THE IMMIGRATION BILL
(GENERAL NOTICE, GOVERNMENT GAZETTE 20889)

Submission to the Department of Home Affairs, February 2000

In a written submission to the Home Affairs Portfolio Committee ("the Portfolio Committee) dated January 2000, the South African Human Rights Commission ("the SAHRC") commented on the White Paper on International Immigration ("the White Paper"). While the SAHRC welcomed the move toward legislative reform with regard to International Migration, it raised a number of concerns about inconsistencies contained in the White Paper. In particular, the SAHRC submitted detailed comments on the following points to the Portfolio Committee:

1. **The need to manage, rather control migration against the background of South Africa's international and regional obligations;**
2. **The fight against xenophobia and racism;**
3. **The application of the Bill of Rights to non-citizens;**
4. **The proposed appeal procedure;**
5. **Places of detention; and**
6. **The risk of corruption.**

The recommendations contained in the White Paper have largely been incorporated into the Immigration Bill ("the Bill"), which was published for public comment by the Minister of Home Affairs on 15 February 2000 (General Notice 621 of 2000, Government Gazette number 20889). However, at the same time, the Portfolio Committee has scheduled public hearings on the White Paper during the course of May 2000. It would appear, therefore, that the Department of Home Affairs is proceeding with the Bill at the same time as the Portfolio Committee is still debating the very foundations upon which the Bill has been drafted. This state of affairs had led to uncertainty amongst the public, members of civil society as well as Chapter IV institutions such as the SAHRC as to the status of the Bill and the White Paper, the consideration given to earlier submissions on the White Paper, the purpose of present submissions on the Bill, the apparent lack of communication and co-ordination of legislative procedures between the Department and the Portfolio Committee and, most disturbingly, the commitment of both these organs of state to well recognised and established law making practice in South Africa. The SAHRC is most concerned by these developments and call on the

Department and the Portfolio Committee to clarify their respective positions regarding the status of the Bill and White Paper and to make clear their intentions regarding the further legislative process to be adopted with regard to the passage of this statute.

It would appear that the drafters of the Bill have ignored most of the recommendations of the SAHRC and adopted others in one form or another. However, the policies contained in the White Paper have largely been incorporated wholesale into the Bill without significant amendment. Below follows a review of the Bill with an emphasis on the provisions dealing with the points raised by the SAHRC in its submission and certain additional issues arising from the Bill.

1. Management of international migration

1.1 At the outset, the SAHRC emphasises that it does not support the overall premise of the Bill and our comments below should not be interpreted as indicative of our support of the Bill's **control-orientated approach to migration**. This approach becomes particularly clear when regard is had to the position of migrant workers.

1.2 In its submission on the White Paper, the SAHRC emphasised the vulnerable position of migrant workers, and proposed a more humane, **management-oriented approach to migration policy**. Specifically, the SAHRC proposed that development policies take into account South Africa's regional obligations and the implementation of bilateral agreements between South Africa and its neighbours, whereby migrant workers would be subject to the same labour standards, benefits and wage agreements as South African citizens. The SAHRC proposed that South Africa's borders should be opened to the SADC member states in a responsible manner.

1.3 The Bill deals with migration by making provision for a number of temporary residence permits to be issued to appropriate foreigners. None of the permits specifically deals with the position of migrant workers but the proposed solution put forward in the White Paper has been followed. The Bill does not follow the recommendations of the SAHRC and adopts the solution proposed by the White Paper, namely to criminalise the position of most migrant workers.

1.4 The permits provided for are as follows:

1.4.1 Crewman permit;
1.4.2 Medical permit (holder may not work);
1.4.3 Relatives Permit;
1.4.4 Work permit;
1.4.5 Retired person's permit;
1.4.6 Exceptional skill or qualifications permit;
1.4.7 Intra-company transfer permit;
1.4.8 Corporate permit;

1.4.9 Exchange permit (only applicable to persons under 25 years of age);
1.4.10 Asylum; and
1.4.11 Cross-border and transit passes.

1.5 The solution offered by the White Paper and the Bill is to accommodate farm and mining migrant workers under the corporate permit (White Paper, Chapter 7, paragraph 7 and Section 16 of the Bill). Upon application, domestic and foreign businesses intending to relocate human resources to South Africa could receive permission to import a certain number of people. Such business would be handling the visas as well as the work permits directly on the basis of a delegation from the Immigration Service (the "IS"). In order to receive the delegation a corporation will have to meet certain requirements laid down by Section 16(2) of the Bill, namely:

1.5.1 The establishment of training programmes for citizens and residents and/or financial contributions to a training fund established for the development of the employment capacity of citizens and residents;
1.5.2 Certification by a chartered accountant that the terms and conditions of the foreigners will not be inferior to those in the market place and compliance with collective bargaining agreements and other standards, if any;
1.5.3 An undertaking by the corporation that it will take measures to ensure that all foreigners employed comply with the provisions of the Act and the corporate permit and that the corporation will immediately notify the IS if it has reason to believe that a foreigner employee is no longer in compliance with the Act and/or the permit;
1.5.4 Financial guarantees to defray deportation expenses;
1.5.5 Corroborated representations by the corporation in respect of the need to employ foreigners, their job descriptions, the number of citizens or residents employed, their positions and other matters.

1.6 While the corporate permit may be appropriate in the case of large mining houses or commercial farms, it is clear that medium and small businesses without the resources and infra-structure to administer and implement the requirements of Section 16 will be left out in the cold and will be unable to employ migrant workers.

1.7 The approach adopted appears to be that foreign migrant labour is a necessary evil that South Africa will have to abide in the short to medium term. However, domestic and foreign businesses should be encouraged to reduce their reliance on foreign employment with the long-term goal in mind, namely to eliminate dependency of South African and foreign businesses on foreign employees. This goal appears clearly from the following words in the White Paper:

"Through negotiations between the I.S. and mining houses, it should become possible to begin reducing such dependency so that more South Africans could take up mining jobs."
(Chapter 7, paragraph 7.2)

1.8 In the medium term, however, the drafters acknowledge our dependency on foreign migrant workers. In terms of Section 16(5) of the Bill certain industries may be exempted from some of the conditions precedent for corporate permits. Moreover, Subsection (5)(c) provides for the Minister of Labour to apply the subsection in respect of foreigners required for seasonal or temporary peak period employment and Section 16(5) confers on the Minister the power to enter into agreements with one or more foreign states and set as a condition of a corporate permit that its holder:

1.8.1 employs foreigners partially, mainly or wholly from such foreign countries; and
1.8.2 That a portion of the salaries of such foreigners be remitted to such foreign countries.

1.9 The provisions of Section 16(5) would appear to be in compliance with the proposals of the SAHRC as set out in paragraph 1.1 above. However, seen against the background of the policy contained in the White Paper, which seeks to reduce our dependency on foreign employment, the practice is not encouraged and through the imposition of onerous conditions, such as the compulsory remittance of a portion of the foreigner's salary to his or her country of origin, the prohibitive cost of this option may act as a deterrent against employing foreign labour.

1.10 It is also not clear how the provisions of Section 16(5) are to be reconciled with Section 7. Treaty permits (as provided for by Section 7 of the Bill) relate to persons who are admitted into South Africa under government-to-government exchange programmes and in fulfilment of international agreements. It will therefore be possible to admit a migrant worker on the strength of a bilateral agreement between South Africa and one of its neighbours, on a treaty permit.

1.11 Treaty permits are issued by the IS or the Department of Foreign Affairs. Section 16(5), on the other hand, which also deals with employment arising out of international agreements, confers on the delegated corporation the power to issue visas and work permits. It would seem that treaty permits extend beyond the limited application of Section 16(5) corporate permits and that the drafters intended for migrant workers, working in South African on the strength of a bilateral agreement between South Africa and their home countries, to be dealt with in terms of Section 16. However, the Bill gives no clarity in this regard.

1.12 A migrant worker would, of course, be able to apply for a work permit as stipulated in Section 17 of the Bill. However, the Section imposes a heavy onus on both prospective employers and migrant employees, rendering the granting of a work permit to a migrant worker not employed in terms of a corporate permit a theoretical possibility only. For example, the prospective employer will have to obtain certification from the Department of Labour that the terms and conditions of employment of the migrant worker will not be inferior to those prevailing in the market for citizens and residents, taking into account applicable collective bargaining agreements and other applicable standards. Furthermore, the employer will have to pay into the training fund an amount as a ratio of the foreigner's remuneration. These conditions are onerous and will directly impact on the ability of midsize to small businesses to acquire much needed skills in sectors where local expertise is lacking. Instead of encouraging the acquisition of these skilled persons, the Bill effectively entrench the monopoly of large corporations in certain sectors at the expense of smaller businesses.

1.13 At first blush, Section 19 appears to provide some assistance to migrant workers from neighbouring countries who may apply for "cross border passes". However, Section 19(1) makes it clear that such a pass will have the same effect as a multiple admission **general permit**, which prohibits its holder from conducting any work (Section 4(2)).

1.14 A general concern that we raise in the context of work permits, but which equally applies to other provisions dealing with the IS, is the capacity and infrastructural problems facing migration authorities in South Africa at present. The establishment of the IS can only be supported to the extent that it will be adequately empowered to perform its functions and exercise its powers effectively. For example, the creation of a training fund, the administration of payments into the Fund, monitoring of training programmes and the determination of exemptions in terms of Section 12(4) can only hope to achieve the goal of capacity building within the South African labour market if the IS has adequate resources, institutional infrastructure and capacity.

1.15 In conclusion it appears that the temporary residence chapter of the Bill is merely a restatement of Chapter 7, paragraph 17.1 of the White Paper which is based on the premise that South Africa is not in a position to address and alter conditions in the rest of the continent and therefore we are not in a position to develop a migration policy to deal with migrant workers. We call on the Department and the Portfolio Committee to revisit the premise of the Bill and White Paper in order to investigate and adopt a management-oriented approach towards migration. The aforesaid management approach will not only be in line with

South Africa's historical regional obligations, specifically towards SADC countries, but will also be more realistic and achievable in terms of present resources and constraints suffered by all law enforcement agencies.

2. Xenophobia and racism

2.1 **"The White Paper fails to address the issue of xenophobia and how it interacts with migration policy, in any substance"**
(SAHRC submission to Portfolio Committee, p.6: January 2000)

2.2 The drafters of the Bill have unfortunately not heeded the aforesaid caution, taken from the SAHRC's submission to the Home Affairs Portfolio Committee.

2.3 Section 29(1) of the Bill lists the obligations of the IS, which include the prevention and deterrence of xenophobia within the IS, the government, all organs of state and at community level. Moreover, one of the functions of the IS according to subsection (2) is to educate communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees, and to conduct other activities to prevent xenophobia.

2.4 Laudable as these objectives and functions are, however, the Bill pays lip service only to the eradication of xenophobia and racism, as is apparent from certain draconian and xenophobic provisions of the Bill:

2.4.1 The Bill contains no substantive provisions to address xenophobia and racism other than the vague statements set out above;

2.4.2 The policy background of the Bill, as set out in paragraph 1 above, implicitly enforces the public perception that foreigners, particularly from Africa, "steal jobs" from South Africans, are criminals and only deplete our already exhausted natural and other resources. As long as the government persists with a migration policy to the effect that South Africa's sovereignty is under threat and that it must isolate itself from its SADC neighbours in order to protect its citizens and resources from exploitation by outsiders, xenophobia will be encouraged rather that eradicated;

2.4.3 In its original submission, the SAHRC raised the concern that "community based policing will result in a form of institutionalised racism, reminiscent of apartheid" (Page 12, SAHRC submission, January 2000). The Bill has not deviated from the White Paper in this regard. To the contrary, the Bill dedicates an entire chapter to the duties of various natural and legal persons to police the enforcement of its provisions. A number of legal presumptions are also created that shift the

burden of proof from the state to the accused person, in certain cases;

2.4.4 For example, in terms of Section 41 all employers shall make good faith efforts to ascertain that he or she employs no illegal foreigners and to ascertain the status of all his or her employees. If it is proven that an illegal foreigner was employed, it is presumed that the employer knew that the person was an illegal foreigner, unless the employer proves differently. Furthermore, if an illegal foreigner is found on any premises where a business is conducted, it shall be presumed that such foreigner was employed by the person who has control over such premises, unless that person proves the contrary. Upon conviction in terms of these provisions, a person may by jailed for 18 months or fined R75 000,00;

2.4.5 Learning institutions are under a similar obligation to ascertain the status of all persons employed by, or associated with the institution. Section 42(2) provides that where an illegal foreigner is found on any premises, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by the person who has control over such premises, unless the contrary is proven. A conviction in terms of Section 42(2) also carries the penalty of 18-month incarceration or a fine of R75 000,00;

2.4.6 Places offering overnight accommodation are under an obligation to make a good faith effort to identify the status of its guests and must report to the IS any failure to effect identification (Section 43(2)). In the event that an illegal foreigner is found on such premises it shall be presumed that the foreigner was harboured by the person who has control over such premises, unless the contrary is proven. Penalties are the same as in the above three cases;

2.4.7 The aforesaid provisions are aimed at galvanising South African citizens and residents into action in order to remove illegal foreigners from the country. When these detailed and rather daunting duties and obligations are weighed against the meagre anti-xenophobia policy statements contained in the Bill, it becomes clear that the Bill sanction rather than eradicate xenophobia at all levels in South Africa;

2.4.8 Moreover, the legal presumptions the Bill creates may be unconstitutional and contrary to the right to remain silent and not to testify during proceedings, as guaranteed by Section 35(3)(h) of the Constitution;

2.4.9 Of even greater concern is the proposed requirement that any person shall identify him or herself on demand. However, Section 44 goes even further to provide that, when requested to do so by an IS or police officer, the person is not able to satisfy the officer that he or she is entitled to be present in South Africa, such officer may take that person into custody without a warrant and detain him or her until that person's *prima facie* status or citizenship has been ascertained. ;

2.4.10 Section 48 of the Bill goes further to state that any institutions or persons other than organs of state may be required by regulations to endeavour to ascertain the status of any person with whom the enter into commercial transactions and shall report illegal foreigners to the IS;

2.5 In response to these draconian provisions we can only repeat and endorse the SAHRC's earlier comments on this aspect of the White Paper:

> **"This policy is firmly based on the apartheid policy where people were constantly harassed to assert their right to be in South Africa. Because of the nature of xenophobia in South Africa, as practised by both citizens and authorities, the largest number of people falling foul of this enforcement policy will be black South Africans. In particular, people who are darker skinned will more often be 'accused' of being illegal immigrants and therefore subject to institutionalised harassment. To enact legislation which institutionalises this policy will fall foul of the Constitution and be open to Constitutional challenge."**

2.6 The aforesaid provisions should be revisited and amended to comply with the Constitution.

3. Application of the Bill of Rights to non-citizens

3.1 In its submission to the Portfolio Committee the SAHRC called for migration policy to affirm that all of the rights contained in the Bill of Rights, with the exception of political rights, the right relating to freedom of trade, occupation and profession, apply to all persons who are affected by government action, including non-citizens.

3.2 The reasons for this call by the SAHRC are clear: any immigration policy should be informed by a basic respect for human rights and the state should be compelled to guarantee the human rights of all those within its territorial domain.

3.3 Unfortunately, the drafters of the Bill have not expressly followed this recommendation. In the Chapter dealing with the IS the following is listed as one of the objectives of the IS:

> **"29(1) In the administration of the Act, the Service shall pursue the following objectives**
> **(a) promote a human-rights based culture in both government and civil society in respect of migration control;**

(b) …"

3.4 Later on in the same Section, the IS is given the function of educating communities and organs of civil society on the rights of foreigners, illegal foreigners and refugees and conduct other activities to prevent xenophobia (Section 29(2)(d)).

3.5 Whilst the affirmations are welcomed it is regrettable that they were relegated to the Chapter dealing with the IS and that they were not afforded the weight due to them by inclusion of an opening "objectives" section of the Bill. In so doing, the drafters would have gone a long way towards addressing the perception that the Bill is in the first place an "anti-migrants" statute. For example, extending the affirmation of the rights of permanent residents, as contained in Section 20(1), to all foreigners would be an encouraging step towards addressing xenophobia in South Africa. It is trusted that the drafters will heed this call and affect amendments to the Bill to ensure that the rights of all persons within the South African territory are affirmed in the appropriate manner.

4. Proposed appeal procedure

4.1 Section 34 of the Bill creates adjudication and review procedures in respect of determinations adversely affecting a person. The procedures provided for are as follows:

4.1.1 Before making a determination the IS should notify the affected person of the contemplated decision and afford the person at least 10 days to make representations, whereafter the decision will become effective unless it is appealed;

4.1.2 A person may appeal an effective decision to the Managing Director of the IS within 20 days of being notified thereof. The Managing Director may reverse or modify the decision within 10 days, **failing which the decision shall be deemed to have been confirmed**;

4.1.3 If the affected person is not satisfied with the outcome, he or she may appeal to the Board of the IS within 20 days of the modification or confirmation of the decision by the Managing Director. The Board may reverse or modify the decision within 20 days, **failing which the decision shall be deemed to have been confirmed and final**, provided that in **exceptional circumstances** or **when the person stands to be deported** as consequence of such decision:

4.1.3.1 The Board may extend the deadline; and

4.1.3.2 **At the request of the IS, the Board may request such person to post a bond to defray deportation costs, if applicable**;

4.1.4 Within 20 days of the decision by the Board, the person may appeal to an Immigration Court, which may suspend, reverse or modify the decision.

4.2 In its submission to the Portfolio Committee in January 2000, the SAHRC expressed the concern that requiring a bond would be iniquitous and undermine the right to just administrative action, as guaranteed by the Bill of Rights. The Bill has taken heed of these comments to the extent that a bond may only be required in exceptional circumstances or when the person stands to be deported and the IS has requested that a bond be obtained.

4.3 However, the underlying concern, raised by the SAHRC remains; a person who stands to be deported is unlikely to be have access to funds, and therefore, to make the right to appeal conditional upon the posting of a bond, may be discriminatory and in violation of Section 34 of the Bill of Rights, which guarantees **everyone's** right to access to courts.

4.4 Moreover, the SAHRC does not support the "deeming" or "default confirmation" provisions contained in Sections 34(2)(a) and (b) of the Bill and submit that these may be unconstitutional. According to these sections a decision that has been appealed may be confirmed or modified by either the Managing Director or the Board of the IS within 10 and 20 days respectively (depending on who considers the appeal), failing which the decision shall be deemed to have been confirmed. However, by virtue of their origins a large number of foreigners are not proficient in English or any of South Africa's other official languages and may not understand a written of verbal explanatory notice of the above. A more likely scenario is that the vast majority of appellants will regard the adverse determination to have been suspended pending the outcome of their appeal and may therefore be unaware that their appeal has failed and that the adverse decision has been confirmed. We respectfully submit that all appellants in terms of Sections 34(2)(a) and (b) have the right to be notified of the outcome of their appeal, regardless of whether it was successful or not. Failure to notify the appellant of the confirmation of an adverse determination will result in the majority of appellants being unaware that their appeals have failed and will consequently deprive them of the right to a higher appeal to the Board or a Court, as the case may. We call on the drafters to delete the deeming provisions from these subsections and to provide that the relevant appeal authority must "confirm modify or reverse" the decision and advise the appellant of the outcome of the appeal within 10 days after the confirmation, modification or reversal of the decision.

5. Places of detention

5.1 In its submission, the SAHRC called for measures to mandate control and monitoring of places of detention to be included in the Bill. Unfortunately, the Bill contains no such measures.

5.2 The need for monitoring measures where highlighted again recently by the sweep raids carried out in Johannesburg, Pretoria and the Western Cape. Investigation undertaken by the SAHRC after the raids revealed the following disturbing facts:

5.2.1 During the raids a number of persons with valid South African identity documents were held as suspected undocumented migrants despite producing their identification documents;

5.2.2 A number of persons holding genuine refugee exemptions were arrested as suspected undocumented migrants despite producing their identification documents;

5.2.3 A large number of persons holding valid section 41 permits were arrested despite producing their permits;

5.2.4 Pedestrians were stopped randomly and asked for their identification. Commercial taxis (kombi taxis) were stopped randomly, and the passengers asked for identification. In each instance anyone unable to produce an identity document was summarily arrested;

5.2.5 Entire residential blocks were cordoned off and searched. Persons waiting in queues at Department of Home Affairs offices were arrested;

5.2.6 In many instances persons who had *prima facie* valid documentation, whether South African identification documents or refugee or asylum seeker permits, were nonetheless arrested and documentation confiscated and sometimes destroyed;

5.2.7 Looting and loss of personal belongings of detained persons were reported;

5.2.8 Unaccompanied minors were arrested and detained as undocumented migrants Conditions of detention;

5.2.9 Most of those held as a result of the raids were held at Lindela Repatriation Centre, which is designed to hold a maximum of 2 500 persons, yet large numbers exceeding that were apparently held there. The result is an inevitable worsening of conditions. Media reports quoted Lindela officials as saying that they had been taken by surprise and were not equipped for such a massive influx. These reports indicated that people had been taken straight from the point of arrest to Lindela without being taken via a police holding cell. This again raised questions regarding the procedures followed and whether all arrested persons were provided with the opportunity to prove that they were residing legally in the country or not.

(Letter from SAHRC to Minister of Home Affairs, 29 March 2000)

5.3 Moreover, the recent raids brought to light further shortcomings of the Bill. During the raids, unaccompanied minors were arrested and detained as undocumented migrants only on the basis that they were unable to produce the identification. Section 28 of the Constitution provides that such persons should only be detained as a last resort and

for the shortest possible time and must be kept separately and treated in accordance with their age. Article 22 of the UNCRC, which South Africa has ratified, calls for appropriate measures to be taken by the state to ensure that children seeking refugee status whether accompanied or not shall receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the Convention and other international human rights and humanitarian instruments to which this country is a Party. According to the complaints, the Children's Court and the Department of Welfare were not informed of the detention of these minors, thus the Child Care Act was not used to their benefit (Letter from SAHRC to Minister of Home Affairs, 29 March 2000).

5.4 Furthermore, Section 37(1)(d) of the Bill provides that a person may be detained without a warrant for a period of up to 30 days, which may be extended by a court for a period of up to 90 days. Due to the vulnerable position of foreigners, we respectfully submit that detention without a warrant would be unconstitutional, particularly in the light of Section 37(1)(b) which places the onus on the foreigner concerned to request that his or her detention be confirmed by a warrant of a court. To assume that all detained foreigners will firstly be informed of their right to demand a warrant and secondly, that such persons will comprehend a written or verbal notice in this regard is to overlook our history of xenophobia, disregard for the most basic rights of foreigners and corruption. We respectfully submit that these provisions should be amended to require a warrant of a court in all cases of arrest/detention for the purpose of deportation.

5.5 Moreover, the 30-day detention period is excessive and is not supported. The recent raids only confirmed that the potential for abuse under these circumstances is too high to permit such a long period of detention without a warrant.

5.6 The failure of the Bill to deal with the rights of minor detainees, particularly in view of the inadequacy of protection offered by other legislation such as the Child Care Act, the absence of any provisions for the monitoring of detention and detention facilities and the provisions relating to detention without warrant, leave the Bill open to Constitutional challenge.

5.7 Due to the danger of abuse and corruption it is suggested that the Bill should provide for monitoring and reporting of detention centres by an independent body, such as the SAHRC. It is submitted that outside monitoring is the only effective way to limit abuse of power, violation of rights and corruption inside detention centres.

5.8 We note with concern the absence from Section 37 of any clarity on the establishment, administration, monitoring and control of places of detention. When regard is had to Section 37(1) it appears that the drafters had in mind that places of detention will resort under the IS.

The Managing Director of the IS may determine the "manner and place" of detention. This construction is confirmed by Section 30(g) which empowers the IS to apprehend, detain and deport illegal foreigners. However, no detail is provided in this regard. For the reasons that appear above in paragraph 5.2 The SAHRC is opposed to detention of foreigners in prisons and calls for the establishment of places of detention that do not resort under the authority of the Department of Correctional Service or the South African Police Department and independent monitoring of these centres as set out above.

5.9 Finally, we note that Sections 37(8) to (10) do not accommodate foreigners who seek asylum in South Africa in a manner different from illegal foreigners. We call on the drafters to reconsider these sections with a view to providing for asylum seekers not to be detained by masters of ships and for the establishment of separate reception centres for asylum seekers in order to ensure that they are afforded a reasonable and adequate opportunity to apply for asylum in South Africa.

6. Potential for corruption

6.1 Section 50(1) of the Bill creates an internal anti-corruption unit charged with he task of preventing, deterring, detecting and exposing any instance of corruption, abuse of power, xenophobia and dereliction of duty within the IS.

6.2 The proposed anti-corruption unit should be applauded and is in line with the recommendations of the SAHRC in its submission on the White Paper. However, it is regrettable that the Bill gives no clarity on the appointment, powers and functions of the anti-corruption unit. In its present form, Section 50 pays no more than lip service to the elimination of corruption.

6.3 Section 50 should be expanded to include full details of the appointment of members, the powers, functions and duties of the unit. It is proposed that the unit should consist of independent persons from civil society with relevant experience and that the unit should report directly to Parliament on an annual basis.

7. Additional Comments

In addition to the points raised by the SAHRC in its original submission, certain provisions of
the Bill require closer scrutiny:

7.1 **Section 26(1): The withdrawal of permanent residence:**

Section 26(1) provides that the IS may withdraw a permanent residence permit if its holder, within three years of the issuance of the

permit, has been convicted of any offence listed in Schedule 1. It is proposed that the list of offences be amended to include a protection order issued against the holder of a permanent residence permit in terms of the Family Violence Act, No. 116 of 1998.

7.2 **Section 53: Administrative Offences**

Section 53 authorises the IS to impose a range of administrative fines for certain offences, such as failure to depart from the country after the expiry of a permit and incorrect certification of information contemplated by the Bill. The rational behind administrative penalties is that the offences they address are of a relatively minor nature and that in the interests of justice and expediency to dispose of the matters without delay. However, the Bill provides for the imposition of fines ranging between R3000-00 and R10 000-00 and makes no provision for further legal recourse.

It is also regretted that Section 40, which deals with the powers of immigration courts, does not include the review of the imposition of administrative fines in terms of Section 53. Although it can be argued that the power falls within the inherent jurisdiction of the court, it should be borne in mind that the Immigration Court is a creature of statute and has no inherent or common law powers. The Bill should be amended in this regard to avoid uncertainty.

7.3 **Section 4(5): Special financial and other guarantees**

To avoid confusion, arbitrary determinations and to limit the potential of corruption, the SAHRC proposes that this section, which arguably amounts to unfair discrimination against illegal foreigners or classes of foreigners, to include guidelines or detail of the circumstances under which the special financial or other guarantees may be imposed.

7.4 **Section 8(3): The holder of a Crewman Permit may not conduct work**

We respectfully submit that this clause is confusing. It appears to prohibit all crewmen form working in South Africa, even while on the vessel carrying them. We do not believe to have been the intention of the drafters and call for an amendment to Section 8 to limit the work prohibition to work other than the normal duties of the crewman upon the carrying vessel.

7.5 **Temporary and Permanent Residence Permits**

The Bill contains no time limits for the finalisation of applications for the above-named permits. Existing backlogs and delays experienced by the Department of Home Affairs in this regard make is clear that consideration must be given to the inclusion in the Bill of appropriate

wording to mandate the finalisation of applications within a reasonable time, as determined by the Minister from time to time.

7.6 **Section 18: Asylum**

As we have pointed out above in paragraph 5.9, the Bill draws no distinction between asylum seekers and illegal foreigners. The SAHRC is particularly concerned that asylum seekers should not be held with illegal foreigners while applications for asylum is being considered. In this regard we refer to the provisions of the Refugee Act and note with approval that asylum permits may be issued only subject to the Refugee Act.

7.7 **Section 21(2): Permanent Residence – Spouses**

We note with regret that the drafters have not affirmed the right of a spouse of a South African citizen or permanent resident to conduct work. As a permanent resident, a spouse should be entitled to "all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations legally prescribed to citizenship" (Section 20(1) of the Bill). To grant a spouse permanent residence but prohibit him or her from conducting work is akin to giving with the one hand and taking away with the other. Such a limitation will, in the vast majority of cases, deny the person concerned the right to residence itself, because only a small percentage of South African spouses can afford to support their foreign spouse financially. We respectfully submit that Section 21 should be amended to affirm of the right of spouses with permanent residence to conduct work. Failing to do so would amount to an unconstitutional limitation of the right of the South African spouse to a family life, human dignity, freedom of association and freedom of movement.

7.8 **Section 23(1)(c): Prohibited Persons**

The exclusion of citizens of certain prescribed countries appears arbitrary and open to abuse. We call for the inclusion of a framework and guidelines for a determination in terms of Section 23(1)(c) to be included in the Bill.

7.9 **Section 28: The Immigration Board – appointment of members**

The SAHRC proposes the amendment of this section to provide that the Minister is bound by the recommendations of the Portfolio Committee when appointments are made to the Board. This will facilitate accountability and transparency of the appointment process.

7.10 **Section 29: Objectives and functions of the Service**

The following words should be included at the end of Section 29(1)(c):

"…with strict regard to the rights of such illegal foreigners."

7.11 **Section 36(5)(b): Apprehension of illegal foreigners**

Pursuant to the Bill, the IS may obtain a warrant to:

> **"(a) …;**
> **(b) apprehend an illegal foreigner subject to section 37(1);**
> **…."**

Section 37(1) provides as follows:

> **"Without the need for a warrant, an officer may arrest an illegal foreigner …, and shall deport him or her…., and may detain him or her… in a manner and at the place determined by the Managing Director."**

The Aforesaid quotations are contradictory. Section 37(1) clearly sanctions **arrest without a warrant**. Therefore it is misleading and confusing to include a reference to this section in Section 35(5)(b), which deals with arrest **with a warrant**. The SAHRC proposes that Section 37(1) be amended to require a warrant for **all** arrests.

7.12 **Contextual errors**

Finally, the Bill contains a number of typographical errors. It is trusted that these will be corrected in due course and before the Bill is finalised.

This submission was prepared by:
Victor Southwell
Legislation Monitor / Parliamentary Officer
South African Human Rights Commission
CAPE TOWN
Tel: 021 426-2277
Fax: 021 426-2875
Email: victor@ct.sahrc.org.za