Barbra Schlifer Commemorative Clinic
Freedom From Violence.

September 15th, 2016

UNWGDAW Best Practices and Recommendations

Background on the Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Commemorative Clinic is the only Clinic of its kind in Canada. It has been providing legal representation, counseling, and language interpretation to women who have experienced all forms of violence since 1985. The Schlifer Clinic was established in the memory of Barbra Schlifer, an idealistic young lawyer whose life was cut short by violence on the night of her call to the bar of Ontario on April 11, 1980.

We assist about 4,000 women every year. We also engage in various educational initiatives, including public legal education, professional development for legal and non-legal professionals, and clinical education for law students. We work on law reform activities both within Canada and internationally, and consult broadly with all levels of government on policy or legislative initiatives that impact on women survivors of violence.

Since opening in 1985, the Clinic has assisted over 55,000 women. We have been part of numerous legal test cases, are represented at public policy tables and in law reform efforts related to violence against women. We work in over 100 languages, provide a variety of innovative counseling services and are the go-to for community mobilization, public legal education/information and legal representation for gender-based violence across the lifespan nationally and internationally, perpetrated by non-state actors such as family and spouses, stranger and acquaintance sexual assault, state sponsored violence, forced marriage and so-called "honour"-related violence. The Clinic has also developed innovative programming for young Muslim women experiencing violence and has been consulted by numerous government and non-governmental agencies on this subject.

The Clinic serves women from ethno-racially and socio-economically diverse backgrounds, frequently from highly marginalized communities. Our clients often experience multiple social inequalities, including poverty, homelessness, racism, and discrimination on the basis of religion, country of origin, newcomer status, mental health, and disability.

Our recent test cases have included the following:

1. The Clinic was one of three interveners in a case involving a Muslim woman's right to testify about sexual assault while wearing a niqab, a veil that covers the face except for the eyes (*NS*).[1] In addition to the intervention, the Clinic sponsored a grass roots movement for young Muslim women, "Outburst!", that engaged multimedia campaigns on the issue of Muslim women's rights. Prior to the *NS* case, the Clinic also presented deputations to the Quebec General Assembly against *Bill 94,* which requires women wearing the niqab to unveil when working in the public service.[2]

2. We were active in a number of ways in challenging the government's baring of niqabs at the citizenship oath ceremony, at first through the UN Reporting mechanisms (UN Committee on the Elimination of Racial Discrimination, "CERD")[3], and later in the case of a woman who challenged the government under federal law (*Ishaq*).[4] We were also involved in robust media and awareness-raising campaigns about this issue.

3. We intervened at the Supreme Court to protect the privacy rights of two sexual assault complainants when the defense counsel and the crown argued to have their past police occurrence records released to the defence (*Quesnelle*).[5]

4. We fought the federal government when it loosened the gun laws in Canada, specifically related to the class of firearms most often used to kill and terrorize women in domestic violence situations.[6]

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[1] *R v NS*, 2012 SCC 72. See also Barbra Schlifer Commemorative Clinic, 2012. "Media Release." (December 20, 2012). Online: http://schliferclinic.com/womens-rights-supreme-court-releases-n-s-decision.

[2] Bill n°94: An Act to establish guidelines governing accommodation requests within the Administration and certain institutions, February 24, 2011. Online: http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-94-39-1.html. See also: Quebec's Bill 60, the "Charter affirming the values of State secularism and religious neutrality and of equality between women and men, and providing a framework for accommodation requests" is one of Canada's most visceral and infamous of such debates. Available at: http://www.nosvaleurs.gouv.qc.ca/medias/pdf/Charter.pdf.

[3] Amanda Dale, "The Intersection of Race and Gender in the Matter of the Canadian State's Ban on Facial Coverings During the Course of Citizenship Oaths", 2012. Online: http://schliferclinic.com/wp-content/uploads/2012/09/CERD_Citizenship_Ban_Schlifer.pdf .

[4] Ishaq v. Canada (Citizenship and Immigration), 2015 FC 156 (CanLII), <http://canlii.ca/t/ggc86>, retrieved on 2016-09-14

[5] *R v Quesnelle*, 2014 SCC 46. Online: http://schliferclinic.com/wp-content/uploads/2016/05/SCCDecisionQuesnelle.pdf. See also Barbra Schlifer Commemorative Clinic, 2014. "Media Release." (July 09, 2014). Online: http://schliferclinic.com/wp-content/uploads/2016/05/Quesnelle_mediarelease.pdf.

[6] Shaun O'Brien, Nadia Lambek, Amanda Dale. 2016. "Accounting for Deprivation: The Intersection of Sections 7 and 15 of the Charter in the Context of Marginalized Groups." 35 *National Journal of Constitutional Law* 163. Online: http://schliferclinic.com/wp-content/uploads/2016/05/Accountingfor-Deprivation.pdf. See also: Laurie Monsebraaten. 2013. "Toronto's Barbra Schlifer Clinic files evidence in

5. We had leave to intervene on a Supreme Court case that tested the scope of harms considered by the Humanitarian and Compassionate immigration provision, which is used by women to stay their deportations when their experiences of violence have not been properly heard through the refugee or immigration processes. We won a wide-ranging reinterpretation of that provision, which will assist women who experience violence in making humanitarian and compassionate claims in the future (*Kanthasamy*).[7]

6. We were part of a Federal Court constitutional challenge to the Designated Safe Country provisions of the new immigration act. We argued that these provisions fail to consider what "safe" means to identified groups with intersecting vulnerabilities who experience state neglect and harm, such as women who experience violence, gay, lesbian and trans people, and others. The Federal Court found that these provisions which denied appeal rights to refugee claimants from Designated Safe Countries contravened Canada's Charter of Rights and Freedoms equality provisions and struck down these provisions (*YZ and the Canadian Association of Refugee Lawyers*).[8]

7. Currently, we are co-intervening at the Canadian Judicial Council (CJC) public inquiry for suspended Federal Court Justice Robin Camp, who faces this inquiry for mishandling a 2014 sexual assault case. This inquiry can lead to his removal from the bench. It was during the case of *R v Wagar*[9] at the Court of Appeal of Alberta, where Justice Camp made comments about the victim of sexual assault that put the concept of impartiality, integrity, and independence of the judicial role in question and sufficiently undermined public confidence in Justice Camp's capability to properly execute his judicial office.

   Our experience of working with women over the years tells us that one of the greatest bars to reporting sexual assault consistently expressed by the women we serve is that they will not be believed in the criminal justice system, they will be blamed for the violence perpetrated against them. Instead, they will be re-traumatized and re-victimized in the trial process. Clients who experience intersecting inequalities, including on the basis of their age, newcomer status, religion/race, Indigeneity and other grounds, face particular concerns that they will be subjected to stereotypical thinking with respect to who is, and who is not,

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Charter case to restore Canadian gun registry." *The Toronto Star.* Online: https://www.thestar.com/news/canada/2013/05/30/torontos_barbra_schlifer_clinic_files_evidence_in_charter_case_to_restore_canadian_gun_registry.html.

[7] *Kanthasamy v. Canada (Citizenship and Immigration),* 2015 SCC 61.

[8] *YZ v Canada (Minister of Citizenship and Immigration),* 2015 FC 892, [2015] FCJ No 880.

[9] *R v Wagar*, 2015 ABCA 327. See also Allison Crawford. 2016. "Inquiry into Judge Robin Camp to hear from advocates for sex assault victims." (July 27, 2016). Online: http://www.cbc.ca/news/politics/judge-robin-camp-judicial-inquiry-1.3697014.

a "real" rape victim. As part of coalition of front line workers, we believe that Justice Camp should be removed from the bench.

Despite the Schlifer Clinic's successes in individual cases, we still see a deep reluctance in the courts to engage in the most advanced international thinking about violence against women and the law. Whereas there is growing in international consensus that the prevention of violence against women is a state responsibility and, along with torture, slavery and capital punishment, should be considered *jus cogens*,[10] Canadian courts still make their decisions about violence against women in an archaic liberal model of protection of privacy from state interference, placing violence against women by their partners outside state responsibility.[11] According to the interpretations of the treaties Canada has signed to protect the rights of women, this is not the case. Violence against women is a matter the state can be held accountable for failure to protect against non-state actors from perpetrating it within its borders.[12]

In this memorandum, we highlight some of the encouraging developments and "best practices" in family law in Canada as they impact women experiencing violence. We also provide our recommendations for reform concerning troubling changes to Canada's immigration and refugee regime, some of which are in direct contravention of Canada's international obligations to fight discrimination and violence against women.

Family Law Best Practices in Canada

1. Amendments to Section 24 of the Children's Law Reform Act

Amendments to s. 24 of the Children's Law Reform Act (CLRA)[13] made in 2006 are a clear example of legislative change that have had meaningful impact on gender equality in Ontario. With these amendments, our judiciary was directed to consider family

[10] See Hilary Charlesworth and Christine Chinkin 'The Gender of Jus Cogens' (1993) 15(1) Human Rights Quarterly 63; see especially, Gemma Connell, "Survivors Of Domestic Violence In The Gaza Strip: Living In A Lacuna Of International Law?" (Dissertation submitted for the Master of Studies Degree in International Human Rights Law University of Oxford: unpublished) 2011, pp. 6-26; and Zarizana Abdul Azizi and Janine Moussa, Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women, International Human Rights Initiative, 2014, Malaysia, at http://www.duediligenceproject.org, accessed 28/12/14; Special Rapporteur on Violence Against Women, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, 35, U.N. Doc. E/CN.4/2006/61 (2006).

[11] See especially Barbra Schlifer Commemorative Clinic v. Canada, 2014 ONSC 5140 (CanLII), paras 25-27.

[12] Committee on the Elimination of Discrimination against Women
Thirty-second session, 10-28 January 2005, 2/2003, *Ms. A.T. v. Hungary*; see also CEDAW, General Comment 21, 'Equality in Marriage and Family Relations'A/49/38 thirteenth session, 1994; CEDAW General Comment 19 'Violence Against Women', A/47/38 eleventh Session, 1992; CEDAW General Recommendation 12, 'Violence Against Women', A/44/38 eighth session, 1989.

[13] Children's Law Reform Act, R.S.O. 1990, c. C.12. Online: https://www.ontario.ca/laws/statute/90c12.

violence as a key part of the best interests of the child test which is central to determinations of custody and access.

The section was expanded to include the following mandatory language of s. 24(3), (4) and (5):

24(3) *A person's past conduct shall be considered only,*
(a) in accordance with subsection (4); or
(b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

24(4) *in assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,*
(a) His or her spouse;
(b) A parent of the child to whom the application relates;
(c) A member of the person's household; or
(d) Any child.

24(5) *for the purposes of subsection (4), anything done in self-defense or to protect another person shall not be considered violence or abuse. 2006, c. 1, s. 3 (1).*

These amendments came about as a result of the efforts of violence against women advocates who worked together to lobby the provincial government about the need for change.

According to violence against women expert Pamela Cross in her paper "*It Shouldn't Be This Hard: A gender-based analysis of family law, family court and violence against women,*" written for Luke's Place in June 2012 with the support of Status of Women Canada:

> "These provisions acknowledge the reality of violence within families. In the past, judges were not specifically required to consider spousal violence and abuse in their custody and access decisions. Before the law changed, some judges would disregard evidence of violence or abuse because they believed that woman abuse had nothing to do with parenting skills and that it ended on separation.
>
> Creating the statutory framework as has been done with the changes to section 24 of the CLRA is an important step towards making it clear that violence or abuse perpetrated by a parent is relevant to his or her abilities to act as a parent and requiring the judge to consider it."[14]

[14] Pamela Cross. 2012. "*It Shouldn't Be This Hard: A gender-based analysis of family law, family court and violence against women.*" Online: http://lukesplace.ca/resources/it-shouldnt-be-this-hard.

Evidence of the abuse is still required, and allegations of abuse will not always be believed. However, where the court accepts the abuse occurred, it is now much less likely to grant an abusive spouse custody and more likely to recognize that a history of spousal violence precludes an order for joint custody.

Unfortunately, the Schlifer Clinic still sees cases where the court will make an order for joint custody even when it accepts there has been a history of abuse. For example, we have seen these types of decisions where the court is satisfied that the abuse was an isolated incident and is not likely to recur; or where the abuser acknowledges the abuse and has undergone counselling; or where, despite the abuse, there is evidence that the parents have managed to cooperate for some time.

2. Family Court Support Worker Program

The Family Court Support Worker (FCSW) Program was funded in the fall of 2011 by Ontario's Ministry of the Attorney General. It is available in 49 locations across the province. In the Toronto family court system, the program is provided by the Schlifer Clinic. The goal of the FCSW program is to help those experiencing violence to understand and fully participate in the family court process.

The program keeps survivors of violence informed and protected throughout the family court process by:

- Explaining the family court process
- Working with women who have experienced violence to document history of abuse
- Referrals to specialized services and supports in the community
- Helping with safety planning related to court appearances
- Accompanying women to court proceedings

The FCSW program is of key importance because it increases women's safety as they access the courts, thereby enhancing their access to justice. Women who have experienced violence are at an increased risk of further violence during separation or divorce. In fact, this is a key risk factor for lethality identified by the Domestic Violence Death Review Committee of the Office of the Coroner of Ontario.[15] The FCSW program forms a crucial link in the province's successful portfolio to respond to and ameliorate the highest risk women in this province. Ontario partnered with the Schlifer Clinic and other service providers, such as Luke's Place, to deliver the FCSW program because our clinic has taken a leading role in violence against women advocacy and is recognized for our excellence and expertise in preventing and responding to gender based violence.

[15] See: ONMCSCS, The Domestic Violence Death Review Committee Report 2013-2014. Online: http://www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office_coroner/PublicationsandReports/DVDR/DVDR.html.

3. Support For Victims and Survivors: The Independent Legal Advice for Sexual Assault

The Schlifer Clinic is the only Clinic in Ontario spearheading the new independent legal advice ("ILA") pilot project for sexual assault survivors. Launched in June 2016, the creation of this project was one of 13 commitments made by the Ontario government in 2011 as part of its "It's Never Okay" Action Plan to Stop Sexual Violence.

Survivors of sexual assault living in Toronto, Ottawa, and Thunder Bay receive up to four hours of free, confidential advice from a lawyer, over the phone or in person. Survivors can choose from a roster of lawyers or may access the service directly through our clinic. The Schlifer Clinic was selected to participate in the program because of its expertise in sexual assault law and its wrap-around services beyond the limits of the law for women who engage in the criminal justice and other legal systems to redress sexual violence.

Sexual assault complainants do not have the right to legal representation in criminal courts. The criminal process is often described as daunting, isolating, overwhelming, and re-traumatizing for sexual assault complainants. The ILA program helps address the feeling of being ousted by the process and unprepared to give evidence at trial or face cross-examination described by many survivors of sexual assault who have gone through the criminal justice system.

The ILA project enhances women's agency and access to justice by giving them the information they need to make informed choices about reporting to police, what they can expect from the criminal justice system, and what other legal options they might have to seek redress (such as the Criminal Injuries Compensation Board, the Human Rights Tribunal, or pursuing a civil lawsuit). Importantly, is also serves their healing needs first, ahead of the requirements of the state's case against the accused, through provision of counseling and other supports.

4. Court Challenges Program

The Liberal government has announced that it is reinstating the Court Challenges Program of Canada,[16] (a program that subsidized minority rights groups to exercise their constitutional rights in the years after the Canadian Charter of Rights and Freedoms had been ratified, and which was deleted by the previous Conservative government). This indicates a recognition that there need to be more safeguards for Canada's language and equality rights, including protecting the rights of women and minorities. However, while there is some allocation specifically for increasing access to justice for women, it is unclear how many resources will be devoted to this. We have

[16]CCPC. 2016. "Reinstatement News." Online: http://www.ccppcj.ca/en/news.php.

approached the government to prioritize women's rights and increase the capacity of the Court Challenges Program specifically for women and other marginalized groups. It is of grave concern to us as legal service providers, that Canadian legal scholars and activists have begun to conclude that Section 15 of the Charter, protecting the equality of women, is a poor tool of protection in the hands of the courts.[17] We have advised that a robust and express reinvestment in section 15 claims would go a long way to correct that record.

There are also continuing gaps in judicial and police education and accountability when dealing with women who have experienced violence or who are bringing forward a sexual assault complaint. As the Inquiry into the conduct of Justice Robin Camp highlights, and in which the Schlifer Clinic is a co-intervenor, more resources must be devoted to educating law and policy makers, police officers, and court personnel about the intersecting modes of violence experienced by women, especially those from marginalized backgrounds or who are Indigenous.

Immigration and Refugee Law Recommendations for Canada

In the last five years, Canadian refugee and immigration policies have undergone dramatic changes. The former Conservative Government enacted a number of legislative amendments which created a two-tier refugee determination system, stripped refugee claimants of health care, implemented a conditional permanent residence framework which exacerbates risks to women experiencing violence, and introduced a bill criminalizing polygamy and forced marriage as 'barbaric cultural practices.'

While there have been some positive changes with the new federal Liberal Government coming to power in November 2015, women's rights organizations, such as the Schlifer Clinic, continue to be concerned about the impacts of these provisions on women experiencing violence.

Canada presents itself as an international leader on women's issues. For example, Canada has committed to the United Nations 2030 Agenda for Sustainable Development, which includes a target to end child, early and forced marriage.[18]

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[17] Sherene Razack, *Canadian Feminism and the law*,(Toronto: Second Story Press, 1991) ; Melanie Randall, "Equality Rights and the Charter: Reconceptualising State Accountability for Ending Domestic Violence", in Fay Faraday, et al, 2006; Fay Faraday, Margaret Denike & M.Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality Under the Charter* (Toronto: Irwin Law, 2006); Fay Faraday, Judy Fudge & Eric Tucker, eds, *Constitutional Labour Rights in Canada* (Toronto: Irwin Law, 2012); Shaun O'Brien, Nadia Lambek and Amanda Dale, "Accounting for Deprivation: The Intersection of Sections 7 and 15 of the Charter in the Context of Marginalized Groups", N.J.C.L, 35.

[18] Government of Canada. 2016. "Child, early and forced marriage." Online: http://international.gc.ca/world-monde/aid-aide/child_marriage-mariages_enfants.aspx?lang=eng.

However, there continue to be profound gaps in its legislative frameworks concerning women, especially those from marginalized communities such as refugees, temporary foreign workers, and sponsored spouses.

Some of these issues that the Schlifer Clinic would like to highlight include:

1) Conditional Permanent Residence
2) Live-In Caregiver Program
3) Designated Countries of Origin
4) Forced Marriage and Trafficking of Women
5) Immigration Detention of Women and Children
6) Family Reunification
7) Resettlement

1. Conditional Permanent Residence

In October 2012, the federal government announced the introduction of a conditional permanent residence period for sponsored spouses and partners. [19]The rationale was to discourage "marriages of convenience" and "sham marriages."

Under the new rules, there is now a period of conditional permanent residence of two years for sponsored spouses and partners who have been in a relationship of two years or less with their sponsors, and who have no children in common. If the sponsored spouse or partner does not remain in a conjugal relationship and cohabitate with their sponsor during the conditional period, their permanent residence could be revoked, and they could be deported.

Access to Justice Concerns

While an exception to conditional permanent residence has been carved out in cases of domestic violence or spousal abuse,[20] in which women who have experienced violence can apply to have the conditional permanent residence requirement waived, women's organizations continue to express concerns. For example, immigration, refugee and sponsorship processes often put one partner in a position of power over the other. The

[19] Canadian Council For Refugees. 2015. "Conditional Permanent Residence: Failure in Policy and Practice.' Online. http://ccrweb.ca/sites/ccrweb.ca/files/cpr-report-2015.pdf See also Government of Canada. 2012. "Operational Bulletin 480 (Modified) – November 16, 2015." Online: http://www.cic.gc.ca/english/resources/manuals/bulletins/2012/ob480.asp.

[20] Government of Canada. 2012. "Backgrounder — Exceptions from Conditional Permanent Residence for Victims of Abuse or Neglect." Online: http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-10-26b.asp.

reinforcement of power imbalances works in favour of an abusive partner or spouse.[21] Conditional permanent residence for sponsored spouses puts newcomer women at increased risk of violence and abuse. One form of abuse faced uniquely by immigrant, refugee and non-status women is the threat of reporting them to the immigration authorities and having them deported. Many women fear deportation even if they have the right to remain in Canada, because their partner may keep them uninformed of their full rights, or when their partners revoke their sponsorship on various grounds, including allegations of sponsorship misrepresentation or fraud once the woman leaves the abusive situation.

There are established provisions for investigating cases where the sponsored person misrepresented the nature of their relationship, with the possible consequence being the revocation of sponsorship. Unfortunately, this is also used against many women who leave a relationship due to abuse irrespective of whether they first arrived in Canada as a Conditional Permanent Resident or Permanent Resident. Most of these investigations are triggered based on a "poison pen letter," written by the sponsor or his disgruntled family members who remain in a position of power over the sponsored person due to this imbalanced relationship. The Schlifer Clinic also works with many cases where sponsored women face abuse, but remain tied to the sponsorship undertaking in spite of being abused and/or abandoned by the spouse here in Canada. Additionally, the Schlifer Clinic is also contacted by several women who are abandoned abroad by Canadian spouses and/or partners.

Newcomer women face particular barriers to accessing justice and services. Often they lack access to information on their legal rights and recourse, as a result of isolation or language barriers. Newcomer women in situations of violence also sometimes fall through the cracks between women's organizations, familiar with VAW, and settlement organizations, familiar with migration issues, due to a lack of awareness and cross-training of front-line workers regarding the particular vulnerabilities and problems newcomer women face.

Making permanent residence conditional on staying in the marriage for two years traps abused partners (mainly women) into staying in abusive relationships for fear of losing their status. Abused partners, especially women, will not be able to take advantage of the exemption because of lack of access to accurate information on the exemption (e.g. language, isolation), as well as the inherent burden of proving their own abuse, as well as the material cost of providing evidence of the abuse.

[21] Government of Canada. 2012. "Backgrounder — Exceptions from Conditional Permanent Residence for Victims of Abuse or Neglect." Online: http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-10-26b.asp.

Children will also be hurt, for example, when they remain with their parent in an abusive home, or if they face being separated from one parent if the sponsored parent is removed from Canada.

RECOMMENDATIONS:

- **Repeal conditional permanent residence of sponsored spouses. The introduction of "conditional permanent residence" represents a major step backwards in Canadian immigration policy, increases inequalities in relationships between spouses, and puts women in particular at heightened risk of violence**

- **Increase access to information and recourses for immigrant, sponsored, and non-status women experiencing domestic violence. In abuse cases (including emotional, physical, and mental), "misrepresentation" or "fraud" investigations should have special guidelines and frameworks to make sure that individuals are dealt with in a skillful and sensitive manner that will illicit the buried experiences of abuse.**

- **In cases of Forced Marriage (defined as "marriage without consent or with coercion") there should be a protection provision extended to the individuals from misrepresentation of fraud investigations.**

- **Lift the 5 year sponsorship ban is currently in effect on the sponsored spouse individuals in cases of disclosure of abuse**

- **Indefinitely suspend the 3 year sponsorship undertaking in cases of disclosure of abuse**

- **Advise sponsored spouses and conjugal partners of their rights and the supports available to them at the time of arrival in the country.**

- **In cases of abuse, the Government should thoroughly investigate sponsoring spouses who abuse and abandon spouses/partners abroad.**

2. Live in Caregiver Program Changes

The Live-In Caregiver Program introduced by the previous government in November 2014 [22] placed caps on applications for permanent residence, thus removing the guaranteed pathway to permanent status in Canada.

According to the Canadian Union of Public Employees:

> "Caregivers are still required to work as temporary foreign workers for **two years** so the promise to process applications for permanent residence within six months does not prevent family separation. Women from poor countries who are now working under the LCP are **separated from their own children** for at least three to five years in the heartbreaking situation of caring for someone else's children here in Canada. Given the reality of medical, security screening and other requirements, in order to apply for permanent residency status, migrant advocates do not expect these changes to be realized or families to be reunited quickly.
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> Migrant advocates are clear that as long as the status of a caregiver is **tied to one employer**, employers can make demands on caregivers to live in their homes which render the "option" of living outside the home a risk. Providing the option to live out without addressing the root of this vulnerability – being tied to one employer is pointless. Furthermore, caregivers in the LCP are only paid minimum wage, without a living wage most are unable to afford to live out' It is not a real choice."[23]

RECOMMENDATIONS:

- **Strengthen pathways to permanent residence for Live-in Caregivers and expedite processing of pending cases**
- **Implement express entry family reunification, reuniting children with their mothers as they work on getting their permanent residence in Canada**
- **Implement policies that do not tie Live-in Caregivers to one employer, placing them at further risk of isolation and abuse**

[22] Government of Canada. 2016. "Live-in caregivers. " Online: http://www.cic.gc.ca/ENGLISH/work/caregiver/index.asp.

[23] CUPE. 2015. "Fact sheet: Temporary Foreign Workers Program and the Live-in Caregiver Program," Online: http://cupe.ca/fact-sheet-temporary-foreign-workers-program-and-live-caregiver-program.

3. Countries that Otherwise Appear Democratic (Designated Countries of Origin)

In December 2012, *Bill C-31: Protecting Canada's Immigration System Act* substantially changed Canada's refugee determination system.[24] It created a two-tier system of refugee determination, negatively affecting refugee claimants who have experienced domestic violence of SGBV from countries that have been designated as "safe" and "not likely producing refugees."

Bill C-31 gave the Minister of Citizenship and Immigration the power to identify certain countries he considered presumptively safe as "Designated Countries of Origin" (DCOs) for the purpose of deciding asylum claims.[25] Canada added Mexico to the DCO "safe" list in February 2013.[26] As of April 2016, there were 42 countries on the DCO list.[27] Until July 2015, refugee claimants from DCO countries were barred from access to appeal a negative refugee determination to the newly created Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB). It was also possible to deport failed DCO claimants from Canada immediately after a negative decision on their refugee claim; they did not have a right to an automatic suspension of deportation when they pursued review of a negative decision at the Federal Court.

In *Y.Z.*, the Justice Boswell found that the RAD bar for claimants from DCO countries contravenes section 15 of the Canadian Charter of Rights and Freedoms (the right to equality and non-discrimination).[28]

The Liberal government has promised to institute an "expert human rights panel" to determine DCO designations.[29] As of April 2016, the specifics of such a panel's composition and the process for DCO designation (and de-designation) have not been announced. With or without input from such a panel, the government of Canada has the authority to remove Mexico from the DCO list.

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[24] Bill C-31, Protecting Canada's Immigration System Act, SC 2012, c 17, online: Parliament of Canada http://www.parl.gc.ca/LegisInfo/BillDetails.

[25] The category of DCOs was originally introduced by the Canadian government by the Balanced Refugee Reform Act [BRRA] of 2010 as amendments to the Immigration and Refugee Protection Act [IRPA]. The original amendments, however, never came into force. Bill C-31 modified the BRRA (s. 109.1).

[26] Immigration and Citizenship Canada, Designated Countries of Origin, online: Government of Canada, online: http://www.cic.gc.ca/english/refugees/ reform-safe.asp.

[27] The countries are: Andorra; Australia; Austria; Belgium; Chile; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Israel (excludes Gaza and the West Bank); Italy; Japan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Mexico; Monaco; Netherlands; New Zealand; Norway; Poland; Portugal; Romania; San Marino; Slovak Republic; Slovenia; South Korea; Spain; Switzerland; United Kingdom; United States of America.

[28] *YZ v Canada (Minister of Citizenship and Immigration*), 2015 FC 892, [2015] FCJ No 880.

[29] Minister of Immigration, Refugees and Citizenship Mandate Letter (November 2015), online: Prime Minister of Canada Justin Trudeau, http://pm.gc.ca/eng/minister-immigration-refugees-and-citizenship-mandate-letter.

Women fleeing gender-based violence are particularly affected by the policy of deeming certain countries "safe," since violence against women is widespread in many countries that appear stable and democratic. For example, countries such as Mexico, with very high incidence rates of SGBV and violence against women, remain on the DCO list.[30]

RECOMMENDATIONS:

- **Repeal DCO regime in its entirety, and guarantee all refugee claimants, including victims of SGBV and domestic violence full access to appeal rights at the RAD and reasonable timeline**

- **In the alternative, remove countries such as Mexico and Hungary from the DCO list. For example, Mexico has very high incidences of SGBV and violence against women and is clearly not "safe" for everyone.**

4. Forced Marriage[31] and Trafficking of Women[32]

On November 5, 2014, the Federal Government tabled *Bill S-7: Zero Tolerance for Barbaric Cultural Practices Act*, an Act to amend the Immigration and Refugee Protection Act, the Civil Marriage Act and the Criminal Code and made consequential amendments to

[30] For more information, see: IHRP. 2016. 'Unsafe and On the Margins: Canada's Response to Mexico's Mistreatment of Sexual Minorities and People Living with HIV," Online: http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/Report-UnsafeAndOnMargins2016.pdf.

[31] Forced Marriage as a form of human trafficking is about the local, national and international movement of women, men and children from one location to another through the formal institution of "marriage." South Asian Women's Centre. 2014. "Forced Marriage As A Form Of Human Trafficking," Online: http://www.sawc.org/wp-content/uploads/2015/04/Forced-Marriage-as-a-Form-of-Human-Trafficking-Resource-Guide.pdf

[32] The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women/Girls and Children* (2000), set out minimum international standards for the prevention and combat of trafficking in persons for different forms of exploitation.
Article 3: (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefi ts to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; (b) The consent of a victim of trafficking in persons to the intended exploitation … shall be irrelevant where any of the means set forth in paragraph (a) have been used; (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in paragraph (a); (d) 'Child' shall mean any person under 18 years of age." Canada ratified the Trafficking Protocol in May 2002 and accordingly made changes to Criminal Code in 2005. Parliament also enacted the Immigration and Refugee Protection Act (IRPA) in June 2002.

other Acts. This Act made participating in and supporting forced marriage a criminal act in Canada.[33]

The Government made numerous statements in support of these changes, including the need to guard against 'barbaric cultural practices,' as highlighted in the name of the legislation itself. The government particularly focused on the need to 'protect women' from the practices of polygamy and forced marriage in immigrant and recently arrived communities.

According to the South Asian Legal Clinic of Ontario (SALCO):

> The government's statements in support of these changes are not based on any statistical data or research, perpetuate myths about practices of polygamy and forced marriages, and lead Canadians to believe that violence against women is a "cultural" issue that happens only in certain communities.[34]

There are a number of issues with Bill S-7 which must be addressed by the Government. For example, the Bill proposes that, if a permanent resident after landing in Canada through a sponsorship stream or otherwise starts or resumes a polygamous relationship, they can be found inadmissible on this basis alone, without requiring evidence that the person misrepresented their situation or has a criminal conviction. If found to be inadmissible, the permanent resident can be subject to removal. Also, a foreign national who practices polygamy in their country of origin seeking temporary residence will be found inadmissible if they try to enter Canada with only one spouse at the time of seeking entry. The conflation of polygamy with forced marriage is also an inaccurate and misleading—in addition to redundant— aspect to the framing of these provisions.

Under the *Civil Marriage Act*, the new legal requirement for "free and enlightened consent" to marriage now applies nationally to all Canadian residents (in addition to the new minimum age of 16). It is unclear what qualifies as "free and enlightened consent."

There are also provisions under the Criminal Code which criminalize additional acts associated with polygamy and forced marriage. For example, there are new provisions regarding marriage ceremonies, the removal of children from Canada, peace bonds and available defenses in murder and manslaughter cases under the guise of providing "protection" to the survivors and victims of forced marriages.

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[33] Canada is also a signatory to several international consensus documents including the *Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women* and *Convention on the Rights of the Child*. However, Canada has not signed or ratified the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* and has no domestic legislation specific to forced marriage.

[34] South Asian Legal Clinic Ontario. 2014. "BILL S-7: Zero Tolerance for Barbaric Cultural Practices Act," Online: http://www.salc.on.ca/sw00nb4.html.

As a result of Bill S-7, victims and survivors of gender based violence will be discouraged from coming forward if disclosing that they have experienced forced marriage or trafficking will mean criminal sanctions or deportation for their own family.

RECOMMENDATIONS:

- **Repeal Bill S-7 and focus on education and prevention mechanisms. Criminalization has the potential to become a tool to further target and over-police racialized communities. While prevention is important in the discussion around forced marriage in Canada, education is the most effective preventative tool in this debate.**

- **No longer recognize marriages that were conducted abroad by proxy, telephone, fax, Internet or other similar forms, across all permanent and temporary immigration programs. Include an exemption for members of the Canadian Armed Forces who, due to travel restrictions related to their service, were not physically present at their marriage ceremony and registration.**

- **Amend the Immigration and Refugee Protection Act to guarantee protection to survivors of trafficking. Canada also needs to offer adequate support to trafficked persons and faster access to permanent residence[35]**

- **Increase access to information about Temporary Residence Permits (TRPs) to victims of human trafficking and streamline applications for Permanent Residence.**

5. Immigration Detention of Women and Children

As a legal rule, children and youth (minors under 18 years of age) should not be held in immigration detention. Canada has ratified *the United Nations Convention on the Rights of the Child*, which insists that "the best interests of the child" always be a primary consideration and that detention must be a complete "last resort."[36] Section 60 of *IRPA* affirms "as a principle that a minor child shall be detained only as a measure of last

[35] Canadian Council for Refugees. 2015. Comments of the Canadian Council for Refugees on proposed changes to the Immigration and Refugee Protection Regulations Published in Canada Gazette, Vol. 149, No. 14, April 4, 2015. Online: http://ccrweb.ca/sites/ccrweb.ca/files/ccr-regs-comments-may-2015.pdf.
[36] As per Art. 37 of the *United Nations Convention on the Rights of the Child* (1577 UNTS 3, 20 Nov.1989 (entry into force: 2 Sep. 1990)): "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

resort, taking into account the other applicable grounds and criteria including the best interests of the child."[37]

Pregnant women are also detained and some have been forced to give birth while in immigration detention.[38]

Despite knowledge of their legal responsibilities as well as the harms experienced by detained children,[39] CBSA detains children with their families. Men and women are held in separate wings, with a special range for children detained with their mothers. Fathers are allowed to visit their children daily. Some children who are held in the IHCs are not officially detained; instead, they are considered the "guests" of their detained parent.

In 2008, an average of 77 children per month were detained, with the monthly average dropping to 31 in the first 6 months of 2009.[40] In 2012, CBSA officially detained 291 minors under the IRPA, of whom 288 were held in IHCs and 3 in provincial prisons.[41] As the child-guests are excluded from the official statistical record, the true number of detained children is higher than the statistics imply.[42]

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[37] *Immigration and Refugee Protection Act*, IRPA Section 60.

[38] See for example the case of Glory Anawa, who gave birth to her son Alpha Anawa while she was in detention. Alpha spent his entire 2+ years in detention, and at the time of the Chaudhary case, in which his mother was a party, he had not been outside: Amnesty International, Canada Submission to the United Nations Human Rights Committee 112th Session of the Human Rights Committee, London, Amnesty International, 2014, available at: https://www.amnesty.org/en/documents/amr20/1806/2015/en/. H. Gros & P. van Groll. 2015. "We Have No Rights": Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada, Toronto, International Human Rights Program Reports, Online: http://ihrp.law.utoronto.ca/We_Have_No_Rights.

[39] Detaining children has proven grave consequences on children's mental, physical, and emotional wellbeing: "Regardless of the conditions in which they are kept, detention has a profound and negative impact on children. It undermines their psychological and physical health and compromises their development. Children are at risk of suffering depression and anxiety, as well as from symptoms such as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can manifest as acts of violence against themselves or others. Further, detention erodes the functioning of families, meaning that children can lose the support and protection of their parents or take on roles beyond their level of maturity. The detention environment can itself place children's physical and psychological integrity at risk." See International Detention Coalition (IDC), Captured Childhood: Introducing a New Model to Ensure the Rights and Liberty of Refugee, Asylum Seeker and Irregular Migrant Children Affected by Immigration Detention, Melbourne, IDC, 2012, 5, Online: http://www.refworld.org/docid/510a604c2.html.

[40] Canadian Council for Refugees. 2009. "Detention and Best Interests of the Child, Montreal." Online: http://ccrweb.ca/documents/detentionchildren.pdf.

[41] Canadian Red Cross Society.2013. "Canadian Red Cross Society Annual Report on Detention Monitoring Activity in Canada, 2012 – 2013." Online: http://www.redcross.ca/crc/documents/Who-We-Are/Red-Cross-AR-2013-e.pdf.

[42] R. Browne.2015. "What Are Babies Doing Behind Bars in Canada?" *MacLeans* (18 Jun. 2015). Online: http://www.macleans.ca/news/canada/what-are-babies-doing-behind-bars-in-canada/

Detention is very traumatic. The 2013 death of Lucia Vega Jimenez in Vancouver, British Columbia, who killed herself awaiting her deportation to Mexico, highlighted the desperation of many detainees.[43] CBSA did not announce her death until community groups brought it to the media and called for an independent investigation of detention conditions.

The Federal Government's August 15, 2016 announcement of wide-ranging changes to Canada's immigration detention policy[44] are welcome, but it is still unclear how these changes will be implemented.

The government's stated reform objectives include:

- Increasing the availability of alternatives to detention.
- Reducing the use of provincial jails for immigration detention to prevent the interaction of immigration and criminal detainees.
- Avoiding the detention of minors in the facilities as much as possible.
- Improving physical and mental health care offered to those detained.
- Maintaining ready access to facilities for agencies such as the Red Cross, United Nations High Commissioner for Refugees as well as legal and spiritual advisers.
- Increasing transparency.[45]

RECOMMENDATIONS:

- **Stop the practice of detaining children and pregnant women, and implement alternatives to detention, such as community release and supervision or tracking mechanisms.**

- **Increase oversight and implement independent and effective complaints and monitoring mechanism of CBSA detention policies.**

- **Increase training and education to IRCC and CBSA officials about SGBV and domestic violence, as well as the trauma faced by women and children in detention.**

[43] Stephanie Silverman and Petra Molnar. 2016. "Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada," *Refugee Survey Quarterly* 35 (1): 109-127,http://rsq.oxfordjournals.org/content/35/1/109.abstract.

[44] CBC News. 2016. "Canada's immigration detention program to get $138M makeover." Online: http://www.cbc.ca/news/canada/montreal/goodale-immigration-laval-1.3721125.

[45] See: Petra Molnar and Stephanie Silverman, *Research Findings from Immigration Detention: Arguments for Increasing Access to Justice,* CARFMS Blog, August 15, 2016, http://carfms.org/blog/research-findings-from-immigration-detention-arguments-for-increasing-access-to-justice/. H. Gros & P. van Groll, "We Have No Rights": Arbitrary Imprisonment and Cruel Treatment of Migrants with Mental Health Issues in Canada, Toronto, International Human Rights Program Reports, 2015, available at: http://ihrp.law.utoronto.ca/We_Have_No_Rights.

6. Family Reunification[46]

Refugee and immigrant families are frequently separated for prolonged periods or indefinitely, due to policies and practices that block or delay reunification.

The barriers include a narrow definition of family (excluding, for example, non-biological children), costly and time-consuming DNA testing, bars on sponsorship if the sponsor is receiving social assistance, a category of "excluded family members," and administrative delays.

Immigration Refugee Protection Act Regulation 117(9)(d) imposes a lifetime bar on sponsorship of a family member, if the family member was not examined by an immigration officer when the sponsor immigrated to Canada. This permanent ban on family class sponsorships, no matter how compelling the case, is inconsistent with the Act's objective of seeing "that families are reunited in Canada." It has an extremely detrimental impact on children.

Refugees, particularly women with children, are among those hardest hit. Women who flee persecution and seek asylum in Canada often arrive, by force, without their spouse or children. Once recognized as refugees in Canada, they can apply to bring their immediate family members to Canada. However, sometimes they are forced to wait years to be reunited with their spouses and children overseas, who can be in situations of danger and persecution.

RECOMMENDATIONS:

- **Implement express entry family reunification, where children are reunited with their parents in 6 months or less.[47]**
- **Reinstate the previous age of dependants (to 21 years old) and eliminate the 'excluded family member' rule (Regulation 117(9)(d) to recognize that a definition of family members is broad and inclusive.**

[46] Canadian Council for Refugees.2016. "Family Reunification." Online: http://ccrweb.ca/en/family-reunification.

[47] Canadian Council for Refugees.2016. "Family Reunification." Online: http://ccrweb.ca/en/family-reunification.

7. Resettlement

Government-assisted refugees ("GARs") are persons who have been found to be Convention Refugees abroad whose initial resettlement in Canada is entirely supported by the Government of Canada. They are usually referred to the Government by the UNHCR, who determines their refugee status claim when they register. GARs must establish that that their case is appropriate for Canadian resettlement because they do not have access to other durable solutions, such as remaining in the country of asylum or returning to their country of origin.

Canada allocates targets each year for the resettlement of convention refugees who are eligible to receive financial assistance from the government. The federal government is fully responsible for GARs for up to one year. This support includes accommodation, food, clothing, and assistance with employment[48] and is delivered by CIC-supported NGOs. Support can last up to one year from the date of arrival in Canada or until the refugee is able to support himself or herself, whichever occurs first.

Urgent Protection Program (UPP)

The Urgent Protection Program (UPP) ensures that Canada is able to respond to urgent emergency requests by the UNHCR to resettle refugees under threat of being returned home, expulsion or facing direct threats to their lives

Women-at-Risk (WAR)

This is a subsection of the UPP, which processes cases of women who are at risk and who require urgent protection or who are in need of special attention. According to the UNHCR, Canada defines women-at-risk as "women without the normal protection of a family who find themselves in precarious situations and who are in a place where local authorities cannot ensure their safety."[49] WARs may be accepted even if they have "limited settlement prospects" if they are in need of urgent protection.[50] WARs may also be privately sponsored. [51]

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[48] CIC, "Government-Assisted Refugee Program," 01 February 2015, available at: http://www.cic.gc.ca/english/refugees/outside/resettle-gov.asp.

[49] UNHCR Resettlement Handbook, Country Chapters – Canada, July 2011 – revised August 2014, page 9. http://www.unhcr.org/3c5e55594.pdf.

[50] UNHCR Resettlement Handbook, Country Chapters – Canada, July 2011 – revised August 2014, page 10. http://www.unhcr.org/3c5e55594.pdf.

[51] CIC, "Government-Assisted Refugee Program," 01 February 2015, available at: http://www.cic.gc.ca/english/refugees/outside/resettle-gov.asp.

RECOMMENDATIONS:

- **Continue resettling refugees to Canada, including women who have experienced domestic violence and SGBV.**

- **Strengthen the UPP and WAR programs for faster processing of particularly vulnerable and at-risk cases.**

- **Support private sponsorship in addition to government assisted refugees, including targeted sponsorship of women who have experienced SGBV.**

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