

REPORT:

*Workshop on the violation of Children's rights through
the abuse of the cultural practice of*

UKUTHWALA

Held

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ABBREVIATIONS AND ACRONYMS:

ACC	African Children's Charter
CRC	Convention on the Rights of a Child
CEDAW	Committee on the Elimination of Discrimination against Women
DSD	Department for Social Development
DTA	Department of Traditional Affairs
DoHA	Department of Home Affairs
DWCPWD Disabilities	Department for Women, Children and People with Disabilities
DoJCD	Department of Justice and Constitutional Development
DoE	Department of Education
CoGTA	Corporate Governance and Traditional Affairs
NHTL	National House of Traditional Leaders
NPA	National Prosecuting Authority
SAPS	South African Police Service
CANE	Child Abuse, Neglect and Exploitation
SALRC	South African Law Review Commission
VT	Virginity testing

1 INTRODUCTION

Ukuthwala is an old age tradition which is currently being practiced by some communities in a manner which violates the rights of children. More specifically, this practice infringes on the provisions of Section 28 of the Constitution, the Children's Act 38 of 2005 and the Sexual Offences and Related Matters Act 32 of 2007.

This practice according to the National Prosecuting Authority has taken an illegal tangent where some young girls, some as young as 12 years are abducted and forcibly married to older men. In addition, the manner in which this tradition is being practiced entails all the ills that women and children (specifically the girl child), are generally vulnerable to, such as sexual and domestic violence, trafficking in persons and the resultant problems of maintenance after the girls fall pregnant.

This abuse of children through this practice is an aberration, and as such calls for a response that will curtail the practice in its current form and ensure that the custom reverts to the historical respected tradition of marriage between adults. Therefore a task team comprising of representatives from the Department of Traditional Affairs and the Commission on the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities was established. The task team lead by the Department of Social Development was responsible to plan and organise the workshop; and to ensure that all the relevant stakeholders who are responsible to ensure care and protection of children through this cultural practice are invited.

The workshop was intended to create a platform for all stakeholders to deliberate on the practice of ukuthwala, ascertain the historical background of the practice, clarify roles and responsibilities of all stakeholders and determine interventions that will protect children from this abuse. In addition, the workshop was expected to review the legal framework that protects children with the view of identifying gaps and recommending changes where appropriate.

4 Chakras Consulting was appointed to facilitate the workshop and compile a report on the violation of Children's rights through the abuse of the cultural practice of UKUTHWALA. This report is thus the outcome of the deliberations of the workshop.

2 ATTENDANCE

The workshop was attended by various stakeholders including the following national departments: South African Police Service (SAPS), Department of Justice and Constitutional Development (DoJCD - South African Law Reform Commission), Department of Traditional Affairs (DTA), Department for Women, Children and People with Disabilities (DWCPWD), Department of Education (DoE), Department of Local Government and Housing Gauteng, Department of Rural Development and Land Reform, Department of Communication, provincial departments of social development and SAPS, Commission on

the Promotion and Protection of the rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission), civil society and traditional leaders represented by the national and provincial houses of traditional leaders.

3 WORKSHOP REPORT

The theme of the workshop was the *“Mobilization and strengthening the partnership with stakeholders to protect children from the abuse of the cultural practice of ukuthwala”*.

The agenda is attached as **Annexure 1**.

The workshop was held over 2 days (23-24 August 2011) at the Kopanong Hotel and Conference Centre. The first day was dedicated to presentations by speakers that were invited to address the delegates. Mrs. Margot Davids - Chief Director for Children was the Programme Chairperson.

3.1 Session 1

3.1.1 Welcome

The Chairperson welcomed all the participants and observed protocol by extending a special welcome to the Deputy Chairperson of the House of Traditional Leaders and all the traditional leaders from the different provinces.

She expressed a word of welcome to all the guest speakers and thanked them for accepting the invitation to this special workshop that would assist the Department in purging the country of a practice that is currently violating the rights of children.

She requested all delegates to participate to ensure that the action plan that is derived from the workshop is well informed and would lead to the eradication of this practice in its current form.

She articulated the purpose of the workshop as being a platform to raise awareness amongst various stakeholders on the cultural practice of ukuthwala particularly the impact it has on children. Furthermore the workshop will provide an opportunity to delineate other practices that seem to prevail under the camouflage of this cultural practice. She hoped that the workshop will also raise awareness on the country's obligation to promote and protect the rights of children as enshrined in the Constitution of the Republic of South Africa (RSA), as well as other international instruments of which the country is a signatory.

She continued that the workshop will enable us to deliberate and reflect on what we have done, what still needs to be done by the different stakeholders from (government, NGOs, civil society, Chapter 9 institutions, and traditional leaders), to protect children from the abuse of the cultural practice of ukuthwala. Lastly it is hoped that the workshop will give

social workers a legal position to enable them to work within the parameters of the law, especially with regard to protecting vulnerable children.

3.1.2 Opening Remarks

Dr. Mabetoa, Deputy Director General for Welfare Services

In the absence of the DDG, the Chief Director - Ms. Davids delivered the opening address.

She commenced the address by emphasizing that children are one of the vulnerable groups in our society, and therefore there was a need to protect them, give them special care, development and nurturance. Children should be receiving this from their families, but research indicates that the quality of life of families in general is deteriorating. This deterioration can be attributed to poverty, lack of housing, access to education, access to water, sanitation and electricity, as well as access to health care. Some families are affected by the scourge of HIV/AIDS which has left behind child headed households. These children need specific attention and care as they are more prone to abuse and neglect.

She emphasized the fact that children need to grow in an environment where they feel protected and enjoy their childhood, but they have been deprived of this, as many of them are exposed to violence, abuse neglect and exploitation. There is a need to invest in our children as they are our future. She shared with the delegates Government's commitment to children. Government has prioritized service delivery to children in line with global targets and indicators as set out in the Millennium Development Goals (1990-2015).

- ***In terms of GOAL 2: ACHIEVE UNIVERSAL PRIMARY EDUCATION states that , children everywhere, boys and girls alike , must be afforded an opportunity to complete a full course of primary schooling. In terms of this goal she raised the question "with the abuse of the cultural practice of ukuthwala which seem to target young girls- will the country be able to achieve this goal?" In addition she articulated the concern that the cultural practice of ukuthwala of the young girls which seems to be rife in Eastern Cape Province (Pondoland) has brought public outcry and concerns over appropriate interventions by government and other relevant stakeholders to address the abuse of this practice, and its detrimental impact on the girl child.***

She stated that whilst children belong to families, the state has an obligation to protect children from harmful practices that are detrimental to their lives. In order to fulfil this obligation, the country has developed legislative and policy frameworks which are aligned to international instruments that protect children. The Children's Act 38 of 2005 (Children's Act) which has been promulgated since 1 April 2010 is one of the most progressive pieces of legislation that the country has produced, to ensure care and protection of all children in South Africa. However, the challenge is to ensure that the Act is enforced.

She identified strengths in the Act which are critical to the protection of children:

- The promotion and protection of the rights of children are provided for in the Constitution.
- Promotion of the best interest of the child as enshrined in the Constitution of the Republic of South Africa.
- Section 12 of the Children's Act and the Regulations 3, 4, 5 and 6 make provision for the protection of children from social, cultural and religious practices which are detrimental to their well-being.
- The Children's Act provides for child participation and for children's voices to be heard, as far as possible, and for them to be involved in any decisions that affect them.

She further alluded to the fact that, it is the responsibility of the Department of Social Development to ensure compliance to the provisions of the Children's Act.

In addition to the above, she identified MDG 3 which seeks to **promote gender equality and women's empowerment**, as critical to the issue under discussion. Of major concern is the high number of teenage pregnancies in many communities, resulting in young girls dropping out of school. The response is more life skills programme, that seek to empower and develop young girls and boys.

She called for the strengthening of families to ensure that they assume their role and responsibility of being an anchor and cornerstone in the rearing of children. She reiterated that families are becoming dysfunctional, due to their inability to cope with the challenges facing them; therefore their capabilities need to be enhanced to ensure that they are in a position to socialize, care, nurture, love and support their members.

The role of families' and communities' particularly traditional communities as custodians of the customs, traditions and cultural practices is crucial.

The Children's Act promotes the preservation and strengthening of families. In addition it makes provision for the strengthening and development of community structures which can assist in providing care and protection for children. The problem of ukuthwala needs a response that is made up of all stakeholders, however, the roles and responsibilities of all partners who will support victims of this cultural practice must be clearly defined. This is an agenda item and it is hoped that delegates will take the opportunity to identify the different role that stakeholders must play.

She informed the workshop that there will be a report from the Eastern Cape later in the programme on the interventions directed at the victims of ukuthwala practice. The presentation will attest to the need for strong partnerships and intersectoral collaboration.

In conclusion she emphasized once again the need to strengthen families and communities through the existing legislative and policy frameworks to ensure that children enjoy their constitutional rights. Furthermore she hoped that the workshop will also raise awareness on the country's obligation to promote and protect the rights of children as provided for in the Constitution and other international instruments which the country has ratified.

She concluded her opening remarks by requesting that delegates identify workable solutions in addressing such challenges and ensure that in all the endeavours, the best interest of the child is upheld.

3.1.3 Interplay between cultural, religious rights and human rights

Prof N.S. Zulu - Stellenbosch University

He commenced his presentation with the comment that South Africans tend to polarise things and this acts against them: This polarisation results in an “us and them” situation. The workshop today is about children’s rights against the cultural practice of ukuthwala. He posed the question - “where is the common ground”. He suggested that there should be a connection between cultural rights and children’s rights.

He indicated that his paper is divided into two sections, namely the tensions between cultural, religious and human rights, and the second section focuses on the interplay between cultural, religious and human rights.

South Africa is still in transition. He compared this transition to “rites of passage” and explained that transition is that “becoming” or what happens between the two spaces. He contends that at each transition, the life cycle “included rites of separation, to ensure proper departure out of the prior status; rites of transition, to ensure safety during hazardous liminal period; and rites of incorporation, to ensure proper identification with and recognition in the new status”.

He referred to the fact that transition in South Africa is often seen in terms of ‘from apartheid to democracy’, and therefore the ‘becoming’ of two essentialised western systems. These systems ignored the indigenous cultures and religions of the country, with the result that people now say that ‘there is no place for such things in our democracy’. ‘Such things’ are chieftaincy and kingdoms that entrenched good indigenous morals and knowledge systems. In addition this relegation of indigenous governing systems presented a climate for individuals to abuse religion and culture for their own evil agendas. Initiation is one such example. It has become a business for many. Further, South Africans see a resurgence of the abuse of *ukuthwala* in Pondoland.

In addition, individualistic human rights have come with some behaviours and practices that are completely un-African and offensive. Those who are offended by such practices are told to live with them, because ‘now we have a democracy’.

The advent of democracy came with new social tensions and transgressions. The tensions emanate from several oppositional essentialisms, for example:

African religions vs. western religions;
Aspirations of black people vs. aspirations of white people vs. Indians vs. Coloureds;
Collective rights vs. individual rights;
Collectivism vs. Individualism;

Indigenous cultures vs. human rights, these are just a few of the spaces that produce these tensions. The bottom line is “how do we strike a balance between these tensions”?

These tensions create more *difference* rather than similarity, reconciliation and interplay.

The speaker then applied the transitional phases of Van Gennep to the South African situation. He described Van Gennep’s (1960) transitional phases, as follows:

- Social alienation
- Transition
- Finding common ground
- Attaining social integration

He suggested that South Africa is in the second stage - with some overlaps to the third stage, but South Africans certainly have not yet found *common ground* for all the social issues that caused unhappiness during and after apartheid.

Furthermore he is of the opinion that cultures change, things become archaic, and there is a need to see that culture is dynamic and needs to change as progress takes place. To illustrate his point he made the example of indigenous practices and schools, especially ex-model C schools with regard to the wearing of certain traditional artefacts such as *isiphandla*, *ubuhlalu*, *iintsimbi*, *difaha* and many more.

He pointed out that there are several ways to reduce such tensions, and the most important one is to communicate with the aim to understand the other. To grandstand makes matters worse. He made the example of the Roman Catholic who reduced tension between itself and indigenous religions and cultures of the world through a process of *inculturation*, which he describes as a process of making a western religion acceptable and relevant to indigenous cultures and religions.

Professor Zulu concluded by suggesting a way forward for finding common ground and inter-connectiveness. His suggestion is that that all Chapter 9 institutions, government departments and stakeholders should try to solve problems of this country in such a way that mutual understanding, respect and acceptance is established as the ultimate aim of conflict resolution. He also hoped that the Department of Social Development would not just end with this workshop in Boksburg, but would become the link, the liminal space, the communication channel, between children’s rights and the Pondoland community on *ukuthwala*. There is an urgent need to engage the Pondoland community on the criminalisation of *ukuthwala* and to change some of its archaic aspects in line with the current human rights of the country.

The Chairperson thanked the speaker for his most enlightening presentation. She summarized by saying that it is a hot topic, but Professor Zulu had calmed this down by explaining the theoretical perspectives and how these translate into tensions. However, once an understanding is reached then one can look at an issue objectively. She thanked him for setting the scene and urged delegates to read the complete presentation.

3.1.4 'Legislative and policy frameworks on children's rights in the context of the right to culture and customary law'

Professor Julia-Sloth Nielsen - University of Western Cape - Law Reform Committee -

Professor Sloth Nielsen commenced her presentation by thanking the organizers for inviting her to the workshop. She informed the delegates that she and a colleague have co-authored a paper on ukuthwala and customary law. However, she would not be presenting this paper, but would present on broader policy and children's rights. Her presentation is based on a paper that will be publicized in Australia later this year.

She indicated that she premised her paper on the legislative and policy frameworks on children's rights in the context of the right to culture and customary law without referring specifically to the practice of Ukuthwala. She contextualised her presentation broadly on the customary law link with the legal system under the Constitution; in addition she will cite examples of cases in the area of children's law and family law to showcase how customary law, interplays with the law of the land.

She initiated the presentation by highlighting Section 8(1) within the Constitution and more specifically the Bill of Rights. The Bill of Rights is supreme and cognisance must be taken of this supremacy during deliberations on the cultural practice of ukuthwala. Section 8 provides for the requirement that common law be developed to give effect to the Bill of Rights. Furthermore Section 211(3) provides for the courts to apply customary law when that law is applicable, just like the other laws that are integral to the law of the land. It is only subject to the Constitution i.e. the Bill of rights. Therefore there is a constitutional duty to apply customary law as an equal form of law as the other laws of the land.

She pointed out that there are three limitations to Section 211- these are:-

- No conflict is allowed with Bill of Rights.
- Customary law must not be superseded by a specific Act of Parliament. The question is whether the Children's Act provides for an exception?
- Section 28(2) - Best interest of the child is paramount in all matters. That clause must provide as a limitation on the application of customary law as this is the overriding principal in the Children's Act. This principle clearly outweighs any other matter.

Therefore, she concluded that customary practice or cultural issues could be found contrary to child's best interests and therefore qualify for Section 211(3) exclusion. The "best interest of a child" is also an overriding principle in Children's Act itself. To illustrate the last limitation, she referred to a case in Swaziland - **Hlophe v Mahlalela (1998)** which specifically addressed conflict between customary law, in this case Swazi law, and best interests of a child: The ruling was that the best interest of the child were held paramount.

In addition she cited Sections 30 and 31, which provide for culture and religion as a fundamental right. These are important freedoms that are provided for by the Bill of Rights. She made reference to two cases, namely "Christian Schools vs Minister of Education". This case requested an exception from the Schools Act with regard to corporal punishment in Christian schools. Their argument was that corporal punishment is based on a biblical concept. This exception was disallowed based on children's rights to be free from all forms of violence. The second case was based on the right to religion. "Ms. Pillay vs Durban Girls High School". She claimed the right to wear a nose stud to school as part of her attainment of puberty. This was upheld by the court based on the right to celebrate differences in our society.

The presenter suggested that the deliberations could learn from this case - as it does allow for the recognition and the right to celebrate differences.

She summarised the South African legal position as being that:

- Customary law is now an integral part of the law of the land;
- It is an independent source of norms within the legal system;
- It can shape common law and co-exist alongside statute: so called 'recognition' which is actually very complex.

She cited the following case to illustrate the above. **Maneli v Maneli (2010)**: This couple adopted a child through customary law. They did not register the adoption through the legal channels. The marriage subsequently broke down and resulted in a divorce. The mother requested maintenance from the father, who refused on the grounds that the child was not his. The court recognised the customary law of adoption, and enforced maintenance from the father for the customary adoption. Whilst there is a chapter on Adoption in the Children's Act, the court recognised customary law as a basis for their decision.

In terms of the International treaties the following are important to the rights of a child.

- Convention on the Rights of a Child (CRC) Article 24(3): states parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. According to the presenter this article is narrowly concerned with the issue of health only. It does not deal with prejudice to education, or to equality of rights etc. The CRC Committee is currently drafting a general comment on harmful cultural practices: The problem associated with this provision is that it only identifies health issues and there are many other practices that are harmful to children, but this provision falls far short in terms of offering protection to children from all the harmful practices.

CRC also promotes positive enjoyment of cultural rights just as the Constitution does in terms of Section 30-31

Article 31 (States parties shall respect and promote the right to the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate opportunities ...for cultural activity.) Whilst CRC is culturally sensitive, it only extends to harmful practices that are health related.

She highlighted the African Children's Charter (ACC), which in her opinion is much more useful in the interplay between traditional practices, religion and children's rights. The law has a dedicated Article 21 headed "Harmful social and cultural practices". It states parties are required to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity normal growth and development of the child and in particular:

- Customs and practices prejudicial to the health or life of the child.
- Customs and practices discriminatory to the child on the grounds of sex or other status - The presenter made the point that this can serve as evidence of concern for the girl child. In contrast the CRC shows no concern, whereas the ACC has a particular concern for the plight of girls.
- Article 31 prohibits child marriages and betrothal of girls and boys.

Effective action is therefore required, including legislation, to specify minimum age of marriage as 18, and to make registration in an official registry compulsory. The presenter cited the example of the South Sudanese, who allow their girls to marry at 12 or 13 years of age. By the time they reach 18 years, they have had 5 children. They are heavily disadvantaged as they cannot be educated. She called for the practice of early marriage to be excluded, as this is detrimental to the health of the girl child, it is not safe and is risky for both mother and child. Furthermore the young girls are less likely to be good mothers; neither will they be in a position to educate their children.

She summarised the progressive aspects of the ACC as:

- The minimum age is explicitly set at 18 years in the ACC, to negate against the practice of early marriages.
- In addition to the provisions, the preamble to the ACC explicitly recognises 'the virtues' of African cultural heritage, historical background, the values of African civilisation, and through Article 1 obligates the state to deal with any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter.

The difference between the CRC and the ACC is that the CRC used the word 'abolish' however the ACC is much more nuanced, as it does not say abolish everything, rather it says 'deal with it to the extent that it is inconsistent with the rights of the child'.

Therefore, as a team, and in the papers that have been written, we have taken the same line and looked at the positive aspects of the practice, and therefore did not throw the baby out with the bath water.

She added that CEDAW is the other relevant text from the international treaty. She raised a critical issue in that the Committee have criticised the framing of virginity testing in the

Children's Act. The African Women's' Charter has gone a bit further than the ACC by prohibiting all forms of child marriage and harmful practices.

In terms of domestic legislation (she added that the next speaker will add to this conversation) there is the Recognition of Customary Marriages Act 1998, and Reform of the Customary Law of Succession Act 2009.

The Children's Act in terms of Section 12(1) does not focus only on health, but adopts a broader approach that included anything that is detrimental to a child's life chances. The strong belief is that a child should not be subjected to those practices that imply force, or "compelled to" - which is evidence of the child's right to make choices. There is however, no criminal sanction for the violation of Section 12(1), though there may be a possibility for civil liability.

Section 12(2) provides for the prohibition on a child below the minimum age for a valid marriage being given out in marriage or engagement. There are major inconsistencies within our laws regarding the minimum age of marriage. There are difficulties with different minimum "ages" for marriage 'set by law'. There is no agreement between the different laws as to what this age will be. The Recognition of Customary Marriages Act say 18; the Draft Muslim marriages Act is in agreement with age 18, but the Marriages Act of 1961 still has the possibility of a girl marrying at the age of 15 and even lower with Ministerial consent. She posed the question - "Which law then will be used?" In addition the laws currently target the parent or care-givers who give the child out and not the abductor. Therefore the section does not deal with the situation under discussion.

She informed delegates that the remainder of the presentation will deal with the rest of Section 12 namely virginity testing and circumcision. She hoped that by going through these two sections, that delegates would derive a sense of what will be needed in the management of ukuthwala. However, she cautioned that she is not saying that it is the right way; rather it is one way to manage it.

Section 12(3) prohibits genital mutilation or the circumcision of female children. During the drafting of the Children's Act, this was not a major issue however, since then; we need to look at the extent to which this is practiced in South Africa given the growing immigrant population

- Section 12(4) prohibits virginity testing (VT) of girls below age 16; the opinion is that this should be prohibited altogether.
- Section 12(5) regulates VT of girls above 16 in 3 ways: This was the clause that was highly criticised by the CEDAW committee. The criticism is on the fact that South Africa allows such a practice.
- She identified the steps in the processes. It consists of three elements namely consent, counselling and adherence to regulations. Thereafter, there is an administrative process that is outlined in regulation 3.

- Regulation 4: Sets out the manner in which the test must be conducted. What is important to note is that this regulation sets out internal criminal sanction created by Regulation 4(4), as Section 305 does not include criminal sanction for contravention of Section 12(5).
- Section 12(6): The results of VT may not be disclosed without consent of the child. A criminal sanction exists for this violation in Section 305.
- Section 12(7): The body of child may not be marked. A criminal sanction exists for this violation in Section 305.
- Section 12(8): The circumcision of male children under age of 16 is prohibited except for religious circumcision or one performed for medical reasons on the recommendation of a medical practitioner.
- Regulation 6 provides for the requirements for medical and religious circumcision.
 - Requirement as to who performs, sterile gloves to be worn and disposed of, sterile instruments and their disposal, no direct blood contact or contact with any foreign substance between child and circumciser.
 - Human tissue to be disposed of in accordance with medical standards.
 - Consent to religious circumcision - both parents where child is under 16years, child himself if over 16.
- Section 12(9): Social and cultural circumcision restricted to male children older than 16, with consent in the prescribed manner and after counselling; and in accordance with all the details contained in Regulation 5.

In concluding her presentation, she made the statement that the Children's Act has made a very limited attempt to deal with customary law and cultural practice. Furthermore the child marriage/early marriage aspects in the Children's Act are not well framed. The Act essentially deals with:

- Forced and early marriages;
- Female mutilation;
- Virginity testing; and
- Circumcision.

However, some parts of these are also not well framed and may not be helpful.

She expressed her concern that ukuthwala was not mentioned in the Children's Act. The question is, did the legislature not know about the practice? Or did it ignore it? There is case law that dates back to 1930, which should have informed the deliberations. Does this mean that they did not want to deal with it? Her view is that when drafting the Act a minimalist approach was used. Statutory regulation using world like prohibit, abolish and

criminalise can be a blunt instrument, as it does not help with giving guidance to those who implement the Act.

In conclusion she stated that disadvantages and burdens suffered by children as a result of cultural practice must always be juxtaposed against potential benefits of exercise of cultural rights; at the same time, protection against clear rights violations and harm must be ensured.

The Chairperson thanked her for highlighting the real difficulty in the ability to regulate and legislate certain customary practices. The problem is how to enforce legislation. What is the role of the social worker that is expected to do something about these abuses under the guise of a cultural practice?

There is a need for policy directives in order to insure that everyone knows what needs to be done in these situations. The Children's Act was promulgated a year ago and the implementation has indicated that there are gaps in the Act. In addition there are differences in interpretation; thereby resulting in difficulty in enforcing some sections. It is also difficult for practitioners who have been involved in these practices to step away and be objective and professional about it.

She thanked Professor Julia Sloth-Nielsen and hoped that the next speaker will be in a position to close some of the gaps that she had identified.

3.1.5 Legislative and Policy Frameworks on Marriages.

Advocate F. Mdumbe - Department of Justice and Constitutional Development

Advocate Mdumbe started his presentation by thanking the organisers for the invitation. Due to the invitation received a day prior to the workshop, he did not prepare a paper for the morning's proceedings. However, he shared some of the experiences he has gathered from being part of a team that have been commissioned to investigate the practice of ukuthwala. He admitted that whilst the work had begun, it is still in the early stages, therefore is unable to share any recommendations. However a discussion paper is in the process of being developed and will be published soon.

Before describing the legislative framework he posed a number of questions in order to contextualise the practice of ukuthwala.

- Firstly what is ukuthwala?
- What is the intention of ukuthwala,
- Lastly were there any safeguards when this practice was initiated?

His presentation thus attempted to answer these questions within the ambit of the different domestic legislation that promotes marriages as well within international practices that promotes the rights of a child.

According to the speaker, ukuthwala is an unwritten customary practice, observed by all indigenous ethnic groups other than the Tsonga speaking people. Therefore it is not unique to the communities of Transkei, on the contrary all indigenous groups have this cultural practice; it is called by different names by each of the groups.

He explained the practice in most of the indigenous communities as being - a marriage proposal was initiated by this practice. However, not all proposals were done in the old traditional manner. A number of unconventional methods have also surfaced. The traditional manner was that the intending bridegroom would waylay the intended bride in the neighbourhood of her home, often in the late evening. He would forcibly take her to his home, sometimes the girl is caught unaware, but most times it is planned between the two individuals. She is expected to put up a show of resistance so that onlookers would think that it is happening without her consent.

He summarised what he has learnt about this practice as follows:

- The practice only affects women and young girls, sometimes with the consent of the women, and sometimes not. The practice does not happen to boys.
- In some instances it is consensual and in others not.
- In both cases it is expected that the women will shout and scream and call for help, however, it is a well known fact that there is consensus to the practice.

He made the observation that the practice has two criminal elements to it, namely:

- At what age is a girl deemed to be old enough to be subjected to ukuthwala or capable of marriage?
- Secondly can a woman be physically compelled to enter into this marriage despite explicit rejection of the proposal?

The primary objective of the custom was for marriage purposes. Customary law before the promulgation of the Recognition of Customary Marriages Act had no specific law for determining a marriageable age, other than the prospective partner who should have reached the age of puberty, which makes one assume that only girls were subjected to this practice. Case history indicates that the practice of ukuthwala affects predominately young girls.

With regard to the second element - "compelled to marry against her will", customary law sanctioned against the use of violence, exposure to assault, rape and threats and other forms of coercion. Thus the conclusion that can be made about this practice is that it results in:

- Forced marriages;
- Marrying of children;
- Marriages that are entered into without the consent of the intended bride;
- Sometimes a girl is forced into a marriage that she does not want; and
- In violence, rape, sexual assault especially if the girl resists the marriage.

He asked the question - "what then was the rational for this practice?"

The custom was used to force the bride's parents to give consent, avoid the expense of the wedding, including its formalities and the avoidance of the immediate payment of *labola*. Therefore it can be said that this practice was often resorted to by urgent suitors to persuade women of their serious intentions.

In his attempt to answer the last question namely "Were there safeguards against this practice?" He is of the opinion that these questions must be interrogated as it is necessary to go back into history and interrogate this practice. There is a need to understand whether the practice - practiced today is the same custom of ukuthwala or is it totally different. The presenter explained processes that were followed in the past when ukuthwala was practised. According to the presenter, the main distinguishing element of the practice was that upon abducting the girl, the prospective bridegroom reports the matter to the head of his family, and gives the girl into the safekeeping of an elder female relative. The head of the family then must reports the matter to the girls' parents, clearly stating the intentions of paying cattle for the intended bride. This process is done as soon as the bride is abducted, or at dawn the next day. These are the safeguards that should be in place.

It is contrary to customary law to have sexual intercourse with the girl before these processes are followed. In illustrating the abuse of the practice of ukuthwala, Advocate Mdumbe shared discoveries made by the Commission for Gender Equality upon the investigation of the ukuthwala practice in Pietermaritzburg. He mentioned that people in Pietermaritzburg say that the practice is being abused by unemployed men loitering around to satisfy their lust.

The presenter posed an additional question in an attempt to contextualise the legislative framework. The question posed was - "was there legislative protection prior to 1994?" In addition to other claims, the courts considered forced marriages in general contrary to public policy and repugnant to natural justice. Where a woman was *'thwaled'* without her consent the ensuing customary marriage was considered *void*. In addition the courts also made it clear that the custom of ukuthwala was no defence to abduction, and to rape if proven that she resisted.

In the Transkei it was an offence to compel women to marry against her will. In Natal, and later Kwa-Zulu Natal (KZN) a woman was required to publically declare that she was willing to enter into a marriage. If the woman declined to announce her consent, the witness was required to stop all proceedings, take her under his wing and report the matter to the magistrate. This is an indication that a customary marriage could also be annulled. Important to note that in KZN the Codes on Zulu law made it a criminal offence for a family head, or any other person to "coerce or attempt to coerce a girl into marriage"

The situation post 1994 is different. The legislative framework of the country gives some guidance, but there are some gaps in the legislation that are a point of concern. For e.g. the Natal codes protect women from this practice, but the Customary Marriages Act sanctions the marriage of a minor.

The following information on international and domestic law is extracted directly from a paper that was forwarded after the workshop took place.

According to international law a forced marriage including abduction for forced marriage and child marriage, is considered a form of ‘harmful traditional practice’; acknowledged as a form of violence against women, constituting a gender-based discrimination and a violation of the women’s human rights: and as a form of slavery generated by gender-based violence. The right of a woman to choose when, who and whether to marry at all is protected by a number of international human rights instruments, including those that South Africa has either ratified or acceded to. These conventions are:

- Article 16(2) of the Universal Declaration of Human Rights declares that marriages shall be entered into only with the free and full consent of the intending spouses.
- The Convention of the Consent to Marriages, Minimum Age for Marriage and the Registration of Marriages prohibits marriages that are not entered into with the full and free consent of both parties and requires that such consent should be expressed by the prospective spouses in person. This Convention obliges State parties to take legislative action to specify minimum age for marriage. Furthermore, it states that no marriage should be entered into by any person below the minimum age, except with where a competent authority has granted a dispensation as to age, for serious reasons, in the interests of the intending spouses.
- In 1954, the United Nations General Assembly adopted a resolution calling on all States to abolish customs and practices inconsistent with the Universal Declaration of Human Rights by ensuring a complete freedom in the choice of spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty and by establishing appropriate penalties where necessary.
- The International Covenant on Economic, Social and Cultural Rights (1966) states, in article 10(2), that marriage must be entered into with the full and free consent of the intending spouses. In its general comment no 14; the Committee on Economic, Social and Cultural Rights noted that States are under a specific legal obligation to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage.
- Article 16(1)(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (1979) is particularly relevant as it calls upon State parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular ensure on the basis of equality between men and women the same right to choose a spouse and to enter into a marriage with their free and full consent. Article 16(2) provides that the marriage of a child shall have no legal effect and all necessary action including legislation shall be taken to specify minimum age for marriage.

- The Committee on the Elimination of Discrimination Against Women recommends that the State parties take effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all forms of violence.
- The Convention on the Rights of the Child (1989) requires States parties to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. The Committee on the Rights of a Child urges States parties to develop and implement legislation aimed at changing the prevailing attitudes and address gender roles and stereotypes that contribute to harmful traditional practices, to protect adolescents from all harmful traditional practices, such as early marriage. It also urged States parties to increase the minimum age for marriage with or without consent to 18 year, for both girls and boys.
- The international legal framework sketched above has been augmented by regional legal framework. In the African Continent, the following instruments are particularly important:
 - The African Charter on the Rights and Welfare of the Child (1990) obliges all state parties to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child, as well as prohibit child marriage through legislation and take action to specify the minimum of marriage to be 18 years.
 - The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (2003) requires state parties to take all legislative and other measures to eliminate all forms of harmful practices which negatively affect human rights of women. The Protocol also requires state parties to enact appropriate national legislative measure to guarantee that no marriage takes place without consent of both parties and that the minimum age of marriage for women is 18 years.
 - The African Youth Charter (2006) also requires states parties to take all appropriate steps to eliminate harmful social and cultural practices that affect the dignity and welfare of youth.
 - South Africa has a duty to ensure that customary practices such as ukuthwala which result in forced marriages and child marriages are abolished and that laws are put in place to ensure access to justice for victims of these practices. Failure to do so is likely to be interpreted as a dereliction of the obligation imposed on South Africa by these international human rights instruments.

Domestic legal framework

(a) The Constitution

- South Africa is now a constitutional democracy; it is therefore imperative to review the practice of ukuthwala and all its consequences, in particular forced marriages and child marriages and the violence which has come to characterise

this practice, in the light of the Constitution as the supreme law of the Republic.

- On the one hand, the Constitution recognises that South Africa is not a homogenous society and guarantees to persons belonging to a cultural community the right to enjoy their culture and the right to participate in the cultural life of their choice. However, both these rights may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

On the other hand, it must be remembered that, apart from few exceptions imposed by their youth, every child has the same rights as his or her adult counterpart. Some of these rights are:

- The right to equality; which must be read in conjunction with the Promotion of Equality and Prevention of Unfair Discrimination Act which prohibits customary practices that impair the dignity of women and undermine the dignity and well-being of girl children and sexual harassment.
- The right to human dignity.
- The right to freedom and security of the person, which includes the right to be free from all forms of violence.
- The right to education.
- The rights of children in section 28, which includes the right to be protected from maltreatment, neglect, abuse and degradation; the right not to be required or permitted to perform work or provide services that are inappropriate for a person that child's age or place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development. Furthermore, and most importantly, the Constitution enjoins everyone to take into account the child's best interests in every matter involving a child. The Children's Act elaborates what the principle of the "best interests of the child" entails, by providing, for example, that in matters concerning a child, the child's age, maturity and stage of development; the need to protect a child from any physical or psychological harm must be taken into account.

The right to enjoy one's culture has been thrown into competition with other rights and inevitably this has led to conflict. The Constitution gives no indication whether other rights supersede cultural rights; the fundamental rights are not ranked. The SALRC has considered the interplay between individual rights and group rights in the Constitution, particularly as regards children, and concluded that:

"There can be no doubt that the South African Constitution recognises the importance of customary law to the majority of South Africans. The Commission also accepts the importance of customary law and practices for a very large portion of our population. However, the Commission notes that customary law is recognised as a system of law provided it operates within the broad principles of the Constitution of 1996. Given the fact that the best interest of the child

principle in section 28 is paramount and the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of cultural or religious group”.

The question therefore is whether practice of ukuthwala, as it is currently practiced, is at odds with any of the rights of the girl-child as contained in the Constitution. Secondly, if it is found that the practice violates the rights of the girl-child, the question arises whether such a violation is justifiable in terms of section 36 of the Constitution. Undoubtedly, the direct consequences of ukuthwala custom namely, forced marriages, child marriages, violence against women and young girls, and dropping out from school constitute gross violation of the rights of women and girl children referred to above. And, these violations can in no way be justified. The constitutional recognition of cultural diversity should not be used as an excuse for, or be seen as sanctioning, the violations of the rights and liberties of women.

(b) The law on customary marriages in South Africa

In the Republic, customary marriages are regulated by national legislation enacted after the advent of constitutional dispensation and by laws promulgated by the former Transkei, Bophuthatswana and Ciskei and KwaZulu and Natal. Whether or not the marriage laws enacted by these self-governing territories and independent states should continue to exist, despite the coming into operation of the Recognition of Customary Marriages Act, is an issue that is beyond the scope of this investigation and the SALRC does not wish to express any view in that regard. The Children’s Act, to the extent that it deals with the marriages entered into by children, will also be considered. There are, however, serious gaps, particularly in national legislation, which could exacerbate the practice of ukuthwala. These laws are considered below.

(c) The Recognition of Customary Marriages Act

Given that ukuthwala should eventually lead to the formation of a customary marriage, the essentials of a valid customary marriage as set out in the Recognition of Customary Marriages Act must be complied with.

This Act clearly states that the parties to a customary marriage must be above the age of 18, and that they must both consent to the proposed customary marriage. Furthermore, this Act contains a number of provisions aimed at making it possible for people under the age of 18 years conclude a valid customary marriage by approaching the Minister of Home Affairs. Most important, for our purpose, this Act also provides that if either of the prospective spouses is a “minor”, both his or her parents, or if he or she has no parents, his or her legal guardian must consent to the marriage. If, for whatever reason, the consent of the parents or legal guardian of a minor cannot be obtained, section 25 of the Marriage Act applies. It is trite that the power of approval given to the parents, guardians

and government officials must be exercised in the best interests of the child. Where a minor has entered into a marriage without consent as required by this Act, the parent, guardian or the minor him or herself can approach the court for the dissolution of the marriage. Such an application must be made before the minor attains majority and within six weeks of the date that the parent becomes aware of the existence of the marriage. Where such an application is made by the minor herself, it must be made before she turns 18 years or within three months thereafter.

In addition to the requirement of consent, this Act also contains a number of safeguards aimed at ensuring that the parties to customary marriages comply with the essentials set out in the Act. The Recognition of Customary Marriages Act requires customary marriages to be registered; stipulates that in the case of a minor, the marriage officer may accept birth certificate, identity document, or sworn statement as proof of that person's age; and that if there is uncertainty with regard to the age of a person who is a minor, the registering officer may submit the matter to the magistrate's court, which must then establish the age of the person concerned.

(d) The Children's Act

The provisions of the Recognition of Customary Marriages Act discussed above must be read in conjunction with the provisions of the Children's Act relating to marriages entered into by children.

First, this Act makes it clear that children, that is, persons below the age of 18 years, should not be subjected to social, cultural and religious practices which are detrimental to their well-being. Secondly, it provides that a child below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and that a child above minimum age may not be given out in marriage or engagement without his or her consent. Non-compliance with these provisions constitutes a criminal offence.

(e) The Codes of Zulu Law

In KwaZulu-Natal the KwaZulu Act on the Code of Zulu Law and Natal Code of Zulu Law (the Codes) are still in force and regulate customary and cognate unions. While, in terms of the Codes, the consent of the father or guardian of the intended wife is necessary if the wife is a minor, it is also imperative on the intended wife, irrespective of her age, to make a public declaration during the wedding ceremony that she is getting married of her own free will and consent.

The Codes require the official witness to publicly ask the intended wife, at the wedding ceremony, whether it is of her free will and consent that she is about to enter into a customary marriage with the intended husband. Should the woman decline to announce her consent, declare her dissent or otherwise appear to be unwilling to proceed with the intended marriage, the official must immediately stop the proceedings and, if necessary, take the woman into under his protection and report the matter to the Commissioner or Magistrate. Furthermore, the marriage may be annulled by the court for the lack of consent. It must be added that the Codes require all customary marriages to be registered. However, failure to register a customary marriage does not affect its validity.

Most importantly, the Codes make it a criminal offence for any family head or any person to coerce or attempt to coerce any girl or woman to enter into a marriage or cognate union against her will; to celebrate or permit the celebration of a customary marriage in the absence of an official witness or to celebrate a marriage that the official witness has stopped; and any misconduct or breach of duty by the official witness.

(f) Transkei Marriage Act

The Transkei Marriage Act merely requires the consent of every party to a customary marriage that has attained the age of twenty-one years or the consent of the father or guardian of the party to such marriage that has not attained the age of twenty-one years, for it to be a valid.

Gaps in the law

Although these Acts did not fossilize the practice of *ukuthwala* by codifying it, there are noteworthy lacunae in the laws. The first, and the most glaring, is the inconsistencies between the national legislation and the “provincial” legislation as regards the age of majority. As stated above, the SALRC expresses no opinion on whether it is constitutionally permissible to have national and provincial legislation regulating customary marriages.

The Codes are the only statutory enactments expressly making it an offence to coerce a person into a marriage and requiring a public declaration by the *intended wife* that she is entering into a marriage freely and with her consent. However, the protection afforded by the Codes is limited to women and young girls residing in the Province of KwaZulu-Natal. They do not address the plight of women and young girls threatened with *ukuthwala* in the rest of the Republic. Besides, the Codes have been repealed and these protective measures will cease to exist in that province when the repeal takes effect.

The Recognition of Customary Marriages Act complies with the international instruments requiring minimum age for marriage to be set at 18 years for both men and women. However, this Act does not prohibit marriages of people below the minimum age as required by the Convention on Consent to Marriage, Minimum Age for Marriage and Registration for Marriage. Instead, it gives parents or guardians the right to approve marriages of their “minor” children. Moreover, this Act is silent on whether the “minor” should give consent too. The use of the term “minor” in this Act is problematic. It will be remembered that this is a common-law concept. Under that system, the minimum age at which a valid marriage could be concluded by a minor is 14 years for boys and 12 years for girls. Therefore, it could be argued that when the parents give consent to marriages on behalf of their 12 year old girl children, they are acting within the framework of the law. As argued elsewhere in this report, girls who are married at a young age have no say in decisions concerning the choice of spouse and whether they wish to marry at all. This decision is usually made for them. A child is not capable of making an informed decision about marriage and may not fully understand the consequences of such a decision. In addition, this gender-based discrepancy in minimum ages of marriage for boys and girls provided for by this Act is inconsistent with the right to equality enshrined in the Constitution.

The laudable provisions of the Children's Act aimed at preventing forced marriages and child marriages have been rendered nugatory by the lack of specificity. The legislature, in an effort to ensure that these provisions applied to all the statutes regulating marriages in the Republic, decided not to specify the "minimum age" of marriage, which would have made it impossible for young children to contract a valid customary marriage, even with their consent or that of their parents. In the context of customary marriage, the provisions of the Children's Act referred to above should be interpreted to mean that a girl below the age of 12 years and a boy below the age of 14 cannot conclude a marriage at all; and that a girl above the age of 12 and a boy above the age of 14 should, in addition to the approval of a marriage by their parents, also consent to the proposed customary marriage. It has been argued above, that a child is incapable of making an informed decision about the marriage partner or about the implications of marriage itself; and that his or her consent or that made on his or her behalf should not be considered valid consent. The Children's Act effectively prohibits customary marriages of girl children below the age of 12 years, but sanctions the marriages of girl children above the age of 12 years but below the age of 18 years, provided they consent. This provision is problematic as it does not contemporaneously require the involvement of the official of the state or that such a marriage should be allowed if it would be in the interest of the girl child.

Protection afforded by criminal law

In addition to the offences referred to above, and depending on the circumstances of each case and the age of the victim; those involved in the planning and execution of *ukuthwala*, where the consent of the intended bride is lacking, could be prosecuted for offences such as being an accomplice to rape; common law abduction, kidnapping, assault, rape, statutory rape; compelling or causing a person 18 years or older to witness a sexual offence or compelling or causing a person 18 years or older to witness a sexual act; sexual exploitation of a child; and conspiring and inducing another person to commit an offence. This list is by no means exhaustive.

In KwaZulu-Natal, a person could also be charged under the Codes with seducing or abducting an unmarried girl; enticing a female from the control or custody of her husband, father, or guardian or having or attempting to have illicit intercourse with her; or harbouring without just or reasonable cause, the wife, daughter or ward of another person after a demand has been made for her return.

In the area formerly known as the Transkei, the Transkeian Penal Code of 1983 (the Code) is still in force and people who coerce others into marriages against their will under the pretext of *ukuthwala* could be charged with assault and kidnapping. The sexual offences created by the Code were repealed by the Justice Laws Rationalisation Act 18 of 1996.

The Chairperson thanked Advocate for his enlightening presentation. All the presentations made added to the elucidation of the customary practice. It is extremely comfortable to know that there is light at the end of the tunnel, however, there is still a number of processes that will have to be reviewed; legislation changed before we can ensure that children's rights especially the girl child is not violated.

Discussions based on presentations made:

Ms Janet du Preez facilitated questions and discussion. However, more statements and agreements with the opinions expressed in the papers were made rather than questions asked. Some of the comments made were as follows:

- Rational for the practice has changed and what is happening today is not the practice of ukuthwala. Therefore there is a need to define this custom and the word ukuthwala.
- Workshops should take place as a matter of urgency in the areas where this is still taking place.
- A holistic approach must be taken on all traditional customs, and not only on ukuthwala. There are many other customs that jeopardize the safety of women and children, and all these must be investigated.
- The customs must all be documented starting with the history explaining why the custom was initiated to avoid the constant changes and to provide background to the practice.
- Department of Social Development must approach Parliament for the sanctioning of marriages at only at 18 year and to amend laws that are not addressing rights in the new dispensation.
- Proposals were made on the development of a charter on culture rights. There is currently a charter on religious rights therefore this can be seen as a precedent to the development of a charter on cultural rights.

3.2 Session 2:

3.2.1 Understanding Ukuthwala: Research Perspective

Mr. Ramagadza - Department of Traditional Affairs

The presenter commenced his presentation by acknowledging the Deputy Chair of the National House of Traditional Leaders. He thanked the organizers for providing the opportunity for his Department of Traditional Affairs (DTA) to share the research conducted on ukuthwala. He continued that the impetus for the research was driven by the number of challenges that emanated from the management of the practice of Ukuthwala.

He informed the delegates that he had a presentation, but being fourth person to present, and in the interest of time, he will not repeat what other speakers have said about the practice, but rather concentrate on the role of tradition leaders in the prevention of the abuse this practice. He identified five critical roles that they must play in the areas where they have jurisdiction, these are:-

- Create awareness in the communities about the practice of ukuthwala to enable them to make a distinction of what is not the practice.
- Conduct vigorous public awareness campaigns especially in the affected areas.
- All government departments must establish partnerships with traditional leaders as they are in a better position to understand customs, traditions and culture at grass-root level. Traditional leaders are in a position to find better ways of dealing with the abuse of culture and customs.
- Make people aware of basic human rights when applying any custom.
- Awareness campaigns must be intensified and all institutions of government, traditional leadership and NGOs etc must educate communities on the respect their cultures and customs to prevent abuse thereof.
- Sensitize communities about punitive measures that will be applicable where ever a person breaks the law.
- The Houses of traditional leaders must provide leadership and support in this regard

He suggested the way forward in terms of the amendments of the legislation, and in terms of making the public aware of the right practice of ukuthwala.

- Amendments to the Recognition of the Customary Marriages Act to give effect to the essence of ukuthwala with its underlying principles and safeguards taking into consideration the following:
 - sources of marriage
 - kinds of customary marriages
 - the importance of ukulobola

During public campaigns he suggested that:

- All legislation that protects children must be explained during public hearings.
- Sexual Offences and Related Matters Act, 2007 must be effectively utilized for those who force themselves onto children under the pretext of a custom.
- Discourage the notion of ukuthwala as a source of economic stability or poverty alleviation at the expense of a child.

The speaker returned to the beginning of his presentation by explaining the role of the Department and the rationale for initiating the research. The original objective of the research was to find ways to regulate the customary practice. However, the need to understand the problem was greater, and there was an urgent need to bring to book those who were abusing young girls under the guise of the customary practice. In addition the need existed to show case the system in its truest form in order for people to understand it. He hopes that once people are empowered with the knowledge that if someone within

the community practiced the custom in a different manner, they could be challenged by the community. He expressed an opinion that by creating awareness of the right process, this would serve as one of the safeguards as identified by Advocate Mdumbe in his presentation.

He added that the purpose of the research is to stimulate discussion on the operation of the custom. This is in an effort to provide guidance to communities and authorities in order to curtail the practice of abuse, abduction and misuse of the practice by parents for income purposes.

He briefly shared the historical perspective that they obtained when conducting the research. According to the presenter ukuthwala was originally a source of marriage in most African communities. Many communities embraced this practice still up to today. There were safeguards put in place to ensure that the practice was not abused. One of these was that it is only applicable to people who are already in love, and furthermore it was a well organized action by the two lovers who voluntarily embark on it. This practice is definitely different from arranged marriage, elopement or ukudla isibaya. However, the practice of "true" ukuthwala is currently not understood and therefore practiced in a harmful way.

He acknowledged that the custom of ukuthwala cannot be above the law; it has to be regulated to ensure that the practice is in line with the current human rights / constitutional dispensation. However, he emphasized that nearly everybody within the black community were aware of this practice and each group called it something different, but it is essentially the same practice.

He made an excellent observation in terms of asking the question as to whether it is right to restrict the custom to one word or should there be an explanation that accompanies the word. His observation is that using the word ukuthwala creates problems as it literally means to 'carry away' this direct translation could be the problem.

He briefly explained how different communities still use the practice and how they apply the custom.

Ndebele

The two lovers will agree to get married and each will inform his/her elder brother or sister to report the matter to the parents. Parents from the boy side will start negotiations with the parents from the girl side. Once agreed on iLobolo and the function, the date and time will be set by the two lovers (in consultation with their parents).

The girls will be collected in the evening (she will voluntarily leave her home and go with the boy to his house). A messenger will be sent in the morning to the family to report that their child is safe with them. The response will be "she can be married (Muvunuliseni) and bring her back accompanied by six head of cattle".

The in-laws will indeed Vunulisa her through slaughtering a goat and as a proof to her family that she is now a wife, she will come with a front right limb, goat skin and a blown up gall sack (inyongo). She will be given a new name that removes her from the girls; a name will be a symbol of ushering her to the womanhood. She is now a fully married

woman. Any marriage in Ndebele that does not include ukuvunula is not regarded as marriage and therefore is not blessed.

Zulu

Ukuthwala is a custom known and practiced by the Zulu speaking people in an acceptable manner. This practice happens under a number of circumstances. Firstly, it happens when a girl is already staying with a boyfriend whereby two cows are sent to her parents. The first cow is called Inquthu and it is intended for the mother, and the other cow is Imvimba, and is intended to apologize for the act of "thwala". The goat is also handed over to the family to cleanse the ward (isigodi).

The second reason for ukuthwala is the peer pressure and stern competition for marriage amongst girls where lovers would agree that a girl be thwalad. The third reason is to seize a girl from her initial boyfriend and marry her through ukuthwala. Ukuthwala will happen after they have agreed (lovers) and the following day a messenger will be sent to indicate that their child is with them and he will enumerate the number of cows they are prepared to pay as ilobolo. The family may confirm the girls' free will on ukuthwala by sending two people to check with her. Should she say she was forced, she is immediately returned home and checked if no sexual penetration took place and a fine ranging from two to six head of cows will be paid by the boys family should such a violation be detected. The process of marriage starts when the girl indicates her free will to marry.

AmaXhosa (all Eastern Cape communities)

The custom is best described by Professors Koyane and Bekker in their article "Indomitable ukuthwala Custom". The custom is described as an arrangement between the two parties (boy and a girl). The authors describe the processes that are followed by the parties involved. The two must have been in love and ready to get married. The lady will display an attitude of resistance/unwillingness in order to preserve her family dignity. She will go freely when nobody is watching because she wants to get married. The family of the boy will send a messenger to the girls' family informing them that their daughter is with them. The verification of the girl's own wish to marry will be established and the marriage negotiations will start. It does not matter even when the boy does not have cattle to lobola.

AmaSwati

The two must be in love. The girl should be at a required age (marriageable) The boy will be invited to her house. She will spend the night there and in the early hours of the morning the old ladies will burst in the room and dress her with isidwaba on her loin and take her to the cattle byre. She will perform what is called ukumeketa. A goat will be slaughtered and all relevant rituals regarding marriage will be performed. The messenger is dispatched with the girl to the family of the girl that she is married. She will be returned to her in laws in few days with a knobkerrie properly cut to indicate the number of cows to be paid.

BaSotho

The custom has a different name -tjobedisa. The process is the same where the parties must be in love. The girl is not forced but an agreement is reached with her and on her own will she goes with the prospective husband.

The family of the prospective husband will send a messenger the following day to the parents informing them that their daughter is safe with them. The family of the girl might decide to send a messenger to check if she is there at her own will or forced. The beginning of the lobola/mahadi negotiation starts with the messenger having to inform the in-laws that their daughter is with them.

Pedi

The Pedi ethnic group calls the process Tjhabisa. It is the similar practice of ukuthwala or Tjhobediso. This is only applicable after a ritual called go o pelelwa has been performed. The girl must be in love with the boy and must have agreed that they are ready for marriage. A seago sametse will be asked from the family of the girl family of which after confirmation, Matshwara will be paid. The prospective son in-law will visit and be exposed to a lot of temptations in terms of beautiful ladies and if he succeeds, he will see his prospective wife only the following day. The elders will engage first and once an agreement is reached, a message called goshila letsoko will be sent and that is the confirmation of a relationship. Tjhabisa will be effected thereafter.

Hlomisa and ku Tlhakisa or ku tlhaka

The two are identical to tjobediso. The couple must have been in love and agreed to get married. A girl might go to the prospective husband after an arrangement by the two in order to start a marriage negotiation. A messenger will be sent once the Hlomisa or Tahisa or ku tlhaka has been affected. The negotiations for lobola then commence.

Mr. Ramagadza identified similarities between all the different ethnic groups' application of the custom:

- There must be spousal consent.
- The majority age as defined by culture and custom is over 18 years.
- There must be an agreement by the two parties concerned to be married under indigenous African law.
- The parents of the prospective bride must be informed immediately about this event following the operationalization of ukuthwala.
- Sexual intercourse during this period is forbidden pending the finalization of all the processes leading to the consummation of the marriage (the indigenous African law is the authority for this safeguard).
- The young men must inform the head of his family about his action and process (the head of the family has thus an obligation to put the prospective bride in the care of women of the family. Furthermore, the head of the family is obliged to inform the family of the prospective bride about the ukuthwala).

He then briefly outlined the key legislative frameworks that were considered during the research and the identified gaps in some of these legislative frameworks pertaining the practice of ukuthwala:-

- **Recognition of Customary Marriages Act, 1998**

- Does not provide for the sources of marriage in a customary way (ukuthwala, ukudla isibaya, elopement).
 - The Act does not define kinds of customary marriages like ukungena, marry a dead/late person etc.
 - No marriage to a child unless prior approved by the Minister of Social Development (this should not be allowed under any circumstances).
 - The Act does not talk about ilobola besides defining it.
 - Family is not mentioned which is the core in customary marriage
- **Children's Act, 2005**
 - Children's Act describe a child as any person who is eighteen years and lower.
 - However, a child may be married who is less than eighteen years if that is approved by the Minister of Social Development.
 - The culture of the Act prescribes that any person who wants or agree to a marriage must be of marriageable age (over 18 years).
 - No child may be forced or subjected to any custom against her/his will including ukuthwalwa

The research findings and recommendations in relation to ukuthwala amongst all cultures are in agreement that:

- No girl must go through this practice without her permission or understanding and readiness.
- No child under 18 years of age must be subjected to this practice.
- No school (basic education) going lady irrespective of age must be subjected to this practice.

In conclusion, he made a call to law enforcement agencies to take responsibility and ensure that perpetrators who are abusing this customary practice and are abducting children and women in the name of ukuthwala are brought to book.

3.2.2 Case Study on ukuthwala

Presented by Ms. M. T. Titus from Eastern Cape Department of Social Development and Special Programmes:

Ms. Titus made a presentation on how OR Tambo District manages the violations on childrens' rights as a direct consequence of the custom of ukuthwala. She explained that her presentation will outline the experiences of the children of Lusikisiki who were exposed to ukuthwala, and give a perspective as to how they managed the problem within the OR Tambo District.

She initiated her presentation with a definition of **ukuthwala**.

"Ukuthwala is a Xhosa word with various meanings. It means:

1. Putting on a head gear.
2. Bearing with.
3. Magic for wealth.
4. Carrying on head or shoulder.

She compared this definition with the one compiled by the Department of Justice and Constitutional Development. The department defined ukuthwala as “a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young women’s family to endorse marriage negotiations”.

In the ancient Africa, particularly among the Nguni ethnic group, ukuthwala was condoned as an abnormal path to marriage. It targeted certain girls or women of marriageable age, but it did not involve raping or having consensual sex with the girl until marriage requirement had been concluded.

She explained that the practice was used for a number of reasons e.g.

- To force the father of the girl to give consent for the marriage to take place.
- Hasten matters if the woman was already pregnant.
- To persuade the woman of the seriousness of the intent to marry her.
- To avoid the payment of Lobola.

She stated that, currently the custom is distorted and outdated, and more importantly it is a violation of the rights of children as enshrined in the Constitution and the Children’s Act. The original practice was never meant for minors, but now minors are exposed to abuse and violation. This practice infringes on the best interests of children.

She makes the assertion that the community of Kwa Cele in Lusikisiki where this aberration is currently taking place, appear not to perceive the wrongness of the custom. They appear to welcome and accept the practice as their culture. There was a belief that the practice would reduce the prevalence and the rate of HIV/AIDS. This belief was based on the fact that, if girls married at a young age the rate of infection would go down as she would stick to one partner in spite of the sexual behaviour of the husband. Another belief is that if the girl is taken back to school she will be taken by other boys or is being educated for other men. Furthermore it is believed that this practice would help reduce poverty as the parents of the abducted girl would receive cattle as dowry and that a girl would be forced to marry the father of her child.

There were people who with different opinions but were afraid of repercussions from the group of men with strong opinions about the practice. These men were unopposed.

She shared the background of how they become involved in the management of the problem. Apparently in 2009 a complaint was made that children were being abducted

into marriages with older men. These children were exposed to physical trauma as the beginning of the process saw them being chased by men on horseback and some beaten with a sjambok. These children became "brides" to these older men, and they would lose their virginity and innocence at tender ages of 12 years and older. Their educational opportunities were interrupted and some would even lose interest to proceed with schooling. Their total future hung in a balance, as the chances of future job opportunities were destroyed. Many of them did not complete the minimum schooling requirements. In addition the children were exposed and some were infected with HIV/AIDS as their husbands had sexual relations with other women.

This consequence of ukuthwala is that children have become psychologically and emotionally traumatised as the experiences changed their lives completely. The children lost self esteem and some became very depressed.

This was viewed in a serious light by the Executive Mayor, Social Development and Special Programmes and the then National Minister attached to the Presidency. They concluded that the practice is against the provision of the Constitution especially the Bill of Rights and Children's Act, as it exposes children to harmful practices rather than keeping them safe. They then mobilised different departments to assist with an intervention to remove the children from these unlawful marriages and harmful practice.

In her presentation she attached a number of case studies of children who had experienced this practice of ukuthwala. Those children who could be found, and were brought to the attention of the authorities and community leaders; they were removed from these men and brought to a safe haven called Palmerton Centre. This place of safety was started by the Executive Mayor of the O.R. Tambo District. Twelve children were placed in this centre. These case studies are attached as Annexure 2.

She explained the process of reclaiming the children who found themselves "twalad" and living as "brides". This process was to ensure that the children were reunified with their families, and reintegrated into the community:

In order to ensure that the intervention succeeds, a multi stake-holder approach was adopted. An institutional mechanism was formed comprising of the various government departments such Social Development and Special Programmes, Department of Justice, SAPS, NPA, Department of Health, Department of Education, OR Tambo District Municipality and Traditional Leaders and Faith Based Organisations. Each stakeholder had a core function to perform. A partnership with the local or district office and the Palmerton Methodist Mission was formed with the view of opening a place of care, for these children. The role of each department was clearly outlined.

- Social Development and Special Programmes was responsible for support, counselling and immediate needs of the children.
- SAPS were responsible for arresting the perpetrators of abduction, and removing them.
- Department of Justice and NPA were responsible for fast tracking sentencing.
- Department of Health was responsible for taking care of medical needs.
- Department of Education would safeguard the process of ensuring that the children are re-registered with schools.
- The Traditional Leaders would lead in terms of making sure the communities were properly guided in terms of cultural practices.
- The Faith Based Organisations provided shelter and spiritual support.

In addition the task team, led by Social Development and Special Programmes used all avenues open to them to sensitize the various communities about the practice, and through this process made attempts to curtail it. The celebration of International Day of Families used this opportunity to create awareness about the negative effects of ukuthwala. A door to door campaign led by SAPS was conducted to create awareness about the practice. Social Workers conducted family reunification programmes and also the reconciliation of families was done.

In order to limit the occurrence of this practice the Department of Social Development and Special Programmes initiated Kwa Cele Family Resource Centre as a resource to assist the children and their families to manage this custom. Community development programmes are also being investigated that will target the youth and the women in the community.

In addition, the Eastern Cape Department of Social Development has started with household profiling as a preventative measure to understand the multitude of problems that communities have to contend with, and to design interventions within the community that would help community member's deal with social problems. The results of community profiling identified a community that is dependent on grants. This implies that there is very little employment opportunities and development in these communities. In addition, poverty is rife, and the educational standards of the older generation are not very high. There are a number of social problems, such high drop-out rates, teenage pregnancies, high incidence of young mothers who are still at school, no role models and youth getting married at a young age to escape the poverty trap. The community also does not have basics services such as running water, sanitation and electricity. There is also a propensity for health problems to occur, as the drinking water is shared with cattle and community laundry. The risk of waterborne diseases is very high.

In conclusion she introduced the delegates to a young lady who is one of the survivors of this practice, and is a beneficiary of the services of Palmerton Centre.

3.2.3 Experience of a survivor:

"I am here to share with you what has happened to me and other young girls under the guise of the custom 'ukuthwala" We, who have survived are against this practice, and will fight it, as this practice has ruined our future. I have no problem in standing in front of you and sharing my experience, I wish the others were here too, to tell you what we have gone through. We just want this practice to stop!

I am 18 years old and I am back at school now because of the help we received from the centre in our community. I was forcibly married when I was 14 years old. In 2006 I was "twala'd" by a man born in 1961. I have a three year old child.

My "husband" kept me inside for months. I tried to ask him his age, he said that age should not be an issue between us - and the custom is not about age, it is about love. It was only when he left me in the house, and he went to Durban that I searched and found his clinic card. I was surprised to find out that he had TB, and on the card I also saw that he was born in 1961. I also found out that I was pregnant. He has not supported me or the child. When I was pregnant I looked for odd jobs and even after giving birth I worked in peoples, houses to feed myself and my child.

There were many times that I thought of committing suicide, but there is a world out there, and it is not over until God says it over. I am not fearful of talking. In Kwa Cele there is no-one that talks about the practice. If one talks about it, they may get hurt or even murdered, but I am free and will talk about it today, tomorrow and any other time. The men that do these things to us must be punished and we ask you to do something about this custom.

After the presentation there was not a dry eye in the house. Delegates had to take time to compose themselves in order for discussions to proceed.

The facilitator thanked both the Social Worker who had the courage to expose this aberration, and the survivor for her courage to stand up and tell her story. She also took the opportunity to apologise to the Survivor for the violation that she had experienced, and the fact that this progressive country with one of the best protective legislation for children in the world is unable to stop this practice and protect its children.

The facilitated a session for questions and comments followed.

- Have any men been prosecuted? How many cases have gone to court? What has happened to the children of the survivors? Have the children who remain in these homes been visited and counselled?
- There have been 9 arrests so far, and they are currently out on bail. Cases have not been finalised as yet.
- According to the representative from SAPS -he has records indicating that in the Eastern Cape 11 cases are pending. One suspect has absconded; therefore there is a warrant of arrest out for him. A 12th suspect received a 10 year sentence. Another two suspects each received a three year suspended sentence for 5 years as long as they do not commit a similar crime.

However, what was interesting to note was that one of the accused was a 45 year old women. It is extremely disturbing that women get involved in this criminal activity. The NPA reported that women sometimes act as an accomplice and assist with the abduction of young girls. Parents too are complicit because they benefit from the transaction. This touches on the social problem of poverty, as it contributes to the perpetuation of the harmful practice of ukuthwala, because some families view the payment of lobola as a way of survival for the whole family. This does not in anyway condone the practice! There must be other ways that families can survive without sacrificing one of their children!

- An observation was made during the presentation on the case study and the research paper presented by Mr. Ramakgadza that there appears to be another custom at play. He is of the opinion that the current practice of ukuthwala, is not practiced with love, yet all the indigenous practices - identify 'love' as being one of the key elements. There is therefore the need to develop a common understanding of the true practice in order to curb the prevailing trends.
- A comment was made that the custom is practiced differently by different groups, however, from the information shared by different speakers, an element that is recurring is that the custom was not practiced on young children. Even during the initiation processes, the young boys are taught to respect young girls and scholars and those who are church goers. However, it can be categorically stated that the practice is not the same as that which was practiced in the previous generation. Those who kidnap or abduct young girls against their will should be prosecuted.
- Some questions posed were "Can the practice of ukuthwala really be classified as a form of marriage if there is no consent?"

The facilitator thanked those that raised the questions and suggested that additional debate and dialogue should continue in the commissions.

3.2.4 Role of Traditional Leaders in the promotion and protection of children:

Nkosi D. Ndabankulu - Member of the National House of Tradition Leaders', and Chief of Flagstaff community in Eastern Cape.

He opened his presentation by indicating that he will be extremely brief, as the speaker for the Department of Traditional Affairs had presented their view. Furthermore, all the traditional leaders have endorsed the discussion document.

However, he made a few comments in term of comparing the area that he comes from with that of Kwa Cele, where the erroneous practice of ukuthwala is rife. The Flagstaff area has not had an experience of the practice in its current format. His opinion is that the perpetrators of this practice in Kwa Cele are common criminals, who rape and abduct the young girls. He however raised a concern that some of these crimes can be attributed to the negative teachings that take place in the initiation schools in Pondoland. He suggests that research be conducted to ascertain whether there is a link between the initiation schools and some of the killings that have been taking place in Pondoland. According to the Chief the young boys are made to believe that there is witchcraft and the older generation are witches as a result they become targets of witchcraft killings.

He mentioned that Traditional Leaders are governed by the Traditional Leadership Framework Act 41 of 2003. However, all provinces have enacted their own provincial laws. He shared a concern that there are many traditional leaders who are not aware of these Acts and therefore don't apply them in the communities under their jurisdiction.

He attributes some of the problems experienced by traditional leaders at the door of the National Department of Traditional Affairs. He alleges that traditional leaders are not being capacitated to do their work. They need extra training as many of them are illiterate. In addition the Department does not make sufficient funds available to them in order for them to be more visible in the different communities. He appreciated efforts made by the National Prosecuting Authority (NPA) who has trained Traditional Leaders in the Domestic Violence Act.

3.3 Session 3

3.3.1 Commissions.

The delegates were divided into the following 3 commissions. Each commission had a set of questions that they had to interrogate. These are attached as Annexure 3

- **Commission 1:** Legislative and policy framework in the care and protection of children - All delegates who were officials of the different departments were assigned to this group. As the number of delegates for this commission was high, the group was divided into two groups.
- **Commission 2:** Ukuthwala Practice and the role of traditional leaders - All the traditional leaders were assigned to this commission.
- **Commission 3:** Causes and impact of ukuthwala practice including preventative measures. - This commissioned hosted all the partners from civil society.

Each commission was assigned a facilitator, a scribe and a rapporteur. In addition to their brief, the crosscutting issues of roles and responsibilities, preventative measures and intersectoral collaboration in relation to the care and protection of children from the abuse of the cultural practice of ukuthwala had to be discussed.

Commissions were not requested to provide feedback on Day one of the workshop, but were expected to continue with deliberations until teatime on Day Two..

3.4 Feedback – Day 2

Commission 1 - Group 1 - Legislative and policy framework in the care and protection of children;

Legislation	Section/Provision	Effectiveness	Challenges to implementation
Constitution	Section 28	If the Bill of Rights is infringed courts can be asked to intervene	
Children's Act 38/2005	Section 12	Lacks specificity	Prohibits but does not make it an offence/ not effective in curbing the scourge of forced marriages
Equality Act	Section 8(d) and 11	Does not define the conducts - harassment and detrimental	No sanctions outlined for the perpetrator
Customary Marriages Act 1998	Sect 3	Informs on the age of marriage -above 18 years	Need for harmonization of marriageable age in all the Acts Does not require registration of a CM.
Sexual Offences Act 2007	Termination of pregnancy/	Does not deal with all perpetrators/ accomplices of rape and abduction	
Marriage Act 25/61 Transkei Marriages Act Children's Act KZN codes	Sections on age	Not currently effective as they are not harmonised on age requirements.	

Challenges:

1. There is a need for age harmonization within all the Acts.
2. There is an absence of a comprehensive legislation that deals with ukuthwala in all its manifestation and consequences.
3. The Customary Marriages Act does not require the registration of a marriage, and this failure to register a marriage does not affect the validity of that marriage. There is no data base or record of how many marriages have taken place, whether these were preceded by ukuthwala, neither is it known how many children were forced into marriages.
4. There is a lack of mainstreaming of the women's and girl's issues.
5. Lack of coordination between all role-players.
6. Insufficient awareness and education and reporting.
7. Section 110 of Children's Act is not well known and therefore not being applied.
8. Training and capacity building of all people involved must take place.
9. Shortage of resources
10. Failure of taking responsibility by authorities.
11. No proper consultation of relevant stakeholders.
12. Prioritization of cases is not normally done in courts.
13. Shortage of court infrastructure resulting in delays in the finalization of cases.
14. Ukuthwala as a traditional custom is used as a mitigating factor for minimum sentencing.

Stakeholders Roles and Responsibilities:

The group identified the following roles for the Departments concerned:

- DTA - Training of all traditional leaders, monitoring and implementation
- Civil Society - Protecting, reporting and advocacy.
- DWCPWD - Finalise Gender Equality Policy, mainstreaming women empowerment.
- NPA - Prosecution, fast tracking of cases, capacity building for prosecutors.
- SAPS - Investigation and arrest of perpetrators.
- DoJCD - Prioritization of children cases and investigation of specialised courts.
- Department of Health - Health education.
- DoE - Life skills, integration of children back to school.
- Home Affairs - Documentation.
- CoGTA - Alignment and integration of policies and plans.
- DSD - Policy development and monitoring and evaluation.
- Department of Communication - Information, education and awareness; management of perception and Political buy-in.

Preventative Measures:

1. Section 110 must be included in all public awareness campaigns section, as well as highlight harmful practices especially during the child protection week and 16 days of Activism.

2. In terms of capacity, the costing of the Child Abuse, neglect and exploitation strategy (CANE) process must include the management of ukuthwala.

Some Comments and questions to the Commission:

- Is there a restitution process for these children?
- How do we begin to co-ordinate and collaborate on these issues?
- A delegate challenged the comment that Section 12 lacks specificity. She argues that it must be read in conjunction with 305 1(a) and Section 15.
- The legislation must be read in its totality.
- Section 10 is an important section, but it is not always implemented in practice.
- The role of the Department of Rural development and Land Affairs is critical in ensuring rights based approach and educating communities.

Commission 2 - Traditional Leaders

Ukuthwala practice and the role of traditional leaders

- **Definition**
“agreement/consent between two lovers to get married due to certain reasons known by them and will involve their parents at a later stage (lobola and cultural rituals).”
- **Eligible person’s participating in ukuthwala practice**
Two consenting lovers and their family members, usually the elders in the family, but may be uncles and aunts. Parents play a critical role. In some areas it is still practiced accordingly and in others not.
- **Causes for the abuse of ukuthwala practice.**
 - Lack of moral and ubuntu/botho.
 - Misconceptions around HIV/AIDS (myths).
 - Poverty
 - Taking advantage of existing legislation gaps.
- **Roles of traditional leaders in the protection of ukuthwala practice.**
 - Partnership with relevant government departments, other stakeholders and Chapter 9 institutions for the purpose of educating communities on children’s right and mobilizing resources or victims.
 - School curriculum must include cultural practice to enable children to differentiate between good and bad practice.
 - Traditional Leaders to act as an intermediary between two families involved in ukuthwala.
 - Traditional leaders to have power in terms of legislation to prosecute perpetrators.
 - Educate communities.

- **Support to victims abduction.**
 - Refer victims to relevant stakeholders for counselling and monitor progress.
 - Traditional leaders to be equipped with basic counselling skills.
 - Ensure that victims and parents are protected from communities and perpetrators.

- **Challenges experienced by traditional leaders**
 - Reluctance of parents and victims to report cases of abduction.
 - Lack of social infrastructure in rural communities (recreational facilities).
 - Traditional leaders are unable to enforce laws due to (outstanding traditional courts bill) gaps in the legislation.
 - Not all provinces are present in this workshop. Therefore they have missed an opportunity to understand the practice in its truest form. The NHTL will engage with provincial houses for further inputs and secure a meeting with Department of Traditional Affairs and Department of Social Development.

- **Preventatives measures**
 - Partnership between all sectors, community based organisation, not for profit organisations, government departments, Chapter 9 institutions municipalities (ward committees) media and traditional practitioners.

- **Monitoring and evaluation**
 - Use the policy as a monitoring tool.
 - By-laws for traditional councils.
 - Government departments and traditional leaders should work hand in hand to ensure that the programmes are implemented.

- **Enforcement mechanism**
 - To educate and workshop parties and judiciary system about cultural policies.
 - Gaps on the legislation to be filled to give traditional leaders power to deal with the perpetrators.
 - Traditional leadership to have powers to deal with the perpetrators of this practice.
 - To check if all or some cultural practices are practiced accordingly.

Comments on the Feedback from the Commission:

- The House of Traditional leaders' urges people especially departments to take cognisance of Section 19 and 20 of Traditional Leaders Act - which clearly provides for Departments to allocate roles to traditional leaders.

- The role of the Department for Rural Development must not be underplayed.
- DSD and Traditional leaders must meet to debate the age for initiation, as in some practices children as young as 12 are taken for circumcision and this is placed under religious reason. The Act says 16 years and over.

When dealing with cultural and religious rights there is a need to understand first before regulating. Need to identify what is a religious practice versus a cultural practice.

Commission 3. Civil Society

The commissioned presented their feedback by answering the questions posed in the brief. Their first question was;

“What is the understanding of children’s right and the best interest of the child?”

Their response in terms of children’s right was that there was a need to take children’s rights seriously and involve children in decision-making and in conversations about them.

“What will help the child to attain a better life in future?”

Their response was that the principle of “best interests of the child” must be maintained at all times, and whenever a decision about a child is made. In addition, responsibilities must be included with children’s rights. They made the analogy of adults who at times forget their rights and responsibilities. They emphasized that to be a citizen is a right; however, there are behaviours that are expected to accompany these rights as citizens. In the same way parents are expected to act in a responsible manner, and care and protect their children.

However they made the point that people in general are resistant to children’s rights. This resistance may be due to them (adults) being personally disempowered, or that they did not have choices. Whatever the cause of resistance, there is a need to ensure that children’s rights are upheld. They suggested that those who experience this resistance must be capacitated about children’s rights in the context of human rights, as children’s rights emanate from human rights. There is a need to convince everyone to promote everybody’s rights, including children’s rights to reduce the resistance.

The third question was to classify the type of abuse towards children in relation to ukuthwala: They identified the following:

- Sexual abuse. Section 12(2) of the Children’s Act makes provision for the right to bodily and psychological integrity; therefore the practice of ukuthwala violates this provision.
- The education opportunities of the child are curtailed;
- Their development opportunities such as the right to play (recreation); the choice of association; participation in decision-making and economic opportunities are decreased. A child is expected to become an adult, whilst still being a child. This

practice decreases the period of their childhood. They are catapulted into adulthood prematurely.

- The children experience degradation, abuse and neglect; In addition their dignity is compromised, they cannot practice choices, and experience emotional abuse and trauma.
- They made the point that the victim is not the only one who experiences these abuses. The child's child will also be exposed to a host of secondary abuse issues, such as removing a child from a mother who is unable to care for the child in the most appropriate manner. This is no fault of the mother as she is a child herself.
- The practice promotes a cycle of abuse.

In terms of the impact of this type of abuse on the lives of children - they were of the opinion that the child's education is curtailed, they are disturbed psychologically, their wellbeing is affected and their rights will not be realised.

- **What are the roles and responsibilities of various stakeholders?**

Children themselves

- Peer support - children must watch out for each other in order to protect each other.
- Children themselves must dictate which issues are supposed to be reported with the support of Life Orientation teachers.
- Child structures must be used as a platform to raise issues.
- Children and youth dialogues must be organised in order to give the children a voice. They will be in a position to communicate on how they are affected by various issues. These conversations will raise awareness of children's rights.
- Children can offer peer to peer support, counselling and psychosocial support to other children. This will however need an investment to develop the children's capabilities to do this.
- The utilisation of the Child led child protection committees must be reviewed with the aim of institutionalising a platform for children.

However, they cautioned that the adults' role in making this happen will have to be discussed and clearly spelt out. It should be made clear that their role is to facilitate and not take over.

Families

- Primary role of the family is to protect, care and support to children. First point of call to protect children.
- They have to explain the various cultural practises to the children.
- They have a responsibility to report the cases of ukuthwala.
- They must support the child victims as a part of the journey to recovery.

Community

- The adage that “it takes a village to raise a child” must be vigorously endorsed as this increases the safety and protection net.
- Can institute community level agreement on the different cultural practices; in other words, the community must act as custodians as to which practices will be allowed.
- Communities need to know that they are collectively accountable for the children.

Schools

- Diversify the role of school governing body to look beyond the running of the school but also include child care and protection whilst children are in their care.
- Schools must be made accessible to other stakeholders who have taken on the role to care and protect children.
- Teachers to be aware of the practises and look out for the signs of abuse and report any cases noted. This must be a mandatory process that is underpinned by a directive from DoE.

Traditional leaders

- Traditional Leaders are custodians of the communities and as such are the key stakeholders in this whole process.
- Traditional leaders need to take an active role in addressing the issue of ukuthwala.
- The role of traditional leaders versus that of the municipalities must be strengthened in order to give them the power to act in such cases. Traditional leaders are the custodian of the communities. So their significance and role should be clearly understood.
- Traditional leaders should use the systems in place that protect children.
- There is a need to define which cases are to be dealt with by traditional leadership and which must be directly referred to the police.
- They need to ensure that there is a common understanding of the different customs and traditions.
- Traditional leaders should have regular forums/ conversations with their communities.
- All cultural practices and customs must be documented with the support from organs of civil society, political leaders and religious leaders.

Political leaders

- They should provide political will and support, and act as the advocates of children when faced with these atrocities.
- There must be clear demarcation of roles and responsibilities when an intervention becomes necessary. Political leaders tend to become involved in the operations, whereas their role should be to unblock blockages to

ensure that the child gets the best possible assistance, and that the perpetrator is sanctioned.

- They should recognise that children are a priority and thus develop a clear agenda for children. There should be a process that allows them to elevate children's issues on any agenda.
- Oversee collaboration with different stakeholders in communities.
- Educate parent on the children's rights and the Children's Act.
- Conduct empowerment workshops on the rights and responsibilities of parents.

Religious leaders

- Held accountable for children.
- Report abuse.
- Educate children through churches.
- Church buildings should be community church where children can find assistance.

Civil society

- Organs of civil society have a watchdog role.
- They should identify problems and share information with other stakeholders.
- Should acknowledge that this practice is happening and rally around and protect the victim as best as they can until the authorities are informed. There is a current lack of acknowledgement by some that the practice is happening, which places the child in a much more vulnerable position.
- They should collect more evidence i.e. do action research in communities to identify the scope and reach of the problem. (Child-line is doing some research).
- They must act as advocates for children's rights, especially with Traditional Leaders. They must inform that this is not culture, and therefore is a criminal offence and the perpetrators will be prosecuted. Should organs of civil society not take up this challenge, this practice can become widespread and spread to other provinces as well.
- They must act as the voice of the people, and partner communities in the fight against the practice. Communities should be encouraged to take responsibility or ownership. How to encourage that collaboration.

The challenge is however, lack of collaboration at grass-root level.

SAPS

- Strengthen child protection committees.
- Child protection committees must involve children,
- They must be sensitive to issues that involve children.
- Child friendly.

Chapter 9 Institution

- Must become more visible in raising all issues that affect vulnerable groups.
- Engage in community awareness raising on children's rights.
- Educate and share information with families.

In addition to responding to the questions, the commission identified a process for intervention for prevention, care and protection of children against exposure to further occurrences of harmful practices. These can also be seen as recommendation on the way forward.

Process:

- **Step 1** Understand the issue, how it has been historically and traditionally, how it is practiced in its current form, and determine the correct manner to practice the issue.
- **Step 2** Document to conserve and preserve the cultural custom and practises.
- **Step 3** Harmonise legislation of the land with cultural custom and practises, and if there is no fit, develop provisions to circumvent the occurrence of the practice.
- **Step 4** Develop and put in place monitoring and evaluation systems. There is a need for government to implement the legislation that is in place, therefore the monitoring and evaluation system must also be aimed at monitoring the application of legislation.
- **Step 5** Training and awareness raising on the customs to all stakeholders.
- **Step 6** Awareness raising to various communities.
- **Intersectoral, coordinative and collaborative systems**
 - Strengthen children's desks.
 - Strengthen coordination of stakeholders who are working in communities.
 - Strengthen the caring schools network.
 - Strengthen the role of children in all intersectoral collaboration.
 - Task teams must be established to deal specifically with issues of harmful cultural practices against children.
 - Best practises from other cultures or countries must be researched for replication in South Africa.
- **Monitoring and evaluation mechanisms**
 - Each stakeholder should monitor, evaluate and document cases.
 - Strengthen the various structures that work with children which already have a monitoring and evaluation system in place.
 - Local forums and national forums on child protection must report on issues of ukuthwala.
 - Make use of existing task team working on ukuthwala.

- **Enforcement mechanisms to deal with perpetrators?**
 - Who is the perpetrator? The family of the groom to be? The girl's family? The ones who thwala the child? There is no common understanding of who is the perpetrator, therefore there is a need to define who the perpetrator is.
 - They posed the question as to who is responsible to deal with the cases of ukuthwala? This question will have to be clarified in order for perpetrators to be sanctioned.

Commission 3 - Questions and Statements on the Report back

- One of the issues that this workshop has highlighted is the number of organs of civil society, state departments and political actors that are involved with children. There is a need to collaborate and support one another and not continuously reinvent the wheel. There are established structures that can be utilised to drive issues.
- In the way forward there is a need to have dialogues for children in order to give them the platform to participate. If there is a commitment to the Children's Act, then all people will be cognisant of Section 10.
- The information gap must be closed at all levels.
- It is said that if you "Educate a girl child - educate a nation", therefore we must ensure that children stay at school as long as they can.
- Introduce and strengthen circle of support - between family and community
- Roles and responsibilities are clear, but collaboration remains an issue. Collaboration becomes easier if there are mechanisms or vehicles established for this purpose.
- Abduction in the name of ukuthwala is corrupt and criminal and must be severely punished.

3.5 WAY FORWARD

Ms. Neliswa Cekiso from the Department of Social Development summarised the way forward, and delivered the vote of thanks. In terms of the way forward she identified a number of interventions that would need to be put into place to ensure that children's rights are no longer violated.

- Adopt a holistic approach to all cultural customs and practices to ensure that they are aligned to legislation protecting children.
- Document all cultural practices in the purest or truest form, but ukuthwala should be prioritised.
- Define terminology such as "minor", concept of ukuthwala and "forced marriages".
- Workshops must be conducted in areas where ukuthwala is practiced in the distorted manner. This should be a priority.
- The role of different departments must be clarified; however there will be a need to find a systematic way to collaborate on issues pertaining to protection of children.

- The principle of “Child participation” must be upheld in all matters that concern children.
 - The Children’s Act must be reviewed to make it specific to harmful practices. The suggestion is that Section 305 must be reviewed first followed by Section 12. Review related legislation such as Sexual Offences Act, Marriages Act and Equality Act.
 - The marriageable age in all legislation must be harmonized.
 - A request must be forwarded to Parliament to make the marriageable age 18 years.
 - Departments must be approached to play a role in the dissemination of information with regard to Ukuthwala.
 - The role of Traditional leaders is paramount in the protection of children, in educating communities, information dissemination and in reporting.
 - Departments must orientate themselves with the provisions of the Traditional Leadership Act (specifically Sections 19 and 20) and find ways of allocating roles and responsibilities to Traditional Leaders.
 - Capacity building programmes must be developed for all professionals and Traditional Leaders in order to increase their case management competencies.
 - Education and awareness raising programmes for the communities on the care and protection of children must be instituted.
 - Close the information gap between all levels of government and communities
- She concluded the workshop proceedings by thanking all the speakers for their rich input, and for creating a better understanding of the practice of ukuthwala. In addition, all participants were thanked for their valuable contributions and for their time spent in pursuance of a solution to this practice.

4 RECOMMENDATIONS

The following recommendations have been extracted from the presentations, questions raised, feedback from commissions and comments made at the workshop. It must be noted that some of these recommendation will need the involvement of the Department of Social Development; while others need an intersectoral response, and others, specific departmental response. It should be noted that these recommendations are not in an order of priority.

1. Develop an intersectoral strategy for the management of ukuthwala.
2. Review the Children’s Act in order to make it applicable to manage the interplay between customary law and all cultural practices. Ensure that there are provisions in the Act that make it a criminal offence.
3. In collaboration with Department of Justice and Constitutional Development, the Department of Social Development must approach Parliament with the request to make the marriage age 18 years and older with no exceptions, whilst awaiting the amendments to all the other Acts that provide for different marriageable ages.
4. Child participation at workshops that deal with issue that affect them must become the norm rather than the exception.
5. Department of Social Development must develop a policy directive to facilitate the management of this practice at grass-root level. In addition a capacity building programme must be undertaken to ensure that all people working with children

understand how to manage this custom in practice. This policy directive must be forwarded to the Cluster for dissemination to all departments who have a role to play in the care and protection of children.

6. Preventative measures such as public awareness campaigns, dialogues and debates on cultural practices must be developed to halt the practice.
7. Interventions must be developed that will strengthen the family system. Strengthening of families and ensuring that there are community based supportive services is key to the care and protection of children.
8. Develop a communication strategy on the issue of ukuthwala that includes the government's view of the practice, the legal position and the sanctions. This communication strategy must be widely circulated starting in Parliament.
9. Department of Traditional Affairs must undertake research into all cultural practices; a comparison will have to be made with the laws of the land to determine their constitutionality. Those that pass the test must be documented for purposes of having an institutional memory and short circuit the propensity of cultural practices being distorted in practice. This is to help conserve and preserve indigenous practices in their original intentions.
10. Intersectoral workshops of similar nature to the current workshop, must take place in the areas where this problem is rife. These workshops should also be take place in provinces.
11. Research must be undertaken into the link between the teachings of the initiation schools and the abuse of this practice especially in Pondoland.
12. The role of traditional leaders must be strengthened and they must be empowered to deal with customs that infringe on the rights of all people especially children.
13. All children who have been exposed to this practice must be engaged in a process of healing.

It must be noted that these recommendations are not exhaustive, but if acted on, will go a long way in curtailing the practice, if not eradicating the harmful aspects of it.

5 CONCLUSION

All the presentations pointed to one conclusion, namely that the practice of ukuthwala violates the rights of a child. There was no argument presented for this practice to continue in its present form, rather to the contrary, the abuse of this practice was condemned by all.

The challenge is however that the laws of the land are not harmonised to ensure that the practice in its current format is firstly eradicated and secondly that there are criminal sanctions in place for the violation. The traditional intention of the practice did not violate the rights of children; however, the manner in which it is currently practiced exposes children to harmful practices. Communities are not equipped to manage these situations; neither do they have the information and knowledge of the 'true' practice. In addition, many cultural practices were never documented and therefore the preserving of these customs has been through word of mouth, and the 'true' intentions are distorted.

This workshop however started the process of dialogue and debate, and gave a strong indication through the case study in Eastern Cape that if all departments work together, through the process of collaboration, interventions are possible and criminals can be sanctioned.

It is therefore imperative that the two studies presently being conducted, and some of the recommendations made, be pursued in order to ensure an intersectoral response to manage this practice.

Annexure 1 – Agenda 23-24 August 2011

Annexure 2 – Case Studies of Children in Eastern Cape

Annexure 3 – Questions for Commissions.

