



LEGAL RESOURCES CENTRE

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Your Ref:

Our Ref: CM/FG/2013

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Office of the United Nations
High Commissioner for
Human Rights
Women Human Rights and Gender Section

By email: akufuor-owusu@ohchr.org and ybirga@ohchr.org

Dear Sir/Madam,

SUBMISSIONS MADE IN RESPECT OF CHILD, EARLY AND FORCED MARRIAGE

We refer to the above call for submissions.

The Legal Resources Centre is a public interest Non-profit organisation in South Africa. The organisation uses the law as an instrument of justice for the vulnerable and marginalized and is dedicated to upholding the rights and values enshrined in the South African Constitution. As one of our key focus areas we provide services to women and children who are the most vulnerable within society.

We trust that the attached submissions provide insight into the issues of child, early and forced marriages in South Africa.

LEGAL RESOURCES CENTRE

Per:

CHARLENE MAY

SUBMISSION ON CHILD, EARLY AND FORCED MARRIAGE IN SOUTH AFRICA

INTRODUCTION

South Africa's Constitution¹ is one of few in the world that includes access to socio-economic and cultural rights. The South African Constitution prohibits gender discrimination² and policies have been put in place that specifically seeks to empower and advance women's rights.

The lived reality of many women however is in stark contrast to what legislation and policy seeks to achieve. Women as a class of persons are the most vulnerable within South African societies, who continue to bear the brunt of discrimination within their home environment, their communities as well as in the workplace. This contributes towards the high levels of gender based violence experienced by women, and women remaining within a vulnerable group.

We are very grateful for the opportunity to make submissions aimed at respecting, promoting and advancing women's rights. As the call for submissions deals specifically with early and forced marriage we will focus on submissions on girl children and women. The submissions will be divided into the following sections:

Part 1: A section addressing the legislative obligations of the state in respect of child, early and forced marriage;

Part 2: The implementation of the legislative obligations and the impact on girls and women;

¹ The Constitution Act 108 of 1996

² Section 9(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

PART 1: THE LEGISLATIVE FRAMEWORK

1. NATIONAL LEGISLATION

1.1 THE CONSTITUTION

The South African Constitution³ in section 9 guarantees the right to equality before the law and equal protection and benefits. The section goes further to grant equal enjoyment of rights and freedoms, and prohibits discrimination on grounds of gender, sexual orientation, marital status amongst others⁴.

Section 10 of the Constitution affords the right to inherent dignity and the right to have that dignity respected and protected. Section 12 of the Constitution speaks to freedom and security of the person where amongst others the right to be free from all forms of violence, not to be treated or punished in a cruel, inhuman or degrading way. Subsection 12(2) in particular speaks to the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, security and control over one's own body. Section 13 addresses issues of slavery and forced servitude and labour. These rights are all implicated and affected when examining child, early and forced marriages within a South African context.

³ Act 108 of 1996

⁴ Section 9(3) *The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

1.2 THE MARIAGES ACT

The South African Marriages Act of 1961 regulates the legal requirements, process and administration of civil marriages between men and women in South Africa. The age of consent to enter into such a marriage is 18 years, but Section 26 of the Act states that:

No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage, except with the written permission of the Minister or any officer in the public service authorised thereto by him.

The Act in its current form therefore allows for an exemption clause from the minimum age of consent to enter into a marriage. The marriage in terms of the Marriages Act must be registered with the Department of Home Affairs in order for the marriage to be legally valid and recognised in law.

1.3 THE RECOGNITION OF CUSTOMARY MARRIAGES ACT

The Recognition of Customary Marriages Act 1998, sets out the requirements⁵ to enter into and the process and administration of marriages that are concluded in terms of the recognised custom of the parties to the marriage. The age of

⁵ Section 3(1) For a customary marriage entered into after the commencement of this Act to be valid –

- (a) The prospective spouses –
 - (i) Must both be above the age of 18 years; and
 - (ii) Must both consent to be married to each other under customary law; and
- (b) The marriage must be negotiated and entered into or celebrated in accordance with customary law.

consent to enter into such a marriage is stipulated as being 18 years. The Act also contains exemption provision in that it allows for two persons below the age of 18 to marry each other where the consent of the Minister of Home Affairs has been obtained⁶. It also allows for the conclusion of a marriage between two parties below the age of 18 where the consent of the parents or guardians⁷ of the parties have been obtained.

It is not a requirement in terms of this Act for the marriage to be registered with the Department of Home Affairs although the Act encourages the registration process.⁸

1.4 THE CIVIL UNIONS ACT 2006

The Civil Unions Act 17 of 2006 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 legally recognised it must be registered with the Department of Home Affairs and a certificate is issued.

2. INTERNATIONAL INSTRUMENTS

⁶ Section 3(4)(a) and (c)

⁷ Section 3(3)(a)

⁸ Section 4(9)

South Africa is bound through signature and ratification to the following instruments that speaks to marriage.

- (a) *The Universal Declaration of Human Rights*: Provides that 'Marriage shall be entered into only with the free and full consent of the intending spouses'
- (b) *The International Covenant on Civil and Political Rights*: Provides that no marriage shall be entered into without the free and full consent of the intending spouses.
- (c) *The Convention on the Elimination of All Forms of Discrimination Against women (CEDAW)*: requires state parties to eliminate discrimination against women in all matters relating to marriage and family relations and provides that the 'betrothal and the marriage of a child shall have no legal effect and all necessary action including legislation shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.
- (d) *CEDAW General Recommendation No 21*: Provides that 'a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being'. It calls for the prohibition of forced marriage in the name of custom, religious beliefs or ethnic origins.
- (e) *The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*: provides that no marriage shall take place without the free and full consent of both parties; that the minimum age of marriage for women shall be 18 years and that every marriage shall be recorded in writing and registered in accordance with national laws in order to be legally recognized.

(f) *The African Charter on the Rights and Welfare of the Child*: prohibits child marriage and the betrothal of girls and boys demands legislation to specify the minimum age of marriage to be 18 years⁹.

It is important to note that the South African Constitution in section 231 requires that international agreements become law in the Republic when enacted into law by national legislation, but that a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution.

Section 223 of the Constitution goes further to stipulate that when interpreting legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

South Africa has therefore taken positive steps in enacting legislation to regulate marriages and unions within the Republic. On the face of it appears that through the enactment of the legislation, laws and policies there is compliance with the obligations placed on the state in terms of the international and regional commitments it has agreed to through signature and ratification of treaties and conventions.

PART 2: IMPLEMENTATION OF OBLIGATIONS AND LEGISLATION

3. The Marriages Act

⁹ Meyersfeld B *"Forced and servile marriage: a proposal for law reform in the Commonwealth"* Common Law Bulletin Vol. 37 No 4, December 2011 pg. 651 – 652

As previously stated the Marriages Act regulates marriages between men and women in the republic. It is a requirement however that these marriages are performed by a duly authorised marriage officer and that the marriage is registered with the Department of Home Affairs. The Marriages Act does not recognise marriages that are concluded in terms of the Islamic faith in South Africa. Jurisprudence indicate that such marriages are not recognised as they have been found to be polygamous in nature and therefore against the public morals of society. The jurisprudence is largely outdated and completely out of touch with the reality of every day South African's, but also a violation of the new dispensation of human rights created under the Constitution.

The government has taken some steps in addressing the recognition of Islamic marriages in the form of a Discussion Paper through the Law Reform Commission and a draft Bill by the Department of Justice and Constitutional Development. There have been a number of notable court judgements pronouncing on the rights of women married in terms of Islamic faith, and which seeks to recognise them as spouses in terms of inheritance laws and pension adjudication¹⁰. The marriages are however not recognised in law and there are no mechanisms in place for the administration and regulation thereof.

As a result there is no legal age for marriages concluded in terms of the Islamic faith and no registration or permission requirements in respect of minors concluding

¹⁰ Hassam v Jacobs NO and Others (CCT 83/08) 2009 ZACC 19; Ahmod v Multilateral Motor Vehicle (444/98) 1999 ZASCA 76

marriages in terms of the faith. Young girls below the age of 18 years are therefore often married off when they fall pregnant so as to avoid shaming the family and allowing for the child to be born in wedlock. Since this marriage is performed by someone who is not a recognized marriage officer the marriage is not legally valid, and therefore the precepts of the Islamic faith is followed. No consent is obtained from the Minister of Social Development or the Minister of Home Affairs to conclude the marriage, as the consent of the parents is obtained. There is also the very real risk of forced marriage where a teenage girl might not wish to enter into the marriage, but would feel compelled to conclude the marriage as it is culturally and religiously expected of her to do so. Very often these young girls leave school to commence their lives as married woman and are not able to complete their education. Effectively continuing the cycle of poverty and entrenching their positions within the community as care providers.

4. The Recognition of Customary Marriages Act 120 of 1998

The Recognition of Customary Marriages Act regulates the administration, management and legal consequences of marriages concluded in terms of customary beliefs and practices in South Africa. The Act is not culture specific so includes all customary beliefs and principles in line with the Constitution which recognises the right to cultural beliefs, customs and activities¹¹.

¹¹ Section 15 of the Constitution

The Act prescribes that a valid customary marriages requires the consent of the parties and requires that they be 18 years of age when consenting to the marriage. The Act however does allow for marriages to be concluded between minors where they have consent of their parents or the Minister of Home Affairs (or a designated official). This effectively means that the Act recognises child marriage where the consent of the parents are obtained and or where the Minister or an official uses their discretion to give permission for such a marriage. The Act also does not require the registration of a marriage in terms of customary law and as a result it is unclear how many marriages of minors have taken place in South Africa and how wide spread the impact of the Act is on the lives of girls and women.

Culture and custom as stated is largely valued in South African society. The Constitution gives recognition to the practice of cultural live and as a result there remains deeply entrenched customary practices that are harmful to young girls and women. One such a practice is the practice of *Ukuthwala*, which has its roots in a customary practice of consensual abduction of the bride by the bride groom¹². The practice historically was to induce the consent of the bride's parents in consenting to a marriage where they would not ordinarily have agreed to the prospective groom, but where the prospective bride had consented and wanted to enter into a marriage. The parties would traditionally have been of the same age and consent from both

¹² Rembe S, Chambaya O, Newman W, Muhuro P "Child and forced marriage as violation of women's rights, and responses by member states in Southern African Development Community" Agenda published online on 12 July 2011 pg.66

parties was a significant factor to prompt the “fake abduction” in order to force the hand of the girl’s parents to consent to enter *lobola*¹³ (bride price) negotiations¹⁴.

In recent times however a derived and harmful practice has been adopted in rural villages where young girls (often as young as 12 years old) are abducted by much older men without the girls consent, and forced into a marriage which she does not consent to. What is important to note is that the traditional practice did not include or contemplate the parties engaging in any form of sexual intercourse as the prospective bride would be taken immediately to the prospective groom’s homestead and handed over to the adult women of his family for safe guarding. Older men were also not traditionally engaged in the practice of *ukhutwala*. The element of force was merely as part of the farce of the abduction and the girl would play out the ritual of objecting to the abduction while fully aware that she had agreed to the drastic step in order to induce her parent’s consent.

The current practice sees the underage girl being forced to consent to a marriage to a husband that she has not willingly chosen. Because the girls are so young when they are abducted they have very little option but to consent to the harmful practice, which has a devastating and lifelong impact on their lives.

¹³ Means the property in cash or in kind, whether known as lobolo, bogadi, bohali, xuma, lumalo, thaka, ikazi, magadi, emabheka or any other name, which a prospective husband or head of his family undertakes to give to the head of the prospective wife’s family in consideration of a customary marriage.

¹⁴ Monyane C “*Is Ukhutwala another form of Forced Marriage?*” Centre for Sociological Research, University of Johannesburg published online 1 August 2013 pg. 67 – 70

The husbands are normally either adult men from their village who work in the cities and who return to the village to create their own homestead. They want to solidify their roots in a community that they no longer live in formally and by taking a wife they have access to communally held land and resources that are available to married men. They create these fictitious homes merely to leave the wife behind to care for the home or their extended family members while they pursue their own lives in the cities. Girls are more often than not forced to engage in sexual intercourse and to bear children while they themselves are still children. The end result being that young girls leave schools to become mothers in rural settings where they have little to no access to health care and sexual reproductive health care. As their husbands are mere visitors to the household they run the risk of contracting sexually transmitted diseases and HIV/AIDS as they cannot navigate consensual sexual intercourse with a partner who engages in sexual activities while in the city.

Our experience¹⁵ also points to young girls being forced to marry much older men as a result of the poverty stricken conditions they find themselves living in. Older men who are able to pay *lobolo* to the girl's family is favoured by the fathers of such girls as the bride price is used to finance the families survival. She is therefore only valued for the money that she can bring into the family and is married off as soon as interest is shown in her from an older man with the means to pay for her. The bride price in these cases is very much a purchase price as oppose to the tradition of it being a form of respect shown to her and her family. These girls are also forced to leave their education aside and to bear children and submit to sexual intercourse

¹⁵ Please note that the villagers have welcomed engagement and participation in our workshops, but did not want the exact village to be identified by name.

with a partner that they did not choose or want. She is further entrenched into poverty as she has no means to provide for herself outside of her forced marriage and is wholly reliant on her husband for her financial survival. She cannot approach her family for assistance as they have agreed to the marriage and would not want to pay back the *lobolo* that they have received for her thereby effectively leaving her destitute and open to further sexual and physical abuse.

It is clear that this type of forced marriage has its roots in the patriarchal attitudes that are prevalent in their communities, which views women as being inferior to men. The political and democratic changes brought about through the enactment of the Constitution have had little to no impact in these communities and the lives of the young girls who live in them.

PART 3: INTERVENTIONS BY EITHER GOVERNMENT OR CIVIL SOCIETY TO ADDRESS THE ISSUE OF CHILD, EARLY AND FORCED MARRIAGE IN SOUTH AFRICA

5. Intervention in respect of recognition and regulation of marriages concluded in terms of the Islamic faith

The South African Constitution recognises the rights of all citizens to uphold and practice their respective religious beliefs. The process of recognising marriages concluded in terms of the Islamic faith has a long road to walk as yet. The Law Reform Commission issued an Issue Paper 15 for public comment in July 2000, which solicited a wide range of comments from civil society organisations, religious

groupings as well as the organised Islamic faith community. Thereafter a Discussion Paper 101 was released in December 2001. In July 2003 a Report was released with the findings of the Commission and a proposed Bill to regulate marriages based on the findings.

Since the report there has been two Bills on the recognition of Islamic Marriages. The first bill sought to give recognition not only to marriages concluded in respect of the faith, but also addresses other aspects and practices of Islamic law including succession. The latest draft of the Bill, which was released for comment in 2010 was focused solely on the recognition of marriages concluded in terms of the faith.

The 2010 Bill was circulated by the Department of Justice and Constitutional Development for comments to the Department by the public. The Bill contained a provision requiring that parties who wishes to enter into a valid marriage must be 18 years or older. It goes further however to allow for marriages in respect of where one or both of the parties are minors. In the case of the minors the Bill proposes that the guardian of the minor must conclude the marriage on behalf of the minor. Further the issue of consent is extended to the Minister of Home Affairs or any Muslim person or body authorised by the Minister to consent to the marriage where the marriage of the minor if found to be desirable and in the interest of the parties. The Bill therefore clearly seeks to continue the current harmful practice of allowing for and legalizing underage marriage and seeking to justify that such a marriage could possibly be in the best interest of the child concerned.

6. Intervention in respect of sanctioned early marriage in terms of the Marriage Act

The South African Constitution places great emphasis on the right to equality and specifies equality in respect of gender and sex. To this end there can be no justification of the distinction between girls and boys in the current framework of the Marriages Act that allows for the marriage of minors where a girl is required to be 15 years of age. It is based solely on preconceived notions of women as being wives and mothers; which is steeped within patriarchy. Allowing for exemption from the required age for marriage is really allowing for and state sanctioned child marriage. The state therefore continues to sanction a harmful practice that entrenches discrimination and inequality.

We could not determine any research or particular focused advocacy on the issue. The Parent Centre a civil society organisation in Cape Town, South Africa provides support services to young and teenage mothers, and has raised the issue of child marriage and the impact it has on especially girls in poverty stricken urban communities as a serious violation of the rights of girl children.

7. Intervention in respect of forced marriage in terms of custom

The South African Constitution stresses the importance of recognition of custom, but stresses that such customs cannot be harmful or discriminatory. Our Courts have

embraced a jurisprudence, which envisages a living customary law which accepts that custom is not stagnant, but flexible and dynamic which corresponds with the changing needs of the society that practices the custom.

In light of this there have been various interventions by government departments as a result of the exposure that the issue has received over the last three years. These interventions have included seminars, roundtable discussions and workshops to discuss the prevalence of the practice and its impact on young women and girls. There have also been internal dialogues to determine roles and clarify responsible departments to implement activities and policy formation¹⁶.

The South African Law Reform Commission has engaged at some level with the issue of forced marriages and *ukhutwala* in particular. On 7 December 2010 they announced in a press release that they would publish a discussion paper on the issue and call for public comment. This discussion paper however has not been released, but a questionnaire was circulated in early 2013 call for responses from civil society on the practice and its impact¹⁷. What is notable about all governments interventions to date is that they were all focused on policy and legislative development at a level that has not seen engagement by communities and the

¹⁶ South African Human Rights Commission(SAHR)C "*Report on Ukhutwala and its impact on children*" Seminar by held by SAHRC, CGE and the Public Protector at Umtata on 17 August 2009; Commissioner for Gender Equality(CG)E "*Traditional Practices and the Constitution: A policy dialogue implications for human rights and gender equality*" paper presented at Kwa Zulu Natal Legislature, Pietermaritzburg on 4 November 2009; South African Law Reform Commission Roundtable discussion 30 November 2009; Department of Social Development "*Report on Workshop the violation of Children's rights through the abuse of the cultural practice of ukhutwala*" held at Benoni on 10 October 2011; Commission for Promotion of Rights of Cultural, Religious and Linguistic Communities *Dialogue on customary practices including ukhutwala and ukuhlohlwa (virginity testing)*" on 23 February 2011

¹⁷ We attach a copy of the Questionnaire as to provide further insight into the level of engagement.

women and girls directly affected by *ukhutwala*. Where there has been engagement at ground level it has been very *ad hoc* and un - coordinated which make it very difficult to monitor efficacy of the interventions. There is therefore no clear plan or strategy in place from government's side to combat and eradicate the practice of *ukhutwala*.

Contributing the lack of success in interventions is the almost double message being sent between government as a whole and individual members of the ruling party and members of parliament. In one instance Mandla Mandela a member of parliament and the Chief of the Mvezo traditional council was quoted as saying "*for a girl to be taken as a wife though ukhutwala ... the process has nothing to do with age ... culture has nothing to do with age*"¹⁸. Media reports¹⁹ have also reported on a community which promised to stop the practice of *ukhutwala* in exchange for the National Prosecuting Authority agreeing to stop prosecution of perpetrators of *ukhutwala* in terms of the number of laws that are breached as a result of the practice. Both of the cited instances point to an overall lack of understanding and ignorance of the role of legislation, criminal law and rights. The message being sent is that where a crime is committed against a woman it can be forgiven as custom allows for reparations or damages to be paid to the women's family. Since the comment made by Mandla Mandela who is a parliamentarian, a member of the ruling party and a member of the house of traditional leaders it certainly creates the

¹⁸ <http://mg.co.za/article/2001-12-02-when-culture-clashes-with-gender-rights> (accessed on 19 April 2012)

¹⁹ <http://www.timeslive.co.za/local/article984376.ece/Community-to-stop-Ukhutwala> (accessed 201 April 2011)

impression that government is prepared to overlook certain harmful customary practices against women where it can be justified through invoking custom.

Civil society organisations and local community based organisations have therefore played a pivotal role in providing places of safety for young girls, advocating for their rights and also facilitating educational engagements with communities and villages in rural areas. The practice of *ukhutwala* has been reported in villages in the Eastern Cape province including Bizana, KwaCele, and Flagstaff as well as villages in Kwa Zulu Natal, including Lusikisiki, Bergville, Loskop and two villages²⁰ in the Umzimkhulu District and Matiele. The Legal Resources Centre has been involved with a campaign in a village in Umzimkhulu and a training session in Loskop. Some of the reports from these engagements indicate that the practice of *ukhuwala* in its current form is perhaps not as new as many would like to think. A number of the more senior women in attendance report that they were forcibly abducted and married as pubescent girls, however they have remained in the marriages and cite reasons as being economic concerns and dependence, the sake of the children born from the marriage and fear of being ostracised from their communities. These women admit to being complacent in their own daughters forced marriage as this is the culture of the community and that the marriages in rural settings at least provide some form of financial security for their daughters.

Some of the young girls in attendance have stated that it is their mothers that have put pressure on them to get married and to remain in the marriages. They do not

²⁰ Community participation was dependent on the name of the village not being disclosed to the public

feel that they are in a position to reject the marriages as they would be a burden on their families and that with strain already placed on the family their continued schooling and demands on family resources would further entrench the poverty of the family. The burden of their care is therefore shifted to their husbands. Girls stated that their marriages often turn abusive where the husband is no longer happy with them. They are forced to endure the abuse as they would not be welcome to return home to their own families.

Civil society organisations such as the National Association for Child Care Workers, the Rural Women's Movement and the Study of Violence and Reconciliation have all been actively providing services to girls in the form of counselling services and places of safety when they run away from their marital homes. The Commission for Gender Equality a Chapter 9 Institution created by the Constitution has also intervened in some matters demanding the prosecution of perpetrators and providing girls with some assistance. There have also been media reports of interventions by the South African Human Rights Commission intervening in cases child abduction and marriages²¹.

A clear strategy needs to be devised and implemented in order to begin to address the root causes of ukhutowala and forced marriage in terms of custom if the government hopes to realise their obligations in respect of the national, regional and international obligations they have undertaken to eradicate forced marriage in terms of custom.

²¹ The Daily Dispatch 3 September 2009

CONCLUSION

It is well documented globally that child, early and forced marriages impact the incidents of maternal and infant mortality, vulnerability to contracting HIV/AIDS and sexually transmitted diseases; and educational and career opportunities as the girl child drops out of school to tend to her growing family's needs and her husband's demands. Early child and forced marriages also result in long term harmful effects on the psychology, emotional and physical wellbeing on the child and woman. This submission therefore clearly indicates that although appropriate laws exist or international commitments have been undertaken not enough commitment is being shown to protect girls and women from early, child and forced marriage.

Submitted by: Charlene May, Mandivavarira Mudarikwa and Thabile Dlamini for the Legal Resources Centre, South Africa

Questionnaire on Ukuthwala

Ukuthwala has various meanings in the Nguni languages and in other language groups in South Africa. This questionnaire refers specifically to the circumstances where people (usually women and girl-children) are taken against their will and forced into a relationship that is described as love, marriage or intention to marry by men and sometimes with involvement and sanction of parents/guardians. On behalf of your organisation, or as someone who has encountered some evidence of this practice in your work, please answer the following questions to help us ascertain the extent of the practice.¹ The intention is to understand it in various social and cultural settings: kindly describe it in detail for the setting in which you have encountered it:

A. Biographic Details – Organisation/ Respondent	
A1. Name of organisation:	Legal Resources Centre www.lrc.org.za
A2. Location and scope of operation:	<p>We have four regional offices: Johannesburg, Durban, Cape Town and Grahamstown.</p> <p>We are a human rights and public interest Non-Profit Organisation. The organisation uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, and disability or by reason of social, economic, and historical circumstances.</p> <p>The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and</p>

¹ Where possible to quantify extent of the problem please do, but please feel free to speak also about incidents that you have become aware of even outside of official recording of your organisation. It is important to bear in mind that where investigations are on illicit and unacceptable social behaviour, formal records and statistics cannot be the only method to arrive at perceptions of the extent of the problem because culprits are discreet and social cover-up is rife. So please be free to describe incidents as you know them.

	networking within South Africa, the African continent and at the international level.
A3. Your position in the organisation:	Candidate Attorney and Attorney (Respectively)
A4. Name and surname:	Thabile Dlamini and Mandi Mudarikwa
A5. Please supply us with your postal address:	N240 Diakonia Centre, 20 Diakonia Avenue, Durban, 4001. 3 RD Floor, 54 Shortmarket Street, Cape Town, 8001.
A6. Please supply us with your email:	thabile@lrc.org.za mandy@lrc.org.za
A7. Please supply us with your telephone/cell number:	Tel: 031 301 7572. Cellphone: 079 472 1093 Tel: 021 481 3000
B. Nature of Practice	
B1. What do you understand ukuthwala to be?	<p>The original/traditional version of Ukuthwala occurred when 2 consenting couples, who were of the same age, wanted to get married but couldn't as the would-be groom did not have the resources (cattle) to pay lobolo. Thus the bride to be would agree to elope with her partner in order to get married. Upon arrival at her partner's homestead, the groom would send messengers or his peers to the parents of the bride to notify them that their daughter was with him and safe in his homestead.</p> <p>The parents were also reassured that both the groom and the bride would not engage in sexual intercourse prior to the conclusion of the lobolo negotiations. Once the lobolo negotiations were concluded, the couple</p>

	<p>would be deemed to be married.</p> <p>What is happening today is not the original version of Ukuthwala, instead it's a distorted version of the practice. Young, school girls are being abducted and forced into marriage without their consent by men or boys who are much older than they are. They are often forced to drop out of school in order to do domestic chores such as washing and cooking. They start having children at a young age and they are deprived of their innocent and childhood. They are forced to be young mothers and wives without education and this traps them in a cycle of poverty.</p> <p>Another problem that some of the girls that are subjected to Ukuthwala face is the lack of support from their parents when they are thwala'd. Some parents are happy to receive cattle for lobolo in "exchange" for their daughter's hand in marriage. The girls who have been thwala'd expressed that they don't feel free to leave the marriage as they are not welcome to return home. They are often encouraged by their parents to enter into marriage at a young age as their parents see them as a financial burden. It must be reiterated that this lack of parental support is experienced by some of the girls who have been thwala'd.</p>
<p>B2. What is/are the vernacular word/s used to refer to it in your area?</p>	<p>"ukuthwala" and "ukuhrulula"</p>
<p>B3. In your view is ukuthwala considered a</p>	<p>The heart of Ukuthwala is consent. The</p>

<p>cultural practice or is it socially unacceptable?</p>	<p>traditional/original practice of Ukuthwala is culturally acceptable as there is mutual consent from the parties who decided to get married through this practice.</p> <p>It is the distorted version of Ukuthwala which is currently being practiced that is totally unacceptable. It's unacceptable because of the lack of consent from the girl, the age of the girl as well as the fact that she is often denied opportunities to education, rights to health and reproduction, childhood and dignity. The distorted practice also reinforces gender inequality.</p> <p>In the majority of cases it is viewed by the communities in which we work as an unacceptable practice. The majority of areas where the practice occurs however is rural where custom is practices and entrenched, as such women have very little bargaining power and their rights to be equal not respected. There if therefore not a lot of avenues for women to raise their objection against the practice, and as men are largely responsible for the continuation of the practice and they derive all the benefit therefrom there is a continued believe and attempt to alleviate the practice into an entrenched customary right.</p>
<p>B4. Describe ways (if any) in which those who justify it practice it</p>	<p>Those that practice this harmful practice do it hiding behind the blanket of "this is our culture" yet the distorted version of the practice is very much removed from the original practice.</p>

	<p>Patriarchy has very strong roots within custom and customary practices. Although not all practices infringe on women and girls rights some like ukuthwala does, and it is justified because the men that practice it believes themselves to be more superior and have more rights than women and girls. The custom is used as the excuse to continue to perpetuate patriarchal customary practices.</p>
<p>C. Occurrence/ Prevalence</p>	
<p>C1. Describe cases you are aware of. [For this question please be free to describe specific individual cases, taking care not to specify names, or kindly give us statistics and areas of occurrence]</p>	<p>This practice usually occurs during the festive season as well as during major holidays such as Easter and June/July school holidays. This is when the boys/men usually working in mines, as taxi drivers and as long distance truck drivers from Durban and Johannesburg return to their villages and want to have a wife that will be responsible for doing domestic chores.</p> <p>In most occasions they don't choose a woman their own age as they prefer a younger girl/woman. They don't wait for the girl by the river (as how the practice is traditionally done) instead they either abduct the girl on her way home from school or they will "ask for directions" to a certain place and will abduct the girl once she comes closer to the vehicle they are driving. The girls report that once they are captured, they are often beaten up if they try to escape and they are often forced by violence to submit to Ukuthwala. Furthermore, they</p>

	<p>are also given <i>muti</i> or traditional medicine which weakens them and makes it easier for their abductor to control them, thereby easily forcing them into marriage.</p>
<p>C2. Of these how many cases have taken place in the last 12 months?</p>	<p>In December 2012, a group of the girls informed the village's child and youth care worker that a girl was being thwala'd and with the help of the police, the perpetrator was arrested. However that is an isolated case. There are more cases of Ukuthwala that are not being reported. They are not being reported due to the fact the girls' parents receives and accepts cattle for lobolo and informing the girls that they are no longer welcome to return back home. Without a place to go back to, these girls are forced by circumstance to stay with the man that thwal'd them.</p> <p>Additionally there is also a stigma within rural communities that it is a shame to walk away from a marriage and it is always the woman's responsibility to ensure that the marriage works and is intact. Should the thwala'd girl leave the marriage, she will be an outcast in her community and viewed as a failure and not marriage "material". Fear of this stigma and being shunned out of communities forces thwal'd girls not to report their circumstances to the police and chose to stay with their 'husbands.'</p> <p>Because of the shame and societies prejudice it is difficult to say how many cases have taken place as girls are hesitant</p>

	to come forward.
<p>C3. Do you think that ukuthwala is omitted in policy or in legal instruments? Please explain.</p>	<p>Ukuthwala is not specifically/explicitly mentioned in policies, however there is legislation that condemns and criminalises the practice especially as pertains to the rape/sexual assault, kidnapping and marriages with minor children. The applicable laws are:</p> <p>1. Constitutional Rights</p> <p>Ukuthwala can be addressed through the enforcement, promotion and protection of Constitutional Rights which informs a number of legislation.</p> <p style="text-align: center;">Section 9 – Equality</p> <p>Ukuthwala as described above targets only women and female children. It deprives young girls of education and a childhood because they are perceived as property only capable of marriage and bringing money to their families. It completely undermines the provision of equality in Section 9.</p> <p style="text-align: center;">Section 10 – Human Dignity</p> <p>The constitutional protection of human dignity recognizes that every human being must be treated as equally worth of respect regardless of any status or position in society. Respect and protection for the inherent dignity of female children and women requires an acceptance that they are not inferior beings, but that they are capable of making their own choices on when and who they marry. Ukuthwala custom as currently practiced treats women and young</p>

female children as objects of their families to give away and bring money to the family which is an obvious violation of human dignity.

Section 12 - Freedom and security of the person

Section 12 of the Constitution guarantees everyone the right to freedom and security. This freedom includes the right to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way. Violence against an individual is a grave invasion of personal security. It is clear that the misused practice of ukuthwala violates this right.

Section 28 - Children

Section 28 provides that children should be free from violence, coercion, discrimination, intimidation and abuse. Section 28(1)(d) explicitly states that all children must be protected from maltreatment, neglect, abuse or degradation. Children should be protected from the practice of ukuthwala because the practice is riddled with violence, coercion, abuse and intimidation of women and female children who are extremely vulnerable and at the mercy of the males in their community. Young girls and women are sexually violated by their 'husbands' all in the name of culture.

Section 28 also provides that 'a child's best interests are of paramount importance' in any matter concerning the child. It cannot be

overstated how forcing a child into a marriage at the age of twelve with an older man cannot be in the best interests of any child.

2. The Children's Act of 2005

The Children's Act, No 38 of 2005 provides for the following:

Section 12(1): states that a child has a right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

Section 12(2)(a): states that a child below minimum age set by law for a valid marriage may not be given out in marriage or engagement.

Section 12(2)(b): states that a child above the minimum age may not be given out in marriage or engagement without his or her consent.

Section 18(1),(2) and (3), focuses on parental responsibilities and rights in respect of a child stating that a parent or a person who acts as a guardian of a child must give or refuse consent required by law in respect of a child including consent to a child's marriage.

3. The Criminal Law (Sexual Offences and Other Related Offences) Amendment Act of 2007,

Section 15 and 16 of the Act provides that a person who commits an act of sexual penetration with a child is, despite the consent of the child to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child. Section 17 of the Act prohibits the sexual exploitation of children by parents and others.

Section 18 prohibits the sexual grooming of children. Parents or relatives and others who collude in or aid and assist the ukuthwala of a girl child commit the crime of sexual exploitation of children. In terms of the Act, a child is any person under the age of 18 but in regard to section 15 and 16, a child is a person of 12 years and older but under the age of 16.

4. The Recognition of Customary Marriages Act of 1998,

The practice of ukuthwala violates the provisions of the Recognition of Customary Marriages Act which states that both parties to the marriage must give their consent before being married.

5. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The practise of ukuthwala as currently practiced prejudices the girl child access to education as they forced to perform wifely duties among others. It also treats the girl child as a person that is inferior and only

valuable for goods paid through lobolo which violates the prohibition of gender discrimination in the Equality Act. this can be characterised as unfair discrimination on ground of gender in traditional customary practice.

6. The Domestic Violence Act 116 of 1998. Because domestic violence is defined among other things as 'any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant.' A victim of ukuthwala may apply for a protection order under the Domestic Violence Act against family members as well as her 'husband' if they were played any role in her abduction and abuse in any way.

7. The Prevention and Combating of Trafficking in Persons Bill as it pertains to the trafficking of girls/women during the thwala.

We have enough legislation to curb and prevent the practice; however it's the non-implementation of the said legislation that enables the practice to continue. It may therefore be necessary for directives or policies that specifically address how cases of ukuthwala can be reported, investigated and prosecuted under the specific already existing laws. This would provide clarity to all the role players and stakeholders.

Training is therefore critical as the first line of intervention when a girl is brave enough

	<p>to report must be equipped to recognize the crime associated with ukuthwala and act thereon.</p>
<p>C4. What do you think needs to be done about ukuthwala? Please specify 'what' and 'by whom'.</p>	<p>In order to effectively end this harmful practice, various people and government stakeholders need to play an active role. Starting in the rural communities, the chiefs and nduna's need to actively condemn this distorted practice and work with their communities towards ending this practice. They must also however know that they are not able to dispense law and justice and that matters must be reported to the relevant police station. In other words chiefs and nduna's need to understand that ukuthwala is a crime and as such must ensure that it is reported, and not dealt with through an informal justice system.</p> <p>The Department of Social Development, Health, Justice and Constitutional Development and the South African Police Services need to enter into meaningful engagements with communities facing and practicing ukuthwala in an effort to educate them about the effects and consequences of the practice (on the girl child and on the community) as well as why it is not in line with the principles of our Constitution. The DSD must establish and fund places of safety for young girls who have fled their homes and we cannot return as this obligation is being fulfilled by CSO's predominantly</p>

The South Africa Police Services need to arrest those that practice Ukuthwala as well as the parents of the girl that have benefitted financially or by 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. Practice guides or standing orders on ukuthwala maybe necessary to provide guidance into how the police 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

The Department of Justice and Constitutional Development (DOJ & CD) needs to implement the relevant legislative frameworks in an effort to curb and end the practice as well as afford access to justice to the victim of this practice. Social workers (from the Department of Social Development) need to help the victim in affording her the counselling and psychological help that she may need. Again Court directives and police would be necessary in the implementation of current laws in prosecuting those who force young girls into the practice.

Currently ALL the government departments that are directly responsible when this

practice happen like SAPS , DOJ & CD, Department of Social Development and Department of Health do not have nay statistics on the practice. How can the practice be addressed if there is no record reflecting its extent. Also without actual statistics the practice continues to exist in the dark because no one can actually give realistic data that warrants any form of action from government. There should therefore be a mandate to every government department to record statistics of any ukutwala case that they encounter as this would breakdown the practice and show areas where resources must be put.

There is very important role that the Chapter 9 institutions can play in combatting the harmful practice of ukuthwala. An example of this is the Commission for Gender Equality who have now developed a strategy in addressing ukuthwala. They have been involved in actually working with the police once cases have been reported to them. This work would need to be budgeted for given the extent of the practices. So a more hands on approach for the Chapter 9 institutions like the CGE.

It is necessary for the South African Law Reform Commission to also conduct a review of current provincial legislation that may give defences for ukuthwala. An example of such legislation is the The KwaZulu Act on the

Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 of 1987.² Section 101 of the KwaZulu-Natal codes¹ provides for damages to be claimed for the removal of a wife, minor child or ward without the permission of respectively the husband, father or guardian. Placed in the context of ukuthwala this essentially means that according to this practice a thwal'd girl cannot be removed from her 'husband' without the consent of her father or guardian.

Section 115(1) provides for the following crimes: the abduction of an unmarried girl; enticing a female from the control or custody of her father, husband or guardian and knowingly harbouring without just or reasonable cause the wife, daughter or ward of another person after a demand has been made for her return. In terms of the courts' interpretation of the Natal Code of Law Proc R195 of 1967 ukuthwala did not amount to a delict.³ However, in cases where lobolo has already been paid, the father may claim damages.⁴

The Department of Social Development should advertise what services and assistance that they can offer to child that has been thwal'd. this is important as often many children that are thwal'd stay with their husbands because they have no options

² As cited in Olivier NJJ *et al* Indigenous LAWSA Par 181.

³ *Dhlamini v Mkize* 1929 NAC (N & T) 100; *Ndhlovu v Sosibo* 1937 NAC (N & T) 102.

⁴ *Dhlamini v Mkize* supra; *Shabangu v Nkosi* 1941 NAC (N & T) 118.

	<p>and nowhere else to turn to for assistance thereby deterring them from reporting and/or leaving.</p>
<p>C5. Do you think that victims have had sufficient support?</p>	<p>No, most victims don't have any support. The little support they have is from their parents (and this is only if their parents condemn the practice). 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.</p>
<p>C6. In your view how should support be rendered to victims or those vulnerable to this practice?</p>	<p>Support in condemning the practice by the community's chiefs and nduna's should be active-the girls feel that they are on their own as their traditional leaders (whom everyone looks up to) are silent about the ending of this harmful practice. The victim's parents and families should be more accepting of their daughters and their educational and career opportunities as opposed to accepting cattle in exchange for their daughter's hand in marriage. This can only be done once the parents are made aware of the consequences of Ukuthwala are on the victim.</p> <p>The police need to arrest those that are practicing Ukuthwala so as to serve a warning to the rest of the would-be perpetrators that the Ukuthwala is against the law and will not be tolerated. Those that are in marriages as a result of Ukuthwala should be allowed to walk away from their</p>

marriages and be accepted back into their communities without any form of discrimination or prejudice.

If a child is born from that marriage and the victim is unemployed, social workers should assist the victim to obtain a social welfare grant for their child as well as a protection order in terms of the Domestic Violence Act of 1998 if the husband is abusive.

Victims should be afforded an opportunity to claim civil remedies against the perpetrator for the pain and suffering they have endured as a result of being thwala'd as well as missed educational opportunities.

Financial assistance as well as psycho-social services must also be made available for victims of ukuthwala, and government must ensure that they budget and fund such interventions.