

# CENTRE FOR CHILD LAW

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**Input to the Secretary-General's Report on Child, Early and Forced Marriage:  
a South African perspective**



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**TABLE OF CONTENTS**

- 1. INTRODUCTION..... 3**
- 2. OVERVIEW..... 3**
- 3. CHILD MARRIAGE ..... 4**
  - 3.1. Background..... 4**
  - 3.2. Parental consent for a child to marry ..... 5**
  - 3.3. Ongoing law reform processes ..... 5**
- 4. FORCED MARRIAGES ..... 6**
- 5. REGISTRATION OF MARRIAGES ..... 7**
- 6. DATA COLLECTION METHODS ..... 8**
- 7. SEXUAL AND REPRODUCTIVE HEALTH RIGHTS ..... 10**
- 8. EDUCATION..... 11**
- 9. SOCIAL PROTECTION ..... 12**
- 10. CONCLUSION..... 13**



## 1. INTRODUCTION

These submissions are prepared by the Centre for Child Law ('CCL'), a public interest litigation organisation registered with the Legal Practice Council in terms of the Legal Practice Act 28 of 2014. CCL operates within the University of Pretoria's Law Faculty and contributes towards the development of child law and practice in academia. CCL contributes to establishing and promoting the best interests of children in South Africa through strategic litigation, policy, advocacy, research, and education.

The CCLs submissions are in response to the *Call for Inputs to inform the report by the Secretary-General on the progress towards ending Child, early and forced marriage worldwide* and the Guiding questions both iterated in UN Doc: WHRGS/GA/RES/77/202, the contents of which will not be reiterated here. Our submissions substantively address various aspects of the law, policy, and practice related to each issue in South Africa.

Our submissions set out:

- i. The relevant legal framework and ongoing law reform processes;
- ii. Data collection by the Department of Home Affairs;
- iii. The prevalent practice of non-registration of customary marriages, recording of birth registrations and the effect of this on child marriages;
- iv. Access to sexual reproductive health rights for adolescents;
- v. Access to social services.

## 2. OVERVIEW

South Africa is a country that embraces diversity. This is manifests in the multitude of statutes regulating various marital unions and our generally pluralistic legislative regime. A person can get married in terms of a civil marriage, customary marriage, a civil union or a religious marriage:

- i. Civil marriages are recognised and regulated under the Marriage Act ('Marriage Act') 25 of 1961. Civil marriages can be entered into solely by monogamous heterosexual monogamous couples. Any attempt to marry a second wife in terms of the Marriage Act yields the criminal offence of bigamy while also rendering the latter marriage null and void from the start;
- ii. Customary marriages are recognised and regulated in terms of the Recognition of Customary Marriages Act ('RCMA'), 120 of 1998. Customary unions can be monogamous or polygynous;
- iii. Civil Unions are recognised and regulated in terms of the Civil Union's Act ('CUA'), 17 of 2006. Civil Unions can be concluded by both heterosexual and same-sex couples and are solely monogamous.
- iv. Religious marriages are not officially recognised, save for the recent recognition of Muslim Marriages following the recent Constitutional Court decision in *Women's Legal Centre Trust v*

*President of the Republic of South Africa and Others.*<sup>1</sup> To date, no specific requirements to solemnise Muslim marriages, or religious marriages in general, terms have been signed into law.

### 3. CHILD MARRIAGE

#### 3.1. Background

Most married children are in customary unions, while civil marriages concluded in terms of the Marriage Act constitute a lesser number. The Marriages Act and the Recognition of Customary Marriages Act permit children to marry subject to specific requirements for consent from the child, the child's guardian and the Children's Court or the High Court.<sup>2</sup> The Civil Union Act does not permit any deviations, as both spouses must be adults aged 18 and older.

Registered customary marriages for children dropped by 82,9% between 2006 and 2021. The same pattern was observed for registered civil marriages, which declined by 93,6% between 2006 and 2021.<sup>3</sup> In 2021, South Africa recorded 207 child marriages, with 188 children taken as brides and 19 as grooms. Of the 207 child marriages in 2021, 37 were registered as civil marriages and 170 as customary marriages.<sup>4</sup> In 2022, the Minister of Justice, Mr Ronald Lamola, reported that [287 girls](#) in South Africa were married before they turned 18.<sup>5</sup>

Section 3 of the RCMA and section 1 of the Civil Union Act expressly preclude anyone aged below 18, children, from entering into a customary marriage or civil union.<sup>6</sup> The RCMA however, backpeddles and permits a child to marry, providing the additional requirement of parental or guardians consent, before a child can conclude a valid customary marital union. The Marriage Act also permits a child to marry with the required consent from the child's guardian or the appropriate courts. Because the present legal dispensation permits child marriage, there are no direct legal sanctions for child marriage. In this premise, only the Civil Union Act strictly, and without exception precludes children from concluding such a marriage.

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<sup>1</sup> 2022(5) SA 323(CC)

<sup>2</sup> Recognition of Customary Marriages Act 120 of 1998, section 3(3), 3(4) and 3(5). Marriage Act 25 of 1961, sections 24, 24A and 25.

<sup>3</sup> Statistics South Africa, *Crimes Series Volume II, Crimes against children Report 2024*, Report 92-02-02, at 15.

<sup>4</sup> Ibid, at 17.

<sup>5</sup> Claasen,L. 'Officially, 287 girls in SA were married before turning 18. The 'real' number is way bigger', 12 April 2022, *News24*.

<sup>6</sup> Recognition of Customary Marriages Act 120 of 1998, section 3(1) and Civil Union Act 17 of 2006, section 1.



### 3.2. Parental consent for a child to marry

The Children's Act,<sup>7</sup> the RCMA<sup>8</sup> and the Marriage Act,<sup>9</sup> read together, provide that all the guardians of a child must consent to the child's marriage. Suppose both parents are alive, and neither of the parents has sole guardianship of the minor. In that case, both parents must consent to the marriage, in writing, on a prescribed form available at the Department of Home Affairs.

If a parent whose consent is legally required cannot be found to grant permission or is legally incompetent to do so, the child can apply to a Children's Court for consent to the marriage.<sup>10</sup>

Should the minor's parents/guardian and/or a Children's Court refuse to grant consent, the minor may apply to the High Court for permission to marry. The High Court, as the upper guardian of all minors, will not grant consent unless it is satisfied that the marriage is in the best interest of the child and that the parents/guardian or Children's Court has been unreasonably refused to grant such consent.

Boys below the age of 18, and girls below the age of 15 must get the written consent of their parents to marry, in the same way as other minors. Additionally, such a child will also have to get the written permission of the Minister of Home Affairs. Where such a marriage has already occurred without Ministerial consent, the Minister may subsequently condone a marriage upon receiving an application from the married parties.<sup>11</sup>

### 3.3. Ongoing law reform processes

There is an ongoing law reform process that Parliament has undertaken, intended:

- To harmonise the various statutes;
- to comply with international treaty obligations, including the eradication of child marriages and forced marriages;<sup>12</sup>
- To affect the recognition and regulation of religious marriages, specifically Muslim marriages.

The Centre for Child Law answered the call for input from Parliament to the Marriage Bill aimed at harmonising marriage laws in South Africa. In our submission, we called for compliance with South Africa's treaty obligations to adopt legal and other measures to eliminate child marriages, as per the African Charter on the Rights and Welfare of the child. We further recommended including provisions intended to support children found to be married to ensure that adequate support is sought and

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<sup>7</sup> Children's Act 38 of 2005, section 18(3)(c)(i), 18(4) and 18(5).

<sup>8</sup> Recognition of Customary Marriages Act, 120 of 1998, at sections 3, 4 and 5.

<sup>9</sup> Marriage Act 25 of 1961, section 24, 24A and 25.

<sup>10</sup> A 'Commissioner of Child Welfare' refers to a Magistrate, who serves as a judicial officer presiding in the Children's Court.

<sup>11</sup> Boezaart, T(ed). *Child Law in South Africa*, 1<sup>st</sup> Edition at 32-33

<sup>12</sup> Government Gazette 48914.



provided by affected children. The latest version of the Bill is linked [here](#) and if retained and signed into law, will have the following effects:

- i. The codification of the crime of child marriage, in terms of which any party who knowingly take part in the marriage of a child, except for the child, will be subject to criminal sanctions in the form of a fine or period of imprisonment. This includes any parents who consent to such marriages, or any adults who knowingly marry a child.
- ii. It repeals section 18(3)(c)(i) of the Children's Act, which sets out the various parental rights and responsibilities accruing to a parent or guardian to include 'consenting to the marriage of the child'. The provision is rendered obsolete.
- iii. requires proof of identification be presented by prospective spouses to ensure that their respective ages can be determined;
- iv. provides for the registration of marriages and the issuance of marriage certificates to validate the existence of a marriage. This is necessary for future customary unions as section 4(9) of the RCMA currently provides that failure to register a customary marriage did not affect the validity of that marriage.
- v. The Bill once enacted into law, has no retroactive effect. All valid existing marriages, including child marriages that exist prior to the enactment of the Bill remain valid. This includes any unregistered customary unions where one or both spouses are children, even if such a union is unregistered in accordance with section 4(9) of the RCMA, which states that a customary marriage need not be registered to be valid.

#### 4. FORCED MARRIAGES

The RCMA requires that both spouses express their consent to each other to marry, in accordance with customary practices.<sup>13</sup> The CUA defines a 'civil union' as a "voluntary union of two persons who are both 18 years of age or older [...]. Thus, the absence of consent to enter into a union or marriage renders such marriage/union voidable. The Marriage Act requires both spouses to give express consent to marry one another. Lack of consent is a ground for annulment.<sup>14</sup>

*Ukuthwala* in its true form is recognised as part of the process of concluding a customary marriage where willing lovers adopt *ukuthwala* as a collusive strategy to secure marriages negotiations, however, this practice has mutated. The widely publicised modern non-consensual form which is categorised by kidnapping, assault and rape and constitutes a forced marriage is illegal. Perpetrators are liable for

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<sup>13</sup> Recognition of Customary Marriages Act 120 of 1998, section 3(1).

<sup>14</sup> Sibisi, S. "Consent and Other ancillary matters as Requirements of a Customary Marriage: LNM v MMM (2020/11024) [2021] ZAGPJHC 563 (11 June 2021) *Potchefstroom Electronic Law Journal*

imprisonment as seen in the *Jezile v S* case,<sup>15</sup> where the court found that *ukuthwala* under customary law includes:

- Consent of both the bride and groom;
- The mock abduction of the bride;
- The strict prohibition of any sexual intercourse during the abduction.

At present no marriage can take place in accordance with South African law without express mutual consent of both parties. Where forced marriages take place the Prevention and Combating of Trafficking in Persons Act 7 of 2013 comes into play. Prevention and Combating of Trafficking in Persons Act is clear on the legal sanctions that apply if a person concludes a forced marriage with another person and applies even in circumstances where parental consent is obtained.<sup>16</sup> Upon conviction, a person who concludes a forced marriage and any other parties who participate and facilitate their child's or another person's forced marriage are liable on conviction to the payment of a fine or period of imprisonment or both. Unfortunately, the practice subsists with cases being reported as recently as 2023.<sup>17</sup>

As recently as 2020, there have been reports of forced marriages taking place in the Eastern Cape. In some instances, the affected 'bride' is a child; in other instances, she is an adult. In one instance, the woman was 19 years old. Her family had potentially assumed that the forced arranged marriage would be legal because she is not a child.<sup>18</sup>

## 5. REGISTRATION OF MARRIAGES

There are many customary and religious unions that are not registered with the Department of Home Affairs, and fundamentally do not comply with the requisite statutory prescripts to begin with. A look at jurisprudence related to customary unions in South Africa shows that many cases brought before the courts are brought on the question of the validity of an unregistered customary marriage after the death of one spouse and inability of the remaining spouse to succeed their deceased partner, to claim

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<sup>15</sup> *Jezile v S* SA 62 (WCC).

<sup>16</sup> Prevention and Combating of Trafficking in Persons Act 7 of 2013, section 4(1) read with section 13(a).

<sup>17</sup> Bhengu C. '[Court sentences Eastern Cape Trio for forcing 13 year old into marriage](#)', 01 February 2023 News24.TimesLive '[Forced marriage trail in the Eastern Cape after friend of 'bride' sounds the alarm](#)', 13 August 2020

<sup>18</sup> Bhengu C. '[Court sentences Eastern Cape Trio for forcing 13 year old into marriage](#)', 01 February 2023 News24.TimesLive '[Forced marriage trail in the Eastern Cape after friend of 'bride' sounds the alarm](#)', 13 August 2020. This case concerned a 19-year-old who was abducted by collusion between her mother, elder brother, sister and the would be 'groom', a 28 year old. See also Seleka N. '[Another Eastern Cape teen rescued from a forced marriage](#)' 22 January 2020. The case concerned a 17 year old who was abducted by two men to be married to a 35 year old.



maintenance from the deceased estate in favour of the surviving partner or the children. In any case, section 4(9) of the RCMA provides that failure to register a customary marriage did not affect the validity of that marriage.

This clearly demonstrates that those who marry children will not register the marriages and may not intend to do so as it may conflict with the law or require too many additional hurdles such as consent from the courts.<sup>19</sup> Some segments of the population in rural and traditional settings are unaware of statutory requirements to register and thus do not ordinarily register their unions.

Other notable challenges and possible remedies in this premise are:

- i. Firstly, many rural communities in South Africa engage in initiation practices, following which the children are recognised as full men and women in their respective communities. Migrant communities may also engage in practices such as child and forced marriage.<sup>20</sup> Consequently, such children can marry without any societal impediment. There is a need to engage in advocacy to ensure that everyone in all corners of the Republic recognises child marriage as a criminal offence and refrains from engaging in such conduct.
- ii. Secondly, poor, rural, orphaned, unaccompanied and separated migrant children are most vulnerable to child marriage. Consequently, child marriage is most prevalent in such circumstances.<sup>21</sup> To ensure adequate access to information and social services, the Departments of Basic Education, Social Development, Health and the Department of Traditional Governance and Cooperative Affairs.<sup>22</sup>
- iii. Thirdly, the lack of information regarding available social support from the state remains a reason for the failure of many children who are in vulnerable situations to seek out assistance from the state. In this respect, schools can be beneficial in providing information to children, empowering them to come forward to seek the social services and assistance, whether financial or other, that is necessary to ensure that the child is properly cared for.

## 6. DATA COLLECTION METHODS

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<sup>19</sup> Maithufi, IP and Bekker, JC 'The existence and proof of customary marriages for purposes of Road Accident Fund Claims', (2009) 30(1) *OBITER Nelson Mandela University La Journal*, at 164-174.

<sup>20</sup> Centre for Child Law, *Child Trafficking in South Africa: Exploring the myths and realities* 2020, at 72-75 and 97.

<sup>21</sup> Statistics South Africa, *Crimes Series Volume II, Crimes against children Report* 2024, Report 92-02-02, at 16.

<sup>22</sup> In this case See also Seleka N. '[Another Eastern Cape teen rescued from a forced marriage](#)' 22 January 2020. The case concerned a 17 year old who was abducted by two men to be married of to a 35 year old. One major concern that is evident in this matter was that the men of that community had rallied to confront police officials to prevent the removal of the girl from the location and the arrest of the perpetrating parents and would be 'husband'.





The Department of Home Affairs can only record marriages once spouses approach the Department to register their union. Alternatively, Statistics South Africa ('StatsSA') can acquire information from participants during the General Household Survey, which is then published. The number of married children in unions that are not formally registered remains unknown.

Unfortunately, there are considerable methodological problems with recording marital status in South Africa. The problems are largely a result of the wide diversity in marriage forms, cultures, religions, and languages, as well as how marriage data is captured. The discrepancy derives from the fact that census and survey data reflect perceptions of marriage, while administrative data generally record the legal system. Many customary marriages are not registered and do not appear in administrative records.<sup>23</sup>

Multiple innovations have been adopted by the Department of Home Affairs, which include:

- i. The Department of Home Affairs has offices inside Health facilities, ensuring that all children born in the hospitals are registered immediately after birth. This innovation was started in 2019 borrowing from the model adopted by Egypt;
- ii. Mobile Home Affairs Office Trucks have been developed and serve as a Department of Home Affairs Office-on-Wheels. The result is that the mobile offices can move from area to area, thus providing access to documentation and registration of people and marriages even in the most rural and secluded places, including farming communities. As at 2023, the Department of Home Affairs has undertaken to increase their fleet of trucks from 100. Additionally, the trucks are deployed to disaster-stricken areas to ensure that communities can still access Home Affairs' services.
- iii. The Department of Home Affairs has started building Home Affairs offices in malls. Through public/private partnerships, some malls have substantially reduced or waived rental fees to help facilitate access to documentation closer to the populations they serve.
- iv. The Department of Home Affairs has also developed an online booking system that is very effective and facilitates effective access to birth and marriage registration. One of the main challenges for many people is the ineffectiveness of Home Affairs offices, slow-moving queues and the need to reserve a full day or more to be serviced. The online booking system has moved interactions with Home Affairs from a full-day affair to a 20-minute engagement, as some preliminary information can be uploaded and pre-processed without people deviating from the ordinary course of their day. However, these booking facilities are primarily used in urban areas by people with access to smartphones, internet access and computers.

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<sup>23</sup> Moore E. & Himonga C. 'Living customary law and families in South Africa' in *Child Gauge 2018*, 61-69, at 61.

## 7. SEXUAL AND REPRODUCTIVE HEALTH RIGHTS

The legal framework governing the sexual and reproductive health rights of teenagers is multifaceted, encompassing various statutes and constitutional provisions aimed at protecting and promoting these rights while considering the unique vulnerabilities and needs of adolescents.

The Children's Act 38 of 2005, is pivotal in defining and protecting the rights of individuals under the age of 18, which implicitly include sexual and reproductive health services. Section 134 of the Act lowers the age of consent for medical treatment and surgical operations to 12 years, provided that the child is of sufficient maturity and has the mental capacity to understand the treatment's benefits, risks, social and other implications.

Public Hospitals and Clinics are available to provide services throughout the country for adolescents free of charge. Statistics South Africa's (Stats SA) General Household Survey (GHS) of 2018 shows that nationally, 71,5% of households said that they would first go to public clinics, hospitals or other public institutions, while 27,1% of households said that they would first consult a private doctor, private clinic or hospital. Only 0,7% of responding households said that they would first go to a traditional healer. The use of public health facilities was least common in Western Cape (56,1%), Free State (63,5%) and Gauteng (63,9%), and most common in Limpopo (86,1%), Eastern Cape (79,8%) and KwaZulu-Natal (79,0%).

The Choice on Termination of Pregnancy Act 92 of 1996, allows for the termination of pregnancy on request and provides for children to consent to termination of pregnancy without parental consent, thereby upholding the reproductive rights and privacy of teenagers.<sup>24</sup>

The National Health Act 61 of 2003, elaborates on the rights to health services. Section 5(2) allows minors aged 12 and above to consent independently to medical treatment, and Section 5(3) permits minors of any age to consent to HIV testing and contraceptives.

During the COVID-19 pandemic, with more children out of school during the pandemic, there was a sharp spike in the number of adolescent pregnancies, which was exacerbated by adolescent's inability

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<sup>24</sup> The Choice on Termination of Pregnancy Act, 92 of 1996, section 5(3) , stipulates the following, "In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them."



to access school, primary health facilities and necessary contraceptives and termination services provided by clinics.<sup>25</sup>

## 8. EDUCATION

The South African Schools Act provides compulsory school attendance for all children of school-going age, 7-15 years old or grade 1-9, whichever comes first. South Africa provides for various kinds of schools: fee paying and no-fee paying public schools; independent schools, international schools and home schooling.

The state fully funds and provides resources to fee-free public schools to improve access to free quality education while also providing subsidies to fee-paying public schools and independent schools. Statistics show that the percentage of learners that attended no-fee schools increased from 21,4% in 2007 to 66,2% by 2019. Furthermore, in 2019, 87% of the schools were no-fee, accommodating 79% of learners.<sup>26</sup> Although it has been reported that many independent schools closed down during the COVID-19 pandemic, this resulting in a sharp increase in the number of children attending fee free public schools.

South African courts have confirmed that a pregnant learner cannot be excluded from school solely on the basis of her pregnancy, this was successfully argued in the 2013 *Welkom High School* case.<sup>27</sup> Department of Basic Education has adopted the *Policy on the Prevention and Management of Learner Pregnancy in Schools*.<sup>28</sup> The Policy advocates for access to comprehensive sexuality education intended to empower teenagers to engage in sexual behaviours and adopt measures such as contraceptives and termination to avoid unwanted pregnancy. The Policy further outlines a clear approach to ensure that learners are supported and retained in schools for as long as possible into their pregnancy.

In practice however, Centre for Child Law and other child rights protection organisations receive, and directly intervene in cases where learners are removed from school as a result of pregnancy, despite the existence of the judgement and Policy. Civil society continues to engage in advocacy through social

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<sup>25</sup> Save the Children 'Teen pregnancies in South Africa jump 60% during COVID-19 pandemic', 23 August 2021. Baroon P., Subedar H., Letsoko M., Makua M. & Pillay Y. 'Teenage births and pregnancies in South Africa 2017-2021 a reflection of a troubled country: Analysis of public sector data' in *South African Medical Journal*, 252-258, at 256.

<sup>26</sup> Department of Basic Education (2019/2020) annual report

<sup>27</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and Another, Head of Department, Department of Education, Free State Province v Harmony High School and Another* S2013 (9) BCLR 989 (CC)

<sup>28</sup> Department of Basic Education, *Policy on the Prevention and Management of Learner Pregnancy in Schools*.



media, written media, national and community-based radio stations to ensure the popularisation of the policy. These interventions are ultimately intended empower and inform that families and communities about the rights of pregnant adolescents, capacitating them to provide the relevant support as she enjoys her constitutionally protected right to education .

## **9. SOCIAL PROTECTION**

Section 150 of the Children's Act provides that a child should be regarded as needing care and protection if, among others, that child:

- lives or works on the streets or begs for a living,
- lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being,
- may be at risk if returned to the custody of the guardian of the child as there is reason to believe that they will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child, or
- is being maltreated, abused, deliberately neglected or degraded by a guardian, care-giver or a family member of the child.

Section 110 of the Children's Act governs the reporting of abused or neglected children and children in need of care and protection. It provides that:

- any teacher, health worker, community leader, social worker and certain government officials, among others, who on reasonable grounds conclude that a child has been abused in a manner causing physical injury, or has been sexually abused or deliberately neglected must report that conclusion in the prescribed form, and
- any other person who on reasonable grounds believes that a child is in need of care and protection may report that belief, to a designated child protection organisation (such as Child Welfare or Childline), the provincial Department of Social Development or a police official.

A department or organisation to which a report has been made must first ensure the safety and well-being of the child. An initial assessment and further investigate the report's veracity. The social worker's investigation includes a full investigation into the child's parental background. Before any further steps are taken, relevant information is then published in the newspaper as a final means of establishing whether any maternal or paternal links to the child exists. If the report is substantiated by such investigation, the organisation must without delay, initiate proceedings in terms of the Children's Act for the protection of the child which may include having a child placed into temporary safe care.



A child may only be removed and placed into temporary safe care by the designated social worker or a member of the South African Police Service, following a court order. In some instances, a child can be placed without a prior court order if the child needs immediate emergency protection and if there is a risk that the delay resulting from obtaining an order will jeopardise the safety and well-being of the child.

The Children's Act makes it clear that the child's best interests is the determining factor in any decision relating to whether and when a child should be removed and placed into temporary safe care.

## **10. CONCLUSION**

Should any further information be required, Centre for Child Law will avail itself to assist in that respect. The CCL is of the view that more can be done, especially as it pertains to the pervasive practice of *Ukuthwala* in the Eastern Cape to ensure an effective ban on forced marriages and the effective implementation of statutory penalties to offenders. Equally, vulnerable categories of children must be assisted by the state and there must be increased effort to provide information and access to social services to children who reside in marginalised, rural and border communities, as well as those who are orphaned or experiencing severe and multi-dimensional poverty to ensure that children, families and communities do not revert to early and child marriages as the only way out.

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