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A RARE MOMENT IN TIME: AN OPPORTUNITY TO ESTABLISH A REVITALIZED CHILD WELFARE SYSTEM THAT PUTS CHILDREN AND YOUTH AT THE CENTRE

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Brief submitted by UNICEF Canada to the Standing Committee on Justice Policy

6 April 2017

INTRODUCTION

Ontario Bill 89, the *Supporting Children, Youth and Families Act, 2016* is historic and groundbreaking legislation. It has the potential to create dramatic changes in the child welfare system that we have not seen previously.

This Bill addresses many topics that have been discussed and placed on the child welfare 'wish list' for many years – such as: explicitly referring to children's rights and the United Nations Convention on the Rights of the Child; increasing the age of protection to 18 years; modernizing stigmatizing legislative language; legislating a regime for confidentiality and access to records; recognizing out-of-province child protection orders; and providing CAS Boards of Directors with protection from legal liability for good faith actions.

UNICEF Canada wishes to congratulate the provincial government for bringing forward such progressive child-centred legislation. We also wish to commend all political parties for the conscientious manner in which this Bill has been scrutinized both in House debates and in this Committee.

ABOUT UNICEF

As a UN agency, UNICEF is active in 190 countries and we have saved more children's lives than any other humanitarian organization. UNICEF Canada is a Canadian non-governmental organization (NGO) established 60 years ago and is the representative of UNICEF in Canada.

We work tirelessly as part of the global UNICEF family to do whatever it takes to ensure that children and young people survive and thrive, and have every opportunity to reach their full

potential. Our global reach, unparalleled influence with policymakers, and diverse partnerships make us an instrumental force in shaping a world where the rights of all children are realized.

UNICEF Canada builds awareness, raises funds, and mobilizes Canadians across the country to help save and protect the world's most vulnerable children. We promote public policy and practices in the best interests of children, informed by our global experience and international best practice, to contribute to the fulfillment of children's rights in Canada and around the world.

UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the United Nations Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. The only organization named in the United Nations Convention on the Rights of the Child as a source of expertise for governments, UNICEF has exceptional access to those whose decisions impact children's survival and quality of life. We are the world's advocate for children and their rights. For more information about UNICEF, please visit www.unicef.ca

SUMMARY OF RECOMMENDATIONS SUBMITTED BY UNICEF CANADA

Recommendation 1: That the Preamble to Bill 89 be amended to reflect mandatory rather than permissive language, by replacing the words "should" and "is to be" with "shall" in each instance and removing the phrase "the aim of".

Recommendation 2: That the Preamble to Bill 89 be amended to explicitly name and set out Katelynn's Principle in its entirety, as originally formulated by the Coroner's Jury at the Katelynn Sampson Inquest, in its first recommendation.

Recommendation 3: That a new subsection 1(3) be added to Bill 89 to read or approximate "In interpreting and applying this Act in its entirety, and in giving effect to the paramount and other purposes enumerated in this section, any court, tribunal or other person's power or duty to make decisions and provide services shall be exercised in a manner consistent with the United Nations Convention on the Rights of the Child, Katelynn's Principle, the *Canadian Charter of Rights and Freedoms*, the *Human Rights*

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***Code*, the United Nations Declaration on the Rights of Indigenous Peoples and Jordan's Principle.**

Recommendation 4: That Ontario Bill 57 proceed through Committee, subject to any appropriate amendments, and be enacted as a companion piece of legislation that complements Bill 89 by improving the likely implementation of Katelynn's Principle in the child welfare sector and by ensuring its application to all provincial government ministries.

Recommendation 5: That a new subsection 1(4) be added to Bill 89 to read or approximate "In giving effect to the paramount and other purposes enumerated in this section, a process of Child Rights Impact Assessment, using the United Nations Convention on the Rights of the Child as a foundational framework, shall be used by the Ministry of Children and Youth Services on an ongoing basis to evaluate the impact of both existing and proposed future legislation, regulations, directives, policies and procedures on the rights and best interests of children falling within the Ministry's mandate."

Recommendation 6: That section 314 of Bill 89 be amended to include a requirement that future legislated periodic reviews of the *Child, Youth and Family Services Act* be grounded in a Child Rights Impact Assessment framework.

Recommendation 7: That the upper age jurisdiction for child protection be increased to age 18.

Recommendation 8: That the right to protection from all forms of abuse, neglect, or exploitation under article 19 of the UN Convention on the Rights of the Child be extended to all children up to the age of 18, whether such protection is consensual or non-consensual on the part of the child.

Recommendation 9: That the duty to report for non-professionals be strengthened by imposing an appropriate penalty for failure to report.

Recommendation 10: That subsection 122(4) of Bill 89 be removed and that the statutory child protection duty to report apply equally to all children, including 16 and 17 year olds.

Recommendation 11: That any remaining stigmatizing and demeaning child protection legislative language contained in Bill 89 be further modernized through the use of the vehicles of the United Nations Convention on the Rights of the Child; a Child Rights Impact Assessment analysis; and engagement with youth currently and formerly in care.

Recommendation 12: That the terms 'apprehension' and 'apprehend(s)', as currently found in Bill 89, be replaced with the terms 'removal' and 'remove(s)'.

OVERVIEW OF UNICEF CANADA'S POSITION

In our brief, we address three main topics – Child and Youth Rights; Child Protection; and Modernizing Child Protection Legislative Language.

In the area of child protection, while we acknowledge the importance of child agency and giving more weight to the views of children according to their age and maturity, we also support increasing the upper age limit of child protection to 18, whether consensual or non-consensual on the part of the 16 or 17 year old child. We also recommend that the proposed duty to report be expanded to apply to all children equally, including 16 and 17 year old children in order to provide protection and to avoid child tragedies resulting from confusion over the scope of one's reporting duty. We also propose that a penalty of some kind be imposed upon non-professionals who fail to comply with their reporting duty.

As to the modernizing of legislative child protection language, we support the deletion of all residual stigmatizing language and the 3-fold recommendations of the Children in Limbo Task Force, which appear later in this brief. We are further recommending that all references in Bill 89 to 'apprehension' and "apprehend(s)' be replaced by "removal' and 'remove(s)', as is the case in the British Columbia child welfare legislation.

In the media and within this Committee, there has been considerable discussion of the need to strengthen the child welfare reforms contained in Bill 89. UNICEF Canada agrees with that observation and we have formulated 12 recommendations towards that objective for this Committee's consideration.

Having regard to the strengthening of child and youth rights, we have recommended: 1) revising the Preamble to Bill 89 by replacing the permissive language with mandatory language; 2) including in the Preamble an articulation of Katelynn's Principle in its entirety, as originally

formulated by the Coroner's Jury at the Katelynn Sampson Inquest, in its first recommendation; 3) strengthening the recognition of children's rights and corresponding obligations of the government beyond the Preamble by reinforcing them in Part I (Purposes and Interpretation) of Bill 89; 4) Including a requirement in Part I of Bill 89 for Child Rights Impact Assessments to be used by the Ministry of Children and Youth Services on an ongoing basis, as well as a requirement that the mandatory 5-year periodic reviews be grounded in a Child Rights Impact Assessment framework; and 6) enacting Ontario Bill 57 as a companion piece of legislation to broaden the impact of Katelynn's Principle.

Having spoken about the importance of strengthening this aspirational legislation and translating these principles and objectives into concrete action, we should keep in mind that the legislation is only one part of the solution needed to strengthen the child welfare architecture in Ontario – there are many other measures that are, as yet, undetermined – such as regulations, policies and procedures, directives, the development of further key performance indicators for evaluation purposes, funding and staff education.

One way of ensuring that these other matters are addressed through a child rights-based lens is by using the process of a Child Rights Impact Assessment. The Coroner's Jury in the Katelynn Sampson Inquest recognized the value of Child Rights Impact Assessments as an accountability measure in strengthening the commitment of the Government of Ontario to fully implement children's rights. The Jury's third recommendation states:

3. *The Government of Ontario, Ministry of Children and Youth Services, Ministry of Education, Ministry of the Attorney General, Family Rules Committee, Ontario Association of Children's Aid Societies, Association of Native Child and Family Services Agencies of Ontario and Children's Aid Societies of Ontario implement a Child Rights Impact Assessment process for future reviews of legislation, regulations, directives, policies and procedures, to screen for the impact on children's rights.*

If we apply all of these approaches in concert with one another through a child-sensitive lens, we will be in the very best position to see these child welfare reforms implemented in the strongest and most consistent manner.

1) CHILD AND YOUTH RIGHTS

A) MOVING FROM ASPIRATIONAL STATEMENTS TO POSITIVE OBLIGATIONS AND CORRESPONDING RIGHTS

While the high ideals set out in the Preamble to Bill 89 are admirable and inspiring, they do not fully translate into positive obligations and corresponding rights. There is too much permissive language framed as acknowledgements by the Government of Ontario, or as "should" or as "is to be" instead of "shall", or as having a particular "aim."

It is essential that the lofty aspirational principles in the Preamble are framed in mandatory language so that the children, youth and families who engage with the child welfare system will experience real time on-the-ground benefits.

In the case of the UN Convention on the Rights of the Child, we are very pleased to see this international treaty referenced in the Preamble to Ontario child welfare legislation for the very first time. However, the statement concerning the observance of the Convention is too tepid in our view. It provides that:

> *In furtherance of these principles, the Government of Ontario acknowledges that the aim of the Child, Youth and Family Services Act, 2016 is to be consistent with and build upon the principles expressed in the United Nations Convention on the Rights of the Child.*

In our view, part of this statement should be amended to read "…the Government of Ontario acknowledges that the *Child, Youth and Family Services Act, 2016* shall be consistent with and build upon the provisions expressed in the United Nations Convention on the Rights of the Child"

It is critically important that the UN Convention on the Rights of the Child be applied as a continuing obligation so that children who come into contact with the child welfare sector (and not simply come into care) are afforded the status of full rights-holders.

The Convention was adopted by the United Nations General Assembly on November 20, 1989. It is the first international instrument to incorporate the full range of rights, from civil and political, to economic, social and cultural, in recognition of the special developmental needs of all children globally.

The Convention is the most widely acclaimed international treaty in history, having been ratified by 196 of 197 nations to date. When Canada ratified the Convention on December 13, 1991, Ontario also assumed an obligation under international law to ensure that all aspects of its child welfare legislation, policy and practice are in compliance with the Convention.

The Convention contains 42 substantive rights that are intended to protect and support children in all areas of their lives by providing a comprehensive framework of the basic conditions for them to reach their full potential.

There are various rights set out in the Convention to which all children are entitled, and special measures may be required to ensure that these rights are respected, as well as actively protected and provided to children in care. All of these rights are universal (apply to all children); indivisible and interdependent (all of these rights are dependent on one another and cannot be viewed in isolation); and inherent and inalienable (all children are born with rights that cannot be taken away from them).

There are four guiding or core principles in the Convention which are self-standing, but also serve as interpretive guides in the implementation of all other Convention rights. They are article 2 (non-discrimination); article 3 (best interests of the child); article 6 (life, survival and development); and article 12 (child participation).

Recommendation 1: That the Preamble to Bill 89 be amended to reflect mandatory rather than permissive language, by replacing the words "should" and "is to be" with "shall" in each instance and removing the phrase "the aim of".

B) INCORPORATING THE FULL SCOPE OF KATELYNN'S PRINCIPLE

Recommendation 1 of the Katelynn Sampson Inquest Jury Verdict states as follows:

> *That all parties to this inquest ensure that Katelynn's Principle applies to all services, policies, legislation and decision-making that affects children.*
>
> *KATELYNN'S PRINCIPLE*
>
> *The child must be at the centre, where they are the subject of or receiving services through the child welfare, justice and education systems.*
>
> *A child is an individual with rights:*
> - *who must always be seen*
> - *whose voice must be heard*
> - *who must be listened to and respected*

A child's cultural heritage must be taken into consideration and respected, particularly in blended families.

Actions must be taken to ensure the child who is capable of forming his or her own views is able to express those views freely and safely about matters affecting them.

A child's view must be given due weight in accordance with the age and maturity of the child.

A child should be at the forefront of all service-related decision-making. According to their age or maturity, each child should be given the opportunity to participate directly or through a support person or representative before any decisions affecting them are made.

According to their age or maturity, each child should be engaged through an honest and respectful dialogue about how/why decisions were or will be made.

Everyone who provides services to children or services that affect children are child advocates. Advocacy may potentially be a child's lifeline. It must occur from the point of first contact and on a continual/continuous basis thereafter.

Katelynn's Principle is consistent with article 12(1) of the UN Convention on the Rights of the Child, which provides:

1. *State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

Katelynn's Principle is also in keeping with the recommendations made to Canada in 2012 by the UN Committee on the Rights of the Child:

37. The Committee …recommends that [the State party] continue to ensure the implementation of the right of the child to be heard in accordance with article 12 of the Convention. In doing so, it recommends that the State party promote the meaningful and empowered participation of all children, within the family, community, and schools, and develop and share good practices. Specifically, the Committee recommends that the views of the child be a requirement for all official decision-making processes that relate to children, including custody cases, child welfare decisions, criminal justice, immigration, and the environment…

While there are elements of Katelynn's Principle sprinkled in various parts of the Bill, there are the following serious shortcomings:

a) Katelynn's Principle is not explicitly named;
b) Katelynn's Principle is not set out in its entirety, as originally formulated by the Coroner's Jury at the Katelynn Sampson Inquest, in its first recommendation;
c) The few elements of Katelynn's Principle that are referenced as specific rights (in section 3) are limited to circumstances when a child is 'receiving services'. These rights do not apply when policies, legislation and decisions (e.g. by courts and tribunals) are being made about a child or children, even though that is what is required on a full reading of Katelynn's Principle;
d) There is no reference anywhere in Bill 89 to the potentially life-saving last element of Katelynn's Principle:

> *Every person who provides services to children or services affecting children is a child advocate. Advocacy may be a child's lifeline and it must occur from the point of first contact and on a continuous basis thereafter*; and

e) Katelynn's Principle is not referenced as applying across all provincial ministry divisions, although that is what is contemplated by the Coroner's Jury. We know that children involved in child welfare often cross over into the realm of other ministries – such as education, justice and health.

Recommendation 2: That the Preamble to Bill 89 be amended to explicitly name and set out Katelynn's Principle in its entirety, as originally formulated by the Coroner's Jury at the Katelynn Sampson Inquest, in its first recommendation.

C) STRENGTHENING CHILD RIGHTS AND OBLIGATIONS OF GOVERNMENT BEYOND PREAMBLE BY REINFORCING THEM IN PART I (PURPOSES AND INTERPRETATION)

While we applaud the Ministry of Children and Youth Services for referencing so many rights-based statutes, Conventions, Declarations and Principles in the Preamble to Bill 89, it is our view that the obligation to implement all of these instruments would be further strengthened and entrenched by setting them out again in Part I (purposes and interpretation) of Bill 89, but in stronger language.

While a Preamble of an *Act*, under section 8 of Ontario's *Interpretation Act* "shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act", it does not have the same force that a mandatory requirement would have, if set out in Part 1 of Bill 89.

Recommendation 3: That a new subsection 1(3) be added to Bill 89 to read or approximate "In interpreting and applying this Act in its entirety, and in giving effect to the paramount and other purposes enumerated in this section, any court, tribunal or other person's power or duty to make decisions and provide services shall be exercised in a manner consistent with the United Nations Convention on the Rights of the Child, Katelynn's Principle, the *Canadian Charter of Rights and Freedoms*, the *Human Rights Code*, the United Nations Declaration on the Rights of Indigenous Peoples and Jordan's Principle.

D) ONTARIO BILL 57 AS A COMPANION PIECE OF LEGISLATION

The Preamble to Bill 57, the *Katelynn's Principle Act (Decisions Affecting Children), 2016*, sets out the genesis of Katelynn's Principle in a manner that honours Katelynn's memory and brings a lasting positive legacy to her unfortunate human life experience:

> *Katelynn Sampson was seven years old when she died from being brutally abused over many months by her legal guardians. Many factors contributed to Katelynn's vulnerable situation and to her case not being addressed by authorities.*
>
> *The jury in the coroner's inquest into the death of Katelynn Sampson made 173 recommendations for preventing another tragic death. The first recommendation, referred to as Katelynn's Principle, places children at the centre of decisions affecting them. The jury requested that all parties to the Coroner's inquest ensure that Katelynn's Principle apply to all services, policies, legislation and decision-making affecting children.*

Unlike the current iteration of Bill 89, Bill 57 fills in a number of the missing links, having regard to the original Coroner's Jury formulation of Katelynn's Principle:

a) It names and sets out Katelynn's Principle in its entirety;
b) It has a Preamble that provides the context for the interpretation and application of Katelynn's Principle;

c) It includes a crucial element that could potentially have saved Katelynn's life – and is completely absent in Bill 89 – that is

> *Every person who provides services to children or services affecting children is a child advocate. Advocacy may be a child's lifeline and it must occur from the point of first contact and on a continuous basis thereafter*; and

d) It fulfills the Coroner's Jury's intent 'that steps be taken to "ensure that Katelynn's Principle applies to all services, policies, legislation and decision-making that affects children" – in other words, that all of the elements of Katelynn's Principle are to apply to legislators, policymakers and decision-makers, such as courts and tribunals, in addition to service providers and that all these elements should apply across all provincial government ministries. In particular, section 2 of Bill 57 clearly stipulates:

> *2. This Act applies with respect to any person's power or duty to make decisions under Ontario legislation affecting children, including decisions relating to,*
>
> *(a) Child welfare services within the meaning of the Child and Family Services Act;*
> *(b) The justice system; and*
> *(c) The education system.*

Any attempt to limit the application of Katelynn's Principle to the child welfare arena and the subject-matter of Bill 89, would not be consistent with the original intent of the Coroner's Jury in the Katelynn Sampson Inquest and would run the risk of reading narrow preconditions into the implementation of that Principle that were never intended – such as has occurred in the case of Jordan's Principle – a 'child first' principle that has been narrowly construed by the federal government, but was originally intended to ensure that jurisdictional conflicts do not cause First Nations children to suffer any denial, delay or disruption of any services that would otherwise be provided to other children requiring the same services.

Recommendation 4: That Ontario Bill 57 proceed through Committee, subject to any appropriate amendments, and be enacted as a companion piece of legislation that complements Bill 89 by improving the likely implementation of Katelynn's Principle in the child welfare sector and by ensuring its application to all provincial government ministries.

E) LEGISLATED REQUIREMENT OF CHILD RIGHTS IMPACT ASSESSMENTS (CRIA)

The implementation of the UN Convention on the Rights of the Child is monitored by the United Nations Committee on the Rights of the Child, a group of 18 international child rights experts whose home base is in Geneva Switzerland. In many of its commentaries, the Committee has noted that the general measures of implementation or child-sensitive mechanisms that can assist in the implementation of the Convention and the progressive fulfillment of children's rights include the concept of Child Rights Impact Assessments.

As previously mentioned in the Overview of UNICEF Canada's Position, the Coroner's Jury in the Katelynn Sampson Inquest recognized the benefits of applying Child Rights Impact Assessments to a vast array of decisions, including legislation, regulations, policies and procedures to screen for the impact on children's rights.

A Child Rights Impact Assessment is a tool for assessing/reviewing the impacts of an existing or proposed policy, law, program, or particular decision on children and their rights. The UN Convention on the Rights of the Child is the framework used to assess these impacts. The impacts revealed can be positive or negative; intended or unintended; direct or indirect; and short-term or long-term. The focus is to understand how the matter under assessment will contribute to or undermine the fulfillment of children's rights and well-being – and to be able to maximize positive impacts and avoid or mitigate negative impacts.

Currently, Child Rights Impact Assessments are being used across all government departments in New Brunswick whenever a proposed law, regulation or policy is being considered by Cabinet from any provincial government department. In Saskatchewan, a Child Rights Impact Assessment has been used within the Ministry of Social Services to support child welfare and adoption legislative reform. It continues to be used on an ongoing basis in the development of new legislative amendments and policy initiatives. In both provinces, new Child Rights Impact Assessment tools have been developed to facilitate this work.

There are a number of benefits of Child Rights Impact Assessments that have been documented in the literature:

a) Placing children at the centre and making them visible in all forms of public policy decision-making;
b) Bringing the voices and lived experience of children into the process;
c) Maximizing positive impacts and avoiding/mitigating negative impacts for children, including identifying unintended negative consequences of proposals;

d) Determining the cumulative 'best interests of the child' through a structured comprehensive analysis;
e) Bringing research evidence and best practice knowledge to bear on public policy decisions that affect children;
f) Avoiding/minimizing discrimination and inequitable treatment of different groups of children by considering the variable impacts for different groups of children;
g) Improving cross-ministry government coordination by considering impacts upon the 'whole child' since children cross over into various service sectors;
h) Protecting the integrity of the proposed law or policy against later allegations of Charter and Convention breaches, particularly through an early impact assessment process; and
i) Increasing the legitimacy of and public support for government decisions affecting the rights and well-being of children through greater accountability and transparency.

UNICEF Canada supports a mandatory legislative requirement for the use of Child Rights Impact Assessments both on an ongoing basis and at the legislated 5-year review intervals as providing the best opportunity for full child rights implementation.

The recent experience with Gender Based Analysis Plus (GBA+) within the federal government is instructive and points to the need for Child Rights Impact Assessments to be made mandatory through appropriate amendments to Bill 89.

The idea behind GBA+ is to think about how a certain law or policy might affect men and women, or boys and girls in different ways, along with taking age, income, culture, ethnicity and other intersecting factors into account. In that case, the absence of any mandatory legislative authority to support GBA+ appears to have led to only sporadic use within federal government departments with inconsistent monitoring, evaluation and enforcement, even though GBA was adopted by the federal government 22 years ago.

In its 2016 Report, *Implementing Gender-Based Analysis Plus in the Government of Canada,* the House of Commons Standing Committee on the Status of Women saw the need for GBA+ processes to be made mandatory through legislation, and recommended, among other things, "[t]hat the Government of Canada introduce legislation, by or before June 2017, which legislates that Gender-Based Analysis Plus (GBA+) is applied to all proposals before they arrive at Cabinet for decision-making…"

Recommendation 5: That a new subsection 1(4) be added to Bill 89 to read or approximate "In giving effect to the paramount and other purposes enumerated in this section, a process of Child Rights Impact Assessment, using the United Nations Convention on the Rights of the Child as a foundational framework, shall be used by the Ministry of Children and Youth Services on an ongoing basis to evaluate the impact of both existing and proposed future legislation, regulations, directives, policies and procedures on the rights and best interests of children falling within the Ministry's mandate."

Recommendation 6: That section 314 of Bill 89 be amended to include a requirement that future legislated periodic reviews of the *Child, Youth and Family Services Act* be grounded in a Child Rights Impact Assessment framework

2) CHILD PROTECTION

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A) INCREASE OF CHILD PROTECTION AGE JURISDICTION WHETHER CONSENSUAL OR NON-CONSENSUAL ON PART OF CHILD

UNICEF Canada supports subsection 2(1) of Bill 89, which defines a 'child' as meaning "a person younger than 18", which is, as explained later, consistent with article 1 of the United Nations Convention on the Rights of the Child.

In Ontario, under the current provisions of the *Child and Family Services Act*, a child must be under 16 years of age in order for a Children's Aid Society to investigate child protection concerns. If a 15 year old child is being physically abused, sexually abused or neglected by a parent or other caregiver and the matter is referred to a Children's Aid Society by a member of the community, the Society receiving the information is legally mandated to investigate and provide protection and support. If, however, the young person turns 16 years of age, the very same Society would be prevented from conducting an investigation or providing protection and support under the *Child and Family Services Act*, thus leaving the young person potentially unprotected.

Ontario's definition of 'child' in Part III of the *Child and Family Services Act* is out of step with most other provinces. Amending the child protection age jurisdiction in Ontario up to age 18 would bring it into line with Article 1 of the Convention which stipulates:

> *For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier*.

In its reporting guidelines, the UN Committee on the Rights of the Child asks States Parties for information on the definition of child' in domestic legislation, and in its last set of Concluding Observations to Canada, the Committee set out the following recommendation for Canada to, among other things, ensure that the definition of 'child' in its many statutes is in "full compliance" with article 1 of the Convention.

> *30. The Committee is concerned that not all children under the age of 18 are benefiting from the full protection under the Convention, in particular children who in some provinces and territories, can be tried as adults, and children between the ages of 16 and 18 who are not appropriately protected against sexual exploitation in some provinces and territories.*
>
> ***31. The Committee urges the state party to ensure the full compliance of all national provisions on the definition of the child with article 1 of the Convention, in particular to ensure that all children under 18 cannot be tried as adults and all children under 18 who are victims of sexual exploitation receive appropriate protection.***

UNICEF Canada recognizes that some stakeholders have argued that expanding child protection jurisdiction up to age 18 should be limited to a consensual or voluntary regime, While we acknowledge the evolving capacity of children and the importance of giving more weight to their views according to their age and maturity, that should not, in our view, turn them into the ultimate decision-makers. To our knowledge, such a purely consensual regime has not been adopted for 16 and 17 year olds in any other Canadian jurisdiction and would undermine children's rights under articles 19 and 3 of the UN Convention on the Rights of the Child.

Article 19 of the Convention guarantees to all children the right to protection from all forms of violence. It states:

> *1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

> *2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as, appropriate, for judicial involvement.*

In its General Comment No. 13 on article 19 of the Convention, "The right of the child to freedom from all forms of violence", the UN Committee on the Rights of the Child makes it clear that the State has a positive obligation to protect all children from violence and children have the corollary right to expect to be safe and protected from violence of all kinds until they reach adulthood. This is not simply a matter of the State choosing to be benevolent towards children or children having the right to veto the State's protective intervention.

> ***13. The human rights imperative:*** *Addressing and eliminating the widespread prevalence and incidence of violence against children is an obligation of States parties under the Convention. Securing and promoting children's fundamental rights to respect for their human dignity and physical and psychological integrity, through the prevention of all forms of violence, is essential for promoting the full set of child rights in the Convention. …Strategies and systems to prevent and respond to violence must therefore adopt a child rights rather than a welfare approach.*

Article 3(1) of the Convention sets out the right of children to have their best interests treated as a primary consideration in all decisions affecting them:

> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

While 16 and 17 year old children have a right under article 12 of the CRC to express their views freely and be fully heard about whether they wish to come into care, that should not translate as a right to veto the need to be protected from abuse, neglect or other forms of exploitation under article 19 of the CRC and to have their need for protection and best interests determined by a court under article 3 of the CRC. This interrelationship between articles 12 and 3 of the Convention was canvassed by the UN Committee on the Rights of the Child in its General Comment No. 12 on 'The right of the child to be heard':

> *Article 3 is devoted to individual cases, but, explicitly, also requires that the best interests of children as a group are considered in all actions concerning children. States*

parties are consequently under an obligation to consider not only the individual situation of each child when identifying their best interests, but also the interests of children as a group. Moreover, States parties must examine the actions of private and public institutions, authorities, as well as legislative bodies. The extension of the obligation to 'legislative bodies' clearly indicates that every law, regulation or rule that affects children must be guided by the 'best interests' criterion.

…There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

Having an avenue for 16 and 17 year olds to be found in need of protection and subject to court ordered supervision or in care protection orders is an important requirement to round out the proposed legislative amendments. This would be beneficial in the following situations:

a) Where the 16 or 17 year old is developmentally delayed and lacks the capacity to enter into an agreement with a Children's Aid Society for services and support;

b) Where the 16 or 17 year old declines to enter into an agreement for services and support with a Children's Aid Society as a result of undue influence exerted by a parent, custodian, peer or other person, such as a pimp or human trafficker;

c) Where the 16 or 17 year old does not accurately perceive the level of risk in his or her living situation (for example, where his or her judgement is impaired by virtue of an addiction or mental illness) and does not wish to enter into an agreement for services and support, but the Children's Aid Society assesses the child as being in need of protection and as requiring protection and support;

d) Where the 16 or 17 year old can benefit from a lifeline or gateway to a range of services offered by the Children's Aid Society and other agencies that he or she may not realize is available to him or her;

e) Where the Children's Aid Society is not seeking the child's removal from his or her home, but is merely seeking to provide supports or to obtain a supervision order from the court;

f) Where the Children's Aid Society declines to enter into an agreement with the 16 or 17 year old – perhaps due to budgetary pressures or constrained priority setting; or

g) Where the initiation of court proceedings could lead to the supportive intervention of the Children's Aid Society, the Court, the child's counsel, or an outside service provider or mediator – potentially leading to the Society withdrawing its protection application in respect of the 16 or 17 year old before the court and subsequently entering into an agreement for services and support with the particular child.

Other checks and balances in the system include:

a) the mandatory requirement for a Children's Aid Society to bring the matter before the court within 5 days where it has removed a child from his or her home;
b) the potential sanction of a costs order against the Society where it has been found to have acted in bad faith;
c) the high standard of independent legal representation for children in the Province of Ontario; and
d) The Court's consideration of the best interests of the child is to include, among other factors, "the child's views and wishes, given due weight in accordance with the child's age and maturity [see subsection 73(3) of Bill 89].

Section 76 provides that 16 and 17 year olds may enter into agreements for services and supports with a Children's Aid Society on the basis of their mutual consent. UNICEF Canada supports this expanded consensual agreement regime for 16 and 17 year olds and sees that as the vehicle of preference, but not as the only vehicle for admission into Society care for 16 and 17 year olds.

Although somewhat ambiguous, section 73 appears to set out a number of grounds that would enable a Children's Aid Society to initiate child protection services on behalf of a 16 or 17 year old, including the bringing of an application before the court to have a child found in need of protection, whether consensually or non-consensually through one or more clauses 73(2)(a) to (o). Some greater clarity regarding clause 73(2)(o), in particular, would also be welcome. That provision allows a child to be found in need of protection where "the child is 16 or 17 and a prescribed circumstance or condition exists." UNICEF Canada supports this expanded age jurisdiction in the case of non-consensual child protection support or intervention, where necessary.

Recommendation 7: That the upper age jurisdiction for child protection be increased to age 18.

Recommendation 8: That the right to protection from all forms of abuse, neglect, or exploitation under article 19 of the UN Convention on the Rights of the Child be extended to all children up to the age of 18, whether such protection is consensual or non-consensual on the part of the child.

B) DUTY TO REPORT – PENALTY FOR NON-PROFESSIONALS

Subsection 122(9) of Bill 89 currently sets out as a penalty "a fine of not more than $5,000" (increased from $1,000) for professionals who fail to report a reasonable suspicion that a child may be in need of protection, but imposes no penalty for members of the public who fail to discharge the same reporting duty.

Our proposal that the duty to report for non-professionals be strengthened by imposing a penalty for failure to report is consistent with recommendation 7 of the Katelynn Sampson Inquest Jury Verdict, which states:

> *The Ministry of Children and Youth Services consider revising the Child and Family Services Act to include penalties for non-professionals who have knowledge of child abuse and fail to exercise their "Duty to Report" as citizens.*

The current distinction between professional and non-professional reporting duties is likely a throwback to the time when Ontario's *Child and Family Services Act* set out two distinct reporting duties – a professional reporting duty based upon a reasonable suspicion that a child is in need of protection and a non-professional reporting duty based upon a reasonable belief that a child is in need of protection (requiring a higher level of certainty). This then gave rise to two distinct approaches to penalties or sanctions in the event of non-compliance.

In our view, the underlying policy objective should be that the protection of all children from harm is everyone's business and that there is the potential for a penalty to be imposed whenever any person fails to discharge his or her statutory reporting duty.

While we support a penalty being added for non-professionals who fail to fulfill their reporting duty, we take no position as to whether that penalty should be the same as for the professional who fails to report (a fine of not more than $5000) or some lesser amount. In fairness, any

imposition of a fine on members of the public for non-reporting should be accompanied by a robust public education campaign on the duty to report.

Recommendation 9: That the duty to report for non-professionals be strengthened by imposing an appropriate penalty for failure to report.

C) DUTY TO REPORT – EQUAL APPLICATION TO ALL CHILDREN

Subsection 122(4) of Bill 89 should be removed. It currently stipulates that that there is no reporting duty in the case of 16 and 17 year olds who may be in need of protection, but there is also no penalty for choosing to report. This provision, if permitted to stand, would likely cause much confusion, leading to a 'discretionary reporting duty' where some individuals will choose not to report based upon the mistaken belief that a younger child is 16 or 17 years of age. Unfortunately, there have already been far too many situations of child deaths and serious injuries resulting, in part, from confusion about one's child protection reporting duty.

A differential reporting duty based upon the age of the child has the potential to produce serious uncertainty in the minds of professionals and non-professionals alike, and a sense that greater certainty of age verification is a necessary precondition prior to a report being made to a Children's Aid Society. It could also serve as a disincentive to report in those situations where the individual does not want to become involved in a so-called 'private parent-child conflict.'

Once the age jurisdiction is increased for child protection to include 16 and 17 year olds, it is only logical, in our view, that the duty to report for that same age group should apply. Education on the duty to report is a key consideration in referencing some of the relevant considerations that the public and professionals should take into account, when deciding whether to report a reasonable suspicion of need for protection in the case of 16 and 17 year olds.

Recommendation 10: That subsection 122(4) of Bill 89 be removed and that the statutory child protection duty to report apply equally to all children, including 16 and 17 year olds.

3) MODERNIZING CHILD PROTECTION LEGISLATIVE LANGUAGE

UNICEF Canada applauds the Ministry of Children and Youth Services for making the changes in legislative language Identified in the explanatory notes to Bill 89:

Significant changes are made to terminology. The terms society ward and Crown ward are no longer used. Instead, the new Act refers to children who are in interim society care or extended society care. The new Act also does not refer to children being abandoned or runaways.

For too many years, children coming into contact with the child welfare system have been the subject of demeaning and stigmatizing terminology. This has not been deliberate on the part of service providers and decision-makers, but this archaic language has seeped into the child welfare culture and become a staple of every day practice.

The impact of such labels can be devastating to children and youth who are healing from neglect, abuse and exploitation by their families of origin. It is critically important to change the lexicon in the system to better affirm to children and youth that they are not offenders, victims, or the property of others, but rather individuals full of potential for achievement and success in each of their own ways.

One of the most prominent terms that has garnered criticism over the years and is still retained in Bill 89 is the word 'apprehension', with all its implicit connotations of criminality. For many decades, one has heard statements of concern within the child welfare sector and beyond, such as "we apprehend criminals – we should not be speaking about apprehending children."

Technically, an 'apprehension' is meant to denote a non-consensual admission of a child into child welfare care. In order to capture this reality, UNICEF Canada is proposing that that the terms 'apprehension' and 'apprehend(s)' be replaced with the words 'removal' and 'remove(s)'. In our view, the language of 'removal' strikes the right balance between moving away from criminal justice terminology without sanitizing the impact of the act of a non-consensual separation of a child from his or her parents or caregivers - and in some cases the additional impact of separation from the same child's community, extended family, culture and language. A case in point is British Columbia's *Child, Family and Community Service Act*, which uses the language of 'removal' as opposed to 'apprehension':

Removal of child
30 (1) A director may, without a court order, remove a child if the director has reasonable grounds to believe that the child needs protection and that

(a) the child's health or safety is in immediate danger, or
(b) no other less disruptive measure that is available is adequate to protect the child.

(2) A director may, without a court order and by force if necessary, enter any premises or vehicle or board any vessel for the purpose of removing a child under subsection (1) if
(a) the director has reasonable grounds to believe that the child is in the premises or vehicle or on the vessel, and
(b) a person denies the director access to the child or no one is available to allow access to the child.
(3) If requested by a director, a police officer must accompany and assist the director in exercising the authority given by this section.
(4) A director's authority or duty under this Act to remove a child applies whether or not
(a) a family conference, mediation or other alternative dispute resolution mechanism is scheduled or in progress,
(b) a date is set for hearing an application under section 29.1, or
(c) any other steps have been taken under this Act with respect to the child.

As a lawyer, I recognize that changing legislative language is not always easy and may open the door to legal challenges. However, at UNICEF Canada, we take the view that it is more important to convey a strong message to children and families that they are respected and that we want to do whatever we can to humanize their situation.

In the Children in Limbo Task Force's earlier 2014 report to the Ministry of Children and Youth Services on the topic of modernizing the language of the *Child and Family Services Act*, the following recommendations were made:

1. *Undertake a systemic review of the language used in the CFSA through the lens of the United Nations Convention on the Rights of the Child.*

2. *Consider using the 'Child Rights Impact Assessment' developed by UNICEF as a tool in this process.*

3. *Ensure that consultation with youth in care and youth formerly in care becomes an integral part of the review process across the Province. This will help to ground the language of the legislation in the reality of the youths' experiences.*

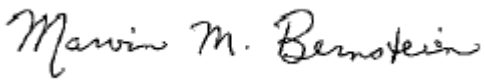
Recommendation 11: That any remaining stigmatizing and demeaning child protection legislative language contained in Bill 89 be further modernized through the use of the vehicles of the United Nations Convention on the Rights of the Child; a Child Rights Impact Assessment analysis; and engagement with youth currently and formerly in care.

Recommendation 12: That the terms ‘apprehension’ and ‘apprehend(s)’, as currently found in Bill 89, be replaced with the terms ‘removal’ and ‘remove(s)’.

CONCLUSION

As the title of this brief suggests, this is a rare moment in time when Bill 89 provides us with an opportunity to establish a revitalized child welfare system that puts children at the centre. It is therefore vitally important to take the time to get this right in order to avoid unintended negative consequences. This will take a concerted effort on everyone’s part, but the potential benefits are enormous.

Respectfully submitted on behalf of UNICEF Canada by:



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