# Bill 96, the *Anti-Human Trafficking Act, 2017*

Date: May 9, 2017

Submitted to: Standing Committee on Social Policy

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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## Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to make this submission to the Standing Committee on Social Policy (the "Committee") in respect of Bill 96, the *Anti-Human Trafficking Act*, *2017*. The Bill will, if passed, proclaim February 22 each year as Human Trafficking Awareness Day, set out a process for obtaining civil restraining orders in the human trafficking context, and establish a tort of human trafficking.

## The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission has been developed by a working group of representatives from the OBA's Women Lawyer's Forum, Aboriginal Law Section, and Child and Youth Law Section, whose members work in a range of environments including private practice, government agencies, and not-for-profit organizations.

## General Recommendations

The OBA recognizes and applauds the goals of Bill 96, the *Anti-Human Trafficking Act*. If passed, the Bill will create a new civil restraining order that would attempt to specifically address the unique nature of trafficking, as well as a new civil cause of action – a tort of human trafficking – that would permit survivors to sue an alleged trafficker without proof of damages. The legislation draws in particular on a recent history of government initiatives in the areas of sexual violence against women and human trafficking, including the reports of the provincial Select Committee on Sexual Violence and Harassment (2015), the *Action Plan on Sexual Violence and Harassment* (2015), the report *Walking Together*: *Ontario's Long-Term Strategy to End Violence Against Indigenous Women* (2016), and the provincial Strategy to End Human Trafficking (2016).

The OBA generally supports the expansion of rights and remedies for survivors of human trafficking and violence. The creation of the tort of human trafficking and a legislative framework providing that a remedy may be sought without proof of damages is an admirable step toward achieving this goal. As a preliminary matter, however, we note that survivors must also have access to competent counsel both for initial independent legal advice and for full representation in their civil actions in order to ensure that they can access a remedy.

Survivors are often in precarious financial and personal circumstances, and the implementation of the legislation must bear this in mind. In our view, for the remedies in the Bill to have any effect, additional legal aid funding and resources must be made available to ensure that survivors of human trafficking are able to access the assistance they need. Absent these resources, it is likely that the new remedies under the Bill will have more symbolic than practical effect. There is a role for the province in connecting survivors with competent counsel; for example, the Independent Legal Advice for Survivors of Sexual Assault Pilot Program could be expanded to include survivors of human trafficking, and the province could consider encouraging and facilitating additional mechanisms to promote access to justice, such as *pro bono* full service representation for survivors.

We must also be mindful of the fact that there are many practical barriers that may discourage or prevent a survivor from bringing a civil action, including the unlikely prospect of financial recovery due to an impecunious respondent, the inability to locate a respondent, or the respondent's involvement in a larger criminal network. Such circumstances warrant the consideration of other potential remedies and venues for survivors to seek relief.

These could include a companion expansion of remedies under the Criminal Injuries Compensation Board scheme. In particular, the OBA supports a non-pecuniary analysis of loss relating to total or partial disability affecting victims' capacity for work, as well as damages being awarded for prospective employment losses rather than only past losses. This is an important and necessary innovation, as survivors of human trafficking and forced labour may be limited in their previous employment and their ability to quantify losses in relation to former employment. More generous awards for pain and suffering would also ensure survivors of human trafficking are able to recover, as intended by the Bill.

Additional resources must also accompany the implementation of the legal remedy to promote its use among survivors, who are often isolated and marginalized. This could include greater support for consultation and information sharing amongst organizations working with survivors. In addition, as pioneered in other jurisdictions, the province could consider requirements that hotels keep records of all guest transactions and receipts for at least six months (subject to the requirements of applicable privacy legislation) and that their employees receive training on human trafficking when they are hired, as well as that the legislation and information hotlines be posted at hotels and federal and provincial prisons.

## Specific Recommendations

The specific recommendations below concern Schedule 2 to Bill 96, which will be the new *Prevention of and Remedies for Human Trafficking Act, 2017* when in force. All recommendations, when referring to specific provisions of Bill 96, are referring to provisions in Schedule 2.

Given the Bill's primary purpose of providing survivors of human trafficking with an easier and more effective way of bringing human traffickers to court, we feel that procedural clarity should be of paramount importance in the Bill and we have made a number of recommendations in that respect.

## Clarifying Jurisdiction

Section 11 of the Bill specifies that an appeal of an order lies with the Superior Court of Justice. While it is therefore implied that a request for a restraining order is to be brought in the Ontario Court of Justice, the proper court with jurisdiction to hear the request for a restraining order should be explicitly named in the Bill.

Similarly, it is unclear from the Bill whether an applicant will be required to commence an action or application to get a restraining order, or if it will be sufficient for the applicant to bring a motion. This issue should be clarified in the Bill or the accompanying regulations.

## The Implications of Party Status

Section 3 of the Bill indicates that any of a victim, a person with lawful custody of a child victim, or any other person prescribed by regulation may apply for a restraining order, and that the parties to such an application are the applicant, the victim (if not the applicant), and the respondent.

In legal proceedings, individuals with party status have special rights and obligations to the court and to other parties. Section 3 of the Bill would, in practice, make a child victim a party to the proceeding where his or her parent is the applicant for a restraining order. Bill 96 does not specify what implications will flow from a child victim being named as a party where they are not the applicant, and it is not clear that naming the child as a party is a desirable outcome in any event.

Further, s. 9 of the Bill makes clear that the court may appoint counsel for a child party, although it has been left to regulation to specify which individual or agency will fulfill this role. However, there is no parallel provision for court-appointed counsel for a non-applicant adult victim, including those who may be under a disability, which could pose access to justice issues in relation to that person's status as a party. As an example, an adult victim may be made a party to a proceeding because another person brings an application on his or her behalf. As a party, the adult victim would then be responsible for retaining counsel, and may also be exposed to costs orders because of their status. It would be appropriate for the legislation to recognize the need to minimize victims' costs and exposure through the course of the process to obtain a restraining order.

## Consideration of Indigenous Heritage

Section 4(3) of the Bill sets out the factors the court should consider in determining whether to make a restraining order. The factors include, among others, the ages of the victim and the respondent, whether the victim has a physical or mental disability, and whether the respondent is in a position of trust, power or authority in relation to the victim. The factors appear designed to

assist in identifying whether, and how, an individual's circumstances increase his or her marginality and vulnerability.

To that end, it would be appropriate to add the victim's Indigenous heritage to the list of factors in s. 4(3). It is surprising that while factors like disability, age, and immigration status are all mentioned in the list, Indigenous heritage is not. The context of the marginality and ongoing social vulnerability of persons of Indigenous heritage is acknowledged in the Final Report of the Truth and Reconciliation Commission of Canada, as well as by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13.

The omission of Indigenous heritage is all the more surprising given the commitments in *Walking Together: Ontario's Long-Term Strategy to End Violence Against Indigenous Women*, which promises a survivor-centred strategy to assist in the identification, intervention, and prevention of human trafficking in Ontario. As part of the Year One Update to *Walking Together*, the introduction of Bill 96 is cited as one of the "implementation actions" under the heading of Community Safety and Healing. Given this context, it would seem appropriate that a victim's Indigenous heritage be taken into account when a decision is made about whether to issue a restraining order.

## Conditions of the Restraining Order

Section 4(4) of the Bill permits the court, in making a restraining order, to include any reasonable condition that it considers "necessary or advisable for the protection of the victim." The conditions may include, among others,

- requiring the respondent to return to the victim the original and any copies of any visual recording of the victim (s. 4(4)(d)); and
- prohibiting the respondent from possessing, making, transmitting, making available, selling, advertising or distributing any visual recording of the victim (s. 4(4)(e)).

These conditions appears to give a victim some recourse if an image or video is posted to the Internet without her consent. There is already some availability in existing law for an individual wishing to have non-consensual content removed from the web – for example, injunctions may be sought under both criminal and civil law. However, in our experience, it can take several years for content to be removed after it has been uploaded to the Internet, particularly if there is first a criminal proceeding and conviction in relation to the trafficker, followed by a civil court injunction for the removal of the images.

For these reasons, we see the value in the conditions set out in s. 4(4)(d) and (e) as a potentially more expeditious way for a victim to have non-consensual content removed. We would, however, make the following recommendations:

- Both s. 4(4)(d) and (e) should include specific reference to an "*image or audio recording* visual recording of the victim," to ensure that photography and audio recordings are also caught by the provisions.

- A further provision should be added to s. 4 to clarify that a victim, in obtaining a restraining order under this legislation, is not barred from seeking additional recourse under existing criminal and civil law.

### Ending or Varying a Restraining Order

Section 7 of the Bill states that the court may, on application in accordance with the regulations, set aside or vary a restraining order made under s. 4 if satisfied that there has been a "material change in circumstances."

We raise two questions in relation to s. 7. The first question is with respect to the phrase "material change in circumstances," which most commonly appears in the family law context as the threshold to vary a support order, for example. However, the phrase is not defined in legislation and continues to be litigated. In determining whether there has been a material change in the family law context, the courts typically consider 1) whether there has been a change to the condition, means, needs, or circumstances of the individual, 2) whether the change materially affects the individual, and 3) whether the change was contemplated by the judge who made the initial order.

Given the amount of litigation created in the family law context over the phrase "material change in circumstances," we would recommend that the phrase be defined in Bill 96 or in the regulations so that the courts and parties have some clarity around what will be needed to set aside or vary a restraining order. In the case of human trafficking, we would recommend that a "material change" refer to 1) a change in the condition, means, needs or circumstances of the victim or the individual who has engaged or may engage in the human trafficking of the victim, which 2) materially affects the victim, and 3) which was either not foreseen or could not have been reasonably contemplated by the Court that made the initial restraining order.

The second question we raise in relation to s. 7 is with respect to which party bears the onus for varying or setting aside an order. Our interpretation of the Bill is that, where a restraining order is made *without* notice to the respondent in accordance with s. 6, the onus is on the person who applied for the order to prove that it should continue without variation under s. 7. On the other hand, if the restraining order was made *with* notice to the respondent in accordance with s. 4, the onus shifts to the person seeking the variation under s. 7 (i.e., the respondent).

Provided this interpretation is correct, we recommend that wording to this effect be added to s. 7 in order to clarify which party bears the onus in setting aside or varying a restraining order.

## Conclusion

Once again, the OBA supports Bill 96 as an attempt to expand rights and remedies for survivors of human trafficking and violence. We commend the attention the Legislature has provided to the need for enhanced protection for some of society's most marginalized individuals.

We anticipate that challenges around procedure and implementation could arise as this new legislation moves forward into practice and as supporting regulations are developed. For this reason, we look forward to participating in the Legislature's periodic reviews of the new legislation, and any regulations made thereunder.