

**BILL C-31: THE *PROTECTING CANADA'S
IMMIGRATION SYSTEM ACT***
Brief submitted by UNICEF Canada
to the
**House of Commons Standing Committee on Citizenship and
Immigration**
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INTRODUCTION

This submission has been prepared by UNICEF Canada in response to Bill C-31 (*The Protecting Canada's Immigration System Act*), an omnibus immigration and refugee bill, which rolls together the earlier anti-human smuggling bills C-4 and C-49, and sets out a number of proposed amendments to the *Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act* and the *Marine Transportation Security Act*.

ABOUT UNICEF

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. 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. UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. For more information about UNICEF, please visit www.unicef.ca.

POSITION OF UNICEF CANADA

UNICEF Canada strongly recommends that Bill C-31 be either withdrawn or referred to committee for further study and consultation. Although we acknowledge that the protection of the integrity of Canada's immigration system and the elimination of human smuggling are legitimate goals, we are concerned that many of the provisions of Bill C-31, as currently framed, are overly broad; provide for sweeping ministerial discretion without judicial accountability or other checks and balances in the system; are unconstitutional under the *Canadian Charter of Rights and Freedoms*; and violate Canada's international obligations, as stated in the United Nations Convention on the Rights of the Child.

UNICEF Canada is concerned that many of the provisions of Bill C-31 are harmful to asylum seekers and refugees and unfairly target children and their families in their impact. Under these proposed amendments, the Minister of Public Safety has a broad discretion to designate certain groups - including

families and children of certain ages - arriving in Canada as “irregular arrivals”, if the Minister either has “reasonable grounds to suspect” they were smuggled or thinks examination of the group’s members cannot be conducted in “a timely manner.” Where such a designation occurs under Bill C-31, a series of harms will likely occur and be imposed upon these vulnerable children and families:¹

- 1. Bill C-31 imposes a lengthy 12 month period of detention upon designated asylum claimants that will have negative impacts on children:** These parents and children, who are 16 and 17 years of age (and possibly younger children for whom there is an age question), will be subject to automatic and warrantless mandatory detention, without any obligation on the part of the federal government either to demonstrate appropriate justification for this detention or to provide the detainees with an objective review of their detention by an independent decision-maker for a period of 12 months. This is in contrast to all other refugee claimants who have a right to be brought before an independent decision-maker within 48 hours of being detained. This would violate the rights of every individual to non-arbitrary detention and an expeditious review under the *Canadian Charter of Rights and Freedoms* – and in the case of children, under the *Convention on the Rights of the Child*.
- 2. Bill C-31 imposes mandatory detention for 16 and 17 year old children designated as ‘irregular arrivals’ and will likely prevent them from being placed in a facility with both parents:** Men and women would likely be locked up in gender-segregated detention facilities or jails, while their 16 and 17 year old children would also be placed in automatic mandatory detention, so these children would likely end up in the same facility with one parent, but not with both parents. This forced separation from family is contrary to children’s *Convention* rights and to their well-being, in a variety of ways.
- 3. Bill C-31 allows for the discretionary detention of children designated as ‘irregular arrivals’ who are under 16 years of age and fails to provide such children with a voice in that process:** While children 15 and under do not have to be mandatorily detained with their designated parents and older siblings, the Minister of Public Safety retains the discretionary power to detain children under age 16, or to forcibly separate them from both accompanying parents, for 12 months. While there have been Ministerial statements advising that parents would be consulted as to the placement of these children, there have been no statements made to date about how the child’s views are to be taken into account in this decision-making process, or the future provision of resources to children in aiding them to express their views as to placement and continuing contact with detained parents and other siblings – such as through the vehicles of counsel, interpreters, and designated representatives.
- 4. Bill C-31 will, in its implementation, likely result in children designated as ‘irregular arrivals’ who are under 16 years of age being placed in ‘de facto’ detention with a parent of the same gender or referred to child welfare authorities, with risks occurring in either scenario:** In the case of children who are 15 and under and whose parents have been detained, they are faced with a Hobson’s Choice, in that they can either be placed in de facto detention with one of their parents in a jail or jail-like facility, where there are serious mental health risks, such as recurring nightmares, depression, self-harm, suicide and Post Traumatic Stress Disorder, often exacerbated by having experienced previous trauma by living in, or escaping from, their country of origin - or alternatively, they can be placed in the care of child welfare authorities,

where there are the risks of separation anxiety, language and cultural disruption, multiple placements, attachment disorders, and insufficient access/communication with parents and siblings.

5. **Bill C-31 fails to protect asylum-seeking children from inappropriate age assessment procedures:** Children of various ages may be exposed to inappropriate age assessment procedures to determine if they are under age 16 and immune from mandatory detention and eligible for admission to child welfare care. Medical assessments - including magnetic resonance imaging, bone and dental radiology and examinations of sexual maturity – have been found to be both invasive and inaccurate, but yet Bill C-31 provides no guidance on this subject.
6. **Bill C-31 deprives ‘irregular arrival’ refugees of the right to apply for permanent residence and seek sponsorship of their children/spouse left behind in their home country for a five years period, thereby impeding family reunification:** Under Bill C-31, persons whose refugee claim is accepted, if they were part of a designated group, will not be able to bring to Canada a child or spouse left behind for many years. Even if Canada has recognized these individuals as legitimate refugees, they will be denied the ability to apply for permanent resident status for a period of 5 years – a necessary step to sponsoring a close family member. Critical years in child development would pass with the prolonged risks associated with family separation.
7. **Bill C-31 deprives ‘irregular arrival’ refugees of the right to travel outside of Canada for any reason for 5 years and compels their regular reporting to immigration authorities:** Under Bill C-31, persons whose refugee claim is accepted, if they were part of a designated group, will still be required, for a 5 year period, to report regularly to immigration authorities for questioning and to produce documents (the purpose and the use of these inquiries being undefined) and will be prohibited from travelling outside of Canada for any reason for that same 5 year period, thus impairing their rights of mobility and family reunification.
8. **Bill C-31 allows ministerial discretion to designate countries as ‘safe’ and to revoke refugee status up to the date of citizenship, thereby immediately deporting adults and children to their subjectively perceived transformed ‘safe’ country of origin:** Children and families could have their refugee status revoked at any time up until they gain citizenship - a new power conferred upon the Minister of Public Safety in Bill C-31 – which, in turn, will result in the automatic rescission of permanent resident status and removal from Canada. Even if parents and/or their children are permanent residents, and have resided in Canada for decades, the Minister can apply at any time for a finding that a refugee is no longer at risk in his or her former country, resulting in immediate deportation, with no right of appeal. The fact that a spouse is in Canada and that there are other Canadian-born children would not prevent such deportation. In this regard, Bill C-31 also gives the Minister of Public Safety broad discretion to designate refugee source countries as “safe”, without being obligated to seek the opinion of experts regarding country conditions, or to consider the ‘differential risk’ faced by certain minorities in a country that may be safer for some children and their families than others.

In our submission, any proposed amendments to our federal immigration and refugee legislation should be reasonable, fair and reflect the reality that children will continue to arrive in Canada through various means as part of the rise in international migration. Political upheavals, conflict and persecution, climate

change and food and economic crises have fuelled the increased movement of children and adults over the past few decades. The children who arrive in our country have not caused these problems; they do not choose to be exploited; and by and large are already traumatized. They must be visible in the law, and afforded treatment that recognizes their vulnerability.

We wish to ensure that the law recognizes our international legal obligations to ensure special protections for asylum-seeking children and that two important principles be borne in mind: 1) that children arriving in Canada are, first and foremost, children, who should be treated as such. The best interests of the child should be a primary consideration in any action that has potentially significant impacts on the child, consistent with its consideration in other established aspects of Canada's refugee law, policy and practice; and 2) that there are feasible alternatives and mitigating measures that should be considered in the treatment of asylum-seeking children and their parents to avoid the *de jure* (legal) or *de facto* (factual) detention of children and the separation of children from their family.

This submission outlines the implications of some of the proposed amendments in relation to international law and to the potential harms to children and their families, and proposes mitigating alternative measures for children.

SUPPORTING POINTS

1. The best interests of children (all children under age 18) should be a primary consideration in their treatment under the law and in practice.
2. Asylum seeking and irregular migrant children should have access to safe and secure accommodation appropriate to their age and gender, cultural background, and family situation, pending a resolution of their immigration status.
3. The detention of children, 'de jure' or 'de facto', should be avoided unless it is in their best interests. If children are detained, or placed in detention facilities (though not under direct detention order), it should be imposed only as a measure of last resort, and for the shortest amount of time, with the right of regular review and potential for release.
4. The separation of families should be prevented unless it is in the child's best interests.
5. Children should have access to health care, education and other support services regardless of their status.
6. There should be no discrimination against any child on the basis of his or her immigration status.
7. There should be meaningful consultation with migrant children, and their views should be sought according to their age and maturity, in all decisions affecting them.
8. The problems of human traffickingⁱⁱ and human smugglingⁱⁱⁱ should be addressed by using child-sensitive approaches that do not have the potential to negatively impact upon the rights and best interests of migrant^{iv} children who arrive in Canada, often having experienced previous traumatic events.
9. The mandatory detention of asylum-seeking children has been attempted in both the United Kingdom and Australia with detrimental results and both of those countries have rescinded the legislative provisions and policies that authorized such mandatory detention.

CHANGE IN MANDATORY DETENTION OF CHILDREN – AGE JURISDICTION

One of the mitigating amendments from the former Bill C-4 to the current Bill C-31, and acknowledged as such by UNICEF Canada, is that children under 16 on the day of arrival would no longer be subject to mandatory detention if they are designated as part of a group of irregular arrivals. While this is a welcome change, it is only a partial solution for the following reasons:

1. The amendment is still not compliant with international human rights requirements, as article 1 of the Convention on the Rights of the Child defines a ‘child’ as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” This means that 16 and 17 year old children will still be subject to the risk of being placed in mandatory detention for a non-reviewable one year period under the provisions of Bill C-31.
2. The Minister of Public Safety is still permitted to exercise his/her discretion to detain children under age 16 in ‘de facto detention’ in the same facility as one parent, or to forcibly separate them from both accompanying parents for 12 months. In the House of Commons, there have been recent ministerial statements which confirm that children under age 16 who accompany irregularly arrived parents will either be placed in child welfare care or informally detained in immigration holding centres with their parents, if that is what the child’s parents choose. What seems to be missing from this public debate is an understanding that there are negative impacts that result from both the de facto detention of children and from placement in state care; that these children should also have a voice in their placement; and that there are feasible alternatives to detaining families to avoid these harms.
3. Children under the age of 16 remain subject to all the other sanctions imposed on designated foreign nationals, such as being deprived of access to permanent residence and family reunification for 5 years, if their refugee claim is accepted.

QUESTION OF AGE ASSESSMENT

Given that many children arrive without proper birth documentation and that there are differential powers of detention based upon the age of such children under Bill C-31, this raises the question as to how immigration officials will assess the age of such children.

Many nations use a number of different age assessment mechanisms if the age of people claiming to be minors is in dispute, including documentary evidence; interviews and professional observations; and medical assessments. Each of these approaches has its own limitations. Documentary evidence such as birth certificates or identity papers, if they exist, can be unreliable and difficult to verify. Interviews and other observational techniques can be highly subjective and contingent upon the expertise, including cross-cultural awareness, of those conducting the assessments. Medical assessments - including magnetic resonance imaging, bone and dental radiology and examinations of sexual maturity – have been found to be both invasive and inaccurate, with some experts suggesting a margin of error of five years on either side of the assessed age.^v

Good practice in age assessment has been elucidated by the UN Committee on the Rights of the Child in General Comment No. 6, where it states that:

“Age assessment ...should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of the violation of the physical integrity of the child; giving due respect for human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.”^{vi}

The European Agency for Fundamental Rights has also established a position on age assessment in the following terms:

“Age assessment should only be used where there are grounds for serious doubts of an individual’s age. If medical examinations are considered essential, the child must give his/her informed consent to the procedure after any possible health and legal consequences have been explained in a simple child-friendly way and in a language that the child understands. Age assessment should be undertaken in a gender appropriate manner by independent experts familiar with the child’s cultural background and fully respecting the child’s dignity. Recognizing that age assessment cannot be precise, in cases of doubt, authorities should treat the person as a child and grant the right to appeal age assessment decisions.”^{vii}

The Statement of Good Practice issued by the Separated Children in Europe Programme proposes the following additional safeguards in relation to the process of age assessment:

“D.5.2 The procedure, outcome and consequences of the assessment must be explained to the individual in language that they understand. The outcome must also be presented in writing. There should be a procedure to appeal against the decision and the provision of necessary support to do so.

D.5.3 In cases of doubt the person claiming to be less than 18 years of age should provisionally be treated as such. An individual should be allowed to refuse to undergo an assessment of age where the specific procedure would be an affront to their dignity or where the procedure would be harmful to their physical or mental health. A refusal to agree to the procedure must not prejudice the assessment of age or the outcome of the application for protection.”^{viii}

DIFFERENTIAL TREATMENT OF DISTINCT GROUPS OF CHILDREN SANCTIONED UNDER BILL C-31

Bill C-31 is likely to impose differential treatment of children in groups designated as ‘irregular arrival’ foreign nationals. Many of these proposed amendments will subject this special class of designated children to treatment different from that of other asylum-seeking children, who have some specific protection and treatment (including consideration of their best interests in particular circumstances) under the current terms of the *Immigration and Refugee Protection Act*, its regulations and policies. For example, the Government of Canada reported to the UN Committee on the Rights of the Child in 2009 that it updated its manual, “Processing Claims for Refugee Protection in Canada”, to include age- and gender-sensitive guidelines – stating that the purpose of these guidelines is to support priority processing of the claims of vulnerable persons, including children (section 101)^{ix}. The new guidelines respond to a recommendation of the UN High Commission for Refugees that Canada accord vulnerable cases priority

processing – a concern that the UN Committee has also raised about Canada in previous reviews. In the same report to the UN Committee, the Government of Canada states that, “The detention of children is avoided as much as possible, whether unaccompanied or accompanied. Alternatives to detention are always considered, with significant weight given to the best interests of the child...The average length of detention of children declined by 40 percent in 2007-2008 from the previous fiscal year, due to the increased use of alternative arrangements” (section 102). These measures recognize the risk to children of prolonged separation from family, of delayed resolution of immigration status, and of detention; they also recognize the duty to apply international legal standards in law and policy.

The discriminatory treatment of designated children proposed in Bill C-31 runs counter to the Government of Canada’s knowledge of its duties to children, including its existing policy directions. It replaces progressive reforms with the greater and longer use of detention or placement of children in detention facilities, lack of access to regular review, longer separation from families, denial of consideration of their best interests and delayed or prolonged resolution of their and their parents’ status – which in turn impacts their health, safety, development and future potential.

MISCONCEPTIONS TO BE ADDRESSED

There are erroneous notions or misconceptions that are important to address, as they go to the core justifications for the proposed bill:^x

1. That “irregular arrival” migrants are “queue jumpers”

There is, in reality, no queue for asylum seekers. International law guarantees to people fleeing from persecution the right to go to any other country and seek asylum – that is why we have a refugee determination system. Different rules apply to asylum claimants fleeing from oppressive regimes precisely because their lives, and those of their families, are at stake. These different rules were adopted following the Second World War when many countries, including Canada, had closed the door on Jewish refugees.

2. That Bill C-31 will constrain the criminal activities of human smugglers

Human smuggling sometimes puts children and other asylum-seekers in dangerous situations, but the provisions of the bill are not likely to deter people seeking refuge from these means. Most asylum-seekers are desperate to move to a place where they can build a safe, stable life for themselves and their families, and may seek assistance from smugglers to do so. Research in the United Kingdom has shown that asylum claimants do not choose their destination based on the policies in place. Many of the research participants did not specifically choose the United Kingdom as a destination and did not know anything about asylum policies in the United Kingdom before they arrived.^{xi}

3. That provisions in Bill C-31 will save tax dollars

The implementation of the provisions in Bill C-31 will be very costly. According to the Office of the Auditor-General of Canada, mandatory detention of “irregular arrivals” for a minimum of one year could cost \$70,000 per claimant.^{xii} Such mandatory detention will also incur long-term mental health costs, as outlined elsewhere in this report.

A CHILDREN'S RIGHTS PERSPECTIVE

UNICEF Canada's concerns with respect to Bill C-31 are rooted in the recognition that Canada has assumed international obligations to respect and promote the rights of all children in this country. Canada signed the Convention on the Rights of the Child^{xiii} on May 28, 1990 and ratified it on December 13, 1991. Due to the nature of treaty obligations and customary law, there is a general duty to bring internal law into conformity with obligations under international law.^{xiv}

The Convention on the Rights of the Child affirms the status of all children as equal holders of human rights and it, as well as international refugee law and the *Canadian Charter of Rights and Freedoms*,^{xv} includes explicit rights to be protected against discriminatory treatment and arbitrary detention, recognizing the harms such practices visit on children. As has been stated elsewhere,^{xvi} Bill C-31 appears to violate numerous rights.

A) UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child is a human rights treaty, which has been ratified by Canada and 192 other nations, and sets out internationally accepted norms for the promotion and implementation of a wide range of fundamental children's rights. Rights set out in the Convention are premised on respect for the inherent dignity of all children, regardless of where they reside or their particular circumstances.

In APPENDIX A, we have enumerated those articles of the United Nations Convention on the Rights of the Child which, in our view, should be considered in the context of assessing whether Bill C-31 is in compliance and conformity with the Convention on the Rights of the Child, and in assessing its possible impacts upon asylum-seeking children over and under age 16.

B) UNITED NATIONS GUIDELINES FOR THE ALTERNATIVE CARE OF CHILDREN

The United Nations Guidelines for the Alternative Care of Children^{xvii} are intended to enhance the implementation of the Convention on the Rights of the Child, and other relevant provisions of international and regional human rights law, in matters of protection and well-being of children who are in need of alternative care.

Although not having the binding force of a Convention, these Guidelines have been welcomed by Canada and hold a great deal of knowledge related to the best practices for children in alternative care. In this context, the Guidelines define 'Alternative Care' as including informal care, formal care, kinship care, foster care, other forms of family-based or family-like care placements, residential care and supervised independent living arrangements.^{xviii}

In APPENDIX B, we have itemized those paragraphs of the Guidelines which, in our view, should be considered by the federal government before proceeding to enact Bill C-31, to enhance the protection of unaccompanied and separated asylum-seeking children over and under age 16.

C) THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Domestically, the *Canadian Charter of Rights and Freedoms*, which came into force on April 17, 1982, entrenches in the Constitution of Canada the rights and freedoms Canadians believe are necessary in a

free and democratic society. The *Charter* guarantees fundamental protections to all persons, including children, and any proposed legislative amendments – such as those contained in Bill C-31 – must uphold *Charter* rights. In particular, sections 7, 8, 9, 10, 12 and 15 of the *Charter* are the provisions that would appear to have direct application to Bill C-31.

In APPENDIX C, we have itemized those provisions of the *Charter* which, in our view, should be considered by the federal government before proceeding to enact Bill C-31, to enhance the legal protection of unaccompanied and separated asylum-seeking children over and under age 16.

CHARTER JURISPRUDENCE

In the 2007 case of *Charkaoui v. Canada (Citizenship and Immigration)*,^{xix} the Supreme Court of Canada discussed extended periods of detention under the *Immigration and Refugee Protection Act* and ruled that the failure to review detention in a timely manner is contrary to sections 7 and 12 of the *Charter*:

“The section 7 principles of fundamental justice and the section 12 guarantee of freedom from cruel and unusual treatment [under the Charter] require that, where a person is detained or is subject to onerous conditions of release for an extended period under immigration law, the detention or the conditions must be accompanied by a meaningful process of ongoing review that takes into account the context and circumstances of the individual case. Such persons must have meaningful opportunities to challenge their continued detention or the conditions of their release.”^{xx}

The proposal in Bill C-31 to detain designated persons for one year without review is not consistent with the Supreme Court’s decision. If this Bill were to be enacted in its present form, it could be challenged in the courts, but the appeal process is a lengthy one, and in the meantime asylum-seeking children and their families would suffer in relation to detention and its associated harms to children.^{xxi}

THE DETENTION OF CHILDREN/PLACEMENT OF CHILDREN IN DETENTION FACILITIES

The use of administrative detention in immigration contexts is governed by international human rights law and international refugee law. These set out the circumstances in which asylum-seeking children can be placed in detention (placement in closed institutions or settings from which they are not free to leave at will) and the conditions and safeguards that governments must guarantee. The treatment of migrant children as adults may lead to harmful practices, for example, when deportation and detention procedures are automatically or routinely invoked, or do not comply with the protection that should be given to children in those circumstances.^{xxii} The failure to make the clear distinction between child and adult migrants has proven to be at the origin of ill-treatment and other human rights abuses.^{xxiii} It is likely that the breadth of powers to detain children who are 16 and 17 years old and the length of detention proposed in the current bill are unlawful in international law.

Article 3 of the Universal Declaration of Human Rights, article 9 of the International Covenant on Civil and Political Rights (ICCPR) and article 37 of the Convention on the Rights of the Child are key provisions in international human rights law, limiting the use of administrative detention. In addition, the provisions of the United Nations Convention Relating to the Status of Refugees 1951 and its 1967 Protocol apply to asylum-seekers, including children. Aside from very specific grounds in individual cases, automatic

detention of asylum seekers, for example as part of a policy to deter future asylum-seekers, is contrary to international law. Any detention that does take place should not be automatic or unduly prolonged, and a period of a year is certainly prolonged.

Where children are concerned, the standards are higher. The detention of 16 and 17 year old migrant children, or the placement of children of any age in detention facilities even if not subject to a direct order of detention, which appear to be possible circumstances arising from Bill C-31, are a breach of Canada's international obligations, according to article 37 of the Convention on the Rights of the Child and international refugee law. International standards on detention require that administrative detention only be used as a measure of last resort; in exceptional circumstances; and for the shortest possible period of time. For children, it should only be applied if in their best interests.

In General Comment No. 6, the Committee on the Rights of the Child provided guidance with respect to the detention of children on the move:

“In application of Article 37 of the Convention and the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”^{xxiv}

The United Nations Human Rights Council Guidelines provide a strong presumption against the administrative detention of children for immigration purposes. Guideline 5 states that “minors who are asylum seekers should not be detained”. They must not be held in prison-like conditions.

Children should never be deprived of liberty without independent scrutiny (i.e., not under the control of the executive). Under article 9(4) of the ICCPR and article 37(d) of the Convention on the Rights of the Child, children have the right to challenge the legality of their detention/deprivation of liberty before a court or other independent authority through an initial and periodic reviews, to prompt decisions, to the possibility of release, and to access legal counsel and other appropriate assistance to do so. Article 25 of the Convention requires that a child's case be reviewed promptly and at regular intervals by an independent and impartial mechanism whose role should be to ascertain whether grounds for detention continue to exist, and if they do not, to ensure the child's release. The right to a review is one of the most important safeguards in preventing unlawful and arbitrary detention and other harms.

Article 9(1) of the ICCPR and article 37 of the Convention on the Rights of the Child require not only that administrative detention be lawful, but also that it must not be arbitrary. The Human Rights Committee has stated that arbitrariness is not simply equated with being “against the law” but must be interpreted more broadly to include elements of inappropriateness, lack of predictability and lack of due process of law. Inappropriateness in relation to placing children in detention includes the likelihood of harm to their well-being, and lack of predictability and due process, which includes prolonged detention with lack of clearly legislated and regular judicial review. Detention will not be considered proportionate if there are “less invasive means of achieving the same ends”, such as reporting obligations or other conditions. Thus a mandatory policy of administrative detention of asylum seekers without the requirement of assessment of the particular individual to determine if detention is necessary, proportionate and appropriate has been found by the Human Rights Committee in the case of *A. v. Australia* to be unlawful and arbitrary. Living in

detention facilities has been shown to cause harm to children's mental and physical health, development and safety. This is true for both unaccompanied children and those in detention facilities with a parent(s).

The harmful effects resulting from the detention of migrant children have been noted in a report of the Special Rapporteur on the Human Rights of Migrants:

"Considerations of health are also a strong argument against detention of children at any stage of the migration process...Often there is a lack of specific provisions regarding the detention of children and other vulnerable groups, allowing for their detention in conditions that often violate their basic human rights and are detrimental to their physical and mental health."^{xxv}

While there is an increasing trend internationally not to subject unaccompanied migrant children to administrative detention, the detention of children in the company of parents is more common but rarely justifiable. The UNHCR Guidelines state that special arrangements must be made for living quarters that are suitable for children and their families. The United Nations Special Rapporteur on the Human Rights of Migrants stated in 2009 that:

"Migration-related detention of children should not be justified on the basis of maintaining the family unit (for example, detention of children with their parents when all are irregular migrants). As UNICEF and other experts have stressed, detention of children will never be in their best interests. Hence the ideal utilization of a rights-based approach would imply adopting alternative measures for the entire family; States should therefore develop policies for placing the entire family in alternative locations to closed detention centres."^{xxvi}

Administrative detention for immigration purposes can have devastating effects on children, not only because of the punitive, isolated environment but also because, for many children who are detained with their families, detention has a significant impact on the ability of parents to care for their children in such adverse circumstances. Periods of detention much shorter than the mandatory year proposed in Bill C-31 can have profoundly negative, long-term impacts on a child's mental and physical health. In a country like Canada where there is no official independent monitor of places of detention, the risks of abuse and harm to detainees can be higher.

Studies in Canada, the United Kingdom and elsewhere have shown that the detention of children undermines their cognitive, emotional and physical development. In a number of countries, government records confirm the findings of scholarly research, detailing that detained children suffer anxiety, distress, bed-wetting, suicidal ideation and self-destructive behavior, including attempted and actual self-harm. Some children suffer from diagnosable mental illnesses, such as depression or Post Traumatic Stress Disorder (PTSD) resulting from prolonged detention.^{xxvii} One recent Canadian study^{xxviii} found that even short-term detention has a negative impact on children, both directly and also because parents often become too depressed and anxious to provide adequate care. Over time, parental distress tends to worsen, and ability to care for children is increasingly likely to be impaired. The same study also found that children may even experience long-term detrimental effects after release from detention, including nightmares, sleep disturbance, severe separation anxiety, and a decreased ability to study.

Similar deterrence measures to some of those proposed in Bill C-31 have been tried in Australia with detrimental results. For example, Australia had policies to detain refugee claimants, including children,

long-term, and to deny them permanent status even when granted refugee status, in an effort to stop asylum-seekers coming by boat. The policies resulted in asylum-seekers, including many children, being traumatized by their experiences in detention. The Australian Human Rights Commission conducted a *National Inquiry into Children in Immigration Detention*^{xxxix} and found that children in Australian immigration detention centres had suffered numerous and repeated breaches of their human rights and were at high risk of serious mental harm where there were lengthy periods of detention. Studies of the effects of immigration detention on children in Australia have found high rates of suicide, suicide attempts and self-harm, even among pre-teens, and high rates of mental disorders and developmental problems, including severe attachment disorders, in very young children^{xxx}. In 2005-2006, most children and their family members were released by the Australian government from immigration detention centres and the *Migration Act* was amended to affirm “as a principle” that a child should only be detained as a measure of last resort. In the past three years, Australia has moved away from policies of detention and prolonged temporary status for asylum-seekers.

In the United Kingdom, a report^{xxxi} that studied the treatment of asylum-seeking children and families in detention centres in 2009 found that, in that same year, 1,000 children in the U.K. were detained with their families and that the detention of children was being used in inappropriate ways and with harmful effects. The authors relied upon medical studies that have found that “detention is associated with post-traumatic stress disorder, major depression, suicidal ideation, self-harm and developmental delay in children.” This coincided with the coalition government declaring in May 2010 that it would end the detention of children for immigration purposes in the United Kingdom.

The harms to children of prolonged detention are recognized in Canada’s existing refugee and immigration law, which by and large prioritizes measures other than detention, and detention of children as a last resort, for shorter periods.

ALTERNATIVE APPROACHES TO THE DETENTION OF CHILDREN/PLACEMENT OF CHILDREN IN DETENTION FACILITIES

The best way to protect children on the move – whatever the circumstances - is to ensure that immigration policies are premised on and respectful of human rights norms and standards, and are evidence-based. International human rights standards outline that for the administrative detention of a child to be lawful, it must be on the basis of necessity and proportionality (with the child’s best interests a priority) and that no less restrictive measure would suffice. Alternative measures must be established in law and practice, giving preference to “less invasive means of achieving the same ends”. A policy of automatic detention without considering the use of less restrictive alternatives is likely to be regarded as unnecessary, disproportionate and inappropriate in human rights law, rendering administrative detention of this type potentially arbitrary. Alternative measures should always be considered before detention and must take into account the particular circumstances of the individual.

Accompanied children tend to be detained (de facto or de jure) with their parents to maintain family unity, usually justified on the basis of the risk of the parent(s) absconding. However, research commissioned by the United Nations High Commission for Refugees (UNHCR) found that the rate at which asylum seekers abscond was low, particularly in destination countries^{xxxii}. A United Kingdom study of bailed asylum detainees showed that 90 per cent complied with their bail conditions^{xxxiii}. A United States study showed an 84 per cent compliance rate^{xxxiv}. Restrictive alternatives involving close supervision or monitoring for

the purpose of ensuring compliance with asylum procedures are seldom required. They are also shown by experience in other countries not to deter other asylum-seekers from arriving. Therefore, destination countries should be able to use effective alternatives to detention including unconditional release or admission to the community with only minor duties to report and appear for appointments.

A recent UNHCR study describing the systems in several Nordic countries, Switzerland, New Zealand and Lithuania recognized that best practice is seen in legislation that establishes a sliding scale of measures from least to most restrictive, allowing for an analysis of proportionality and necessity^{xxxv}. Where detention is one extreme end of a range of measures, and unconditional release the other, governments tend to use alternatives in between. A continuum of measures exists in the legislation of many countries – a range of more or less restrictive alternatives to detention. The most typical include release on bail, bond or surety; release to NGO supervision; reporting requirements; directed residence; residence in open centres; and residence in semi-closed centres. In New Zealand, any measure is periodically reviewed to take into account changing circumstances. In Australia, since 2006, a community organization contracted by the government provides care and residential accommodation to children and families. The Minister for Immigration can stipulate different conditions for each family, such as reporting requirements. In general, even those detained can go about their daily activities, such as attending school. Pre-existing detention centres and residential housing centres are used for individual adults, and for families who breach residential housing orders or for whom removal is imminent.

The Swedish model is an example of one of the more effective alternatives to detention. No child under 18 may be held in detention for more than three days (six days in extreme circumstances). After this, a child will generally be released with his/her family into accommodation at a refugee centre, where they report daily. Where a member of the family is deemed to pose a potential threat to national security, or where a person's identity cannot be ascertained, the father is held in detention, while the mother and child(ren) are released into a community group home and permitted to visit the father during the day. In situations where there is only a child and father, and there are strong reasons not to release the father, the child is released into a home, as would an unaccompanied child, and has regular access to the father^{xxxvi}.

One report^{xxxvii} gives the following non-exhaustive list of accommodation types identified as being used in twelve European countries, many of which constitute alternatives to the deprivation of liberty and detention of migrant children, including options for both unaccompanied children and children with a parent(s):

- Substitute or foster families
- Mainstream residential units
- Residential units specializing in unaccompanied children
- Short-term reception or clearing houses
- 'Semi-independent' residential units
- Educational communities
- Specialist mainstream provision (e.g., young mother and baby units)

Additionally, the Special Rapporteur on the human rights of migrants has recommended that “in accordance with family unity, siblings should be kept together” and that children travelling with adult

relatives should be allowed to remain with them, unless contrary to their best interests.”^{xxxviii} As well, alternatives to detention for the family group should be provided “when parents are detained on the sole basis of migratory status, keeping in mind the necessary balance between the need to protect family unity and the best interests of the child.”^{xxxix}

The Special Rapporteur also recommends that alternative care should be provided to unaccompanied migrant children in accordance with article 22(3) of the Convention on the Rights of the Child, which includes, among other things, “foster placement, *kafalah* of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children.” He notes that when selecting from these options, “the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child’s age and gender, should be taken into account.”^{xl}

NECESSARY CONDITIONS WHERE DETENTION OF MIGRANT CHILDREN OCCURS

In the event that the detention of migrant children occurs, the Committee on the Rights of the Child, in its General Comment No. 6, has set out the following guiding principles:

“In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to article 37(a) and (c) of the Convention and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is child’s best interests not to do so. Indeed, the underlying approach to such a programme should be ‘care’ and not ‘detention’. Facilities should not be located in isolated areas where culturally appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counseling where necessary. During their period of detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to education and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37(d) of the Convention, [they] shall be provided with prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative.”^{xli}

In the Australian Human Rights Commission’s *National Inquiry into Children in Immigration Detention*, it recommended, among other things, that “minimum standards of treatment for children in immigration detention should be codified in legislation.”^{xlii}

Some countries have developed ‘community detention’ options by applying the status of detention to individuals who are located in the community. This status allows authorities to permit selected individuals to live in the community at specified location with some freedom of movement. Persons in community detention are generally not guarded or accompanied by an immigration officer, but placed under intensive supervision. This form of detention has been used with vulnerable groups, such as families, to retain a severely limited legal status that permits immediate removal or deportation while allowing them to reside in a less harmful environment. While ‘community detention’ has been a positive development in

immigration detention policy, it is still a form of administrative detention, where there may be extended periods of uncertainty, with associated mental health implications.^{xliii}

Additionally, the Special Rapporteur on the Human Rights of Migrants has recommended that “exceptional migration-related detention of children should be done in places ensuring the integral protection and well-being of the child, taking due consideration for the fulfillment of the child’s right to education, health care, recreation, consular assistance and legal representation, among others.”^{xliiv}

GUIDELINE ON DETENTION ISSUED BY THE CHAIRPERSON, IMMIGRATION AND REFUGEE BOARD OF CANADA

On September 21, 2010, the Chairperson of the Immigration and Refugee Board of Canada issued a Guideline on Detention. The purpose of the Guideline is “to provide guidance in the treatment of persons who are detained under the *Immigration and Refugee Protection Act*...and to promote consistency, coherence and fairness in the treatment of cases at the Immigration and Refugee Board of Canada.”^{xliv} It states as an underlying principle that:

“Canadian law regards preventive detention as an exceptional measure. This general principle emerges from statute and case law, and is enshrined in the Canadian Charter of Rights and Freedoms. International law, as reflected in the International Covenant on Civil and Political rights and the Optional Protocol to the International Covenant on Civil and Political Rights, respects the same principle.”^{xlvi}

The Guideline also sets out the following relevant special provisions in relation to minors^{xlvii}:

“3.7.1 A minor should be detained only as a measure of last resort. Members should consider a number of factors when determining whether to continue detention or release of a minor, including the best interests of the child.

3.7.2 Members must consider the following prescribed factors in the Immigration and Refugee Protection Regulations (IRPR) when determining the detention of a minor:

- *the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;*
- *the anticipated length of detention;*
- *the risk of continued control by the human smugglers or traffickers who brought the children to Canada;*
- *the type of detention facility envisaged and the conditions of detention;*
- *the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and*
- *the availability of services in the detention facility, including education, counseling and recreation.*

3.7.3 *In addition, when considering whether to release or continue detention under paragraph 58(1)(c) of the Immigration and Refugee Protection Act (IRPA) because identity may not have been established, factors that may apply with respect to an adult will not have an adverse impact with respect to minors.”*

CONCLUDING OBSERVATIONS OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD

In 2003, the United Nations provided the following concluding observations and recommendations to Canada under the category of special protection measures:

“REFUGEE CHILDREN

46. *The Committee welcomes the incorporation of the principle of the best interests of the child in the new Immigration and Refugee Protection Act (2002) and the efforts being made to address the concerns of children in the immigration process, in cooperation with the Office of the United Nations High Commissioner for Refugees and non-governmental organizations.*

However, the Committee notes that some of the concerns previously expressed have not been adequately addressed, in particular, in cases of family reunification, deportation and deprivation of liberty, priority is not accorded to those in greatest need of help. The Committee is especially concerned at the absence of:

- (a) A national policy on unaccompanied asylum-seeking children;*
- (b) Standard procedures for the appointment of legal guardians for these children;*
- (c) A definition of “separated child” and a lack of reliable data on asylum-seeking children;*
- (d) Adequate training and a consistent approach by the federal authorities in referring vulnerable children to welfare authorities.*

47. *In accordance with the principles and provisions of the Convention, especially articles 2, 3, 22 and 37, and with respect to children, whether seeking asylum or not, the Committee recommends that the State party:*

- (a) Adopt and implement a national policy on separated children seeking asylum in Canada;***
- (b) Implement a process for the appointment of guardians, clearly defining the nature and scope of such guardianship;***
- (c) Refrain, as a matter of policy, from detaining unaccompanied minors and clarify the legislative intent of such detention as a measure of “last resort”, ensuring the right to speedily challenge the legality of the detention in compliance with article 37 of the Convention;***
- (d) Develop better policy and operational guidelines covering the return of separated children who are not in need of international protection to their country of origin;***
- (e) Ensure that refugee and asylum-seeking children have access to basic services such as education and health and that there is no discrimination in benefit entitlements for asylum-seeking families that could affect children;***

(f) Ensure that family reunification is dealt with in an expeditious manner.^{»xliviii}

In particular, paragraph 47(c) addresses the importance of refraining from the detention of minors in the immigration context; of clarifying the legislative intent of such detention as a measure of “last resort”; and of safeguarding the ‘due process’ rights to challenge expeditiously the legality of the detention.

CHILD RIGHTS IMPACT ASSESSMENTS

Child rights impact assessments are a key mechanism for implementing the United Nations Convention on the Rights of the Child. Article 3 of the Convention requires that in all actions concerning children, their best interests shall be a primary consideration. This basic principle applies whether the actions are undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. Article 4 of the Convention states that, “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.”

The commentary of the Committee on the Rights of the Child suggests that governments can use child rights impact assessments as a means of going some distance towards fulfilling their obligations under articles 3 and 4. In 2003, the Committee published its interpretation of the ‘general measures of implementation’ of the Convention in its General Comment No. 5, stating that:

“Ensuring that the best interests of the child are a primary consideration in all actions concerning children (art. 3(1)), and that all the provisions of the Convention are respected in legislation and policy development and delivery at all levels of government, demands a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation). This process needs to be built into government at all levels and as early as possible in the development of policy.”^{»xliz}

A ‘Child Rights Impact Assessment’ has been defined as:

“A systematic process or methodology of ensuring that children’s best interests, and impacts upon them of changes in policy, legislation, regulations, budgets, or administrative procedures are considered in the policy-making process. It is a process that examines potential impacts (positive or negative, intended or not, direct or indirect, short or long-term) on children of a decision or action. It uses the framework and principles of the Convention on the Rights of the Child as a lens.”^{»l}

Child impact assessments, in one form or another, have been introduced in a growing number of jurisdictions in recent years. In Sweden, a national strategy for children requires that all government decisions affecting children be subject to child impact assessments. In England, the National Children’s Bureau and the Children’s Legal Centre are currently undertaking assessments of selected [parliamentary] Bills to gauge their effects on children and young people.^{»li}

The objective of a Child Rights Impact Assessment is to make children visible in the policy process – to understand potential impacts of proposed decisions on children in advance so that positive impacts can

be supported and negative impacts can be mitigated or eliminated as part of the design and implementation process. This kind of Assessment can help achieve stronger and more defensible public policies and better outcomes for children. In 2007, the Senate of Canada adopted a report, *Children: The Silenced Citizens*, which recommended that the federal government use child impact assessments of proposed policies and laws. It is submitted that Bill C-31 should be subject to a Child Rights Impact Assessment to ensure that its potential impacts on children are identified and that mitigating measures are introduced.

PROVINCIAL/TERRITORIAL DISPARITIES AND THE NEED FOR A NATIONAL CHILDREN'S COMMISSIONER/ADVOCATE

Within Canada, both the federal and provincial/territorial governments have responsibility for compliance with the Convention on the Rights of the Child. However, because Canada has a 'dualist' legal system, with both distinctive federal and provincial/territorial domains of jurisdiction, many of the matters covered by the Convention such as child welfare, education and health are under provincial jurisdiction, although matters such as immigration and youth criminal justice fall under federal jurisdiction.

Many of the children who enter the immigration system have multiple needs and cross-over different service sectors. Many of these migrant children will need to access social services, child welfare, education, and health services within the provinces and territories. The establishment of an independent national Children's Commissioner or Advocate would provide an important mechanism to help coordinate and resolve inter-jurisdictional issues affecting children. Currently, no office in the federal government has the clear legal and jurisdictional responsibility to ensure that our federal legislation, regulations and programs are viewed through the lens of how they impact children. A national Children's Commissioner or Advocate could have a role in ensuring that there are baseline standards consistent with the Convention that are being met in legislation, policy and practice from one end of this country to the other. In this connection, it is worth noting that, at present, there are no uniform universal and normative rights-based standards for migrant children that apply across the country.^{lii}

Provincial and territorial independent Child and Youth Advocates represent an important mechanism to promote the best interests of children. However, they require a federal counterpart in Ottawa to complement the important work they are doing at the provincial and territorial levels.

The idea of an independent national office focusing on children is neither radical nor new. More than 30 countries have specialized national offices for children. If Canada were to appoint a national Children's Advocate or Commissioner, it could draw upon the experiences and best practices within these various Offices.

Following the lead of the Committee on the Rights of the Child, the Standing Senate Committee on Human Rights, in its 2007 Report, *Children: The Silenced Citizens*, recommended that:

"Parliament enact legislation to establish an independent Children's Commissioner to monitor implementation of the Convention on the Rights of the Child, and the protection of children's rights in Canada. The Children's Commissioner should report annually to Parliament".^{liii}

Unfortunately, in the Federal Government's response to the Senate Committee Report, no mention was made of a national Children's Advocate or Commissioner.

LIST OF RECOMMENDATIONS

As a result of the position articulated by UNICEF Canada in this Written Brief, together with the critical analysis contained herein, we are advancing the following recommendations:

Recommendation 1: That the federal government withdraw Bill C-31 or refer it to committee for further review and consultation.

Recommendation 2: That Parliament amend Bill C-31 in order to exempt all children under the age of 18 on the day of their arrival in Canada from any period of mandatory detention, even if they are designated as part of a group of irregular arrivals.

Recommendation 3: That Parliament amend Bill C-31 in order to remove the requirement that individuals, who are part of a group of designated 'irregular arrivals' and who have obtained refugee status, must wait for a period of 5 years before applying for permanent residence and seeking sponsorship of their children/spouse left behind in their home country.

Recommendation 4: That Parliament amend Bill C-31 in order to remove the requirement that individuals, who are part of a group of designated 'irregular arrivals' and who have obtained refugee status, must wait for a period of 5 years before applying to travel outside of Canada for any reason.

Recommendation 5: That Parliament amend Bill C-31 in order to remove ministerial discretion to unilaterally designate countries as 'safe' and to revoke refugee status up to the date of citizenship, which will result in the immediate deportation of adults and children to their re-evaluated 'safe' country of origin.

Recommendation 6: That the federal government take appropriate steps to comply with the Committee on the Rights of the Child's General Comment No. 6 (2005) on *Unaccompanied and Separated Children Outside their Country of Origin* and provide asylum-seeking and irregular migrant children with access to safe and secure accommodation appropriate to their age, gender, cultural background, and family situation, pending a resolution of their immigration status.

Recommendation 7: That the federal government enact regulations or guidelines for age assessment in order to ensure that, in the case of doubt about the age of an asylum seeker or irregular migrant claiming to be a child, the process of age assessment will be comprehensive, multi-disciplinary and child- and gender-sensitive; will apply the benefit of the doubt and any margin of error in favour of the individual concerned; and will occur only with the informed consent of the individual and only after an opportunity has been provided for proper consultation with a legal guardian, designated representative or legal counsel.

Recommendation 8: That regardless of the eventual status of Bill C-31, that Parliament amend the *Immigration and Refugee Protection Act* so that: a) 'the best interests of the child' is a primary consideration in all actions concerning children; b) the best interests of the child is a consideration in

decisions affecting their parent(s); and (c) opportunities for the child's views to be considered are built into the decision-making process at all stages of the immigration process where the child may be impacted.

Recommendation 9: That regardless of the eventual status of Bill C-31, that Parliament amend the *Immigration and Refugee Protection Act* to include an explicit presumption against the detention of asylum-seeking children. This provision should include requirements that:^{liv}

- (a) detention be used as a measure of last resort and only in the best interests of children (to prevent risk of harm to the child or to others);
- (b) clear procedures be followed in making such a determination and in setting out the reasons for such detention;
- (c) an opportunity be provided to the child and his/her parent or guardian to make representations;
- (d) places of detention be subject to minimum quality standards and regular independent inspection; and
- (e) judicial review be automatic and occur within the first 24 hours of detention, and thereafter, at least every seven days.

Recommendation 10: That a child rights impact assessment of Bill C-31 be conducted by the federal government, and made available in a public report, for purposes of evaluating compliance with:

- (a) the Convention on the Rights of the Child, with particular emphasis on articles 2, 3, 6, 12, 22 and 37;
- (b) guidance documents with respect to the Convention, including the Concluding Observations in respect of asylum-seeking children (paragraphs 46, 47); non-discrimination (paragraphs 21, 22 & 23); and the best interests of the child (paragraphs 24, 25) that Canada received from the United Nations Committee on the Rights of the Child in 2003, after its second review of Canada's implementation of the Convention;
- (c) the United Nations Guidelines for the Alternative Care of Children; and
- (d) the *Canadian Charter of Rights and Freedoms*.

Recommendation 11: That if Bill C-31 is enacted by Parliament, the federal government evaluate the actual impact of the implementation of the bill and its supporting policy and practice on children within one year of proclamation, and thereafter at reasonable periodic intervals, and publicly provide reports of that evaluation process.

Recommendation 12: That the federal government research and take into account evidence of best practices and lessons learned from other nations, including those that have found viable alternatives to the detention of migrant children and their families.

Recommendation 13: That the federal government take steps to prioritize the reunification of children with parents or legal guardians, whether the child is resident in Canada and seeking application for a parent(s) or guardian(s), or the parent(s) or guardian(s) is/are resident in Canada and seeking application for the child(ren) who has/have remained behind.

Recommendation 14: That the federal government, in conjunction with the provinces and their designated child protection agencies, and in consultation with migrant children, UNICEF Canada and the Child Welfare League of Canada, develop a national child protection campaign or strategy to address the plight of unaccompanied and separated migrant children in Canada.

Recommendation 15: That all parliamentarians work towards consensus to ensure that an independent Commissioner for Children and Young Persons or Advocate is established so that legislation, policies and services for children are more equitable and better coordinated.

Recommendation 16: That ongoing training be provided for government officials and private personnel, who come into contact with children in the context of migration, including border control authorities, courts, tribunals, personnel in detention centres, child welfare case managers and care providers. Each should be adequately trained to apply a child-sensitive and rights-based approach, which takes account of the specific vulnerability, needs and rights of children on the move. The principles of the Convention on the Rights of the Child should be an integral part of this training.

SUMMARY

Given the lack of evidence that human smuggling is a pervasive problem, it is unfortunate that the federal government has chosen to introduce Bill C-31 as a solution. Rather than reverting to procedures that will likely have negative impacts upon children and their families arriving in Canada, it would, in our view, be more productive for the federal government to find other more durable solutions and alternatives, which are set out in numerous studies and in international law.

Submitted on behalf of UNICEF Canada by:

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APPENDIX A

PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD APPLICABLE TO BILL C-31

1. Principle of Equality and Non-Discrimination (Article 2)

This principle provides that the rights of the Convention apply to all children equally “without discrimination of any kind,” and means that migrant children are entitled to the same treatment and rights as national or resident children. They must be treated as children first and foremost. Other considerations, including their immigration status, must be secondary. The United Nations Committee on the Rights of the Child’s 2005 General Comment on the *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* provides further interpretation of article 2 and states that “in particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum-seeker or migrant.”^{lv}

2. Principle of the Best Interests of the Child (Article 3)

This principle provides that the best interests of the child “shall be a primary consideration” in all actions concerning children, and means that all decision-making and actions that may directly or indirectly affect a child’s short-term or long-term immigration status must be guided by the child’s best interests as a primary consideration. In General Comment No. 6, the Committee on the Rights of the Child, in its interpretation of article 3, states that “a determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age and gender-sensitive interviewing techniques.”^{lvi} It should be carried out as soon as possible, and should be part of decisions affecting not only the child directly, but also those decisions affecting their parent(s)/guardian(s).

3. The Right to Family Integrity (Article 5)

This provision recognizes that wherever possible, children are entitled to grow up in a family environment with parents, extended family or community members, and means that migrant children should not be separated from parents or other family members unless it is in their best interests.

4. The Right to Survival and Development (Article 6)

This provision, which ensures, “to the maximum extent possible, the survival and development” of children, relates directly to the well-being of asylum-seeking children, who may suffer emotional trauma, anxiety and/or depression if separated from their parents or placed in detention. In General Comment No. 6, the Committee on the Rights of the Child, in its interpretation of article 6, states that “practical measures should be taken at all levels to protect children” from various risks, and such measures could include: “priority procedures for child victims of trafficking, the prompt appointment of guardians, the provision of information to children about the risks they may encounter, and establishment of measures to provide follow-up to children particularly at risk.”^{lvii}

5. The Right to Protection from Arbitrary Separation from Parents (Article 9)

This provision ensures the right of children to be protected from separation from their parents “against their will,” and “to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to [their] best interests.” The issue of regular family access by asylum-seeking children is an important consideration, as children who are in de facto detention with their mothers often are deprived of regular visitation with their fathers.

6. The Right to Family Reunification (Article 10)

This provision recognizes that applications by a child or his/her parents to enter or leave a particular country “for the purpose of family reunification shall be dealt with ... in a positive, humane and expeditious manner.” In addition, such applications “shall entail no adverse consequences for the applicants and for members of their family”.

7. The Right to Child Participation (Article 12)

This provision affirms the right of children to express their views freely in all matters affecting [them],” with such views “being given due weight in accordance with [their] age and maturity,” and means that their views must be sought whenever decisions concerning their immigration and placement status are being made. To ensure this right to be heard, asylum-seeking children ought to be provided with access to interpreters, designated representatives and legal counsel, as the case may be. In General Comment No. 6, the Committee on the Rights of the Child, in its interpretation of article 12, states that “to allow for a well-informed expression of [asylum-seeking children’s] views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin...As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure.”^{lviii}

8. The Right to Protection for Children Deprived of Family Environment (Article 20)

This provision provides that children temporarily or permanently deprived of their family environment or whose best interests demand that they leave such environment “shall be entitled to special protection and assistance...” Alternative care must also be ensured for such children, which is to include “foster placement,...adoption, or if necessary, placement in suitable institutions for the care of children”, while having regard to “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”

9. The Right to Special Protection for Asylum-Seeking Children (Article 22)

This provision sets out the State’s obligation to take “appropriate measures” to ensure that children seeking refugee status, whether accompanied or unaccompanied, “receive appropriate protection and humanitarian assistance in the enjoyment of [their] rights...”

10. The Right to Protection from Arbitrary Detention (Article 37)

Article 37 sets out a number of protections for children who are detained. Article 37(b) provides that “no child shall be deprived of his or her liberty unlawfully or arbitrarily” and requires that any such detention “be in conformity with the law...and used only as a measure of last resort and for the shortest appropriate period of time.” Article 37(c) stipulates that children deprived of their liberty “shall be treated with humanity and respect for [their] inherent dignity”, having regard to the needs of children of that age. In particular, every such child “shall be separated from adults unless it is

considered in the child's best interests not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances." Article 37(d) additionally provides that children deprived of their liberty shall have "the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality" of their status before a court or other impartial tribunal "and to a prompt decision on any such action."

APPENDIX B

PROVISIONS OF THE UNITED NATIONS GUIDELINES FOR THE ALTERNATIVE CARE OF CHILDREN APPLICABLE TO BILL C-31

- 1. The Right to the Same Level of Protection and Care as Other Children (Paragraph 141)**
This guideline provides that “unaccompanied or separated children already abroad should, in principle, enjoy the same level of protection and care as national children in the country concerned.”
- 2. The Right to Have Diversity Considered in Appropriate Care Provision (Paragraph 142)**
This guideline states that “in determining appropriate care provision, the diversity and disparity of unaccompanied or separated children (such as ethnic and migratory background or cultural and religious diversity) should be taken into consideration on a case-by-case basis.”
- 3. The Right to Protection from Detention for Breach of Immigration Law (Paragraph 143)**
This guideline states that unaccompanied or separated children, including those who arrive irregularly in a country, should not, in principle, be deprived of their liberty solely for having breached any law governing access to and stay within the territory.” This provision is directly relevant to Bill C-4 and reinforces the importance of not detaining children even where their arrival in a country is deemed to be “irregular.”
- 4. The Right of an Unaccompanied Child to an Appointed Guardian (Paragraph 145)**
This guideline provides that “as soon as an unaccompanied child is identified, States are strongly encouraged to appoint a guardian or, where necessary, representation by an organization responsible for his/her care and well-being to accompany the child throughout the status determination and decision-making process.” This provision contemplates the involvement of a designated representative and the active engagement of child welfare authorities.
- 5. The Right to Family Reunification (Paragraph 146)**
This guideline recognizes that migrant children should grow up in a family environment and provides that “as soon as an unaccompanied or separated child is taken into care, all reasonable efforts should be made to trace his/her family and re-establish family ties, when this is in the best interests of the child and would not endanger those involved.” It is critical that these vulnerable children are not re-traumatized by the separation from their parents. In circumstances where parents and extended family are not available, alternative care arrangements should be made to ensure the adequate care of children.
- 6. The Right to a Risk and Family Assessment in Country of Origin (Paragraph 147)**
This guideline attempts to guard against the arbitrary return of children to their country of origin and provides that “in order to assist in planning the future of an unaccompanied or separated child in a manner that best protects his/her rights, ...social service authorities should make all reasonable efforts to procure documentation and information in order to conduct an assessment of the child’s risk and social and family conditions in his/her country of habitual residence.”

- 7. The Right to Security Against Premature Return to Country of Origin (Paragraph 148)**
This guideline provides that unaccompanied or separated children “must not be returned to their country of habitual residence” if the risk and security assessment discloses “reasons to believe that the child’s safety and security are in danger...or if, for other reasons,” such return is not in their best interests. This right is essentially a restatement of the Principle of Non-Refoulement. According to the Committee on the Rights of the Child’s General Comment No. 6, the Principle of Non-Refoulement means that “States will not return a child to country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child.”^{lix}
- 8. The Right to Regular Contact with Family Members (Paragraph 151)**
This guideline states that “those responsible for the welfare of an unaccompanied or separated child should facilitate regular communication between the child and his/her family, except where this is against the child’s wishes or is demonstrably not in his/her best interests.”
- 9. The Right to Protection Against Family Separation (Paragraph 155)**
This guideline recognizes the family as a unit for the healthy development of children and provides that authorities “should make every effort to prevent the separation of children from their parents or primary caregivers”, unless it is in their best interests and “ensure that their actions do not inadvertently encourage family separation by providing services and benefits to children alone rather than families.”

APPENDIX C

PROVISIONS OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* APPLICABLE TO BILL C-31

- 1. The Right to Life, Liberty and Security of the Person (Section 7)**
This provision states that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.”
- 2. The Right to Security against Unreasonable Search or Seizure (Section 8)**
This provision stipulates that “everyone has the right to be secure against unreasonable search or seizure.”
- 3. The Right to Security against Arbitrary Detention or Imprisonment (Section 9)**
This *Charter* section provides that “everyone has the right not to be arbitrarily detained or imprisoned.”
- 4. The Right to Procedural Protections upon Arrest or Detention (Section 10)**
This provision sets out the right of everyone to three procedural protections upon arrest or detention – namely “(a) to be informed promptly of the reasons [for the arrest or detention]; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.”
- 5. The Right to Protection against Cruel and Unusual Treatment/ Punishment (Section 12)**
This provision states that “everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”
- 6. The Right to Equality before and under the Law (Section 15)**
This section of the *Charter* provides that “every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

ENDNOTES

- ⁱ Many of these potential harms have been identified in a Joint Statement by the Justice for Refugees Coalition (comprised of Amnesty International, the Canadian Association of Refugee Lawyers, the Canadian civil Liberties Association, and the Canadian Council for Refugees, dated March 22, 2012 and in an Op Ed by Noa Mendelsohn Aviv, PostMedia News, April 3, 2012.
- ⁱⁱ The term “human trafficking” is intended to refer to activities that involve individuals – primarily women and children – who are presumed not to have given their consent and are exploited in some way, such as through debt bondage, and are considered to be ‘victims’ or ‘survivors’.
- ⁱⁱⁱ The term “human smuggling” is intended to refer to activities that are essentially consensual business transactions that end upon arrival at a predetermined destination.
- ^{iv} The term “migrant” child(ren) is intended to include all forms of migration, including asylum-seeking, refugee, etc.
- ^v Corlett, D. et al., *Captured Childhood*, International Detention Coalition 2012, www.idcoalition.org, at 65.
- ^{vi} United Nations Committee on the Rights of the Child, General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6)* CRC/GC/2003/5, at para. 31.
- ^{vii} European Union Agency for Fundamental Rights, *Separated asylum-seeking children in European Union Member States: Comparative Report*, 2011, at 55, available at <http://fra.europa.eu>.
- ^{viii} Separated Children in Europe Programme 2009, Ed. Smith, T., *Statement of Good Practice*, 4th revised edition, available at www.separated-children-europe-programme.org.
- ^{ix} Government of Canada, 2009, Canada’s Third and Fourth Reports on the *Convention on the Rights of the Child* (<http://rightsofchildren.ca/wp-content/uploads/canadas-third-and-fourth-report-on-crc.pdf>).
- ^x *Supra*, note iv.
- ^{xi} Crawley, H., *Chance or Choice? Understanding why asylum seekers come to the U.K.*, London: Refugee Council, 2010, available at <http://www.refugeecouncil.org.uk/policy/position/2010/18jan2010>.
- ^{xii} Office of the Auditor General of Canada, <http://bit.ly/wvECWT>, May 2008.
- ^{xiii} United Nations, Convention on the Rights of the Child, A/RES/44/25, United Nations, New York, 20 November 1989.
- ^{xiv} Brownlie, I., *Principles of Public International Law* (New York: Oxford University Press, fifth ed., 1998) at 35.
- ^{xv} *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11, which came into force on April 17, 1982.
- ^{xvi} *Supra*, note iv.
- ^{xvii} Guidelines for the Alternative Care of Children, Resolution 64/142, adopted by the United Nations General Assembly, 24 February 2010.
- ^{xviii} *Ibid.*, at para. 29.
- ^{xix} *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 (Supreme Court of Canada).
- ^{xx} *Ibid.*, at para. 107.
- ^{xxi} Canadian Council for Refugees, *Bill C-4: Frequently Asked Questions*, available at <http://ccrweb.ca/en>.
- ^{xxii} *Ibid.*, at para. 24.
- ^{xxiii} *Ibid.*, at para. 25.
- ^{xxiv} *Supra*, note xv, at para. 61.
- ^{xxv} Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. E/CN4/2003/85, 30 December 2002.
- ^{xxvi} Report of the Special Rapporteur on the Human Rights of Migrants, UN Doc. A/HRC/11/7, 14 May 2009, at para. 62.
- ^{xxvii} *Supra*, note iv.
- ^{xxviii} Cleveland, J., Rousseau, and C., Kronick, R., *Bill C-4: The impact of detention and temporary status on asylum seekers’ mental health*, <http://www.cssdelamontagne.qc.ca/fileadmin/csss>.
- ^{xxix} See Australian Human Rights Commission, *A Last Resort – Summary Guide: A summary of the important issues, findings and recommendations of the National Inquiry into Children in Immigration Detention*, available at http://www.hreoc.gov.au/human_rights/children_detention/index.html.

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- ^{xxxi} Campbell, S., et al., *Last Resort or First Resort: Immigration Detention of Children in the UK*, 2010, available at <http://resourcecentre.savethechildren.se/content/library/documents/last-resort-or-first-resort-immigration-detention-children-uk>.
- ^{xxxii} United Nations High Commission for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006, POLAS/2006/03, at p. iv.
- ^{xxxiii} Brugel and Natamba, E., *Maintaining Contact: What Happens After Detained Asylum Seekers Get Bail?* Social Science Research Paper No. 16, London South Bank University, 2003.
- ^{xxxiv} *Supra*, note xxxi, at p. 231.
- ^{xxxv} *Ibid.*
- ^{xxxvi} Mitchell, G., *The Swedish Model of Detention, 2000*, at www.safecom.org.au/sweden.htm, International Detention Coalition, Children in Immigration Detention Position Paper, May, 2009.
- ^{xxxvii} Smith, T., *Promoting Inclusion for Unaccompanied Young Asylum Seekers and Immigrants – A Duty of Justice and Care*, European Social Network, 2005.
- ^{xxxviii} *Ibid.*
- ^{xxxix} *Ibid.*, at para. 107.
- ^{xl} *Ibid.*, at para. 40.
- ^{xli} *Supra*, note xv, at para. 63.
- ^{xlii} *Supra*, note xxx.
- ^{xliiii} *Supra*, note xxvi, at p. 39.
- ^{xliiv} *Supra*, note xxviii, at para. 107.
- ^{xliv} *Supra*, note vi, para. 1.1.
- ^{xlvi} *Ibid.*, at para. 1.2.
- ^{xlvii} *Ibid.*, at para. 3.7.
- ^{xlviii} UN Committee on the Rights of the Child, *Concluding Observations: Canada*, CRC/C/15/Add.215, 27 October 2003.
- ^{xlix} United Nations Committee on the Rights of the Child, General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6)* CRC/GC/2003/5, at para. 45.
- ⁱ UNICEF Canada, *Children's Rights Training Workshop Materials*, (2011), at p. 85.
- ⁱⁱ Scotland's Commissioner for Children and Youth, *Children's Rights Impact Assessment: The SCCYP Model*, 2006, at p. 7, available at: http://www.sccyp.org.uk/uploaded_docs/children's%20rights%20impact%20assessment.pdf.
- ⁱⁱⁱ UNICEF Canada, *It's Time for a National Children's Commissioner for Canada*, Canadian UNICEF Committee, 2010, at www.unicef.ca/portal/Secure/Community/502/WCM/HELP/take_action/Commission%20booklet.
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