



**WOMEN'S
LEGAL
CENTRE**



**SUBMISSION TO MINISTER OF SOCIAL DEVELOPMENT ON THE CHILDREN'S
AMENDMENT BILL [Government Gazette No. 53426 of 26**

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A. INTRODUCTION

1. We refer to the call for comment in respect of the Children's Amendment Bill [*Government Gazette No. 53426 of 26 September 2025*]. ('**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 three specific issues in the Bill: child abandonment, adoption processes and child marriages. Our submission is therefore split into three parts, with **Part A** addressing child abandonment and the proposed amendments relating thereto, **Part B** addressing adoption processes and the proposed amendments relating thereto, and **Part C** addressing child marriages and the proposed amendments relating thereto

B. THE AUTHORS

3. 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, races, ethnicities, sexual orientations, gender identities and disability. The Centre does its work across five programmatic areas, including the right to be free from violence, women's rights to equality in relationships, women's sexual and reproductive health rights and women's rights to just and favourable working conditions.

PART A: CHILD ABANDONMENT

This section of our submission deals with clause 1 of the Bill, which seeks to amend section 1 of the principal Act. Our submission draws from the work of the WLC, the rights enshrined in the Constitution, as well as from regional and international statutes and mechanisms that bind South Africa.

GENERAL CONTEXT OF CHILD ABANDONMENT

4. The WLC's Sexual and Reproductive Health and Rights ('SRHR') focus area seeks to advance women's constitutional right to make decisions about their bodies, reproductive health and to access the full range of reproductive healthcare services, including contraception, termination of pregnancy, adoption, and child welfare.
5. Through our SRHR programme, the WLC has engaged extensively with women and young women in particular in their ability to access reproductive health rights through the public health care sector. Reports of systemic barriers to access and infringements of rights to equality, dignity and privacy are often experienced in and through the health care system as well as the social protection aspects related to reproductive health. Persistent systemic failures such as contraceptive stockouts, inadequate abortion provision, the absence of youth and gender-sensitive services, and the inaccessibility of adoption have combined to produce high rates of unplanned pregnancy. These systemic barriers require that we have a functional and rights-enforcing social development system in which the rights of women who choose not to be mothers are supported to make decisions that are in the best interest of the children that they give birth to.
6. The systemic barriers, instead, led to an increase in acts of desperation such as infant and child abandonment. Child abandonment must therefore be understood as a manifestation of structural inequities rather than individual criminality.
7. Child abandonment in South Africa accordingly occurs within a complex web of social, economic, and systemic failures that shape the circumstances under which women make reproductive and parental decisions. It is not an isolated act of neglect or malice but a desperate response to a lack of safe, accessible, and

rights-based alternatives. Understanding this broader context is therefore critical before considering any legislative amendments that will further entrench criminalisation and narrow the scope of lawful protection for women who give birth to children and their children.

8. The criminalisation of child abandonment itself flows from a punitive framework, inherited from colonial and apartheid-era laws, that prioritised the punishment of the crime over the protection of the now constitutional rights of both mothers and children.
9. Now years later, in our constitutional dispensation, which places value in the child's best interest (section 28), the child's right to life (section 11), and a woman's right to make decisions regarding her sexual and reproductive rights (section 27), section 305 of the Children's Act 38 of 2005, still, without exception and consideration of these rights, and the various socio-economic factors regards child abandonment as a criminal offence without exception. A punitive approach that disproportionately affects women and deters them from seeking lawful or safe alternatives when they are unable or unwilling to care for a newborn.
10. In the absence of a rights-based approach to the criminalisation of child abandonment, the offence has done little to curb abandonment rates and their contributing factors. Instead, the practice has been driven underground, and women and children have continued to suffer from this systematic failure. A large majority of women have resorted to unsafe routes of abandonment, which have seldom left the children involved alive and have led to a competition of rights, with priority often being given to avoiding prosecution and maintaining anonymity.
11. To address the lived reality of women in communities, some child protection organisations have established baby boxes or baby safes to mitigate infant mortality by allowing anonymous and physically safer relinquishment. These are often structures attached to these centres and are designed to allow women to safely relinquish their infants anonymously and within reach of childcare officials who would thereafter see them being officially processed through child protection

processes as set out in the Children's Act. Therefore, ensuring that the best interest of the child is prioritised.

12. The above interventions are harm-reduction measures that attempt to protect life where the implementation of public health care and other policy and legislative measures have failed to provide rights-based and compassionate options. However, rather than recognising this reality or creating a regulated framework for safe relinquishment, the proposed amendment to the Children's Act seeks to define the use of baby boxes as a form of "abandonment." An approach that conflates acts of empathy, compassion aimed at preserving life, with acts of neglect and violence and entrenches the existing criminalisation framework to the detriment of all the parties. Our position is that such an approach cannot be in the best interest of the child.
13. By extending the definition of abandonment to include baby boxes, the amendment risks driving the practice further underground, discouraging women from using safer options for fear of prosecution, and ultimately placing more infants at risk of unsafe abandonment and death. It also perpetuates gendered discrimination by punishing women for choosing or not being able to be mothers, where it is the state's own failures to ensure accessible, non-punitive reproductive choices.
14. We submit that any reform to the law should be moving in the opposite direction: towards recognising safe relinquishment as a necessary and compassionate public health and child protection measure. To include baby boxes within the definition of "abandoned" without simultaneously creating a lawful mechanism for safe, confidential relinquishment would be to reinforce a system that criminalises women's desperation and endangers the very children the law seeks to protect.

THE PRACTICAL IMPLICATIONS OF CONTINUED CRIMINALISATION

15. Child abandonment refers to the deliberate act of leaving a child without care or supervision, often in situations that place the child at significant risk.

16. Child abandonment is not a new phenomenon and is symptomatic of systemic failures in our SRHR and social support sectors. These actions are driven by desperation and reflect a broader socio-economic challenge faced by women and marginalised groups.
17. South Africa has alarmingly high rates of child abandonment, with estimates suggesting that thousands of children are abandoned annually. Newborns are particularly vulnerable, with hospitals and community health centres frequently reporting cases of infants left without parental care.
18. In 2010, it was estimated that 3500 babies were abandoned, 200 of these were abandoned in Soweto and Johannesburg monthly, and only 60 were found alive. For every 1 baby found alive, 2 were found deceased, and 70% of abandonments are unsafe, with 65% of them being newborns.¹
19. In 2016, a study estimated that many infant deaths in South Africa were related to abandonment. The study found that in the year 2009, 454 children under 5 years of age were killed in 2009 and, importantly, found that 84.9% of neonaticides were related to abandonment. The study accordingly concluded that “a child born in South Africa is at the highest risk of being killed during its first six days of life.”²
20. The above numbers were estimated to be exacerbated during the COVID-19 pandemic, wherein concerns were raised about the increasing effect the lockdown and economic hardships were having on abandonments across the country. To date, news broadcasters and social media pages still increasingly report the discovery of abandoned infants in storm drains, toilets and open fields, few of which survive. Between April 2020 and October 2022, roughly more than 83 babies were found unsafely abandoned, and 65 were found deceased and reported by the media.

¹ Blackie, D.E. (2014) *Sad, Bad and Mad: Exploring Child Abandonment in South Africa*. Master's dissertation, University of the Witwatersrand, Johannesburg.

² Mathews, S., Abrahams, N., Martin, L.J., Vetten, L., van der Merwe, L. & Jewkes, R. (2016) 'A national study of child homicide in South Africa: Results from the cross-sectional 2009 Child Homicide Study', *PLoS ONE*, 8(5)

21. The above data is, however, an estimate and a far cry from what could, in reality, be happening in our communities. Despite the concerning nature of this problem and the regular news reports, no official data has been collected by the state on the exact prevalence of this practice and the related causes. Information on the prosecution and charge rate of the criminal offence associated is also scarce, as the associated evidentiary burden makes such matters a challenge for law enforcement.
22. The specific circumstances wherein children are abandoned vary. According to Patricia, a social worker, some women take their baby or child to a hospital, give a false name to register, and then make an excuse to get up and walk away alone.³ Others leave their babies with people, sometimes family members, or sometimes with complete strangers. Usually, however, in the more desperate situations, children are found in unhygienic, dangerous places like sewer drains and toilets. As a result, significant numbers of children die and reinforce abandonment as a public health and human rights issue.
23. The root causes of child abandonment in South Africa are also complex and multifaceted. The leading causes include poverty, gender-based violence, gender inequality, HIV/AIDS, rape, restrictive legislation, and a failing SRHR system.
24. Poverty remains a significant factor, with women being the most disproportionately affected due to historical, socio-economic, and cultural factors. Women, particularly black women, face extreme poverty, lack of access to economic opportunities, lack of education, and little to no access to rights-based education and information.⁴ Their vulnerability is compounded in rural areas governed by traditional conservative views and customary laws, which are steeped in patriarchy and discriminatory stereotypes about women and their agency to make decisions about their sexual and reproductive health and rights. With most South African homes already struggling, women are at a heightened

³ Blackie, D.E. (2014) *Sad, Bad and Mad: Exploring Child Abandonment in South Africa*. Master's dissertation, University of the Witwatersrand, Johannesburg.

⁴ Statistics South Africa (2022) *Gender Series Volume IX: Women Empowerment, 2017–2022*. Pretoria: Stats SA. Available at: <https://www.statssa.gov.za/publications/Report-03-22-09/Report-03-22-092022.pdf>

risk of experiencing desperation and hopelessness, which could result in some abandoning their children for their own survival or for those children to have a chance at a better life.

25. Systemic failures in the public healthcare and social welfare systems only further exacerbate the above challenges. South Africa's failing healthcare system struggles with resource shortages and limited accessibility in rural areas, leaving many women without access to preventative services, alternative options and prenatal or postnatal care.⁵ Social services are similarly under-resourced, preventing timely interventions for at-risk families.⁶
26. South Africa's failing healthcare system also contributes to increasing rates of unplanned and unwanted pregnancies, which themselves also contribute significantly to abandonment rates.⁷ The system's failures include limited access to comprehensive sexuality education, contraception, adoption and safe abortion services. Adolescents and young mothers most often bear the brunt of this failing system and additionally experience intense stigma and ostracism, especially in patriarchal communities where extramarital pregnancies are frowned upon.

SEXUAL AND REPRODUCTIVE HEALTH IN SOUTH AFRICA

27. Although this Committee is not charged with oversight of health care, there is significant overlap between SRHR and the social protection framework and policy. South Africa's progressive legal and policy framework offers a robust foundation for advancing SRHR. However, despite these achievements, access to SRHR services remains inequitable, especially for rural populations, adolescents, LGBTQIA+ individuals, and those facing socio-economic

⁵ Commission for Gender Equality, *The State of Maternity and Neonatal Health Care in the Eastern Cape Province (2023/2024)*, 2024, <https://cge.org.za/wp-content/uploads/2024/08/The-State-of-Maternity-and-Neonatal-Health-Care-in-the-Eastern-Ca-pe.pdf> [accessed 20 October 2025]; National Department of Health, *Saving Mothers Report 2023*, National Committee for Confidential Enquiry into Maternal Deaths, 2024, <https://www.health.gov.za/wp-content/uploads/2024/10/Saving-Mothers-Report-2023.pdf>;

⁶ Children's Institute, University of Cape Town, *South African Child Gauge 2016*, Children's Institute, University of Cape Town, Cape Town, 2016,

⁷ Woldesenbet, S., Kufa, T., Lombard, C., et al., 'The prevalence of unintended pregnancy and its association with HIV status among pregnant women in South Africa, a national antenatal survey, 2019', *Scientific Reports*, vol. 11, art. 23740, 2021; Woldesenbet, S., Kufa, T., Lombard, C., et al., 'The prevalence of unintended pregnancy and its association with HIV status among pregnant women in South Africa, a national antenatal survey, 2019', *Scientific Reports*, vol. 11, art. 23740, 2021,

hardships. Many women and girls still encounter regular challenges in accessing safe and legal sexual and reproductive health care services. They continue to experience structural, societal and political barriers in their efforts to exercise what is meant to be a constitutionally protected right.

28. More than 30 years since the enactment of key SRHR legal frameworks, women report a loss of confidence in our healthcare system, escalated medico-legal claims and an overburdened system failing to meet public demand.
29. South Africa still experiences high unplanned pregnancy rates, high child abandonment rates, low SRHR education rates and high maternal mortality rates that can largely be attributed to complications arising from unsafe and illegally provided abortions. Women often report experiencing challenges with accessing services of their choice, and largely jointly report experiencing a reproductive health system that does not meet their needs
30. Comprehensive sexuality education (CSE), although part of the national curriculum, is inconsistently implemented and is nonetheless silent on a number of crucial topics, with the overall position being pro-abstinence above all else.⁸ Resistance from conservative groups and a lack of teacher training also contribute to gaps in SRHR knowledge, increasing risks for unwanted pregnancies and unsafe abortions. For marginalised groups, including adolescents, LGBTQIA+ individuals, and rural communities, these barriers are particularly acute as the current model is not inclusive of diversity and does little to challenge long-held societal beliefs on gender roles and norms.
31. Contraceptives should be widely available at public health facilities. Yet, instead, frequent stockouts, insufficient budgeting and lacking patient-centred procurement have meant that limited and inconsistent contraceptive services are made available to women. Women have reported being cornered into

⁸ Ibis Reproductive Health, *A qualitative exploration of knowledge, attitudes, and experiences with abortion among adolescents in Gauteng province, South Africa*, RSA Minors Study, January 2023, https://www.ibisreproductivehealth.org/sites/default/files/files/publications/minors_study_brief_2024_act_96.pdf; Koch, Ronel, & Welma Wehmeyer. "A systematic review of comprehensive sexuality education for South African adolescents." *The Journal for Transdisciplinary Research in Southern Africa* [Online], 17.1 (2021).

contraceptive options due to the limited options available, and also report being forced into contraceptives after birth or abortion. In addition to this, adolescents and LGBTQIA+ individuals also regularly report experiencing stigma and judgment from healthcare providers, which discourages them from seeking care and using public healthcare facilities. The above issues, coupled with challenges in accessing information on contraceptive options and the burden of contraception being placed on women, have contributed to a high unplanned pregnancy rate, which then places additional pressure on other already struggling SRHR services.⁹

32. One of those SRHR services struggling to meet the unbalanced need is access to abortion in and through the public health system. Studies and regular news reports continue to show that despite abortion being legal and free in public healthcare facilities, women continue to seek unsafe abortions and face risky adverse health outcomes or death, with an estimated minimum of 50% of terminations provided by informal, illegal and unsafe providers in South Africa.¹⁰ Many studies have identified progressing barriers to safe abortions in South Africa and have noted that these include resource/facility shortages, provider bias and opposition, stigma, lack of infrastructure, equipment and/or training providers at the facility, access to information, and unmet contraceptive needs.¹¹
33. The Department of Health further estimated that unsafe abortions have directly resulted in 23% of the deaths from septic miscarriages in public health facilities

⁹ Jonas K, Duby Z, Maruping K, Harries J, Mathews C. Rumours, myths, and misperceptions as barriers to contraceptive use among adolescent girls and young women in South Africa. *Front Reprod Health*. 2022 Sep 15;4:960089. doi: 10.3389/frph.2022.960089. PMID: 36406890; PMCID: PMC9673823; Stop Stockouts Project & Ritshidze, *Contraceptive Supply Chain: Stockouts and their Causes*, 2024, <https://www.msf.org.za/news-and-resources/press-release/report-causes-contraceptive-stockouts-and-shortages> ; Stop Stockouts Project, *Access to Contraceptives in South African Public Health Clinics*, 2022, <https://section27.org.za/wp-content/uploads/2022/08/Stop-Stockouts-Project-Access-to-Contraceptives-in-SA-Report-Aug-2022-WEB.pdf>

¹⁰ National Department of Health, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act*, 2020, https://www.health.gov.za/wp-content/uploads/2023/04/Termination-Pregnancy-Guideline_Final_2021.pdf

¹¹ Amnesty International, *Barriers to Safe and Legal Abortion in South Africa*, 1 February 2017, <https://www.amnesty.org/en/documents/afr53/5423/2017/en/>; Monanyane, K.P., *Experiences of Women Regarding Accessibility of Choice on Termination of Pregnancy Services in North West Province, South Africa*, *Open Public Health Journal*, 2024, 17, e18749445280828, <https://openpublichealthjournal.com/VOLUME/17/ELOCATOR/e18749445280828/>; Ibis Reproductive Health, *Facility Mapping Study: Availability of Safe Abortion Care Services in South Africa*, 2024, https://ibisreproductivehealth.org/sites/default/files/files/publications/research_brief_top_provision_facility_mapping_study.pdf

between 2008 and 2010, and have found that unsafe abortions have been avoidable in at least 25% of those cases.¹² Despite these concerning numbers, abortion services are not adequately prioritised in public health care, and increasingly, designated abortion facilities have become dysfunctional, and issues related to staff and resource shortages have very quietly led to the effective closure of these facilities. Women in the more rural and remote areas of our country report being left without the ability to exercise the right to choose, after a failing CSE structure and limited/inconsistent contraceptive access contributed to their unplanned pregnancy rates.

34. Adoption is often the last option women can explore in the suite of SRHR services available. South Africa's adoption laws emphasize the best interests of the child as paramount, and while in principle the system should, in the same thread, encourage and accommodate women seeking to place their children up for adoption, in practice, several barriers have rendered the system dysfunctional, practically inaccessible and anti-choice.
35. The adoption process in South Africa is marked by delays, bureaucracy, and at times, undue interference by the state.¹³ In many cases, biological mothers face challenges in navigating the adoption system due to a lack of accessible information, social stigma, and inadequate legal and psychosocial support. For example, in a case WLC has litigated¹⁴, the Department of Social Development interfered with the adoption process by prioritizing reunification with extended family against the biological mother's wishes when such reunification was not in the child's best interests. Social stigma around adoption further compounds

¹² National Department of Health, *National Clinical Guideline for Implementation of the Choice on Termination of Pregnancy Act*, 2020, https://www.health.gov.za/wp-content/uploads/2023/04/Termination-Pregnancy-Guideline_Final_2021.pdf

¹³ Centre for Child Law, 'SA Must Tackle Systemic Issues Impacting Adoptions', University of Pretoria, 2018, https://www.up.ac.za/news/post_2732972-sa-must-tackle-systemic-issues-impacting-adoptions-ups-centre-for-child-law; Vorster, R.W., 'The Great Power Struggle Over Adoption', *For the Voiceless*, 2023, <https://forthevoiceless.co.za/adoption/op-ed-the-great-power-struggle-over-adoption/>; Luyt, J. & Swartz, L., 'Implementation of Adoption in South Africa: Perspectives from Practitioners in the Western Cape', *Social Work/Maatskaplike Werk*, 2022, https://www.scielo.org.za/scielo.php?pid=S0037-80542022000200006&script=sci_arttext

¹⁴ *TT and Another v Minister of Social Development and Others* [2023] ZAGPJHC 42 (25 January 2023)

challenges in a country that is not pro-adoption and has, for some reason, only provided for women over 18 to be able to independently explore this option.

36. Barriers to SRHR access in South Africa are accordingly varied and multifaceted, with a lack of funding, limited resources, and sociocultural norms, including patriarchal attitudes, stigma, and conservative religious beliefs, creating an environment in which SRHR knowledge and access are limited.
37. With the current status of the SRHR sector, many women are increasingly facing being forced into motherhood and are forced into a state of desperation, should motherhood not be an option they wish to or can explore.
38. For many women left in these desperate situations, only two unthinkable options present themselves: either attempting to access an illegal abortion or taking measures to abandon and potentially conceal births.

Legal framework in support of Child Abandonment Laws with Safe Relinquishment Provisions like baby boxes/ baby safes.

39. *Applicable International and regional laws*

- 39.1. South Africa has ratified several international human rights treaties and agreements, which place it under the duty to ensure that the reproductive choices of women are respected and protected.
- 39.2. Among the instruments ratified by South Africa are the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights (African Charter) and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).
- 39.3. Several international human rights standards "affirm that good health is critical for the enjoyment of all human rights, including participation in socio-economic

and political life,” and attaining “a decent and dignified life”.¹⁵ Sexual and Reproductive Health Rights are accordingly integral to good health and thus to human rights. The right to the highest attainable standard of physical and mental health is guaranteed by Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), among others.¹⁶ The right to sexual and reproductive health is a fundamental component of the right to health.

39.4. The adoption of the Programme of Action of the International Conference on Population and Development in 1994 further highlighted reproductive and sexual health issues within a human rights framework. Moreover, the 2030 Agenda for Sustainable Development includes goals and targets to be achieved in the area of sexual and reproductive health.

39.5. Sexual and Reproductive Health Rights must be understood within the context of equality and non-discrimination, and the guarantee that both men and women should be equally provided for, with consideration of the unequal burden men and women carry in relation to reproduction.

39.6. Article 2(1) ICESCR states that “States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

39.6.1. Many women and girls in South Africa continue to live without the full enjoyment of the right to sexual and reproductive health, despite the set of freedoms and entitlements that are necessitated by it.¹⁷

39.6.2. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has explained these entitlements as the right “to make free and

¹⁵ DM Chirwa, “The Right To Health in International Law: Its Implications for the Obligations of State and Non-State Actors in Ensuring Access to Essential Medicine” (2003) 19 *South African Journal on Human Rights*.

¹⁶ The right to health is guaranteed, *inter alia*, in Art 25 of the Universal Declaration of Human Rights, Article 24(1) of the Convention on the Rights of the Child, and Article 5(e)(iv) of the Convention on the Elimination of All Forms of Racial Discrimination, which mandates States party to prohibit and eliminate racial discrimination and promote equality in the enjoyment of the right to “public health, medical care, social security and social services.” Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women mandates states to take all appropriate measures to eliminate discrimination in the field of health care and ensure that there is equality between men and women in accessing health care services including those related to family planning.

¹⁷ CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 2, 5.

responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health" and unobstructed access to a range of health facilities, goods, services and information critical for the enjoyment of SRHR.¹⁸

39.6.3. SRHR are also intricately interlinked with other rights connected to non-discrimination, such as the International Covenant on Civil and Political Rights (ICCPR) guarantees of the "rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality".¹⁹

39.7. Articles 5 and 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) mandate states to take all appropriate measures to eliminate discrimination in the field of health care and society and ensure that there is equality between men and women in accessing health care services, including those related to family planning. This recognises the unequal burden women face and seeks to provide balance by providing the tools women need to exercise their right to choose.

39.7.1. Article 12(2) of CEDAW obligates State parties to ensure women have access to "appropriate services in connection with pregnancy", and Article 16 calls for gender equality in family matters, including equal rights for women to decide on the number and spacing of their children.

39.8. Article 17 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to privacy.

39.9. Within the African human rights systems, Article 2 of the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), commits States to combat all forms of discrimination against women and modify social and cultural patterns of conduct of women and men in order to eliminate all practices based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

¹⁸ CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 5.

¹⁹ CESCR, *General Comment 22*, E/C.12/GC/22, (2016), par. 10.

- 39.10. Article 3 protects every woman's right to respect for her dignity. Article 4 protects every woman's right to life, integrity and security of the person; Article 8 enshrines every woman's right to equal protection before the law, including obligating States to reform existing discriminatory laws and practices in order to promote and protect the rights of women.
- 39.11. Article 14.1 protects the right to health of women, including sexual and reproductive health, including the right to control their fertility; the right to decide whether, when and how many children to have; the right to choose any method of contraception; the right to self-protection and to be protected against STIs and HIV/AIDS; the right to be informed on one's health status and on the health status of one's partner; the right to have family planning education.
- 39.12. Article 14.2 obligates States to a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas; b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding; and c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.
- 39.13. Article 25 (a) obligates States to provide for appropriate remedies when rights or freedoms under the Charter have been violated; Article 26.2 obligates States to adopt all necessary measures and, in particular, shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised.

40. *Constitutional Framework*

- 40.1. The following Constitutional rights are violated by the continued criminalisation of child abandonment without safe relinquishment provisions or anonymous birth provisions:
- 40.1.1. rights to reproductive health care (section 27(1)(a)),
 - 40.1.2. equality (section 9);
 - 40.1.3. dignity (section 10);

40.1.4. privacy (section 14); and

40.1.5. security in and control over their body (section 12(2)). Section 12(2)(a) and (b) expressly recognise and protect the right of one to make decisions in relation to reproduction.

40.2. Freedom of choice and the ability to make decisions based on one's own circumstances are the golden thread running through these constitutional rights.

40.3. Section 39(1) of the Constitution also further provides that when interpreting the Bill of Rights, a court must consider international law and must consider foreign law. We have discussed international law above. We will discuss foreign below.

41. *Constitutional and Legal bodies*

41.1. The state did, at some point, recognise the importance of safe relinquishment options and the South African Law Reform Commission was tasked with investigating the possibility of establishing baby safe haven laws as implemented in other jurisdictions or by making use of the various options. This is in their issue paper 32, Project 140, published on 20 May 2017. This issue paper was prepared to start an important discussion and elicit responses from the public on the child's right to knowledge of its origins and how baby hatches or other systems will either infringe on the child's right or, alternatively, ensure the child's safety.

41.2. Similarly, the legislature has also previously considered this matter in 2022/2023 when the Children's Act was being amended. Submissions were made by pro-safe haven law NGOs, and it was recommended that the act be amended to reflect an exception for safe relinquishments. Unfortunately, the suggested changes were not adopted.

WLCs POSITION

42. The Women's Legal Centre appreciates the opportunity to contribute to the review of the Children's Amendment Bill and remains committed to working with the Department of Social Development in advancing legislative reform that upholds the constitutional and human rights of women and children.

43. Across both the child abandonment and adoption-related amendments, our submission highlights a common concern: the persistence of a legal and policy framework that fails to reflect the lived realities of women in South Africa and that, as a result, undermines

rather than advances the best interests of children. The proposed inclusion of baby boxes in the definition of “abandoned” exemplifies this problem. Rather than addressing the structural conditions that lead to unsafe abandonment, it entrenches the criminalisation of women who act under conditions of desperation, while making no lawful provision for safe or confidential relinquishment. This approach reinforces stigma, fear, and punitive treatment, deterring women from seeking assistance and increasing the risk of harm to infants.

44. A legal framework supporting child abandonment laws with safe relinquishment provisions offers an opportunity to address the systemic failures and inequities perpetuated by South Africa’s current punitive approach. International and regional human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Maputo Protocol, emphasize the importance of respecting and protecting women’s reproductive autonomy while ensuring the safety and welfare of children. These principles underline the necessity of balancing the competing rights of mothers and children in ways that prioritize health, safety, and dignity.
45. Introducing these provisions should seek to balance the rights of children with the equally critical rights of mothers to privacy, autonomy, and freedom from criminalization for acts borne of desperation.
46. A rights-based approach to child protection must be grounded in constitutional and international obligations to respect, protect, promote, and fulfil women’s reproductive rights and children’s rights to life, dignity, and protection from harm. This requires shifting the focus of law and policy away from criminalisation and towards compassion, care, and accountability for state inaction. The law must create safe, accessible, and confidential pathways for women to make reproductive decisions, including decisions relating to relinquishment, without fear of punishment or stigma.
47. We therefore urge that the proposed amendment to section 1 of the Children’s Act, which seeks to include baby boxes in the definition of “abandoned,” not be adopted in its current form. Instead, the Department should undertake a comprehensive review to develop a legislative framework for safe relinquishment that aligns with constitutional rights, international standards, and the realities of women’s lives. Such a framework would not only reduce unsafe abandonment and infant mortality but would also affirm the dignity and agency of women as rights-holders and caregivers.

48. The Women's Legal Centre stands ready to support this process through further engagement, legal input, and rights-based advocacy to ensure that South Africa's child protection laws reflect compassion, equality, and justice for both women and children.
49. We submit that this is an important conversation that requires further discussion and exploration, rather than an approach that we know does not work and continues to fail women and the children that they give birth to.

LANGUAGE RECOMMENDATIONS

50. The WLC acknowledges the Department's intention, through the Children's Amendment Bill, to update several provisions of the *Children's Act 38 of 2005* and to thereby address several challenges that children face today. We are, however, deeply concerned that the proposed 2025 amendment to section 1 seeks to include the use of "baby boxes" or "baby savers" within the statutory definition of "abandonment."
51. We do not support the proposed inclusion of *baby boxes* within the definition of "abandonment as this approach will be misaligned with constitutional, public-health, and human-rights principles, as it conflates acts of desperation aimed at preserving life with acts of neglect or malice.
52. By defining the use of baby boxes as a form of abandonment, the amendment risks:
 - 52.1. Criminalising women in crisis who use these mechanisms to preserve their infants' lives;
 - 52.2. Since the underlying cause has not been addressed, driving the practice underground, thereby increasing unsafe abandonment and infant mortality, and
 - 52.3. Entrenching gendered discrimination by punishing women for systemic failures in reproductive and social support services.

53. Rather than reinforcing a punitive and outdated framework, the Children's Act should recognise safe relinquishment as a lawful, compassionate, and regulated alternative to unsafe abandonment. This approach would better align with sections 9, 10, 12, 27, and 28 of the Constitution, and with South Africa's obligations under CEDAW, the Maputo Protocol, and other international human-rights instruments.
54. Accordingly, we propose alternative language amendments to sections 1, 236, and 305 of the *Children's Act*, designed to:
- 54.1. Differentiate clearly between abandonment and safe relinquishment;
 - 54.2. Provide a lawful, rights-based mechanism for women to relinquish infants safely; and
 - 54.3. Ensure that children relinquished in this manner are quickly and appropriately placed within the child-protection system.
55. The Bill currently proposes that the definition of "abandoned" be expanded to include infants left in baby boxes. We instead recommend that this proposal be rejected and substituted with the following addition, which reframes the concept in line with safe relinquishment principles:
- 55.1.
- "abandoned", in relation to a child, means a child who—
- (a) has obviously been deserted by the parent, guardian or caregiver;, or
 - (b) has, for no apparent reason, had no contact with the parent, guardian, or caregiver for a period of at least three months;
 - (c) has no knowledge as to the whereabouts of the parent, guardian or caregiver, and such information cannot be ascertained by the relevant authorities; or

(d) Is an Infant who has obviously been relinquished by a parent, guardian or caregiver, has not been placed or safely relinquished in a Baby box/saver and has not been relinquished in terms of Safe Haven provisions.

56. The above wording is recommended as it would distinguish between unsafe desertion and safe relinquishment, thereby protecting the life and welfare of the child while avoiding the criminalisation of mothers who act out of desperation. It recognises that safe relinquishment is an act of preservation, and ensures that such infants are brought into lawful child-protection processes without delay.

57. In addition to amending the above section, the following two amendments are also recommended to ensure better integration of safe relinquishment measures like baby boxes and to ensure there is an easier transition to related child welfare and protection processes.

58. We accordingly recommend that section 236(1) be amended to include the following additional subsection:

58.1. 236. When consent is not required.

(1) The consent of a parent or guardian of the child to the adoption of the child is not necessary if that parent or guardian -

(g) “has safely relinquished an infant in a Baby Box/Saver or to a Designated Safe Haven Provider and has failed to reclaim the infant.”

59. The above amendment would ensure that infants relinquished through recognised and safe channels may be placed in adoption processes where appropriate, provided the relinquishing parent does not reclaim the child within a defined timeframe. It introduces legal certainty into post-relinquishment procedures and aligns adoption processes with a compassionate, rights-based framework that respects both the parents and the child’s interests.

60. Lastly, we recommend an amendment to section 305, which relates to penalties and offences. Here we recommend the following subsections to section 305(3) and (4):

60.1. Section 305 (3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person—

(c) relinquish an Infant in a manner other than by placing or safely relinquishing them in a Baby Box/Saver or safely relinquishing them in terms of Safe Haven provisions;

(d) relinquishes an Infant in a Baby Box/Saver or in terms of Safe Haven provisions, but such Infant shows signs of Abuse.

(4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance unless that person has placed or safely relinquished an Infant in a Baby Box/Saver or has safely relinquished in terms of Safe Haven provisions, in which case they will not be guilty of an offence in terms of this subsection.”

61. The above proposals reinforce a protective legal distinction between when harmful intent is present and when relinquishment happens in the best interest of the child. This would ensure that women who relinquish infants safely and in accordance with prescribed procedures are not criminally liable, while maintaining accountability for those who commit acts of abuse or neglect. This balances compassion with accountability, advancing both public safety and gender justice objectives.
62. In summary, the above recommendations would ensure the Children’s Act speaks to the realities of South African women and children. They promote a rights-based approach to child protection and support the constitutional values of dignity, equality, reproductive autonomy and the child’s best interests

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

63. Adoption in South Africa operates within a broader socio-economic and structural context marked by poverty, gender inequality, and inadequate access to sexual and reproductive health and rights (SRHR) services. These intersecting barriers contribute to high rates of unplanned pregnancy and child abandonment, while simultaneously making lawful adoption an inaccessible option for many women.
64. 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.
65. 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 consent.
66. 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.²⁰ Disclosed/open adoptions are where the birth mother/biological parents consent to the adoption, and the prospective adoptive parent knows one another's identities.²¹ In contrast, a non-disclosed/closed adoption is one in which the birth mother/biological parents and prospective adoptive parents do not know one another's identities or personal details.²² 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.

67. 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 2017/2018.²³ 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 residential care facilities in 2018 at 21,000.²⁴ 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 the permanency and support of a family unit. The destinies of orphaned or abandoned children are divergent. Some are cared for by their extended families, and 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.*²⁵

²⁰ Department of Social Development, 'Practice Guidelines on National Adoption' (undated), p19-20.

²¹ *Ibid*, 19.

²² *Ibid*, 20.

²³ Annelise de Vries 'Flash Report on the 2019 amendments to the Children's Bill' Solidarity Research Institute (2019)

²⁴ National Adoption Coalition of South Africa 'Position paper re: Tabled Children's Amendment Bill' (20 October 2020) p3.

²⁵ *National Adoption Coalition of South Africa v Head of Department of Social Development, KwaZulu-Natal and others* 2020 (4) SA 284 (KZD) at 1.

68. 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, preclude 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]*²⁶

69. From the above, it is clear that there are fundamental issues plaguing the adoption process in South Africa, 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:²⁷

69.1. 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;

69.2. 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

69.3. There was a shortage in human resources, which affected the implementation of social work practices and the ability to timeously deal

²⁶ *Supra* note 39 at 41.

²⁷ Zitha Mokomane & Tamsen J Rochat, 'Adoption in South Africa: Trends and patterns in social work practice' *Child and Family Social Work* (2012)

with matters as and when they arise without neglecting pre-existing casework.

70. Additionally, and as reflected in case law,²⁸ 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:

70.1. Accreditation of adoption social workers;

70.2. Managing the register of adoptable children and prospective adoptive parents;

70.3. The issuing of section 239(1)(d) letters recommending an adoption; and

70.4. The finalisation of an adoption where formal court procedures have taken place.²⁹

71. The delay in providing section 239(1)(d) letters of recommendation is 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.³⁰ 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.

72. Through our work, we have experience of the damaging effects of this prioritisation of exploring the placement of children with their birth families.³¹ 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

²⁸ 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); *Carolyn and another v Provincial Head of Department, Gauteng Social Development* (case no. 43586/2018) Gauteng Local Division.

²⁹ Dee Blackie 'Why adoption is a problem in South Africa' *Daily Maverick* (January 2019)

³⁰ *Supra* note 39 at 46.

³¹ *TT and Another v Minister of Social Development and Others* [2023] ZAGPJHC 42 (25 January 2023)

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.

73. 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

74. 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 are fundamentally linked to the right to bodily and psychological integrity, as provided in South Africa's Constitution.³² 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.

³² Constitution of the Republic of South Africa, 1996, section 12(2)(a)

75. With a projected population of 63,02 million people,³³ 51.0% is female, and 81,7% 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 to 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.
76. With the majority of adoptions involving children from single birth mothers, the study goes on to note that drivers for this prevalence are a lack of financial, emotional and practical support from partners and biological fathers, and poverty.³⁴ We understand that due to the racist policies of the past, in a country that continues to experiences 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.
77. 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 impacts negatively on the right to equality

³³ S Statistics South Africa (2024) *Mid-year population estimates 2024* (Statistical release P0302). Pretoria: Statistics South Africa. Available at:

<https://www.statssa.gov.za/publications/P0302/P03022024.pdf>.

³⁴ Op cit note 41 at 354.

as provided in section 9 of the Constitution. And given the interconnected and interrelated 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.

78. 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 accordingly also 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 their interpretation and implementation by social workers, so that abuse of processes does 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

79. 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.

80. Article 14 of the Maputo Protocol provides for the 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.*

81. 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.

82. The above is intimately linked to the rights to privacy, 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;³⁵ personal freedom, security and integrity; privacy;³⁶ equality and non-discrimination;³⁷ and to be free from practices that harm women and girls, provided for across these different instruments.³⁸

³⁵ 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.

³⁶ Articles 3 and 5 of the UDHR; 7, 9(1) of the ICCPR; and 37(a) of the CRC.

³⁷ 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.

³⁸ Articles 2(f) and 5(a) of CEDAW; 24(3) of the CRC.

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

Protection of the rights of birth mothers in adoption processes

86. We submit that a new section should be inserted after section 229 of the Principal Act to expressly recognise the rights of birth mothers and biological parents in adoption processes. Such a provision would give effect to the constitutional rights that this part of the Act seeks to uphold and would establish clear protections and mechanisms of redress where those rights are violated. While this proposed amendment is advanced primarily from the perspective of birth mothers, whose

rights to privacy, dignity, and reproductive autonomy are most often infringed, it should equally extend to prospective adoptive parents, whose rights to make decisions concerning reproduction and family formation are similarly engaged in adoption processes.

87. We urge the inclusion of this 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 may choose 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.

88. To this end, we propose the following amendment to the Children's Act, which is aimed at protecting the right of mothers' privacy and confidentiality in the 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.

89. Section 233, which regulates consent to adoptions, would therefore be amended as follows, with the 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.”

Specific Language Recommendations

Clause 100 amendment to section 234 of the Principal Act

90. 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. This amendment seeks to expand parties that may be involved in an adoption process and seeks to expand it beyond those who hold rights and obligations to the adoptable child.
91. The expansion of the number of people who may be involved in adoption processes raises concerns. As does the broad nature of the proposed category of ‘family members’.
92. While the intention may be to encourage family connection and cultural continuity, in practice, this provision risks deepening a pattern of administrative and professional conduct that has already been found unconstitutional and harmful to women.
93. In *TT v Minister of Social Development and Others* (Gauteng Division, 2022), the High Court declared invalid the Department’s *National Adoption Guidelines*, which had permitted intrusive tracing of birth mothers’ families without their consent. The Court held that these practices violated women’s constitutional

rights to dignity, privacy, and reproductive autonomy. The case demonstrated how social workers and departmental officials, under the guise of “family reunification,” often disregard the clear wishes of women who have lawfully and confidentially consented to adoption. This conduct exposes women to stigma, coercion, and potential violence, and it directly undermines their right to make reproductive decisions free from interference

94. The proposed amendment to section 234, by expanding the list of parties who may participate in post-adoption agreements to include extended family members and unspecified “interested persons,” reopens the very door that *TT v Minister of Social Development* sought to close. It invites renewed intrusion into the private lives of birth mothers and children, without providing any corresponding privacy safeguards or recognition of the right to confidentiality in adoption processes. In a context where family reunification is often prioritised above women’s safety and autonomy, this amendment is particularly regressive.
95. The Act must be interpreted and amended consistently with the Constitution, which protects every person’s rights to dignity (section 10), privacy (section 14), and bodily and psychological integrity, including reproductive decision-making (section 12(2)). Any statutory expansion of participation in the adoption process that fails to embed explicit privacy exceptions, consent requirements, and confidentiality protections will perpetuate the very violations condemned in *TT v Minister of Social Development*.
96. For these reasons, the WLC does not endorse the proposed amendment to section 234 in its current form. Rather, we recommend that section 234 be reviewed to explicitly include confidentiality protections.
97. In the 2020 proposed amendment bill, the accompanying memorandum provided 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.*’ The current 2025 version however, does not provide this qualifier and instead only aims to include the category of ‘family members’ without qualification.

98. 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.
99. Without the caveat that the family member has been formally recognised as a care-giver for instance, the proposed section will allow for any family members 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 with or without the parent or guardians consent; allowing 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.
100. For this reason, we propose the inclusion of a parental/guardian consent restriction to subsection 2 and the addition of the words '***where the family member has been formally recognised as a caregiver to the adoptable child***' to the proposed amendment of subsection 1 as follows:

234. (1) *The parent, [or] guardian or a family member, **where the family member has been formally recognised as a caregiver**, 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—;*

*(2) An agreement contemplated in subsection (1) may not be entered into without **the written consent of the parent or guardian** or child if the child is of an age, maturity and stage of development to understand the implications of such an agreement.*

101. 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;

102. In all instances provided by the definition above, the caregiver must have met and had a pre-existing relationship of some form with the child, limiting the potential for abuse and limiting it to persons with a potential existing interest.

103. 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 from her family, then such a right will not be violated through the inclusion of family members in the process by way of a post-adoption agreement.

104. Without these protections, the amendment risks institutionalising the harmful practices that the courts have already declared unlawful. It would represent a step backwards for women's reproductive justice and for children's rights to safe, stable, and confidential family placements

Clause 102 amendment to section 239 of the Principal Act

105. Clause 102 proposes to amend section 239 of the principal Act, and more importantly, section 239(1)(d). As stated above, 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 102 proposes an amendment to this section, which is known to be the cause of delays in adoption applications.

106. Section 239(1)(d) proposes to replace the word 'recommending' with 'confirming'. The reasoning for this amendment is 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 above. For this reason, and to guard against delays in adoption application processes, we propose the following addition to the subsection:
107. "(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"
108. 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 104 amendment of section 250 of the Principal Act

109. 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.
110. 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.

111. The Women's Legal Centre supports the principle of expanding access to adoption services, including the Department of Social Development's (DSD) capacity to provide such services directly. This expansion, if properly implemented, could help reduce inequities in access and promote adoption as a viable and rights-based alternative for women and children. However, we remain deeply concerned about the implications of this amendment for private adoptions and the potential for renewed administrative interference by departmental social workers who are not designated or accredited to render adoption services. 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 the national or provincial level.
112. The *TT v Minister of Social Development and Others* judgment again provides a cautionary example. Here, DSD social workers who were not designated to provide adoption services intervened in an ongoing private adoption process led by an accredited adoption social worker, and their interference resulted in significant delays, the violation of the birth mother's rights, and the effective frustration of her lawful decision to place her child for adoption. The Court found that such conduct exceeded DSD's lawful authority and constituted an infringement of constitutional rights.
113. This history demonstrates that DSD's involvement, when exercised without clear procedural limits, risks undermining rather than facilitating adoption. When departmental social workers intervene in private adoptions without designation or

legal mandate, they disrupt professional processes governed by statutory and ethical safeguards. This practice has repeatedly led to the miscarriage of birth mothers' wishes, violations of confidentiality, and the erosion of trust in the adoption system.

114. While we welcome the intention of the 2025 amendment to section 250 to ensure broader access to adoption services through DSD, we emphasise that this must not translate into unregulated interference in private adoptions or duplication of functions already competently performed by accredited adoption social workers. Expansion must be accompanied by restrictions and safeguards to prevent a recurrence of the unlawful and harmful practices highlighted in *TT v Minister of Social Development*.

115. 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);

116. 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.³⁹

117. The services referred to in paragraphs (a) and (d) of the principal Act are currently worded so broadly that they permit any social worker to perform them, regardless of whether they hold the required specialisation in adoption services. Consequently, the proposed paragraph (e) further widens this scope by effectively including social workers employed by the national or provincial Departments of Social Development in the category of persons who may provide adoption services, even if they are not “adoption social workers” as defined in the Act. This broad and undefined extension creates significant room for administrative abuse and interference, as it enables social workers without the necessary expertise or designation to intervene in private adoption matters, practices that have historically resulted in delays, breaches of confidentiality, and violations of birth mothers’ rights, as illustrated in *TT v Minister of Social Development*

118. 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.**

119. Due to the Centre’s experience with adoption processes, 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.

CONCLUSION

³⁹ Act 110 of 1978.

120. In conclusion, while the Women's Legal Centre supports efforts to strengthen and expand adoption services, the proposed amendments, if adopted without the safeguards we have recommended, risk deepening the systemic problems that have long undermined the accessibility, integrity, and constitutional soundness of South Africa's adoption framework. The persistent absence of statutory recognition for birth mothers' rights, the broad authorisation of non-specialised social workers to intervene in adoption processes, and the expansion of participation in post-adoption agreements without privacy protections all point to a continued failure to centre women's autonomy, dignity, and reproductive decision-making within the child protection system.
121. These gaps are not merely technical. They perpetuate a social and legal environment in which women who face unplanned or crisis pregnancies are left without safe, confidential, and compassionate options for relinquishment. The result is a cycle in which abandonment becomes an act of desperation rather than choice, directly undermining both women's rights and children's best interests. The inability of the current framework to recognise adoption and relinquishment as legitimate, rights-based reproductive decisions is one of the key factors contributing to unsafe abandonment, as detailed in our earlier submissions.
122. Our proposed amendments, including the insertion of a new section 229A to recognise the rights of birth mothers and the establishment of clear limits on departmental interference in private adoptions, would not only address these immediate concerns but also form part of a broader structural solution. They would ensure that adoption processes operate with transparency, accountability, and compassion, thereby restoring public confidence in the system and providing real alternatives to unsafe abandonment.
123. Ultimately, aligning the adoption framework with the Constitution's equality, dignity, and privacy guarantees, and with South Africa's obligations under the Maputo Protocol and CEDAW, would transform adoption from an administratively burdensome and often punitive process into a pathway that affirms women's agency and promotes every child's right to family and care. The Women's Legal Centre therefore urges that the Department adopt these recommendations in full

to create a legal environment that upholds reproductive justice and advances the best interests of both women and children.

PART C: CHILD MARRIAGES

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?

124. 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.
125. 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 consent⁴⁰ 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

126. According to the United Nations Children's Fund ('UNICEF') SA is home to nearly 2 million child brides, with approximately 4 per cent of girls in South Africa marrying before the age of 18 years, and 1 per cent by the age of 15 years.⁴¹
127. 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

⁴⁰ Child, early and forced marriage, including in humanitarian settings at https://data.unicef.org/wp-content/uploads/cp/child-marriage/Child-marriage-profile_ZAF.pdf

⁴¹ UNICEF 'State of the world's children 2024: A fair chance for every child' <https://www.unicef.org/reports/state-of-worlds-children/2024>

based on the records of the Department of Justice and Constitutional Development ('DOJ&CD').

128. For ten years, selected randomly, child marriage statistics were recorded as follows:

- 128.1. In **2010**,⁴² 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.
- 128.2. 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.
- 128.3. In **2013**,⁴³ 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.
- 128.4. In **2015**,⁴⁴ 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.
- 128.5. In **2016**,⁴⁵ 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.
- 128.6. In **2017**,⁴⁶ 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.
- 128.7. In **2018**,⁴⁷ 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.

⁴² Marriages and Divorces, 2010, available at <http://www.statssa.gov.za/publications/P0307/P03072010.pdf>

⁴³ Marriages and Divorces, 2013, Available at <http://www.statssa.gov.za/publications/P0307/P03072013.pdf>

⁴⁴ Marriage and divorces, 2015, Available at <http://www.statssa.gov.za/publications/P0307/P03072015.pdf>

⁴⁵ Marriage and Divorces, 2016, Available at <http://www.statssa.gov.za/publications/P0307/P03072016.pdf>

⁴⁶ Marriages and divorces, 2017, Available at <http://www.statssa.gov.za/publications/P0307/P03072017.pdf>

⁴⁷ Marriage and Divorce, 2018 Available at <http://www.statssa.gov.za/publications/P0307/P03072018.pdf>

- 128.8. More recently, in **2021**, South Africa recorded 207 child marriages, with 188 of the children taken as brides and 19 as grooms. And from these statistics, 37 were registered as civil marriages and 19 were customary marriages.⁴⁸
129. The statistics indicate that more girls than boys are being allowed to enter into marriage while under the age 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 records 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).
130. 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.
131. 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 the government to record how many child marriages take place in terms of religious beliefs, and these marriages go unrecorded.
132. What is clear from the available data is that child or forced marriage disproportionately impacts 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

133. 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, educated, wealthier families are less likely to be married at a young age compared to girls from rural, poor, and uneducated backgrounds.⁴⁹

⁴⁸ <https://www.sanews.gov.za/south-africa/south-africa-records-207-child-marriages-2021-stats-sa>

⁴⁹ Carrington, Kerry *Feminism and Global Justice*. 'Violence against women: Asia and the Middle East.' London: Routledge, 2015 at p 47.

134. 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.*”⁵⁰ 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.⁵¹
135. 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.
136. Early childbirth is one of the consequences of child, early or forced marriages.
- 136.1. Globally, pregnancy is reported to consistently be one of the primary causes of death for young girls between the ages of 15 to 19.⁵² 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.⁵³
- 136.2. Moreover, statistical patterns show that young girls from lower-income households are more likely to become pregnant and suffer from nutritional deficiency, 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.⁵⁴
- 136.3. These deaths occur mostly in developing countries, where poverty and remoteness produce an unequal allocation of health care services and food

⁵⁰ Rangita de Silva-de-Alwis (2008) Child Marriage and the Law, Legislative Reform Initiative Paper Series, Working Paper Series, UNICEF, p 1.

⁵¹ 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>

⁵² Ending Child Marriage: Progress and Process’, available at:

https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf at p 2.

⁵³ Ibid at 31.

⁵⁴ 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> at p 18.

distribution.⁵⁵ This is notably the case for regions with low numbers of skilled health workers, such as sub-Saharan Africa.⁵⁶

136.4. 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 the rich and the poor.⁵⁷ Ninety-nine per cent of maternal deaths are said to occur in developing countries; more than half of these deaths occur in sub-Saharan Africa.⁵⁸

136.5. 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.⁵⁹

137. 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.⁶⁰ The power imbalance that exists when minor girls are forced into marriage means that they are unable to negotiate safe sex methods and contraceptives.⁶¹

138. 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.⁶² Studies have also reported that young girls in marriage often show signs symptomatic of sexual abuse and post-traumatic stress disorder.⁶³ Young girls in marriages also exhibit existential anxiety as well as feelings of hopelessness and debilitating depression.⁶⁴

⁵⁵ Ibid at 28.

⁵⁶ Ibid.

⁵⁷ Maternal mortality at: <http://www.who.int/mediacentre/factsheets/fs348/en/>

⁵⁸ Ibid.

⁵⁹ Maternal health care in SA shows signs of improvement, March 2020, available at <http://www.statssa.gov.za/?p=13102>

⁶⁰ Richard Kollodge, pg 28.

⁶¹ Ibid, pg 33.

⁶² Child Marriage, Facts and Figures, International Centre for Research on Women, available at: <http://www.icrw.org/child-marriage-facts-and-figures>

⁶³ Ibid.

⁶⁴ Ibid.

139. 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.⁶⁵
140. These consequences should motivate us all to address the root cause of child marriage. Indeed, the state has a Constitutional duty to do so.

Harmful Customary Practices Related to Child Marriage

141. 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.⁶⁶ Some of the reports noted that:
- 141.1. About 20 girls a month were being forced to drop out of school because of the forced marriage resulting from *ukuthwala*.
- 141.2. 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.
142. 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.
143. 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.
144. Immediately after the abductions, most girls were verbally, sexually, and physically abused by their "husbands" and their families.⁶⁷

⁶⁵ Ibid.

⁶⁶ 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>

⁶⁷ Discussion Paper Page 19

145. *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.⁶⁸ It is not a marriage. In the evidence that the *amici curiae* put before the High Court in the *Jezile*⁶⁹ 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 “bastardised” version of *ukuthwala* is the lived experience of large numbers of women and children and is a blatant abuse of fundamental constitutional rights.
146. 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.
147. We submit that any customary practices that allow women and children to be married without their consent are 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

148. 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.

⁶⁸ Para 72.

⁶⁹ *Jezile v S and Others* 2016 (2) SA 62 (WCC).

149. 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 marriage represent and reiterate gender discrimination.
150. 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.'*
151. 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 girls and boy children is a violation of the equality clause and constitutes unfair discrimination on the grounds of gender.
152. 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.⁷⁰ 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.
153. The Civil Unions Act 17 of 2006 ('**Civil Unions Act**'), which regulates same-sex 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.

⁷⁰ 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'.

154. The Marriages Bill (B43 of 2023) is currently before the Portfolio Committee for consideration, deliberation and public engagement.⁷¹ The Marriages Bill presents a historic opportunity to harmonise South Africa's fragmented marriage laws and to affirm the constitutional values of equality, dignity, and freedom. However, unless it directly addresses the systemic challenges outlined above, particularly those affecting the registration of customary marriages, it risks reinforcing existing inequalities rather than dismantling them.
155. It introduces measures to prevent child and forced marriages, such as requiring both prospective spouses to be at least 18 years old and criminalizing marriages involving minors. The Draft Marriage Bill (B- 2022) contained a section on Age Determination, which has been omitted from the Marriage Bill, 2023, which is a serious concern, and the inclusion of it in the previous draft affirmed the state's commitment to its obligation to address and eradicate child marriage. Its inclusion made a strong statement to society and to those who solemnise marriages that there is an obligation on everyone to ensure that we protect children.
156. In a separate submission to the DHA on the Green Paper and to the draft Bill circulated for public comment by the Department, we argued strongly that 18 years needed to be declared the legal age for marriage in the country. This approach affirms the Court's position in *Jezile v The State*⁷², where it noted that parental consent for minors to marry indirectly fuelled rape, abduction, trafficking and or coercion of children into marriages in the name of custom and or religious practices.
157. In addition, we recommended to the Portfolio Committee on Home Affairs to ensure that the age of consent is the first stipulation and serves as the introduction of the chapter, which can be followed by the provision which sets out the requirements on marriage officers to determine the age of consent and ensure compliance with the age of consent prior to solemnising the marriage.⁷³
158. South Africa's marriage laws remain fragmented and inconsistent regarding the minimum legal age for marriage, often perpetuating gender inequality and child marriage. The Marriage Bill (B43 of 2023) offers an opportunity to unify these laws and

⁷¹ Parliamentary Monitoring Group <https://pmg.org.za/call-for-comment/1464/>

⁷² *Jezile v S and Others* [2015] ZAWCHC 31.

⁷³ Section 4 Marriage Bill (B43 of 2023)

prohibit child and forced marriages, but the omission of its earlier “Age Determination” clause undermines efforts to protect children and eliminate harmful practices.

159. In this context, it is critical for the Departments of Social Development, Home Affairs, and Justice to adopt an intersectional and coordinated approach to law reform. Child marriage is not merely a legal issue; it is a social, economic, and human rights concern that intersects with poverty, gender inequality, and cultural practices.
160. The Children’s Amendment Bill reinforces the state’s obligation to protect children from exploitation and harmful practices, which cannot be achieved through fragmented policy responses.
161. Collaboration across these departments ensures that legal reforms are supported by appropriate social protection mechanisms, enforcement systems, and community-level interventions. Such coordination will strengthen prevention, enhance accountability, and ensure that reforms to marriage laws are implemented in a way that genuinely upholds the constitutional rights of children and promotes substantive gender equality.

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

162. 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.
163. 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.

164. 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.”*
165. 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.⁷⁴ The CRC in article 34 also provides that children are to be protected from all forms of sexual exploitation and sexual abuse.
166. 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.
167. 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.
168. 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.

⁷⁴ 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*.

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.

169. 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 women 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".⁷⁵ 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.*"⁷⁶

170. 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 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.

⁷⁵ Article 6 (a).

⁷⁶ Article 8 (2).

Child Marriages and Sustainable Development Goals

171. 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'*).
172. 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.*⁷⁷
173. 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 were one of the shortcomings that remain in the legal framework.⁷⁸ Based on this acknowledgement, there is a clear awareness on the part of the state and therefore, action is required.
174. 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:
- 174.1. Goal 1 – No poverty, because child marriage is linked to higher household poverty and perpetuates cycles of poverty across generations
- 174.2. Goal 2 – Zero hunger, since child brides and their children are more likely to be malnourished
- 174.3. Goal 3 – Good health and well-being, 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.
- 174.4. Goal 4 – Quality education, since child marriage is a barrier to girls' education

⁷⁷ 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

⁷⁸ 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

- 174.5. Goal 5 – Gender equality, because ending child marriage will help achieve gender equality and empower all women and girls.
- 174.6. 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
- 174.7. Goal 10 – Reduce inequalities, as we mentioned, child marriage affects poor, rural, and disadvantaged populations disproportionately, and creates cycles of poverty that reinforce inequality.
- 174.8. 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.⁷⁹

SUBMISSIONS TO THE CHILDREN’S AMENDMENT BILL

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

175. We now move to the content of the proposed amendment in the Bill. We note that the Bill has sought to bring about the prohibition of child marriages by adding a specific age limit “**18 years**” and 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 age of 18 must not be given out in marriage or engagement.
176. In light of our submissions above, the WLC is accordingly in support of the proposed developments and appreciates that our submissions on this topic for the 2020 B18 Bill were considered. We believe this development 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 of South Africa.
177. We, however, are still concerned that amending this section in the manner proposed is not strong enough, as it fails to clearly state that child marriages are prohibited in South Africa, and fails to provide that NO child can be given out in marriage or engagement, even with the consent of a parent, guardian or state official.

⁷⁹ 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

178. As mentioned above, the age of marriage is set out in the Marriages Act, and the RCMA above has built exceptions that allow girls as young as 15 to be legally married. Framing the amendment in this way, although it adds the age limit, leaves room for the Children's Act to be misinterpreted or superseded by other acts. 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.
179. Further, in amending the section by mainly adding just an age and 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

180. 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.
181. 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

182. In our view, it is important to ensure that steps are adopted to protect children from being married and/or forced into marriage. Accordingly, the protection mechanisms in the Children's Act should therefore include such children in its ambit.

183. 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 child marriage and/or of a forced marriage. To this extent, section 150 of the Children's Act must also 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.
184. 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.
185. 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 are similar to those 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.
186. 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 also has the potential of minimising the possibility that the same child could be forced into a marriage again.

LANGUAGE RECOMMENDATIONS

Definition Section 1

187. "child marriage" means marriage, engagement or cohabitation with a child or any arrangement made for such cohabitation or marriage or engagement.
188. "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 were coerced into the marriage or one of the parties to such a marriage is a child.

Section 12(2)

189. 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 follows:

- a) "Contrary to any provisions in law, no child under the age of 18 can be given away into a child marriage."
- b) "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."
- c) "Any person who forces a child into a marriage is guilty of an offence of forcing a child into a marriage."
- d) "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:
 - i. to contend that the child in question consented to the marriage.
 - ii. to contend that their religion, culture, or any other similar practices that permit children to be married allow for children to be married."

Section 150

190. 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."

CONCLUSION

191. We trust that you will find this submission made by the Women's Legal Centre to the Children's Amendment Bill [Government Gazette No. 53426 of 26 September 2025] useful.

192. Should you have any comments or questions, please do not hesitate to contact Ms Managa at khuliso@wlce.co.za; Ms Motileni at khensani@wlce.co.za; Ms May at charlene@wlce.co.za

ENDS