

February 29th, 2016

Pre-Inquiry Secretariat
Missing and Murdered Indigenous Women and Girls Inquiry



Dear Sir/Madam:

The Canadian HIV/AIDS Legal Network (“Legal Network”) promotes the human rights of people living with and vulnerable to HIV and AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization. We envision a world in which the human rights and dignity of people living with HIV and those affected by the disease are fully realized and in which laws and policies facilitate HIV prevention, care, treatment and support.

The National Inquiry into Missing and Murdered Indigenous Women and Girls (“Inquiry”) is a process that is close to our hearts. The Legal Network’s guiding values are rooted in a focus on the human rights of marginalized populations such as Indigenous peoples, sex workers and people who use drugs, and their meaningful participation in policies and programs that affect them. We are pleased to see the new federal government’s commitment to recognizing the legacy of colonization on Indigenous peoples and its direct relationship to the widespread violence that Indigenous women suffer. We make this submission to urge the Inquiry to ensure the meaningful participation of Indigenous women who sell or trade sex and/or use drugs, so that they can speak to the effects of the criminal law on their lives.

The violence that Indigenous women suffer is often directly related to criminal laws and their consequent relationship with law enforcement. When they are targets of the criminal law, whether because of their use of prohibited drugs or because of their involvement in selling sex, Indigenous women experience heightened violence and an adversarial relationship with the police, thus deterring them from reporting that violence. It is vital that the Inquiry takes into the account the experiences of Indigenous women who are criminalized and for whom law enforcement is not a source of protection or assistance but rather of neglect or of intimidation, harassment or violence. Indigenous women who are criminalized can attest to the harms of criminalization and its role in creating vulnerability in various ways, including the over-criminalization and under-protection of Indigenous women who sell sex or use drugs. Without hearing such evidence, the Inquiry will fail to appreciate the complexity of the factors that have led so many Indigenous women to experience violence and other harm.

In order to participate in the Inquiry, many **Indigenous women who sell sex or use drugs will require a process that accounts for their privacy needs, including the need to protect their identity.** Because of heavy surveillance, criminalization, stigma and disdain for both those who sell sex and people who use drugs, anonymity is essential to enable the participation of those women who request it – and it should be made abundantly clear, to those who may be considering sharing their testimony, that this is an option.

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The Supreme Court of Canada recognized the importance of anonymity for criminalized communities in its 2012 decision *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach*, a case in which public interest standing was being contested. The respondents in the case had formed Downtown Eastside Sex Workers United Against Violence Society (“SWUAV”), a collective predominantly made up of Indigenous women who sold sex in Vancouver’s Downtown Eastside, to challenge prostitution-related provisions of the *Criminal Code*. In granting SWUAV public interest standing, the Supreme Court of Canada acknowledged the substantial difficulties that would be faced by any individual member of SWUAV that might seek to challenge the provisions on her own, and recognized the importance of organizational representation:

“[Members of SWUAV] feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities.”¹

At the same time, the testimonies of Indigenous women who sell sex or use drugs should be central to the Inquiry and **anonymity should not render their experiences invisible, invalid or less important**. Therefore, a process should be established to ensure that the stories of Indigenous women who sell sex or use drugs, and who choose not to disclose their identity, are not negated or deemed less worthy by virtue of being anonymous.

Indigenous women who sell sex also need to participate in the Inquiry to **testify about the harms of the legal and social conflation of the sex trade with human trafficking and exploitation, and about recent harms of the new prostitution laws**. Since the passage of the *Protection of Communities and Exploited Persons Act* in 2014, and the implementation of new provisions regarding the sex trade, the simplistic and inaccurate equation of all selling of sexual services with human trafficking has enabled law enforcement to intensify police surveillance and other policing initiatives. This has not resulted in more protection or safety for Indigenous women selling sex. Rather, the increase in policing initiatives related to trafficking has contributed to greater surveillance of Indigenous women who leave their communities and has undermined their relationships with family members or others who may offer safety or support to them, including in circumstances where they may be selling sex. Indigenous women who sell sex can also speak to the harms of conflating the experiences of adult women and girls as these relate to the sex trade.

This conflation of any involvement in selling sex with being “trafficked” and exploited is too simplistic, including in the case of Indigenous women. It denies from the outset the voice and agency of any persons, including Indigenous women, whose experience of selling sex they do not view as the result of trafficking or exploitation — even if it may be the case, for some women, that they are exercising that agency in constrained circumstances. Too often, the only stories presented by women who have experience of selling sex are ones that align with “victim” or “survivor”

¹ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 71.

narratives. There is no doubt that too many women, and in particular Indigenous women, face violence in Canada. Women who use drugs and are criminalized as a result are at greater risk of violence. And sometimes that violence is experienced in the context of selling sex. It would be a mistake on the part of the Inquiry, and a disservice to Indigenous women such as those whose experiences of violence or murder lie at the heart of the Inquiry, to ignore these realities — and the ways in which punitive laws relating to sex work and to drugs help produce such terrible harm. But, equally, it would be a mistake and a disservice, in acknowledging these realities, to therefore see all Indigenous women who have experience of selling sex and/or of using drugs as trafficked victims.

In light of the above considerations, we urge the Inquiry to ensure that it hears from Indigenous women who *currently* sell sex or use drugs. They can testify about their firsthand experience with increased surveillance and criminalization, yet they are often left out of discussions – for the reasons described above and also because they are not supported socially and financially to participate in inquiries about their lives. Ultimately, **Indigenous women who sell sex or use drugs must also be provided with necessary and adequate social and financial supports** to make their participation in the Inquiry possible and meaningful.

Thank you for your consideration.

Sincerely,



Sandra Ka Hon Chu
Director, Research & Advocacy



Richard Elliott
Executive Director