



LAWYERS FOR  
HUMAN RIGHTS

terre des hommes  
Help for Children in Need



***Two steps backwards: The Right to Education for undocumented children, including both South African and migrant children, within the context of the White Paper on Citizenship, Immigration, and Refugee Protection***

***By Thandeka Chauke, Abigail Dawson and Tshegofatso Mothapo***

*Introduction*

“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”

South Africa’s history of inequality and prejudice continues to disenfranchise refugee, asylum seeking as well as stateless children’s right to education. This is reflected in the Department of Home Affairs’ (DHA) [White Paper on Citizenship, Immigration, and Refugee Protection](#) (White Paper) published on 10 December 2023 for public comment. The DHA, in this White Paper proposes repealing the Births and Deaths Registration Act, the Citizenship Act and the Refugees Act to consolidate them into a single legislation. Notably, the DHA suggests that South Africa must review and/or withdraw from the 1951 Convention and the 1967 Protocol and reaccede with reservations restricting socio-economic rights , including access to education.

On the morning of 16th June 1976, thousands of students from secondary schools in Soweto gathered to march in protest against the compulsory introduction of Afrikaans as a language of instruction. However, they were met along the way by a heavy police force that used tear gas and live ammunition to try to disperse them. Chaos ensued when the police opened fire, resulting in the deaths of many students, including Hastings Ndlovu and Hector Pieterse. To commemorate this event, in 1991, the Assembly of Heads of State and Government of the OAU (now the African Union) designated the 16th June as the Day of the African Child (DAC) in memory of the 1976 Soweto Uprising in South Africa.

The DAC serves as a reminder of the ongoing challenges faced by African children, emphasising the critical need to promote and protect their rights. Each year, in consultation with children, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) selects a theme for the DAC that is adopted by all Member States. This year, the theme is ‘*Education for all children in Africa: the time is now*, aligning with the African Union’s (AU) 2024 theme, “*Educate an African fit for the 21st Century: Building resilient education systems for increased access to inclusive, lifelong, quality, and relevant learning in Africa.*” The AU’s focus on education follows the assessment of the implementation of SDG4 and the AU Continental Education Strategy

for Africa (CESA) which revealed that despite the various achievements, African States are experiencing increasing rates of out-of-school children, lack of quality education, and higher teacher-to-student ratios.

In South Africa, while the right to education is constitutionally guaranteed, undocumented children, including both South African and migrant children, continue to be left behind. Schools persist in demanding valid documentation, refusing to enroll undocumented learners, and denying matriculants the opportunity to sit for examinations or withholding their examination results. It is particularly outrageous that NGOs must send countless letters to schools at the start of each year explaining that documentation and immigration status cannot be used as a barrier to education, yet these calls often go unheeded. Adding to these challenges are the unbearable costs of fees charged by fee-paying public schools, primarily located in impoverished communities where parents struggle to afford monthly payments. Inevitably schools are unable to maintain infrastructure, leading to adverse learning environments for many black learners who are both migrant and South Africans alike. This has led to mental harm for both parents and learners. It is for these reasons that the White Paper at its core represents a regressive step for South Africa by proposing to further limit the right to education for asylum seeking, refugee and stateless migrant learners.

In commemoration of Youth Month which fittingly includes *Day of the African Child* and *World Refugee Day*; *Sophiatown Psychological Services*, *Terre des Hommes*, *Lawyers for Human Rights* and *Three2Six* denounce the DHA's White Paper and its curtailment of socio-economic rights, particularly the right to education. This is especially concerning considering that apartheid's discriminatory policies resulted in long-term adverse challenges for many children in South Africa -often [black children from low-income communities and deprived contexts](#). And for the last 30 years, the Department of Basic Education has had to redouble efforts to address curriculum changes, infrastructural development to ensure that no child is left behind. As reiterated in numerous court precedents, "in our constitutional dispensation basic education is a pivot of transformation, serving as it does to '[redress the entrenched inequalities caused by apartheid](#)'". The White Paper threatens this fundamental right.

### *Legal Framework*

In South Africa, the right to education is guaranteed by section 29 of the Constitution: "Everyone has the right to a basic education, including adult basic education." South Africa has ratified several treaties upholding this right, such as the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child. The Refugees Convention requires that refugees receive the same treatment as nationals concerning elementary education. However, the DHA's White Paper aims to restrict this provision.

Despite court rulings emphasizing the right to education for all children, the DHA seeks to limit this right for refugees and asylum seekers. In [Minister of Home Affairs v Watchenuka](#), the court affirmed that education is essential to human dignity and must be upheld, especially for children seeking asylum. The Constitutional Court, in [Centre for Child Law v Minister of Basic Education](#), held that the right to basic education is unqualified and applies to all children, regardless of documentation. The court stressed that *immigration and labor laws should not infringe on children's fundamental rights*.

The Committee on the Rights of the Child, in its [2024 Concluding Observations](#), urged South Africa to eliminate discrimination and improve access to quality education for disadvantaged children, including those with disabilities, migrants, asylum seekers, and those without IDs. The same was reiterated by the ACEWRC in their [Concluding Observations](#), noted with concern the *inadequate number of schools and infrastructure, high level of school absenteeism, the poor capacity of school regulating bodies, the high cost of education and shortage of materials*. The Committee urged upon the Department of Education to allocate a sufficient budget for the education sector, construction of schools and basic infrastructure in the rural areas.

What can be gleaned from the above is that the White Paper threatens the progress that South Africa has achieved towards the rights of access to education for all children including migrant children. Its regressive nature eliminates all efforts made legislatively and otherwise to realize the right to education for all. By introducing reservations, the White paper threatens the four cardinal principles of child protection: the right to survival and development, the best interests of the child, non-discrimination and child participation. Lastly there was no consultation or consideration given to children and youth themselves. This omission is a significant oversight, as children and youth's perspectives and experiences are crucial in shaping policies that affect them directly. By neglecting to involve children in the process, the White Paper disregards their right to participate in decisions that impact their lives, undermining the principles of democracy and human rights. Any law concerns an alleged failure by Parliament to comply with its constitutional obligations to facilitate public involvement, is in breach of sections [59\(1\)\(a\)](#) and [72\(1\)\(a\)](#) of the Constitution. The White Paper also fails dismally in that it contradicts constitutionally entrenched rights (section 28, 29) and any law that is inconsistent with the Constitution risks being declared invalid by the courts, to the extent of its inconsistency. It is on this basis that the organizations in commemoration of Youth Day, DAC and World Refugee Day, call on the DHA to withdraw the White Paper and rather strengthen the existing current frameworks and implementation mechanisms, truly ensuring that “no child is left behind”.

For further comment or information please contact:

**Tshegofatso Mothapo- Legal and Advocacy Officer**

Sophiatown Community Psychological Services  
advocacy@sophiatowncounselling.co.za

**Thandeka Chauke- Head: Statelessness Unit**

Lawyers for Human Rights  
thandekac@lhr.org.za