SOUTH AFRICAN HUMAN RIGHTS COMMISSION

SUBMISSION ON THE TRADITIONAL COURTS BILL [B1-2017]

Submitted to the Portfolio Committee on Justice and Correctional Services,

March 2017

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

SUBMISSION ON THE REFUGEES AMENDMENT BILL [B12B-2016]

For submission to the Select Committee on Social Services

June 2017

1. Introduction

The South African Human Rights Commission (SAHRC / Commission) welcomes the opportunity to engage with the Select Committee on Social Services on the Refugees Amendment Bill [B12B-2016].

The SAHRC notes the extensive public hearings and subsequent deliberations on the Bill which occurred at the Portfolio Committee on Home Affairs during 2016. The Commission further notes that the Bill currently before the Select Committee includes the further amendments as effected by the Portfolio Committee. However, there are several areas of concern which the SAHRC notes in the amended 'B' version of the Bill and within its constitutional, statutory and international mandate, the SAHRC presents its comments to the Select Committee.

2. The mandate of the South African Human Rights Commission

2.1 Constitutional and Statutory Mandate

The SAHRC is a constitutionally created independent state institution. It is mandated by section 184 of the Constitution of the Republic of South Africa[1] which states,

[1] The Constitution of the Republic of South Africa, 1996, hereinafter the 'Constitution'.

184. (1) The South African Human Rights Commission must-

(a) promote, respect for human rights and a culture of human rights;

(b) promote the protection, development and attainment of human rights; and

(c) monitor and assess the observance of human rights in the Republic.

In September 2014, the new South African Human Rights Commission Act 40 of 2013 came into effect, repealing its predecessor the Human Rights Commission Act 54 of 1994. Section 13 of the new Act expands on the powers and functions of the Commission.

Accordingly, section 13(1)(a)(i) provides,

(a) The Commission is competent and is obliged to-

(i) Make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of human rights;

Section 13(1)(b)(v) further states,

(b) The Commission-

(v) Must review government policies relating to human rights and may make recommendations.

2.2 International Mandate

As a national human rights institution (NHRI) the SAHRC is additionally guided by the *Principles Relating to the Status of National Institutions* (the Paris Principles) adopted by United Nations General Assembly Resolution 48/134 in 1993. These principles direct NHRIs in their duties and responsibilities and include, *inter alia*, the following relevant provisions:

3. A national institution shall, inter alia, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall

> examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
>
> (ii) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.[2]

It is in terms of these powers that the Commission hereby presents the following submissions.

3. SAHRC Concerns with the Amendment Bill

3.1 Definitions Clauses

The SAHRC notes the amendments to the definitions section of the Principal Act and specifically draws the Committee's attention to the following:

3.1.1 Definition of 'dependant'

The SAHRC notes that the Amendment Bill seeks to amend the definition of 'dependant', to read as follows,

> …'dependant' in relation to an asylum seeker or a refugee, means any unmarried minor dependant child, whether born prior to or after the application for asylum, a spouse or any destitute, aged or infirm parent of such asylum seeker or refugee who is dependent on him or her, and who is included by the asylum seeker in the application for asylum or, in the case of a dependant child born after the application for asylum, is registered in terms of section 21B(2);

The SAHRC specifically highlights the following concerns in this regard:

i. The Bill has narrowed the definition of a 'dependant' through the deletion of the term 'includes' in the principal Act and the insertion of the term 'means' in the Amendment Bill. The amendment therefore denotes a closed list of dependant types.

ii. The definition is restricted to minor children. The resultant impact is that, upon reaching 18 years of age,[3] the child would cease to be regarded as a dependant despite his / her continued and actual dependence on the asylum seeker / refugee. Many children,

[2] *Principles Relating to the Status of National Institutions*, available at, http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx
[3] The age of majority is set at 18-years of age by section 17 of the Children's Act 38 of 2005.

however, remain dependent on their parents well beyond the age of majority. The SAHRC submits that the inclusion of the word 'minor' will unfairly prejudice major refugee children who, for instance, are attending tertiary education. The SAHRC further points out that the Children's Act 38 of 2005, defines a family member, in relation to a child as, a) a parent of the child; b) any other person who has parental responsibilities and rights in respect of a child; c) a grandparent, brother sister, uncle, aunt or cousin of the child; or d) any person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship. The SAHRC further notes that the prevalence of 'separated and unaccompanied children' which is defined by the Inter-agency Guiding Principles on Unaccompanied and Separated Children of 2004, as children who are 'separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives…therefore, include children accompanied by other adult family members.' Thus the exclusion of these children is not in the best interests of the child. The SAHRC therefore strongly recommends that these factors are taken into consideration in relation to the definition of a 'dependant'.[4]

iii. The Commission notes that the proposed amendment replaces the terms, 'destitute, aged or infirm member of the immediate family' in the principal Act, with 'destitute, aged or infirm parent' in the Amendment Bill. The SAHRC notes that the insertion of the word, 'parent' is limiting and restrictive as it would exclude categories of family such as, grandparents, minor siblings etc. who are dependent on the asylum seeker / refugee. The SAHRC recommends that the existing provision, which includes members of the immediate family, should be retained.

iv. The existing wording of the draft provision appears to indicate that a term 'spouse' applies to persons married at the time the asylum seeker application is made. Thus, any subsequent marriage after asylum was granted, may not necessarily extend protection to the spouse, as he / she was not included in the initial application and can therefore not be regarded as a dependent. Furthermore, international human rights law imposes obligations upon States to respect and protect marriage and family life, as contained under the Universal Declaration of Human Rights,[5] the International

[4] In this regard, the Select Committee may also wish to refer to other international human rights instruments such as the Convention on the Rights of the Child; General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, The African Charter on the Rights and Welfare of the Child.
[5] Article 16 of the Universal Declaration of Human Rights provides:

Covenant on Civil and Political Rights,[6] and the African Charter on Human and Peoples' Rights[7] In addition, the Commission points out that at the domestic level, the Constitutional Court in *Dawood v Minister of Home Affairs*[8] recognised that:

> 'The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function.'[9]
>
> 'The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance…. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right.'[10]

Whilst the Commission notes that the potential abuse of the system insofar as marriages concluded after asylum has been granted, it is concerned that the limitation imposed may be discriminatory and could infringe on the right to a family life.

v. Furthermore, noting the length of time taken to finalise an asylum seeker application, it is natural that asylum applicants who were unmarried at the time of entry into the country, may later enter into relationships, get married or have children. The wording of the draft provision therefore indicates the exclusion of such dependants as they were not listed at the time of application.

---

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

[6] Article 23 of the International Covenant on Civil and Political Rights, which South Africa has ratified, provides:
'(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.
(3) No marriage shall be entered into without the free and full consent of the intending spouses.
(4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.'

[7] African Charter on Human and Peoples' Rights, also ratified by South Africa, provides in Article 18:
'1. The family shall be the natural unit and basis of society. It shall be protected by the State…
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community…'

[8] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC)

[9] Ibid. at para [31].

[10] *Dawood v Minister of Home Affairs* (note 8 above), at para [37].

vi. The Bill contains the proviso that the dependent must have been 'included by the asylum seeker in the application for asylum'. This has the effect of prohibiting the addition of dependants who were not included at the time of the initial application for asylum. This proviso also fails to take into account the plight of asylum seeker / refugee in the typical environment which results in families being separated and the reality that often families flee separately and are not always aware of each other's whereabouts. The proviso therefore may deny asylum seekers and refugees their fundamental right to family unity. The SAHRC therefore recommends that the proviso be removed.

3.1.2 Definition of marriage

The SAHRC notes that the Amendment Bill has expanded the definition of marriage to include, 'a marriage concluded in terms of Islamic or other religious rites'. The SAHRC supports this proposed amendment[11].

3.2 Clause 2: 'Exclusion from refugee status' (Section 4 of the Principal Act)

The SAHRC notes the extensive proposed amendments contained in clause 2 of the Bill to provide for additional disqualifications from refugee status. The SAHRC expresses particular concern over the amendments to sub-clauses (d) to (i) which currently read as follows:

> ''**Exclusion from refugee status**
> **4.** (1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she—
>
> *(d)* enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen; or
>
> *(e)* has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or
>
> *(f)* has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or
>
> *(g)* is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or

[11] It should be pointed out that no formal statutory recognition exists in respect of Muslim marriages in South Africa.

> (h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or
>
> (i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum."

The Commission is of the opinion that the draft provisions appear to be exclusionary which may make it increasingly difficult for an asylum seeker to qualify for refugee status. Furthermore, the amendments as contemplated by the Bill have the potential to violate the principle of non-refoulement. The principle of non-refoulement asserts that a State may not oblige a person to return to a country where he / she may be exposed to persecution. These principles are contained in section 2 of the principal Act and constitutes an essential component of asylum and international refugee protection. In addition, the principle of non-refoulement is an entrenched cornerstone of the asylum regime and is recognised as constituting a norm of Customary International Law.[12] The SAHRC therefore recommends that the Committee consider the following in respect of the sub-clauses:

3.2.1 Clause 4(1)(d)

A proviso should be inserted into clause 4(1)(d), stating that in the case of a recognised refugee, should the country in question no longer be able and / or willing to provide protection, the person will be permitted to apply for refugee status in South Africa. This recommendation is formed on the practical experience of the Commission in dealing with individuals who are recognised refugees in a third country, but that nevertheless have faced persecution and are no longer guaranteed protection despite this status. The Commission expresses concern that current practice in South Africa does not grant refugee status to such persons, irrespective of their circumstances.

3.2.2 Clause 4(1) (e)

This clause has the potential of violating the principle of non-refoulement. Section 34 of the Refugees Act already provides that, 'a refugee must abide by the laws of the Republic'. It is

[12] In *C v. Director of Immigration* CACV 132-137/2008 the Hong Kong court of final appeal found that the concept of non-refoulement of refugees has developed into a Customary International Law (at para 67).

recommended that an asylum seeker who contravenes the law should therefore be subjected to criminal sanctions in the same manner as a South African citizen, and not automatically be excluded from refugee status.

3.2.3 Clause 4(1)(f)

The SAHRC is aware of the challenges in the asylum seeker / refugee system insofar as fraudulent documentation is concerned. The Commission expresses concern that the provision excludes an asylum seeker from ever being eligible for refugee status and therefore recommends that comparative benchmarks be considered to permit more equitable penalties. Furthermore, that the applicant's claim should be considered in its entirety rather than a blanket exclusion. To assist the Committee in this regard, the SAHRC specifically points out that in *Tantoush v RAB & Others*[13] it was found that:-

> 'The objective facts must be examined to decide if a well-founded fear exists. And for that purpose it will usually not be enough to rely almost exclusively on the evidence of the asylum seeker only to reject his claim of fear of persecution because he has previously lied while living, for whatever reasons, on the margins or in the shadows of a legal existence.'[14]

3.2.4 Clause 4(1)(g)

The fact that an applicant may be a fugitive from justice in another country does not exclude the possibility that the person may still be subjected to persecution. The term 'fugitive from justice' should therefore not automatically exclude an applicant from having a legitimate claim to refugee status. In addition, the SAHRC notes that an applicant's fugitive status may be intrinsically linked to his / her claim for refugee status. For example, the SAHRC has found that several LGBTI asylum seekers / refugees have fled their home countries due to the fact that their sexual orientation was regarded as a punishable offence. In these instances, the punitive measures amounted to a form of persecution.

In its current form, the clause permits the Refugee Status Determination Officer (RSDO) to reject an application based on the reasoning that the rule of law is being upheld in the applicant's home country, by a 'recognised judiciary'. The clause is however silent on what factors the RSDO should take into account to determine whether a judiciary upholds the rule of law in another country. It is recommended that the clause should contain reference to the recognised independence and impartiality of the judiciary. The SAHRC also recommends that the clause be amended to include further safeguards for the applicant such as affirming the

[13] *Tantoush v RAB & Others* 2008 (1) SA 232 (T).
[14] Ibid. at para 102.

opportunity to make representations, which representations should include the provision information about the nature and gravity of offence.

3.2.5 Clause 4(1)(i)

The SAHRC is of the view that the 5 day period as provided in section 4(1)(i) is unreasonable, on the basis that:

i. The application of this provision would violate an applicant's right to non-refoulement. The SAHRC points out that in the matter of *Abdi and Another v Minister of Home Affairs and Others* the Supreme Court of Appeal (SCA), noted that:

> '*The Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant Refugee Reception Office....*'

Furthermore, in *Bula and Others v Minister of Home Affairs*[15] and in *Ersumo v Minister of Home Affairs*[16] the SCA considered regulation 2 of the principal Act. In both cases the court held that if an asylum seeker delays in applying for asylum, he/ she will not lose his or her rights under regulation 2(2), and the immigration authorities will not be relieved of their obligation under the Refugees Act to entertain his / her application.

ii. The prescribed period fails to take account of the practical challenges faced by migrants and asylum seekers. For example, the current administration of the Refugee Reception Offices (RRO) allocates specific days of the week to particular nationalities. Therefore, an applicant cannot simply apply for status when he / she arrives, but must make such application on the day allocated to his / her nationality. The prescribed period may impact negatively on the asylum seeker as there may be inadequate time between entry into the country and making the application. If the time period remains, there is also the possibility that the applicant could enter into the country on a day that his / her nationality was already considered for that respective week. The Commission further notes that the high volumes of applicants and the subsequent administrative processing may give rise to a situation whereby a person may not be able to apply for refugee status, or even enter the particular RRO on a particular day, but may need to revisit the RRO several times. The SAHRC is concerned that the mere fact that an applicant fails to apply within a five day period, should not automatically lead to their exclusion from eligibility for refugee status.

[15] *Bula and Others v Minister of Home Affairs and Others*2012 (4) SA 560 (SCA).
[16] *Ersumo v Minister of Home Affairs and others* 2012 (4) SA 581 (SCA).

iii. The clause requires the provision of 'compelling reasons,' but does not provide clear criteria for what would constitute compelling reasons. Instead, examples of compelling reasons such as hospitalisation or institutionalisation are listed. The SAHRC is concerned that the practical challenges such as language barriers, unfamiliarity with the geographical locations of the RRO's, lack of money for transport, and the arduous application process have not been factored into the clause. The Commission therefore recommends that the prescribed period is re-visited to allow for an extended and reasonable time period (e.g. minimum of 21 working days). Furthermore, that safeguards are put in place to curtail any undue prejudice an applicant may face as a result of the RRO's administrative processes and backlogs.

The Commission reiterates that any consideration of exclusion from refugee status should be guided by the overarching non-refoulement principle.

3.3 Clause 3: Cessation (amendment of section 5 of the Principal Act)

The SAHRC notes the proposed amendment of section 5 of the principal Act in order to provide additional grounds on which a person ceases to qualify for refugee status. The SAHRC notes in particular the sub-clauses (a); (d); (f) and (h) which read as follows:

> **5.** (1) A person ceases to qualify for refugee status for the purposes of this Act if—
>
> *(a)* he or she voluntarily re-avails himself or herself in the prescribed circumstances of the protection of the country of his or her nationality; or
>
> *(d)* he or she voluntarily re-establishes himself or herself in the country which he or she left or outside of which he or she remained owing to fear of persecution, or returns to visit such country; or
>
> *(f)* he or she has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or
>
> *(h)* the Minister may issue an order to cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status.''

In this regard, the SAHRC specifically highlights the following:

3.3.1 Clause 5(1)(a)

The SAHRC notes, in line with international law, that persons who voluntarily return to the country they have fled from cease to qualify for refugee status. The Commission further notes

the removal of the term 'in any way' in the initial version of the Amendment Bill, and the replacement instead of the term 'in the prescribed circumstances' as per the Portfolio Committee on Home Affairs recommendation. However, it remains unclear what the 'prescribed circumstances' may be within the context of the clause and clarity is required in this regard, based on the legal principle that the law should be reasonably clear to enable a person to direct their conduct in accordance with the law. The SAHRC further notes instances where refugees may have to re-avail themselves for the purpose of 'visiting' their home country (e.g. visiting a sick relative, attending a funeral etc.), and that these forms of visits may amount to automatic cessation of refugee status. The SAHRC therefore recommends that cessation be considered on a case by case basis.

3.3.2 Clause 5(1)(d)

The SAHRC is of the view that the wording in clause 5(1)(d) is not clear in its conception. Whilst the 're-establishment' provision is in line with international law standards, the addition of the second part of the provision may be concerning. The fact that an individual merely visits the country from which they have fled is not, in the SAHRC's opinion, sufficient to give rise to a cessation of protection, unless it can be established that the persecution or threat posed to the individual / category of persons has ceased to exist. The SAHRC draws to the Committee's attention that often persons are encouraged to return to their home country in an attempt to determine whether the conditions have improved and are suitable for return. The SAHRC further points out that the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) clearly recognises that 'where a refugee visits his or her former home country, not with a national passport but, for example, with a travel document issued by the country of residence, s/he has been considered by certain States to have re-availed herself/himself of the protection of his/her former home country and to have lost his/her refugee status…'[17]. The guide recommends that cases of this kind should, however, be judged on their individual merits'.[18] The SAHRC therefore strongly recommends a reconsideration of the clause to clarify 're-establishment' within the context of the clause (e.g. purchasing property, starting a job, receiving government benefits etc.)

[17] of Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 , para 125
[18] ibid

3.3.4 Clause 5(1)(h)

The SAHRC notes that the B version of the draft Amendment Bill places a discretion on the Minister to cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status. However, the Commission remains concerned that this form of blanket cessation is contrary to the Refugees Convention and Article I.4 of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, which clearly stipulates the grounds when refugee protection is no longer required and may be ceased.[19] In addition, the UNHCR Handbook advises that the 'the strict approach to the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in the country of origin.'[20] The Commission further points out that section 33(1) of the Constitution affirms that, 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair' and that blanket cessation may impact on this right. The SAHRC is therefore concerned that the clause vests the Minister with the power to unilaterally and arbitrarily revoke the refugee status of a person without due process. The SAHRC therefore strongly recommends that the clause is re-considered in light of these factors, that due process provisions are included and a public consultation process is factored into the Bill setting out the manner in which the Minister will come to a cessation determination.

3.4 Clause 6: Refugee Reception Offices and Refugee Status Determination Officers (Section 8 of the Principal Act)

The SAHRC notes that Clause 6 amends section 8 of the principal Act in order to, *inter alia*, grant the Director-General the power to disestablish Refugee Reception Offices. The proposed amendment reads as,

> 8(1) Notwithstanding the provisions of any other law, the Director-General may, by notice in the Gazette, establish as many Refugee Reception Offices in the Republic as he or she regards as necessary for the purposes of this Act and may disestablish any Refugee Reception Office, by notice in the Gazette, if considered necessary for the proper administration of this Act.

The SAHRC is concerned that the insertion of the term, 'notwithstanding the provisions of any other law', grants the Director General the power to establish and disestablish any Refugee Reception Office (RRO), without following due process. The SAHRC specifically notes that in

[19] See article 1(c) and article 1.4 respectively.
[20] Para 112 of the Handbook

its current form, the provision seeks to exclude the applicability of other laws including, the Promotion of Administrative Justice Act (PAJA). The SAHRC emphasises that any proposal to disestablish a RRO must be subject to a public consultation process. Furthermore, that sound measures are put in place to ensure services continue to be rendered to refugees and asylum seekers in the event of disestablishment. It is critical that the Director General ensure that the rights of refugees and asylum seekers are paramount in any matters affecting them and that any decision-making process is subject to an open, transparent, consultative process.

3.5 Clause 9 (Insertion of new sections 9A to 9H in the Principal Act)

It is noted that clause 13 of the draft Amendment Bill inserts the new sections 9A to 9H in the principal Act to provide for the re-establishment, functions, composition and operational aspects of the Standing Committee for Refugee Affairs (SCRA). The SAHRC particularly notes that the new section 9(C) envisaged by the Amendment Bill sets out the function of the SCRA. Section 9C(1)(b) specifically states that:

> **9C.** (1) The Standing Committee—
>
> *(b)* must, in the event that an asylum seeker is permitted to work or study in the Republic, determine the period and conditions in terms of which such asylum seeker may work or study whilst awaiting the outcome of his or her application for asylum;

The SAHRC notes with concern the limitation imposed on the right to work or study which is critical to sustain a livelihood as an asylum seeker.

It is further noted, that the onus placed on the SCRA to determine the period and conditions in terms of which an asylum seeker may work or study, places unnecessary administrative burdens and may lead to further delays and inefficiency in the application process. The Commission is of the view that the new clause is unreasonable in curtailing the right to work or study, as it may further result in placing persons is a position of vulnerability. The SAHRC recommends that the clause be re-considered with the practical implication fully considered. (Further note the SAHRCs comments under point 3.9.2 below).

3.6 Clause 14: Crime prevention and integrity measures (insertion of new section 20A into the Principal Act)

The SAHRC commends the legislature for the inclusion of anti-corruption measures in the draft Amendment Bill as well as the additional provisions proposed by the Portfolio Committee in the B version of the Bill. Through its complaints handling procedures, investigations and

monitoring, the Commission is acutely aware of the widespread corruption and intimidation perpetrated against refugees and asylum seekers, at the hands of government officials. The SAHRC therefore welcomes and supports the insertion of the new provision. However, the SAHRC notes that the clause is silent on what punitive measures shall be taken against officials found to have integrity issues or found to subject asylum seekers / refugees to oppressive conditions, particularly in refugee detention facilities.

3.7 Clause 15: Rejection of Application (section 21 of the Principal Act)

Clause 15 amends section 21 of the principal Act and addresses matters relating to the rejection of an application for asylum. The SAHRC expresses the following concerns in this regard:

3.7.1 Clause 21(1)

> (1) An application for asylum must be made in person in accordance with the prescribed procedures, within five days of entry into the Republic, to a Refugee Status Determination Officer at any Refugee Reception Office or at any other place designated by the Director-General by notice in the *Gazette*.

Whilst it is expected that an asylum seeker must appear at a RRO, the Commission reiterates that the five day time period is unreasonable (as set out above in para 3.2.5) and may prejudice an applicant if the application is not submitted timeously.

3.7.2 Clause 21(1C)

> (1C) The Director-General may, by notice in the *Gazette*, require any category of asylum seekers to report to any particular or designated Refugee Reception Office or other place specially designated as such when lodging an application for asylum, if the Director-General considers it necessary for the proper administration of this Act.

Whilst the Commission supports the notice of publication in the Gazette, it recommends that additional measures are introduced to communicate with refugees and asylum seekers. These may include the use of social media, community radio, advertisements etc. It is also recommended that any notices of this nature ought to be advertised at the RRO and shared with stakeholders such as Chapter Nine institutions, NGOs, CSOs and places of worship, for further distribution and sharing. The SAHRC further recommends that in addition to the formal notice, a simplified version is made available in manner which is easily understood and in the key languages generally spoken by refugees and asylum seekers.

The Commission notes with concern the proposal that the Director-General may require that, 'any category' of asylum seeker should report to a particular or designated RRO, 'or other place specially designated as such' in order to lodge an application for asylum. The draft provision fails to take into account the fact that asylum seekers may have to travel long distances in order to report to a particular office, which may result in high cost implications and have a disproportionate impact on poor or indigent applicants. In addition, categorising asylum seekers and the RRO where they ought to lodge an application, may lead to discrimination as it is likely that the categories will be based on the applicant's country of origin, geographic area, gender, religion, nationality, political opinion or social group (as stipulated in clause 21(1D). In addition, if these categories are relied on, the separation of families who are not from the same gender, religion, nationality, political opinion or social group could potentially result. Whilst the Commission notes the good intention of the provision, particularly for the purposes of administrative efficiency, it alerts the Committee that categorising persons in this manner may pose a security threat, particularly in instances where an applicant has escaped persecution for belonging to a particular religion, political opinion, social group etc.

3.7.3 Clause 21(e)

The SAHRC note the addition of the following to section 21 of the Principal Act,

> (6) An application for asylum, which is found to contain false, dishonest or misleading information, whether by a Refugee Status Determination Officer, when considering the application, the Standing Committee, when reviewing, monitoring or supervising a decision or the Refugee Appeals Authority, when adjudicating an appeal, must be rejected.
>
> (7) It is presumed that a person who has indicated a language of preference in an application for asylum, understands and is proficient in such language.''

The Commission is concerned that the proposed insertion of subsection (6) may be too broad in permitting the rejection of an application found to include false, dishonest or misleading information. Furthermore, the wording of the provision is unclear and ambiguous as it is uncertain whether the SCRA is the body which is expected to reject the decision of the RSDO or the false, dishonest or misleading information provided by the asylum seeker in his / her application. The current wording of the provision also leans to the interpretation that the Refugee Appeals Authority (RAA) should reject any application containing false, dishonest or misleading information. This is concerning as the RAA serves as an independent, adjudication body and, in terms of natural justice, ought to consider all the facts and information before it, prior to coming to a decision. The SAHRC proposes that the clause either be removed entirely or re-drafted in a manner which makes the intent clear and factors in the procedural fairness elements. Alternatively, that the clause uses the discretionary term that '…applications found

to contain false, dishonest or misleading information…*may* be rejected' (emphasis added). The Select Committee may further wish to consider the option of an appeals process, noting that there may be reasons why persons included false information which subsequently resulted in the rejection of their application.

The Commission is further concerned that the insertion of subsection (7) fails to consider the practical challenges of the language barriers faced by asylum seekers. In the SAHRC's experience, several asylum seekers cannot write or converse in English and often seek the assistance from others when completing their application forms. Often the applicant is not comfortable sharing all the details of his / her reasons for asylum, which could lead to inaccurate or perceived 'false, dishonest or misleading' information, and which may result in a dismissal of the application. The SAHRC is of the view that it is unreasonable to legislate a presumption that the asylum seeker 'understands and is proficient' in a language preference indicated on the asylum application. The SAHRC recommends that safeguards are put in place to ensure that there is translation services available at the RRO's and that staff are adequately trained to engage with applicants where language challenges are encountered. It is also recommended that public awareness initiatives such as posters, information brochures and pamphlets are visibly displayed at the RRO in French, Arabic, Swahili and Portuguese, setting out the rights and responsibilities of asylum seekers and providing guidance on the asylum application process.

3.8 Clause 17: Refugee Children (section 21B of the Principal Act)

It is noted that clause 17 of the Amendment Bill seeks to amends section 21B of the principal Act so as to clarify that the dependants of an asylum seeker born in the country, have the same status as the applicant. The clause however provides instances where a dependant ceases to be regarded as a dependant and provides that,

> (3) Where a dependant of a recognised refugee ceases to be a dependant by virtue of marriage or cessation of his or her dependence upon the recognised refugee, as the case may be, he or she may apply in the prescribed manner to be permitted to continue to remain within the Republic in accordance with the provisions of this Act;
>
> ''(3A) Where a dependant of an asylum seeker ceases to be a dependant by virtue of marriage or cessation of his or her dependence upon the asylum seeker, as the case may be, he or she may apply for asylum himself or herself in accordance with the provisions of this Act.

In both these respects, the SAHRC expresses concern that,

i. The child of a refugee (including one who has resided in South Africa for many years) who attains the age of majority and/or gets married, may not have an individual claim to refugee status. This may lead to a situation where such person may be denied a permit to reside within the Republic.

ii. In the situation of death or divorce, a former spouse may not have an individual claim for refugee status, and risks being deported, despite the fact that he/she may have children residing within the country.

iii. There is no provision for instances where children of refugees or asylum seekers marry South African citizens or permanent residents.

iv. It is unreasonable to expect a child who has lived most of their life in South Africa, having attended school in the country, to be subjected to an application process which will determine whether they may continue to reside in the country as a refugee. This has the potential to impact on many children and families in the event that some members of a family are qualify for a refugee / asylum seeker status whereas others may not.

The SAHRC therefore recommends that the legislature explore the clause on refugee / asylum seeker children and consider the option of allowing such persons to apply for regularisation in terms of the Immigration Act 13 of 2002.

3.9 Clause 18: Asylum seeker visa (section 22 of Principal Act)

The SAHRC notes that clause 18 of the Amendment Bill, which amends section 22 of the Principal Act, criminalises the possession of an expired asylum seeker visa and makes provision for instances where an asylum seeker fails to present him / herself for renewal of their visas within one month after expiration of their visa, unless there are compelling reasons for a delay. The clause further provides that an asylum seeker whose application has been abandoned, may not re-apply for asylum and must be dealt with as an illegal foreigner under the Immigration Act. The SAHRC expresses several concerns in this regard as set out below.

3.9.1 Clause 22(5)

The following clause is proposed to be substituted into the Principal Act under section 22(5) and reads as follows,

> (5) The Director-General may at any time withdraw an asylum seeker visa in the prescribed manner if—
> *(a)* the applicant contravenes any condition endorsed on that visa;
> *(b)* the application for asylum has been found to be manifestly unfounded, abusive or fraudulent;
> *(c)* the application for asylum has been rejected; or
> *(d)* the applicant is or becomes ineligible for asylum in terms of section 4 or 5.

The prerogative of the Director General to withdraw an asylum seeker application is concerning, particularly in instances where an applicant has been rejected by the RSDO and is yet to lodge an appeal. The SAHRC recommends that safeguards should be inserted into this provision, particularly in respect of allowing the applicant sufficient time in which to have his / her application reviewed or appealed. It is recommended that the wording is further amended to clearly stipulate the right of the applicant to exhaust all remedies in appealing a rejection within a prescribed, reasonable time period. Following this time period, and dependant on whether the applicant lodges an appeal or not, the Director General may make the further determination to withdraw an asylum seeker visa.

3.9.2 Clause 22(8) to (11)

The amendments to sections 22(8) to (11) relates to the right to work and contains several provisions which may be regarded as unnecessarily restrictive and unreasonable. The selected amendments read as follows:

> (8) The right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who—
>
> > *(a)* is able to sustain himself or herself and his or her dependants, as contemplated in subsection (6);
> > *(b)* is offered shelter and basic necessities by the UNHCR or any other charitable organisation or person, as contemplated in subsection (7); or
> > *(c)* seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): Provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.
>
> (9) In the event that the right to work or study is endorsed on the asylum seeker visa, the relevant employer, in the case of a right to work, and the relevant educational institution, in the case of a right to study, must furnish the Department with a letter of employment or of enrolment at the educational institution, as the case may be, in the prescribed form within a period of 14 days from the date of the asylum seeker taking up employment or being enrolled, as the case may be.

(10) An employer or educational institution contemplated in subsection (9) who or which fails to comply with the duty imposed in that subsection, or fraudulently issues the letter contemplated in that subsection, is guilty of an offence and liable upon conviction to a fine not exceeding R20 000.

(11) The Director-General must revoke any right to work as endorsed on an asylum seeker visa if the holder thereof is unable to prove that he or she is employed after a period of six months from the date on which such right was endorsed.

The Commission brings the following practical concerns to the attention of the Committee,

i. Subsection (a) makes reference to subsection (6) of the principal Act which stipulates that an asylum seeker may be assessed to determine his or her ability to sustain himself or herself, and his or her dependants, with the assistance of family or friends, for a period of at least four months. It is concerning that the right to work may not be endorsed even in the event that an asylum seeker may be receiving support from family and friends. There is also no clarity provided on what would be considered as sustaining oneself and dependents. The lack of a minimum threshold in this regard could result in asylum seekers and refugees living in poor and deplorable conditions without the possibility of authorised employment to ameliorate these conditions.

ii. The SAHRC welcomes the amendments proposed by the Portfolio Committee in subsection (b) which recognises the role of the charitable organisations and persons, in addition to the UNHCR. However, the provision is not clear on what the 'shelter and basic necessities' are and how long such assistance may be provided. In addition, the mere fact that the UNHCR or other charitable organisations / persons are offering assistance to an asylum seeker is not reason enough to justify the denial of authorisation of the right to work. This is in effect, holding an asylum seeker to remain in a position of vulnerability and reliant on others for assistance and could arguably be regarded as an infringement on their right to human dignity.

iii. The SAHRC is of the opinion that the requirements and expectations, as contained in subsection (c) are unreasonable and onerous. On a practical operational level the clause in effect stipulates that in becoming a holder of the right to work, the asylum seeker first has to demonstrate that they cannot be sustained by family / friends; secondly, that assistance cannot be obtained from UNHCHR or other charitable organisations / persons and lastly, that the asylum seeker must find employment in order to be granted to the right to work for a period of six months. In the latter instance, the employer has to attest to the employment of the asylum seeker. This in effect,

excludes the informal employment market and self-employment. In addition the condition potentially discriminates against persons who are skilled and unskilled. The Commission notes the reality of high unemployment in the country and challenges in securing work in the formal employment sector. Through its engagement with asylum seekers and refugees, the Commission is aware that many asylum seeker workers are dependent on receiving a letter of employment in order to legally enter the employment sector and sustain their families, and as a result are sometimes placed in precarious situations where they may be willing to accept lower wages and poor working conditions to secure confirmation of employment. The Commission has further noted that the requirement of producing a formal letter; the penalties attached for a failure to do so; and the possibility that the permit may not be extended after 6 months is likely to discourage employers from hiring refugees and asylum seekers.

iv. If read within the context of the new Amendment Bill in its current version, an application for the right to work has to be made at the same time as the application for asylum, which must be within 5 days of arrival in the country. To require persons to undertake such extensive tasks, in the current environment, in the short amount of time is unreasonable and impractical.

v. The right to work is enshrined in international law instruments such as the Universal Declaration on Human Rights; the International Covenant on Economic Social and Cultural Rights; and the African Charter on Human and Peoples Rights.

vi. The Commission reminds the Committee that judicial precedent exists in the country, in respect of the right to work (including self-employment) for refugees and asylum seekers. In particular, in *Minister of Home Affairs and Others v Watchenuka and Others*,[21] the SCA noted that the freedom to engage in productive work is an important component of human dignity in that human beings are inherently a social species with an instinct for meaningful association. Fulfilling a socially useful purpose is therefore linked to an individual's self-esteem and sense of self-worth.[22] The court ultimately held that a general prohibition on the employment, where there is no reasonable means of support is a material invasion of human dignity and justifiable in terms of the Constitution's limitation clause.[23] Furthermore, in the *Somali Association of South*

[21] 2004 (4) SA 326 (SCA)
[22] Ibid. at para [27].
[23] Ibid. at para [33].

Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others[24] the SCA overturned the decision of the North Gauteng High Court and declared that the closure of businesses owned and operated by refugees and asylum seekers in the Limpopo Province was unlawful and invalid. Consequently, the SCA endorsed the right to self-employment of asylum seekers and refugees in South Africa.

vii. The Commission emphasises that the exclusion of asylum seekers / refugees persons from the employment market may expose them to vulnerable situations and illegal income generating activities in order to sustain themselves. This was also recognised by the SCA in the *Watchenuka* case, where the court opined that '…a person who exercises his or her right to apply for asylum, but who is destitute, [would] have no alternative but to turn to crime, or to begging, or to foraging.' [25] The Commission further notes that the exclusion from employment may limit an asylum seeker's ability to effectively integrate into society and therefore hinders the achievement of sustainable social cohesion.

3.10 Clause 19: Detention of Asylum Seekers: (section 23 of the Principal Act)

Clause 19 of the draft Amendment Bill addresses the detention of an asylum seeker and permits the Director-General to withdraw an asylum seeker visa, subject to the provisions contained in the principal Act, and effect the detention of its holder, pending the finalisation of the application for asylum. The Commission does not support the arrest and detention of persons pending the finalisation of their application for asylum, particularly in relation to the withdrawal of permits for minor offences. In addition, the Commission expresses concern that the provision fails to take into account the rights of the child in respect of detention and reiterates that the detention of children can only be used as a measure of last resort and for the shortest appropriate period of time. The SAHRC recommends that any decision regarding the detention of a child under the Principal Act, be considered in light of the existing legislation in South Africa which safeguard the rights of the child.

[24] *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others* (unreported, Case No. 48/2014, ZASCA 143, 26 September 2014).
[25] Ibid, note 20, at para [32].

3.11 Clause 23: Continuous residence (section 27 of the Principal Act)

Clause 23 amends section 27 of the principal Act in order to provide for the period in which a refugee qualifies for permanent residence. The amended clause changes the qualification period from five years and states, an application for permanent residence can be made 'after ten years of continuous residence' from the date on which asylum was granted. This is further premised on the requirement that, 'the Standing Committee after considering all the relevant factors and within a reasonable period of time, including efforts made to secure peace and stability in the refugee's country of origin, certifies that he or she would remain a refugee indefinitely.'

The SAHRC expresses concern that the proposed increase in the number of years of continuous residence will adversely affect refugees. This in effect places refugees in a state of uncertainty / limbo and can have multiple impacts on their life including education, employment, and job security. Furthermore, the indirect effect of the extended period of time potentially limits their sense of belonging and full integration into South African society. The SAHRC recommends that the Select Committee take these factors into consideration and requests clarity regarding the intention of the increased time frame.

3.12 Clause 24: Removal and detention of refugees and asylum seekers (section 28 of the Principal Act)

The SAHRC notes that the proposed clause 24 in the Amendment Bill seeks to substitute section 28 of the principal Act and provides for the Minister to order the removal and detention of both refugees and asylum seekers (and their dependants who have not been granted asylum) on the grounds of national security or public order. The clause reads that:

> **"**28. (1) Subject to section 2, a refugee, asylum seeker or categories of refugee or asylum seeker may be removed from the Republic on grounds of national security, national interest or public order.
> (2) A removal under subsection (1) may only be ordered by the Minister.
> (3) Any visa or status granted to a refugee or asylum seeker who is removed from the Republic in terms of this section is revoked.
> (4) If an order is made under this section for the removal from the Republic of a refugee or asylum seeker, any dependant of such refugee or asylum seeker who has not been granted asylum, may be included in such an order and removed from the Republic.
> (5) Any refugee or asylum seeker ordered to be removed under this section may be detained pending his or her removal from the Republic".

The SAHRC expresses the following concerns in respect of the draft clause:

i. The SAHRC recognises that the grounds of national security and public order are in line with article 32 of the Refugee Convention. However, removal on the grounds of 'national interest' is unclear.

ii. The authority of the Minister to expel categories of refugees / asylum seekers fails to take into consideration the specific and unique circumstances of each person's case. In addition, the order for removal of entire categories of persons may have an impact on the family structure, if members do not fall within the category identified for removal.

iii. In respect of subsection (5), the SAHRC brings to the Select Committee's attention the August 2014 judgment of the Gauteng High Court in the case of *South African Human Rights Commission and Others v Minister of Home Affairs.*[26] The matter, challenged the detention of 39 individuals at the Lindela Repatriation Centre who were held beyond the requisite time frame of 30 days as stipulated under section 34 of the Immigration Act 13 of 2002.[27] In this instance, the individuals were detained for over 120 days without a warrant. The Court accordingly found this to be unlawful and unconstitutional[28] and ordered the respondents to, *inter alia,* take all reasonable steps to terminate such unlawful detention practices.[29] The Court further declared that the respondents are to provide the SAHRC with a written report on a 'regular or at least a quarterly basis' setting out i) the steps taken to comply with the judgment to ensure that no person is detained in contravention of the order[30]; and, ii) full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of that person's initial arrest and detention.[31] The SAHRC therefore emphasises that the detention, as envisaged by subsection (5) must comply with prescribed time periods. It should further be noted that following the judgment, the SAHRC conducts regular monitoring at the Lindela Repatriation Centre and releases reports on the conditions of detention at the facility.

---

[26] *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* (41571/12) [2014] ZAGPJHC 198, available at http://www.saflii.org/za/cases/ZAGPJHC/2014/198.html

[27] The section relates to the 'deportation and detention of illegal foreigners'.

[28] *Ibid,* note 345, *para* 52.2 of the judgement. Also, http://ewn.co.za/2014/08/29/SAHRC-immigration-case-and-outright-victory

[29] *Ibid,* note 345, *para* 52.3 of the judgement.

[30] *Ibid,* note 345, *para* 52.4.1 of the judgement

[31] In terms of the judgment, these include *under para* 52.4.2.1 The person's full names; person's country of origin; The reason for the person's detention; The date on which that person was arrested; The basis on which the respondents seek to justify that person's continued detention beyond the 30 day period and whether a warrant for extension of the detention beyond 30 days has been authorised in terms of section 34(1)(d) of the Immigration Act (with a copy of such warrants to be provided).

iv. The SAHRC is concerned that the proposed draft clause removes the assurances of section 33 of the Constitution (right to just administrative action), as contained in the existing enactment of the Principal Act. In its current form, the draft clause excludes the right to review or appeal the Minister's decision to remove / detain persons. Thus, there is no oversight for the decisions taken by the Minister.

v. The removal of the provision in the existing enactment in the Principal Act, to source an alternate country for repatriation, is particularly concerning especially in instances where persons may face persecution if repatriated to their country of origin. Without the necessary safeguards in place, South Africa may contravene the non-refoulement principle. In these instances, it is recommended that the affected refugee / asylum seeker, with the assistance of the State, is afforded a reasonable time period to obtain approval to be repatriated to another host country.

4. Conclusion

The Commission acknowledges the need to strike a balance between granting refuge to asylum seekers and refugees to live in South Africa, whilst at the same time mitigating the abuse of the system through ensuring that a sound legislative framework is in place to address matters related to migration, refugees and asylum seekers. The Commission reiterates that any legislation in this regard should be guided by the Bill of Rights and at all times, ensure that the right to human dignity is upheld at every step of the process - from entry into the Republic at the border level through to the consideration of applications at the RRO's. Through the Commission's extensive monitoring, research and investigations into the lived reality of asylum seekers and refugees, it is acutely aware of the vast challenges facing this vulnerable group of persons. It is therefore of some import that the practical implications of the draft are fully interrogated and deliberated on to ensure rights are respected, including the rights of a sovereign state. In the pursuit of such objectives, the Commission therefore remains available to further engage with the Select Committee to share its insights and further recommendations.

***