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**SUBMISSIONS TO
THE OFFICE OF THE UNITED NATIONS HIGH COMMISSION FOR HUMAN RIGHTS
ON
YOUTH AND HUMAN RIGHTS ISSUES**

Submitted by

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On behalf of the
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BRIEF DESCRIPTION ABOUT THE ORGANISATION

1. The **Legal Resources Centre (LRC)**, established in 1979, is a public interest, non-profit law clinic in South Africa. The LRC uses the law as an instrument for justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and to the social and economic transformation of society. The LRC through its Equality and Non-Discrimination project focuses on empowering marginalised and vulnerable groups by utilising creative and effective solutions to achieve its aims. Within the arena of equality and non-discrimination, the LRC has viewed the rights of vulnerable and marginalised persons including sexual and gender non-conforming minorities, among other, as being integral to the pursuit of social justice.
2. We welcome and are grateful for this opportunity to make submissions. Our submissions will address the following key issues affecting young people in South Africa:
 - 2.1 Definition of a child, Child marriages and the practice of *ukuthwala*;
 - 2.2 Birth registration, lack of citizenship and risk of being stateless;
 - 2.3 The challenges faced by transgender, gender diverse and intersex children and
 - 2.4 The education system.

I. DEFINITIONS OF A CHILD, CHILD MARRIAGES AND THE PRACTICE OF *UKUTHWALA*

Definition of a child

3. Section 28(3) of the Constitution of South Africa defines a child as a person under the age of 18. However, this definition and protection entrenched for children are completely diluted by South Africa's marriage legislation which legally allows children below the age of 18 to be married and does not provide for a standard minimum age of marriage.
 - 3.1 The Children's Act 38 of 2005 in fact sets the minimum age for marriage at 12 years for girls and 14 for boys;
 - 3.2 Both the Marriage Act (1961) and the Recognition of Customary Marriages Act (1998) sets 18 as the age of marriage with built in exemptions for children to be married. These exemptions set different conditions for marriages for girls and boys under 18 years old.
4. These exemptions that allow children to be married are detrimental to the rights of children especially girl children, as the laws allow them to be married when they are much younger than boys. It is our submission that any laws or customary practices that allow children to be married is an unjustifiable violation of their rights to equality, dignity, freedom and security of the person and privacy. Such laws and/or custom would need to be developed in order to ensure that it complies with the prescripts of the Bill of Rights.

Child Marriages and the practice of ukuthwala

5. One of the challenges faced by young girls in South Africa concerns the harmful customary practice of *ukuthwala*.
 - 5.1 *Ukuthwala* is an irregular method for commencing marriage negotiations between the families of the intended bride and bridegroom directed at the conclusion of a customary marriage. It is not a marriage in itself.
 - 5.2 The essential elements of the traditional conception of *ukuthwala*, are as follows: both parties must be of marriageable age (usually determined with reference to sexual or physiological maturity rather than purely age); both parties must consent to the *ukuthwala* (although the woman's consent may be obtained after the 'abduction' has taken place, it is usually obtained

in advance as part of a pact between willing lovers, and the woman's protestations will be dramatized as a sign of modesty); the woman must be placed in the safe custody of the women in the man's homestead; sex is strictly prohibited and the man's family must send an envoy to the women's family to advise them of the *ukuthwala* and to commence *lobolo* negotiations.

- 5.3 There are however 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 girl children, and is a blatant abuse of fundamental constitutional rights. As was explained to Court in the *Jezile vs State*¹ matter "*ukuthwala has been manipulated to be the systematic, culturally-sanctioned abduction, rape and torture of young girls/women*".
6. The South African Law Reform Commission Discussion Paper on *ukuthwala* (SALRC)², in 2009 noted that 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.³ Some of the reports noted that:
 - 6.1 About 20 girls a month were being forced to drop out of school because of the forced marriage resulting from *ukuthwala*;
 - 6.2 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;
 - 6.3 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;
 - 6.4 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;
 - 6.5 Immediately after the abductions, most girls were verbally, sexually and physically abused by their "husbands" and their families.⁴
7. *Ukuthwala*, in both its forms, feeds on the patriarchal nature of customary law which is prejudicial to girl children living in communities that live in terms of custom. This patriarchal nature of how the practice is conducted leads to a violation of a number of children rights as envisaged in the South African Constitution. Langa DCJ (as he then was) described customary law as "*a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors*".⁵ There are echoes of that patriarchy even in the relatively benign form of *ukuthwala* described above.
8. Many men who abduct girls in the name of *ukuthwala* conceive of *ukuthwala* as a form of marriage. However, that is also 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 in the same manner also apply to the minimum standards of *ukuthwala*. This proposition finds

¹ *Jezile v. S and Others* (A 127/2014) 2015 ZAWCHC

² Available at <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf>

³ Discussion Paper, *supra* note page 18.

⁴ Discussion Paper, *Supra* note Page 19

⁵ *Bhe* (above n 2) at para 78.

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. Properly understood, the first version is the only version of *ukuthwala* that should be recognised because of the ordinary principles for determining the content of customary law, and because the aberrant version would have to be excised from customary law through the operation of s 39(2) of the Constitution. However, even on the first version, *ukuthwala* is still a constitutional problem because only girls are abducted.

II. BIRTH REGISTRATION, LACK OF CITIZENSHIP AND RISK OF BEING STATELESS

9. The LRC continues to receive reports relating to the refusal by the South African Department of Home Affairs (DHA) to register the birth of children born to at least one parent (a mother) or both parents who have sought asylum in South Africa in terms of the Refugees Act 130 of 1998. In all cases the mothers have written confirmation from maternity obstetric units confirming that they have given birth in South Africa. However, DHA refuses to register the birth of children born to foreign nationals due to a range of reasons, which includes but are not limited to; one or both parents not having valid documentation; lengthy documentation verification processes conducted by DHA and arbitrary requirements to renew one's permit. The reason for denying the child's birth being registered stems from the Birth and Deaths Registration Act 51 of 1992 (**the BDRA**) and its regulations which were amended in 2014 (**2014 regulations**).
10. The manner in which the BDRA deals with the registration of children born to asylum seekers and refugees is unconstitutional. It bases the child's right to a name, identity and nationality on the legal status of the parents to be in the country. As a result these children's rights are unjustifiably infringed upon where their parents are not in possession of valid documentation and in certain instances where DHA is unable to carry out their duties effectively.
11. Without confirmation of birth, parents are unable to pass their nationality to their children which place them at risk of becoming stateless. The right to a name, a nationality and to have ones birth registered is fundamental to the first few days of a child's life. Failure to do so violates the rights of children as envisaged in both the South African Constitution and a number of international laws.

Unaccompanied or Abandoned Children

12. Unaccompanied or abandoned children face a number of challenges in obtaining documentation that enables them to permanently integrate in South Africa. Integration is often the most durable solution for children in such cases because they often do not have any ties to their countries of origin having arrived in South Africa at a young age and lived all their lives in South Africa. There are many instances where some abandoned children are born in South Africa and live in South Africa all their lives without any contact or visit to their parents' country of origin, if known. A number of children in such circumstances go undocumented and remain vulnerable to arrest and police harassment. Such children also remain at risk of being refused access to schools and other services.
13. Some unaccompanied children or abandoned children are documented through the refugee system. Where their parents had applied for asylum before abandoning them they continue to be documented on their parent's file until they turn 18. Once they reach the age of majority they are informed by the Refugee Reception Offices that they have to now lodge an individual refugee claim. Such a process will only set them up for failure - because of their age when they left their parents' country of origin, they would not be able to meet the standard by which a person is granted asylum in South Africa i.e. must have a well-founded fear of persecution based on either race, nationality, political opinion, membership to a particular social group or

ethnicity, and because of this persecution they are unable or unwilling to return to their country of origin. This is also true for unaccompanied or abandoned children born in South Africa.

14. A number of such children will inevitably become undocumented at a crucial point in their development. For some, because of their circumstances, they are in the last years of high school and some struggle to access tertiary education where an identity document is a mandatory requirement for registration. Their ability to access education is therefore hindered by the documentation system that only prioritises their documentation when they turn 18 and not permanently from the point they are considered to be children in need of care and protection in terms of section 150 of the Children's Act 30 of 2005.
15. Section 32 of the Refugees Act states that "any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the [Children's Act] must forthwith be brought before the Children's Court for the district in which he or she was found. The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act." This section would only apply to children that appear to qualify for refugee status. There is no other provision that speaks to children who do not qualify for refugee status or children who are stateless or at risk of being stateless. Additionally, given the age of some of the children, they are unable to provide information relating to any form of persecution that they experienced with their families before fleeing to South Africa. There are currently no clear guidelines as to how such children should be dealt with in the asylum system or any other system for that matter in relation to ensuring that they are documented. As a result, unaccompanied and abandoned children are at risk of being perpetually undocumented and stateless with very limited or no access to education, health, and social services, among others.

Citizenship by Birth in South Africa

16. Citizenship by birth in South Africa is regulated by Section 2 of the Citizenship Act, which provides for three categories of persons who qualify for citizenship by virtue of being in South Africa. For the purpose of stateless children, section 2(2) of the Citizenship Act promises citizenship to children born in South Africa but do not have citizenship or nationality of any other country and whose births are registered in terms of the Births and Deaths Registration Act 51 of 1992. However, as mentioned before, the birth registration process for foreign national children process is a difficult one because of the 2014 regulations. Without their birth being registered in South Africa, despite being born in the country, children described above would not be able to apply for citizenship in terms of section 2(2) of the Citizenship Act. Children whose birth has not been registered do not have any documentation that ties them to any country, thereby rendering them stateless. For those who are able to receive a birth certificate in South Africa, citizenship is not conferred on them until they turn 18 years old and have lived all their life in South Africa.

Citizenship through Naturalisation

17. Section 4(3) of the Citizenship Act allows children who were born in South Africa, have lived in South Africa until they turn 18 and whose birth is registered in South Africa to apply for citizenship. Again, birth registration is vital in this section to enable children to be granted citizenship. Therefore section 4(3) does not provide much of an option for children whose birth has not been registered in South Africa or children at risk of being stateless or stateless children. Additionally, section 4(3) fails to provide documentation processes to legalise their stay in South Africa should they remain minors in South Africa. Without a definitive process, these children have the right to apply for citizenship in terms of section 4(3), however by the time they are able to do

so, they would have been without education, health, social services and other services which require identification documents to access these services.

18. Section 5(1) of the Citizenship Act states that the Minister may, upon receiving an application, grant a certificate of naturalisation to any “foreigner” who satisfied the following conditions: (a) he or she is not a minor; and, (b) he or she has been admitted to the Republic for permanent residence therein; and (c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application; (d) and he or she is of good character; and (e) he or she intends to continue to reside in the Republic or to enter or continue in the service of the Government of the Republic or of an international organisation of which the Government of the Republic is a member or of a person or association of persons resident or established in the Republic; and (f) he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister; and (g) he or she has adequate knowledge of the responsibilities and privileges of South African citizenship; and (h) he or she is a citizen of a country that allows dual citizenship: Provided that in the case where dual citizenship is not allowed by his or her country, such person renounces the citizenship of that country and furnishes the Minister with the prescribed proof of such renunciation.
19. Clearly minor children cannot apply for naturalisation in terms of section 5(1) because it specifically excludes them in subsection (a) above. The wording of Section 5(1) of the Citizenship Act clearly obligates potential applicants to satisfy all the listed requirements because of the use of the word “and” that follows each requirement. However, section 5(4) of the Citizenship Act attempts to cure this defect by authorising the Minister to consider granting South African citizenship to a minor child who is permanently and lawfully resident in South Africa. For many children we have worked with and as described above, permanent stay in South Africa is not an issue as they do not possess travel documentation that would enable them to leave South Africa. However, the lawful residence requirement will most certainly make it extremely difficult, if not impossible, for them to apply for citizenship in terms of section 5(4) as most stateless minor children remain undocumented precisely because they are stateless. It is therefore our submission that while section 5(4) is aimed at enabling minor children to apply for citizenship, it fails to consider the predicament faced by stateless children.
20. Of greater concern, in cases where undocumented children are abused and/or in need of care and protection, the guarantees in the South African Constitution and the Children’s Act are not always available to them. This is also because, in some cases, social workers are unable or unwilling to help them because they have been threatened with arrest by the Department of Home Affairs for assisting these children. In some instances, the social workers themselves believe that their services are only for South African children and documented children.
21. Perhaps the most concerning violation of the rights of undocumented persons is the constant risk and fear of arrest. It was recently reported that an undocumented man has never left the only South African town he knows because of fear of arrest. As an undocumented person his freedom of movement is completely non-existent, as are any of his rights as explained above - he lives in a world where these guarantees mean nothing in reality. Additionally, with regard to detention of stateless persons, there is no country to deport them to so they are detained for longer periods until they are released.
22. Lastly, the fact that a stateless person does not exist in any country on paper, means that they are not counted in national populations in the country in which they reside, they cannot own anything, cannot travel and no country can claim them as their own, which means that they “do not exist.” These persons “do not exist” anywhere but they have lives, children, needs, rights and vulnerabilities that must be catered for. While human rights are guaranteed for all human beings regardless of status, for stateless persons their

experiences and their status has condemned them to lives without rights and without legal existence, simply an undignified existence.

III. SPECIFIC CHALLENGES FACED BY TRANSGENDER, GENDER DIVERSE AND INTERSEX CHILDREN

Intersex genital mutilation in medical settings

23. Intersex persons in South Africa are often subjected to intersex genital mutilation (IGM) during infancy or childhood in medical and social settings. IGM are non-consensual genital and gonadal surgeries and other treatments that are medically and physiologically unnecessary, physically and psychologically harmful (causing sterility, genital insensitivity, impaired sexual function, chronic pain, chronic bleeding, chronic infections, post-surgical depression, trauma, internal and external scarring and metabolic imbalances), and often require repeated follow-up treatments through childhood and later life. It takes the form of so-called 'normalising feminising' or 'normalising masculinising' treatments that aim to make all human bodies conform to stereotypical sex standards based on highly problematic and discriminatory notions of sex binarism, namely, the assumption that there are only two 'normal', legitimate sexes (female and male) and that each of these has a typical appearance to which members of that sex must conform in order to be healthy and happy human beings. Intersex genital mutilation is similar to female genital mutilation in constituting treatments or interventions that are gross human rights violations. IGM and related practices are a form of child sexual abuse, torture, or inhuman and degrading treatment.
24. As has been pointed out in a recent document by an international group of intersex activists and experts (including South African intersex activist, Nthabiseng Mokoena): "Normalizing' procedures violate the right to physical and mental integrity, the right to freedom from torture and medical abuses, the right to not being subjected to experimentation, the right to take informed choices and give informed consent, the right to privacy and, in general, sexual and reproductive rights."⁶ Consent given without positive, affirming language and information cannot be characterised as full, free and informed consent. Training and education on informed consent, bodily diversity and the right to bodily integrity and autonomy, are therefore necessary to ensure that healthcare professionals are able to provide medical information and healthcare services that are balanced, accurate, evidence-based and informed by human rights approaches when interacting with intersex infants, youth and their parents and/or guardians.
25. Practices of intersex genital mutilation in South Africa include sterilising procedures and arbitrary imposition of hormones, "feminising" genital surgeries and "masculinising" genital surgeries. Other human rights violations include repeated forced genital exams and photography. These human rights abuses are taught and perpetrated with impunity at South African academic hospitals funded by the South African state.⁷
26. Where the principle of informed consent is invoked in relation to medical treatments and surgeries on intersex infants and children, the emphasis is not on informed consent given by the intersex child (who mostly is not yet in a position to effectively question and challenge medical decisions), but consent by the parents of the child, who have often internalised society's intersexphobic values, which then become further entrenched through exposure to pathologising medical discourses employed by clinicians. Clinicians inform parents of the potential risks and complications of surgery, rather than focusing on the child's rights to bodily integrity, privacy, freedom, security and sexual and reproductive health. Notwithstanding an acknowledgement that all

⁶ Mokoena, N. (2015). Intersex youth: Can we say that consent is truly free, full and informed?, Page 3.

⁷ Bauer, M. & Truffer, D. 2016. Intersex genital mutilations: Human rights violations of children with variations of sex anatomy. NGO Report to the 2nd Periodic Report of South Africa on the Convention on the Rights of the Child (CRC). Zurich: *Zwischengeschlecht.org*.
<http://intersex.shadowreport.org/public/2016-CRC-ZA-NGO-Zwischengeschlecht-Intersex-IGM.pdf>

decisions by the team and parents should take into account the rights and/or best interests of the child – a right also included within the South African Constitution – the power to decide over the child’s body currently remains almost exclusively in the hands of clinicians and parents, and what they consider to be the child’s best interests in terms of hegemonic and discriminatory binary sex and gender norms.⁸

27. Information about the number of surgeries performed on intersex infants, children and adolescents in South Africa is not easily accessible. However, judging from the life stories of intersex persons in South Africa,⁹ as well as publications¹⁰ and statements by local medical experts, such surgeries remain common despite the severe physical and mental health risks involved. Recently, detailed report on human rights violations against intersex children and adults in South Africa was submitted by StopIGM to the United Nations Committee on the Rights of the Child under the Convention on the Rights of the Child.¹¹
28. On 7 July, 2016, the SABC for instance aired¹² a segment on intersex traits (specifically, hypospadias) on the show, “Morning Live”, featuring Dr Kabo Ijane from the Urology Hospital in Pretoria who strongly advocated for ‘normalising,’ cosmetic surgery during infancy or early childhood even when there is no medical need. Dr Ijane appreciated the high complexity and expertise required for these surgeries and low levels of competency among surgeons, while simultaneously advocating for early intervention. This can only increase the rate of revision, and Dr Ijane acknowledged that 50% of cases were for revisions as a result of complications. Children therefore end up spending inordinate amounts of time in surgery, for medically unnecessary procedures taking place without full, free and informed consent, within a pathologising framework affecting not only their sexual and reproductive health but psycho-social wellbeing.
29. This approach is in contravention of the call by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that all States “repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, ‘reparative therapies’ or ‘conversion therapies,’ when enforced or administered without the free and informed consent of the person concerned. He further calls for the outlawing of forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.”¹³
30. For adolescents who are at the age where their consent must be obtained for surgical procedures, their interaction with medical practitioners is often dictated by power imbalances that leave very little choice. It has been reported that because of this power imbalance, intersex youth are often at the mercy of medical practitioners who exude authority over any decision that an intersex adolescent could make. Consequently,

⁸ Maharaj, N.R., Dhai, A., Wiersma, R. & Moodley, J. (2005). Intersex conditions in children and adolescents: Surgical, ethical, and legal considerations. *Journal of Pediatric and Adolescent Gynecology* 18(6): 399–402. See also Rebelo, E., Szabo, C.P. & Pitcher, G. (2008). Gender assignment surgery on children with disorders of sex development: A case report and discussion from South Africa. *Journal of Child Health Care* 12(1): 49–59.

See also Wiersma, R. (2011b). Ovotesticular disorder of sex development in Southern Africa. Doctoral thesis, Erasmus University Rotterdam.

⁹ Van Rooyen, J. (2015). Understanding social inclusion or exclusion of intersex people living in South Africa. MSc thesis, Trinity College Dublin.

See also Soldaat, N. (2006). The story of my life. In T. Shefer, F. Boonzaier & P. Kiguwa (Eds.), *The gender of psychology*. Cape Town: Juta Academic/UCT Press, 267–269.

¹⁰ See footnotes 5 and 11.

¹¹ Bauer, M. & Truffer, D. 2016. Intersex genital mutilations: Human rights violations of children with variations of sex anatomy. NGO Report to the 2nd Periodic Report of South Africa on the Convention on the Rights of the Child (CRC). Zurich: *Zwischengeschlecht.org*.

<http://intersex.shadowreport.org/public/2016-CRC-ZA-NGO-Zwischengeschlecht-Intersex-IGM.pdf>

¹² For the interview with Dr Kabo Ijane on the MorningLive show, SABC2, see <https://www.youtube.com/watch?v=gig4QqudTo>. See also the press release by Iranti-org at http://www.iranti-org.co.za/content/Press_Releases/2016/Urology-Hospital-Pretoria-Intersex.pdf.

¹³ Méndez, Juan E. (2013). Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez. Human Rights Council, 22nd Session, 1 February 2013. United Nations General Assembly, Document A/HRC/22/53, p.23. See also pp.18-19.

this power imbalance leaves the medical practitioner's decision on surgery unchallenged even when there is not enough evidence to support the suggested procedure.¹⁴

31. A so-called informed consent approach that focuses on getting consent from parents constitutes a denial of the child's right to bodily integrity. The current medical practice of a so-called informed consent approach that focuses on informing parents of the potential risks and complications of medical treatment and surgery for their child, leaves the decision over the child's body exclusively to clinicians and parents, often pre-empting the possibility of informed consent for the intersex person later in life.
32. Surgical interventions are frequently harmful to intersex children and pose serious risks to their mental and physical health. Intersex variations rarely constitute life-threatening conditions and in most cases surgery is not medically necessary.¹⁵ When an intersex child is forced to undergo surgery, the child frequently suffers physical and emotional harm for the rest of their life.¹⁶
33. The parents' decision to subject their intersex child to surgical interventions often revolves around socio-cultural and psychological fears as opposed to medical necessity. Intersex variations are generally framed as a condition or disorder to be managed, thereby further reinforcing stereotypical sex standards and discriminatory notions of normality. Typically, it is problematically assumed that some form of treatment is necessary for the child to be accepted as "normal".
34. Non-surgery is treated as a marginal option. Despite the fact that surgical interventions are usually unnecessary to preserve the health of the child, professionals continue to offer parents the option of non-consensual surgery in conformance with societal prejudices.

Continued pathologisation of transgender, gender diverse and intersex children

35. In South Africa, conventional medical discourses and practices are complicit in enforcing dominant societal norms about sex and gender, actively pre-empting the possibility of informed consent for intersex children and undermining the protection of their bodily integrity. Human rights violations in medical settings largely continue to take place because the diagnostic nomenclature and language used in medical and public discourses to name, classify, describe and understand intersex bodies are generally stigmatising and pathologising, as for instance in the World Health Organisation's International Classification of Diseases and Related Health Problems (ICD)17 and in South African medical publications.¹⁸ The way different forms of bodily diversity relating to sex characteristics are framed in the ICD as "disorders", "diseases", "dysfunctions", "abnormalities", "anomalies", "syndromes", "deformations", "malformations" and so on, points medical health practitioners toward medical intervention even where there is no medical need, and there is a clear link between pathologising clinical language, lack of informed consent and human rights abuses in medical settings.

¹⁴ Mokoena, N. (2015). Intersex youth: Can we say that consent is truly free, full and informed?, Page 3.

¹⁵ Diamond, M. & Garland, J. 2014. Evidence regarding cosmetic and medically unnecessary surgery on infants. *Journal of Pediatric Urology* 10(1): 2–6.

¹⁶ Carpenter, M. & Cabral, M. (Eds.). (2015). Intersex Issues in the International Classification of Diseases – a revision. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>.

¹⁷ Carpenter, M. & Cabral, M. (Eds.). (2015). Intersex Issues in the International Classification of Diseases – a revision. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>.

¹⁸ Rebelo, E., Szabo, C.P. & Pitcher, G. (2008). Gender assignment surgery on children with disorders of sex development: A case report and discussion from South Africa. *Journal of Child Health Care* 12(1): 49–59.

See also Wiersma, R. (2011a). The clinical spectrum and treatment of ovotesticular disorder of sexual development. In New, M.I. & Simpson, J.L. (Eds.), *Hormonal and genetic basis of sexual differentiation disorders and hot topics in endocrinology: Proceedings of the 2nd World Conference*. New York: Springer, 101–103.

See also Wiersma, R., & Ramdial, P.K. (2009). The gonads of 111 South African patients with ovotesticular disorder of sex differentiation. *Journal of Pediatric Surgery* 44(3): 556–560.

36. Trans and gender diverse children continue to be pathologised through the practice of diagnosing them with “F64.2 Gender Identity Disorder of Childhood” as currently defined in the International Classification of Diseases and Related Health Problems, Tenth Revision (ICD-10). Such pathologisation of gender diversity in childhood leads to stigmatisation and discrimination, and is used to motivate and justify other human rights abuses, such as so-called corrective, reparative or conversion therapies.¹⁹

Violence and discrimination

37. Intersex persons in South Africa are subjected to widespread intersexphobia, verbal and physical violence, and subjected to gross human rights violations in society and the medical sector, including infanticide, mutilations, non-consensual, medically unnecessary treatments and surgeries, and being put on medical display and having their bodies and genitals treated as a curiosity. For a detailed documentation of human rights violations against intersex children and adults in South Africa, see the NGO report on intersex genital mutilation in South Africa submitted by StopIGM to the United Nations Committee on the Rights of the Child under the Convention on the Rights of the Child.²⁰
38. Intersex persons face even greater obstacles of invisibility, isolation, misunderstanding, stigma, secrecy, shame and pathologisation.²¹ It has been reported in the South African media that in some areas there may be a practice of murdering intersex infants shortly after birth. An activist said, “We interviewed 90 midwives ... 88 of them said when a child with ambiguous genitalia is born they will twist the child’s neck, killing it, because it is a product of a bewitched or cursed family.’ The mother would be told that her child was stillborn.”²²

Access to education for transgender, gender diverse and intersex children

39. The lack of education around and awareness of gender, bodily and sexual diversity creates a hostile and discriminatory environment for transgender, intersex and gender diverse/gender non-conforming youth in schools.²³
40. The issue of bullying and ostracism in schools is of particular concern to transgender, intersex and gender diverse/gender non-conforming children and youth. Some teachers and administrative staff try to prevent the bullying of transgender and intersex youth in schools. However, support for, and protection of, transgender, intersex and gender diverse/gender non-conforming youths generally come from individual teachers and staff members. There are no systems and structures in place to ensure consistent and sustainable interventions of teachers on behalf of transgender and intersex youth. In many cases, the lack of an organised support system capable of meeting the needs of transgender and intersex youth forces transgender, intersex and gender diverse/gender non-conforming learners to enter into a hostile school environment.

¹⁹ Pyne, J. 2014. The governance of gender non-conforming children: A dangerous enclosure. *Annual Review of Critical Psychology* 11:76-96.

²⁰ Bauer, M. & Truffer, D. 2016. Intersex genital mutilations: Human rights violations of children with variations of sex anatomy. NGO Report to the 2nd Periodic Report of South Africa on the Convention on the Rights of the Child (CRC). Zurich: *Zwischengeschlecht.org*.

<http://intersex.shadowreport.org/public/2016-CRC-ZA-NGO-Zwischengeschlecht-Intersex-IGM.pdf>

²¹ Iranti-Org. (2015b). ICD intersex workshop. Video made during a regional African intersex workshop on the International Classification of Diseases (ICD), hosted by Iranti-Org, Gender Dynamix and GATE, 27 September 2015. Available at <https://www.youtube.com/watch?v=4med0vTOzU0>.

See also Soldaat, N. (2006). The story of my life. In T. Shefer, F. Boonzaier & P. Kiguwa (Eds.), *The gender of psychology*. Cape Town: Juta Academic/UCT Press, 267–269. See also Van Rooyen, J. (2015). Understanding social inclusion or exclusion of intersex people living in South Africa. MSc thesis, Trinity College Dublin.

²² John, Victoria. (2012). Gentle man's brutal murder turns spotlight on intolerance. *Mail & Guardian Online*, 28 June 2012. Available at <http://mg.co.za/article/2012-06-28-gentle-mans-brutal-murder-turns-spotlight-on-intolerance>.

²³ Submissions here largely draw from the following research report: Sanger, N. (2014). *Young and transgender: Understanding the experiences of young transgender persons in educational institutions and the health sector in South Africa*. Cape Town: Gender Dynamix. Available at <http://genderdynamix.org.za/wp-content/uploads/GDXtransyouth2015-web.pdf>.

41. There have been reports of transgender and intersex children being sexually harassed at school. It was for instance reported that a learner was singled out by his fellow learners (and their older friends who are not learners at the school) who tried to disrobe him, threatened him and posed uncomfortable questions which implied that his gender expression existed because he is afraid to sleep with men. Such targeted incidences of abuse against transgender, intersex and gender diverse/gender non-conforming learners forced them to stop attending school in order to remain safe, free from abuse and harassment, inadvertently impacting their rights.
42. Transgender and intersex learners often choose not to use the toilets and shower facilities at school for fear of harassment and discrimination by other learners and educators. Trans and intersex children contain urinating, defecating and changing menstrual items until they are at home in order to avoid discrimination, sexual assault and harassment. It has been reported that a principal undressed a six-year-old intersex child, who preferred to use the girls' toilets, and forced the child to use the boys' toilets instead.²⁴ Although individual teachers have allowed transgender and intersex youth access to staff toilets, this often only further isolates these learners from other learners at school and enables discrimination to continue.
43. Due to prejudice and limited understanding of gender identity, gender expression and body diversity, both learners and teachers have been reported as refusing to refer to transgender and intersex persons using the right pronouns. This has a detrimental effect on the ability of transgender and intersex children to learn and to socially relate with their peers and can instigate and sustain bullying.
44. Sex segregation through use of school uniforms according to a gender binary that is enforced for boys and girls rob gender diverse/gender non-conforming students of their equality and dignity. Dress and pronouns are important ways in which persons express their gender identity. Forcing incorrect pronouns and inappropriate sex-specific uniforms on transgender, intersex and gender diverse pupils in the educational environment is harmful to their dignity, sense of self and educational experience. The discomfort expressed by some gender diverse/gender non-conforming pupils is exacerbated by their being targets of bullying and intimidation on school grounds, which various school policies do not take into account or adequately address.
45. Currently, the matriculation certificate for the final high school qualification requires the identification number of the applicant, as well as personal details such as forenames, to be captured. In the event that a person changes their legal gender, this gendered information on the certificate makes it impossible for the person to use the certificate, especially when they have also altered their forenames (and surname) and identification number on the identification card. This often leads to transgender and intersex persons being unable to rely on their qualification in seeking employment and other financial opportunities. There is currently a policy in place that allows for such alterations to be made. The responsible unit, Umalusi, understands this policy to mean that certificates are only re-issued where administrative errors occur and not for reasons of legal gender recognition in the case of transgender and intersex persons. They believe that transgender and intersex persons bear the responsibility of proving that the certificate is theirs and not fraudulent. This violates the rights of transgender and intersex persons to privacy and equality by requiring them to divulge private details about their gender identity and bodily characteristics when seeking jobs and other opportunities.
46. All of the above circumstances are compounded by the fact that currently, there are no policies or guidelines for schools to assist learners, teachers, school-governing bodies and school communities on how to ensure social inclusion for transgender and intersex children. The inclusion and realisation of the rights of transgender and intersex children are currently dependent upon the willingness of the school community in question to include and cater for transgender and intersex children.

²⁴ John, Victoria. (2012). Gentle man's brutal murder turns spotlight on intolerance. *Mail & Guardian Online*, 28 June 2012. Available at <http://mg.co.za/article/2012-06-28-gentle-mans-brutal-murder-turns-spotlight-on-intolerance>.

47. There is no mention of gender, sexual, or bodily diversity in the school curriculum. Gender identity, gender expression, intersex variations and sexual orientation are rarely discussed in a manner which ensures inclusivity and a balanced, informed understanding in schools. This has serious consequences for transgender and intersex individuals who are not educated about gender and body diversity in their school curriculum. Transgender and intersex youth may feel pressured into conforming to the existing gender and sex binaries and stereotypes, and for intersex youth this could include undergoing invasive and medically unnecessary procedures to do so. This has a detrimental effect on the mental and sexual health of transgender and intersex youth as they go through puberty and may result in depression, self-harming and other life-risking behaviour.
48. The lack of education on gender identity and gender expression causes many transgender youth to at first interpret their gender identities in terms of sexual orientation categories (e.g. gay or lesbian) because they have never been exposed to the notion of transgender identities. Other transgender people identify as gay or lesbian because the community more easily understands these terms than “transgender”. Exposure to gender diversity education is crucial to a transgender individual’s understanding of their gender identity, healthy mental and sexual development, and navigation of puberty and appropriate options available to them at that time.
49. Intersex persons whose bodies (sex characteristics) do not appear stereotypically female or male are also generally only exposed to sexual orientation terminology or to stigmatising terms that conflate incorrect assumptions about biology and sexual orientation (e.g. *stabane*).²⁵ Additionally, they may be exposed in medical settings to highly technical and pathologising medical language (e.g. “disorder,” “disease,” “malformation,” “pathologic,” “defect” and “abnormality”) about their bodies.²⁶ This undermines a positive sense of self and causes depression, anxiety and confusion about one’s body, identity and belonging. Early social affirmation of body diversity as a healthy manifestation of human diversity, and access to intersex-positive language are crucial for the self-understanding, self-affirmation and healthy mental and sexual development of intersex children and youth.

IV. THE EDUCATION SYSTEM

50. The South African education system is deeply divided and unequal. The Apartheid regime created a segregated education system in which schools for white learners enjoyed substantial financial support from the State, while schools for their black counterparts received only a fraction of this. This resulted in extremely inferior school conditions for the majority of South Africa’s children. Despite attempts to address the unequal system, the legacy of apartheid education is still clearly apparent in State provision for education today.
51. Provinces which, under the Nationalist government were former homelands bear the brunt of the inequality in the system.²⁷ Limpopo, (which incorporates former homelands such as Venda, Gazankulu and Lebowa), and the Eastern Cape, (which incorporates the former homelands of Transkei and Ciskei) are provinces facing extreme poverty and bureaucracies (particularly, those in charge of education) which are failing to meet the requirements of effective governance. Serious backlogs in the provision of basic education facilities in these provinces also persist.
52. The right to basic education in the South African Constitution provides, at section 29(1)(a), that “*everyone has the right to a basic education*”.

²⁵ Swarr, A.L. (2009). ‘Stabane’, intersexuality, and same-sex relationships in South Africa. *Feminist Studies* 35(3): 524–548.

²⁶ Carpenter, M. & Cabral, M. (Eds.). (2015). Intersex Issues in the International Classification of Diseases – a revision. Available at <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>.

²⁷ Homelands were the areas of land established by the Apartheid Government, where the non-white population were forcibly moved in order to separate them from white South Africans.

53. However, particularly in the Provinces discussed above, this right is not being fulfilled. Litigation has sought to force State provision of aspects of this right, successfully winning court cases ordering the provision of textbooks,²⁸ desks and chairs,²⁹ transport to schools,³⁰ and teaching and non-teaching staff.³¹
54. However, these gains have been incremental, and compliance with court orders by the State has been inconsistent at best. Implementation of court orders has required multiple visits to courts to force compliance and the State has demonstrated an unwillingness and/or inability to move quickly in fulfilling the right to basic education as guaranteed by the South African Constitution.
55. On 5 December 2017, the results of South Africa's participation in the globally recognised 2016 Progress in International Reading Literacy Study (PIRLS) were released. The results were devastating. They showed South Africa placing last out of 50 countries taking place in the study (including middle-income countries such as Iran and Chile). The results also showed that 78% of South African children in Grade 4 cannot read for meaning in any language. Results such as these demonstrate the multitude and depth of problems plaguing the South African education system and have led to well respected education experts calling for a Marshall Plan to eradicate illiteracy in South Africa.³²
56. Education is understood to be an empowerment right. Article 13 of the ICESCR provides that "*education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms*". Its fulfilment sits at the foundation of the fulfilment of a number of other rights. A failure in an education system negatively impacts not only on the fulfilment of the right itself, but on fulfilment of other fundamental rights also.
57. The national crisis of education in South Africa is arguably one of the most far-reaching and crucial human rights challenges that South African youth face.

CONCLUSION

58. We thank you for the opportunity to provide information to the Office of the United Nations for Human Rights. Should the Office have any questions about the information in the submission or wish to communicate any related information to the organisations submitting this report, please do not hesitate to contact Mandivavarira Mudarikwa at mandy@lrc.org.za.

ENDS

²⁸ *Minister of Basic Education and others v Basic Education for All and others* 2016 (4) 63 SCA

²⁹ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM)

³⁰ *Tripartite Steering Committee and another v Minister of Basic Education and others* 2015 (5) SA 107 (ECG)

³¹ *Centre for Child Law and others v Minister of Basic Education* 2013 (3) SA 183 (ECG), *Linkside and others v Minister of Basic Education* 2015 JDR 0032 (ECG), *Federation of Governing Bodies of SA Schools and others v MEC for the Department of Basic Education, Eastern Cape and others* [2011] 6 BCLR 616 (ECB)

³² <https://www.dailymaverick.co.za/article/2017-12-06-open-letter-to-the-next-south-african-president-get-an-urgent-plan-to-eradicate-illiteracy/#.WIOHRKIWbIV>