



BILL S-7: the *Zero Tolerance for Barbaric Cultural Practices Act*

**Brief submitted by UNICEF Canada
to the House of Commons Standing Committee on
Citizenship and Immigration**

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INTRODUCTION

This brief is submitted by UNICEF Canada to the House of Commons Standing Committee on Citizenship and Immigration in response to Bill S-7, the *Zero Tolerance for Barbaric Cultural Practices Act*, introduced for first reading in the House of Commons on 29 January 2015.

The stated intention of this bill is to curb practices in Canada that exploit children and promote gender inequality, including forced/child marriages and spousal abuse. UNICEF Canada welcomes Canada's leadership on the issue of forced marriage. Canada has demonstrated a commitment to reducing the incidence of forced marriage worldwide. However, we take the position that some of the provisions are not supported by available evidence or may set off unintended negative impacts for children's well-being and the enjoyment of their rights under the United Nations Convention on the Rights of the Child. We therefore ask the Committee to consider our proposed amendments to Bill S-7 to increase the protection afforded vulnerable children and the bill's alignment with children's human rights.

UNICEF Canada is of the view that the term 'barbaric' in the short title of the bill stands in contradiction to the principles of respect, dignity and tolerance, which are values that Canada seeks to instill in and toward its children. **We recommend that the short title of the bill be replaced with a title which succinctly and neutrally reflects the actual subject matter of the bill.**

UNICEF Canada takes the position that more research and consultation are required before determining whether a particular federal minimum age of marriage is necessary, and if so, what that minimum age threshold should be, or whether a consent and capacity-based regime alone is sufficient. **We recommend that the introduction of a federally mandated minimum age of marriage, as proposed in Bill S-7, be withdrawn until further evidence-informed analysis and consultative processes with children and youth and other relevant stakeholders have been conducted to determine what course of action will serve the best interests of Canada's children and youth, having regard to careful consideration of each of the three options of a) a federally mandated minimum age of marriage of 18, subject to court ordered exceptions for 16 and 17 year-olds; b) a federally mandated minimum age of marriage of 16, as currently proposed in Bill S-7; and c) a consent and capacity-based regime alone.**

UNICEF Canada supports a strong commitment to evaluating the impacts of any enactment or implementation of an age-based or consent and capacity-based regime for marriage. **We recommend that regardless of which approach is adopted regarding the issue of a federally mandated minimum age of marriage, the impacts of such legislation be reviewed through a structured and consultative process of Child Rights Impact Assessment within a reasonable period of time following its implementation to determine whether it is having the desired effects.**

UNICEF Canada is concerned about children's increased potential for criminal liability as a result of proposed changes to the *Criminal Code* and the *Youth Criminal Justice Act*. Children are the intended subjects of protection in Bill S-7 and there is no compelling reason to justify

increasing criminal sanctions against them in the context of protection from forced marriage. Should a child be implicated as a potential victim, witness or facilitator in a possible situation of forced marriage, alternative interventions should be pursued such as a special program of prevention and child and family counselling under the auspices of child welfare authorities or community based organizations with appropriate competencies. **We recommend that children and youth be exempt from the measures set out in the proposed new sections 293.1 and 293.2 of the *Criminal Code*, and the proposed amendments to subsection 14(2) of the *Youth Criminal Justice Act*.**

UNICEF Canada is concerned about the risk of retribution to children implicated in a forced marriage situation that can result when a family member or an adult agent acting on their behalf is summoned to appear before a court, and possibly subject to a peace bond pursuant to proposed *Criminal Code* provisions. **We recommend that law enforcement authorities consult with child protection specialists (e.g., child welfare agencies or appropriate community based services), to the extent possible, prior to commencing a legal process involving criminal law sanctions so that less intrusive and/or supportive alternatives to protect and assist the child(ren) and restore or preserve their familial relations can be identified and provided.**

Where a child or children is/are separated from a parent who seeks to emigrate to, or remain in, Canada and dissolves a polygamous union to do so, UNICEF Canada is concerned about the impact on their children's relationship to the parent including access to the parent – which may in turn affect their access to financial support, their standard of living, their education, and other rights and opportunities to develop and thrive. **We recommend that Canada take all due legal and administrative measures to ensure the unfettered access across borders by a child or children to a parent from whom they have been separated in the context of immigration - such as where a parent dissolves a polygamous union for the purpose of emigration to Canada and leaves a child or children behind in the country of origin, or where a parent is removed from Canada due to a polygamous union, but their Canadian-born children remain in Canada.**

ABOUT UNICEF

The United Nations Children's Fund (UNICEF) works in 190 countries through country programs and National Committees. 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 UN 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 the world's leading child-focused humanitarian and development agency. Through innovative programs and advocacy work, we save children's lives and secure their rights in virtually every country. Our global reach, unparalleled influence on policymakers, and diverse partnerships make us an instrumental force in shaping a world in which no child dies of a

preventable cause. 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.

POSITION OF UNICEF CANADA

Addressing the issue of child/ forced marriage is welcomed by UNICEF Canada as a top foreign affairs and international development policy focus for Canada. The development of this bill also represents an important contribution to curbing violence against children. UNICEF Canada appreciates Canada's leadership toward securing a UN resolution, introduced and led by Canada and Zambia, adopted 21 November 2014, toward strengthening efforts to prevent and eliminate child, early and forced marriage, building on Canadian-led inaugural UN resolutions on this issue adopted by the United Nations Human Rights Council (UN HRC) and United Nations General Assembly (UNGA) in 2013. Canada continues to demonstrate multilateral leadership to ensure this is a priority issue and meaningfully included in the Post-2015 development agenda. In 2013, the Department of Foreign Affairs, Trade and Development (DFATD) established the Child, Early and Forced Marriage Unit and further established the Vulnerable Children's Consular Unit, with a broad mandate for child protection. Canada has also increased programming on child, early and forced marriage.

Ending child marriage is included as a priority in UNICEF and UNICEF Canada's joint policy paper on ending violence against children (2014) and ending and preventing child, early and forced marriage is also included as a priority policy recommendation in a paper by the International Child Protection Network Canada (ICPNC) on strengthening Canada's efforts to promote child protection, of which UNICEF Canada is a member.

Bill S-7 has the potential to advance the protection of children from exploitation and harm, particularly in the domestic and immigration context, but UNICEF Canada urges further consideration and amendments to strengthen the rights of children, as set out in the Convention on the Rights of the Child, and to avoid potential unintended consequences the proposed changes may have on vulnerable children.

ANALYSIS WITH RECOMMENDATIONS

Short Title of Bill S-7

UNICEF Canada disagrees with the inclusion of the term 'barbaric' in the title of this legislation. While forced marriage and other harmful practices may be extremely harmful in their effects, they are often not punitive in their intent. That is, individuals who commit harmful practices do so for a myriad of reasons; for some, it is seen as a lesser evil than a greater harm that would

befall the individual if they don't undergo the harmful practice. For example, forced marriages may be condoned by a parent in order to provide economic stability and a source of reliable income for their child (from an older, established and employed spouse). The term 'barbaric' is far too simplistic to encapsulate the complex problems that lead to the perpetuation of harmful practices. It will not succeed in discouraging these practices simply because of its so-called 'shock value'.

Forced marriage has been addressed in numerous international conventions. The United Nations Committee on the Rights of the Child has addressed forced marriage in both its General Comment 13 (hereinafter referred to as UNCRC GC13) as well as in General Comment 18 (UNCRC GC 18). In UNCRC GC13, forced marriage and early marriage are defined as a form of violence, falling under the category of 'harmful practices'. Likewise in UNCRC GC18, forced marriage is considered a 'harmful practice'. Nonetheless, in neither of these documents is the word 'barbaric' considered necessary to convey the severity of this type of harm.

Article 29 of the Convention on the Rights of the Child states that,

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

UNICEF Canada holds the view that the term 'barbaric' stands in contradiction to these principles of respect, dignity, and tolerance. The inclusion of the term 'barbaric' may serve to discourage individuals from coming forward. Children in particular may not wish to, nor believe, that their parents are behaving in a 'barbaric' manner. They may also wish to avoid the stigma and reputational damage that such a term may invoke, should it become known that they are involved in a case being prosecuted under this legislation. No child wants to be the son or daughter of a 'barbarian'.

Furthermore, the short title of the bill is misleading and suggests that violence against women and children is a cultural issue which is limited to certain communities. This is an oversimplification of the problem, as harmful practices are not necessarily cultural, but rather the outcome of underlying social, educational and economic factors which contribute to discrimination and violence against women and children. Such an inflammatory title compromises the right of children to take pride in their cultural identity and enjoy harmonious family relationships.

RECOMMENDATION 1: That the short title of the bill be replaced with a title which succinctly and neutrally reflects the actual subject matter of the bill.

Age of Marriage

In UNICEF Canada's view, the issue of a minimum age of marriage is not a clear-cut one. The question of establishing a national uniform minimum age of marriage is an important one but raises a number of important questions. For example, are there enough youth at risk of being forced into marriages in order to propose an age of marriage that justifies taking away the right to self-determination of all young people in the country? Can the requirement of obtaining parental consent be replaced with the need to secure a court order of approval, without becoming too prohibitive and cumbersome a process to impede young people's access to the courts? The commendable goal of this proposed legislation must be balanced against its likelihood of effectiveness, as well as what may be viewed as the erosion of children's rights to self-determination. Careful consideration must be given to whether the establishment of a minimum age below which no marriage can be contracted, and enforced by criminal sanction, is preferable to a consent-based regime, supplemented by parental approval and/or judicial oversight, such that a child with capacity and sufficient maturity may determine his or her own best interests. There currently is not enough data available to assist in determining an appropriate course of action that gives effect to the best interests of the child.

One must also keep in mind that in accordance with the constitutional division of powers, and the exclusive power of the provinces to make laws in relation to the solemnization of marriage, the provinces and territories could, if Bill S-7 were to be enacted, still prescribe additional requirements pertaining to the prerequisite of parental or judicial consent for marriages between the national minimum age and the age of majority.

As a consequence, these considerations have caused UNICEF Canada to propose that no federal legislated minimum age of marriage be enacted until there is a careful examination of three options, which consist of a) a federally mandated minimum age of marriage of 18, subject to exceptions for 16 and 17 year-olds; b) a federally mandated minimum age of marriage of 16, as currently proposed in Bill S-7; and c) a consent and capacity-based regime.

Option 1 – Federal Minimum Age of Marriage at 18 Years (with exception for 16 and 17 year-olds based on court approval)

The proposed amendments to the *Civil Marriage Act*, as set out in Bill S-7, would create a new national minimum age of 16 for marriage, below which no marriage could be contracted, and without any enumerated exceptions.

UNICEF Canada recognizes the harm caused by early and forced marriages, and therefore encourages the discussion concerning a federally-regulated age of marriage in Canada. As noted by the United Nations Committee on the Rights of the Child in its recently issued General Comment 18 (hereinafter referred to as UNCRC GC18) paragraph 21,

Child marriage [also known as early marriage] is often accompanied by early and frequent pregnancies and childbirth, resulting in higher than average maternal morbidity and mortality rates. Pregnancy-related deaths are the leading cause of mortality for 15-19 year old girls (married and unmarried) worldwide. Infant mortality among the children of very young mothers is higher (sometimes as much as two times higher) than among those of older mothers. In cases of child and/or forced marriages, particularly where the husband is significantly older than the bride, and where girls have limited education, the girls generally have limited decision-making power in relation to their own lives. Child marriages also contribute to higher rates of school dropout, particularly among girls, forced exclusion from school, increased risk of domestic violence and to limiting the enjoyment of the right to freedom of movement. Forced marriages often result in girls lacking personal and economic autonomy, attempting to flee or commit self-immolation or suicide to avoid or escape the marriage.

UNCRC GC18 also speaks to forced marriage, noting in paragraph 18 that,

A child marriage is considered as a form of forced marriage given that one or both parties have not expressed their full, free and informed consent.

Paragraph 20 goes on to describe examples of when full, free and informed consent are lacking,

...such as when they have been married too young to be physically and psychologically ready for adult life or making conscious and informed decisions and thus not ready to consent to marriage.

Arguably the most simplistic way of preventing early and forced marriage and ensuring that parties to a marriage are capable of exercising full and free consent is to set a minimum age of marriage. This protectionist approach asserts the belief that older individuals are more capable than younger ones of stating their liberties, expressing their opinions and extricating themselves from undesirable situations. There is considerable support for this position, as UNCRC GC18 articulates in its paragraph 19,

Child marriage, also referred to as early marriage, is any marriage where at least one of the parties is under 18 years of age. The overwhelming majority of child marriages, both formal and informal, involve girls, although at times their spouses are also under the age of 18

UNCRC GC18 goes on to state,

The Committees recommend that the States parties to the Conventions adopt or amend legislation with a view to effectively addressing and eliminating harmful practices. In doing so, the State party should ensure that:

(f) A minimum legal age of marriage for girls and boys is established, with or without parental consent, at 18 years. When exceptions to marriage at an earlier age are allowed in exceptional circumstances, the absolute minimum age is not below 16 years, grounds for obtaining permission are legitimate and strictly defined by law and marriage is permitted only by a court of law upon full, free and informed consent of the child or both children who appear in person before the court;

UNICEF Canada appreciates that this approach may limit the occurrence of forced marriages in Canada, and enable the achievement of the stated intentions of Bill S-7.

It should be noted however that the UN Committee on the Rights of the Child's General Comment 18 does allow for some flexibility in the age of marriage in exceptional cases, noting that

As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions.

This guidance from the Committee on the Rights of the Child provides that in exceptional circumstances children who are 16 or 17 years of age may be mature and capable enough of making the decision to freely enter into marriage, but this must be carefully considered and sanctioned by a member of the judiciary. This is an important element, as decision-makers must recognize that restricting children's ability to make decisions about their own interests can in fact be harmful to their well-being.

As well, it is important to note that this most recent international normative guidance places more emphasis on judicial discretion than parental discretion. The former is more protective in circumstances of forced marriage, and is seen, for instance, in age of marriage legislation in Ireland, Italy, Sweden, Finland and the Slovak Republic.

Option 2 – Federal Minimum Age of Marriage at 16 Years (as currently proposed in Bill S-7)

Given that the UN Committee on the Rights of the Child recommends a minimum age of marriage of 18, at first glance it appears that the minimum age of 16, as proposed by Bill S-7, is inconsistent with this norm. A deeper understanding of the selection process that was utilized to come to the age of 16 in the drafting of Bill S-7 would assist in confirming that this decision was not made arbitrarily. A review of the OECD Family database on the minimum age for marriage (2013) fails to identify any country that has a strict minimum age of marriage of 16 for both genders. For example, Mexico has set a minimum age of 16 for the marriage of males, but 15 for females with parental consent, while Luxembourg has established a minimum age of 18 for the marriage of males, but 16 for females.

While several other international Conventions also recommend that States Parties set a minimum age of marriage, what that minimum age should be is frequently left open to interpretation.

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages states, in Article 2,

States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

In the follow-up Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Principle II further elaborates on this point, noting that,

Member States shall take legislative action to specify a minimum age for marriage, which in any case shall not be less than fifteen years of age; no marriage shall be legally entered into by any

person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses.

Canada is of course not obligated to abide by these provisions, having neither signed nor ratified the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. However these requirements are stipulated in other Conventions to which Canada is a ratifying party, notably Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women,

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Also of relevance is the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which Canada has ratified. Article 2, in particular, specifies,

With a view to bringing to an end the institutions and practices mentioned in article 1(c) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.

These provisions recommend the institution of a minimum age of marriage in States Parties, but allow for flexibility in the selection of what that age should be. Canada's selection of the age of 16 is therefore technically compliant with the guidance provided by these Conventions, albeit inconsistent with what appears to be international best practice.

That being said, it should be noted again that UNCRC GC 18 provides the most recent guidance pursuant to the Convention on the Rights of the Child, which Canada has ratified.

A final consideration, as noted above, is that there is not yet enough research or evidence to adequately assess the incidence of forced marriage in Canada. The number of forced marriages which occur in Canada every year is not known, nor can one definitively say who the primary organizers of forced marriages are. Therefore the introduction of an age of marriage at 16, without exceptions or caveats, as currently proposed by Bill S-7, may be ineffective in reducing the incidence of forced child marriage.

If forced marriages are, in fact, primarily instigated by one or both parties' parents, then the current provincial norm requiring underage spouses to acquire parental consent before marriage is a moot safeguard. Indeed this precondition suggests that current provincial and territorial legislation may not effectively protect against forced marriage, and that the requirement of parental consent may actually serve to facilitate forced marriage in some cases. Therefore while setting a minimum age of marriage at 16 years will protect the minor child's right to expression and opinion, it may not achieve the stated objectives of Bill S-7 in preventing forced marriage. This suggests that while setting a minimum age of marriage of 16 may be a positive step in the right direction, it should not be immune from future discussion and analysis.

Option 3 – Consent and Capacity--Based Regime Governing Marriage

As of yet, Canada has not enforced a minimum age of marriage federally outside of Quebec. Furthermore, while international conventions encourage the adoption of a minimum age of marriage, there is some question as to their efficacy and the consequential effects they might have on the fulfilment of all the rights of children.

Restricting children's capacities in areas where they are mature and their capacity has evolved to the point where they can reasonably give consent may interfere with their rights to freedom of opinion and expression, and there are conceivable situations where doing so could be harmful. These rights are well-articulated in articles 12 and 13 of the United Nations Convention on the Rights of the Child:

ARTICLE 12

1. States 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.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

ARTICLE 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

There is a fine balance to be found between setting a minimum age of marriage in order to protect against harmful practices such as forced marriage, in a manner that does not undermine children's rights to freedom of opinion and expression in line with their evolving capacities.

While introducing a minimum age of marriage is intended to protect young people from forced marriage, as well as marriage otherwise contrary to the best interests of young people who are still developing their capacities, it must be considered from a children's rights perspective in order to ensure that the minimum age is not so high as to detract from the rights and capacity of young people to act in their own best interests. It is for this reason that the United Nations Convention on the Rights of the Child, as well as the Committee on the Rights of the Child, has encouraged a flexible approach to this issue. Canadian legal jurisprudence also attempts to balance these rights in other serious life matters related to minimum ages including the right to make medical decisions or join the armed forces, recognizing not just a child's age but also their

autonomy, as defined by their evolving capacities. In this regard, the Committee has, in its General Comment 12, expressed the view that there is no minimum age threshold that activates the child's right to be heard in all cases under article 12 of the Convention on the Rights of the Child:

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice, which would restrict the child's right to be heard in all matters affecting her or him...

The Committee in the same General Comment goes on to provide guidance as to the interpretation of the phrase "Being given due weight in accordance with the age and maturity of the child":

*28. The views of the child must be "given due weight in accordance with the age and maturity of the child." This clause refers to the capacity of the child, which has to be assessed in order to give due weight to her or his views, or to communicate to the child the way in which those views have influenced the outcome of the process. **Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views.***

*29. By requiring that due weight be given in accordance with age and maturity, **article 12 makes it clear that age alone cannot determine the significance of a child's views. Children's levels of understanding are not uniformly linked to their biological age.** Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. For this reason, **the views of the child have to be assessed on a case-by-case examination.***

*30. **Maturity refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child. Maturity is difficult to define; in the context of article 12, it is the capacity of the child to express her or his views on issues in a reasonable and independent manner.** The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of the child.*

These arguments suggest that the creation of a minimum age of marriage may in fact, interfere with a child's right to be heard and to express their views. Proponents of this perspective might argue in favour of a consent and capacity-based regime to marriage, where age has no impact upon an individual's ability to marry. Federally, this is an approach that Canada presently exercises. Currently, the proposed minimum age of 16 for marriage is contained in federal legislation that applies only to the Province of Quebec. For purposes of the other provinces and territories, a minimum age is not specified in federal legislation and there is some question about the minimum age at common law. There is instead a whole kaleidoscope of different minimum ages of marriage in various Canadian jurisdictions, yet with little empirical evidence as to how these provisions are working in practice. In a country such as Canada, where a high premium is placed on an individual's human rights and their ability to exercise them, this is not altogether a bad thing. In fact UNCRC GC18 notes, in Paragraph 7,

*(32) In both instances, **the effective prevention and elimination of harmful practices require the establishment of a well-defined, rights-based and locally-relevant holistic strategy which includes supportive legal and policy measures, including social measures that are combined with***

a commensurate political commitment and accountability at all levels. The obligations outlined in CEDAW and CRC provide the basis for the development of a holistic strategy to eliminate harmful practices the elements of which are set out in this GR/GC.

Canada's current lack of a federally-mandated minimum age for marriage can be considered a rights-based and locally-relevant strategy. Whether or not this is the best approach for Canada, however, is difficult to determine, given a lack of information both on the efficacy of this current state of affairs as well as a lack of information about the occurrence of forced marriage domestically.

UNICEF Canada urges the Government of Canada in cooperation with provincial/territorial governments, First Nations and civil society organizations to undertake research and consultation to determine future directions of age of marriage legislation. Furthermore, throughout such a process, it is of paramount importance that the views and thoughts of those who this part of the legislation will most affect, children and individuals exposed to forced marriage, are consulted, and that their opinions and experiences are used to inform Canada's decision regarding the question of a minimum age of marriage. The guidance provided by the Committee on the Rights of the Child in its General Comment 18 is unquestionable in this respect:

Paragraph 44: The full and inclusive participation of relevant stakeholders in the drafting of legislation against harmful practices can ensure that the primary concerns related to the practice are accurately identified and addressed. Engaging with and soliciting inputs from practicing communities, other relevant stakeholders and members of civil society, is central to this process. Care should be taken, however, to ensure that prevailing attitudes and social norms which support harmful practices do not weaken efforts to enact and enforce legislation.

Paragraph 52: The best interests of the child and the protection of the rights of girls and women should always be taken into consideration and the necessary conditions must be in place to enable them to express their point of view and ensure that their opinions are given due weight. Careful consideration should also be given to the potential short- and long-term impact on children or women of the dissolution of child and/or forced marriages, return of dowry payments and bride price.

Paragraph 54: The Committees recommend that the States parties to the Conventions adopt or amend legislation with a view to effectively addressing and eliminating harmful practices. In doing so, the State party should ensure that:

- (a) The drafting process of legislation is fully inclusive and participatory. For that purpose, they should conduct targeted advocacy and awareness-raising and use social mobilization measures to generate broad public knowledge of and support for the drafting, adoption, dissemination and implementation of the legislation.*

All of these considerations suggest that regardless of which approach is adopted in setting a minimum age of marriage in Canada, the impacts of such legislation should be reviewed at a set time following its implementation to determine its impacts and whether it is having the desired effects. Indeed the setting of a minimum age of marriage is not something that should be taken lightly. An excellent starting point would be to review the current effectiveness of provincial and territorial marriage laws, to determine whether there is even a need to introduce a federally-mandated minimum age of marriage at this point in time. This would be a preferable alternative

to prematurely instituting an age of marriage without evidence indicating the need to and effectiveness of doing so.

RECOMMENDATION 2: That the introduction of a federally mandated minimum age of marriage, as proposed in Bill S-7, be withdrawn until further evidence-informed analysis and consultative processes with children and youth and other relevant stakeholders have been conducted to determine what course of action will serve the best interests of Canada's children and youth, having regard to a careful consideration of each of the three options of a) a federally mandated minimum age of marriage of 18, subject to court ordered exceptions for 16 and 17 year-olds; b) a federally mandated minimum age of marriage of 16, as proposed in Bill S-7; and c) a consent and capacity-based regime alone.

RECOMMENDATION 3: That regardless of which approach is adopted regarding the issue of a federally mandated minimum age of marriage, the impacts of such legislation be reviewed through a structured and consultative process of Child Rights Impact Assessment within a reasonable period of time following its implementation to determine whether it is having the desired effects.

Criminal Sanctions for Children

UNICEF Canada is concerned about children's increased potential for criminal liability as a result of proposed changes to the *Criminal Code* and the *Youth Criminal Justice Act*. Children are the intended subjects of protection in Bill S-7 and there is no compelling reason to justify increasing criminal sanctions against them in the context of protection from forced marriage. The introduction of criminal liability related to knowingly celebrating, aiding, or participating in a forced marriage should not apply to persons under the age of 18 years. If a child can be forced into marriage, they can also be forced into celebrating, aiding, or participating in a forced marriage. The way that the new section 293.2 of the *Criminal Code* is phrased, even the child-victim who is being forced to marry can be charged criminally as a person who "participates in a marriage rite or ceremony knowing that one of the persons being married is under the age of 16 years"

Children in conflict with the law are at further risk of reputational damage, permanent stigma negatively affecting education and employment opportunities, family disruption and potential acts of self-harm resulting from a sense of embarrassment and humiliation. Should a child be implicated as a potential victim or as a facilitator in a possible situation of forced marriage, alternative interventions should be pursued such as a special program of prevention and child and family counselling under the auspices of child welfare authorities or community based organizations with appropriate competencies.

Article 40(3) of the Convention on the Rights of the Child states that:

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular... **measures for dealing with such children without resorting to judicial proceedings**, providing that human rights and legal safeguards are fully respected.

These rights are reinforced in the United Nations Committee on the Rights of the Child's General Comment No. 10:

10. Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law.

26. States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected.

RECOMMENDATION 4: That children and youth be exempt from the measures set out in the proposed new sections 293.1 and 293.2 of the *Criminal Code*, and the proposed amendments to subsection 14(2) of the *Youth Criminal Justice Act*.

Use of Criminal Sanctions with Parents

UNICEF Canada is concerned about the risk of retribution to children posed by adults who are summoned to appear before a court, and possibly subjected to a peace bond pursuant to new *Criminal Code* provisions.

While peace bonds may be appropriate for adults to prevent a forced marriage, especially in extreme situations, the risk they pose of instigating retribution against or further endangering children in the case of forced/child marriage is significant. Particularly where children are involved, these sanctions should be utilized as an option of last resort or only in the most urgent situations. UNCRC GC18 recognizes this threat in its paragraph 50,

*Although criminal law sanctions must be consistently enforced in ways that contribute to the prevention and elimination of harmful practices, **States parties must also take into account the potential threats to and negative impact on victims, including acts of retaliation.***

Children who have undergone or who are at risk of forced marriage may be discouraged from coming forward due to the apprehension of having criminal charges laid against the person(s) contracting the marriage. This may be particularly relevant when the person contracting the marriage is a close family relation. A study undertaken by the South Asian Legal Clinic of Ontario noted this, stating:

Survey results revealed a consistent theme of shame from [Forced Marriage, hereinafter referred to as "FM"] FM clients. Survey results also revealed that a large majority of Forced FM perpetrators are family members. [The South Asian Legal Clinic of Ontario] SALCO case studies have revealed that time and again, FM clients have expressed concern about getting family members into trouble and wanting to protect their families regardless of their own victimization.

FM clients have indicated that they would be hesitant to seek outside assistance if this would result in criminal consequences for family members.

If children must expose their relatives to criminal liability in order to access services that could serve their own best interests, namely preventing or dealing with a forced marriage, then the addition of sections 293.1 and 293.2 to the *Criminal Code* can have the opposite of their intended effect: they are likely to discourage at least some children from reporting potential/plausible cases of forced marriage, rather than triggering other interventions that can support the child victim.

It is the view of UNICEF Canada that education and awareness-raising regarding the harm caused by forced marriages should continue to be relied upon as a key strategy, in tandem with appropriate legal measures. This is in line with Article 18 of the Convention on the Rights of the Child, which provides that,

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

RECOMMENDATION 5: That law enforcement authorities consult with child protection specialists (e.g., child welfare agencies or appropriate community based services), to the extent possible, prior to commencing a legal process involving criminal law sanctions, so that less intrusive and/or supportive alternatives to protect and assist the child(ren) and restore or preserve their familial relations can be identified and provided.

Children's Relationships with Parents – Proposed Amendments to the *Immigration and Refugee Protection Act*

Under the proposed new section 41.1 of the *Immigration and Refugee Protection Act*, a permanent resident or a foreign national would be inadmissible on grounds of practicing polygamy with a person who is or will be physically present in Canada at the same time as the permanent resident or foreign national.

The proposed amendment makes some problematic assumptions, which are underscored in a study undertaken by the South Asian Legal Clinic of Ontario previously referenced:

The Act makes the unfounded and problematic assumption that polygamous unions by their nature are abusive or coercive. This is not always the case. It further ignores the reality that polygamy has been illegal in Canada since 1892., and immigration law and policy already contain provisions addressing polygamous unions...Most critically, the suggested changes do not contain any protection or assistance framework for the victims of abuse and children in polygamous marriages...The tabled [A]ct appear[s] embedded in myths about practices of polygamy and forced marriages, including the assumption that all polygamous unions are without women's consent.

This proposed amendment raises a number of concerning scenarios, which UNICEF Canada has identified as a result of its participation and consultation with the Canadian Bar Association's national Children's Law Committee.

Under the proposed legislation, a foreign national who practices polygamy in their country of origin and is seeking temporary residence will be found inadmissible if they try to enter Canada with even one spouse. This would make it impossible for the children of polygamous relationships to be in Canada with both parents at the same time, thus losing the benefit of a meaningful relationship with the parent who already resides in Canada. For example, a father may already be a permanent resident in Canada. He then tries to sponsor a wife and their three children. The wife would be found inadmissible, as would be her children in accordance with the provisions of section 42.1 of the *Immigration and Refugee Protection Act*. As a consequence, the children will not be reunited with their father in Canada, and that important parental relationship will be impeded.

Also under the proposed legislation, once in Canada, a permanent resident who starts or resumes a polygamous relationship could be found inadmissible on this basis alone, without requiring evidence that the person misrepresented their situation in the immigration context or was convicted criminally. If so found to be inadmissible, the permanent resident could then be subject to removal. UNICEF Canada is concerned about what procedural protections would be afforded to the permanent resident, and/or his or her dependants, if such a concern were raised. Canadian-born children could be forced to sever a relationship with a parent who becomes subject to removal, or to both parents if the other parent has no status in Canada and a decision is made to leave the children in Canada (with other family, friends or in foster care). In addition to the loss of a significant relationship with a parent, there could be a loss of financial support and/or other benefits caused by the removal of a parent. Foreign national children could face removal as well, losing established ties to community, friends, family and services in Canada, or at a minimum, the severance of a relationship with the newly-found inadmissible parent.

A further concern is the impact of the dissolution of a relationship on children left behind in the country of origin. UNICEF Canada notes that there is a risk that the disallowance of residency or citizenship on the grounds of polygamy may result in a parent who seeks such status to dissolve a marriage/union(s) and leave a child or children behind. For example, if a man is seeking to enter Canada, but has two wives in his country of origin, he may seek to dissolve either one or both of those relationships in order to be considered admissible to Canada. Will the children from those unions then face a loss of financial support, educational or other opportunities, access to necessary health care or other services and/or stigmatization as a result of the "illegitimacy" caused by the need for the parent seeking admission to Canada as a permanent resident to convert their polygamous marriage to a monogamous one? In the case of a foreign national seeking temporary admission, the inability to enter Canada with even one spouse heightens the possibility that children will be left behind with the other parent in the country of origin, thus increasing the risk of stigmatization and the potential loss of support and services.

In all of these circumstances children's rights to family reunification would be denied. Articles 9 and 10 of the Convention on the Rights of the Child recognize the child's right to be protected from separation from their family, and the right to family reunification should they be separated across borders. Article 9 of the Convention on the Rights of the Child provides:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 10 of the Convention on the Rights of the Child additionally states:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, **applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner**. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. **A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents**. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

While UNICEF Canada does not condone the practice of polygamy and recognizes that polygamous unions can have negative effects on children, there are important benefits and bonds that all children receive from familial relationships, regardless of their structure. It is important that the positive and beneficial relationships that children have established with their parents not be broken as a result of this new legislation. While the dissolution of polygamous relationships may provide some benefit to the child(ren) of such unions, this should not overshadow the positive aspects provided by a child's relationship and psychological attachment to their parents, which should be allowed to continue regardless of the change in the family structure.

RECOMMENDATION 6: That Canada take all due legal and administrative measures to ensure the unfettered access across borders by a child or children to a parent from

whom they have been separated in the context of immigration – such as where a parent dissolves a polygamous union for the purpose of emigration to Canada and leaves a child or children behind in the country of origin, or where a parent is removed from Canada due to a polygamous union, but their Canadian-born children remain in Canada.

CONCLUSION

UNICEF Canada strongly supports the stated intention of Bill S-7, which is to curb practices in Canada that exploit children and promote gender inequality, including forced/child marriages and spousal abuse. In particular, UNICEF Canada welcomes Canada's leadership on the issue of forced marriage. However, some of the proposed amendments to existing legislation contained within this bill require further research, analysis and consultation with children and youth and other relevant stakeholders to ensure that we are not inadvertently victimizing and compromising the rights of the very children and other vulnerable persons this proposed legislation is meant to protect from abuse and exploitation.

Respectfully submitted on behalf of UNICEF Canada this 25th day of March, 2015 by:

"MMB"

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APPENDIX 'A' – LIST OF RECOMMENDATIONS

RECOMMENDATION 1:

That the short title of the bill be replaced with a title which succinctly and neutrally reflects the actual subject matter of the bill.

RECOMMENDATION 2:

That the introduction of a federally mandated minimum age of marriage, as proposed in Bill S-7, be withdrawn until further evidence-informed analysis and consultative processes with children and youth and other relevant stakeholders have been conducted to determine what course of action will serve the best interests of Canada's children and youth, having regard to careful consideration of each of the three options of a) a federally mandated minimum age of marriage of 18, subject to court ordered exceptions for 16 and 17 year-olds; b) a federally mandated minimum age of marriage of 16, as proposed in Bill S-7; and c) a consent and capacity-based regime alone.

RECOMMENDATION 3:

That regardless of which approach is adopted regarding the issue of a federally mandated minimum age of marriage, the impacts of such legislation be reviewed through a structured and consultative process of Child Rights Impact Assessment within a reasonable period of time following its implementation to determine whether it is having the desired effects.

RECOMMENDATION 4:

That children and youth be exempt from the measures set out in the proposed new sections 293.1 and 293.2 of the *Criminal Code*, and the proposed amendments to subsection 14(2) of the *Youth Criminal Justice Act*.

RECOMMENDATION 5:

That law enforcement authorities consult with child protection specialists (e.g., child welfare agencies or appropriate community based services), to the extent possible, prior to commencing a legal process involving criminal law sanctions, so that less intrusive and/or supportive alternatives to protect and assist the child(ren) and restore or preserve their familial relations can be identified and provided.

RECOMMENDATION 6:

That Canada take all due legal and administrative measures to ensure the unfettered access across borders by a child or children to a parent from whom they have been separated in the context of immigration – such as where a parent dissolves a polygamous union for the purpose of emigration to Canada and leaves a child or children behind in the country of origin, or where a parent is removed from Canada due to a polygamous union, but their Canadian-born children remain in Canada.

APPENDIX 'B' – REFERENCES AND SELECTED BIBLIOGRAPHY

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