CONSOLIDATED PUBLIC COMMENTS RECEIVED AND INPUTS BY THE DEPARTMENT

OF HOME AFFAIRS ON THE REFUGEES AMENDMENT BILL, 2016 [B122016]

(PORTFOLIO COMMITTEE ON HOME AFFAIRS)

This overview presents a summary of the 19 submissions of over 200 pages made by various organisations to the 2016 Refugee Amendment Bill (the Bill) and arranges these according to the Clauses of the Bill (the Bill) and the Sections of the original Refugees Act (the Act). Agreement on submissions are indicated with an “&” and additions to a submission by other parties are listed under the same sub-section and the name of the organisation.

|  |  |  |
| --- | --- | --- |
|  | **Submission From:** | **Acronym** |
| 1. | Agency for Refugee Education, Skills Training & Advocacy | ARESTA |
| 2. | Amnesty International | AI |
| 3. | Centre for Child Law | CCL |
| 4. | Centre for Constitutional Rights | CCR |
| 5. | Commission for Gender Equality | CGE |
| 6. | Consortium for Refugees and Migrants in South Africa | CORMSA |
| 7. | Goodway & Buck Attorneys | GBA |
| 8. | International Network of Congolese Lawyers | INCL |
| 9. | Joburg Child Welfare | JCW |
| 10. | Jesuit Refugee Service South Africa | JRS |
| 11. | Lawyers for Human Rights | LHR |
| 12. | Legal Resources Centre | LRC |
| 13. | M. J. Bauwens: Refugee Lawyer | MJB |
| 14. | M. Kande: Lecturer/Writer | MKL |
| 15. | Refugee Legal and Advocacy Centre | RLAC |
| 16. | Rwandan Refugee Community Association | RRCA |
| 17. | The Agency for Refugee Education, Skills Training and Advocacy | ARESTA |
| 18. | Scalabrini Centre of Cape Town | SCCT |
| 19. | Scalabrini Institute for Human Mobility in Africa | SIHMA |
| 20. | Stop the Attack on Refugee Rights Campaign | STAR |
|  |  | |
| **Acronyms Used** | |  |
|  | Refugee Reception Office | RRO |
|  | Refugee Status Determination Officers | RSDO |
|  | Standing Committee on Refugee Affairs | SCRA |
|  | Director-General | DG |
|  | Refugee Appeal Board | RAB |

| **Clause** | **Section** | **Organisation(s)** | | **Submission** “*insertion”* | **Department’s response** |
| --- | --- | --- | --- | --- | --- |
| **Preamble & General**  **Preamble & General** | **Preamble & General**  **Preamble & General** | AI & SCCT & LRC & LHR & CORMSA | | The Bill should not come before finalisation of the white paper on migration which has had a far more rigorous consultative process. This policy is still underway at present and should be finalised first to ensure credibility to the laws processed subsequently and ensure that South Africa’s future migration policy is compliant with the Constitution and international law. | All the issues that are dealt with in the Bill are challenges to the asylum process and the Department is of the view that the proposed amendments should be treated with some urgency. |
| STAR | | Amendments should have the Promotion of Administrative Justice Act as one of the cornerstones of the Bill. Administrative justice should be strengthened, not omitted. | The Promotion of Administrative Justice Act applies in all administrative actions regardless of whether or not its principles are incorporated into any legislation. |
| AI | | Realisation of adequate and comprehensive protection of the asylum seekers and refugees will require an adequately resourced DHA, with efficiently functioning systems, qualified personnel and a well-resourced and adequately constituted Refugee Appeals Board and Standing Committee on Refugee Affairs. | The Department agrees that it should fully resourced. |
| MJB | | The SCRA and RAB should be merged for efficiency of service to assess manifestly unfounded (MU) and unfounded applications and should comprise of 3 members and 1 judge and only process unfounded cases after MU.  Certification of long standing asylum seeker for permanent residence by SCRA is unnecessary and should just be time dependent and based on skills etc. as per the green paper. | This is a policy matter and for as long as there is review and appeal the provisions for RAB and SCRA are to make process to work smoothly. |
| SCCT  & LHR | | Research on the asylum system has consistently shown that the decision making done by RSDOs lacks in quality, consistently fails to identify those in need of protection, and does not meet the basic standards of administrative justice. Since the publication of this research, SCCT have not seen an attempt to improve refugee status determination processes nor an increase in the quality of decisions; in fact 2015 saw the refugee recognition rate sink to 4% nationally.  Musina RRO – the only RRO currently operating near the border and as such a key indicator in regards to DHA’s future RRO relocation policy– has only recognised five refugees out of over 34,559 applications decided in the three years between 2013 – 2015, equating to an acceptance rate of 0.00014%.  Although officials have stated that DHA is now dealing with asylum applications within several months, our office consistently sees deserving refugees waiting up to a year for first-instance decisions – when including appeal processes, the adjudication time takes years and is rarely finalised within six months. Our office assists individuals on a daily basis who have been in the asylum system for five years or more.  The poor quality of decisions has a severe impact on the functioning of the asylum system as it requires legitimate and vulnerable refugees to repeatedly report to RROs for temporary extensions of their asylum documentation pending final adjudication leading to access and administrative efficiency problems. It also places severe strain on the ability of the RAB and SCRA to carry out their duties in regards to appeal hearings for those rejected as unfounded and review of applications for manifestly unfounded rejections.  SCCT are concerned about move away from urban refugee system which is progressive and not enough detail is given in the Bill on UNHCR and DHA support. Many of the proposals add additional work for RSDOs without determining status better such as 5 day limit and refusal of asylum after irregular entry. Assistance from family will be almost impossible to determine let alone administer even if UNHCR was on board. DHA would benefit more by just improving current system.  These challenges often mean legitimate refugees’ only recourse to protection is through judicial review in the High Court, with many judgments from these cases expressing grave concerns with how asylum applications have been handled. In one case the Court described DHA's handling of an asylum application as ‘deplorable’.  This imbalance in South Africa's migration policy has been recognised in the National Development Plan (NDP) that advised that South Africa ‘will need to adopt a much more progressive migration policy in relation to skilled as well as unskilled migrants’. More recently, the recent Green Paper on International Migration, released by DHA in June 2016, recognised the NDP’s position in relation to regional migration and development. One proposal put forth is for the introduction of special regional work and business visas to address regional economic migration realities. We believe that such a proposal, if implemented in a transparent and accessible manner, would result in a more holistic migration policy thereby lessening some of pressure on the asylum system.  SCCT recommend that the Refugees Amendment Bill should be withdrawn in its current form pending the finalisation of the Green Paper on International Migration Process and subsequent release of a new White Paper on International Migration. Amendments to areas of critical need, such as in refugee status determination decision-making and with the Refugee Appeals Authority – should be addressed through prioritised amendments to the Refugees Act. | The reference to the Musina Refugee Reception Centre having granted status to only five people is for the Department is an outcome of quality assurance. The Department has always pointed to an abuse of the asylum system by economic migrants (with such applications making up about 90%).  The trends available points to most asylum seekers avoiding making applications at the Musina Refugee Reception Office due to its efficiency levels thereby choose to lodge their application at Marabastad Refugee Reception Office where quality assurance is constrained.  The Department always strives to ensure that RSDO’s makes good quality decisions and in this regard, the Bill proposes certain measures (see clause 9C) whereby SCRA may assist with monitoring and supervision of decisions of RSDO’s. |
| LRC | | Apartheid government rejected international standards but the country is now bound by Geneva and OAU conventions which have led to excellent Refugees Act, which should not be allowed to regress due to severe security measures. | The proposed amendments are aimed at providing measures to deal with the challenges experienced within the system and not intended to move away from the obligations under International Instruments. |
| INCL | | The wholesale change to refugee protection and adjudication in the Bill present a massive deviation from the urban refugee policy considered as the corner stone of refugee protection in South Africa compared to global trends.  It is unclear how economic migrants will be distinguished from genuine refugees and whether it will be the Department of Labour or the Department of Home Affairs to determine this.  Xenophobia and Racism seem to be some of the influences on the Bill. South Africa is however welcoming many foreign nationals from almost the entire world and has the opportunity to be the forerunner to the United Stated of African Countries (USAC), by celebrating its unity in diversity. | Our asylum process is not meant for economic migrants. |
| LRC | | An overly bureaucratic and restrictive asylum system will have the adverse effect of driving asylum seekers underground which will cause the exact deregulation which the 2016 Bill seeks to redress. An effective asylum system should actively and openly seek to document and assist asylum seekers. To effectively do so, the DHA should focus on increasing its capacity at the Refugee Reception Offices as opposed to seeking to diminish applications received. | The Department is of the view that genuine asylum seekers and refugees will be aided by the efficiency brought about by the proposed changes. It is not meant to diminish or restrict access to Refugee reception office for asylum seekers or refugees. |
| RLAC | | RLAC are perplexed with the fact that the department seeks to withdraw protection from those that already have been granted it instead of prioritizing clearing the appeal backlog which dates back to at least the last five years. The phrasing of the Bill calls into question the Department’s commitment to adhering to the UN refugee convention. | There is nothing in the Bill that seeks to withdraw the already granted protection. |
| SIHMA | | The combination of the proposed amendments risk to drastically restrict the possibility for individuals of accessing a fair and efficient asylum procedure. The inability to lodge applications due to time restrictions, a reduced number of available Refugee Reception Offices, new stringent criteria to exclude individuals from refugee status and to cease refugee status, and inability to support themselves might leave asylum seekers and recognised refugees undocumented without alternatives to legalise their status in the country. | There is nothing in the bill that seeks to restrict access to a fair and efficient asylum procedure. |
| LHR | | LHR submit that the provisions of the Bill which deal with immediate capacity problems, particularly the massive backlog of approximately 200 000 appeals before the Refugee Appeal Board can be severed from the whole scale changes in the system and dealt with immediately. This would include the changes contemplated in section 8C(2) of the principal Act permitting appeals to be heard by one member as determined by the Chairperson of the Board. We submit that this change can be effected while the overall changes as contemplated in the Green Paper on International Migration are being considered in a final White Paper.  The Green Paper makes much of preserving the asylum system for the “genuine” refugee while relying on a 96% rejection rate of asylum applications by the Department of Home Affairs. The 2011 UNHCR Handbook on Refugee Protection which states: *“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.”*  Therefore, many asylum seekers are already refugees while their status is being official determined. Refugee status is a declaratory status from the moment one crosses an international boundary due to persecution under the definitions in section 3 of the Refugees Act. Strict differentiation of treatment between asylum seekers and refugees may therefore be inappropriate and where rights reserved for “refugees” may be removed from asylum seekers, this may be a violation of South Africa’s obligation toward the 1951 UN Convention and the 1969 OAU Convention. | Refer to comment on page 3 above under preamble. |
| RRCA | | One key area of concern for the refugee community is the lack of transitional provisions for existing asylum seekers, particularly those who have been in the system for extended periods and who may still face years in South Africa due to the backlogs in appeals. These provisions should be immediately addressed in order to provide clarity in the law.  The amendments of the Act should not distance itself from any of the practical guidance contained in the Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating To The Status Of Refugees (UNHCR 1979). The explanations in the Handbook  “…are based on the knowledge accumulated by the High Commissioner's Office over some 25 years…”  It is submitted that the Legislature of South Africa should not lightly disregard or not follow these guidelines published in the Handbook. If the DHA wants to deviate from the Handbook, it should do so very cautiously and with very good reason. | **There are no backlog cases for RSDO’s and therefore there is no need for transitional provisions in this regards.**  **However, the Department proposes the following as transitional provisions as the new clause 31:**  **“Transitional provisions**  **31.(1) Any matters pending before the Refugee Appeal Board immediately before this Act takes effect must be regarded as matters before the Refugee Appeals Authority in terms of the principal Act, as amended by this Act.**  **(2) Any decisions and determinations made by the Refugee Appeal Board in terms of the principal Act immediately before this Act takes effect, remain in force.”.**  There is no intention to deviate from the Handbook. However, it should be noted that the Republic is faced with unique challenges that require to be addressed as the Bill seeks to do. |
| **1. Definitions**  **1. Definitions** | Permit | MKL & RLAC | | Change of definition from visa to permit is supported as less demeaning. But needs to be better described in case of change of appearance.  Request that along with the change, the Department conducts awareness workshops with employers to sensitize them on the rights that flow from the above documents. Our office is more than open to partnering with the Department in this regard. | The comment on the change of the word permit to visa is noted.  The Department will engage in public education (to the public, employers and other relevant stakeholders) in order to explain the refugee regime and any assistance in this regard will be considered by the relevant sections of the Department. |
| AI | | Visa implies known and fixed period whereas refugees are indefinite so should remain refugee permit. | A refugee is not automatically indefinite as circumstances that may have brought about the reasons for seeking asylum may change thereby bringing a change in the status of a person. |
| RRCA | | The case for Refugees in general calls for a clear cut distinction between refugee purposes [catered for in the Refugees Act] & normal immigration purposes in the Immigration Act. It is suggested that the term should be used consistently as follows: "*asylum seeker visa*". It is acknowledged that this amendment is to bring it more in line with the Immigration Act, but the case for Refugees in general clearly calls for a definite distinction and should be used consistently. | **The comment is noted and the suggestion will be effected where necessary.** |
| (b) Dependent  (b)  Dependent | AI &CCL  & CORMSA  LHR & STAR & RLAC  RLAC & SCCT  SCCT | | Definition should include informal care giving relationships such as where there is no formal adoption of a child by the asylum seeker or refugee but they are the primary care giver of such a child or children.  Should include children above the age of majority and children who are under their guardianship.  Adoption procedures either do not exist or are not functioning in war-torn countries that most refugees come from.  The definition should align with international law to which South Africa is signatory including: The United Nations 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 and the Inter-agency Guiding Principles on Unaccompanied and Separated Children of 2004.  A restrictive definition of the term dependent is a violation of the principle of unity of the family, which is one of the binding principles in terms of the UNHCR Convention. RLAC therefore recommend that for the sake of uniformity and the indigent family members and dependents of the main applicant the section read as follows:  *“dependent in relation to an asylum seeker or a refugee, means any unmarried minor dependent child, including an adopted child if such child was legally adopted by the asylum seeker or refugee, a spouse legally married to the asylum seeker or refugee or any destitute, aged or infirm parent of such asylum seeker or refugee who is dependent on him or her , or any other family member who is dependent on the principal applicant for support, and who can prove such dependency, and provided that such family member was included by the asylum seeker in the application for asylum or good cause is shown why such dependent was included by the asylum seeker in the application for asylum or good cause is shown why such dependent was not included in the application”*  The SCCT further recommends to DHA to develop standardised and inquisitorial questions regarding family members during refugee status determination interviews to ensure the inclusion of bona fide dependents and protect family unity. | The Department is of the view that legally adopted children or those under legal guardianship are covered by the definition. Furthermore. There is a law in the Republic that regulates issues of majority and care and therefore the Refugees Act should not venture into that.  A spouse is an equal partner of and can make an application on his or her own. In cases such divorce he or she can make an application unlike if he or she is classified as a dependent. |
| LRC | | Asylum seekers who marry after arrival in South Africa should be permitted to add their spouses to their asylum applications if required and that this should also be included in the definition of dependant. We submit that excluding spouses married in South Africa from the definition of dependant is an unreasonable limitation of the right to a family life, which the Constitutional Court has recognised within the broader right to human dignity and the right not to be unfairly discriminated against on the basis of birth, among other grounds. The adjudication of asylum applications is often lengthy, in some instances asylum applicants have waited up to ten years to receive a final decision. It is therefore natural that asylum applicants who arrive in South Africa single without any dependants may during this time enter into relationships/get married and have children who may not be included in their asylum file at the time of application.  Members of the immediate family of the asylum applicant/recognised refugee should be included in the definition of dependant. Limiting the meaning of dependants to only include parents, children and spouses would exclude members of the asylum applicant/recognised refugee’s family who may be destitute, aged, infirm who may include grandparents, minor siblings etc. who are dependant financially or otherwise on the asylum applicant/recognised refugee. We therefore submit that the words “member of the immediate family” should be retained in the definition of dependant.  The condition of inclusion in the asylum application is an impracticable condition and we suggest that it be excluded from the definition. We submit that once a person qualifies as a dependant as defined, that should suffice for the purposes of joining that person to the file without any further unnecessary qualification. | As indicated above, a spouse is an adult person who should not be classified as a dependent.  Nothing prevents a spouse who is married after having failed in his or her application to indicate to RRO his or her changed circumstances and produce record of marriage for consideration. |
| CCL | | Align with definition of family member in Children’s Act and international law for Separated Children accompanying adults:  *(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.*  Include definition of “Separated Children” in the definition of the word “dependant”: Pursuant to section 233 of the Constitution South Africa’s international law obligations favour a conclusion that the separated children be recognised as dependants of their care-givers who accompany them into the country and thus be granted asylum visas as such. | See comment above. |
| CGE | | The CGE supports the proposed revision. | The comment is noted |
| GBA | | Many dependent children are, due to their studies, dependent upon their parents after they reach the age of eighteen (18) and usually up until about the age of twenty three (23).  (a) This proposed amendment will have the effect of splitting up families which cannot be in accordance with the values attributed to refugees by The United Nations Convention.  (b) Accordingly, the word “minor” should not be inserted.  Inserting the word “parent” will have a similar effect of splitting up families, whereby creating grave restrictions for children as they (ie. children) may not always be in contact with their parents; especially in circumstances where children and parents had to flee their countries at different times due to danger or persecution experienced by them. | There is no way in which the provision may split families, as it is merely regulating issues of dependency and not family union. |
| (d) Marriage | CCR | | Exclusion of marriages in terms of Islamic or other religious rites as was provided for in section 1(d) of the Amendment Act of 2008, which is now specifically excluded in the Bill, fails to take into account that our law currently provides no legal protection for Muslim marriages. It is possible for an Imam to be recognised as a marriage officer in terms of the Marriage Act of 1961 and a Muslim marriage will then be recognised in terms of the Marriage Act but if this is not done, no legal protection will be afforded to spouses in a Muslim marriage.  There appears to be no logical reason why a distinction is drawn between spouses married in terms of the Marriage Act of 1961; the Civil Union Act of 2000; the Recognition of Customary Marriages Act.  This provision will specifically exclude spouses in a Muslim marriage, which is contrary to the approach adopted by the Constitutional Court in Daniels v Campbell and others, in which the majority found the definition of “spouse” to be extended to include spouses in a Muslim marriage.  There should not be undue restriction on the right to equality as provided for in section 9 of the Constitution which states: “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.” False marriages pose a real risk to the refugee system but the limitation to the definition of “marriages” is constitutionally unreasonable and arbitrary. | There is no law in South African that regulates marriages according to Islamic rites, and therefore the Bill may only refer to existing laws. However, where a marriage is concluded in terms of the laws of a foreign country, such marriage would be recognised as the principle in our law is that we recognise legally concluded foreign marriages. This excludes the marriages conducted by authorised marriage officers under the Marriage Act. |
| LRC | | LRC welcome the deletion of the word ‘legally’ from the initial definition as this was too restrictive in the draft Bill. | The comment is noted |
|  | RRCA | | It is necessary to refer this Bill to the National House of Traditional Leaders because it seeks to re-introduce the concept of marriage into the Bill and it strikes at the heart of customary law or even customs of traditional communities. | The Department is of a different view and maintains its opinion as outlined in the Memo on the Objects of this Bill |
| **2. Exclusion from Refugee Status**  **2. Exclusion from Refugee Status**  **2. Exclusion from Refugee Status**  **2. Exclusion from Refugee Status**  **2. Exclusion from Refugee Status** | 4. | STAR | | Remove provisions excluding asylum seekers from protection by the act and cessation of refugee status in general. | The Department disagrees with the suggestion. |
| STAR & MJB & AI | | Refugees should not face cessation of their status for engaging in any way with their home country's embassy, or for returning to their home country. Cessation should be based on the individual merit of each case. | **The suggestion for clarification and it is proposed that the words “in anyway” may be substituted for the words “in the prescribed circumstances” to provide clarity on instances where such re- availment may be restricted.** |
| JCW  JCW | | Section 33(2) of the Act, only provides for dependants to make their own claims upon death of the principal claimant or if they cease to be a dependent-not when the principal claimant is excluded from refugee status. For children this suggests that exclusion of the principal claimant means that they too are excluded from obtaining refugee status regardless of their best interests. This means that children have little to no autonomy in the asylum seeking process if they are placed on the same file as the principal claimant. Such children may not be able to return to their country of origin owing to a well-founded fear of persecution.  This is contrary to the child rights framework of South Africa, particularly section 28(2) of the Constitution, which states that "the best interests of the child are of paramount importance in every matter concerning the child."  On this basis, there should be clear procedures for children and other dependants being removed from the files of the principal claimant. The insertion should make explicit provision for dependants of an excluded person to apply for refugee status.  There may be instances in which a child- accompanied or unaccompanied may have committed an act which excludes them from obtaining refugee status such as having committed a crime. However the UNHCR handbook indicates that: “In view of the particular circumstances and vulnerabilities of children, the application of the exclusion clauses to children always needs to be exercised with great caution. In the case of young children, the exclusion clauses may not apply at all. Where children are alleged to have committed crimes while their own rights were being violated (for instance while being associated with armed forces or armed groups), it is important to bear in mind that they may be victims of offences against international law and not just perpetrators.  It is therefore submitted that addition should be made regarding children, their vulnerabilities and the specialised approach needed to address whether or not they ought to be excluded from refugee status. | There is no provision in the Bill that deals with the amendment of section 33(2) of the principal Act, as amended. |
| CCR | | The UNHCR published guidelines in 2003 relating to article 1F of the 1951 Convention provide that the exclusion clause should be interpreted restrictively and is an *exhaustive* list. The guidelines also state that an exclusion clause should have “rigorous procedural safeguards built in”, suggesting the creation of “specialised exclusion units” to specifically deal with exclusion cases and that exclusion should be based on “clear and credible” evidence. Furthermore, the guidelines specifically state that “lack of cooperation by the applicant does not in itself establish guilt.” | The Department will, as a matter of procedure, develop guidelines for RSDO to follow in cases where the exclusion clause applies. |
| LHR | | The wording of the amendment, does not clearly define the burden or standard of proof for assessing whether someone has committed a serious crime contemplated in this clause or whether a particular offence requires a conviction from a South African court of law in order to effect an exclusion. The effect of excluding individuals for crimes committed in South Africa would be to expose individuals with genuine persecution concerns regarding potential r*efoulement*. Depending on the severity of the crime, this may be inconsistent with the constitutional right to life, section 2 of the Refugees Act and the country’s international obligations. Each case would have to be dealt with on an individual basis.  It should also be noted that individuals who may face the death penalty in their country of origin, or any other country, where they may be suspected of or have committed a capital crime cannot be returned to their country of origin. It should be noted that neither the Refugees Act nor the Immigration Act make provision for permitting such individuals who may not return to their country of origin without the requisite assurances that the death penalty will not be imposed. | As indicated in the comment, each case is dealt with on its merits and therefore there is no need for the Bill to provide for or define the standard of proof for assessing whether one has committed a serious crime. |
| 4(1)*(a)* to *(i)* | CCR  & AI | | The determination of excluding an asylum-seeker from refugee status should not be exercised by one individual who is given a discretionary power to exclude an asylum-seeker if he has “reason to believe” that the asylum-seeker has committed any of the acts described in sections 4(1)(a) to (i) since this is an opportunity for corruption. The DHA have previously acknowledged in a presentation to Parliament in May 2010 that “…placing the decision-making responsibility in the hands of one individual increased the susceptibility to corruption.”  There is also not sufficient oversight of the RSDO’s discretionary power since no obligation on the Standing Committee, in terms of clause 13 of the Bill (section 9C(1)(c), the Standing Committee “*may* monitor and supervise all decisions taken by Refugee Status Determination Officers…” not *must* monitor.  The Bill should not deny refugee status on illegal entry alone before careful consideration whether a “well-founded fear of persecution exists from the country they are fleeing”. This provision should provide investigation by the RSDO whether a well-founded fear of persecution exist in determining justification for illegal entry. | The suggestion to have status determination adjudicated by a committee is not sustainable, as explained during the briefing session that there is no funding for such model as well as that, as with the Refugee Appeal Board there are going to be challenges relating to quorum.  With regards to comment on section 4(1)(e) and (f), a person is allowed to apply. The principle is that a person is included first and upon consideration of an application is then excluded.  As a refugee one may end up being a citizen and therefore we do not need the categories of person who commit offences of this nature. |
| AI  SCCT | | Fugitives of Justice are often victims of unfair prosecution related to their claim for asylum such as being gay.  The SCCT recommends that exclusion from refugee status due to criminal acts remain consistent with those set out in the 1951 Convention relating to the Status of Refugees. Accordingly, subsections 4(1)(e)-(i) should be removed. | As indicated above, each case will be considered on its own merits. |
| 4(1)(f) | RLAC | | This clause is an overzealous provision that seeks to disqualify asylum seekers who have committed any offence against the Immigration Act, the Identification Act, or the South African Passports and Travel Documents Act. This provision is preposterous when considering the numerous asylum seekers and refugees who have, despite countless efforts, committed such “offences” without choice due to the inefficient asylum system that continues to be overwhelmed by backlogs. RLAC therefore recommend that before the law is changed to disqualify refugees and asylum seekers for contravening the Immigration Act or any other Act, the department prioritizes the functioning and efficiency of its staff thereof. | Every person who is in the Republic should observe and abide by the laws of the Republic. The Department cannot tolerate persons who commit fraud and contaminate the population register which, when unreliable, affects the country’s sovereignty.  No one who wishes to apply for asylum has a need to obtain fraudulent documents as we allow people to apply for asylum with or without documents. |
| 4(1)(g) | RLAC  LHR & CORMSA | | In Mohammed and another v President of the Republic of South Africa and others, the court held that this country is underpinned by the concept of and respect for human rights including the right to life and dignity, and that “this must be demonstrated by the state in everything it does.” RLAC accordingly submit that in handling matters concerning fugitives of justice, due regard be nonetheless had to the above rights, regardless of the seriousness and severity of the offence.  The inclusion of offences relating to fraudulent possession, acquisition or presentation of identity / travel documents is broad and may case the net too wide when it comes to excluding refugees from international protection. The nature of these offences is administrative in nature and would not, in many cases, meet the “seriousness” test under Article 1F of the 1951 UN Convention.  This provision fails to take into account the often irregular migration of individuals who are fleeing persecution. Many refugees are often forced to use irregular migration methods to secure their safety and privacy. Such methods have been recognised under UN Convention and Refugees Act. Such acts would often fall within acts that are considered offences in the Immigration Act, the Identification Act, or the South African Passports and Travel Documents Act. The net effect of excluding people who commit offences under these Acts would be to exclude a good number of genuine refugees from refugee protection for the nature of their flight from persecution. | See comment above |
| 4(1)(h) | RLAC & CORMSA  LHR | | South Africa signed and assented to the international Refugee Convention without making any reservations, which therefore means that article 31 of the Convention is binding upon the state. As such, this proposed departure that aims to impose penalties based on illegal entry and/or presence is not in line with the principle of non-refoulement, which has already been explained at length above. It is inadvisable for the state to disqualify an applicant based on port of entry without considering the merits of the application. We thus recommend that the department focuses on whether the asylum seeker is a bona fide applicant with a valid claim, rather than dismissing cases solely according to whether the applicant entered the country legal or not.  The above provisions will also be in conflict with the provisions of section 2 (the refoulement principle provision) of the Refugees Act.  The amendment provides the Refugee Status Determination Officer a wide discretion for determining what qualifies as a compelling reasoning. Such unfettered discretion for such an unnecessary exclusion provides opportunity of exploitation and corruption. This is inconsistent with Article 31(1) of the 1951 UN Convention which provides for non-penalisation for unlawful entry or presence within the territory of the host country. One interpretation of this Article is that only refugees who come “directly” from their country of origin benefit from this provision, however, this interpretation would be controversial as international law recognises that an asylum seeker does not need to make his or her application in the “first safe country” in which he or she finds themselves. This has been the opinion of the UNHCR in several opinions relating to First Safe Country agreements. | Nobody is prevented from making an application and the Department simply makes provision regarding qualification.  Anyone who has no asylum transit visa is taken through a process to verify the means of entry and reasons therefor and such is taken into account on consideration of the application.  People from neighbouring countries will be dealt with differently, as it comes this requirement. |
| 4(1)(e)&(g)  4(1)(e)  4(1)(f)  4(1)(g)  4(1)(i)  4(1)(i) | AI & LRC  SIHMA  & CORMSA  LHR  LHR  &  RLAC  &CCL  & STAR & MJB  & ARESTA  & GBA | | Any individual, whether South African citizen or asylum seeker who commits a crime should be prosecuted in accordance to the law. Any decision to deny asylum must be based on fair administrative justice, observing the principles of innocence until proven guilty and all due processes before any exclusionary measures.  Refusing asylum for fleeing country of origin because of facing the death penalty for a crime may result in death.  It should be considered that the risks ‘associated with the exclusion from refugee status must not outweigh the harm that would be done by returning the claimant to face prosecution or punishment’. This provision should not be applicable to an asylum seeker who has been convicted of a ‘serious’ crime and has served a sentence in South Africa as he or she should not forever be barred from refugee status.  This provision raises some concerns as the exclusion from refugee status for criminal activities in a country of refugee should be limited only to ‘serious’ and ‘non-political’ acts posing a security threat to the country of refugee.  It may be difficult to apply as the mere fact that an individual is considered to be a ‘fugitive from justice’ should not lead ipso facto to the exclusion from refugee status. A government with persecutory intent could, in fact, ‘use the criminal law to persecute its opponents; in such circumstances, ‘it makes no sense to treat those at risk of politically inspired abuse of the criminal law as fugitive from justice.’3 It is suggested that at the least this be changed to read: *is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary and does not qualify for refugee status as defined in Section 3 of the principal Act.*  The standard set by the wording of the amendment does not adequately factor in the independence and impartiality of the judiciary from which the applicant might be a fugitive from and does not factor in the seriousness and/or nature of the crime. For example, a judicial system may be quite independent and uphold the rule of law in uncontroversial areas relating to economic transactions or banking law, but may be subjected to manipulation in politically sensitive “criminal” cases. Further the burden on the asylum seeker to prove that his or her judiciary does not uphold the rule of law. In light of the above qualifications relating to uncontroversial areas of the law, this may be an impossible task to prove and would result in refugee status being unlawfully withheld from a refugee deserving of international protection.  The proposed addition of Section 4(1)(i) is problematic and although it is reasonable to expect an individual to lodge an application for asylum as soon as he or she arrives in the country of refuge, a general rule for migrants to present themselves within 5 days from their arrival in South Africa cannot lead ipso facto to their exclusion from refugee status. Moreover, this provision fails to take into consideration the case of Refugees. The 1951 Convention Relating to the Status of Refugees and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa ‘do not distinguish between persons who flee their country in order to avoid the prospect of persecution and those, who while already abroad determine that they cannot or will not return by reason of the risk of persecution in their state of nationality or origin.’ It seems, therefore, necessary to allow individuals already present in South Africa to benefit from international protection without the restriction of a formal timeframe to lodge an asylum request. It is suggested to add the following provision subsection *4(1)(i) do not apply to an asylum seeker whose well-founded fear of being persecuted may be based on events which have taken place since he or she left the country of origin.*  While disqualification based on criminal activity, particularly those concerning terrorist activities or against the security of the government rendering protection, is acceptable and in line with the objectives of the Convention, RLAC are of the opinion that the right to non-refoulement and, in conjunction, the right to life, supersedes other concerns and must be given heavy consideration. Therefore, refusing protection to an asylum seeker based on their committing of an offence that does not amount to treason is a breach of international law and the Constitution. Section 7 which reads: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.” The Bill of Rights also extends to refugees and asylum seekers in the Republic. Furthermore, the Constitutional Court held in the landmark case S v Makwanyane (CCT3/94 [1995] ZACC 3) that the right to life is an absolute right that cannot be limited in any way.  South African courts have ruled that “a person may not be surrendered to a country where he or she faces the death penalty without first seeking an assurance that the death penalty would not be imposed.” cessation must consider the current circumstances of the country of origin of the refugee in line with section 11 of the constitution.  Retain 14 Days in original act (other submissions say 21 to 90 days) since 5 days to apply is unreasonable, harsh and impossible given asylum seekers having no money for transport for long distances and not speaking local languages. Penalties for not complying with this time are unclear and are unreasonable. | See previous related comment |
| MJB & GBA  CCR  RLAC  & CORMSA  LHR  & RRCA  RRCA | | In Bula v Minister of Home Affairs, the Supreme Court of Appeal (SCA held that the applicants – who did not have the opportunity to apply for asylum but had attempted and had been unsuccessful in doing so – were nevertheless entitled to invoke the protection of the Refugees Act. In Ersumo v Minister of Home Affairs, the SCA ordered the Department to issue an asylum transit permit to an applicant who had been detained following his inability to gain access to the Refugee Reception Centre because of relentless queues.  Compelling reasons for not complying with the 5 day requirement includes hospitalisation, institutionalisation or “any other compelling reason of similar nature”. This provision presents a real risk for corruption as there is again no indication what factors will be considered by the RSDO in deciding whether a “compelling reason of similar nature exist”.  Section 4(1)(f) to (i) should not be included as these exclusions can be influenced by the subjectivity of the RSDO and places an undue burden on asylum seekers. In the alternative, procedural safeguards should be built in terms of which these decisions are supervised by a committee.  While in general agreement with this provision, we recommend that subsection (i) is revised to read as follows:  *“has failed to make an application for asylum within five days of entry into the Republic as contemplated in section 21, and having failed to do so has been given an opportunity to reasonably explain such failure, and has failed to reasonably convince the Refugee Status Determination Officer, which reason has been communicated to the applicant in writing; provided that despite failure to reasonably explain such a failure, no applicant will be denied the right to lodge a claim for asylum and have that claim adjudicated before being disqualified.”*  In other words, we recommend that the issue of failure to lodge an application within the five day period only be raised once adjudication on the merits of the application has taken place.  This provision is particularly harsh considering that most refugee reception offices only allow certain nationalities to apply for asylum one day of the week. This essentially means that asylum seekers have effectively one day in order to apply for asylum otherwise, they will be excluded from refugee status. It also runs afoul the findings in *Ersumo vs Home Affairs* *and others in 2012* which found that the 14 days, as prescribed under Regulation 2(2) of the Refugee Regulations, 2000 was a starting point and not determinative of who may apply for asylum.  This is coupled with the asylum seeker’s lack of knowledge of where refugee services are provided as well as travel time to centres such as Pretoria, Durban, Port Elizabeth (when it is re-opened by order of the Supreme Court of Appeal) or Musina where the support structures, such as family or friends, may be located in order to maintain one’s file at those offices and not incur the additional expense of frequent travel to RRO’s based at border points during the asylum process.  This is particularly serious in light of the changes to section 22(6) and (7) of the principal Act which will require an assessment of an asylum seeker’s ability to sustain him or herself “with the assistance of family and friends”. This provision essentially makes it impossible to make such an assessment if they are effectively excluded from status.  The “compelling reasons” provision does not limit the unfair prejudice of this provision. Compelling reasons are limited to hospitalisation or institutionalisation of some kind. This is an unreasonable amount of time and will likely not pass the reasonableness test under the Constitution.  The suggested amendment is vague and ambiguous as it does not specify what would happen to asylum seekers who arrive in the Republic over a weekend or on public holidays or fail to gather as much information as possible to enable them to locate the Refugee Status Determination Office in a huge, diverse and complex territory such as South Africa. It is suggested that the duration should exclude weekends and public holidays and be extended to a minimum of 21 working days. | The Department is aware of the cited judgments and is proposing measures to ensure that there are no people prevented from seeking asylum. There a several administrative measures taken to ensure that Refugee Reception Offices operate more effectively and efficiently. |
| 4  4 | LRC  RLAC  RLAC | | The UNHCR have stated that the exclusion clauses in the 1951 Refugee Convention are exhaustive. As the language in the OAU Refugee Convention is almost identical, this would also be the case when interpreting its Article I(5). As a signatory to the 1951 Refugee Convention and the OAU Refugee Convention South Africa cannot lower the threshold of protection that they offer to persons seeking asylum.  It is unlawful to provide additional exclusionary clauses as envisioned in the proposed section 4(1)(e) – (i). These additional exclusionary clauses should be removed as they will not stand constitutional scrutiny if challenged in a court of law.  A person guilty of a common law offence may be liable to excessive punishment because of the applicable laws, which may amount to persecution within the meaning of the definition. The determination of whether a person is fleeing prosecution or persecution must be left to the consideration of the RSDO. This will ensure that all the applicable laws and factors are taken into consideration when a decision has to be made.  Failure to apply for asylum within five days is not comparable to war crimes or crimes against humanity for which the exclusions were originally intended. Service delivery problems at RROs will only increase if the proposed section 21(1A) is implemented, which provides that asylum seekers must provide biometric data prior to making an application for asylum. Particularly given the current lack of resources and problems within the existing asylum system. The current proposed exclusion provision does not reflect these realities and must be deleted. | The Department disagrees with the comment. |
| **3. Cessation**    **3. Cessation**  **3. Cessation**  **3 Cessation** | 5 | JCW | | If a principal claimant has obtained refugee status and then ceases to qualify due to the factors listed in section 5 of the Act their dependent(s) very often has no control over the actions of the principal claimant and therefore will not be able to retain their own status because section 33(2) mentions that dependants can apply for status in their own right only in the event of death of the principal claimant or if they cease to be a dependent. It is therefore submitted a clause be inserted into section 5, protecting children who are not in a position to re-avail themselves to their country of origin when the principal applicant to whose case they connected ceases to qualify. |  |
| 5(1)(a) | RLAC & LHR  SCCT  LHR | | RLAC agree that those who voluntarily return to the country they fled be disqualified, our concern is with the provisions of section 5 (a). RLAC are of the opinion that the phrase “in any way” is too vague and thus is subject to a wide range of interpretations, thereby giving rise to problems and complications. For example, DRC nationals who seek to have their foreign qualifications evaluated by SAQA are first required to submit their foreign qualifications at their Pretoria Embassy, after which the embassy must issue a Homologation Certificate before the qualifications are sent to SAQA. Would this therefore be construed as voluntarily re-availing oneself to the protection of his or her country? RLAC recommend that this section be removed completely, or alternatively it be phrased to make for exceptions:  *“he or she voluntarily re-avails himself or herself to the protection of the country of his or her nationality, provided that contact made with the embassy of the country of origin or of nationality for purposes of facilitating integration in the country shall not be construed as re-availing oneself for purposes of protection.”*  The SCCT recommends that the insertion of 'in any way' to section 5(1)(a) be removed as it is inconsistent with the 1951 Refugee Convention and is exceedingly broad in scope.  If additional grounds are necessary regarding re-availment, they should be specific in the law so that refugees know what they may or may not do and meet the “seriousness” criteria for removing refugee status. This is particularly the case in section 3(b) claims where the agent of persecution may not be the state itself, but the state is unable to protect the individual. Interacting with one’s embassy in those circumstances cannot amount to re-availment. There is no public policy reason for permitting this type of exclusion.  LHR submit that whether a “visit” amounts to re-establishing oneself should be taken on a case-by-case basis, but should not result in automatic cessation of refugee status. It may be appropriate to permit a “compelling reasons” defence in this case to permit the refugee to explain the nature of his or her visit.  LHR further submit that to cease status based on a conviction for the use of a fraudulent document is out of proportion and irrational. Returning someone to face death or a serious deprivation of their liberty due to such relatively minor administrative offences is disproportional to any objective and would therefore not meet the limitations test under section 36 of the Constitution. Criminal sanctions exist in these circumstances to punish unlawful behaviour without breaching the proportionality requirements of natural justice. | In reference to “in any way”, the Department wishes to point out that every case will be dealt with on its own merits. |
| 5(1)(f)&(g) | AI  SCCT | | Any negative action regarding an asylum seeker and/or refugees stay in the country be taken only after legal processes concluded noting the principle of innocent until proven guilty.  The SCCT recommends that the insertion of sections 5(1)(f)-(g) be removed as they are inconsistent with the 1951 Refugee Convention and do not consider the principle of non-refoulement. | The principles of natural justice applies, |
| 5(1)(e)(f)(g) | CCL | | Special provision is needed for procedures to protect children as per the Child Justice Act in terms breaking the law leading to cessation. Also in terms of S28(2) of the Constitution and Criminal Justice Act 75 of 2008 | The existing laws relating to children who commit crimes will apply. Asylum seekers and refugees are bound by all laws of the Republic. |
| 5(1)(a)(d)(e) | RRCA | | The following questions need to be addressed regarding 5 (a), (d) & (e):  What are the criteria to ascertain when and if a person has re-availed, re-established, or such a person can no longer continue to refuse to avail him/herself of the protection afforded by the host country?  Who is going to adjudicate/determine that a person has re-availed, re-established himself?  What does it mean to “re-avail yourself”?  What does it mean to “re-establish yourself”?  Who is going to adjudicate/determine that such a person can no longer continue to refuse to avail him/herself of the protection afforded by the host country?  The RRCA views these proposed amendments as if the DHA introduces more punishments to their already traumatised state in life. They are of the view that they have suffered enough trauma in their lives by fleeing from their country of birth, the trauma of travelling through other hostile environments to reach a safe haven in the Republic of South Africa – it is submitted that having regard to the protocols found in the UNHCR Handbook it should be adhered to and not introduce more stumbling blocks by excluding them from obtaining refugee status.  All these conventions and laws require refugees to abide by the law of the hosting country including punishment when a refugee fails to comply with any laws or has committed a crime regardless of the scheduled offenses in terms of the Immigration Act, Identification Act, Passport and Travel Document Act.  Maintaining the suggested amendment is discriminatory in nature, and may be contrary to other laws of the Republic including the Constitution of South Africa.  The RRCA further submits that the intended amendment should, at a minimum, preserve the humanitarian character of refugeehood and not be framed in an exclusionary immigration framework.  This proposed amendment assumes that an asylum seeker is a regular traveller who must prepare himself before leaving his country of origin to pass through the regular border entries to come to South Africa.  If they do not pass through the ports of entry as designated by the Minister, they are at high risk of being excluded during his interview if he fails to satisfy the Refugee Status Determination Officer.  The RRCA asks that these provisions be repealed and not put into force or should be redrafted more clearly.  These proposed amendments are contrary to the letter and spirit of the refugee legal regime and was not intended as such when South Africa ratified the conventions of 1951 and the protocol of 1967.  Beginning with the Universal Declaration of Human Rights, which states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State” The unity of the family is of paramount importance and it should be taken into account when refugee status ceases. | SCRA deals with this aspect and is per case by case. |
| 5(1)(d)  5(1)(h)  5(e) & (h)  5(f)(g) | MJB  CCR  SIHMA &  CCR & SCCT  SCCT  SIHMA &  CCR & SCCT  SCCT  CORMSA  JRS  CCR  & LRC  CCR  & LRC  INCL | | In the event a refugee visits his or her country of origin, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status indicates cases of this kind should “be judged on their individual merits” rather that be ceased automatically and the DHA should verify if the person concerned can show good cause for visiting their home country. If the refugee does not act voluntarily, they should not cease to be a refugee for example applying to his Consulate for a national passport or needing to apply for a divorce when no other options exist.  Article 1C(1) of the 1951 Convention, which states that if a person voluntarily re-avails himself to the protection of the country of his origin they cease to qualify. In terms of the related Handbook issued by the UNHCR there are three requirements in regard to article 1C(1), namely voluntariness, intention and re-availment. The inclusion of “in any way” in this subsection is too vague and loses sight of the requirement that a refugee must have the intention to re-avail himself and it should be deleted from this subsection.  The proposed addition of Section 5(1)(d) raises some concerns as it fails to consider that the ‘voluntary re-establishment’ is to be understood as return to the country of nationality or formal habitual residence with the view to permanently reside there. Therefore, a temporary return to a former country does not constitute ‘re-establishment’ and cannot lead ipso facto to the cessation of refugee status5. This is, for instance, the case of a temporary return to visit a sick relative/friend or to check a property. It is suggested that at the least, this be changed to read: he or she voluntarily re-establishes himself or herself in the country which he or she left or returns to visit such country with a view to permanently reside there.  The SCCT recommends that the insertion of 'or returns to visit such country' in section 5(1)(d) be removed as it is inconsistent with the 1951 Refugee Convention and is exceedingly broad in scope. Determinations for the cessation of refugee status regarding whether a refugee has 're-established' themselves in their country of origin should be done on a case-by-case basis.  The insertion of Section 5(1)(h) should not lead to a frequent review of refugees’ continued eligibility; with regard to this provision, the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees highlights that ‘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.’ Moreover, Section 5(1)(h) does not explicitly refer to Article 1C of the 1951 Convention Relating to the Status of Refugees and Article I.4 of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa which defines when refugee protection is no longer needed and can be ceased. It is noteworthy that the cessation of individual refugee or category of refugees should not be used to ‘trigger automatic repatriation and that a refugee may obtain another lawful status in the state of refuge’.  The SCCT recommends that section 5(1)(h) be linked with 5(1)(e) to ensure cessation processes can occur where conditions in the country of origin are suitable for return in safety and dignity.  The intention of Section 5(1)(h) is unclear. If an individual, or indeed a “category” (as defined in Section 8), has been deemed a refugee by an RSDO through the asylum management system then their status should not be further contingent on the subjectivity of the Minister and Cabinet colleagues. This speaks to focusing on improving the status determination process, rather than giving additional possibilities to over-turn decisions made by that system.  JRS recommends that cases should be reviewed on a case-by-case basis as with their initial application for asylum in South Africa. Many asylum seekers arrive from countries where their individual rights and protection is not guaranteed despite the relative peace and stability enjoyed in the country for example membership of a particular political or social group etc.  The only requirement in the bill for mass revocation of refugee status is a “resolution” from the Minister. Mass revocation of refugee status is a denial of the individualized process advocated by the UNHCR. In the event of mass revocation, the SCRA “must implement” the withdrawal “as a whole” by notice in the Gazette without consideration of the evidence and credibility of the applicant’s statements”. But in section 9A(2) of the Refugees Act “the Standing Committee for Refugee Affairs is independent and must function without any fear, favour or prejudice”. The SCRA should not find itself in a position where it “must implement” the resolution of the Minister to mass revoke the status of a category of refugees. In 2015, the Refugee Amendment Draft required that the Minister’s decision be taken “after consultation with Cabinet”. The current Bill is doing away with that basic safeguard but it should require at minimum that the Minister consults with the UNCHR delegation in South Africa AND obtains cabinet’s approval.  Blanket cessation is vague and contrary to the 1951 Convention. This provision does not provide for any prior consultation nor the criteria what will be considered by the Minister to come to such decision. The UNHCR guidelines specifically provide that the review of refugee status should be cautiously approached in order to respect a “basic degree of stability for a refugee”. This subsection is also contrary to section 33(1) of the Constitution which provides that “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.” We submit that this subsection should provide for prior consultation as well as the manner in which the Minister will come to such determination.  Two new cessation clauses in terms of which refugee status will cease if the refugee has committed: (1) a serious crime in the Republic or (2) an offense in relation to the use of a fraudulent South African visa, permit or travel document. The new cessation clauses introduced by the Bill add to the exhaustive list prescribed by the Geneva Convention, and are thus a violation of the terms of this Convention.  The refugee regime should be taken away from criminal procedure as much as possible to prevent arbitrary and unfairness deprivation of their Human Rights. Safety and security should be reviewed and followed when it comes to Deportation. | See comment above – with regard to re-availment under clause 4.  The provisions of section 5(1)(h) with 5(1)(e) are distinct and should be kept separate.  The Department disagrees with the argument that voluntary re-availment should be understood as return to the country of nationality or formal habitual residence with the view to permanently reside there.  The Department suggests that the word “resolves” be substituted for the words “may issue an order” in clause 3 dealing with section 5(1)(h). |
| **6. Refugee Reception Offices and Refugee Status Determination Officers**  **6. Refugee Reception Offices and Refugee Status Determination Officers** | 8(1)  8(1) and (2)  8(1) and (2) | SIHMA  LHR  CCR  & INCL  LRC & SCCT & CORMSA & JR  & INCL  LRC & SCCT & CORMSA  RLAC | | The proposed amendment of Section 8(1) suggests an intention to introduce greater control by the Department over policy matters without including a process of consultation with an independent body or with persons affected by the decisions. It is noteworthy that ‘the decision to establish or disestablish an RRO is an administrative action and may not be arbitrary excluded but must fulfil the requirement of the promotion of Administration Justice Act (PAJA).  The term “notwithstanding the provisions of any other law” cannot be used to exclude the application of PAJA from administrative decision-making, particularly where such decisions have such a prejudicial and adverse effect on a large segment of the population, including refugees and asylum seekers. It should be noted that PAJA is the implementing legislation as contemplated by section 33(3) of the Constitution of the Republic of South Africa, 1996 and therefore has a quasi-constitutional stature. The right to just administrative action, including the right to public consultations, procedurally fair decisions and administrative action that comply with the principle of legality, cannot be excluded by the inserted provision and the requirements set out by the courts, most notably the Supreme Court of Appeal in Minister of Home Affairs and others v SASA (EC) 2015 (3) SA 545 (SCA), must be complied with.  Indicating that each Refugee Reception Office must consist of least one officer of the Department, who is appointed by the DG as a RSDO and thus deletes the proposed amendment made in section 3 of the Amendment Act of 2011 which provided for the appointment of Refugee Status Determination Committees (RSDC) and subcommittees to assist.  A 2016 UNHCR report found that the number of asylum-seekers in South Africa amounted to around 1 million people, the largest backlog of unsettled cases in the world. These statistics are worrisome and it is submited that providing for RSDC’s will curb the susceptibility for corruption and might also relieve the administrative burden on one individual. Furthermore, no provision is made in this Amendment Bill to address the administrative backlog. | The establishment or disestablishment of RRO’s is determined by many factors, including resources. |
| The words ‘notwithstanding the provisions of any other law’ in section 8(1) should be deleted. The power to disestablish an RRO must be subject to consultation with proper notice of intention to disestablish an RRO publically and widely circulated to ensure that there is public participation before the final decision is taken. There must also be clear procedures developed in ensuring efficient service continues to be rendered to asylum seekers and refugees who received services at the RRO to be disestablished. The Director General of the DHA cannot be granted unfettered powers to disestablish an RRO without consultation and without compliance with the Constitution, especially section 33, and PAJA. The Director General must consult with refugees and asylum seekers, and stakeholders, in order to ensure that the rights of those utlising the service are protected and respected, as well as ensuring that public power is exercised in a manner that is transparent, accountable and procedurally fair.  Lack of skills within the DHA that is evident in the inadequate and low quality of decisions by RSDOs in determining asylum applications. Requiring RSDOs to have legal qualifications is a necessary step towards addressing the flawed system by improving the quality of decision making at the first instance. We therefore urge the DHA to require legal qualification from the RSDOs since they are also required to apply and interpret the various laws mentioned above.  RLAC recommend that subsection (1), outlined in clause (b) of this section, read as follows:  *“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 deems fit and necessary for the purposes of this Act, and may disestablish any such office, by notice in the Gazette, if deemed necessary for the proper administration of this Act, provided that proper administrative measures are taken prior to the disestablishment of such office (s) and provided that at all times, the actions of the Director-General are taken having due regard to the circumstances of the refugees and asylum seekers and striking such a balance between such interests and the objectives of the Act.”* | Refer to comment above. |
| 8B(2) | MKL  SCCT  CCR | | Appointment of RAB members should include considering ability to deliver services in time, since delays increase chance of corruption/fraud. Non-governmental humanitarian experience should be compulsory particularly relating to famine, war zones and poverty relief is essential given apparent lack of concern for the plight of such individuals in the refugee administration.  Only 5 persons in SCCT experience in 2 years have been able to access RAB.  Quality of decisions by RSDOs is so poor they need to be considered as new.  The deletion of section 8B (2) on factors considered by the Minister in the appointment of the Chairperson and members of the RAA should be reconsidered since the only qualification required to be either appointed as the Chairperson or a member of the RAA is a legal qualification and no reference is made to any experience or ability to be considered by the Minister in appointments. Therefore section 8B(2) should provide for the factors to be taken into account by the Minister in the appointment of the Chairperson and the members of the RAA. | The Department is of the view that the current requirements for appointment are sufficient. The provision has been enhanced to require all members to be legally qualified. |
| **6.Composi-tion of Refugee Appeals Authority (RAA)**  **6. RRA** | 8  8C  8B | SCCT  LRC &GBA  GBA | | The SCCT recommends that the amendments to section 8 of the Refugees Act be complemented by targeted amnesty or regularisation projects, within designated parameters and implemented with the assistance of stakeholders, to address the large backlogs present in the appeal process.  The 2016 Draft Bill does not incorporate LRC recommendation that the RAA should consist of three persons, as required by jurisprudence to ensure that RAA is properly constituted. An appeal ought to be determined by no fewer than three (3) members, alternatively by The Chairperson and two (2) members.  It should be specified further that even though due regard will be given to the “experience, qualifications and expertise, as well as their ability to perform the functions of the Refugee Appeals Authority properly” this still leaves too much room for (with respect) a certain level of incompetence and/or deficiency which might as well be dealt with sooner rather than later (i.e. now). (e) Experience, qualifications and expertise are key factors which have to be taken into account. RAA must be “legally qualified” is vague and ambiguous and it cannot stand.  (a) What does this actually mean?  (b) Can one possess merely an LLB or other degrees or does one need to be an admitted attorney? | With the proposed amendment of having the RAA members dealing with cases individually, there will be improvements to the finalisation of the backlog cases of the RAB.  The Department does not agree with the suggestion by LRC to have appeals dealt with by three members composing the RAA, as this brings challenges of quorum. The chairperson should have the discretion to decide as to which appeal may be decided upon by more than one members. |
| RRCA | | The DHA and government should be congratulated for this very positive step forward and to make it abundantly clear that a single member of the RAA may consider appeals. It is also a positive step forward in respect of the term of office of these independent commissioners may vary and that the effective working may not to be stymied by a fixed term of office. | The comment is noted and **the Department wishes to indicate that a similar provision should be made for SCRA as pointed out in the presentation on the Bill. In view hereof clause 24A should be amended to insert a new subsection (2) similar to section 8(2)(c) in clause 8 of the Bill –**  **‘‘(2) A review contemplated in subsection (1) may be determined by a single member or such number of members of the Standing Committee as the chairperson may consider necessary.’’.).**  Alternatively, if the proposal to amend section 9C(2) is acceptable, it may as well address the issue raised herein. However, there may be a need to be specific in this aspect***.*** |
| CGE & LRC  CGE | | The CGE supports the proposed substitution for Section 8B which requires persons with legal expertise to be appointed to the Refugee Appeals Authority.  In addition to legal expertise the CGE recommends that gender equity should also be considered given the gender related needs of refugees. In this regard the CGE proposes an insertion of a new sub-paragraph (c):  (c) Consideration also be given to gender equity when appointments are being made. | The Department has taken not of the comment regarding consideration of equity when making appointments to SCRA. |
| GBA | | A member of the Refugee Appeals Authority should serve for a period of no longer than three (3) years which would be renewable for a further three years; and, thereafter no further terms can be served. The Bill proposes periods which are far too long for officials to sit in these positions and then to be reappointed for an unlimited number of periods – this is unacceptable as the checks and balances in a democratic system require shorter periods as suggested as well as a cap on the amount of time one can serve on the Refugee Appeals Authority in order for such appointments to be deemed to be fair | The Bill set the limits at no more than five years at a time and therefore such provision allows for any particular period depending on the volume of work. |
| 8E | MJB | | On pain of “summary” dismissal and/or “disciplinary measures”, the Department may impose a “vetting investigation” on the members of the Standing Committee for Refugee Affairs and the Refugee Appeals Authority. The vetting is to be conducted in accordance with section 2A of the National Strategic Intelligence Act, which, according to this Act, includes the “use of a polygraph to determine the reliability of information gathered during the investigation”.  The Standing Committee for Refugee Affairs is meant to be an independent body. The Refugee Appeal Board is a specialist administrative court. Section 12(3) of the current Refugees Act reads that the Appeal Board must function without any bias and must be independent. The use of a polygraph is radically inconsistent with international standards when it comes to ensuring discipline within such administrative or jurisdictional bodies. | Government has made a firm commitment to prevent corruption and therefore the provision is seen as sufficient.  It is important to point out that anyone can potentially be corrupt. |
| 8G | LRC | | Section 11 of the 2008 Amendment Act provided for the filling of vacancies which arise in the RAA as a result of death, resignation or removal from office. On the current reading no provision is made for the filing of such vacancies and it creates a gap in such instance. Note: Covered by new Section 8B | Section 8B provides for filling of vacancies. |
| **13. Insertion of section 9A to 9H**  **13. Functions of the SCRA** | 9B  9C  9C(1)(a)  9C(1)(a)&(h) | MKL  CCR  GBA  MJB  CCR  SCCT | | SCRA members must have NGO Humanitarian experience.  The composition of the Standing Committee needs to be carefully reviewed and should not consist solely of members of the DHA.  RAA must be “legally qualified” is vague and ambiguous and it cannot stand.  (a) What does this actually mean?  (b) Can one possess merely an LLB or other degrees or does one need to be an admitted attorney?  SCRA should be decentralised from only national to provincial level or delegate some functions to provincial level to improve ease of access and address bottlenecks.  Reading section 24A together with proposed insertion 9C(1)(c) there appears to be no obligation on the Standing Committee to monitor or review any other decision taken by RSDO and this clause does not provide enough checks and balances on the decision-making power of the RSDO. For instance if the application is “unfounded”, the process of how the RSDO applied his mind to the decision cannot be reviewed on the current reading of the Bill. The asylum-seeker can appeal a section 24(3)(c) decision to the RAA but our law makes a clear distinction between appeal and review. On appeal the merits of the case are considered whereas with review the manner in which a decision-maker came to his decision is investigated. There is also no obligation by the Standing Committee to review the RSDO’s decision to *grant* asylum, in terms of section 24(3)(a), which could also be susceptible to corruption. It is submitted that 9C(1)(c) has to make provision that all decisions by a RSDO have to be monitored and supervised.  The SCCT recommends DHA clarify how sections 9C1(c) and 9H will be implemented with special regards to capacity and maintaining the independence of SCRA. In regards to section 9C1(c), with the information currently available, the SCCT recommends that DHA instead use its available resources to increase capacity where urgent needs exist. | Legally qualified may include academics and not only practitioners.  SCRA and RAB operate in a decentralised manner. |
| 9C  9C | STAR  LRC | | A limitation on the right to work for asylum seekers and refugees is deeply problematic and completely unfeasible to assess. Sustainability determination must be removed.  restricting the rights of asylum seekers and refugees to work and study has remained in the 2016 Draft Bill, and continues to confer additional administrative tasks to the SCRA which is currently overburdened with reviews and taking lengthy periods of time to review RSDOs decisions. The DHA must therefore be cautious about adding more unnecessary administrative burdens like the granting of the right to work/study on the SCRA as this may lead to more pronounced inefficiencies and delayed service delivery. Increasing the administrative burdens without increasing capacity is neither tenable nor practical. | In exercising the SCRA's power to determine work and study conditions, SCRA must take account of the circumstances of the applicant, whether on a case by case basis or by formulating guidelines to be applied by Refugee Reception Officers when issuing section 22 permits in particular cases. Provided that a Refugee Reception Officer acts within closely and clearly defined guidelines, and SCRA retains the power of oversight, the delegation to Refugee Reception Officers of the power to assess what conditions should be imposed in particular cases would not be unlawful.    In the Watchenuka judgment, the order was that "The Standing Committee for Refugee Affairs is directed to consider and determine whether the first applicant and her son respectively should be permitted to undertake employment and to study pending the outcome of the first respondents application for asylum, and to cause the appropriate condition to be endorsed upon the permit issued to her in terms of s 22 of the Refugees Act. " |
| INCL  LRC  INCL  LRC | | Refugees who are Doctors, Engineers, Nurses, Lawyers, Accountants etc, can contribute to a new and developed South Africa and so should not be excluded from being able to find their own employment.  The right to work for asylum seekers, upheld in the 2004 Watchenuka case, is also codified by the Universal Declaration of Human Rights and the International Convention on Economic & Social Rights the right to dignity can be “limited where the limitation is of general application and is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.”14 Limiting the rights of asylum seekers to work and study would be neither reasonable nor justifiable. Most asylum seekers in South Africa do not come here for economic reasons, and the need to work arises from the basic human need to support oneself in society in terms of housing, food and other essentials.  An asylum seeker arriving in South Africa with means to support themselves is not a reasonable or logical justification to deny such a person the ability to work and earn an income. Such a person must, in fact, be given the opportunity to work to ensure that they continue being able to provide for themselves and their dependants.  Being a recipient of assistance by the UNHCR should not preclude asylum seekers from working otherwise they would be perpetually dependant on aid which has the potential of placing them in perpetual abject poverty which disproportionally affects women and children.  Because of the high unemployment rate, many refugees and asylum seekers either work in the informal sector or are self-­‐employed in order to earn an income which the 20 2016 Draft Bill fails to include in its concerning attempt to regulate employment of refugees and asylum seekers. | The view of the Department is that those who have particular skills may apply for appropriate temporary residence visas in terms of the Immigration Act, 2002. |
| MJB | | New Section 9C(1)(c) read with Section 9H could mean:  - that the Standing Committee for Refugee Affairs can invalidate any RSDO’s decision granting refugee status OR, on the contrary, decide to confer refugee status to any asylum seeker whose application has been declared unfounded and who has lodged an appeal to the Refugee Appeal Authority;  OR  - that these “monitoring or supervisory” decisions are in actual fact made by civil servants appointed by Home Affairs’ Director-General in lieu of the Standing Committee for Refugee Affairs itself.  Clarification should be provided to avoid undesired situations whereby the DHA or the Standing Committee interferes with the duties of the RSDOs and/or those of the Refugee Appeal Authority or becomes the ultimate decision maker within the whole asylum process. | The Department’s reading of the clause 9C(1)*(c)* is not as per the comment. The intention of the provision is to deal with quality assurance before the decision is communicated and not as an after effect. Even in cases where decisions are communicated, there is a need for monitoring in order to improve the quality of the decisions of RSDO’s which some of the commenters are raising issues with.  **The Department proposes that the provisions of section 9C(2) be amended to read as follows, in order to ensure that all functions of SCRa may be undertaken by a single member as may be considered necessary:**  **“(2) Any function performed by the Standing Committee in terms of this Act may be determined by a single member or, in particular matters, such number of members of the Standing Committee as the chairperson may consider necessary.”.** |
| SASA | | Reducing Rights reputation of RSA and UNHCR is already overburdened with refugees resulting from many other current conflicts. | The comment is not clear |
| 9C(c) | GBA | | *The Standing Committee* ***must*** *monitor and supervise all decisions taken by the refugee status determination officers* (not “may”). | **The comment is noted and will be considered** |
| 9E | CGE | | On pain of “summary” dismissal and/or “disciplinary measures”, the Department may impose a “vetting investigation” on the members of the Standing Committee for Refugee Affairs and the Refugee Appeals Authority. The vetting is to be conducted in accordance with section 2A of the National Strategic Intelligence Act, which, according to this Act, includes the “use of a polygraph to determine the reliability of information gathered during the investigation”.  The Standing Committee for Refugee Affairs is meant to be an independent body. The Refugee Appeal Board is a specialist administrative court. Section 12 (3) of the current Refugees Act reads that the Appeal Board must function without any bias and must be independent. The use of a polygraph is radically inconsistent with international standards when it comes to ensuring discipline within such administrative or jurisdictional bodies.  The CGE recommends an insertion of a new sub paragraph to the proposed section 9B as follows :  (c) Consideration must be given to gender equity when making appointments to the standing committee. | See previous related comments. |
| **13. Remuneration of SCRA** | 9G | CCR | | The new section on remuneration, allowance and other benefits to be received by SCRA members may be determined by the Minister “with the *concurrence* of the Minister of Finance”. The previous section 19 of the Act provided that such remuneration, allowance and benefits has to *be approved* by the Minister of Finance and it is submitted the previous version provided for stronger oversight and supervision. | The Department’s view is that the provision is sufficient as it is in the Bill. |
| **13. Administrative task of SCRA** | 9H | CCR | | The independence of SCRA comes under attack members of the DHA may supervise the decisions of the RSDO. In Ruyobeza v Minister of Home Affairs the Court found that the previous section 9(2) of the Act (which is echoed in Section 9A(2) to be inserted in the Act) required the SCRA be independent and impartial and that it is inconsistent with the Constitution if this supervisory function is performed by officers of the DHA.  Section 33(3)(a) of the Constitution requires that the “review of administrative action by a court or, where appropriate, an independent an impartial tribunal”. It is submitted that DHA should amend this section to provide for independent monitoring. | The provision deals with administrative work and not the core function of SCRA, being of review. It is not logically possible, as suggested by the comment, that administrative staff can supervise and monitor members of SCRA. **In view hereof, the Department suggests the deletion of the words “monitoring and supervisory” in order to give proper meaning of the provision.** |
| **14. Crime Prevention**  **14. Crime Prevention** | 20A  20A | STAR  GBA  GBA | | Anti-corruption is supported but lie detectors are not scientific and should not be used.  The intention behind CLAUSE 14 and the provisions therein are commended. Refugees and/or Asylum Seekers are exposed to widespread corruption. There have been many cases in which officials have requested cash payments from refugees and/or asylum seekers in exchange for ‘administrative favours’ regarding such persons’ papers and/or files and/or documents.  There is widespread intimidation to the extent that refugees and/or asylum seekers are told that they will be deported if they approach lawyers for assistance as any such persons create ‘problems’ for those attending officials when lawyers become involved.  There is widespread intimidation where refugees and/or asylum seekers are told that they will be deported if they do not pay a certain amount of money to the attending official/s.  However, Perhaps the amendment regarding the gathering of information (to determine integrity of an employee at a refugee reception office) should be extended to include the requirement that any and/or all such employee/s *shall consent* to polygraph tests (ie. Lie Detector tests) when requested to do so. | Government has taken a strong stance on combating corruption and therefore the provision is in line therewith. |
| 20A  21(a) | MKL  SCCT | | Significant delays in services by RSDOs and RAB increases the likelihood of corruption.  The SCCT recommends that DHA consider non-legislative anti-corruption mechanisms and policies that consider the power imbalances between officials and asylum seekers and adequately protects those who approach DHA with evidence of corruption. | The comment is noted, and mechanisms over and above legislative measures will be taken into consideration. |
| CCR | | The attempts made by the DHA to combat corruption in the asylum application process are admirable but it is submitted that no provision is made for reporting of corruption. It is submitted that an internal corruption reporting mechanism should be considered by the DHA. | The comment is noted |
| CGE | | The CGE does not support 20 A (4) in its current form because it is in conflict with Section 35 of the Constitution. Where information is gathered with the purpose of vetting a person it should not be used in criminal or civil proceedings. This would amount to the violation of the right to a fair trial as the information used will constitute unlawfully obtained admissions. This position is settled in law as seen in S v Seehama, S v Shabalala and S v Naidoo.  Accordingly, the CGE recommends the deletion of the following words at 20A(4)(a) :  Any information gathered in terms of subsection (2) may be used for purposes of  (a) instituting criminal, civil or disciplinary proceedings against a person referred to in sub section (1).  So that the proposed section reads as follows :  *(a) disciplinary proceedings against a person referred to in subsection (1).* | Government has taken a strong stance against corruption and therefore disagrees with the suggested approach. |
| LHR & RRCA & CORMSA | | LHR welcomes initiatives by the Department of Home Affairs to deal with corruption. Corruption needs to be dealt with as a matter of urgency in policy as well as legislation, which is currently not the case. | The comment is noted |
| **15. Rejection of Applica-tions**  **15. Rejection of Applica-tions**  **15. Rejection of Applica-tions**  **15. Rejection of Applica-tions** | 21(b)  21(1) | RLAC  LHR & GBA & SCCT L  HR & GBA & SCCT | | Whilst we have no objections to such, we recommend that the section be phrased to allow for exceptions, and recommend that it reads as follows:  *“an application for asylum must be made in person in accordance with the prescribed procedures, within five days of entry into the Republic, provided that failure thereof shall not disqualify the applicant, on condition that the applicant avails him/herself at his/her earliest possible opportunity and provides a reasonable explanation of the failure thereof, and provided further that any applicant who did not and or failed to submit his biometrics or other data to an immigration officer at a designated port of entry is given a reasonable opportunity to do, and to explain the failure to have done so”.*  Section 23 (1) of the Immigration Act of 2002 provides for the issuing of an asylum transit visa that is valid for five days. However, from our observations of the general practice, such visas are inconsistently issued at the port of entry, especially at Beitbridge Border Post. The underlying problem that is associated with transit visas appears to be that officials deliberately do not provide these visas to asylum seekers at the port of entry. Although an excuse that is often stated that those individuals who enter the country do not use the official port of entry. But the reality is that if the individual concerned approaches the officials and presents such a request, it risks being summarily refused in the absence of valid passport / visa. Such non-entrée practices are clearly unlawful.  Asylum seekers who are not in possession of transit visas have a limited choice when it comes to access to the refugee reception offices. For example, an individual who entered into the country through Beitbridge border may be forced to lodge his application in Musina, despite having intention to apply in places such Pretoria, Port Elizabeth and Durban because if he or she attempts proceeding inland without any form of identification he might be arrested and face deportation.  The “humanitarian reasons” for establishing RRO’s at ports of entry become extremely prejudicial when file transfers are consistently refused to be permitted by the Asylum Seeker Management directorate. Requiring asylum seekers to repeatedly travel long distances has a major cost implication, presents dangers to vulnerable groups such as children who must also travel and present themselves and who risk not being seen on their “country day” and must wait another week until they can be seen.  This serves to further exclude people from renewing their permits through the increased barriers put in place to make the system nearly impossible to access. New practices of requiring travel documents and / or affidavits to submit an application for asylum are also unlawful and not provided for in the Refugees Act, the amendments or the international conventions. | The Department is satisfied with the current provision as in the Bill. |
| 21(b)  21(1)(c)  21(1)(c) | LRC  LRC  GBA & SCCT & CORMSA | | Welcomes the inclusion of biometrics in the asylum documentation in the proposed section 22(3) of the Refugees Act as this will enable the DHA to easily identify persons who report to the RROs and avoid conflation and confusion of files and identities.  Asylum seekers needing to provide biometric data prior to making an application for asylum, will not be workable in the current asylum system given the well-known issues regarding lack of resources at RROs. It is unclear how the DHA intends to ensure that biometric data can be provided by asylum seekers within the proposed five day times frames for applying for asylum.  It is inadequate for the Minister to simply publish a notice in the Government Gazette in order to communicate with refugees and asylum seekers in South Africa. More measures must be taken including advertising at the RROs, use of community radio, newspapers, notices in major languages known by refugees and asylum seekers, approaching CSOs offering services to refugees to pass the message, as well as the UNHCR.  It is completely unfair to propose that the Director General can acquire any category of Asylum seekers to report to any particular or designated Refugee Reception office or other place specifically designated as such when lodging the Application for Asylum.  This could lead to absurd consequences where persons residing in one particular place have to travel hundreds of kilometres to report to a specified refugee reception office.  Is there is any intention to establish more refugee reception offices which type of office shall then be more accessible to asylum seekers?  DHA ought to bear in mind that surely the proposed legislation ought not to be with any intention or repercussion that asylum seekers find it even more difficult and physically impracticable to attend on any such specially designated office so as to apply for asylum. In this regard, we must be reminded of the spirit and intention of our Bill of Rights.  The SCCT recommends that DHA elaborate further on subsection 21(1C) regarding the intent of the provision to better inform stakeholders in regards to the policy envisioned. Any limit on an asylum seeker's rights to freedom of movement would have to be justifiable under section 36 of the Constitution and there is not at present enough detail regarding this proposal to adequately consider the limitation. | The comment regarding biometrics is noted.  The issue of publications in the media, radio, newspapers etc. is an administrative measure that should not be legislated. |
| 21 1(d) | RLAC  GBA | | RLAC are concerned with the fact that “opportunity to exhaust his or her rights of review or appeal” is being substituted with the words “application has been reviewed in terms of section 24A…” and would recommend that instead the words *“has exhausted his/her legal remedies available to him or her” be used.*  This inclusion is completely unfair and should be deleted from the Bill. | The provision is as is in the Act and the Department has just made it more explicit. There are no changes to the principle. |
| 21(e) | MJC & CGE | | All applications containing false, dishonest or misleading information​ must be rejected by SCRA or RAA. This is inconsistent with the independence of the Standing Committee for Refugee Affairs [s 9A(2)] and the fact that Refugee Appeals Authority is a specialist jurisdictional organ.  Clause 15(e) is ambiguous. It is uncertain as to whether SCRA is expected to reject the decision of the Refugee Status Determination Officer or the false, dishonest and misleading information provided by an asylum seeker in his/her application. In order to adjudicate any matter the Refugee Appeals Authority is expected to consider the facts and the information provided has to be considered. Furthermore, the decision of the RSDO has to be considered in order to determine whether it was lawful, reasonable or procedurally fair. Therefore, paragraph 15(e) is unnecessary and should be deleted. | The guidelines of UNHCR on page 40 of the Handbook enjoins applicants to be honest and establish fully the merits of their application. |
| 21(e)  21(e) | LRC & SCCT  RRAC | | We remain concerned that section 21(e) generally rejects any application with false information as this does not reflect the reality of the asylum seeker experience. In many cases, asylum seekers cannot speak, read or write English and they often rely on other persons at RROs who are waiting to apply to help with their applications. In such an instance, sharing personal and traumatising experiences with a stranger is very difficult, particularly if the asylum seeker was a woman having to speak to a man. We submit that it would be unconscionable and most certainly unconstitutional to summarily dismiss such an application without applying one’s mind on the reasons why the female asylum seeker withheld such information in their application. Such a determination must be made by either the RAA in an appeal, should the case be rejected as unfounded or the SCRA. In the event that the DHA is of the opinion that the dishonestly or false information warrant the revocation of status, any steps taken towards making this conclusion must comply with the Promotion of Administrative Justice Act (PAJA).  The SCCT recommends that subsection 21(6) be reworded to state that applications found to contain false, dishonest or misleading information 'may be rejected'.  The insertion of this clause that a Refugee Status Determination Officer, the Standing Committee for Refugees Affairs or the Refugee Appeals Authority may reject an application for asylum or any other subsequent process gives uncontrolled and unfettered powers/discretion to determine falsity, dishonesty or misleading information.  It is suggested that such discretion should at the minimum be exercised judicially and these entities should provide written reasons for any decision handed down fully supported by facts & authorities relied on.  This would enable an aggrieved party to be fully versant with the matter and the basis for that decision. | See comment on related issue. |
| 21 2(A) | LRC &SCCT  RRAC | | To require that applicants must declare spouses and dependants would unfairly punish and limit those applicants who do not declare dependants and spouses due to the genuine believe that they are not recognised in South Africa, or will not be joining them in South Africa. This condition of inclusion in the asylum application is an impracticable condition and we suggest that it be excluded from the definition. We submit that once a person qualifies as a dependant as defined, that should suffice for the purposes of joining that person.  It is submitted this amendment does not make provision for inter alia the following everyday scenarios:  An applicant whose application was not finalised can get married in the Republic after he has submitted his application.  An applicant whose application was not finalised may adopt children from his home country while in the Republic.  An applicant whose application was not finalised may sire or give birth to children while in the Republic. | See previous related comment. |
| 21  21 | SIHMA & SCCT  LHR &SCCT  LHR &SCCT  LHR &SCCT | | Although it is reasonable to expect an individual to lodge an application for asylum as soon as he or she arrives in the country of refuge, a general rule for migrants to present themselves within 5 days from their arrival in South Africa cannot lead ipso facto to their exclusion from refugee status. Moreover, this provision fails to take into consideration the case of Refugees sur place. The 1951 Convention Relating to the Status of Refugees and the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa ‘do not distinguish between persons who flee their country in order to avoid the prospect of persecution and those, who while already abroad determine that they cannot or will not return by reason of the risk of persecution in their state of nationality or origin.’ It seems, therefore, necessary to allow individuals already present in South Africa to benefit from international protection without the restriction of a formal timeframe to lodge an asylum request.  LHR notes with particular concern the authorisation which is given to the DG to require “any category” of asylum seeker to report to a specific Refugee Reception Office “or other place specially designated as such” to lodge an application for asylum. Such categories may be based on the applicant’s country of origin, or the specific ground of persecution including gender, religion, nationality, political opinion or social group. This provision is troubling in a number of respects:  It appears to allow the DG the authority to create additional burdens on individuals by requiring them to report to a certain office, despite the fact that the Constitution provides for freedom of movement throughout South Africa and the right of asylum seekers to reside in any part of the country. Such a power is making it impossible to comply with the provisions of the Refugees Act and the desire of the Department to have asylum seekers depend on “friends and family” by creating increased obstacles to applying for asylum. If there are no means to support oneself and everyone is obliged to use the services of the UNHCR and its implementing partners, South Africa is effectively creating a de facto encampment policy in direct violation to its stated intentions and without the protection of minimum standards of conditions for such encampment.  It allows the DG to discriminate based on the very grounds of persecution from which individuals are fleeing.  There is no indication for the rationality of such an authorisation “necessary for the proper administration of the Act”. This is something that should have been considered with refugee communities, civil society and other stakeholders to determine whether services are available in those parts of the country.  Most seriously, this power allows the DG to require these categories to report to a refugee reception office “or other place specially designated as such”. This clearly opens to door for the DG to allow for certain categories to be detained in places of detention. Such a power clearly has serious constitutional ramifications and should have been considered after proper consultations with service providers to the refugee community.  LHR submit that sections 12(1) and 21(1) of the Constitution will not permit arbitrary and irrational deprivation of liberty of an entire class of persons, particularly based on the very grounds of persecution from which they are fleeing. In addition, South Africa has not registered any reservations to the 1951 UN Convention which provide for non-discrimination and the free movement of refugees within the territory of the Republic.  The Committee should take note of the decision of the High Court in Lawyers for Human Rights v Minister of Home Affairs in which the court found that detention without judicial oversight was unconstitutional and referred the matter to the Constitutional Court for confirmation. Confirmation proceedings will take place on 8 November 2016. Similar detention previsions under the Refugees Act will also likely not pass constitutional muster. | This is to encourage people to use Ports of Entry and further to deal with security risks of having undocumented people in the Republic for a longer period. This is to protect the such person against possible arrests. |
| **16. Unaccom-panied**  **Child**  **&**  **Person**  **with**  **Mental**  **Disability** | 21A(2) | LRC & RRAC  RRAC | | Section 21A(2) of the Refugees Act provides that any person with a mental disability who is found under circumstances that clearly indicate that he or she is an asylum seeker must be issued with an asylum seeker permit in terms of section 22 and in the prescribed manner be referred to a health establishment contemplated in the Mental Health Care Act, 2002 (Act No.17 of 2002), to be dealt with in terms of that Act. The 2016 Draft Bill proposes to amend that this applies to any person reasonably suspected to have a mental disability. While we welcome this as it provides for those asylum seekers who do not have a formal diagnosis to regularise their status and obtain treatment, we are concerned that the provision is silent as to who will make the assessment that a person is reasonably suspected of having a mental disability, and how these assessments will be made.  It is submitted that the DHA and its officials inclusive of the RSDO’s, Independent Commissioners who serve on the RAA of SCRA are ill equipped to solely take care of such a situation  It is therefore submitted that the term “mental health status” as is defined by the Mental Health Care Act 17 of 2002 be used and that a person should be taken care of in terms of the Mental Health Care Act. | All the provision has done is to insert the words “reasonably suspected to have” as we are not experts on health related matters. |
| **17. Refugee Children** | 21B | MKL  RLAC | | Provision is needed for children of Refugees married to Citizen or Permanent Resident/other permit holder.  RLAC request, that in as much as this subsection provides that the person may apply for asylum himself/ herself, that these be considered for regularization under the Immigration Act 13 of 2002. RLAC submit the above as we believe that the onus of proof on dependency is difficult albeit impossible to discharge with regards the aspect of persecution as (especially in the case of minor children) these would have left the country at a young age. Therefore, for the department to request that they lodge their own applications when they come of age is tantamount to disposing of them through the asylum regime. | Regularisation on the Immigration Act is within the applicant’s right and the applicant may do so on their own as the courts have afforded them this right. |
| CGE | | The CGE supports this clause in its current form. | The comment is noted |
| **18. Asylum Seeker Visa**  **18. Asylum Seeker Visa**  **18. Asylum Seeker Visa**  **18. Asylum Seeker Visa**  **18. Asylum Seeker Visa**  **18. Asylum Seeker Visa**  **18. Asylum Seeker Visa**  **18. Asylum Seeker Visa** | 22(2)  22 (4)  22(5)  22(5)(c)  22(6)    22(7)  22(6)(7)  21  21  22 (6)(7)  (8)  22(7)  22(7)  22(7)  22(8)  22 (8 to 11)  22 (6-11)  22(6)  22(6-11)  22 (9)  22(5)(6)(7)(8)  22(8)  22(9) | CCR  LRC  RLAC &CCR  CGE  CCR    SIHMA & CORMSA  JRS  SCCT  LHR  LHR  LHR  LHR & CORMSA & JRS  ARESTA& JRS  AI &  ARESTA  CCR & CORMSA  SIHMA & RRAC  & SCCT  MJB &  ARESTA &  SCCT  MJB &  ARESTA  CCR & LHR & RRAC  & CORMSA  RRAC  & SCCT & CORMSA & JRS  SCCT  & JRS  RLAC  RLAC & LHR & JRS | | In Ahmed v the Minister of Home Affairs (Ahmed) 2016 found that on a holistic reading of the Act does not preclude a failed asylum-seeker to apply for a “temporary residence permit” in terms of the Immigration Act despite section 22(2) which provides that any previous visa issued to an applicant in terms of the Immigration Act becomes null and void when an asylum-seeker is afforded an asylum-seeker visa in terms of section 22(1) of the Act. The intention of the Legislator needs to be clarified on this issue as it does not deal with failed asylum-seekers who may now apply for temporary residence permits in terms of the Immigration Act.  The person who has expressed his/her intention to seek asylum has the right to remain physically present in South Africa, the renewal of the visa cannot be discretionary. Such an extension is mandatory given South Africa’s regional and international law obligations until such a time as a final decision rejecting the application for asylum has been made.  RLAC are concerned by the withdrawal of the asylum seeker visa by the Director General. This provision endangers the protection of bona fide asylum seekers in that an application may be erroneously rejected by the RSDOs, and before such a person may exercise the recourses available, the Director General may decide to withdraw the visa. We therefore strongly recommend that another paragraph, paragraph (e), be introduced to read as follows:  *“Provided that the asylum seeker has been afforded an opportunity to exercise the right to either appeal or review the rejection as applicable, within the prescribed timeframe, and that having been afforded such an opportunity the asylum seeker has either failed to exercise the right, or having exercised the right, the Director General is convinced that there are no grounds for rendering protection (or the applicant does not meet the criteria).”*  Section 22(5)(c) in its current form may infringe the rights of the asylum seeker set out in terms of Section 33 of the Bill of Rights. Accordingly, the CGE recommends the following revision to Section 22(5)(c) :  (*c) the application has been rejected and no review or appeal has been initiated within thirty days of such rejection.*  *The above revision allows the asylum seeker to remain in the Republic until such time that his or her right to any judicial remedy has been exhausted. In many instances asylum seekers are repatriated while they are in the process of review. This must be avoided.*    The proposed addition of Section 22(6) requires further clarification to determine who is going to be responsible to conduct a ‘financial assessment’ and what will be the main criteria applied to establish whether an asylum seekers is able to support himself/herself or his/her family. It is acknowledged that, in the past, asylum seekers were asked to fill sort of ‘pre-screening’ forms on arrival at the Refugee Reception Office. These forms were often completed outside the office, without the support of interpreters, while asylum seekers were queueing. Therefore, there is a necessity to clarify in detail the modalities in which a ‘financial assessment’ will be conducted in full respect of individual’s privacy. Moreover, considering that the Department of Home Affairs lacks adequate personnel and financial resources, as proved by the fact that there were no resources available to operationalise the 2011 refugee amendment, this provision seems to be problematic and difficult to implement.  The amendment in Section 22 (6) makes reference to the exclusion of the right to work for asylum seekers. It reads, “the asylum seeker may be assessed to determine his or her ability to sustain himself or herself and his or her dependents…”  It is also unclear whether the term ‘sustain’ will take into cognisance, professional and technical skills as a requirement to get an endorsement to work and in the case of continuing education.  The term ‘sustain’ is very vague as used in this context. From our experience, we know that very few refugees arrive in the country with financial capital. However, a vast majority come with skills or professional qualifications and/or technical know-how.  The insertion of subsection (7), regarding the presumption of language proficiency, is unlikely to have any effect if there is no improvement in reception and translation services at RROs or without any effort to raise awareness amongst applicants regarding their rights and responsibilities.  The amendments envisage three groups of asylum seekers: those who can provide for themselves, those who cannot and are dependent on the UNHCR and its partners for four months and those who have received UNHCR assistance but are still awaiting adjudication after four months. Despite the fact that the amendments appear to place each group in a position in which they can live with comfortably and with dignity, on closer inspection, this is not the case.  The first group of asylum seekers is totally denied the right to work (for at least the first four months of their stay in South Africa) and must rely on the support of friends and family. The amendments do not clarify what being “sustained” by family and friends looks like and without a minimum threshold having been set, asylum seekers may find themselves living below the breadline - a situation which undoubtedly impairs the dignity of asylum seekers and restricts their ability to live without positive humiliation and degradation. To the extent that there are asylum seekers who will live well or comfortably on the support of their friends and relatives, those individuals must be seen as a small and exclusive minority of the asylum seeking population. That there are some people who may live comfortably in this way cannot be a reason to impose the overly broad restrictions on the majority of the asylum seeking population.  The second group of asylum seekers are also totally denied authorisation to work as they have presumably have obtained social assistance from UNHCR and its partners. Again, the amendments contain no definition of what “assistance from UNHCR or its partners”. Therefore, it is not defined what “social assistance” would constitute that could justify the denial of the right to work. The amendments appear to indicate that being offered shelter and basic necessities by UNHCR and its partners would justify a denial of authorisation to work. These rudimentary means cannot be considered a reasonable amount and a blanket prohibition against employment under these circumstances is again an invasion of human dignity that cannot be justified and is therefore unconstitutional.  The third group of asylum seekers, while not outright denied authorisation to work, in reality, face trying obstacles to ultimately become the holder of the said right. As mentioned in detail above, to become a holder of the right, one must first show that they cannot rely on their families or friends to support them, then that they cannot obtain assistance from UNHCR and its partners (under circumstances where they are new in the country and have no financial support from their families or friends) and lastly, they must actually find work to be granted the right for a period of more than six months (under circumstances in which the work must be the type of work in which an employer can provide a letter confirming employment and which therefore implicitly has the effect of unlawfully restricting asylum seekers from self-employment and piece work).  The obstacles and restrictions imposed on newly arrived asylum seekers in this regard must be seen as insurmountable for a majority of asylum seekers. When taking into consideration:   * the hurdles the asylum seeker must overcome to be granted the right to work (including actually finding work and the implied unlawful restrictions on the type of work that can be entered into); and * the delays in the adjudication of asylum seeker claims (and therefore the length of time an asylum seeker can expect to live under these conditions) as well as the restrictions on the type of work an asylum seeker is entitled to engage in it is not difficult to conclude that the manner in which the legislative scheme bestows (or realistically, prohibits) the right to work is an unjustifiable invasion of human dignity.   The relationship between asylum seekers’ right to work and dignity has already been highlighted in several seminal cases, *Minister of Home Affairs and Others v Watchenuka and Others; Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others and Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others.*  LHR cannot foresee circumstances under which an asylum seeker – who is very likely traumatised and without the ability to speak a South African language – will not feel humiliated and degraded in attempting to be given the right to work through:  i. finding help from family and friends and UNHCR partners,  ii. failing to obtain this assistance;  iii. finding wage-earning employment  To the extent that this can be done without a sense of desperation and degradation, we submit it is possible only for a minority of asylum seekers and again cannot be a reason to impose the overly broad restrictions on the majority of the asylum seeking population.  An “assessment test” to be for an asylum-seeker determining “their ability to sustain themselves, and their dependants, with the assistance of friends, for a period of at least four months.” is too vague as it does not define what will be considered as sufficient means to sustain oneself, as well as how this will be measured. If this is left to the discretion of the Refugee Status Determination Officer its open to discrimination.  DHA can’t restrict the right of asylum seekers to work according to SCA in Watchenuka case “The inherent dignity of all people-like human life itself- is one of the foundational values of the Bill of Rights” and that “The freedom to engage in productive work –even if that is not required to survive- is an important component of human dignity.” The application process for asylum status and related appeals in South Africa can be lengthy due to various delays Sections 22 (6), (7) and (8) infringe and restrict the right of asylum seekers to work. Further, these provisions reduce asylum seekers to people dependent on state provided social assistance (shelters), and dependent on family and friends; restricting their ability to provide for themselves and thus negatively affecting their dignity. If it is found that an asylum-seeker is unable to sustain themselves they “may be afforded shelter and basic necessities provided by the UNHCR”. Again no clear indication is given on how this will be determined and for long shelter will be provided.  The proposed addition of Section 22(7) sounds unrealistic, difficult to implement and will require considerable additional resources. The vast majority of asylum seekers, in fact, do not have financial resources to maintain themselves and therefore it is plausible that they would require shelter and basic necessities provided by the UNHCR. However, the position of UNHCR with regard to the relocation of RROs near the borders has never been clear nor supportive of government’s plan to relocate RROs, as stated by the UNHCR Senior Operations Manager in South Africa on 29 August 2016 ‘UNHCR is concerned about the impact the planned relocation of the RROs to the borders would have on the rights of refugees and asylum-seekers’. Moreover, the UNHCR Southern Africa office is likely to lack the necessary fund to offer adequate assistance to all individuals in need . The overall number of asylum seekers in the country is also a matter of great concern. In 2015, the Department of Home Affairs received nearly 70 000 new applications but the overall number of individuals who are registered as asylum seekers is over 1 million. The Bill does not clarify whether Clauses 22(6)(7)(8) apply to new asylum seekers or to those who are already registered. The only effective way to separate asylum-seekers and economic migrants in a dignified manner is through a fair adjudication of the refugee claim, as provided by the Procedural Standards for Refugee Status Determination, compiled by the UNHCR and not through denying access to the asylum system nor limiting fundamental human basic rights.  Prior to allowing an asylum seeker the right to work, the DHA being tasked to assess whether the applicant is able to sustain themselves and needing a letter of employment or to study, a letter of enrolment will put further pressure on the Department’s workload. If, after assessment, the asylum seeker is found to be unable to sustain himself or herself, he or she may be offered shelter and basic necessities by the UNHCR, in which case the right to work may be refused. The DHA should provide evidence that it has obtained the UNHCR’s accord to provide shelter and basic necessities to asylum seekers in South Africa. Otherwise this provision should be removed.  The welfare responsibility left to the UNHCR is not clear. Government responsibility leads to some of the current welfare challenges (documentation, healthcare, social grants, legal support, social cohesion and reintegration) that refugees and asylum seekers face in South Africa. The government needs to clearly define its role, including realistic time frames for documentation outcomes for section 24 permits to be granted/ denied. A lot of money and time travelling to Refugee Reception Offices to renew section 22 permits. A standard length of section 22 permits must be clearly stated within the bill. The lack of clearly defined laws allows for unfair practice from the DHA as some section 22 permits are renewed for 30 / 90 /180 days.  Asylum seekers being denied the right to seek employment will negatively impact on their livelihoods as well as the livelihoods of their families. They should rather be allowed to acquire skills and training that will allow them to find formal employment and increase the Countries tax base.  The responsibility of reporting the hiring of asylum seekers should be on the employer as asylum seekers may not be familiar with the Republic’s Refugee laws as well as employment laws. In addition the Bill must clearly state the fine that will be imposed on the employer if they fail to disclose the hiring of an asylum seeker.  The complex and confusing manner in terms of which the right to work in the Republic be endorsed on asylum-seeker visas places an additional burden on the DHA to monitor the employment situation and also does not consider self-employment. On reading the provisions it appears that the DHA intends to settle an application for asylum within four months. However, what happens if it fails to do so in the instance where it was determined that an asylum-seeker can sustain themselves for four months with the help of family, which effectively denies them the right to work on their asylum-seeker visa? Does it mean that a re-assessment of the asylum-seeker’s needs in terms of section 22(6) will be done or does it mean that if the four months have passed and the application for asylum is still pending that the asylum-seeker’s visa may be endorsed with the right to work?  An asylum seeker who submits an application must be immediately issued with an asylum seeker permit in the prescribed form to avoid arrest and deportation, as well as access services such as hospitals and schools. We submit that this immediate requirement should be reflected in section 22(1) of the Refugee Act.  Government is reminded of the guidelines given by the HANDBOOK Chapter III – Gainful Employment Articles 17, 18 & 19 which recommend according to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. In addition the handbook indicates that restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting States concerned.  The state should rather give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.” Article 18 of the handbook on Self-employment: “The Contracting States shall accord to a refugee lawfully in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.”  Why put a legal statutory duty on his friends who are in all probabilities in the same predicament? It is suggested that this be scrapped.  If such an applicant is not in a position to comply with these requirements, he/she faces the grim prospect of a living in a refugee camp.  With the status quo at present where the temporary asylum seeker permit is endorsed that such a person may work and/or study such a person is not a burden on the state.  If a person is prohibited to work or to study the State will have to provide shelter in a refugee camp at great expense to the South African Taxpayer.  The term “work” is difficult to define: does that include to be self-employed?  Or if an asylum seeker is employed in the informal sector by another asylum seeker?  The practicalities in respect of educational institutions are that they give asylum seekers and even refugees a raw deal and don’t accommodate these people easily.  Regard should be had to the criteria created in the Handbook.  A refugee is not an employment seeker, neither is he a student. He/she came to South Africa primarily to survive.  The rights to work and study attached to asylum seeking or refugee status in international and existing domestic legal instruments should not be prejudicial to the humanitarian interests of any asylum seeker and in any manner whatsoever.  It is strongly urged that this part of the intended amendment be repealed and not enacted as it is contrary to the fundamental human rights aimed at having minimum living conditions.  DHA should rather redirect the resources allocated toward this process to the refugee status determination and systems to receive asylum seekers to improve the integrity of the asylum system.  The SCCT recommends that DHA clarify the right of asylum seeking children to access basic education and to commit to removing the current barriers to education many asylum seeking and refugee children face.  JRS supports the UNHCR view that, “it is the refugee with an education, above all, who provides leadership during displacement and in rebuilding communities of peace. The future security of individuals and societies is inextricably connected to the transferable skills, knowledge and capacities that are developed through education.” Education is the one vital skill refugees can take back to their countries in the period of cessation to rebuild their communities and start a new life.  The withdrawal of the asylum documentation as envisaged by the proposed section 22(5) must be done in terms of PAJA with notice of intention to withdraw communicated to the affected person.  It was unclear who would conduct the assessment intended in the proposed section 22(6) – (7) of the Refugees Act. This still remains unclear. Furthermore it still remains unclear on what steps should be taken when the UNHCR cannot provide shelter and basic necessities as envisaged in this section, particularly given that the 2016 Draft Bill has removed the reference to “or any participating partner” from the provision.  The withdrawal of the asylum seeker visa by the Director General endangers the protection of bona fide asylum seekers in that an application may be erroneously rejected by the RSDOs, and before such a person may exercise the recourses available, the DG may decide to withdraw the visa. RLAC therefore strongly recommend that another paragraph, paragraph be introduced to read as follows:  *22(5)(e) “Provided that the asylum seeker has been afforded an opportunity to exercise the right to either appeal or review the rejection as applicable, within the prescribed timeframe, and that having been afforded such an opportunity the asylum seeker has either failed to exercise the right, or having exercised the right, the Director General is convinced that there are no grounds for rendering protection (or the applicant does not meet the criteria).”*  RLAC are of the opinion that it will be cumbersome to require RSDOs to consider the ability of an applicant to sustain himself while the application is adjudicated. From the onset, the application is meant to focus on the merits of the asylum claim itself, in line with international law. Social standing and prowess do not alter the validity of an asylum claim. This will only add to the already lengthy adjudication process. RLAC recommend therefore that this section be omitted altogether. Instead of these assessments, we recommend that upon completion of the interview, the RSDOs refer applicants to the UNHCR offices and/or its partners for possible consideration for social assistance. RLAC are against the idea of having RSDOs bear the additional burden of conducting sustainability interviews.  For this reason, we are against the provisions of subsection 8. In the case of Watchenuka, the court held that: “the freedom to engage in productive work-even where that is not required in order to survive-is indeed an important component of human dignity…for mankind is eminently a social species with the instinct for meaningful association”.  RLAC thus strongly recommend that the right to work be an inherent right at the time that the visa is issued pending the finalization of the application, on condition that the provisions of subsection 9 are applied. RLAC also submit that the time frame be increased from 14 days to 6 months. This would mean that within the first 6 months, an asylum seeker would have to prove that he/she is gainfully employed, failing which the right be revoked. | Any person who applies for a temporary residence visa in terms of the Immigration Act should comply with its requirements. There are provisions in the Refugees Act to deal with failed asylum seekers and such will be enforced by the Department.  There will certainly be guidelines to implement the provisions of section 22 as it relates to the condition of work.  As indicated above, the Watchenuka judgment has not made provision for a blanket condition, which is what the Bill proposes that each case must be assessed individually. The Department has carefully studied the judgment as has also explained this amendment in the Memo on the Objects of the Bill.  The UNHCR has not submitted any comments to the Portfolio Committee and commenters cannot be a mouthpiece of the UNHCR and declare that it is unable to provide aid to asylum seekers.  **The department proposes to amend section 22(8)(b) to add the words “or any other charitable organisation or person” after the word “UNHCR”.** |
| 22(9)  22 (10)  22(8)(9)(11)  22(12)  22(13)  22(12)(13) | SIHMA  LHR  CORMSA & JRS  RLAC  SIHMA  LHR  JRS  LHR & SCCT  SCCT | | The insertion of Section 22(9) does not refer to asylum seekers who are self-employed or run their own business to earn a living. It is, in fact, true that for asylum seekers who are unable to find employment in South Africa, self-employment activities represent the only means of financial support. Research conducted by MiWORCs11 shows that 32.65% of international migrants, including asylum seekers and refugees, are employed in the informal sector. In this case, the provision does not specify what sort of documentation is needed in order to receive an endorsement on the asylum visa. The Bill must cater also for self-employed people.  LHR is concerned about the criminal sanctions imposed upon employers and learning institutions for employer or enrolling asylum seekers. This is not provided for under any legislation or other category of non-nationals and appears to be discriminatory against asylum seekers due to the delays by the Department in adjudicating claims.  Such a provision, and the rather harsh penalties attached to it, will no doubt have a chilling effect on the willingness of employers to hire asylum seekers, thereby effectively removing the ability of asylum seekers to provide for themselves and ensuring their human dignity as required by the case law cited above.  LHR propose that similar provisions as those under sections 38 and 39 of the Immigration Act, 2002 which require adequate recordkeeping by employers and learning institutions rather than reporting provisions with the threat of criminal sanction.  The proposed addition of Section 22(12) does not include a provision to inform each affected person of the intention to consider an application ‘abandoned’. Asylum seekers should be able, within a prescribed period, to make a written submission with regard thereto.  There is no indication if the UNHCR and implementing partners have already agreed to provide such assistance. Section 22(8) then implies that the asylum visa will be endorsed with the right to work if the asylum seeker cannot support themselves and dependents for up to four months and the UNHCR and partners do not offer to provide assistance. However this is qualified in Section 22(9) by the fact that the asylum seeker must provide a letter of employment within fourteen days of taking up employment or, under Section 22(11) forfeit their right to work within six months of the endorsement being granted. These amendments mean that asylum seekers are effectively prohibited from legally undertaking piecework, work in the informal sector or self-employment of any kind as they would not be able to comply with Section 22(9).  RLAC are also concerned with the provisions of subsection 12. Whilst the reading of it gives an impression that the department is allowing a grace period of 30 days for those whose permits have expired to report to the offices for extensions, it appears to be in conflict with the provisions of section 2 which seeks to disqualify asylum seekers who have committed an immigration offence. If these two are read together, it raises an issue of ambiguity. Is the department stating that despite committing an offence in terms of the Immigration Act (failing to renew /extend permit on time), one is entitled to a 30-day period before being disqualified? This needs to be clarified.  RLAC have further noted that the 30-day period is subject to only two exceptions, which are “hospitalization or any other form of institutionalization”. RLAC strongly recommend that this clause be struck off, for reasons that have been highlighted throughout this submission. RLAC further fear that this section may be abused by DHA officials. Even more worrisome is the fact that a disqualified asylum seeker may be barred from reapplying or having the disqualification decision reviewed. Without such recourse, refoulement without due process may take place in violation of the Convention, the Constitution, and the purpose of the Refugee Act that this section intends to amend.  The proposed addition of Section 22(13) appears particularly harsh and might contravene fundamental international obligations. An individual should be given the opportunity to re-apply for asylum at least in the case that new elements or findings have arisen or have been presented by the applicant to support a request for asylum. Moreover, in case the determining authority considers that a return decision will lead to direct or indirect *refoulement* in violation of the State’s international obligations a person should be granted the right to stay.  LHR recognises the need for a process regarding abandoned applications for asylum. Such abandoned claims tend to skew the statistics and risk presenting an unrealistic view of South Africa’s burdens regarding asylum seekers and refugees. However, it should be noted that the amended provisions are far too narrow to be justified and reasonable, especially considering the multitude of reasons why a permit may not be renewed on time.  Many other factors that could inhibit an asylum seeker from renewing their document for a period of more than one month. These factors include: shortage of staff at the RROs, system malfunction or lack of connection, laziness, bribery and corruption, lack of funds to attend to the RROs which are far and expensive to reach for many asylum seekers, far too limited RROs attending to high volumes of applications, renewals and other services.  For these reasons, we recommend that the committee considers a period of four (4) months after the expiration of the visa as an abandoned claim.  The application to re-open should not be limited to hospitalisation or institutionalisation as stated in point one, there are many other mitigating factors that could affect the asylum seeker from renewal timeously.  SCRA should consider these factors on a case-by-case basis and the merits of the case or circumstantial evidence as provided by the applicant.  South Africa has an obligation not to return people to countries where they may face continuing persecution or death because of their inability to renew their visa which may be a valid reason but not restricted to hospitalisation or institutionalisation.  A one-month period is clearly unreasonable, even when an individual has not be hospitalised or other institutionalised. Failure to renew may have resulted from difficulties in accessing a refugee reception office due to corruption or difficulties in accessing refugee reception offices as they close.  LHR submit that a longer length of time to prove an actual abandoned claim would be more reasonable in the current circumstances. We would submit that one year would be a more appropriate approximation of an abandoned claim.  Shorter time periods where an asylum seeker or a refugee permit expires (i.e. less than a year) is in fact governed by section 37 of the Refugees Act and is a criminal offence. At the Marabastad and TIRRO Refugee Reception Offices, such offences are governed by the Admission of Guilt Fines Schedule issued by the Chief Magistrate for Pretoria in November 2012. However, immigration officials at those offices as well as the SAPS officials at Pretoria Central Police Station are not issuing fines properly. They are only issuing fines to people willing to pay the fine immediately and not to those who wish to contest the fine in court, as they are permitted to do under section 57 of the Criminal Procedures Act. This is clearly unlawful and until such time as the fines procedures are clarified, presuming that such applications have been abandoned after one month is clearly irrational, unreasonable and procedurally unfair.  Under the current circumstances, we believe a strict time-limit for abandonment cannot be enacted until DHA's systems for reception of asylum seekers and administration of permits are strengthened and can meet an acceptable standard of administrative justice. | The Department does not grant asylum seekers business visas but in terms of the Watchenuka judgment, the right to work and study.  The notion of self-employment extends to business regulation matters which are regulated by other legislation.  The comment on section 22(12) is not clear. **However, the Department suggests to add the words “or any other compelling reason of similar nature”** |
| **19. Detention of asylum seekers** | 23 and 29 | JCW | | In respect of children, the refugee act states that “the detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time. The High Court Judgement in Centre for Child Law and Others v The Minister of Home Affairs and Others dealt with children who had been detained at the Lindela Centre for Repatriation. The court firmly articulated its displeasure towards children having been placed under such conditions and ordered that the respondents must refrain from causing an unaccompanied foreign child to be admitted to Lindela without such a child first having been dealt with by the Children’s Court in accordance with the provisions of section 12 to 14 of the Child Care Act.  It is submitted that a children’s court process is vital before a determination can be made regarding the need to detain a child in terms of the Act. | The proposed amendment is of a technical nature to change “permit” to “visa” and the provision has always existed. |
| **20. Decision regarding asylum** | 24 |  | |  | **The Department has noted an error of having omitted to align the provisions of section 24(5)*(a)* as contained in the Amendment Act of 2011 to substitute “Director-General” with “standing Committee. In this regard, the following insertion (as new paragraph *(d) with the current (d) becoming (e)*) is proposed to address the issue:**  **“*(d)* the substitution for paragraph *(a)* of subsection (5) of the following paragraph:**  **“(5) *(a)* An asylum seeker whose application for asylum has been rejected in terms of subsection (3)*(b)* and confirmed by the [Director-General] Standing Committee in terms of section 24A[(3)](2), must be dealt with in terms of the Immigration Act.”; and** |
| **21. Review by Standing Committee** | 24A |  | | None | **In the matter of Abdi Liban Mohamed v Minister of Home Affairs and Others, the Cape High Court held that SCRA is only functus officio when the RSDO advises a failed asylum seeker of SCRA’s decision. In view hereof, and in order to clarify the provisions of section 24A(3), the addition of the following words is proposed:**  **“whereafter the Standing Committee will be functus officio”.** |
| **22. Referral of decisions back to RSDO by RRA** | 24B(c) | RRAC | | It is submitted that the RAA is in a better position to deal there and then with the appeals material because it has dealt recently with the matter and should thus revert to the appellant.   * It is further submitted that it would be costly and time consuming to refer the matter back to the RSDO. * What is the situation if the specific RSDO has resigned and is no longer in the employ of the DHA? * The applicant is entitled to speedy resolution to his matter – see our Constitution in respect of criminal matters. * The matter will be unduly delayed by a reference back to the RSDO. | Where there is new information, the matter must be referred back as that information was not part of the application. The RAA should only deal with appeals and not adjudicate on applications. |
| **23. Continuous Residence**  **23. Continuous Residence** | 27  27(c)  27(c) | AI  GBA  SCCT  RLAC  SIHMA  SIHMA | | In relation to the proposed section 27(c), we are deeply concerned about the proposed increase in years of continuous residence in South Africa from five to 10 years from when a person is granted asylum to when they can apply for permanent residence. This will effectively mean that refugees will remain in limbo for ten years.  he proposed increase in years of continuous residence in South Africa from five to 10 years from when a person is granted asylum to when they can apply for permanent residence will result in them having no sense of belonging until they get to the point (in our system) of obtaining permanent residence. This:   * Impacts on employment opportunities * Impacts on education * Impacts on further education (of certain adults) * Prejudiced by other persons who live in South Africa * People living in limbo for longer periods of time * Unfair * Unjust * Unreasonable   SCCT suggest South Africa keep with international best practice standards in that in order to promote a  refugee's full integration into society, the required period of permanent residency and should not exceed five years and this length of time should include time spent awaiting recognition of refugee status. This is especially given the current obstacles refugees face in attaining permanent residence which further impedes local integration as a durable solution. In our experience refugees struggle immensely in attaining permanent  residence through application to SCRA. In order to get certification, SCRA must be fully satisfied that conditions in the refugee’s country of origin are unlikely to change in the foreseeable future – the refugee must prove that they will remain one ‘indefinitely’ – leaving much room for the discretion of SCRA. Even receiving a response from SCRA on their applications is difficult; in the past year and a half the SCCT has assisted 30 clients who have applied for certification but have not yet received any response from SCRA.  The insertion 'efforts made to secure peace and stability in the refugee's country of origin' such is unnecessary as this will be considered by SCRA.  Allowing refugees to become eligible for permanent residence as soon as possible will not only assist those refugees in integrating into their respective communities in society but will also assist in alleviating the uncertainties that generally come with being a refugee. This will give them hope for the future and at least be in a position to fully integrate into society without any fears or uncertainties. It will also reduce the costs on DHA of having to renew asylum seeker permits/visas for an additional five years per asylum seeker.  DHA should at least consider certain circumstances such as the length of period that a refugee would have settled in South Africa when considering the issuing of permanent residence and we recommend that the period of five years remain.  In the case of Moustapha Dabone, an application was lodged by the afore-mention to declare certain provisions of the latter Immigration Act requiring applicants for permanent residence to be passport holders, and to abandon their refugee and asylum claims. Despite an order being granted by agreement between the parties (the Dabone order), the DG issued a new directive, Directive 21, on the 3rd of February 2016, announcing that the order will no longer be complied with. It is no mere coincidence that this provision is introduced at a time that circular has also been passed. It is so deplorable that the department which is meant to uphold the rights of victims of human rights violations seeks to deprive them of the right to be considered for permanent residence, and we move that this section be struck.  The amendment of section 27(c) contradicts the provisions of the 2016 Green Paper on International Migration. The latter intends, in fact, to delink permanent residency from the length of stay in the country by not allowing long-term temporary residents, including recognized refugees, to apply for permanent residency, while the Bill allows refugees to apply for permanent residence after 10 years of continuous residence in South Africa.  SIHMA believe that government should maintain the status quo and continue granting permanent residency to eligible refugees12 who have been legally residing in South Africa for at least five consecutive years, as opposed to the years. This is, in fact, morally acceptable and compatible with democratic principles of justice. Moreover, every immigrant who is lawfully present, is employed or self-employed and have no criminal record, is an economic contributor to the local economy and do not pose a security threat to the country.  Research shows that, on average, asylum seekers in South Africa have spent 2.8 years in the asylum system. It is vital that the challenges around implementation are taken into account in the process of considering amendments to the Refugees Act.  It is difficult to believe that the United Nations will be able to provide adequate shelter and basic services for thousands of asylum seekers across the country. This will have, in fact, enormous financial and capacity implications and it is unlikely that UNHCR or NGOs in South Africa would be able to foot this bill. | The proposed period is in order. No person who is granted refugee status will be in limbo as they have refugee status. Applying for permanent residence does not grant any new rights that the person on refugee status does not enjoy.  The issue of the Directive 21 relating to the Dabone judgment is being addressed under the Immigration Act processes. |
| **27. Withdrawal of Refugee status** | 36 | RLAC | | RLAC have also noted the provisions of this section. RLAC are perplexed to note that the provisions of this section depart from those contained in Regulation 17 of the Regulations, which provide amongst others that notice must be given to the refugee:  “Explaining that the Standing Committee intends to withdraw the status identifying the reasons for the intended withdrawal giving the refugee notice that he or she has the right to make a written submission to respond to the Standing Committee and that the burden of proof is on the Standing Committee to establish that a refugee is subject to one or more grounds for withdrawal.”  What both these provisions lack is a reference to the Promotion of Administrative Justice Act notifying the refugee of his or her right to challenge this decision which undoubtedly will adversely affect the rights of the latter? RLAC therefore pray that the notice makes reference to the latter Act. | Regulations are subordinate legislation and therefore do not supersede the provisions of the Act. PAJA is an integral element of the process of withdrawal as is referred to in section 36 of the Act. |
| **24. Removal and detention of refugees and asylum-seekers**  **24. Removal and detention of refugees and asylum-seekers** | 28(1)  28(1)  28(5)  28 | CCR | | This section has to put in line with section 33(1) of the Constitution, when the Minster orders that a refugee or asylum-seeker or categories of either to be removed from the Republic on the grounds of national security, national interest or public order. On the current reading no mention is made on the factors the Minister will consider in order to make such a decision.  The recent judgment in Ahmed also creates a problem in regard to the interpretation of section 22(3) as read with section 22(4) to be inserted in the Act. Failed asylum-seekers may in terms of the judgment apply for “temporary residence” in terms of the Immigration Act. The question now arises what happens in the instance where a refugee (who is ordered to be removed or falls in one of the categories of refugees to be removed) whose spouse is a failed asylum-seeker applied for temporary residence in terms of the Immigration Act and was granted same? Does it mean the spouse’s “temporary residence visa”, which technically does not fall in the category of section 22(3) as it only refers to the visa of a refugee or asylum-seeker, is not revoked and that despite the fact that as a dependant she may be included in an order for removal in terms of section 22(4), she would be able to reside in the Republic until the expiry of the “temporary residence visa”?  It is submitted that the DHA should carefully reconsider the impact of the Ahmed judgment on this provision. | This highlights the absurdity of allowing people in RSA to apply for visa as the norm is to apply outside of the country you wish to enter. If that is the case this is the problem to apply for a visa in RSA. |
| INCL | | In terms of the proposed Camps/Detention Centres, who will cover the charges? For how many people will they be designed? For how long with they be detained? There is strong possibility that corruption, discrimination and rejection will increase given the threat of detention. | The Department has not made any proposal for Camps or Detention Centres in the Bill. Therefore, this comment is misinformed. |
| LRC  LRC | | LRC are concerned with the proposed section 28(5) which allows for the detention of refugees and asylum seekers until they are removed and it signifies a move towards increasing encampment of this vulnerable group. Detention should only be for a reason that is justifiable and reasonable, and for the shortest amount of time. Further, the Refugees Act and international law states that the detention of children should only be as a last resort. The inclusion of this provision is worrying, as it arguably demonstrates a move toward the policy of encampment that has been proposed in the Green Paper.  The removal of allowing reasonable time for a refugee who is being removed to obtain approval from any country of his or her own choice, is concerning. There may still be non-­‐refoulement claims that would prevent a refugee from going back to their country origin, such that they need to go to another country. If they are not permitted time to get approval to go to a country of their choice, and therefore have to go back to their country of origin, they could be at risk of being returned to a country where they face persecution. South Africa would be in breach of their non- refoulement obligations if refugees are removed without having that reasonable period of time.  In relation to this section, we recommend that the proposed section be deleted and the current section remain in force. | The provisions of section 28(5) have always been in the principal Act as section 28(4). Furthermore, this provision is not obligatory but discretionary and therefore, the concern raised by LRC is misinformed. |
| **25**  **&**  **26. Time**  **limit**  **to**  **inform**  **of**  **change**  **of**  **address** | 34 &34(A) |  | | The 2016 Draft Bill proposes to introduce the requirement that refugees and asylum seekers are to inform the RRO of his or her residential address and of any changes to that address within 30 days. We submit that introducing this timeframe is placing an unnecessary and unrealistic burden onto refugees and asylum seekers who are already required to update their address under the current provisions. By requiring them to report within 30 days, the proposal does not reflect the realities that are faced by this group and challenges they face. As we submitted in paragraph 21, there may be financial constraints and/or limited understanding of the refugee process which may delay a potential asylum applicant for applying for asylum. The majority of asylum seekers who arrive in South Africa do not speak English which makes navigating the asylum process fraught with difficulties. It is concerning that a failure to advise within the 30 days timeframe could render them in breach of conditions, which is grounds for detention. We recommend that the time period of 30 days be deleted from the proposed sections 25 and 26. | The issue relating to change of addresses is already contained in the 2011 Amendment Act and are standard provisions applicable to citizens as well in the respective Acts of the Department.  Should the time period of 30 days be deleted, there would be no obligation on the part of the asylum seeker to comply. |
| **27. Withdrawal**  **of**  **Refugee**  **Status** | 36. | LRC  LHR | | We welcome the inclusion of the provisions of PAJA in this proposed section. As in our submissions in relation to the 2015 Draft Bill, we again urge the DHA to ensure that the implementation of the cessation in the proposed section 36(3) of the Refugees Act is done in a manner that also complies with the regulations and guidelines set out by the 27 UNHCR. Again we repeat that the use of the Government Gazette in such instances is not adequate, additional steps as mentioned in paragraph 54 above are required.  LHR is further concerned with the ability of a RSDO to re-open the decision making process on account of an error, omission or oversight. Under South African administrative law, decision-makers are functus officio once they have made an administrative decision and may only reconsider their decision in very specific circumstances. This is to create some stability in the decision-making process. In addition, where information of this sort comes to light, the burden must be on the official to prove that the error, omission or oversight was the fault of the applicant and not the decision-maker. To keep a refugee in limbo by constantly question his or her status through no fault of their own would be unfair, prejudicial and a violation of the constitutional right to just administrative action. | The comment regarding PAJA is noted.  The provisions of clause 27 which substitutes section 36 have always been contained in the principal Act and therefore the concerns raised are misplaced.  **The Department suggests that the following words “: provided that no such notice is required if the withdrawal is requested by the refugee concerned”.**  **Furthermore, a suggestion is made to amend section 36(3) to substitute the words “resolved” for the words “issued an order”** |
|  | | | | |  |
| **Not in Bill** | 32. | CCL  JCW | If a child is found in circumstances that “clearly indicate that he or she is a child in need of care and protection” must he or she be brought before a children’s court. That court *may* order that the child be assisted with an asylum claim. This is no guarantee that the child will be assisted. Provision should be made for unaccompanied asylum seeking children to access temporary asylum visas pending the referral to the Children’s Court and the final determination of the children’s status. Will ensure children are in the DHA system and protected from potential deportation and can access services. The Act makes provision for unaccompanied children being assisted to apply for asylum by referring them to the Children's Court (as set out in section 32(1) of the Act), who may order that the child be assisted in applying for asylum. The question, however, arises as to why the courts need order this. Surely the Department of Home Affairs ought to be enjoined to provide this assistance in any case. As such, it is submitted that an amendment be made to section 32, indicating that The Department of Home Affairs must assist a child in applying for asylum should they have an independent claim. In light of the need of DHA to provide children with assistance in application for asylum they have special needs and require a particular form of guidance in navigating the asylum-seeking process. ln the case of Van Garderen v The Refugee Appeals Board and Others which dealt with Congolese children who sought asylum in South Africa, the court called upon the provisions of the UNHCR Refugee Handbook, which stated that, *The question of whether a minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enrol the services of experts conversant with child mentality.* This clearly suggests a need for those assisting the child to be trained on how to render the process child friendly. This may be difficult due to a lack of resources, but nonetheless, concerted efforts must be made in this regard so as to ensure that the claims of such children are adjudicated justly and equitably. Such efforts include rendering the environment and atmosphere in which the child is interviewed child friendly, ensuring that those conducting the interview be appropriately trained, ensuring that should such a person be unable to adjudicate the claim without prejudicing the child that an expert should be called upon to speak with the child and communicate the account of the child to the Refugee Status Determination Officer. On this basis it is recommended that an insertion providing for same be added to section 32 of the Act. | | The issues of children are already addressed in the previous amendments which are the 1998 and 2011 Amendments. |
| Asylum Seeker and Refugee Children | N/A | LRC | There is no mention of asylum seeker and refugee children in the 2016 Draft Bill or their special vulnerabilities as persons on the move. Children are among the most vulnerable in our society and are at risk of further marginalisation and violations of their human rights if not effectively protected in legislation and policies. Some children come to South Africa by themselves or eventually live in South Africa unaccompanied by parents or relatives, or live with adults who have no legal duty to take care of the child. Such children are at risk of becoming undocumented or stateless, especially children who are unaccompanied and separated. These children have specific needs that are not currently recognised.  We are therefore concerned that the 2016 Draft Bill does not address the needs of vulnerable asylum seeker and refugee children and we urge the DHA to take this opportunity to improve on how children are regulated in the Refugees Act. | | The issues of children are already addressed in the previous amendments which are the 1998 and 2011 Amendments. |