

MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION

Government mandates the South African Law Reform Commission to investigate the practice of *ukuthwala*

The 16 Days of Activism for No Violence Against Women and Children campaign provides an opportunity not only to reflect on the achievements that have been made to eradicate the exploitation, abuse and discrimination of women and children, but also to renew our commitment as a society to vigorously confront the social and cultural practices that continue to dictate the daily lives of vulnerable and marginalised women and girls, particularly in rustic communities. In accordance with government's commitment to protect the human rights of girls and young women, the Minister of Justice and Constitutional Development has formally mandated the South Africa Law Reform Commission to conduct an investigation into the cultural practice of *ukuthwala*. This practice sanctions the abduction of women for the purpose of marriage. There is invariably an element of coercion to compel the intended bride to acquiesce to the proposed marriage. And, in contemporary South African society, it affects disproportionately girls below the age of 18. This practice has been impugned because it sanctions "forced marriages" and "child marriages" with devastating physical, developmental, psychological and social consequences for the girl children.

In 2009, and following reports in the media about the prevalence of forced marriages and the "sale" of young girls between the ages of 11 and 15 years into marriages with grown men for the purpose of marriage under the pretext of *ukuthwala*, particularly in the Eastern Cape, the Commission was requested by the Gender Directorate in the Department of Justice and Constitutional Development to conduct an investigation into this area of customary law of marriage. To gather more information on the subject, the Commission hosted a roundtable discussion on this topic which was attended by a broad range of stakeholders from various institutions and organisations, including officials from national, provincial and local government, non-governmental organisations and representatives of professional bodies on 30 November 2009. The delegates cited poverty and traditional attitudes by which women are considered subordinate to men or as having stereotyped roles as some of the factors that have contributed to the resurgence of this practice. The delegates condemned the abduction of young girls and the violence that has come to characterise this practice as sheer criminality, a violation of the rights of women and girl children and as an abhorrent behaviour that need not be tolerated in South African society which subscribes to the rights and values contained in the Constitution.

The Commission has also conducted a cursory review of South African law to determine, among other things, whether it provides adequate protection to young girls and women threatened with or subjected to *ukuthwala*. Although South Africa has enacted laws such as the Recognition of Customary Marriages Act 120 of 1998 and the Children's Act 38 of 2005 which are aimed at ensuring that marriages, including customary marriages, are entered into only with the free and full consent of the intending spouses; that cultural practices affecting the welfare, dignity, normal growth and development of children are eliminated; and that harmful practices that negatively affect the rights of women are completely eradicated as required by numerous conventions acceded to by South Africa, the provisions of these laws have been rendered nugatory by the lack of the specificity. The Commission has tentatively found that the lack of a single piece of legislation dealing comprehensively with the problem of forced marriages and child marriages, setting out the responsibilities of "frontline officials" such as the police and health professionals and the obligations of members of society who come into contact with young women affected or threatened by this practice, exacerbates the problem. The choice of charging people involved in the planning and execution of *ukuthwala* with a hotchpotch of offences such as rape, being an accomplice to rape, abduction, kidnapping, assault, statutory rape, compelling a person 18 years or older to witness a sexual offence or sexual act, sexual exploitation of a child, or conspiring and inducing another to commit an offence, makes the work of the police and prosecuting authorities particularly challenging.

The Commission accepts the importance of customary law and practices for a very large section of the population. However, customary law must operate within the broad principles of the Constitution which guarantees the rights of children; the right to equality; human dignity; and security of the person which includes the right to be free from all forms of violence. The Commission will soon publish a discussion paper containing preliminary law reform proposals designed to eliminate the scourge of forced marriages and child marriages under the pretext of *ukuthwala*.

ISSUED BY THE SECRETARY: SOUTH AFRICAN LAW REFORM COMMISSION

7 DECEMBER 2010