

# **Realising the rights of all children in South Africa**

An Alternative Report to the United Nations Committee  
on the Convention on the Rights of the Child

Submitted by the Legal Resources Centre, South  
Africa



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## **Realising the rights of all children in South Africa**

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## **I. INTRODUCTION**

1. In the evaluation of a country's implementation of the United Nations Convention on the Rights of the Child (UNCRC), national stakeholders can send alternative reports to the Committee on the Rights of the Child (hereinafter "the Committee") in parallel to the state party report. The government of South Africa submitted its combined second, third and fourth report on measures taken between 1998 and 2013 to the Committee on 26 November 2015.
2. The Legal Resources Centre, as a national organisation with offices in four provinces of South Africa, has prepared an alternative report titled, "*Realising the Rights of all Children in South Africa*". This report is hereby submitted to the Committee. This report provides supplementary information on South Africa's periodic report on the implementation of the UNCRC. It critically analyses trends related to the practice of *ukuthwala* as a harmful customary practice to girl children, children's access to education, the realities of disabled children and refugee children as a marginalised group in South Africa. It is important to note from the onset that all our submissions and recommendations in this report are informed by the experiences and realities of the children we are/have representing/represented in various legal interventions including litigation, law reform, advocacy, research and training.
3. We are grateful for this opportunity to contribute to the evaluation of the implementation of the Convention on the Rights of the Child in South Africa. We will be available and willing to participate in the pre-sessional working in February 2016 should we be invited by the Committee.

## **II. INTRODUCTION TO THE LEGAL RESOURCES CENTRE**

4. The Legal Resources Centre<sup>1</sup> (hereinafter referred to as the "LRC") is a national public interest, non-profit law clinic in South Africa that was founded in 1979 with offices in Cape Town, Durban, Johannesburg and Grahamstown. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument of justice to facilitate the vulnerable and marginalised persons to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights

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<sup>1</sup> [www.lrc.org.za](http://www.lrc.org.za)

jurisprudence and to the social and economic transformation of the South African society.

5. The LRC, through its Equality and Non-Discrimination project (“the project”), focuses on empowering marginalised and vulnerable groups by utilising creative and effective solutions to achieve its aims. These include using a range of strategies including impact litigation, law reform initiatives, participation in development processes, education and networking within and outside of South Africa. Within the arena of equality and non-discrimination, the LRC firmly believes that the rights of vulnerable and marginalised persons, including children and refugees among others, are integral to the pursuit of social justice.

### **III. CIVIL RIGHTS AND FREEDOMS**

#### ***Child Marriages, Age of Consent and the Practice of Ukuthwala***

6. Within the context of customary law, the LRC firmly agrees with the Constitutional Court in the *Bhe and Others v Khayelitsha Magistrate and Others*<sup>2</sup> judgment which stated that the South African Constitution envisages a place for customary law in its legal system. This is because certain provisions of the Constitution of South Africa put it beyond doubt that our basic laws specifically require customary law to be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions of the custom are not in conflict with the Constitution.<sup>3</sup>
7. Our submissions on the practice of *ukuthwala*, which is described below, are informed by the LRC’s experiences in conducting several *ukuthwala* workshops in rural KwaZulu-Natal in areas such as uMzimkhulu, Bergville, Loskop and other surrounding areas. Our work has been primarily targeted at girls below the age of 18 years as this group seems to be the primary target for *ukuthwala* incidences in these areas.
8. The LRC has also made numerous written submissions to the South African Law Reform Commission (SALRC)<sup>4</sup> on the practice of *ukuthwala* in a discussion paper on the issue and actively participated in *ukuthwala* seminars hosted by the SALRC in Limpopo, Kwa-Zulu-Natal, Pretoria and Eastern Cape.

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<sup>2</sup> 2005 (1) SA 580 (CC)

<sup>3</sup> *Bhe* Para 41.

<sup>4</sup> The objects of the South African Law Reform Commission are to do research with reference to all branches of the law in order to make recommendations to Government for the development, improvement, modernisation or reform of the law. The Commission investigates matters appearing on a programme approved by the Minister of Justice and Constitutional Development. Reports and other documents published by the Commission are made available on the Commission's website for general information.

9. More importantly, the LRC represented a number of clients in litigation before the Western Cape High Court where *ukuthwala* was raised as a defence to criminal charges in the matter of *Jezile v State*.<sup>5</sup> In this case a 28 year old man decided to return to his home village to find a girl to marry. He chose a 14 year girl as his wife. He then paid *lobolo*<sup>6</sup> to the girl's uncle and the negotiations were concluded in one day. Early the following morning, the girl was called to a gathering of various male members of both families who informed her that she was now married. They instructed her to take off her school uniform and put on different clothes. Her resistance to this instruction was ignored and her uncle proceeded to take her one hand and another man, the other. She was removed from her home and taken to the house of the 28 year old man. On the way to this house she was introduced to the man who "married" her for the first time and informed her that he was to be her husband. Among other things, the man raped the minor child as she was now his "wife." He then transported her from his rural village to Cape Town where he kept her under lock and key and raped her with the help of a family member. The girl managed to escape and reported the whole incident to the police. Once the girl reported the matter to the police and the older man was brought before Court, his defence to the charges of human trafficking, rape and assault, was that he had practiced *ukuthwala*.
10. As noted by the SALRC in 2009 there were numerous reports that the age-old tradition of *ukuthwala*, which had apparently died out, was re-emerging in certain parts of the country.<sup>7</sup> Some of the reports noted that:
- About 20 girls a month were being forced to drop out of school because of the forced marriage resulting from *ukuthwala*;
  - A disturbing dimension had arisen where girls as young as 12 years were being forced to marry men old enough to be their parents, some of whom were HIV positive;
  - Some of the abductions were sanctioned by the parents/guardians of the abducted girl who in some instances were influenced by the *lobolo* offered by the prospective husband due to their dire economic situation;

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<sup>5</sup> (A 127/2014) [2015] ZAWCHC 31 (23 March 2015).

<sup>6</sup> *Lobolo* is property in cash or in kind, which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage as defined by MN Ngema in *The Enforcement of the Payment of Lobolo and its Impact on Children's Rights in South Africa*, 2013(16)1 PER / PELJ, pg 405. Available at <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2013volume16no1/2013%2816%291NgemaNOTE.pdf> Accessed on 29 October 2015

<sup>7</sup> Discussion Paper page 18.

- Parents/guardians of the abducted girls rarely reported the abductions to the police *for fear of reprisals, ridicule or being shunned by community members*; for those who reported, police often told them that there was not much to be done because *ukuthwala* is/was a cultural issue;
- Immediately after the abductions, most girls were verbally, sexually and physically abused by their “husbands” and their families.<sup>8</sup>

### The Characteristics of Ukuthwala

11. In order to give some context, we will briefly highlight some of the characteristics of the practice as put before the High Court in the *Jezile* matter.
12. *Ukuthwala* is an irregular method for commencing negotiations between the families of the intended bride and bridegroom directed at the conclusion of a customary marriage.<sup>9</sup> It is not a marriage in itself. In the evidence that the LRC put before Court in the *Jezile* matter discussed above, there are two contrasting understandings of the content of *ukuthwala*. On the one hand, there is the traditional conception of *ukuthwala* that requires consent, and is used primarily to further marriage negotiations; on the other hand, there is the aberration of the traditional conception, which permits rape and abduction. The “bastardised” version of *ukuthwala* is the lived experience of large numbers of women and children, and is a blatant abuse of fundamental constitutional rights. Properly understood, the first version is the only version of *ukuthwala* that should be recognised because of the ordinary principles for determining the content of customary law, and because the aberrant version would have to be excised from customary law through the operation of s 39(2) of the Constitution.<sup>10</sup> More worryingly though, as the Rural Women’s Movement explained in an affidavit in the *Jezile* matter “*ukuthwala has been manipulated to be the systematic, culturally-sanctioned abduction, rape and torture of young girls/women*”.
13. Some of the essential elements of the traditional conception of *ukuthwala*, confirmed by the Court *S v Jezile*<sup>11</sup>, are as follows: both parties must be of marriageable age (usually determined with reference to sexual or physiological maturity rather than purely age); both parties must consent to the *ukuthwala* (although the woman’s consent may be obtained after the ‘abduction’ has taken place, it is usually obtained in

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<sup>8</sup> Discussion Paper Page 19

<sup>9</sup> Para 72.

<sup>10</sup> For a detailed characterisation of the practice of the *ukuthwala* we refer the Committee to the SALRC Discussion Paper 31: The Practice of *Ukuthwala*

Available at <http://www.justice.gov.za/salrc/dpapers/dp132-Ukutwala.pdf>

<sup>11</sup> Para 72.

advance as part of a pact between willing lovers, and the woman's protestations will be dramatised as a sign of modesty); the woman must be placed in the safe custody of the women in the man's homestead; sex is strictly prohibited and the man's family must send an envoy to the women's family to advise them of the *ukuthwala* and to commence *lobolo* negotiations.

14. *Ukuthwala*, in both its forms, feeds on the patriarchal nature of customary law which is prejudicial to girl children living in communities that live in terms of custom. This patriarchal nature of how the practice is conducted leads to a violation of a number of children rights as envisaged in the South African Constitution. Langa Deputy Chief Justice (as he then was) described customary law as "*a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors*".<sup>12</sup> There are echoes of that patriarchy even in the relatively benign form of *ukuthwala* described above. The impact of the patriarchal nature of these rights is discussed below.

#### **The Issue of Consent and age of marriage:**

15. As stated above, the practice of *ukuthwala* is done as a precursor to a marriage so there should be no parents or guardians involved in the process at this stage. As such, 'consent' here refers to the consent that the person (the girl or woman) to be *thwala*'d and the person to *thwala* (the boy or man) give each other before the abduction happens. This consent has to be given by these two parties to each other.
16. Many men who abduct girls in the name of *ukuthwala* like the Appellant in the *Jezile* matter conceive of *ukuthwala* as a form of marriage. However, that is also contrary to the provisions of the Recognition of Customary Marriages Act 130 of 1998. Since *ukuthwala* is a portal to commencing marriage negotiations, the minimum requirements for a valid customary marriage must in the same manner also apply to the minimum standards of *ukuthwala*. This proposition finds its authority in the wording of section 211(3) of the Constitution which states that the practice of custom is subject to any applicable legislation that specifically deals with customary law.
17. Section 3 of the Recognition of Customary Marriages Act stipulates two requirements for a valid customary marriage to exist (i) that both parties consent to the marriage; and (ii) that both parties be at least 18 years old or have parental consent. A version of *ukuthwala* that permits marriage to flow when those requirements have not been met

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<sup>12</sup> *Bhe* (above n 2) at para 78.

would not only be inconsistent with the Constitution, it would be inconsistent with the Act.

18. Additionally, there is an exemption clause in the Recognition of Customary Marriages Act which gives parents and guardians the authority to give consent for their minor children to be married in terms of this Act. This is not a unique provision as a similar provision is replicated in the Marriages Act 25 of 1961<sup>13</sup> which regulates civil marriages. This is detrimental to the rights of the girl children forced into these circumstances. A number of cases have been reported where girls as young as 12 were *thwala'd* by men old enough to be their fathers in some cases. Many of these girls have had to drop out of school because they fall pregnant and/or are required to stay home to take of household chores, placing them in perpetual poverty and dependency on their male counterparts. Many girls/women have had difficult and in some cases fatal experiences with child birth as they are too young to be delivering babies. This undoubtedly undermines the constitutional precepts that value and protect children as a vulnerable group in society.
19. We submit that any customary practices that allow women and children to be married without their consent is an unjustifiable violation of their right to equality, dignity, freedom and security of the person and privacy. Such a custom would need to be developed in order to ensure that it complies with the prescripts of the Bill of Rights.

## ***Recommendations***

### ***Legislative Recommendations***

20. We recommend that both the Marriage Act and Recognition of Customary Marriages Act be amended to ensure that the minimum age for all marriages is 18. Any sections that allows for parental consent to be given in order for a minor child to be married must be removed from all legislations relating to marriage. We propose that the position in the Civil Unions Act 17 of 2006 where the minimum age for a person to consent to a marriage is 18, be uniformly applied to all marriages without any exemptions in order to comply with international obligations that have abolished child marriages.<sup>14</sup>

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<sup>13</sup> Section 26 of the Marriages Act prohibits the marriage of males below the age of 18 years and females below the age of 15 years, unless consent has been granted by the Minister of Home Affairs or any public officer designated by the Minister.

<sup>14</sup> The Civil Unions Act recognises the union between couples of the same sex and allows for them to enter into a civil union. The age of consent to enter into such a union is 18 years and no exception provision is allowed for. The Act also regulates unions between couples of different sex who do not wish to enter into a marriage in terms of the Marriages Act. In order for this union to be

21. We encourage the South African government to enact legislation that would define and criminalise forced marriages in any context including customary marriages.
22. It is necessary for the review of current provincial legislation that may give defences for *ukuthwala*. An example of such legislation is The KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.<sup>15</sup> Section 101 of the KwaZulu-Natal codes provides for damages to be claimed for the removal of a wife, minor child or ward without the permission of the husband, father or guardian respectively. Placed in the context of *ukuthwala* this essentially means that according to this practice a *thwala'd* girl cannot be removed from her 'husband' without the consent of her father or guardian.
23. The South African Police Services (SAPS) must develop practice guides, standing orders and national strategy on *ukuthwala* and other similar customary practices including guidance into how the police should handle a report of *ukuthwala* at the scene, removal of the child from the 'husband', transporting the child to place of safety and care. The police themselves would need to be trained on the harmful nature of the current practice of *ukuthwala* and their role in protecting the rights of these vulnerable children.
24. Criminal sanctions must also be put in place to regulate and deter conduct that is associated with the practice where such consent is not obtained prior to the abduction, and where such consent is not informed and freely given. Currently criminal elements related to *ukuthwala* are being regulated in a fragmented manner with different statutes and common law rules being applied. These include, *inter alia*, the Children's Act, The Recognition of Customary Marriages Act, the Sexual Offences Act, common law abduction or kidnapping to list a few. Perhaps this is why there is some confusion about the legality of the practice by important role players such as the police and social workers who, based on our experience, do not always know what their roles are in terms of the criminal aspects and the social welfare obligations. This fragmented approach fails to appropriately capture the relationship between this practice and forced and child marriages because the enforcement of the laws above fails to address the resulting forced or child marriages.

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legally recognised it must be registered with the Department of Home Affairs and a certificate issued.

<sup>15</sup> As cited in Olivier NJJ *et al* Indigenous LAWSA Par 181.

### ***Non-Legislative Recommendations:***

25. Awareness campaigns must be conducted by government in order to teach all the key stakeholders particularly in rural areas and in schools about the rights of children, among others. Currently these are being predominantly conducted by NGOs. Traditional leaders must be also be engaged as they are viewed (view themselves) as the custodians of custom. If the awareness campaigns are to include workshops in the communities, such workshops should be separated i.e. separate workshops for children and the parents and elders. In our experience the workshops are more effective when this group is separated from the girl children, in the sense that the sessions are more engaging and interactive.
26. The South African Police Services should arrest those that practice *ukuthwala* in a manner that forces minor children into marriages as well as the parents of the girl that have benefitted financially or received cattle *for lobolo*. They should help the victim in laying criminal charges of abduction, rape (if she was forced to have sexual intercourse as a result of the “marriage”) against the perpetrator.
27. The Department of Social Development should advertise the services and assistance they can offer to a child that has been *thwala’d*. This is important as often children that are *thwala’d* stay with their husbands because they have no options and nowhere else to turn to for assistance, thereby deterring them from reporting and/or leaving. In most cases, the victim’s parents and family members promote and accept the practice. This leaves a young girl destitute with very little option but to continue living under harsh and abusive conditions. Financial assistance as well psycho-social services must also be made available for victims of *ukuthwala*, and government must ensure that they budget for and fund such interventions.
28. Education and workshops for vocational training social workers and police – they should be included in the workshops and can participate in how to report an *ukuthwala* case. The police and social workers also need to be trained on this practice and it must be ensured that they understand their respective roles and legal obligations. They further need to be involved in rolling out the awareness campaigns; for example the police can speak about the process of reporting the matter to them and the opening of a case, while the social workers can speak about their role in *ukuthwala* matters, e.g. the placing of the girl child in places of safety.

## **IV. BASIC HEALTH AND WELFARE**

### ***Children with disabilities***

29. The impact of South Africa's legacy of deep inequality and stigma is reflected acutely in the lived reality of children living with physical and mental disabilities. The needs of children living with disabilities in accessing education are largely overlooked in the implementation of policies governing the provision of education to all children in South Africa. This manifests itself in a variety of ways at both the policy level and on the ground.
30. The LRC has been assisting learners who attend a school in Eastern Cape which caters for learners with physical disabilities in a residential school environment. This case has highlighted the lack of protection for children living in a residential school environment who are cared for by care workers regulated by the South African Schools Act rather than the Children's Act, which results in there being no statutory requirement for the standard of care that such care workers should meet. Children with disabilities in such settings are particularly vulnerable to abuse and require special protection; however this is not the case currently under the legislation. The LRC has begun a litigation strategy to compel the departments of education and social development to combine efforts to ensure that care workers who work with children with disabilities in a residential school environment are bound by the standards of care workers under the Children's Act and are adequately trained to assist such learners. The alternative would be to transfer the administration of all residential school facilities for learners with disabilities to fall under the responsibility of the Department of Social Development who have the expertise and financial capacity to train care workers.

### ***Recommendations***

31. Policy changes need to be made in order to ensure that workers who care for learners with disabilities in residential school environments are regulated and trained in terms of the Children's Act and administered by the Department of Social Development.
32. Capacity for coordination between Department of Education and Department of Social Development is strengthened and streamlined to expedite both departments' capacity to assist schools in situations of crisis.

## **v. EDUCATION, LEISURE AND CULTURAL ACTIVITIES**

### ***The right to education, including vocational training and guidance***

33. The legacy of deep-rooted inequality caused by racial segregation under apartheid is still reflected in the disadvantaged schools which remain prevalent in South Africa. Section 29 of the South African Constitution protects the right to education as an immediately realisable right, which is not subject to the availability of resources. This has been confirmed in case law, particularly in the case of *Juma Masjid*<sup>16</sup>. However, too many children in South Africa are still unable to realise this right. The government has attempted to reform the education system through restructuring, increasing the education budget, infrastructure development and special measures designed to ensure inclusive education. The progress or lack thereof made in each area is discussed below.

#### **Restructuring of the Education System**

34. A mechanism introduced in an attempt to make the education system more equal was the “quintile system” relating to non-personnel funding, laid out in the National Norms and Standards for School Funding. The system categorises schools into five quintiles based on their level of poverty (with quintile 1 the poorest, and 5 the least poor). A formula is then applied to provincial budgets so that 30% of the budget is allocated to the poorest 20% of schools, and 5% to the least poor 20% of schools<sup>17</sup>. However, there are a number of problems with the system, which means that it has not allowed for a redistribution of resources to the extent required. For example, it does not take into account the fact that children do not necessarily attend school in the area in which they live. This has resulted in poor schools in wealthy areas being underfunded, as the majority of the learners come from impoverished areas and travel long distances to attend better-resourced schools.

35. A further means of attempting to equalise the education system is the post-provisioning system in relation to teachers. The system allocates a certain number of teachers to each school per academic year, depending on the size of the school. However, in 2012 it was evident that post-provisioning was not being implemented in some provinces, with many schools in the Eastern Cape in particular lacking teachers, while there was a surplus in other schools. This resulted in schools having to re-

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<sup>16</sup> *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. & Others* 2011 (8) BCLR 761 (CC)

<sup>17</sup> “Shifts in education policy (1994–2012), <http://www.zenexfoundation.org.za/zenex-news-archive/item/117-shifts-in-education-policy-1994-2012>

allocate budgets from other resources, or charging additional fees to pay temporary teachers' salaries to fill vacant posts. In other schools, classes simply did not have teachers. The persistent failure to implement post-provisioning led to litigation being undertaken by the Legal Resources Centre on behalf of several of the worst affected schools in the Eastern Cape, which sought the appointment of teachers to vacant posts, as well as the back-payment of the salaries of temporary teachers. Non-compliance by the government led to the case of *Linkside*<sup>18</sup>. This was the first certified opt-in class action in South Africa. A total of 90 schools joined the application, and eventually the government was ordered to pay R82 million in unpaid teachers' salaries, as well as to permanently appoint teachers to their posts. The court went so far as to appoint a "claims administrator" to ensure that the correct amounts were paid to the schools.

36. While measures such as these may have been intended to redistribute resources and personnel in the education system, they have only been successful when the government is compelled to implement them by the courts. Despite court intervention, there are still more than 1 000 vacant posts in the Eastern Cape and more than 2 000 teachers posted to schools where they are in excess of the post establishment. This is a gross misuse of scarce resources and perpetuates inefficiencies in the system. Tens of thousands of children are without teachers for large parts of the school day.
37. The expansion of the compulsory phase of education for 5 year olds (in grade R) is still not universal. Thousands of children are still not offered grade R education and studies have shown that many children that are enrolled in grade R do not receive education that has any discernible benefit. One problem is that grade R practitioners are not fairly compensated receiving a stipend of R5 000 per month without any benefits. This has been the status quo for more than five years.

### **Increased education budget**

38. It is not disputed that the secondary and higher education budgets have increased over the last decade. However, the concern is that this increase in budget is not being seen in the classrooms and is largely consumed by expenditure on personnel. The Limpopo textbook scandal (detailed below), as well as litigation for the provision of furniture in schools, as well as Learner Teacher Support Material is evidence of this.
39. In February 2012 it came to light that many schools in the Limpopo province had not received textbooks for the academic year. SECTION27, a South African NGO,

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<sup>18</sup> *Linkside and Others v Minister of Basic Education and Others* (3844/2014) [2014] ZAECGHC 111 (17 December 2014).

became involved in the matter and made enquiries with the Department of Education to ascertain when the textbooks would be delivered. The Department missed the agreed deadline of May 2012, prompting SECTION27 to make an urgent application to court on behalf of the schools<sup>19</sup>. Despite the court order obliging the Department to deliver textbooks, continued non-compliance meant it was necessary to return to court. The court made a mandatory order for the delivery of textbooks, and a supervisory order to ensure that textbooks would be delivered the following year.

40. In a similar way, in the Eastern Cape it was evident that many public school children were forced to sit on makeshift chairs or the floor, cramped around inadequate numbers of desks. In 2012, the Legal Resources Centre represented three schools in the Eastern Cape, along with the institutional client, the Centre for Child Law, in an application to compel the Department of Education to provide every child in the Eastern Cape with a desk and chair<sup>20</sup>. The litigation was lengthy, due to the Department's repeated non-compliance. In February 2014, the court gave a significant judgment which confirmed that the right to education was immediately realisable and not subject to the availability of resources. The Department continued however to fail to deliver the furniture, resulting in further litigation. Although some of the furniture has now been delivered, it is unclear exactly how much, due to the failure of the Department to keep accurate records.
41. Although positive changes have been made through this litigation, it is disheartening that government policies and mechanisms are not in place to ensure the appropriate spending of the education budget in the first place. Simply increasing the budget means very little if it does not translate into practice. A bloated civil service consuming close to 90% of the education budget (ignoring the policy which recommends expenditure of 80% on personnel) crowds out spending on other critical elements of an education program.

### **Infrastructure development**

42. Two significant steps forward in the improvement of infrastructure must be mentioned here. The Accelerated Schools Infrastructure Development Initiative (ASIDI) was implemented as a result of litigation to address the appalling state of many school buildings, often referred to as "mud schools." The government committed to

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<sup>19</sup> *Section 27 and Others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114; [2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP); 2013 (2) SA 40 (GNP) (17 May 2012).

<sup>20</sup> *Madzodzo and Others v Minister of Basic Education and Others* (2144/2012) [2014] 2 All SA 339 (ECM).

eradicating 445 “inappropriate school structures” within 3 years, including a financial commitment of over R8 billion. By January 2014, 63 schools had been replaced and a plan was in place to replace a further 230 schools. There was however no plan in place setting out a timetable for replacement of a further 200 schools. Furthermore, the ASIDI programme had only spent a quarter of the money allocated to it by the national treasury by 2014. A plan has finally been developed for the remaining 200 schools on the ASIDI list but this was only produced after two years of litigation.

43. In addition, the state has failed to adequately supply electricity, water, sanitation and security in many schools. A report carried out by the Department of Education in 2014 showed that over 1 100 schools still do not have access to electricity, over 500 do not have sanitation facilities, and over 600 were still without water. This is despite Norms and Standards being introduced in November 2013. In March 2012, legal action was launched to compel the government to implement regulations regarding infrastructure in schools, which resulted in binding norms and standards being introduced in November 2013. The regulations set out standards in relation to electricity, water supply, security, sanitation, sporting and library facilities. They set out various time frames, varying from 3 years to 17 years, by which these standards must be met in all schools. However, it is very concerning that a plan for implementation was due to be published by November 2014 but was not produced until July 2015. The reports for many provinces indicate that the first round of deadlines set out in the Norms and Standards will not be met.
44. While there have been developments in infrastructure, many of them have been as a result of litigation, rather than at the government’s initiative.

### ***The aims of education, with reference to quality of education and civic education***

#### **Quality of Education**

45. It cannot be accepted that there have been improvements in the quality of education - statistics reveal that learning outcomes are still poor in many areas. In particular, the government publishes statistics regarding the matric (grade 12) pass rate each year, which is not an accurate measure of how well learners are doing. The matric pass rates only reflect those students who actually reach and write matric exams. A more accurate picture would be to look at the percentage of learners who passed matric

compared to the percentage of learners who began school twelve years previously<sup>21</sup>. For example, the traditional matric pass rate for 2014 (based on those learners who wrote matric) is 76%. However, based on learners from grade two through to matric, it would be just 37%. Furthermore, the aggregate matric pass rate does not enable comparative analysis across schools, quintiles and geographical areas.

### **Access to Education**

46. Policies and laws have been introduced in an attempt to guarantee children equal access to education and outlaw discrimination. Laws such as the Promotion of Equality and Prevention of Unfair Discrimination Act and the South African Schools Act all prohibit the unfair exclusion of learners, but the government has not provided evidence of this. *Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System* (2001) sets out the government's strategy for inclusive education with a goal of 500 mainstream schools to be transformed to accommodate disabled learners over the course of 20 years. A significant flaw in this strategy however was that it only provided for learners of moderate or mild intellectual disability, and not those with more severe disabilities. In 2011, only 108 mainstream schools were able to offer fully inclusive education<sup>22</sup>, far from the goal set out in White Paper 6. Recognising this huge shortfall, , in its progress report of May 2015, the Department of Education advised the government to take "urgent and radical steps" to ensure that it is able to fulfil the policy's goals<sup>23</sup>.
47. Of great concern is that recent research carried out by Human Rights Watch suggests that current available figures dramatically under-estimate the number of children with disabilities who are out of school<sup>24</sup>. The Department's May 2015 progress report (referred to above) reflects wide variances and data discrepancies.
48. The lack of scholar transport has also severely restricted access to education. Large numbers of pupils of all ages have to walk long distances each day in all-weather to attend school. There are also serious concerns about the safety of the children on their way to and from school. In 2015 the LRC represented four schools in an application for transport to be provided. The litigation was successful and the 175

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<sup>21</sup> Nic Spaull, "How to raise the real matric pass rate, " Africa Check (13<sup>th</sup> January 2015); <http://africacheck.org/2015/01/13/how-to-raise-the-real-matric-pass-rate/>

<sup>22</sup> "Only 108 Schools offer inclusive education," Bongani N, Mail & Guardian Online (6 December 2011): <http://mg.co.za/article/2011-12-06-only-108-sa-schools-offer-inclusive-education>

<sup>23</sup> Department of Basic Education, "Progress Report on Inclusive Education and Special Schools," presentation to Portfolio Committee on Basic Education, June 23, 2015, in "Complicit in Exclusion," Martinez, E, Report by Human Rights Watch (18 August 2015)

<sup>24</sup> Ibid.

pupils involved in the litigation will now be spared the long walk to school. It is worrying, however, that there are still so many children who have to attend schools far away and have no means of getting there other than walking. The government needs to urgently adopt a suitable transport policy that applies to all learners across South Africa. The National Scholar Transport Policy has been adopted but is apparently still not published.

### ***Recommendations***

49. The government should closely reassess the quintile system to allow for better redistribution of resources. Factors such as learners travelling to schools in different areas need to be accounted for.
50. Other equalising mechanisms such as post – provisioning should be properly implemented.
51. Further monitoring of the education budget is needed to ensure that the increase is reflected in the classrooms. Given that the budget is there, there is no excuse for a lack of textbooks or furniture in schools.
52. Infrastructure development programmes such as ASIDI and the Norms and Standards must be properly implemented urgently.
53. Full and accurate data regarding school drop – out rates needs to be collected. Plans need to be implemented to tackle this.
54. Measure of quality of learning should not be based simply on traditional matric pass rates, but should take into account those who did not write matric.
55. *Education White Paper 6* should be re-examined and properly implemented, to ensure that disabled children are included in mainstream schools and able to receive a quality education.
56. A nationwide scholar transport programme should be implemented to ensure children do not have to walk long and dangerous distances to school.

## ***VI. SPECIAL PROTECTION MEASURES***

57. Through strategic litigation, advocacy, education and training, the LRC has played a pivotal role in developing robust jurisprudence in the promotion and protection of rights of asylum seekers and refugees. A significant proportion of the LRC's work, since 1996, has been in the sphere of refugee law where the rights of vulnerable and marginalised persons including women, men and children are promoted and protected because they are integral to the pursuit of social justice in South Africa. It is in this

context that we seek to ensure that the existing legal apparatus available and in development are appropriately cognisant of the rights of refugees and asylum seekers. We believe that this will ensure that their experiences of discrimination and prejudice are reduced and eventually diminished. Our regional offices, offer free legal assistance to recognised refugees and asylum seekers in South Africa. Our submissions on this topic are therefore informed by our experience working with refugees and asylum seeker children in South Africa since 1996.

### ***Refusal to Register Birth of Children Born to undocumented Foreign Parents in South Africa***

58. The LRC has been receiving a number of queries relating to birth registration of children born to a mother who has expired papers or has never been documented in the asylum seeker process. The reasons for undocumentation currently vary but they include the refusal by the Refugee Reception Office in Cape Town to receive new applications for asylum because the Department of Home Affairs is attempting to close this office.<sup>25</sup> Additionally, the main reason why asylum permits go unextended includes the Home Affairs practice of refusing to extend permits of asylum seekers who initially applied for asylum in a different province. The Department of Home Affairs requires such asylum seekers to travel back to their original refugee reception office to extend their asylum permit, which for most asylum seekers is financially untenable.<sup>26</sup>
59. In all the cases that we are currently working on all the mothers had written confirmation from the hospitals where the baby was delivered confirming that they had recently given birth in South Africa. However, without any documentation to prove legal stay in South Africa, the births of children born in these circumstances remain unregistered. This is because the birth registration regulations and practices of the Department of Home Affairs requires both parents or at least the mother to be documented before they can register the birth of any child born to non-South African parents.
60. Without confirmation of birth, these mothers are unable to pass their nationality to their children which places them at risk of being stateless. We have emphasised that the right to name, nationality and to have one's birth registered as fundamental to the first few days of a child's life. Failure to do so violates the rights of children as envisaged in

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<sup>25</sup> The LRC is currently pursuing litigation on this matter as it is our belief that the decision to close the Cape Town Refugee Reception Office is unlawful.

<sup>26</sup> The LRC is also pursuing litigation on the refusal by the Refugee Reception Office in Cape Town to renew permits of asylum seekers who originally applied for asylum at another Refugee Reception Office – this matter is currently pending before the Western Cape High Court.

both the South African Constitution and the UNCRC and is certainly not in the best interests of children born to undocumented mothers or mothers with permits that are expired.

### ***Unaccompanied or Abandoned Children***

61. Some unaccompanied and/or abandoned children face a number of challenges in getting refugee documentation that enables them to permanently integrate in South Africa. Integration is often the most durable solution for children in such cases because they often do not have any ties to their countries of origin having arrived in South Africa at a young age and lived all their lives in South Africa. Some abandoned children are born in South Africa and live in South Africa without any contact or visit to their parents' country of origin if known. A number of children in such circumstances go undocumented and remain vulnerable to arrest and police harassment. Such children also remain at risk of being refused access to schools and other services.
62. Some unaccompanied children and/or abandoned children are documented through the refugee system, in many instances where their parents had applied for asylum. In most cases they continue to be documented on their parent's file until they turn 18 when they are informed by the Refugee Reception Offices that they have to now lodge an individual refugee claim. Such a process will only set them up for failure - because of their age when they left their parents' country of origin, they would not be able to meet the standard by which a person is granted asylum in South Africa i.e. must have a well-founded fear of persecution based on either race, nationality, political opinion, membership to a particular social group or ethnicity, and because of this persecution they are unable or unwilling to return to their country of origin. This is also true for unaccompanied or abandoned children born in South Africa.
63. A number of such children will inevitably become undocumented at a crucial point in their development. For some, because of their circumstances, they are in the last years of high school and some struggle to access tertiary education where an identity document is a mandatory requirement for registration. Their ability to access education is therefore hindered by the documentation system that only prioritises their documentation when they turn 18 and not permanently from the point they are considered to be children in need of care and protection in terms of section 150 of the Children's Act 30 of 2005.
64. Section 32 of the Refugees Act states that "*any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the*

*[Children's Act] must forthwith be brought before the Children's Court for the district in which he or she was found. The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act.*" This section would only apply to children that appear to qualify for refugee status and there is no other provision that speaks to children who do not qualify for refugee status or children who are stateless. Additionally, given the age of some of the children, they are unable to provide information relating to any form of persecution that they experienced with their families before coming to South Africa. There are currently no clear guidelines as to how such children should be dealt with in the asylum system which leaves unaccompanied and abandoned children at risk of being undocumented and stateless with very limited access to education, health, and social services, among others.

### **Stateless Children**

65. According to the United Nations High Commissioner for Refugees "*statelessness refers to the condition of someone who is not considered as a national by any country.*"<sup>27</sup> There are at least 10 million stateless people across the world.<sup>28</sup>
66. Parents who give birth to children in their country of asylum are unable to register such birth with their country of origin because doing so would inform their government which was unable or unwilling to protect them and, in some instances the agent of persecution, of their location which could place them in danger. Additionally, utilising any services offered by their government either at embassies or consulates can be construed as an act of availing themselves of the protection of their country of origin, thus placing their asylum application or refugee recognition in jeopardy. As such, the provision of birth registration services and birth certificates in the country of asylum is paramount in ensuring that the rights of children are protected.

### **Citizenship by Birth in South Africa**

67. Citizenship in South Africa can be acquired through birth, descent, or naturalisation as set out in the Citizenship Act. For the purpose of these submissions we have not focused on citizenship by descent but only focused on citizenship by naturalisation and citizenship by birth.
68. Within the framework of birth registration above, children in these circumstances do not have any documentation that ties them to any country, thereby rendering them stateless. For those who are able to receive a birth certificate in South Africa,

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<sup>27</sup> <http://www.unhcr.org/pages/49c3646c155.html>

<sup>28</sup> Ibid.

citizenship is not conferred on until they turn 18 years old and have lived all their life in South Africa.

### **Citizenship by Birth**

69. Very briefly, citizenship by birth is regulated by Section 2 of the Citizenship Act, which provides for three categories of persons who qualify for citizenship by virtue of being in South Africa. For the purpose of stateless children, section 2(2) of the Citizenship Act promises citizenship to children born in South Africa but do not have citizenship or nationality of any other country and whose births are registered in terms of the Births and Deaths Registration Act 51 of 1992. Without their birth being registered in South Africa despite being born in the country, children described above would not be able to apply for citizenship in terms of section 2(2) of the Citizenship Act.

### **Citizenship through Naturalisation**

70. Section 4(3)<sup>29</sup> of the Citizenship Act allows children who were born in South Africa, have lived in South Africa until they turn 18 and whose birth is registered in South Africa to apply for citizenship. Again birth registration is vital in this section for children to be granted citizenship therefore section 4(3) does not provide much of an option for stateless children.

71. Additionally, section 4(3) fails to provide documentation processes for such children should they remain minors in South Africa. Without such a process, these children have the right to apply in terms of section 4(3) but by the time they are able to do so, they would have been without education, health, social services and other services that are linked to an identification document.

72. Section 5(1) of the Citizenship Act states that the Minister may, upon receiving an application, grant a certificate of naturalisation to any “foreigner” who satisfied the following conditions: *he or she is not a minor; and, he or she has been admitted to the Republic for permanent residence therein; and he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application; and he or she*

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<sup>29</sup> Section 4(3) states that 3) *A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if—*  
*(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and*  
*(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act No. 51 of 1992.*

*is of good character; and he or she intends to continue to reside in the Republic or to enter or continue in the service of the Government of the Republic or of an international organisation of which the Government of the Republic is a member or of a person or association of persons resident or established in the Republic; and he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister; and he or she has adequate knowledge of the responsibilities and privileges of South African citizenship; and he or she is a citizen of a country that allows dual citizenship: Provided that in the case where dual citizenship is not allowed by his or her country, such person renounces the citizenship of that country and furnishes the Minister with the prescribed proof of such renunciation.*  
(Own emphasis)

73. As can be noted above, minor children cannot apply for naturalisation in terms of section 5(1) because it specifically excludes them in subsection (a) above. The wording of Section 5(1) of the Citizenship Act clearly obligates potential applicants to satisfy all the listed requirements because of the use of “and” that follows each requirement. However, section 5(4) of the Citizenship Act attempts to cure this defect by authorising the Minister to consider granting South African citizenship to a minor child who is permanently and lawfully resident in South Africa. For many children we have worked with and as described above, permanent stay in South Africa is not an issue as they do not possess travel documentation that would enable them to leave South Africa. However, the lawful residence requirement will most certainly make it extremely difficult, if not impossible, for them to apply for citizenship in terms of section 5(4) as most stateless minor children remain undocumented precisely because they are stateless. It is therefore our submission that while section 5(4) is aimed at enabling minor children to apply for citizenship, it fails to consider the predicament faced by stateless children.

### **Practical Application of the Citizenship Laws to Minor Children in South Africa**

74. For the benefit of the Committee, we have provided a case summary that highlights the lived realities of a stateless child currently living in South Africa. Her name and personal details have been anonymised to prevent any prejudice to her case.

*Child A was born in South Africa to parents with refugee status in South Africa. As the parents were documented, his birth was registered. When A was a toddler mother abandoned him, whereafter he was declared a child in need of care and protection and placed with a foster family to take care of him. As he was born in*

*South Africa, he cannot sustain a refugee claim as he does not know why his parents left their country of origin. His foster placement does not confer any citizenship rights to him, or any other immigration status for that matter.*

*In South Africa, like many countries, most services require picture identification. These services include banks, university applications, and driver's licenses among many other services. Child A has managed to attend school because of his South African birth certificate, however once he completes high school; he will not be able to apply successfully for tertiary education without a picture identification document. This will place a cap on his access to education and his ability to positively contribute to society, when he has potential to thrive given his past results.*

*His freedom of movement is also limited as he is unable to travel domestically without a picture identification document and internationally without a passport. South Africa will not issue him with a passport or identification document because he is not a citizen while his mother's country of origin will not do the same because his birth is not registered there and he does not have any documentation that ties his mother to any country.*

75. If children like A above are not registered and granted citizenship in their country of birth to ensure that they do not continue to be stateless, they would not be able to register the births of their own children once they become parents themselves. This initial failure to curb statelessness means that statelessness becomes something that parents pass onto their children consequently multiplying the number of children and persons who are stateless.
76. Of greater concern, in cases where undocumented children are abused and/or in need of care and protection, the guarantees in the South African Constitution and the Children's Act are not always available to them. This is also because, in some cases, social workers are unable or unwilling to help them because they have been threatened with arrest by the Department of Home Affairs for assisting these children. In some instances, the social workers themselves believe that their services are only for South African children and documented children.
77. Perhaps the most concerning violation of the rights of undocumented persons is the constant risk and fear of arrest. It was recently reported that an undocumented man has never left the only South African town he knows because of fear of arrest. As an undocumented person his freedom of movement is completely non-existent, as are any of his rights as explained above - he lives in a world where these guarantees mean nothing in reality. Additionally, with regard to detention of stateless persons,

there is no country to deport them to so they are detained for longer periods until they are released.

78. Lastly, the fact that a stateless persons does not exist in any country on paper, they are not counted in national populations where they reside, they cannot own anything, cannot travel and no country can claim them as their own, which means that they “do not exist.” These persons “do not exist” anywhere but they have lives, children, needs, rights and vulnerabilities that must be catered for. While human rights are guaranteed for all human beings regardless of status, for stateless persons their experiences and their status has condemned them to lives without rights and without legal existence, simply an undignified existence.

### ***Recommendations:***

79. We urge the South Africa government to ratify the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. We believe that this ratification will bring South Africa’s law and policy on nationality in line with international standards.
80. Amend the Citizenship Act to ensure that children born in South Arica are conferred with South African citizenship. We also urge the South African government to confer citizenship at birth to those children born in conditions that would lead to statelessness or are stateless. This can be achieved through the amendment of the Citizenship Act to confer citizenship by birth to all children born in South Africa. We believe that this would go a long way to reduce statelessness in South Africa.
81. Develop policies and practices that enable unaccompanied and abandoned foreign minor children who do not qualify for refugee status and cannot be repatriated or resettled to be conferred with immigration status during the care and protection process which would ultimately enable them to permanently integrate in South Africa.
82. Put measures in place to make sure that all children birth in South Arica are registered and issued with birth certificates regardless of parents’ lack of identity documents and/or immigration status as this will ensure that the children are immediately able to have their birth registered access education, health services, social services and other similar services without limitation. More importantly providing birth registration will ensure that all children born in South Africa are not stateless birth registration documents indicates where a person was born and who their parents are which very

crucial pieces of information needed to establish which country's nationality a child can acquire.<sup>30</sup>

83. Develop and implement statelessness determination mechanisms which lead to stateless persons being granted legal status that permits residence and guarantees the enjoyment of basic human rights and facilitated naturalisation. This is in line with the UNHCHR's Global Action Plan to End 2014-24 Statelessness.<sup>31</sup>
84. Ensure that the South Africa legal framework on refugees and immigration are operating in a manner that positively contributes to the UNHCR's Global Action Plan to End 2014-24 Statelessness.

## **VII. CONCLUSION**

85. We trust that these submissions will be helpful in the evaluation of the implementation of the Convention on the Rights of Children in South Africa.
86. We thank you again for the opportunity to make submissions on this issue. Should you have any queries and/or do not hesitate to contact Ms. Mandivavarira Mudarikwa (mandy@lrc.org.za).

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<sup>30</sup> Global Action Plan to End 2014-24 Statelessness is available here <http://www.unhcr.org/54621bf49.html> Accessed on 29 October 2015

<sup>31</sup> Ibid.