

WORKSHEETS FOR DISCUSSION ON THE PRACTICE OF UKUTHWALA

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Please mail/fax/e-mail (preferably email) completed worksheets to:

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OVERVIEW OF THE DISCUSSION PAPER

1. The primary aim of the Discussion Paper is to consider the need for law reform in relation to the practice of *ukuthwala* and to identify alternative policy and legislative framework that might regulate *ukuthwala*. The secondary aim is to review the legislative framework which currently regulates customary marriages and to enhance its alignment with international human rights obligations for the country. Under South African legislation, marriage has to be entered with free and full consent of the parties.

2. The discussion paper has five chapters. Chapter 1 describes the background to the investigation (Project 138) and the research approach. Chapter 2 discusses the custom of *ukuthwala* and traditional safeguards against its abuse. Chapter 3 discusses diverse views on *ukuthwala* and outlines some documented occurrences and responses to these. Chapter 4 discusses the legal framework, including the implications of *ukuthwala* for national legislation as well as regional and international instruments. In the last chapter, the Commission makes general proposals in preparation for reforming the laws related to *ukuthwala*, and proposes **three options** that might be employed in South Africa.

The proposed law reform options are:

- The enactment of new legislation that would define “forced marriage”, “child marriage” and “*ukuthwala*” in all its manifestations, and would criminalise forced and child marriages that occur under the pretext of *ukuthwala*.
- The amendment of existing legislation (namely the Recognition of Customary Marriages Act and the Children’s Act) to insert provisions dealing specifically with *ukuthwala*.
- The creation of non-legislative measures to deal with the causes and consequences of *ukuthwala*.

3. The release of the discussion paper on the practice of *ukuthwala* will be followed by a draft Bill and/or proposed non-legislative measures to regulate the practice of *ukuthwala*. The aim of the discussion paper is to elicit comments, which will assist the Commission in preparing the draft Bill, and subsequently the Report on Ukuthwala.

The Commission requests stakeholders and interested members of the public to comment on the proposals in the Discussion Paper or to propose alternative models to assist the Commission to identify an appropriate legislative model for South Africa.

WORKHEET ON PROPOSALS

In Chapter 5 of the Discussion Paper the Commission makes general proposals in preparation of reforming the practice of *ukuthwala*. To give effect to the general proposals the Commission proposes the following:

- The enactment of new legislation that would define “forced marriage”, “child marriage” and “*ukuthwala*” in all its manifestations, and would criminalise forced and child marriages that occur under the pretext of *ukuthwala*.
- The amendment of existing legislation (namely the Recognition of Customary Marriages Act and the Children’s Act) to insert provisions dealing specifically with *ukuthwala*.
- The creation of non-legislative measures to deal with the causes and consequences of *ukuthwala*.

QUESTIONS ON THE ENACTMENT OF NEW LEGISLATION

1.	Do you agree with the above proposals? If yes, please substantiate your answer. if not, please motivate your disagreement
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2.	<p>1. How must <i>ukuthwala</i> be defined in the new legislation?</p> <p>2. How must forced marriage be defined in the new legislation?</p> <p>3. With reference to section 12(2) of the Children’s Act, how must child marriage be defined in the new legislation? Section 12(2) provides as follows: A child –</p> <ul style="list-style-type: none"> (a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement, and (b) above the minimum age may not be given out in marriage or engagement without his or her consent.
3.	<p>How should the new legislation</p> <ul style="list-style-type: none"> 1. reduce or eliminate the distortion of <i>ukuthwala</i>? 2. reduce the harm done to women and children, and reduce these groups’ vulnerability to abuse and exploitation?

	<p>3. assist women and children to enforce their rights to:</p> <p>(a) equality?</p> <p>(b) human dignity?</p> <p>(c) freedom and security of a person?</p> <p>4. assist children to enforce their rights to education?</p>
4.	<p>What aspects of <i>ukuthwala</i> should be regulated and how?</p>
5.	<p>Should the following be criminal offences?</p> <p>1. child marriage: YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>2. forced marriage: YES <input type="checkbox"/> NO <input type="checkbox"/></p> <p>If yes, how should the offences be formulated?</p>

QUESTIONS ON THE AMENDMENT OF EXISTING LEGISLATION

1.	Do you agree that the Recognition of Customary Marriages Act and the Children's Act should be amended to insert provisions dealing with <i>ukuthwala</i> ? If not, please motivate your disagreement.
2.	If you agree with amendments, which aspects of <i>ukuthwala</i> should be included in the amendments?
3.	If you agree with amendments, how should the amendments 1. reduce or eliminate the distortion of <i>ukuthwala</i> ?

	<p>2. reduce the harm done to women and children, and these groups' vulnerability to abuse and exploitation?</p>
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QUESTIONS ON THE CREATION OF NON-LEGISLATIVE MEASURES

1.	Do you think an awareness campaign is needed to address the issue of distorted practices of <i>ukuthwala</i> ?
2.	If you agree that an awareness campaign is needed, how should it be carried out?
3.	If you agree that an awareness campaign is needed, would it be sufficient to curb the distortion in <i>ukuthwala</i> ? Or are other non-legislative measures also needed? Indicate what other non-legislative measures are needed.
4.	If you suggest other non-legislative measures, how should these be carried out?

5.	<p>What support should be given to the current victims of distorted <i>ukuthwala</i> practices? Which Government Departments or institutions should provide such support? What role should community leaders and civil society organisations play?</p>
6.	<p>What support should be given to girls and women who are currently at risk for distorted <i>ukuthwala</i>, to prevent them from becoming victims in the future? Which Government Departments or institutions should provide such support? What role should community leaders and civil society organisations play?</p>