



**the doj & cd**

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA

Ref: 8/6/Geregs/Nie  
Enq: E Steyn  
Tel: 012 - 4064768

Mr B L Mashile, MP  
Chairperson:  
Portfolio Committee on Home Affairs  
P O Box 15  
Cape Town  
8000

[emathonsi@parliament.gov.za](mailto:emathonsi@parliament.gov.za)

Dear Mr Mashile

#### **BORDER MANAGEMENT AUTHORITY BILL, 2016**

Thank you for your letter of 6 June 2016 affording my Department the opportunity to provide comments and suggestions regarding the above-mentioned Bill.

My Department's comments are contained in the annexure hereto which I hope will be of assistance.

In addition to comments on the specific clauses as set out in the attached annexure, I make the observations and raise some questions as set out below.

It is noted that the Bill does not repeal or amend any existing legislation. It is trusted that this aspect was considered during the preparation and certification of the Bill. If there is no need for this the question arises whether the existing entities which play a role in border management will continue to exist. The Bill and Memorandum on the Objects of the Bill seem to suggest that this will not be the case. The SEIAS report relating to the Bill might throw light on these aspects and also highlight the cost benefits of establishing and maintaining the Border Management Authority.

It is noted that the Bill in clause 25 establishes an Inter-Ministerial Consultative Committee. The question is raised whether the establishment of Inter-Ministerial Committees is not the prerogative of the Executive/Cabinet. I am not aware of other legislation which establishes an Inter-Ministerial

Committee by means of legislation. In the Justice environment there is a Criminal Assets Recovery Committee, established in terms of section 65 of the Prevention of Organised Crime Act, 1998, which consists of specified Ministers of Cabinet, the functioning of which has its own challenges. The Portfolio Committee might wish to interrogate the desirability of the Bill establishing such a Committee with something more workable in practice.

Kind regards



1 **MR V MADONSELA**  
**DIRECTOR-GENERAL:**  
**JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

Date: 29/08/2016

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## ANNEXURE

### Comments on the Border Management Authority Bill, 9 of 2016

#### 1. Background

The Department's comments and suggestions are set out below:

#### 2. Clause 1 Definitions

##### 2.1 "border law enforcement area":

It is uncertain what the basis is for the determination of the 10 km distance or any reasonable distance inside the internationally recognized borders. What "a reasonable distance" is, could be open to various interpretations.

##### 2.2 "border law enforcement functions":

This definition means "functions conferred on the Authority by law and in terms of this Act". Clause 2(3)(b) provides that the Act will not apply to the border law enforcement functions performed by the Defence Force in respect of the airspace of the Republic. It is suggested that either the definition or clause 2(3)(b) should contain a provision excluding the border law enforcement functions of either the Border Management Authority (BMA) or the Defence Force to avoid any possible confusion. (Own underlining.)

##### 2.3 "border management":

2.3.1 It is suggested that the words "South African National" be deleted as the Defence Force is defined in clause 1.

2.3.2 In terms of the definition, "border management" means the execution of border law enforcement functions and includes co-operation with the Defence Force on the implementation of border protection functions". In terms of clause 3 the object of the Bill is to establish and empower the BMA to achieve —

- (a) integrated border law enforcement within the border law enforcement area and at ports of entry; and

(b) co-operation on and co-ordination of border management matters in general.

(Own underlining.)

It appears that "border management" in the definition is limited, but that the concept is broadened in clause 3 to include matters other than law enforcement functions and the border protection functions performed by the Defence Force.

#### **2.4 "border protection functions":**

It is suggested that the expression "of the Republic of South Africa, 1996" be deleted as the Constitution is defined in the Bill.

#### **2.5 "commissioned officer":**

The question arises whether it will be clear to ordinary members of the public as to what is meant by a "commissioned" officer?

#### **2.6 "Defence Force":**

It is suggested that the definition reads "'Defence Force" has the meaning ascribed to it in section 1 of the Defence Act, 2002 (Act 42 of 2002);".

#### **2.7 "prescribed":**

It is suggested that the definition reads "'prescribe" means prescribe by regulation in terms of section 37 of this Act".

### **3. Clause 2 Application of Act**

Subclause (3)(b) – see comments in paragraph 2.2 above.

### **4. Clause 3 Object of Act**

See comments in paragraph 2.3.2 above.

### **5. Clause 7 Appointment of Commissioner**

Subclause (1) sets out a list of requirements with which a person to be appointed by the President as the Commissioner, must comply. Subparagraphs (g)(i) and (ii) provide that

the President must appoint a person who is a commissioned officer or who must subsequent to his or her appointment, successfully complete any prescribed training and who must comply with the prescribed security grading requirements to be appointed as a commissioned officer. The question arises what the position would be if the appointed Commissioner does not successfully complete the prescribed training or does not comply with the prescribed security requirements. (Own underlining.)

## **6. Clause 9 Removal of Commissioner from office**

6.1 Clause 9(1) provides that the "Commissioner must not be suspended or removed from office, except in accordance with the provisions of subsections (2), (3), (4) and (5)". Subclause (2) lists the circumstances in which the Commissioner may be removed from office. Subclause (3) provides that the Commissioner may be suspended pending an investigation into the circumstances listed in subclause (2) and subclause (4) states that the Commissioner must receive his or her remuneration whilst on suspension, pending the outcome of the investigation or inquiry. The question arises whether clause 9(1) is necessary in the light of the list given in subclause (2). The circumstances in which the Commissioner may be removed by the President are misconduct, ill-health, incapacity to carry out his or her duties effectively and efficiently, being no longer a fit and proper person to hold the office or on account of a loss of confidence in the Commissioner. The list excludes any other possible circumstances.

6.2 Subclause (4) provides that if the Commissioner is suspended pending an investigation into the circumstances listed in subclause (2), he or she must continue to receive his or her remuneration, allowances and other benefits as if he or she was not suspended, pending the outcome of the investigation.

6.2.1 It is noted that subclause (3) empowers the President to suspend the Commissioner pending an investigation into the circumstances mentioned in subclause (2). Subclause (4) refers to both an investigation and an inquiry.

6.2.2 The question also arises whether it is not advisable to provide for a time limit for the completion of the investigation or inquiry so as to ensure a speedy and cost-effective finalization of the matter. It is noted that section 8(3)(b) of the South African Police Service Act, 1995 contains a similar provision but to which is added “unless the President or the National Commissioner, as the case may be, determines otherwise”.

#### **7. Clause 11 Functions of the Commissioner**

Clause 11(1) provides that the Commissioner must exercise control over and manage the Authority in accordance with “this Act and the directions of the Minister”. It is suggested that reference be made to the Constitution as well. The fact that the Commissioner is subject to the directions of the Minister, may raise questions.

#### **8. Clause 12 Delegation by Commissioner**

Clause 12(1) provides that the Commissioner may delegate to any official of the Authority any function or power conferred, or duty imposed, on the Authority or the Commissioner, by this Act or any other legislation. This provision seems to be very wide and it is suggested that consideration be given to limiting the delegation to officials of a more senior rank or level. (Own underlining.)

#### **9. Clause 15 Duties, functions and powers of officers of border guard**

9.1 Clause 15(1) provides that “an officer must ensure compliance with and enforce the provisions of this Act”. The Bill seeks to provide for the establishment of the BMA with attendant provisions for the appointment, functions and powers of a commissioner as the head and its personnel. It further provides for the funds and immovable property of the BMA, committees, the review or appeal of decisions, reporting to Parliament, confidentiality, exemption from payment of fees or tolls, certain offences and penalties, regulations and transitional provisions.

9.2 The powers of an officer provided for in this Bill, relate to entry, search and seizure with a warrant and without a warrant. Further powers include routine search and seizures, powers relating to vessels within maritime borders and detained or

arrested persons and seized goods. Officers also have the powers conferred upon them in a declaration as a peace officer.

9.3 Although there is no fault with the wording of clause 15(1), it could be interpreted that an officer also has the power to enforce provisions relating to the "administration" of the BMA, which does not seem to be the intention. It is suggested that clause 15(1) be limited to the enforcement of the Bill ("this Act"), as far as it relates to the duties, functions and powers of an officer as provided for in the Bill. A further question arises what the position of officers is in relation to the enforcement of the Immigration Act, 2002 and other relevant legislation in the law enforcement areas or will it be covered under the definition of "border law enforcement functions" as defined?

#### **10. Clause 17 Limitation of rights of officers**

Clause 17(1) provides that "subject to the Constitution, the rights of officers may be limited in the prescribed manner ...". The intention is therefore to limit their rights by way of regulation, which is subordinate legislation and the question is whether this is not substantive law which should be addressed in the Bill itself.

#### **11. Clause 18 Powers of entry, search and seizure with warrant**

11.1 Clause 18 provides that an officer may with a warrant enter certain premises, search persons, goods, vehicles and premises, inspect goods, documents, premises and vehicles, seize things that may be lawfully seized, question persons about certain matters and "arrest or detain any person reasonably suspected of contravening any provision of this Act" (paragraph 18(f)). (Own underlining.)

11.2 It is suggested that the heading of clause 18 should also reflect the arrest or detention of a person as it is a substantial power.

11.3 As already indicated in paragraph 8 above, the Bill provides for more than the powers, functions and duties of an officer of the BMA. Paragraph 18(f) seems to be capable of a very broad interpretation as it could, for example, mean that an officer may

arrest or detain the Minister for not determining a policy for the BMA in accordance with the Public Finance Management Act, 1999, as provided for in clause 24(2) or for not tabling reports in terms of clause 32. A person may only be arrested for committing an offence and it is suggested that the specific provisions in terms of which a person may be arrested or detained, namely, clause 36, be referred to.

11.4 Furthermore, the provision seems to provide that an officer may only arrest or detain persons who contravene "this Act" and no other legislation, such as the Immigration Act.

## **12. Clause 19 Powers of entry, search and seizure without warrant**

Clause 19 provides that an officer may without a warrant exercise some of the powers referred to in clause 18 (entry, search, inspect and seize). No mention is made of the arrest or detention of a person. Could this omission be interpreted to mean that even if a person is caught while committing an offence within the border law enforcement area, that a warrant must first be obtained? Or is the intention that the provisions of the Criminal Procedure Act, 1977, relating to the arrest of a person without a warrant would then apply?

## **13. Clause 20 Routine searches and seizures**

13.1 Clause 20(2)(b)(iv) provides that an officer may without a warrant, during a routine inspection or search, "detain or arrest any person reasonably suspected of contravening any provision of this Act". The same concerns as raised in paragraph 10 above apply.

13.2 The question also arises whether there is not a contradiction between clauses 18, 19 and 20 if regard is had to the arrest or detention of a person. In clause 18 an officer may with a warrant, arrest or detain a person; in clause 19, an officer may not arrest or detain a person without a warrant; but in clause 20, when conducting a routine inspection or search, an officer may arrest or detain a person without a warrant.



#### **14. Clause 21 Powers relating to vessels within maritime borders**

14.1 Clause 21 provides that an officer may without a warrant perform certain functions relating to vessels within the maritime borders. Among others, he or she may in terms of clause 21(g) "enquire into whether any provision of this Act has been contravened". (Own underlining.) It is not clear which provisions of this Bill can be contravened by a vessel before an officer boards the vessel. It appears from the provisions of the Bill, that a vessel (its master or crew) can only contravene clause 36, which provides for certain offences. The offences relate to inducing officials to contravene the Bill or other relevant legislation or to breach their duties, to compel officials through threats to contravene the Bill or to breach their duties, to pretend to be or to impersonate an official, to resist, hinder or obstruct officials in the performance of their duties or to intentionally furnish false or misleading information to an official. These offences in relation to a vessel, can only take place whilst the officer is on the vessel, and he or she is being bribed or threatened to contravene relevant legislation or breach his or her duties or is being given false information, or is resisted or obstructed in the performance of their duties. It is suggested that consideration be given to providing as follows in paragraph (g): "enquire into whether any provision of any relevant legislation pertaining to the import or export of goods or the entry or exit of any person has been contravened;".

14.2 Clause 21(j) further stipulates that an officer may "give directions to the master and any crew member of any vessel stopped, boarded or searched as may be necessary or reasonably expedient for any purpose specified in this Act...". (Own underlining.) It is not clear for which purpose, other than those listed in clause 21, an officer can give directions.

14.3 It is also noted that there are no provisions relating to the arrest or detention of persons who are illegally on a vessel or who commit an offence set out in clause 36 of the Bill.

#### **15. Clause 25 Inter-Ministerial Consultative Committee**

15.1 Clause 25(3) provides for the compilation of the Inter-Ministerial Consultative Committee. It is noted that the Ministers of International Relations and Co-operation and of Justice and Correctional Services will not form part of this Committee, although the President may designate any other Cabinet member.

15.2 The list of Ministers in subclause (3) appears to be in alphabetical order and it is suggested that the words "Economic Development" in subparagraph (x), be inserted before "Environmental Affairs" in subparagraph (iv).

15.3 Clause 25(5) states that the Committee may determine its own rules and procedures. It is suggested that the provision be expanded to read that the Committee may determine its own rules and procedures which may not be in conflict with this Bill, the Constitution or any other relevant legislation.

**16. Clause 31 Designation, determination, appointment, prescription, withdrawal or cancellation of ports, points or place of entry or exit**

Clause 31 provides that the power to designate, determine, appoint, prescribe, withdraw or cancel any port, point or place of entry or exit may only be made with the approval of the Minister of Home Affairs. The Minister must, prior to the actions mentioned above, publish a notice in the *Gazette* for public comments for a period not less than 30 days. It is submitted that it is the designation, determination, appointment and prescription which is withdrawn or cancelled and it is suggested that the heading and the wording of the clause should reflect this. As an example, section 9A(2) of the Immigration Act provides that the Minister may, on good cause shown, withdraw the designation of a place of entry or exit. (Own underlining.)

**17. Clause 36 Offences and penalties**

17.1 Clause 36(1)(d) provides that it is an offence to resist, hinder or obstruct an official in the performance of his or her functions or duties under this Act or any other relevant legislation. Clause 15 refers to the duties, functions and powers of officers and

clauses 18 – 21 also provide for certain powers of officers and it is suggested that the word “powers” be included. (Own underlining.)

17.2 Clause 36(4)(b) provides that it is an offence for an officer to commit a breach of the prescribed disciplinary code related to the border law enforcement functions of an officer. It is trite law that all offences must be clearly proscribed and the question arises whether this provision is not too vague. Furthermore, what would the position be if the disciplinary code is amended from time to time?

17.3 Clause 36(5) contains the penalties for the offences created in clause 36(1) to (4). Clause 36(5)(a) provides for a sentence of a fine or imprisonment not exceeding 10 years or to both such fine and imprisonment in respect of the offences referred to in subclauses (1) or (2). Subclause (4)(a) makes it an offence for an official to contravene clause 34 regarding the confidentiality of information. Clause 36(5)(b) provides that if a person is convicted of this offence, that person is liable to a fine or a period of imprisonment not exceeding 12 months or to both a fine and imprisonment. As pointed out in paragraph 17.2 above, clause 36(4)(b) makes it an offence for an officer to commit a breach of the prescribed disciplinary code related to the border law enforcement functions of an officer. Besides the fact that the view is held that the provision is vague, clause 36(5)(c) which provides for the penalty for this offence, does not specify the period of imprisonment of a person who is convicted of this offence.

17.4 When no term of imprisonment is prescribed, it is left to the court's discretion to impose a term of imprisonment within its jurisdictional limits. *Terblanche, in Chapter 2 paragraph 4.3.9 of The Guide to Sentencing, LexisNexis*, submits that “Such penalty clauses are without precedent in our legal history. Perhaps the relevant Act contains offences of varying seriousness, and such a provision may simplify the legislature’s task in prescribing punishment. What is clear is that it leaves the sentence completely in the hands of the courts. It is submitted that such a penalty clause is ill-advised. The first courts to impose sentences for offences with such penalty clauses will be totally in the dark with regard to the seriousness with which the legislature (as representative of

*society) views these crimes. It is inevitable that, in the absence of such guidance, different courts will have widely divergent views on the seriousness of such crimes."*

17.5 It is suggested that, in order to ensure compliance with the principle of legality, consideration be given to the scrapping of clause 36(4)(b) or to specifying the term of imprisonment, as was done in respect of the other offences in clause 36.

## **18. Clause 37 Regulations**

18.1 Clause 37(1) states that the Minister may, after consultation with the Commissioner, make regulations regarding several aspects relating to the Authority. It must be mentioned that there is a distinction between the expression "after consultation with" and "in consultation with". In *MacDonald and others v Minister of Minerals and Energy and others 2007 (5) SA 642 (C)*, the principle was explained as follows:

*"Likewise, where the law requires a functionary to act 'in consultation with' another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act 'after consultation with' another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary."*

18.2 Since the regulations concern the operations of the BMA with the Commissioner as its head, the view is held that it might be appropriate for there to be concurrence between him or her and the Minister regarding the contents of the regulations and not merely that his or her views be taken into account by the Minister.

18.3 Clause 37(4) provides that the Minister may make regulations that prescribe different penalties for different degrees of misconduct of officers in breach of the disciplinary code of conduct for officers. It is uncertain if the code of conduct referred to in this clause is the same code of conduct referred to in clause 36(4)(b) which provides that an officer commits an offence when he or she breaches the prescribed disciplinary code related to the border law enforcement functions of an officer.

19. It is further assumed that consideration was given to the possible consequential amendments or repeal of other existing laws. A law that comes to mind is, for example, the Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998). Part 8 of the Cross-Border Road Transport Act, 1998, also contains law enforcement provisions which could overlap with the provisions of the Bill relating to cross-border road transport.