



LAWYERS FOR  
HUMAN RIGHTS



CENTRE FOR  
CHILD LAW

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Help for Children in Need

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**SUBMISSIONS ON THE PUBLICATION OF THE WHITE PAPER ON CITIZENSHIP,  
IMMIGRATION AND REFUGEE PROTECTION: TOWARDS A COMPLETE OVERHAUL OF  
THE MIGRATION SYSTEM IN SOUTH AFRICA.**

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Submitted by:

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## **INTRODUCTION**

1. The National Inter-Agency Working Group (NIAWG) on Unaccompanied and Separated Migrant Children (USMC) welcomes the opportunity to provide comments and recommendations in response to the Department of Home Affairs (“DHA”) White Paper on Citizenship, Immigration and Refugee Protection (“White Paper”), as announced on 10 November 2023.
2. The NIAWG is a 13 member, commitment based committee, comprised of organisations who work on issues related to children affected by migration and displacement, including and not limited to unaccompanied and separated migrant children as well as stateless children.
3. Our key objectives include:
  - 2.1. providing technical assistance and support to the South African government, specifically the directorate leading the provincial and national steering committees on unaccompanied and separated migrant children; as well as refugee and asylum seeking children;
  - 2.2. compiling joint reviews/submissions and recommendations on policies and legislation under review in South Africa, focusing on identifying and addressing gaps in the protection of the rights of migrant children, including other vulnerable children;
  - 2.3. ensuring child participation and/or self-representation of migrant children, their caregivers, and host communities in issues that affect them;
  - 2.4. initiating and participating in joint advocacy for the care, protection, and recognition of migrant children in South Africa. Our emphasis is on equal humanitarian support for all migrants facing similar set of challenges in South Africa and devise realistic ways of achieving this and advise agencies accordingly;
  - 2.5. collaborating on interventions and monitoring of alternative care places and collaboration on improving the quality and access of care and protection for vulnerable migrant children in South Africa;
  - 2.6. coordinating assistance, referral platforms, and support on the basis of need, irrespective of location, for comprehensive coverage of services to maximise the quality of services rendered to migrants and vulnerable migrant children; and
  - 2.7. improving the flow of information to and from migrants, through supporting development of clear messaging and enhanced means of mass communication including strengthening the flow of information to government, from and between non-governmental agencies and to donors to ensure transparency and accountability.
4. The NIAWG is comprised of the following civil society organisations and UN agencies:
  - United Nations High Commissioner for Refugees (UNHCR)

- International Organization for Migration (IOM)
  - UNICEF
  - Save the children South Africa (SCSA)
  - Lawyers for Human Rights (LHR)
  - Consortium of Refugee and Migrants in South Africa (CoRMSA)
  - Terre Des Hommes- Germany
  - Three2Six
  - International Redcross Society
  - Centre for Child Law (CCL)
  - Sophiatown Community Psychological Services
  - South African Human Rights Commission
  - Regional Psycho-Social Support Initiative
5. Our mandate is to define and implement policies and standards of protection and assistance for vulnerable migrant children and their families. The NIAWG coordinates the implementation of activities under its framework among all actors including national and international non-governmental organizations, relevant government bodies, as well as UN agencies. The NIAWG aims to ensure that assistance is provided in a harmonized way, using resources in the most efficient manner.

#### **GENERAL COMMENTS:**

6. The White Paper proposes several critical changes in the law including:
- a. South Africa's withdrawal from key international and regional treaties concerning refugees
  - b. South Africa's review of pathways to citizenship (\*especially Section 4(3) citizenship applications)
  - c. South Africa's overhaul of the birth registration law

These changes pose significant risks to children and youth, impacting their rights to documentation, education, health, and employment, and potentially exacerbating statelessness in South Africa. However, the White Paper is silent on its impact on children and youth.

7. The DHA's public participation process has failed to include children and youth. It is imperative to note that this is a violation of two cardinal principles of children's rights i.e. the **best interests** of the child and **child participation** as children have the right to actively participate in decisions, processes, programmes, and policies that affect their lives. We urge DHA to involve these groups in the public participation process before proceeding any further with this policy document.
8. The White Paper's vague and broad language, coupled with its lack of child-friendliness, impedes meaningful engagement. We recommend DHA to ensure its communications in this regard are more accessible to children and youth.

9. The White Paper overlooks the role of the Department of Social Development as the lead directorate on unaccompanied and separated migrant children and the need for enhanced inter-departmental collaboration for effective and child rights-centered migration management.
10. From the outset, we recommend a complete recall of the White Paper to address these and other concerns highlighted below. This is by no means a comprehensive response to the White Paper given the time limitations. The DHA published the White Paper in November 2023, with an initial deadline of 19 January 2024. While the DHA extended this deadline to 31 January 2024, we submit that this is not a reasonable time allocation for proper public participation due to December office-closures.

## **REFUGEE PROTECTION**

11. The White Paper proposes South Africa's withdrawal from the 1951 UN Refugee Convention (and Protocol) and the 1969 OAU Convention, with a view to re-accede with reservations and exceptions to restrict children's rights to health care and education. This poses significant risks for children on the move, and violates South Africa's own Constitution and its international obligations under the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the International Covenant on Economic, Social, and Cultural Rights. Furthermore, if withdrawal from the 1951 UN Refugee Convention occurs, we are concerned about the lack of timeline regarding the claimed re-accession and the lack of details concerning the interim measures DHA will implement to ensure that children whose applications are still pending in the asylum system, those that are born in the intervening period and need to apply for family joinder, or those who will need to renew their asylum visas or refugee status remain protected and documented.
12. The White Paper proposes the adoption of the "first safe country principle" and further states that "cessation of refugee status" provisions "must be used much more frequently in order to lessen the burden that comes with recognition of refugees". This reflects South Africa's intention to limit the number of refugees by denying entry to those who have travelled through another country deemed "safe" by the DHA. However, this approach risks violating the **principle of non-refoulement**, a critical obligation under international law, which prohibits a state from deporting or returning refugees, including children, to the country they fled due to persecution. It is worth noting that adopting the "first safe country principle" does not absolve South Africa from ensuring the protection of refugees and the rights they are guaranteed under international law.<sup>12</sup> The White Paper does not address the criteria to be used in deeming a third country "safe" nor does it outline the procedural guarantees DHA will establish to prevent refoulement in respect of children. The [Constitutional Court](#) has recently affirmed the critical importance of non-refoulement in international law, emphasising that deporting a child back to a country they fled not only endangers them but also contravenes their best interests.
13. Recommendations:

- We strongly oppose the proposed withdrawal from the 1951 UN Refugee Convention and the restriction of children’s rights to education and health care. We further call on the DHA, together with relevant stakeholders such as the Department of Basic Education and the Department of Health, to implement immigration firewalls in schools and health care facilities.
- We advise against the proposed adoption of the “first safe country principle” and the intended frequent use of cessation provisions. DHA needs to establish robust child protection mechanisms at points of entry for children on the move. Some countries may be deemed safe in general but are not safe for specific groups (e.g. based on sexual orientation). The FSC principle constitutes indirect refoulement which is against international law and poses specific concerns with regards to children.
- We recommend that DHA establish child-friendly and special procedures under the asylum system. These procedures should include the expedition of applications relating to children, child participation, and respect for the child’s individuality, cultural and social identity. We further recommend capacity building and sensitivity for all DHA officials in respect of child care and protection.

#### **CITIZENSHIP, BIRTH REGISTRATION, AND STATELESSNESS**

14. The White Paper proposes repealing the Citizenship Act and “reviewing” the pathways to citizenship, specifically section 4(3) of the Citizenship Act. DHA claims that the current citizenship law makes it easy for refugees and migrants to gain citizenship, thus necessitating “more stringent criteria for granting citizenship”. Sections 2(2), 2(3), and 4(3) of the Citizenship Act are crucial legal safeguards against statelessness for children born in South Africa to refugee, migrant, or stateless parents. Imposing stricter criteria for citizenship will increase the risk of statelessness, particularly among vulnerable groups like unaccompanied, separated, orphaned, and abandoned children.
15. The White Paper further suggests repealing the Birth and Deaths Registration Act (2018). It contends that an interpretation of Section 28 of the Constitution - “every child has a right to a name and a nationality” – that encompasses all children born in South Africa, regardless of their parent’s legal status, “stretches the meaning...too wide”. This stance directly contradicts the Constitutional Court, as well as previous recommendations made to South Africa by the UN Human Rights Council, the UN Committee on the Rights of the Child, and the African Committee of Experts on the Rights and Welfare of the Child. It thwarts ambitions to achieve universal birth registration as children born in South Africa, whether South African or non-South African, already face significant barriers to birth registration for various reasons beyond their control. DHA recently disclosed in parliament that more than 250,000 children under the age of 15 are undocumented, and researchers estimate this number to be at least double that<sup>1</sup>. The White Paper fails to address these issues, instead making proposals that will exacerbate statelessness, entrench exclusion, and

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<sup>1</sup> <https://www.ioi.co.za/weekend-argus/news/more-than-a-quarter-of-a-million-children-under-the-age-of-15-are-undocumented-in-south-africa-5a643dab-1cbc-4dfc-b3e1-b32180bf7329>

perpetuate the marginalisation of vulnerable children, including South African children.

16. Recommendations:

- We recommend that DHA retains the inclusive provisions in the Citizenship Act, particularly those that prevent childhood statelessness i.e. sections 2(2), 2(3) and 4(3). DHA must comply with the court orders directing it to promulgate regulations to these sections in order to operationalise them and provide clarity on the various citizenship processes.
- We urge DHA to establish a Statelessness and Nationality Determination Procedure to identify and protect stateless children, and to facilitate their access to nationality. This procedure must be aligned with constitutional prescripts and child rights principles.
- We demand that DHA urgently addresses persistent barriers to birth registration faced by children in South Africa. This includes;
  - waiving or subsidising DNA costs for indigent families, implementing court judgments that have declared the refusal to issue a child a birth certificate because their parent(s) is undocumented or has a blocked ID as unconstitutional
  - ensuring universal access to birth registration for all children including those living in rural or remote areas, enhancing birth registration systems within health care facilities including fast-tracking the verification of asylum visas or refugee status;
  - strengthening birth registration procedures and protocols to ensure all children are registered promptly after birth, conduct more frequent outreach campaigns in communities;
  - collaborating with stakeholder departments such as DBE, DoH, and DSD to identify all undocumented children and implement measures to ensure their documentation;
  - promoting and ensuring administrative justice in all processes, including issuing written reasons for any adverse decisions

## **IMMIGRATION**

17. The White Paper neglects to address a crucial gap in the law for documenting unaccompanied migrant children in alternative care who are ineligible for citizenship or refugee status. South Africa has been urged by civil society and treaty bodies to consider a special dispensation for this category of children, a need that remains unaddressed.

18. Recommendations:

- We recommend that DHA establish a special dispensation for unaccompanied and separated migrant children living in South Africa, ensuring they have access to basic rights and services .
- We further recommend the introduction of different visa and permit categories to enable people to get documented. DHA's migration management needs to

respond to specific context of South Africa so that people do not fall through the cracks, especially children.

## **CONCLUSION**

In conclusion, the NIAWG urges DHA to reconsider the proposed changes in the White Paper.