex trade by older siblings, or told to engage in prostitution by mothers, fathers, uncles and aunts. Girls living in First Nations communities may also be related to members of Aboriginal gangs active in nearby urban centres and can be lured into the sex trade through those extended family ties or by seeking the protection or affiliation of being gang-involved. Girls have been moved to other prairie towns and prostituted against their will by means of force, or been “traded” between gangs as payments for debts. Numerous other stories have emerged where young girls were lured to parties by gang members or other individuals, given drugs over a period of time, and then informed that they now had to “pay” for the drugs. In other cases, girls’ addictions have been facilitated primarily for the purpose of getting them involved in the sex trade. Drug dealers in this way profit from the girl’s labour through her payments for drugs.

Trafficking in the Prairies

In determining the ways in which these instances may or may not be discussed under the umbrella of “trafficking,” it is important to take into account the histories of Aboriginal peoples and the particular ways in which Aboriginal women and girls

⁶ Melissa Farley, Jacqueline Lynne, and Ann J. Cotton, “Prostitution in Vancouver: Violence and the Colonization of First Nations Women,” *Transcultural Psychiatry* 42, no. 2 (2005), 242.

find themselves in the sex trade. The poverty, unemployment, over-representation in the child welfare system and lack of sufficient access to education that provide the backdrop to many Aboriginal women and girls' lives resonate as the types of conditions that anti-trafficking measures were designed to address. Anti-trafficking work has been aimed at addressing individuals preying upon women and girls who have limited opportunities because of these conditions. Thus, when determining whether or not specific situations should be addressed within the context of "trafficking," these conditions should be considered.

For example, while the facilitation of sexual exploitation of children by parents or older siblings has not been recognized by law enforcement as "trafficking," when the age of the victim and the context of her family life and history are taken into account, the situation has the hallmarks of situations that anti-trafficking work was meant to address. It also falls within the purview of s.279 of the *Criminal Code*. Where a mother or older sister insists that a girl stand in a certain place on the street to perform sex work, or have sex with a specific person, the mother or older sibling is controlling the movement of the girl. The family bond, when used to manipulate, can be an intimidating and oppressive tool. This "request" ("exercising control over the movements" – the *actus reus*) is understood in the context of the unspoken familial relationship. The girl could certainly expect that not performing such acts could result in her ostracism from the family – the loss of shelter, food, clothing and the only caregivers she has known. The threat of withdrawal of the family unit can be perceived as quite a serious threat to both the *physical and emotional safety* of a child (the "exploitation").

Although the offence of "trafficking" has not yet been judicially considered, what it means to "reasonably fear for one's safety" has been interpreted in the context of other

sections in the *Criminal Code* to include fear for psychological as well as physical safety.⁷ Thus, not only does this act have the hallmarks of trafficking, it also has the specific elements required for a charge to be laid under s.279 of the *Criminal Code*.

Where a family member is also part of a gang, unspoken physical threats and the family bond work together to form a coercive force that can cause a girl to believe her physical and mental safety would be threatened if she were to refuse to comply with any requests made. Because family involvement has traditionally been a trigger for law enforcement to deal with an issue as a "social" problem rather than a criminal one, the manipulation of girls into the sex trade by family members has not been recognized as trafficking. However, within Aboriginal communities, the exertion of control by a family member – particularly where they are also gang associated – can actually be more exploitative than the same control exerted by a third party. This fact requires acknowledgement where trafficking analyses are performed.

Where girls are "traded" between gangs and physically threatened to continue exploiting themselves, the inability of the girl to refuse to continue the exploitative labour is clear. She does not have control over her own body and the services she performs under pain of physical threat. Although it has rarely been categorized as such, this scenario clearly has the hallmarks of trafficking. It also falls within the purview of the *Criminal Code*: if a gang member (or several) directs the girl to perform a particular activity, she has been sold and bought between people and thus her movements are *controlled* (the *actus reus*); and she is prevented from refusing to participate in the activity for fear of physical repercussion (the "exploitation"). Additionally, in those cases where gangs

⁷ See *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. Leasak*, [2006] A.J. No. 431; *R. v. Gagnon*, [2002] A.J. No. 1097.

reportedly *transported* girls to Calgary from Edmonton in order to sexually exploit them in hotel rooms by force (thereby causing the girls to fear for their safety), the situation is such that the girls have no control over their engagement in the activity and are essentially in slave-like situations. All of the same elements for a charge of trafficking under s. 279 of the *Criminal Code* are also present.

What preventative measures can we take to stop this form of trafficking?

Reframing some of the exploitative acts that are perpetrated against Aboriginal women as “trafficking” may serve to undermine the stereotypes that have so long been attached to them, such as “prostitute” and “criminal.” As such, it is a reorientation that is worthy of pursuit. However, it is important that such discussions are contextualized within the larger framework of exploitation, discrimination and violence to which Aboriginal women and girls are subject. The “trafficking” discussion is simply one tool in a larger struggle. Overall, a shift is required away from interpreting legislation in the light of preconceived notions of what trafficking “victims” look like and toward protecting vulnerable people in dire economic circumstances from having their labour exploited.

1. Law enforcement, non-governmental organizations and prosecutors in various regions across Canada should discuss and clarify the elements required to classify an act as “trafficking” and identify the specific types of trafficking taking place against Aboriginal women and youth in their areas.
2. Law enforcement and prosecutors should acknowledge the inclusion of psychological harm within the concept of “safety” in section 279.01 of the *Criminal Code*. The term “safety” in this context should explicitly include the potential for the withdrawal of the necessities of life by a person upon whom a victim is dependent.
3. Programming should be created within the child welfare system to address the specific needs of sexually exploited youth. Programs should include appropriate, separate and staged housing that addresses all of the coercive factors that lead Aboriginal youth into situations in which they are “trafficked,” including the influence of family members and drug use.
4. Guidelines should be created within child welfare systems for involvement of law enforcement or laying of criminal charges for acts committed within the context of child welfare residences or foster-homes. These guidelines should be created with a view to preventing youths’ contact with the criminal justice system.
5. Law enforcement, prosecutors and members of the judiciary in the Prairie provinces particularly should be trained on interacting with sexually exploited Aboriginal youth, including components on recognizing and addressing associated criminal activity in a way that does not further exacerbate the conditions that make youth vulnerable to trafficking.
6. Youth should be given every opportunity to meaningfully participate and be heard as credible witnesses in judicial processes, and their “reasonable apprehension of fear” must be contextualized in their personal, familial and cultural histories.

Conclusion

“Trafficking” of Aboriginal women and girls in the Prairie provinces should not be addressed as a new phenomenon. The acts of “trafficking” described above are simply a subset of the sexual exploitation that has been and continues to be perpetrated against Aboriginal women and girls more generally. Programs designed to address only

“trafficking” fall short in that they fail to recognize the broader context of exploitation in which the trafficking of Aboriginal girls takes place. Thus, programs must be designed to address the exploitation in its broader context, including the historical and social backgrounds against which this exploitation happens.