Barbra Schlifer Commemorative Clinic
Freedom From Violence.

Submissions to the Special Rapporteur on Violence Against Women

April 30, 2018

Background on the Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Commemorative Clinic is the only Clinic of its kind in Canada. Since 1985, the Clinic has been providing legal representation, counselling and language interpretation to women who have experienced all forms of violence since 1985. We assist about 4,000 women every year. We also engage in various educational initiatives, including public legal education, professional development for legal and non-legal professionals and clinical education for law students. We work on various law reform activities, both within Canada and internationally, and consult broadly with all levels of government on policy or legislative initiatives that impact on women survivors of gender-based violence (GBV).

Since opening in 1985, the Clinic has assisted over 60,000 women. We have been part of numerous legal test cases, are represented at public policy tables and in law reform efforts related to violence against women. We work in over 200 languages, provide a variety of innovative counselling services and are the go-to for community mobilization, public legal education/information and legal representation for GBV across the lifespan. We are active nationally and internationally, combating violence perpetrated by non-state actors such as family and spouses, stranger and acquaintance sexual assault, state-sponsored violence, forced marriage and so-called "honour"-related violence.

Canada's Inadequate Implementation of International Commitments

More robust national and regional plans are needed to effectively incorporate international human rights standards. Within the context of a declaration that violence against women constitutes a global health pandemic, the United Nations has called on all countries to have a National Action Plan on Violence Against Women by 2015.

The Clinic has seen firsthand some of the gaps between international norms and their incorporation into domestic legislation in Canada. Moreover, Canada's approaches to human rights and women's rights with respect to freedom from violence often come

from a place of Western ideological supremacy and promote and sustain cultural stereotypes. This places migrant women at a disadvantage when seeking assistance and redress for violence perpetrated against them. The UN Committee on the Elimination of Discrimination against Women has attempted to integrate intersectionality into its understanding of gender-based violence (GBV) in conjunction with the release of General Recommendation 35 (GR 35) in July 2017, stating:

> Accordingly, because women experience varying and intersecting forms of discrimination which have an aggravating negative impact, the Committee acknowledges that gender-based violence may affect some women to different degrees, or in different ways, so appropriate legal and policy responses are needed.[1]

Intersectionality, when improperly defined or understood, can invite a hierarchy of rights. At its most precise, intersectionality is an approach to anti-discrimination and equality law that attempts to move beyond static conceptions[2] and fixed "identities" of discriminated subjects, and, based on the metaphor of a traffic intersection, delineates the 'flow' of discrimination as multi-directional, and injury as seldom attributable to a single source[3]. However, feminist scholars have come to acknowledge "the courts' failure to engage deeply with the equality argument yields an impoverished and decontextualized analysis which allows the differential and prejudicial treatment to persist"[4]. Importantly, this diminished law and legal discourse re-centres on the stripped-down bearer of legal rights, essentialized to a single axis of identity, often competing against herself for protections that may well apply to her as a complex subject, but which are constructed outside intersectional approaches to be separate and at odds with one another[5]. In this sense, even as an elaboration of the law's test or

---

[1] *General recommendation No. 35 on gender - based violence against women, updating general recommendation No. 19 [advance unedited version]* (2017), Article 12.

[2] Emily Grabham with Didi Herman, Davina Cooper and Jane Krishnadas, "Introduction", *Intersectionality and Beyond: Law, Power and the Politics of Location* (New York: Routledge Cavendish, 2009) at 1.

[3] Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics 1989 U. Chi. Legal F. 139 1989, at 149.

[4] Fay Faraday, "Envisioning Equality: Analogous Grounds and Farm Workers Experience of Discrimination". In, Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada* (Toronto: Irwin Law, 2012), 109 at 111.

[5] A classic example from the international human rights context is 'Sandra Lovelace v. Canada [1977-1981] and the right to enjoy First Nation (Indian) culture under art. 27 of the International Civil and Political Covenant) 024/1977'. Online at http://sim.law.uu.nl/SIM/CaseLaw/CCPRcase.nsf/40aef4fd0f005d2d41256c02003.
Sandra Lovelace presents herself as neither subsumed by nor divorced from culture, but in critical negotiation with it. Lovelace was shut out of her right to 'access to culture in community with others' (ICCPR article 27) as an Indigenous person, but on the basis of matrimonial property rights which divested women who married outside of the community differently than it did men who did the same. Lovelace argued her case under ICCPR on the basis of discrimination as an Indigenous person and as a woman experiencing 'sex discrimination' (articles 1 and 2). The state's defense rested on its contention that the patriarchy of her community determined her loss of entitlement, and that, in order to respect their autonomy (group rights), the state could not protect her rights as a woman (individual right). Lovelace countered this by submitting evidence that traditional Indigenous culture was not patriarchal, and that this was a colonial distortion of it. Lovelace thus contested both the colonial state's definition of (her) culture and the Indigenous male leadership's collusion with it. Importantly, this complexity of identity, or revelation of

grounds of protection in anti-discrimination law, intersectionality has something to offer.

Moreover, the Clinic has found that in addition to, or conjunction with, discussions of gender-based analysis, references to "culture" in the condemnation of practices must be addressed. Discourses, which rely on culture as the explanatory phenomenon for violence against women, exacerbate problematic myths about violence in specific communities[6]. Placed against the backdrop of 'reasonable accommodation'[7], 'failed multiculturalism' and constrained pluralism in Western liberal democracies that evoke notions of women's equality rights as partial justifications for a roll-back of cultural rights[8], the question of this manipulation of a stagnant formulation of "culture" takes on the urgency for human rights practitioners.

Culture is a notoriously 'spacious' concept in human rights, as Patrick Thornberry has noted, and "finding a discrete substance for the right to culture is a complex undertaking"[9]. It is, in any case, not the primary interest here. It is, however, worth noting at a minimum, as Thornberry has, that bundled into the notion are a number of specific and discernible rights, which might well be named concretely, rather than tackled as an amorphous right[10]. Culture as an umbrella concept is particularly unhelpful where "culture is claimed as a justification for practices unlikely to be consistent with human rights."[11] However, women's negotiations at the intersection of these rights and affiliations are complex and painful. Culture in this sense must be examined more critically to "understand the link between culture and relations of power and domination"[12] that so frequently pit a woman as a bearer of individual rights against the claimed requirements of culture, particularly in cases of violence.

Often, conversations around culture exclusively evoke "stereotyped roles [that] perpetuate widespread practices involving violence or coercion, such as family violence

---

symmetry between the patriarchal state and 'cultural' leadership was not recognized in the holding by the HRC, although Lovelace did win the case on the basis of article 27 (not articles 1 and 2).

[6] Geraldine A. del Prado, 'The United Nations Protection of the Rights of Women: How Well Has the Organization Fulfilled its Responsibility'(1995) William & Mary Journal of Women in the Law 51, 70.

[7] Recent legislative attempts in Quebec to ban the *niqab* in the name of gender equality have prompted feminist opposition of which the author is a part: see John Bonner, 'Coalition Launches Day of Action', May 20 2010, Rabble.ca, http://www.rabble.ca/blogs/bloggers/johnbon/2010/05/coalition-launches-day-action-against-quebec%E2%80%99s-proposed-bill-94, accessed 10 March.

[8] See Volpp L, 'Feminism versus Multiculturalism' (2001) 5 Columbia Law Review 1181.See also Amanda Dale, 'Women In Sudan', *Studio Two*, television program, Television Ontario, broadcast April 18, 2006 on the hypocrisy of international invasion as a strategy to protect women's rights in Afghanistan and Sudan (Darfur).

[9] Thornberry P, 'Confronting Racial Discrimination: A CERD Perspective' (2005) 5:2 *Human Rights Law Review* 1, page 4.

[10] *Ibid* at 5.

[11] *Ibid* at 6.

[12] Yakin Erturk, Report of the Special Rapporteur on Violence Against Women, its causes and consequences' (18 May 2009) A/HRC/11/6, para 18.

and abuse, forced marriage, dowry deaths, acid attacks and female circumcision." These practices are, to be sure, real and discriminatory, but about which some perspective and context are required to avoid a descent into racist stereotypes. Such commentary has "reinforced the notion that metropolitan of the West contains no tradition or culture harmful to women, and that the violence which does exist is idiosyncratic and individualized rather than culturally condoned." European or North American forms of violent discrimination against women seldom receive the same international attention, and the preoccupation with the lurid and with "alien and bizarre"[13] forms of gender persecution among human rights advocates echoes colonial arrogance, and international human rights-protecting instruments can ill-afford to underscore it.

For instance, in 2015, the former government passed the *Zero Tolerance for Barbaric Cultural Practices Act* criminalizing the participation in and support of forced marriage. The government's statements focussed on the need to "protect women" from polygamy and forced marriage dubbed "barbaric cultural practices". However, criminalization can become a tool to further target and over-police racialized communities. Survivors of GBV are discouraged from coming forward when disclosing that they have experienced forced marriage or trafficking will mean criminal sanctions or deportation for their families. While prevention is important, a multi-sectoral approach coupled with an intersectional education strategy is the most effective preventative tool.

In addition, debates in Canada about the niqab rely on a damaging discourse that claims to protect women's "right to choose" while simultaneously imposing discriminating policies robbing women of this choice. The Clinic was one of three interveners in *NS*, a case involving a Muslim woman's right to testify about sexual assault while wearing a niqab.[14] In addition, the Clinic sponsored Outburst! which engaged multimedia campaigns on the issue of Muslim women's rights. The Clinic continues to engage with the young women from diverse backgrounds on issues impacting their self-determination rights. The Clinic also presented deputations to the Quebec General Assembly against *Bill 94*, which required women wearing the niqab to unveil when working in the public service.[15] The Clinic was also active in challenging the government's barring of niqabs at the citizenship oath ceremony, advocating

[13] Leti Volpp, "Feminism versus Multiculturalism" (2001) 101:5 Columbia Law Rev 1181.
[14] *R v NS*, 2012 SCC 72. See also Barbra Schlifer Commemorative Clinic, 2012. "Media Release." (December 20, 2012). Online: http://schliferclinic.com/womens-rights-supreme-court-releases-n-s-decision.
[15] Bill n°94: An Act to establish guidelines governing accommodation requests within the Administration and certain institutions, February 24, 2011. Online: http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html. See also: Quebec's Bill 60, the "Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests" is one of Canada's most visceral and infamous of such debates. Available at: http://www.nosvaleurs.gouv.qc.ca/medias/pdf/Charter.pdf.

through UN Reporting mechanisms,[16] and later in the case of a woman who challenged the government at Federal Court.[17] As it stands, Quebec is debating Bill 62 which seeks to ban face coverings for provincial public sector employees and citizens seeking their services.

Using such "culture-based" reasoning obscures the complexities of women's experiences of violence, risking the exclusion of women who experience multiple forms of marginalization from state protection. In the context of violence against women, we have observed that this confusing use of the notion of "culture" leaps from supporting equitable protection from violence and instead creates a hierarchical model of who needs more protection over others. Unfortunately, in the context of an overarching dominant culture and multiple minority communities, these notions place the most marginalized women at the bottom of protection grid.

Canadian Migration Law and Policy– Overview

In 2016, Canada accepted 296,000 permanent residents and issued a further 286,000 work permits for temporary residents[18]. While there have been recent changes to Canadian government rhetoric and the public framing of migration and refugee, politics, practitioners and advocates working with women experiencing an intersectional spectrum of violence see how official Canadian migration policy remains pervasively problematic and unresponsive and/or insensitive to the needs of vulnerable survivors of GBV.

Women migrants in Canada find themselves overwhelmingly impoverished, underemployed and overworked in low paying, exploitative jobs, facing deteriorating mental and physical health, and vulnerable to violence and abuse. Many of these barriers are created or perpetuated by Canadian immigration law and policy that directly and indirectly discriminate against women, particularly from the Global South. The stated objectives of Canadian immigration law include: pursuing maximum social, cultural and economic benefits; reuniting families; and promoting international justice and security by fostering respect for human rights[19]. However, Canadian immigration policy prioritizes prospective migrant wealth (i.e. economic stability), "high skilled" employment, official language fluency, and recognized credentials. Given global inequalities and disparity in access to education, employment and independent wealth particularly for women of colour, women from the Global South, and survivors of GBV,

---

[16] Amanda Dale, "The Intersection of Race and Gender in the Matter of the Canadian State's Ban on Facial Coverings During the Course of Citizenship Oaths", 2012. Online: http://schliferclinic.com/wp-content/uploads/2012/09/CERD_Citizenship_Ban_Schlifer.pdf .

[17] *Ishaq v. Canada (Citizenship and Immigration*), 2015 FC 156.

[18] Canada, Immigration Refugees and Citizenship Canada (IRCC), *Annual Report to Parliament on Immigration, 2017* (2017) at 1 available at http://publications.gc.ca/collections/collection_2017/ircc/Ci1-2017-eng.pdf

[19] Immigration and Refugee Protection Act (S.C. 2001, c. 27), s 3(1).

these prospective migrants are categorically disadvantaged and marginalized by Canada's immigration system.

Highlighted below are a few particular challenges and barriers faced by women survivors of GBV that the Clinic sees in its everyday practice. Where applicable, suggested reforms are also outlined.

1. Humanitarian and Compassionate Grounds Application Criteria for survivors of GBV[20]

Section 25(1) of the *Immigration and Refugee Protection Act* allows foreign nationals who are ineligible to apply in an immigration class, to apply for permanent residence based on humanitarian and compassionate considerations. Women survivors of GBV are often compelled to bring humanitarian and compassionate applications ("H&C") as last resort applications in situations where, for instance, spousal sponsorship relations have broken down due to abuse; live-in caregivers employment relationships are abusive, exploitative or no longer viable for employees; or claims do not meet the immensely high standards required for a successful refugee determination.

Despite frequent use, H&C considerations are not well suited and often disadvantageous to survivors of GBV. Under the current legislative framework, a successful H&C application must show that applicants face hardship in their country of origin and are established in Canada. It is often extremely difficult for women who have experienced GBV to prove establishment based on current criteria and guidelines. For instance, women who have had failed spousal sponsorships may never have had authorization to work and thus become economically established. Moreover, abusive relationships frequently involve the isolation of survivors by their abusers. Isolation can be particularly thorough and effective where survivors are newcomers to Canada who are separated from their families and social supports in counties of origin and may face language barriers in Canada. A woman who has been isolated by her abuser is unlikely to be able to demonstrate consistent employment or involvement in the community. For mothers, isolation and lack of "establishment" is further exacerbated by women's disproportionate childcare responsibilities. H&C applicants are also unable to increase their establishment during the processing of an H&C application as they are not entitled to apply for work permits until their application is approved, which can take months or years.

Survivors of GBV also struggle to fit their experiences of violence and abuse into the "hardship" consideration. Currently, CIC explicitly states that they "will not assess risk

[20] This section derives from Deepa Mattoo, "Race, Gendered Violence, and the Rights of Women with Precarious Immigration Status" (November 2017) Created as a part of the Community Leadership in Justice Fellowship of Law Foundation of Ontario.

factors such as persecution, right to life, cruel and unusual treatment or punishment". Therefore, women are compelled to try and reframe their experiences as hardships despite the fact that this reframing often obscures the danger faced by survivors. For instance, a woman escaping domestic violence in Canada must focus on "hardship" experienced due to a lack of support in their country of origin.

Recommendations

- Claimants who have experienced GBV should be exempt from having to satisfy the establishment requirement.
- An assessment of risk should be included as a relevant consideration for H&C Applications.
- H&C Applications should be able to apply for an open work permit once their claim is submitted.

2. Immigration and Refugee Protection Regulation 117(9)(d) – Disclosure of family members for sponsorship class

Regulation 117(9)(d) of the *Immigration and Refugee Protection Regulations* requires that applicants for permanent residency disclose all relatives on their initial applications (for refugees, their basis of claim) so that those relatives may be examined. Undisclosed relatives are ineligible to be sponsored in the future. The only way to enable a permanent resident to sponsor an undisclosed relative is to make a humanitarian and compassionate grounds application for an exception. This requirement disadvantages women survivors of violence looking to reunite with their families by ignoring the impacts of trauma on some applicants for permanent residence in Canada, and not considering circumstances that may prompt a lack of disclosure, including the pressure of abusive relatives. In the Clinic's experience, non-disclosure is often incidental or the result of a miscommunication or failure to understand expectations and consequences, or pressure from external forces.

The Clinic works routinely with victims of violence some of whom come to Canada in the midst of abusive familial or economic relationships or to escape abuse in their country of origin. For these women, their trauma, desperation, and the power differential between a woman applicant and immigration officials can impact a decision not to disclose. The Clinic also sees women whose non-disclosure is as a result of misinformation and advice provided by immigration consultants and community services who assist them filling out their forms. These mistakes on forms, even where the error is made at the direction of individuals holding themselves out as professionals, are difficult to correct and can jeopardize a women's ability to sponsor their relatives. To prevent these women from sponsoring family members at a later point in their lives runs contrary to key fundamental objectives of Canadian

immigration law including family reunification and often punishes women for their vulnerability.

Recommendation

- The federal government should repeal section 117(9)(d) of *IRPA.*

3. Sponsorship Breakdown and Misrepresentation[21]

Canada presents itself as an international leader on women's issues, and in many ways, it has a past of being such. For example, Canada has committed to the United Nations 2030 Agenda for Sustainable Development, which includes a target to end child, early, and forced marriage.[22] However, there are profound gaps in its legislative frameworks concerning women, especially those from marginalized communities, such as refugees and sponsored spouses that the Schlifer Clinic frequently works with.

Newcomer women who arrive as sponsored spouses face barriers to accessing justice and services. This often takes the form of lack of access to information on their legal rights and recourse, as a result of isolation or language barriers. Newcomer women in situations of violence also sometimes fall through the cracks between women's organizations and settlement organizations due to a lack of awareness and training of front-line workers regarding the particular vulnerabilities and problems they face.

The government had committed to the repeal of conditional permanent scheme in the cases of sponsored spouse and partners and it was repealed with effect from May 3, 2017. Since that time the Clinic has seen rise in the number of cases where sponsored spouses and partners who leave the relationship due to abuse and violence are routinely investigated for misrepresentation and genuineness of marriage. The Clinic has been advocating for protection for survivors of abuse, violence and forced marriages to be from any possible investigation of misrepresentation and fraud. At the same time knowing that abuse and violence can play a role in sponsorship breakdown where marginalized women are sponsored into the country we propose that the government should also investigate sponsoring spouses who abuse and abandon spouses abroad and advise them of their rights and the supports available to them at the time of arrival in Canada. Additionally, the government should also lift the 5 year sponsorship ban on the sponsored spouses in case of domestic violence situations.

Recommendations

---

[21] This section derives from Deepa Mattoo, "Race, Gendered Violence, and the Rights of Women with Precarious Immigration Status" (November 2017) Created as a part of the Community Leadership in Justice Fellowship of Law Foundation of Ontario.

[22] Government of Canada. 2016. 'Child, early and forced marriage." Online: http://international.gc.ca/world-monde/aid-aide/child_marriage-mariages_enfants.aspx?lang=eng

- The federal government should lift the 5-year sponsorship ban is currently in effect on the sponsored spouse individuals in cases of disclosure of abuse
- The federal government should indefinitely suspend the 3-year sponsorship undertaking in cases of disclosure of abuse
- Sponsored spouses and conjugal partners should be advised of their rights and supports available to them at the time of arrival in the country.
- In cases of abuse, the federal government should thoroughly investigate sponsoring spouses who abuse and abandon spouses/partners abroad.

4. Caregiver Program[23]

Canada has had labour migration programs for live-in or home-based caregivers since the 1950s[24]. The program was most recently restructured in November 2014. It maintained most of the elements of the earlier Live-in Caregiver Program which marginalized migrant caregivers and introduced new changes that created further risks of exploitation.

Migrant caregivers - like other working-class migrant workers - can only enter Canada through labour migration programs which restrict their labour market mobility. They are only able to work in Canada on "tied work permits" which only allow them to work for the employer named on the work permit, doing the specific job listed on the work permit, at the location identified on the work permit, for the time period identified on the work permit[25]. Any work that is done outside those parameters is "undocumented" work which can render a migrant worker deportable and/or can make them ineligible for future work or permanent immigration to Canada. Changing jobs is possible but it can take 6 to 9 months to get a new work permit, during which time the worker cannot legally be employed. This policy of tied work permits forces workers either to remain in abusive jobs or be forced into undocumented work in order to survive. Migrant workers have been calling for open work permits or regional or sectoral work permits for years to end these exploitative practices.

Migrant caregivers like other working class migrant workers - also typically are required to pay thousands of dollars in predatory recruitment fees - even though Canada's temporary labour migration programs expressly require employers to pay all

[23] This section draws on Fay Faraday, "Profiting from the Precarious: Hor recruitment Practices Exploit Migrant Workers" *Metcalf Foundation* (2014).
[24] *Permanent Status on Landing : Real Reform for Caregivers*, Joint Submissions by Caregivers Action Centre, Caregiver Connections ducation and Support Organization CCESO, Eto Tayong Caregivers (ETC), GABRIELA Ontario, Migrant Workers Alliance for Change, Migrante Ontario and Vancouver Committee for Domestic Workers and Caregivers Rights (April 6, 2018) available at 3.
[25] More information on "tied work permits" found at attached report: Fay Faraday, "Profiting from the Precarious: Hor recruitment Practices Exploit Migrant Workers" *Metcalf Foundation* (2014).

costs of recruitment and laws in various provinces make so-called "recruitment fees" illegal. The fees are typically in the order of two years' salary in the workers' home countries[26].

The combination of these tied work permits and recruitment fees place migrant caregivers and other working class migrant workers in an extremely precarious position which employers often exploit through wage theft, extremely long hours, excessive work demands, demands for work beyond their work permits. Migrant caregivers are also often subject to sexual harassment and assault.

Under the Live-in Caregiver Program which existed from 1990 to 2014, all migrant caregivers who completed two years' of live-in care work with temporary migration status were eligible to apply for permanent residence.

The Caregiver Program as amended in 2014 did not address the tied work permits or recruitment fees, but placed caps on how many caregivers can apply for permanent residence in any year, removing what had been a guaranteed pathway to permanent status in Canada[27]. While the number of caregivers who can ultimately apply for permanent residence is capped at 2750 caregivers working with children and 2750 caregivers working with people with high medical needs, there is no cap on the number of caregivers who are eligible to work with temporary status in Canada each year. As a result, no individual caregiver knows in advance whether she will have an opportunity to apply for permanent residence or not. This forces women to stay in abusive work relationships in order to complete their two years' work as quickly as possible in the hopes of applying for PR.

The promise to process applications for permanent residency ("PR applications") within six months does nothing to alleviate the suffering caused by family separation; women temporary foreign workers are still required to maintain two years employment over a four year period before making PR applications[28]. Also, though caregivers can now choose to "live out", a positive development in law, the Canadian Union of Public Employees (CUPE) found that caregivers cannot exercise this "choice" due to their dependence on employers for immigration status, and their low wages[29].

In our direct client and community work at the Schlifer Clinic, we see up close the pathways into human trafficking that are opened when predators exploit the precarious status of caregivers who have been released on arrival by their putative employers or who have tried to protect themselves from the sexual or labour exploitation of an

[26] *Ibid* note 23 at 10.
[27] Government of Canada. 2016. "Live-in caregivers. " Online: http://www.cic.gc.ca/ENGLISH/work/caregiver/index.asp.
[28] CUPE. 2015. "Fact sheet: Temporary Foreign Workers Program and the Live-in Caregiver Program," Online: http://cupe.ca/fact-sheet-temporary-foreign-workers-program-and-live-caregiver-program.
[29] *Ibid*.

employer by "going underground". Caregivers lack of assured status independent of their employers places them in a situation of fundamental, perpetual vulnerability.

In February 2018, the Canadian government announced that the current migrant Caregiver Program would end in November 2019. As a result, applying under these programs must meet permanent residence requirements before the expiry date. There have been reassurances from the Immigration, Refugee and Citizenship Canada (IRCC) that the government is "committed to continuing to have a pathway to permanent residence for caregivers"[30]. However, no further details on the future of the program have been disclosed resulting in some "confusion", "frustration", and "anxiety"[31] from caregivers who have arrived in Canada potentially relying on the current program requirements.

Recommendation

- The federal government should grant live in caregivers permanent residence on arrival in Canada.
- The federal government should adopt the proposal to develop a permanent immigration system for caregivers that have been advanced collectively by migrant caregiver organizations across Canada.[32]
- The federal government should end the practice of issuing work permits that tie migrant workers to a single employer. Instead migrant workers should be issued open permits, regional or sectoral permits.

5. Designated Counties of Origin – Countries that Otherwise Appear Democratic

Women fleeing GBV are particularly affected by policy decisions that deem certain countries "safe", known as the Designated Country of Origin provisions (DCO). Violence against women remains widespread in many countries that appear stable and democratic. Presuming that any country is "safe" for all its citizens fails to account for the complex realities of women experiencing GBV. Women fleeing these situations are restricted by extremely tight timelines (between 30-45 days) to find and retain counsel, gather evidence, and present their traumatic cases before the Immigration and Refugee Board.

Following a decision of the Federal Court, which found some of these measures discriminatory, the Liberal government promised to institute an "expert human rights

[30] http://usa.inquirer.net/10936/canada-caregivers-urge-better-labor-policy-amid-program-review
[31] https://www.thestar.com/news/immigration/2018/02/05/canadas-immigration-program-for-migrant-caregivers-under-review.html
[32] See attached proposal: *Permanent Status on Landing : Real Reform for Caregivers*, Joint Submissions by Caregivers Action Centre, Caregiver Connections ducation and Support Organization CCESO, Eto Tayong Caregivers (ETC), GABRIELA Ontario, Migrant Workers Alliance for Change, Migrante Ontario and Vancouver Committee for Domestic Workers and Caregivers Rights (April 6, 2018) available at 3.

panel" to determine DCO designations[33]. We note this pledge was not in Immigration Minister Ahmed Hussen's mandate letter when appointed and as of August 2017 and no specifics of the proposed panel or process have been announced. This year the Refugee Protection Division of the Immigration and Refugee Board has been notifying failed refugee claimants from DCOs whose decisions followed the 2015 Federal court decision who are not otherwise barred from appealing to the Refugee Appeals Division that they may file an appeal[34]. For refugees whose access to resources and legal assistance is limited or who may already have left or been compelled to leave, this is an empty remedy.

Women fleeing violence continue to be punished by the unreasonable timelines inherent in the DCO regime and the presumption that their country is "safe".

6. Safe Third Country Agreement

The Safe Third Country Agreement between the United States and Canada states that if a refugee enters Canada from the United States at a land border point of entry, Canada will, subject to narrow exceptions, send the refugee back to the United States. The rationale behind this agreement is that the United States is a "safe" country that will fairly process and treat refugees and asylum seekers in accordance with international law.

The Canadian Council for Refugees (CCR), Amnesty International (AI) and the Canadian Council of Churches (CCC) have joined an individual litigant in Federal Court to launch a legal challenge of the Safe Third Country Agreement. The CCR, AI and CCC have called for the immediate suspension of the agreement because it has resulted in almost all refugee claimants from the United States who present themselves at official border crossings being denied access to Canada and immediately returned to the United States. Further, this characterization of the United States as a "safe" third country has disproportionately affected women fleeing gender-based violence and domestic abuse who are unable to gain asylum in Canada by virtue of their port of entry. The CCR, AI, and CCC further identifies the ways in which the United States fails to meet international and Canadian human rights and legal standards in its immigration and refugee policies, including inconsistent recognition of gender-based asylum claims.

Canada is experiencing a dramatic increase in irregular border crossings from asylum seekers who are unable, by virtue of the Safe Third Country Agreement to enter Canada by official channels. As stated by Loly Rico, president of the Canadian Council for

---

[33] Prime Minister of Canada Justin Trudeau. 2015. "Minister of Immigration, Refugees and Citizenship Mandate Letter." Online: http://pm.gc.ca/eng/minister-immigration-refugees-and-citizenship-mandate-letter

[34] Immigration and Refugee Board of Canada, 2017. "Federal Court Decision Impacting the Rights to Appeal to Refugee Appeal Division." Online: http://www.irb-cisr.gc.ca/Eng/NewsNouv/NewNou/2015/Pages/craupd.aspx

Refugees, "This Agreement encourages desperate people to take desperate measures which may put their safety and even their lives at risk". This includes women and children whose forced underground entry makes them more susceptible to exploitation by human traffickers. Since the implementation of this agreement, the Barbra Schlifer Commemorative Clinic has seen a dramatic increase in clients who have entered Canada from the United States through an irregular border crossing.

Recommendation

- The Safe Third Country Agreement between the United States and Canada should be repealed.

7. Immigration Detention

The Federal Government announced on August 15, 2016, that there would be wide-ranging changes to Canada's immigration detention policies[35]. It remains unclear how and when these changes will be implemented, and while there has been a decrease in numbers, children are still being detained by immigration authorities. Immigration detention disproportionately affects racialized people and minorities who make up a majority of detainees[36]. As a legal rule, children and youth should not be held in immigration detention[37]. Canada has ratified the *United Nations Convention on the Rights of the Child* which insists that the best interests of the child always be a primary consideration and that detention must be a "last resort"[38]. Pregnant women are also being detained in Canada and some have been forced to give birth while in immigration detention[39]. Despite knowledge of their legal responsibilities as well as the harms experienced by detained children, Canada Border Services Agency (CBSA) detains children with their families. The UN Special Rapporteur on the Human Rights of Migrants, Francois Crepeau has condemned the detention of children[40]. A September 2016 report also called for the end to the detention of children. It has also been acknowledged that children who are separated from their

[35] CBC News. 2016. "Canada's immigration detention program to get $138M makeover." Online: http://www.cbc.ca/news/canada/montreal/goodale-immigration-laval-1.3721125

[36] Stephanie Silverman and Petra Molnar. 2016. "Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada," *Refugee Survey Quarterly* 35 (1): 109-

[37] As per Art. 37 of the *United Nations Convention on the Rights of the Child* (1577 UNTS 3, 20 Nov.1989 (entry into force: 2 Sep. 1990. Section 60 of *Immigration and Refugee Protection Act ("IRPA")* affirms "as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child.

[38] *Ibid*.

[39] Amnesty International. 2014. "Canada Submission to the United Nations Human Rights Committee." 112th Session of the Human Rights Committee, London. Online: https://www.amnesty.org/en/documents/amr20/1806/2015/en/

[40] Francois Crepeau. 2016. "Any Detention of Migrant Children is a Violation of their Rights and Must End. Online: https://theconversation.com/any-detention-of-migrant-children-is-a-violation-of-their-rights-and-must-end-64985

parents' immigration detention suffer potentially grave mental health consequences[41]. To that end, as a recent report from the University of Toronto's International Human Rights Program argues the best interests of children should be a primary consideration in all detention related decisions that affect children, including the detention of mothers[42].

Recommendations

- The federal government should immediately stop the practice of detaining children and pregnant women, and implement alternatives to detention, such as community release and supervision or tracking mechanisms.
- The federal government should increase oversight and implement independent and effective complaints and monitoring mechanism of CBSA detention policies.
- The federal government should increase training and education to IRCC and CBSA officials about GBV and domestic violence, as well as the trauma faced by women and children in detention.

8. Human Trafficking and Gender Based Violence[43]

The United Nations defines human trafficking as the "recruitment, transportation, transfer, harboring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose including forced labor or sexual exploitation[44]."

The crimes described under the UN definition of "human trafficking" are serious and are grave human rights abuses. In recent years, the federal and provincial governments in Canada have been investing significant funds into initiatives to investigate and prosecute trafficking offences, to provide services for those who have experienced trafficking, and to provide education for service providers and the public about trafficking.

The Clinic has been providing services to migrant women who are subject to economic and sexual coercion that meets the definition of trafficking. Our experience, however, has shown that the framework for understanding trafficking does not adequately address the structural factors that create conditions in which relationships of gendered economic coercion exist and so does not adequately respond to women's own

[41] Kathleen Harris, "Canadian Children 'locked up' in Immigration Detention Centres, report says" *CBC News*, Feburary 24, 2017. Online: http://www.cbc.ca/news/politics/canada-immigration-detention-children-1.3995461.
[42] Hanna Gros, *Invisible Citizens: Canadian Children in Immigration Detention* (University of Toronto Faculty of Law: International Human Rights Program, 2017) at 30-32
[43] This section derives from Fay Faraday, "Profiting from the Precarious: Hor recruitment Practices Exploit Migrant Workers" *Metcalf Foundation* (2014).
[44] *United Nations Covnention Against Transnational Organized Crime and Protocols Thereto*, 2004, Article 3(a).

experiences of gendered economic coercion and may at times put them at risk. Various legal systems that are operating simultaneously are ultimately working at cross-purposes to the extent that create or exacerbate the precarity that women in relationships of gendered economic coercion face.

Canada's response to human trafficking is framed primarily through the criminal law. However, in the Clinic's experience many of the women whose experiences correspond with the definition of "trafficking" face intersecting difficulties that are a product of the migration system which put them in a precarious situation where they experience gender-based violence, and become vulnerable to trafficking. So while the criminal law is used to combat trafficking, the labour migration system implemented under Canada's Temporary Foreign Worker Program and immigration law create conditions which lead women who face gendered economic coercion to themselves become criminalized.

As outlined above, working class women migrating to Canada for work are employed on tied work permits. They are unable to work for any employer doing any job not listed on their permits and they are often subject to predatory recruitment fees. At the same time, it is not possible to receive a work permit to engage in sex work, even though sex work is legal is Canada. Any migrant woman with temporary status who engages in sex work -- including a woman who is trafficked -- is performing undocumented work and so is herself at risk of detention and deportation. This exacerbates the barriers to women facing coercion accessing supports. Because engaging in sex work is necessarily undocumented for migrant women, even when coming forward to report rapes, assaults or thefts that they have experienced, they may find themselves detained and deported.

The combination of tied work permits and high illegal recruitment fees places migrant women workers in a position where because of their precarious status, actual economic exploitation by employers and recruiters, fears of deportation or reprisals by former employers, they experience extreme isolation from access to supports, and, specifically, from supports to prevent trafficking through proper legal information or human rights protections. They may be unable to access social services they need like healthcare because they are undocumented. Even though various cities have declared themselves "sanctuary cities"[45] which have committed to providing social services without asking about migration status, women face real fear of being asked about their migration status, being unable to show documentation that will allow them to access services, and having their non-status information shared with border services.

At the same time, municipal anti-trafficking initiatives have increased bylaw enforcement with respect to massage and holistic health centres which results in a

[45] For example: Toronto, Hamilton, London, and Montreal.

targeting of migrant women engaged in sex work, including women who are subject to economic and sexual coercion, who again may become criminalized. Criminal and other surveillance of migrant women who are caught in relationships of trafficking increases their precarity and marginalization.

There is insufficient recognition of the ways in which Canada's own immigration/migration programs create conditions that make migrant women vulnerable. Given this reality, the Clinic has been advocating to end the circumstances that contribute to the economic and sexual coercion of migrant women and to increase the economic security and agency for migrant women.[46]

At the Clinic we believe that supporting migrant women's agency and self-determination is critical and therefore temporary resident permits that are available to the trafficked survivors under Immigration and Refugee Protection Act since 2006 do not provide adequate support to the survivors.

Recommendations

- Amend the Immigration and Refugee Protection Act to guarantee protection to survivors of trafficking. Canada also needs to offer adequate support to trafficked persons and faster access to permanent residence[47]
- Increase access to information about Temporary Residence Permits (TRPs) to victims of human trafficking and streamline applications for Permanent Residence.
- Amend the programs for permanent immigration so that they better reflect women's independent capacity to immigrate with permanent status as principal applicants.

---

[46] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women/girls and Children (2000), set out minimum international standards for the prevention and combat of trafficking in persons for different forms of exploitation.

Article 3: (a) 'Trafficking in persons' shall mean 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 benefi ts 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; (b) The consent of a victim of trafficking in persons to the intended exploitation … shall be irrelevant where any of the means set forth in paragraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in paragraph (a); (d) 'Child' shall mean any person under 18 years of age." Canada ratified the Trafficking Protocol in May 2002 and accordingly made changes to Criminal Code in 2005. Parliament also enacted the Immigration and Refugee Protection Act (IRPA) in June 2002.

[47] http://ccrweb.ca/sites/ccrweb.ca/files/ccr-regs-comments-may-2015.pdf

- Enable women who are migrant workers to arrive with permanent residence on arrival in Canada.
- End the practice of issuing tied work permits. Migrant workers should have open work permits, or at least regional or sectoral work permits.

Conclusion

As a final thought, we note with concern that policy regarding violence against women is becoming increasingly neutral on the one hand and punitive on the other. This is seen in the discourse and use of terminology such as 'domestic assault' whereby victims of violence – women – are rendered invisible. This is also reflected in the penalization women experience when, in trying to create safety in their lives, they are required by intersecting and contradictory program and eligibility requirements to, in effect, give up their homes, their communities and sometimes their children. For migrant women, their status in Canada and chosen home is often also imperilled. Gender-based analysis is a process that examines the differences in women's and men's lives, and identifies the potential impact of policies and programs in relation to these differences. Gender-based analysis also examines the intersection of gender with other identity factors such as income, race, age, religion, etc. The aim is that this information will support more evidence-based decision-making by both policy makers and service providers, resulting in efficient and effective programs and services that are responsive to the realities of women's lives. A gender-based analysis identifies how policies can create barriers to the determinants of safety for women. Changes to Canada's immigration regime must include a commitment to a gendered analysis recognizing the unique pathways and drivers of migration for women in a system that was designed with the migration patterns of men in mind. It must be emphasized that, as the Clinic sees daily, women's migration is fueled and conditioned primarily by violence.

Barbra Schlifer Commemorative Clinic
Per:

Amanda Dale, Executive Director
Deepa Mattoo, Legal Director
Amy Voss, Articling Student