



## **Comments to the Refugees Amendment Bill, 2007**

*Submitted to the Department of Home Affairs on 3 July 2007 in terms of General Notice 730 of 2007, Government Gazette No. 29976*

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### **Introduction**

The South African Human Rights Commission (SAHRC or Commission) welcomes the Draft Refugees Amendment Bill 2007, which seeks to make various amendments to the Refugees Act of 1998. The Commission has an active and long standing interest in the protection, promotion and monitoring of the rights of non-nationals who are present in South Africa. The Commission in particular welcomes the establishment of the Refugee Appeals Authority and the provisions concerning unaccompanied minors and persons with mental disabilities. It is in light thereof the Commission wishes to bring the following comments on the Draft Bill to the attention of the Department of Home Affairs:

### **Clause 5 of the Bill that seeks to amend section 4 of the Act (exclusion)**

In Clause 5(d) the term “resident” needs to be clearly defined in order to avoid confusion in interpretation thereof. It is noted that the term “residence” has been inserted in the definitions section via these amendments. It is suggested that this definition could be further enhanced by specifically stating that “.. and resident will have the corresponding meaning.

### **Clause 10 substitutes Section 8 of the Refugee Act (Refugee Reception Office)**

Section 8(3) should make specific reference to the provision of interpreters to support and assist the Refugee Reception Officers.

### **Clause 11 of the Bill seeks to make various substitutions in section 8 of the Act (functions and powers of the Refugee Appeals Authority)**

Section 8 C (1) (b) provides the power for the Refugee Appeals Authority to advise the Minister regarding any matter which the Minister refers to the Refugees Appeal

Authority. A further sub subsection 8C. (1)(c) ought to be inserted whereby the Refugee Appeal Authority may advise the Minister *of its own accord* on any matter. The Refugee Appeals Authority should not have to wait for the Minister to refer matters to it.

In Section 8C.(2) the word *may* should be replaced with the word *must*. It is important that the Refugee Appeals Authority consists of at least 3 members when hearing an appeal. For appeals to be heard by a smaller number of persons would compromise the effectiveness of the Appeals authority.

**Clause 13 of the Bill which seeks to amend section 21 of the Act (duties of Refugee States Determination Officer)**

Section 13 (a) (1) appears to do away with Refugee Reception Officers, as an application for asylum must now be made to a Refugee Status Determination Officer. The Commission is concerned about the practical implications of the provision if this interpretation thereof is correct. It now appears that Refugee Status Determination Officers will be responsible for the administrative duties of receiving applications, in addition to the task of determining the application. This may result in further exacerbating the current backlogs in application determinations.

The Commission is of the view that Refugee Reception Officers ought to remain and that the administrative and determination function must be carried out by separate staff. By collapsing these two functions there is the potential for discrimination and corruption to occur.

The addition of the words "except for those persons who have been detained" need to be carefully considered. The insertion of these words could potentially lead to denying a potential asylum seeker the opportunity of making application for asylum. More specifically it could exclude those genuine asylum seekers who are still attempting to access the system.

The Commission suggests that further sections be added to the Amendment Bill which details the procedure to be followed by asylum seekers who wish to apply for asylum whilst detained.

Section 13 (c) 3 would read more clearly if it read as follows: “...including his or her dependants or spouse accompanying him or her ...-”

**Clause 14 of the Bill seeks to insert Section 21A and 21B into the Refugee Act (unaccompanied minors and mentally disabled person)**

The phrase used in this section, namely mentally disabled person is offensive to persons with mental disabilities. The correct or rather a human rights friendly manner in which to refer to such persons is “persons with mental disabilities”. It is suggested that the necessary amendments are made to the relevant sections.

Section 21A. (1) seeks to provide for the procedures for unaccompanied minors and persons with mental disabilities to apply for asylum

The Commission is of the view that this section could go further in spelling out more clearly *who will assist* these particularly vulnerable categories of asylum seekers. The Bill should also provide specifically that the Minister may draft Regulations that will set out in more detail how these asylum applications will be carried out.

It should be noted that the Children’s Act came into effect on 1 July 2007 and this may necessitate amending the reference to the Child Care Act 1983.

Persons with mental disability cover a vast spectrum. The Bill needs to give recognition to this. Persons with mental disability may include for example:

- Intellectual and/or cognitive impairments (Down Syndrome, foetal alcohol, older persons who suffer from diminished mental capacity, Alzheimer’s disease, and AIDS related dementia)
- Psychiatric (anxiety (post traumatic stress disorder) and depressive disorders (depression, bipolarism) and schizophrenic, bipolar)
- Neurological (epilepsy, autism, strokes and other brain conditions)

These categories are recognized within internationally recognised diagnostic tools such as the DSM IV and the ICD9.

Section 21A (2) should state clearly that any person who appears to be a person with a mental disability should be referred to either the Department of Social Development or the Department of Health as the case may be. Regulations to the Act must state more clearly the procedures and the relevant pieces of legislation that would be applicable to such persons (e.g. Mental Health Care Act, National Health Act).

**(Dependants and spouses of refugees)**

The proposed section 21B (1) raises a concern in that an asylum seeker may not at the time of her or his application for asylum want, or have need for, her or his spouse or dependants to join her or him. If this is the case, it is unfair that the failure to include the dependants or spouse in the initial application denies such family members the opportunity to join the asylum seeker at a later stage. It is therefore suggested that the word *must* be replaced with the word *may* thereby ensuring that it is not obligatory to make the application for a spouse or dependant at the time of the initial asylum application.

It is in the Commissions' view a legitimate question to ask of an asylum seeker if they have a spouse or dependants and for this to be recorded at the time of the initial asylum application. However, a failure to list a spouse or dependent should not preclude such spouse or dependent from making application to join the asylum seeker at a later stage. The Department of Home Affairs would be entitled to inquire into the reasons and circumstances for why the spouse and dependents were not named on the initial application.

Section 21B (4) (b) is unclear as upon death there cannot be a surviving spouse. The provisions ought to read "... Provided that, in the case of death, the surviving spouse must re-apply for refugee status."

**Clause 21 of the Bill seeks to substitute section 27 of the Refugee Act (Protection and general rights of refugees)**

Clause 27(g) refers to the right to basic health care services and basic primary education whilst Clause 27(b) correctly states that the rights set out in chapter 2 of the Constitution are applicable to refugees (except those that apply only to citizens). The clause as it stands is confusing and may potentially be read to limit the social and economic rights

that refugees are entitled to. Refugees social and economic rights extend beyond the right to basic health care services and basic primary education.

It would be more inclusive and clearer if the section stated  
“the same economic and social rights services which the inhabitants of the Republic receive which shall include, but not be limited to housing, health care, food, water, social security and education services..”

**Clause 22 of the Bill seeks to insert Section 27A. into the Act (Protection and general rights of asylum seekers)**

The rights set out in the constitution are applicable to all persons. In fact, this has been stated clearly in the previous clause concerning the rights of refugees (Clause 21 which seeks to insert section 27 into the Refugee Act). For purposes of consistency and ensuring that there is clarity that the rights contained in the Bill of Rights are applicable to everyone, this should be stated in Section 27A. It is therefore suggested that the proposed section 27(b) be repeated in the proposed section 27A.

It is suggested that section 22(c) read as follows: “... the right not to be unlawfully or arbitrarily arrested or detained.” This would give greater recognition to the rights contained in section 35 of the Constitution (Arrested, detained and accused persons)

**Clause 30 of the Bill seeks to insert section 37(e) and (f) into the Act (illegality)**

Sub sections 30(e) and (f) makes reference to illegal foreigners which are dealt with in terms of the Immigration Act. It is thus not appropriate for these provisions to be added to the Refugees Act. It may further unintentionally create or perpetuate confusion amongst members of the public who are unable to distinguish between “illegal foreigners” and refugees/ asylum seekers, which in turn may lead to discrimination against refugees and asylum seekers.