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**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT IN  
RESPECT OF THE CHILDREN'S AMENDMENT BILL [B18-2020]**

**Submitted by**

**Women's Legal Centre**

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**Attention: Ms Lindiwe Ntsabo**

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## INTRODUCTION

1. We refer to the call for comment in respect of the Children's Amendment Bill [B18-2020] (**'the Bill'**). We welcome the opportunity to make these submissions and to engage with the issues related to the Bill and its proposed amendments. **We also take this opportunity to note that we will avail ourselves to make oral representation on the submissions made herein should we be called upon to do so.**
2. Our comment, as set out below, will deal with two specific issues in the Bill: child marriages; and adoption processes. Our submission is therefore split into two parts, with **Part A** addressing child marriages and the proposed amendments relating thereto; and **Part B** addressing adoption processes and the proposed amendments relating thereto.
3. Part A: child marriages is arranged as follows:
  - 3.1. General context of child marriages;
  - 3.2. Age of marriage in South Africa;
  - 3.3. Regional and international obligations binding on South Africa relating to child marriages; and
  - 3.4. Submission to the Children's Amendment Bill.
4. Part B: adoption processes is arranged as follows:
  - 4.1. Context of adoption and adoption services provision in South Africa, and its effects on the rights of birth mothers to place their children up for adoption;
  - 4.2. The international and regional law context binding on South Africa relating to adoption processes and the rights of birth mothers; and
  - 4.3. Commentary on specific sections of the Children's Amendment Bill.

## ABOUT THE WOMEN'S LEGAL CENTRE

5. The **Women's Legal Centre** ("**The Centre**" or "**WLC**") is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy and education and training. We aim to develop feminist jurisprudence that recognises and advances women's rights. The Centre drives a feminist agenda that appreciates the impact that discrimination has on women within their different classes, race, ethnicity, sexual orientation, gender identity and disability. The Centre does its work across five programmatic areas including the right to be free from violence; women's rights in relationships; women's rights to land, housing property and tenure security; sexual and reproductive health and rights; and the right to just and favourable working conditions for women.

## PART A: CHILD MARRIAGES

*This section of our submission deals with clause 6 of the Bill (which seeks to amend section 12 of the Act) and section 150 of the principal Act. It draws from the work of the WLC as well as from regional and international statutes and mechanisms.*

### GENERAL CONTEXT OF CHILD MARRIAGES

#### ***What is a Child, Early or Forced Marriage?***

6. Section 28(3) of the Constitution defines a child as a person who is under the age of 18 years. Accordingly, a child marriage, or early marriage, is any marriage where at least one of the parties is under 18 years of age. Forced marriages are marriages in which one and/or both parties have not personally expressed their full and free consent to the union and where parties may or may not be under the age of 18 years.
7. We further submit that, for the purposes of section 12(2)(a) and (b) of the principal Act, a child marriage is a form of forced marriage, given that one and/or both parties have not expressed full, free, and informed consent<sup>1</sup> to enter into a marriage or is deemed not to have the capacity in law to enter into a contract of marriage in legal terms.

#### ***Statistics of child marriages in South Africa***

8. According to the United Nations Children's Fund ('UNICEF') approximately 6 per cent of girls in South Africa marry before the age of 18 years, and 1 per cent by the age of 15 years.<sup>2</sup>
9. Statistics South Africa releases an annual Marriage and Divorce statistical analysis which presents information on civil marriages, customary marriages and civil unions that were registered each year in the South African national marriage registration systems maintained by the Department of Home Affairs ('DHA'). The analysis also includes the number of child marriages as well as divorces that were granted on an annual basis based on the records of the Department of Justice and Constitutional Development ('DOJ&CD').
10. For seven years, selected randomly, child marriage statistics were recorded as following:
  - 10.1. In **2010**,<sup>3</sup> 13 boys and 289 girls under the age of 18 were married according to civil law. Five boys and 758 girls under the age of 18 were married according to customary law.

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<sup>1</sup> Child, early and forced marriage, including in humanitarian settings at <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/ChildMarriage.aspx> [Accessed on 24 November 2020]

<sup>2</sup> UNICEF 'State of the world's children 2016: A fair chance for every child', [https://www.unicef.org/publications/files/UNICEF\\_SOWC\\_2016.pdf](https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf) (Accessed 25 November 2020)

<sup>3</sup> Marriages and Divorces, 2010, available at <http://www.statssa.gov.za/publications/P0307/P03072010.pdf> [Accessed on 26 November 2020].

- 10.2. In **2011**, 18 boys and 238 girls under the age of 18 were married according to civil law. 14 boys and 174 girls under the age of 18 were married according to customary law.
  - 10.3. In **2013**,<sup>4</sup> 14 boys and 172 girls under the age of 18 were married according to civil law. Nine boys and 79 girls under the age of 18 were married according to customary law.
  - 10.4. In **2015**,<sup>5</sup> 6 boys and 77 girls under the age of 18 were married according to civil law. 5 boys and 120 girls under the age of 18 were married according to customary law.
  - 10.5. In **2016**,<sup>6</sup> 4 boys and 99 girls under the age of 18 were married according to civil law. 14 boys and 252 girls under the age of 18 were married according to customary law.
  - 10.6. In **2017**,<sup>7</sup> 2 boys and 70 girls under the age of 18 years married according to civil law, with 62 of these brides marrying for the first time. Eight boys and 77 girls under the age of 18 were married according to customary law.
  - 10.7. In **2018**,<sup>8</sup> 2 boys and 53 girls under the age of 18 were married in terms of civil law, with 50 of these brides marrying for the first time. 7 boys and 139 girls under the age of 18 were married according to customary law.
11. The statistics indicate that more girls than boys are being allowed to enter into marriage while under the of 18, and that these girls under the age of 18 are getting married to persons older than 18 years. These numbers are likely higher given that the Department of Home Affairs' marriage register only record customary marriages that are registered after they are concluded, and in instances where the necessary legal consent has been obtained as required by the Recognition of Customary Marriages Act S4(3).
  12. Based on our experience, the majority of customary marriages are in fact not registered in South Africa as such registration is not a requirement. One could reasonably presume therefore that the number of marriages of girl children is much higher than the number registered and captured annually in official records.
  13. It is further worth noting that the register only captures the details of those marriages legally recognised in South Africa and excludes religious marriages such as Hindu marriages and Muslim marriages. No data is being collected by government to record

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<sup>4</sup> Marriages and Divorces, 2013, Available at <http://www.statssa.gov.za/publications/P0307/P03072013.pdf> [Accessed on 26 November 2020].

<sup>5</sup> Marriage and divorces, 2015, Available at <http://www.statssa.gov.za/publications/P0307/P03072015.pdf> [Accessed on 26 November 2020]

<sup>6</sup> Marriage and Divorces, 2016, Available at <http://www.statssa.gov.za/publications/P0307/P03072016.pdf> [Accessed on 26 November 2020]

<sup>7</sup> Marriages and divorces, 2017, Available at <http://www.statssa.gov.za/publications/P0307/P03072017.pdf> [Accessed on 26 November 2020]

<sup>8</sup> Marriage and Divorce, 2018 Available at <http://www.statssa.gov.za/publications/P0307/P03072018.pdf> [Accessed on 26 November 2020]

how many child marriages take place in terms of religious beliefs and these marriages go unrecorded.

14. What is clear from the available data is that child or forced marriage disproportionately impacts on girls and in particular Black African girls. We accordingly agree with the Department of Social Development that we need to strengthen our laws to address child and forced marriage in our country.

***Circumstances causing, and the consequences of Child, or Forced Marriages***

15. Statistics on child marriages demonstrate a correlation between poverty and child or forced marriages. This is because girls with access to education and health services from urban, and educated wealthier families are less likely to be married at a young age compared to girls from, rural, poor, and uneducated backgrounds.<sup>9</sup>
16. Dependency on male figures perpetuates economic inequality and social disparity, primarily because, as explained above, young girls remain disproportionately affected by child marriage. As a result, child marriages are considered to be one of the “*most pernicious manifestations of the unequal power relations between females and males.*”<sup>10</sup> Societies cannot sustainably develop without transforming the distribution of economic opportunities, resources and choices for males and females in order to ensure that there is equal power for women and girls to impact their own lives and positively contribute to their families, communities and countries.<sup>11</sup>
17. Within this context, there is a direct correlation between promoting gender equality and successful development policies. It is unlikely that countries marked by gender discrimination and inequality will achieve their full potential and/or achieve their development outcomes, such as the National Development Plan in South Africa if this practice continues.
18. Early childbirth is one of the consequences of child, early or forced marriages.
  - 18.1. Globally, pregnancy is reported to consistently be one of the primary causes of death for young girls between the ages of 15 to 19.<sup>12</sup> The risks are enormously compounded for young mothers under the age of 15, who are five times more likely to die from maternal causes than adult women.<sup>13</sup>
  - 18.2. Moreover, statistical patterns show that young girls from lower-income households are more likely to fall pregnant and suffer from nutrition deficiency,

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<sup>9</sup> Carrington, Kerry *Feminism and Global Justice*. ‘Violence against women: Asia and the Middle East.’ London: Routledge, 2015 at p 47.

<sup>10</sup> Rangita de Silva-de-Alwis (2008) Child Marriage and the Law, Legislative Reform Initiative Paper Series, Working Paper Series, UNICEF, p 1.

<sup>11</sup> World Bank Group. 2015. World Bank Group Gender Strategy (FY16-23): Gender Equality, Poverty Reduction and Inclusive Growth. World Bank, Washington, DC. © World Bank. <https://openknowledge.worldbank.org/handle/10986/23425> (Accessed on 24 November 2020).

<sup>12</sup> Ending Child Marriage: Progress and Process’, available at:

[https://www.unicef.org/media/files/Child\\_Marriage\\_Report\\_7\\_17\\_LR..pdf](https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf) Accessed on 24 November 2020 at p 2.

<sup>13</sup> Ibid at 31.

although this notably varies by region. On average one in two girls in developing countries has nutritional anaemia which can increase the risk of miscarriage, stillbirth, premature birth, and maternal death.<sup>14</sup>

- 18.3. These deaths occur mostly in developing countries, where poverty and remoteness produce an unequal allocation of health care services and food distribution.<sup>15</sup> This is notably the case for regions with low numbers of skilled health workers, such as sub-Saharan Africa.<sup>16</sup>
- 18.4. Statistics illustrate that the increased number of maternal deaths in some areas of the world reflects inequities in access to health services, and highlights the gap between rich and poor.<sup>17</sup> Ninety-nine percent of maternal deaths are said to occur in developing countries; more than half of these deaths occur in sub-Saharan Africa.<sup>18</sup>
- 18.5. This is also the reality of women and girls in South Africa. Statistics South Africa has reported that a 7-year survey by the South Africa Demographic Health Survey ('**SADHS**') in 2016 found the pregnancy related mortality ratio to be 536 pregnancy-related deaths per 100 000 live births – essentially for every 1 000 live births, about five women died during pregnancy or within 2 months after childbirth.<sup>19</sup>
19. Young girls in early, child or forced marriages are at greater risk of contracting HIV/AIDS because they are more likely to be married to older men who are more likely to have had a greater number of sexual encounters. In the majority of these relationships the issue of power imbalance is paramount, largely as a result of the marked age difference and social status of the parties.<sup>20</sup> The power imbalance that exists when minor girls are forced into marriage means that they are unable to negotiate safe sex methods and contraceptives.<sup>21</sup>
20. In sub-Saharan Africa, girls between the ages of 15 and 19 are 2 to 6 times more likely to contract HIV/AIDS than boys of the same age.<sup>22</sup> Studies have also reported that young girls in marriage often show signs symptomatic of sexual abuse and post-traumatic stress disorder.<sup>23</sup> Young girls in marriages also exhibit existential anxiety as well as feelings of hopelessness and debilitating depression.<sup>24</sup>

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<sup>14</sup> Richard Kollodge (Ed), *Motherhood in Childhood - Facing the challenge of adolescent pregnancy* Available at: <http://kyrgyzstan.unfpa.org/sites/default/files/pub-pdf/motherhood-in-childhood-en.pdf> [Accessed on 24 November 2020] at p 18.

<sup>15</sup> Ibid at 28.

<sup>16</sup> Ibid.

<sup>17</sup> Maternal mortality at: <http://www.who.int/mediacentre/factsheets/fs348/en/> [Accessed on 24 November 2020].

<sup>18</sup> Ibid.

<sup>19</sup> Maternal health care in SA shows signs of improvement, March 2020, available at <http://www.statssa.gov.za/?p=13102> [Accessed on 25 November 2020]

<sup>20</sup> Richard Kollodge, pg 28.

<sup>21</sup> Ibid, pg 33.

<sup>22</sup> Child Marriage, Facts and Figures, International Centre for Research on Women, available at: <http://www.icrw.org/child-marriage-facts-and-figures>

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.



21. For girls who do not get married early, reaching puberty marks the beginning of a gradual transition to a healthy and productive adulthood. However, for many girls, puberty marks an accelerating trajectory into inequality, and perpetual poverty where they are treated vastly differently from their male counterparts. This is attributed primarily to child marriage.<sup>25</sup>
22. These consequences should motivate us all to address the root cause issue of child marriage. Indeed, the state has a Constitutional duty to do so.

### ***Harmful Customary Practices Related to Child Marriage***

23. The South African Law Reform Commission ('**SALRC**') Discussion Paper on ukuthwala, notes that 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>26</sup> Some of the reports noted that:
  - 23.1. About 20 girls a month were being forced to drop out of school because of the forced marriage resulting from *ukuthwala*.
  - 23.2. 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.
24. 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.
25. 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.
26. Immediately after the abductions, most girls were verbally, sexually, and physically abused by their "husbands" and their families.<sup>27</sup>
27. *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>28</sup> It is not a marriage. In the evidence that the *amici curiae* put before the High Court in the *Jezile*<sup>29</sup> matter 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

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<sup>25</sup> Ibid.

<sup>26</sup> Revised Discussion Paper 138, Project 138, The Practice Of Ukuthwala, October 2015, page 18 available at <https://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf> [Accessed on 25 November 2020]

<sup>27</sup> Discussion Paper Page 19

<sup>28</sup> Para 72.

<sup>29</sup> *Jezile v S and Others* 2016 (2) SA 62 (WCC).

“bastardised” version of *ukuthwala* is the lived experience of large numbers of women and children and is a blatant abuse of fundamental constitutional rights.

28. 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 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 apply. 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.
29. We submit that any customary practices that allows 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. Legislative development is therefore necessary to make it clear that such behaviour is unacceptable.

## **AGE OF MARRIAGE IN SOUTH AFRICA**

30. The first applicable legislation regarding marriages in South Africa is the Children's Act 38 of 2005 (“Children’s Act”). Section 12(2) of the Children’s Act provides:

*A child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and above that minimum age may not be given out in marriage or engagement without his or her consent.*

31. Section 1 of the Children’s Act defines a child as “a person under the age of 18 years”. However, it fails to provide for a minimum age of marriage outside the reference to the common law of South Africa where the minimum age of marriage is 12 for girls and 14 for boys. As is apparent, the common law ages of marriages represent and reiterate gender discrimination.
32. The Marriages Act regulates heterosexual monogamous marriages in South Africa. The general age of consent to enter these marriages is 18 years. However, the Marriages Act allows parents or guardians to consent to a marriage where at least one of the parties to a marriage is a minor. section 26 of the Marriages Act provides 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 office in the public service authorised thereto by him.’*
33. Section 26 is discriminatory as it sets the minimum age of marriage differently for girls, with 15 years being the minimum for girls and 18 years for boys. Assigning different minimum ages of marriage for girl and boy children is a violation of the equality clause and constitutes unfair discrimination on the grounds of gender.
34. The Recognition of Customary Marriages Act 120 of 1998 (‘RCMA’) further allows for an exception to the requirement of consent by giving parents/guardians the power to



consent to a marriage where one or both of the parties is a child.<sup>30</sup> It also provides for an exemption in the instance where the parent/guardian does not consent to the marriage in the form of section 25 of the Marriages Act, which gives a Commissioner of Child Welfare or a Court the power to consent to a minor entering a marriage. Furthermore, section 3(4)(a) and (c) of the RCMA also allows for individuals under the age of 18 years to marry each other if the consent of the Minister of Home Affairs has been obtained.

35. The Civil Unions Act 17 of 2006 (**'Civil Unions Act'**), which regulates same and opposite sex and gender unions, sets 18 as the minimum age of marriage without granting any exceptions for the marriages of children, making it the only legislation that complies with South African international and regional obligations that we discuss below.

## **REGIONAL AND INTERNATIONAL OBLIGATIONS BINDING ON SOUTH AFRICA RELATING TO CHILD MARRIAGES**

36. The 1948 Universal Declaration of Human Rights (**'UDHR'**) states that marriage should be entered into only with the free and full consent of the intending spouses. Even though the UDHR is not binding on all states, it is persuasive and is considered as customary international law. States are therefore obligated to ensure that the principles entrenched in the UDHR are incorporated into local legislation.
37. The United Nations Convention on the Elimination of All Forms of Discrimination against Women (**'CEDAW'**), ratified by South Africa on 15 December 1995, entrenches the obligations set out in the UDHR and further provides for the prohibition of child marriages. Article 16(2) expressly states:

*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 marriage in an official registry compulsory.*

38. Article 16(1)(b) of CEDAW also promotes the right for all women to *"freely choose a spouse and to enter into marriage only with their free and full consent."*
39. The United Nations Convention on the Rights of the Child (**'CRC'**), ratified by South Africa on 16 June 1995, does not expressly provide for child marriage; however, it does state that traditional practices which are prejudicial to the health of children should be abolished in Article 24(3). The UN Committee on the Rights of the Child has previously stated that early marriage is a harmful practice and that this practice has a negative effect on girls' sexual and reproductive health. The Committee further recommended that all State Parties have a minimum age of marriage legislation setting the age at 18 years.<sup>31</sup>

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<sup>30</sup> Section 3(3) of the RCMA provides the following: *'If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage. If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriages Act applies'.*

<sup>31</sup> Committee on the Rights of the Child, General Comment No. 4 (2003), *Adolescent health and development in the context of the Convention on the Rights of the Child*.

The CRC in article 34 also provides that children are to be protected from all forms of sexual exploitation and sexual abuse.

40. Article 1 of the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriages [Ratified by South Africa on 29 January 1993] states that no marriage shall be legally entered into without the full and free consent of both parties and requires that this consent be declared by both parties in person before a competent authority.
41. Article 1 of the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery stresses the need to ensure that legislative and non-legislative measures ought to be undertaken in order to combat forced marriages by addressing practices and institutions that lead to forced marriage.
42. The African Charter on the Rights and Welfare of the Child ('**ACRWC**'), ratified by South Africa on 7 January 2000, provides in Article 21 that:

*States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:*

*(a) those customs and practices prejudicial to the health or life of the child; and  
(b) those customs and practices discriminatory to the child on the grounds of sex or other status.*

*Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.*

43. Article 5 of the Protocol on the Rights of Women in Africa ('**Maputo Protocol**'), ratified by South Africa on 17 December 2004, imposes an obligation on State Parties to prevent all forms of harmful practices which negatively affect the human rights of women or international standards. The Maputo Protocol goes further and supports the standing of the UN Committee on the Rights of the Child by expressly providing that the minimum age of marriage for woman should be 18 years in Article 6(b). It also provides that "no marriage shall take place without the free and full consent of both parties".<sup>32</sup> This notion is supported by the African Youth Charter which provides that "*young men and women of full age who enter into marriage shall do so based on their free consent and shall enjoy equal rights and responsibilities.*"<sup>33</sup>
44. The Southern African Development Community ('**SADC**') Protocol on Gender and Development sums up South Africa's obligations clearly and reaffirms all the objectives mentioned in the above international agreements. Article 8 of the SADC Protocol on Gender and Development provides that State Parties shall enact and adopt legislative and administrative measures to ensure women and men enjoy equal rights in marriage

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<sup>32</sup> Article 6 (a).

<sup>33</sup> Article 8 (2).

and are regarded as equal partners in marriage. Accordingly, the legislation concerning marriage shall ensure that-

- (a) no person under the age of 18 shall marry, unless otherwise specified in law, which takes into account the best interests and welfare of the child,*
- (b) every marriage takes place with the free and full consent of both parties;*
- (c) every marriage, including civil, religious, traditional or customary, is registered in accordance with national laws; and*
- (d) during the subsistence of their marriage the parties shall have reciprocal rights and duties towards their children with the best interest of the children always being paramount.*

### **Child Marriages and Sustainable Development Goals**

45. The Sustainable Development Goals (“**SDGs**”) define global development priorities between now and 2030, and include target 5.3, ‘*Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilations*’ (under Goal 5 ‘*Achieve gender equality and empower all women and girls*).
46. The Girls Not Brides Campaign has noted that *SDGs will not be achieved without significant progress on child marriage, including those related to poverty, health, education, nutrition, food security, economic growth and reduction of inequality, and other manifestations of gender inequality. Likewise, there are a number of related targets in the SDGs that are not hindered by the existence of child marriage, but achievement of these targets is critical to ending child marriage.*<sup>34</sup>
47. During its Voluntary National Review at the 2019 High Level Political Forum, the government of South Africa reported progress on this target and recognised that the exceptions for marriage under the age of 18 was one of the shortcomings that remain in the legal framework.<sup>35</sup> Based on this acknowledgement there is a clear awareness on the part of the state and therefore action is required.
48. The Girls Not Brides campaign has emphasised that without ending child marriage, achievement of eight of the 16 SDGs will not be possible. These 8 goals are:
  - 48.1. Goal 1 – No poverty because child marriage is linked to higher household poverty and perpetuates cycles of poverty across generations
  - 48.2. Goal 2 – Zero hunger since child brides and their children are more likely to be malnourished

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<sup>34</sup> How ending child marriage is critical to achieving the Sustainable Development Goals May 2017, Girls Not Brides, available at [https://www.girlsnotbrides.org/wp-content/uploads/2017/06/Child-marriage-and-achieving-the-SDGs\\_DAC.pdf](https://www.girlsnotbrides.org/wp-content/uploads/2017/06/Child-marriage-and-achieving-the-SDGs_DAC.pdf) [Accessed on 25 November 2020].

<sup>35</sup> South Africa Voluntary National Review (2019), pg 55 available at [https://sustainabledevelopment.un.org/content/documents/23402RSA\\_Voluntary\\_National\\_Review\\_Report\\_The\\_Final\\_24\\_July\\_2019.pdf](https://sustainabledevelopment.un.org/content/documents/23402RSA_Voluntary_National_Review_Report_The_Final_24_July_2019.pdf) [Accessed on 25 November 2020].

- 48.3. Goal 3 – Good health and wellbeing, because as we explained above, child marriage leads to a range of harmful health consequences, including higher rates of maternal and infant mortality and morbidity.
- 48.4. Goal 4 – Quality education since child marriage is a barrier to girls' education
- 48.5. Goal 5 – Gender equality because ending child marriage will help achieve gender equality and empower all women and girls.
- 48.6. Goal 8 – Economic Growth because women who marry as children are less likely to participate in the workforce, which undermines economic growth. Child marriage hinders progress towards ending modern forms of slavery and child exploitation
- 48.7. Goal 10 – Reduce inequalities, as we mentioned, child marriage affects poor, rural, and disadvantaged populations disproportionately, and creates cycles of poverty that reinforce inequality.
- 48.8. Goal 16 – Peace, justice and strong institutions objective is also hindered. We will not end violence against children (target 16.2) without ending child marriage.<sup>36</sup>

## **SUBMISSION TO THE CHILDREN'S AMENDMENT BILL**

### ***Ad Section 6(a) of the Bill Amending Section 12(2)(a) of the Act***

- 49. We now move to the content of the proposed amendment in the Bill. In amending this section, the Women's Legal Centre notes from the Memorandum on the Objects of The Children's Amendment Bill that the intended consequence is prohibiting child marriages in South Africa. We support this development as we believe that this will go a long way to protecting the rights of young girls and will also bring the Children's Act in line with both regional and international obligations on South Africa.
- 50. We note that the Bill has sought to bring about the prohibition of child marriages by replacing the word "**may**" in section 12(2)(a) of the Children's Act with "**must**" in order for the section to read – a child below the minimum age set by law for a valid marriage **must** not be given out in marriage or engagement.
- 51. We are concerned that amending this section in the manner proposed falls far short because (1) it fails to clearly state that child marriages are prohibited in South Africa, (2) that 18 is the minimum age of marriage and (3) that NO child can be given out in marriage or engagement even with the consent of a parent, guardian or state official.

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<sup>36</sup> How ending child marriage is critical to achieving the Sustainable Development Goals May 2017, Girls Not Brides, available at [https://www.girlsnotbrides.org/wp-content/uploads/2017/06/Child-marriage-and-achieving-the-SDGs\\_DAC.pdf](https://www.girlsnotbrides.org/wp-content/uploads/2017/06/Child-marriage-and-achieving-the-SDGs_DAC.pdf) [ Accessed on 25 November 2020].

52. As mentioned above, the age of marriage is set out in the Marriages Act and RCMA above has built exceptions that allows girls as young 15 to be legally married. Framing the amendment in this way means that the Children's Act is indirectly stating that the state finds it acceptable that 15 is the age of marriage for girls. We have already explained the dangers of allowing or creating environments that allow children to be married – in order for the amendment to achieve its purpose of prohibiting child marriage it therefore needs to address the many ways in which it currently takes place either within the legal framework or outside of the legal framework. We submit that the only way to achieve this is to set the age for a valid and legally recognised marriage as 18 years regardless of the sex of the individual.
53. Further, in amending the section by simply adding MUST, the Bill misses an opportunity to define early, child and forced marriages within our South African context. This contextual definition will be of paramount importance given the very need to ensure that the state is taking every opportunity to protect young girls from abuse, oppression, patriarchy and powerlessness in order to guarantee their rights to equality, dignity, bodily autonomy and other constitutional rights.

**Section 12(2)(b) of the Children's Act**

54. Currently section 12(2)(b) of the Children's Act states that a child above that minimum age may not be given out in a marriage or engagement without his or her consent. The Bill as it stands is currently not seeking to amend this section.
55. We submit that this too is problematic given the issue of the age of marriage in the Marriages Act and the RCMA, the section could be interpreted as allowing a child to consent to their own marriage and get married while still a minor. Essentially, if a child consents to the marriage and they are above 15 years of age, being the minimum age in the laws, they can enter into a valid marriage. While the section prohibits forced marriages, it leaves itself open to be interpreted as allowing child marriages. Therefore, creating the exact opposite environment from the one which prohibits and eradicates child marriage in our country. It could be argued that it creates an enabling environment for social, cultural and religious pressure to be applied to children to coerce them into marriage.

**Identification and protecting children from child and forced marriages**

56. In our view it is important to ensure that steps are adopted to protect children from being married and/or forced into entering marriage. Accordingly, the protection mechanisms in the Children's Act should therefore include such children in its ambit.
57. It is critical in ensuring that children are protected by implementing measures to identify and provide protection where it has been established that a child is a victim of a child marriage and/or of a forced marriage. To this extent, section 150 of the Children's Act must be amended to include children who are married and forced into marriages into the ambit of "*children in need of care and protection*". Such protection will be crucial in the consideration of where a child will stay and whether it is suitable to return such a child to his/her parental home and what at the end of the day is in the best interest of the child. It would also open avenues for health and psycho-social support mechanisms which must then be made available to such a child.

58. We recommend the inclusion of a provision that would provide for mandatory reporting obligations of suspected forced marriage by relevant persons such as social workers and/or teachers.
59. We have taken the liberty of seeking comparators in order to guide this legislative process and an African counterpart in the form of Kenya in their Children’s Act of 2001 provides some guidance to our own circumstances. Their circumstances being similar to that of our own. Section 125(2)(g) of that Act grants power to courts that find a child subject to an early and/or forced marriage to be a child in need of care and protection and requires the child to be placed under the care of a fit person and to return to school.
60. Placing the child in these circumstances in the care of someone who is capable of ensuring the safety and education of the child, not only ensures the protection of their rights but has the potential of minimising the possibility that the same child could be forced into a marriage again.

### ***Language Recommendations***

#### Definition Section 1

61. **“child marriage” means marriage, engagement or cohabitation with a child or any arrangement made for such cohabitation or marriage or engagement.**
62. **“forced marriage” refers to a marriage where one or both of the parties who enter(ed) into the marriage did not freely and voluntarily consent to the marriage or was coerced into the marriage or one of the parties to such a marriage is a child.**

#### Section 12(2)

63. Given the concerns and shortcomings identified above, we are of the view that the Bill should seek to amend section 12(2) of the Children’s Act as following:
- 63.1. **“Contrary to any provisions in law, no child under the age of 18 can be given away into a child marriage.”**
- 63.2. **“Contrary to any provision in law, any adult who marries a child below the age of 18 is guilty of an offence of marrying a child.”**
- 63.3. **“Any person who forces a child into a marriage is guilty of an offence of forcing a child into a marriage.”**
- 63.4. **“Whenever an accused person is charged with an offence under section 12(2)(c) and/or (d) it is not a valid defence for that accused person:**
- 63.4.1. **to contend that the child in question consented to the marriage.**
- 63.4.2. **to contend that their religion, culture, or any other similar practices that permit children to be married allows for children to be married.”**

#### Section 150

64. We suggest that that the Bill amend section 150(1) of the principal Act by adding section 150(1)(j) which states that:
- “(j) has been subjected to a child and/or forced marriage.”**

## **PART B: ADOPTIONS**

*This section of our submission deals with clauses that have an impact on current adoption processes. Our submissions draw from the work of WLC in offering legal assistance and representation to birth mothers who have chosen to place their child up for adoption and have therefore consented to an adoption. It also only focuses on national adoption processes and not inter-country adoptions.*

## **CONTEXT OF ADOPTION IN SOUTH AFRICA**

### ***Declining rate of adoptions in South Africa***

65. Adoption is a method of permanent care placement for children. It is a legal process through the Children's Courts in South Africa, facilitated by an accredited social worker specialising in adoptions and a Presiding Officer of the Children's Court. The effect of a finalised adoption application is to terminate the parental responsibilities and rights of birth mothers/biological parents, and vest parental responsibilities and rights in the adoptive parents. The purpose of adoption is to promote permanency in the life of a child, and to provide for permanent care and protection with long-lasting family relationships. It is a meaningful mechanism through which to find a family and caring home for children where their birth mother chooses to place her child up for adoption for whatever reason she may deem necessary to do so.
66. The adoption process requires thorough investigations into the circumstances of the child and the prospective adoptive parents. It also requires the consent of the birth mother/biological parents where they are able to provide such.
67. According to the Practice Guidelines on National Adoption issued by the Department of Social Development, there are two categories of adoptions: disclosed/open adoptions; and non-disclosed/closed adoptions.<sup>37</sup> Disclosed/open adoptions are where the birth mother/biological parents consenting to the adoption and the prospective adoptive parent know one another's identities.<sup>38</sup> In contrast, a non-disclosed/closed adoption is one on which the birth mother/biological parents and prospective adoptive parents do not know one another's identities or personal details.<sup>39</sup> It is important to note that this distinction is not made in the Children's Act, nor is it provided in the proposed amendments in the Bill. This is indicative of the limitations not only of the Act, but the information made available concerning the process of adoption in South Africa.
68. Though the purpose and inherently positive effects of adoptions are widely known, there is a declining rate of adoptions taking place in the country. Of the recorded adoptions, 2840 were recorded in the year 2004/2005, and dropped to 1186 in 2017/2018.<sup>40</sup> The decline in, and low number of registered adoptions is notable in comparison to the 2019 statistics relating to other forms of care. It pales in comparison to the number of children in foster care, which was reported at 386 019; and the estimated number of children in

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<sup>37</sup> Department of Social Development, 'Practice Guidelines on National Adoption' (undated), p19-20.

<sup>38</sup> Ibid, 19.

<sup>39</sup> Ibid, 20.

<sup>40</sup> Annelise de Vries 'Flash Report on the 2019 amendments to the Children's Bill' Solidarity Research Institute (2019)



residential care facilities in 2018 at 21 000.<sup>41</sup> The KwaZulu-Natal High Court at Durban, in a judgment handed down on 24 February 2020, stated the following on this issue:

*There is a growing crisis in the country concerning an ever increasing number of children who are being cared for in alternative care settings, thus growing up without permanency and support of a family unit. The destinies of orphaned or abandoned children are divergent. Some are cared for by their extended families, others are fortunate enough to find adoptive or foster parents who are able to provide them with a home and family life. But sadly there are many who are bound to spend their days in institutions of care.*<sup>42</sup>

69. The Court went further to note, at paragraph 41 of its judgment, that:

*abandonment of children can be attributed to the difficulties experienced by birth parents in placing their babies up for adoption... mothers who abandon their babies face criminal convictions. Despite this, the number of babies and toddlers abandoned continues to increase. Difficulties associated with adoption, including the lack of confidentiality and disregard for the right of self-determination, precludes this as an option for many birth mothers... it has been reported... by birth mothers consenting to the adoption of their babies, that at both government hospitals and clinics, they have been disparaged for even considering adoption as an option. [own emphasis added]*<sup>43</sup>

70. From the above, it is clear that there are fundamental issues plaguing the adoption process in South Africa, and making it an inaccessible option for women. From our experience, in addition to the inaccessibility of the option for birth mothers, even where they actively embark on the process, there are further issues that add to and compound the inaccessibility of adoptions as an option. Our experience is consistent with the findings of the Human Science Research Council ('**HSRC**') in a report as early as 2010, commissioned by the Department of Social Development, which found the following issues in adoption processes:<sup>44</sup>

70.1. Current policy and practice show a priority for adoption of children within their own communities and within the same culture, though there was a generally favourable attitude towards inter-racial/cross-cultural adoptions in South Africa;

70.2. Findings on system- and knowledge-related barriers that there was a lack of consistency and uniformity in the interpretation and implementation of the adoption provisions, and there was not an adequate understanding of the processes relating to adoptions; and

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<sup>41</sup> National Adoption Coalition of South Africa 'Position paper re: Tabled Children's Amendment Bill' (20 October 2020) p3.

<sup>42</sup> *National Adoption Coalition of South Africa v Head of Department of Social Development, KwaZulu-Natal and others* 2020 (4) SA 284 (KZD) at 1.

<sup>43</sup> *Supra* note 39 at 41.

<sup>44</sup> Zitha Mokomane & Tamsen J Rochat, 'Adoption in South Africa: Trends and patterns in social work practice' *Child and Family Social Work* (2012)

- 70.3. There was a shortage in human resources, which affect the implementation of social work practices and the ability to timeously deal with matters as and when they arise without neglecting pre-existing casework.
71. Additionally, and as reflected in case law,<sup>45</sup> there have been delays in the finalisation of adoption applications, which have been attributed to the intervention of the Department of Social Development at different points of the adoption process, namely:
- 71.1. Accreditation of adoption social workers;
  - 71.2. Managing the register of adoptable children and prospective adoptive parents;
  - 71.3. The issuing of section 239(1)(d) letters recommending an adoption; and
  - 71.4. The finalisation of an adoption where formal court procedures have taken place.<sup>46</sup>
72. The delay in providing section 239(1)(d) letters of recommendation are the most prominent or well-known delay experienced during the adoption application process, in some instances taking between 3 months and up to 3 years to obtain.<sup>47</sup> We submit that the delay is related to the issues noted in the HSRC's report from 2010, and most notably the prioritisation of placing children within birth families or extended families, often against the wishes of birth mothers, which has been our experience in our work at the Centre.
73. Through our work, we have experience of the damaging effects of this prioritisation of exploring placement of children with birth families. Our clients, adult black single mothers who chose to place their children up for adoption, but with the express wish that the pregnancy, birth and adoption of their respective children be kept private and confidential from their families, have experienced this policy and practice carried out in a manner that violated their constitutional rights. Where our clients expressed that they did not want their parents, family members or extended family members to know of their pregnancy, birth and adoption, social workers in the employ of the Department of Social Development disregarded these express wishes, threatened to inform their parents of the pregnancy, birth and adoption of their child, and in one case made contact with and informed the parents and immediate family of our client's decision to place her child up for adoption. This violation was done with the aim of placing the child in the foster care of our client's parents, which would effectively set aside her decision to place her child up for adoption and create an untenable situation where the child would be living with their birth mother who chose to place them up for adoption, and which they did in the best interests of the child. We submit that such abuse of process is fundamentally against the best interests of the child.

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<sup>45</sup> See: *National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal and others* 2020 (4) SA 284 (KZD); *In re XN* 2013 (6) SA 153 (GSJ); *JGB and another v Presiding Officer, Children's Court, Wynberg NO and others* [2016] JOL 35790 (WCC); *Carolin and another v Provincial Head of Department, Gauteng Social Development* (case no. 43586/2018) Gauteng Local Division.

<sup>46</sup> Dee Blackie 'Why adoption is a problem in South Africa' *Daily Maverick* (January 2019)

<sup>47</sup> *Supra* note 39 at 46.

74. It is therefore imperative that there are rights pronouncements for birth mothers who choose to place their children up for adoption, and where amendments to the Children's Act are made, they are done cognisant of the practices of the Department when engaging in adoption processes. This is necessary to ensure that the rights of birth mothers are protected in pursuit of the best interests of the child to be adopted.

***Effect of delays and issues on the rights of birth mothers***

75. The Children's Act makes provision for adoptions in terms of Chapter 15 of the Act, to allow for the opportunity where birth mothers may, if they choose to do so, place their biological child up for adoption. This option and the availability of the option for exercise by birth mothers is fundamentally linked to the right to bodily and psychological integrity, as provided in South Africa's Constitution.<sup>48</sup> The right includes the right to make decisions concerning one's reproduction. Undoubtedly, women and birth mothers have a right to choose to place their children up for adoption (among other choices) in giving effect to this constitutional right.
76. With a projected population of 59,6 million people,<sup>49</sup> 51.1% is female and 80,8% of the female population constitutes Black women, it is necessary to prioritise and ensure equitable rights enjoyment for the most marginalised persons in our society. In the HSRC report of 2010, it was noted that there was a high proportion of adoptions of children born of unmarried parents, and therefore single birth mothers choosing to place their children up for adoption. In this instance, the report noted that single motherhood affected adoption patterns and the number of children placed up for adoption between 2005 and 2009, making up 57.7% of the total number of recorded and completed adoptions over this period of time. This, however, is not a complete reflection of the total number of children available for adoption over this time, or the total number of children who would be found to be adoptable.
77. With the majority of adoptions involving children from single birth mothers, the study goes on to note that drivers for this prevalence are lack of financial, emotional and practical support from partners and biological fathers, and poverty.<sup>50</sup> We understand that due to the racist policies of the past, in a country that continues to experience inequality across intersecting areas of life, and which experiences are exacerbated in terms of gender inequality, the current experience of adoption processes and the ability to choose adoption as a reproductive method will be an elusive one for women, and more so Black women in South Africa. It is necessary to put measures in place that not only safeguard the option to choose adoption for vulnerable groups, but to ensure that it is realisable. We submit that the current amendments fall short of robustly addressing the problems plaguing the adoption process in South Africa, and in turn fail women.
78. This failure then affects the right to make decisions concerning one's reproduction, as provided in section 12(2)(a) of the Constitution. Given the inherently gendered nature of the way the problems with the adoption process play out, and as stated above, it also

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<sup>48</sup> Constitution of the Republic of South Africa, 1996, section 12(2)(a)

<sup>49</sup> Stats SA 'Mid-year population estimates' *Statistical Release P0302* (2020)

<sup>50</sup> Op cit note 41 at 354.

impacts negatively on the right to equality as provided in section 9 of the Constitution. And given the interconnected and inter-related nature of rights enjoyment, it necessarily affects the rights to dignity and privacy, given the fundamentally personal and intimate nature of decisions concerning reproduction. It goes to the most personal aspects of one's private life, deciding whether, when and how to have children.

79. We understand that the right to make decisions concerning reproduction is given effect to by, among other legislation and policy, the provisions of the Choice on Termination of Pregnancy Act, which unequivocally recognises in the Preamble that, '*the decision to have children is fundamental to women's physical, psychological and social health and that universal access to reproductive health care services includes family planning and contraception, termination of pregnancy, as well as sexuality education and counselling programmes and services.*' Rightfully, the Act understands the varied nature of reproductive decision-making, and the importance of having access to options, information and services to give effect to this decision-making because of the nature of reproduction to the lives of people and women. An unequivocal recognition and pronouncement of rights in relation to adoption is necessary for effective respect, protection, promotion and fulfilment of the constitutional right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction. And at all times, with the appreciation that this rights enjoyment is done in the best interests of the child, the inclusion of such rights recognition and pronouncement will work towards alleviating any confusion around adoption processes, and its interpretation and implementation by social workers so that abuse of processes do not occur in the interests of skewed policy and practice.

## **INTERNATIONAL AND REGIONAL LAWS RELATING TO THE RIGHTS OF BIRTH MOTHERS TO PLACE A CHILD UP FOR ADOPTION**

80. There are a number of international and regional law instruments that supplement the enjoyment of the constitutional rights stated above, and the duty of the state to respect, protect, promote and fulfil these rights where they are a signatory to the instruments. Below, we refer to specific international and regional instruments articulating rights protections for women related to their reproductive decision-making, and to which South Africa is a signatory.
81. Article 14 of the Maputo Protocol provides for health and reproductive rights of women, that States Parties are to ensure the right to health of women, including sexual and reproductive health, is respected and promoted. This includes:
- a) the right to control their fertility;*
  - b) the right to decide whether to have children, the number of children and the spacing of children;*
  - c) the right to choose any method of contraception;*
  - d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;*
  - e) the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections,*

*including HIV/AIDS, in accordance with internationally recognised standards and best practices;*  
g) *the right to have family planning education.*

82. Article 23 of the Convention on the Rights of Persons with Disabilities ('**CRPD**') provides comprehensive rights recognition for reproductive health and decision-making. Most pertinent are the following pronouncements:

*1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:*

*a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;*

*b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;*

*c) Persons with disabilities, including children, retain their fertility on an equal basis with others.*

*2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.*

This is intimately linked to the rights to privacy, and equality and non-discrimination in Articles 22 and 5, respectively.

83. Article 16(1)(e) of CEDAW protects the '*basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, as well as to attain the highest standard of sexual and reproductive health.*' This is echoed in article 24 on the CRC; article 17 of the International Covenant on Civil and Political Rights ('**ICCPR**'); and article 12 of the International Covenant on Economic, Social and Cultural Rights ('**ICESCR**'). Linked to the enjoyment of these rights, as with the constitutional rights listed above, are the rights to health;<sup>51</sup> personal freedom, security and integrity; privacy;<sup>52</sup> equality and non-

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<sup>51</sup> Article 25 of the UDHR; articles 10(2), 12(1) and (2) of the ICESCR; articles 12(1)(2), 14(2) of CEDAW; and Article 24(1) and (2) of the CRC.

<sup>52</sup> Articles 3 and 5 of the UDHR; 7, 9(1) of the ICCPR; and 37(a) of the CRC.

discrimination;<sup>53</sup> and to be free from practices that harm women and girls provided for across these different instruments.<sup>54</sup>

84. Additionally, the Programme of Action adopted at the International Conference on Population Development held in Cairo in 1994, to which South Africa is a signatory, provides that reproductive rights and reproductive health include the right of individuals to:

*have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed and have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for the regulation of fertility which are not against the law...'*

85. It goes further to recognise that reproductive rights rest in the basic right of women 'to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and... includes their right to make decisions concerning reproduction free of discrimination, coercion and violence.' This decision, we submit, encompasses the option to place one's child up for adoption. It not only gives effect to the reproductive rights of the birth mother, but also gives effect to the reproductive rights of adoptive parents who, for their own reasons, choose to have children through the process of adoption. Undoubtedly, it also holds at the centre the best interests of the child in the adoption.

## **COMMENTARY ON SPECIFIC SECTIONS OF THE CHILDREN'S AMENDMENT BILL**

### ***General comments***

86. In terms of the Memorandum of the Bill, and the statement on its objects, it is noted that the purpose of the Bill is to:

*(a) amend the Children's Act to strengthen protective measure for children;*  
*(b) address critical gaps and challenges in the underlying child care and protection system and identify strategies to address these challenges efficiently and effectively;*  
*(c) contribute towards the comprehensive legal solution as ordered by the Gauteng Division of the High Court in Pretoria, in the matter of Centre for Child Law v Minister of Social Development (Case No: 72513/2017) to deal with challenges relating to the provision and administration of foster care.*

These objectives are therefore the common thread throughout the proposed amendments, and inform our understanding thereof, together with stated rationale specific to certain sections. Of most significance in our examination of the proposed amendments is the objective stated at (b) and the alignment therewith.

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<sup>53</sup> Articles 2 of the UDHR; 2(1) of the ICCPR; 2(2) of the ICESCR; 1, 3, 11(2) of CEDAW; and 2(1), (2) and (5) of the CRC.

<sup>54</sup> Articles 2(f) and 5(a) of CEDAW; 24(3) of the CRC.

87. In addition to the purpose set out in the Memorandum, the objectives listed in the preamble of the Bill is to provide for '*additional matters relating to adoption*' [own emphasis], which we submit ought to include rights recognition and pronouncements of birth mothers in the adoption process and in pursuit of the best interests of the child. Included with this are comments on proposed amendments that do not give adequate effect to the objective at 1(b) of the Memorandum, which comments are included in the interests of ensuring adoption processes provide adequate protections against misinterpretation and misapplication of the sections relating thereto.

### ***Language recommendations***

#### **Protection of rights of birth mothers in adoption processes**

88. We submit that following section 229 of the Principal Act, a section must be included relating to the rights of birth mothers and biological parents in adoption processes, to recognise the constitutional rights the section seeks to respect and protect; and to provide for protection therefor through rights recognition and mechanisms of redress where such rights have been violated. Though we propose the amendment from the perspective of birth mothers, we recognise that equal rights protection ought to extend to prospective adoptive parents as adoption processes give equal effect to their rights to make decisions regarding reproduction as it does for birth mothers.
89. We urge the inclusion of an express provision relating to the right of parents to place their children up for adoption to provide protection for the rights of vulnerable persons in our society, and most notably from our experience for single Black mothers from low-income and poor backgrounds who have chosen to place their children up for adoption and to do so privately and confidentially. Due to our experience assisting women in these circumstances, to place their interests before the Children's Court or the High Court where the Department of Social Development's social workers threatened to inform their parents of the pregnancy, birth and adoption of their child, it is our submission to include a pronouncement that a) parents have a right to place a child up for adoption; and b) they can choose to do so privately and confidentially. It is our submission that this is a positive step towards ensuring that where a social worker, whether employed by the Department or in private practice, attempts to circumvent this right, there is a clear section upon which to rely and which rights can be vindicated through legal mechanisms.
90. To this end, we propose the following amendment to the Children's Act which is aimed at protecting the right of mother's privacy and confidentiality in adoption processes:

#### **"229A Rights of parents in Adoptions –**

**(1) A parent has the right to place a child up for adoption, in accordance with the provisions of the Act.**

**(2) A parent who chooses to exercise their right to place a child up for adoption has the right to privacy and confidentiality.**

**(3) Where a parent has exercised the right to place a child up for adoption privately and confidentially, the conditions for the protection of the parent's privacy and confidentiality are to be stated in the consent to the adoption.**

**(4) To the extent the exercise of the right does not infringe on the rights of others, a social worker providing adoption services must respect the**



**rights of a parent to place a child up for adoption and according to the conditions related to privacy and confidentiality.**

91. Section 233, which regulates consent to adoptions, would therefore be amended as follows, with inclusion of the following section after section 233(3):

**“(3A) If the parent of a child exercises the right to place a child up for adoption privately and confidentially, the conditions of privacy and confidentiality must be stated in the consent.”**

**Clause 118 amendment to section 234 of the Principal Act**

92. The proposed amendment to section 234 is the addition of ‘family members’ to the list of persons who may enter into a post-adoption agreement. The memorandum states that the addition of ‘family members’ to the list of persons is in circumstances where *‘that family member has been formally recognised as a care-giver to the child to be adopted.’*

93. The Act defines a ‘care-giver’ as any person other than a parent or guardian, *‘who factually cares for a child’* and lists a number of persons over and above family members, namely:

- (a) a foster parent;*
- (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;*
- (c) a person who cares for a child whilst the child is in temporary safe care;*
- (d) the person at the head of a child and youth care centre where a child has been placed;*
- (e) the person at the head of a shelter;*
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and*
- (g) the child at the head of a child-headed household;*

In all instances provided by the definition above, the care-giver must have met and had a pre-existing relationship of some form with the child.

94. Clause 118, however, does not refer to a family member that has been formally recognised as a care-giver, but merely states *‘or a family member as contemplated in section (1) under paragraphs (a), (b) and (c)’* for the purposes of entering the post-adoption agreement. Section 1(a), (b), and (c) of the Act defines a ‘family member’ as a parent of a child; any other person who has parental responsibilities and rights in respect of the child; and a grandparent, brother, sister, uncle, aunt or cousin of the child, respectively.

95. Therefore, as it is proposed, the inclusion is too broad and will be open to abuse where misinterpreted by social workers in private practice or in the employ of the Department given the current nature of adoption processes and service provision in South Africa, as we have set out with reference to our clients’ experiences.

96. Without the caveat that the family member has been formally recognised as a care-giver, the proposed section will allow for any of the family members listed above to have the

option of entering into a post-adoption agreement without having met or established a relationship with the child in any form; and more importantly, it will allow for the circumvention of the rights to privacy and confidentiality of parents, and more so birth mothers, who have chosen to place their children up for adoption privately and confidentially. It is necessary to ensure that the rights of birth mothers are respected and protected, and that we guard against the possibility of further opportunity to misinterpret the provisions of the Act, and to allow for entrenched mechanisms through which to violate the rights of birth mothers.

97. For this reason, we propose the inclusion of the words '***where the family member has been formally recognised as a care-giver to the adoptable child***' to the proposed amendment as follows:

"The parent, [or] guardian or a family member as contemplated in section (1) under paragraphs (a), (b) and (c), ***where the family member has been formally recognised as a care-giver***, of a child may, before or during an application for the adoption of a child is made in terms of section 239, enter into a post-adoption agreement with a prospective adoptive parent of that child to provide for—";

98. Our recommendation will ensure that where a birth mother has stipulated that she wishes to place her child up for adoption, and to do so privately and confidentially of her family then such right will not be violated through the inclusion of family members to the process by way of a post-adoption agreement. Including the language '***where the family member has been formally recognised as a care-giver to the adoptable child***' presupposes a pre-existing relationship of caring for the child that is excluded in circumstances where the birth mother has chosen to keep the pregnancy, birth and adoption private and confidential from her family.

#### Clause 120 amendment to section 239 of the Principal Act

99. Clause 120 proposes to amend section 239 of the principal Act, and more importantly section 239(1)(d). As stated above, at paragraph 72 of our submissions, section 239(1)(d) is the most well-known reason for delays in adoption processes. In setting out the requirements for an application for adoption, section 239(1)(d) of the Principal Act provides that the application must '*be accompanied by a letter by the provincial head of social development recommending the adoption of the child*'. Clause 120 proposes an amendment to this section, which is known to be the cause of delays in adoption applications.
100. The memorandum makes no stipulation for the rationale for amending section 239(1)(d), which proposes to replace the word 'recommending' with 'confirming'. The reasoning for this amendment is therefore unknown. It can be argued that the use of the word 'confirming' seems more suitable for addressing delays in the provision of letters in terms of this section; however, this does not do enough to safeguard against delays by the provincial head of social development in providing the letter, which is understood to be the subject of delays in adoption applications, and as set out at paragraph 72 above. For this reason, and to guard against delays in adoption application processes, we propose the following addition to the subsection:

“(d) be accompanied by a letter [by] from the provincial head of social development [recommending] confirming compliance with the requirements for the adoption of the child in terms of this Act, to be provided within 30 days from the date it was requested; and”

101. This is to ensure certainty around timelines for receipt of the letter from the provincial department of social development, in the interests of ensuring adoption applications do not stagnate at this point in the process and the rights of all parties involved in the adoption application are respected. Where there is certainty, there are opportunities through which to hold the relevant authority accountable, which is necessary in the context of adoption processes in South Africa.

Clause 123 amendment of section 250 of the Principal Act

102. This amendment seeks to include, by inserting the proposed new paragraph (e), a social worker in the employ of the Department or a provincial department who ‘provides adoption services’ as part of the list of persons who may provide adoption services in terms of the Act.

103. Section 250 of the principal Act titled ‘[o]nly certain persons allowed to provide adoption services’, and lists the following persons who may provide adoption services:

- (1) No person may provide adoption services except—*
- (a) a child protection organisation accredited in terms of section 251 to provide adoption services;*
  - (b) an adoption social worker;*
  - (c) the Central Authority in the case of intercountry adoptions; or*
  - (d) a child protection organisation accredited in terms of section 259 to provide intercountry adoption services.*

104. As the proposed amendment currently reads, the wording is too broad and therefore open to misinterpretation and abuse by social workers in the employ of the Department at national or provincial level.

105. In terms of the Principal Act, ‘adoption services’ is defined as follows:

- “adoption service” includes—**
- (a) counselling of the parent of the child and, where applicable, the child;*
  - (b) an assessment of a child by an adoption social worker in terms of section 230 (2);*
  - (c) an assessment of a prospective adoptive parent by an adoption social worker in terms of section 231 (2);*
  - (d) the gathering of information for proposed adoptions as contemplated in section 237; and*
  - (e) a report contemplated in section 239 (1) (b);*

106. The services provided in (b), (c) and (e) can only be provided by an adoption social worker, which the Act defines as a social worker in private practice who has a speciality in adoption services and is accredited in terms of section 251 to provide adoption

services; a social worker in the employ of a child protection organisation which is accredited in terms of section 251 to provide adoption services; or a social worker in the employ of the Department or a provincial department of social development with a speciality in adoption services. All three types of social workers are to be duly registered in terms of the Social Services Professions Act.<sup>55</sup>

107. The services in (a) and (d) are worded in such a way in the principal Act that they can be done by a social worker irrespective of whether they have the necessary speciality in adoption services. This means that the current wording of the proposed paragraph (e) is wide enough to include social workers in the employ of the Department or provincial departments of social development in the list of persons who can provide adoption services, extending it beyond those persons with the speciality in adoption services, as provided in the definition of 'adoption social worker'.
108. For this reason, and to avoid misinterpretation and misapplication of the section, we propose that the wording align with that of the definition of 'adoption social worker' in the principal Act, and be worded as follows:

"e) a social worker employed by the Department or a provincial department of social development who [provides adoption services] ***has a speciality in adoption services***'.

109. Due to the Centre's experience with adoption processes, through the provision of legal advice and assistance to birth mothers who have been threatened by Department of Social Development social workers to have their rights to privacy and confidentiality breached by informing their parents and/or family members of the pregnancy, birth and adoption of their child, it is our submission that it is necessary to ensure that those with the relevant qualifications and experience are involved in adoption service provision and processes. To provide otherwise, or to word the section in a way that makes space for misinterpretation or opportunity for a social worker without the necessary experience to be involved in adoption processes would exacerbate an already dire situation. The recommended wording is in line with the stated objective to '*address critical gaps and challenges in the underlying child care and protection system and identify strategies to address these challenges efficiently and effectively.*'

## CONCLUSION

110. We trust that you will find this submission made by the Women's Legal Centre to the Children's Amendment Bill [B18-2020] useful. Should you have any comments or questions please do not hesitate to contact Ms Solomons at [nasreen@wlce.co.za](mailto:nasreen@wlce.co.za); Ms Mudarikwa at [mandi@wlce.co.za](mailto:mandi@wlce.co.za); Ms May at [charlene@wlce.co.za](mailto:charlene@wlce.co.za) or Ms Shongwe at [lulama@wlce.co.za](mailto:lulama@wlce.co.za).

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\*\*\*ENDS\*\*\*

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<sup>55</sup> Act 110 of 1978.