**SUMMARY OF SUBMISSION BORDER MANAGEMENT AUTHORITY**

|  |  |  |
| --- | --- | --- |
| **Clause Number & Heading** | **Organisation/**  **Individual** | **(Sub Clause) Submission [insertion]** |
| **Preamble** | South African Police Service (SAPS) | SANDF is specified but there is no mention of the SAPS constitutional responsibility in section 205(3), namely "The objects of the police service are to prevent, combat & investigate crime, to maintain public order, to protect & secure the inhabitants of the Republic & their property, & to uphold & enforce the law."  Section 218(1)(j) of the previous Constitution (still in force) provides that the National Commissioner shall be responsible for "(j) such functions relating to border control & the import & export of goods as may be assigned to the service by law , subject to the direction of the Minister of Police. Therefor insert:  & ACKNOWLEDGING FURTHER, the constitutional responsibility of the National Commissioner of the South African Police Service for such functions relating to border control & the import & export of goods as may be assigned to the service by law, |
|  | Scalabrini Centre | Make specific reference to international human rights law and specifically *non-refoulement* under RECOGNISING FURTHER [as in section 2 of the Refugees Act (No. 130 1998) below] |
|  | Business Unity South Africa & Tourism Business Council of South Africa | The Bill in no way whatsoever seeks to promote legitimate trade or assist in facilitating the legitimate migration of people. In line with these comments, we are concerned about the negative impact that the militarisation of the border environment will have on legitimate trade and migration. |
| **1. Definitions** | Scalabrini Centre | Insert Definition of *non-refoulement:* No person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-  (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or  (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country. [as in section 2 of the Refugees Act (No. 130 1998)] |
| Insert reference to the Refugees Act (No. 130, 1998) for protection of refugees, asylum seekers and unaccompanied minors and references to the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32, 2007) and the National Policy Guidelines for Victims of Sexual Offences (1998) for the protection of survivors of SGBV. |
| Transnet | The concept of "space" cannot be equated with the notion of a border or boundary. Adjust definition to read as follows:  "airspace" means the space within the outer limits of the internationally recognised airspace of the Republic.” Vs  “air borders, being the outer limit of the internationally recognised airspace of the Republic; |
| “border law enforcement area” would have the unintended effect of limiting the jurisdiction of the Authority. In terms of clause 40 of the Bill the current ports, points and places of entry or exit will remain. It follows therefore that were such ports, points and places are not located in close proximity of the Republic's borders (the definition refers to 10km), the Authority would have no jurisdiction. |
| Dept. of Justice & Constitutional Development (DOJCD) | "border law enforcement area": What is 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. |
| "border management": Delete "South African National" Defence Force is defined in clause 1. |
| "border protection functions": Delete "of the Republic of South Africa, 1996" since Constitution is defined. |
| "commissioned officer": Not clear to public what is meant by "commissioned" officer |
| Define "Defence Force" ascribed to section 1 of the Defence Act, 2002 (Act 42 of 2002);". |
| "prescribed": Definition should read: “means prescribe by regulation in terms of section 37 of this Act". |
| "border law enforcement functions": See 2. Application of Act below |
| **1. Definitions** | Tourism Business Council of SA (TBCSA) | Reference is made to the President in Clause 7. In order to clarify which President reference is being made to, it is suggested that the President needs to be defined (e.g. The President of the Republic of South Africa). |
| **2. Application of Act** | Dept. of Justice & Constitutional Development | The definition of "border law enforcement functions": 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. The definition should contain a provision excluding the border law enforcement functions of the Defence Force or use a phrase other than “border law enforcement functions” |
| **3. Object of Act** | Dept. of Justice & Constitutional Development | 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.)  “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. |
| **5. Functions of Authority** | SAPS | In order to clarify the functions of the BMA as it relates to the SAPS, — reference should be made in paragraph (c) to the SAPS.  It is proposed that the underlined portion be inserted:  (c) Co-operate & co-ordinate with the South African Police Service, other organs of state, border communities or any other persons on its border law enforcement functions. |
|  | Durban Chamber of Commerce | SAPS and Metropolitan Police are mandated and have expertise to carry out “zero tolerance policing strategies”. Law enforcement authorities that ensure a safe and full coverage for South Africa’s geographical space through visibility, timely responses and decisiveness are important. Therefore they should be given a fair opportunity in participating in the enforcement of such a Bill. |
| **Chapter 3: Commissioner (Clause 7-12)** | Katleho Mogase | It would be better to introduce a Board as the accounting authority of the BMA rather than a Commissioner. The Board would report to the Minister of Home Affairs & also allows for the introduction of a Chief Financial Officer, so that the Commissioner & CFO representatives from SADC members of the public/industry experts. This would ensure that too much power centralisation of power in the commissioner. |
| Katleho Mogase | (e) Commissioner needs to be innocent of crime or pardoned should rather be never found guilty in a court of law, of a crime given the security & moral character of the post. |
| **7. Appointment of Commissioner** | Katleho Mogase | (1) Like Chapter 9 Institution's head Commissioner should be given a non-renewable term of six years rather than 5 years renewable once to discourage any kind of corrupt behaviour. |
| Dept. of Justice & Constitutional Development | (1)(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? |
| **8. Terms of office of Commissioner** | Tourism Business Council of SA | (5) the President may from time to time direct that the Commissioner be so retained, but not  for a period which exceeds, or periods which in the aggregate exceed, two years:  Provided that the Commissioner’s term of office, in its entirety shall not exceed 10 years. |
| **8. Terms of office of Commissioner** | Tourism Business Council of South Africa | Provision ought to be made for:  − A written employment contract to be entered into between the Commissioner & the President which must incorporate in an appropriate form the provisions of Section 57 of the Public Finance Management Act No 1 of 1999.  − A Performance Contract to be entered into between the Commissioner & the President setting out, inter alia, the Commissioners measurable work performance objectives & targets. |
| **9. Removal of Commissioner from office** | Dept. of Justice & Constitutional Development | Clause 9(1) is not necessary in the light of the list given list of circumstances in subclause (2).  (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.  Advisable to provide for a time limit for the completion of the investigation 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 to which is added "unless the President or the National Commissioner, as the case may be, determines otherwise". |
| **10. Service Conditions & remuneration of Commissioner** | Tourism Business Council of South Africa | (5) Officers adequate & appropriate training should include aspects of tourism service excellence including avoiding unnecessary delays at ports of entry. |
| **11. Functions of Commissioner** | Dept. of Justice & Constitutional Development | the Commissioner must exercise control over and manage the Authority in accordance with "this Act and the directions of the Minister". Reference the Constitution as well. The fact that the Commissioner is subject to the directions of the Minister, may raise questions. |
| **12. Delegation by Commissioner** | Dept. of Justice & Constitutional Development | (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.) |
| **13. Appointment of Officials** | Tourism Business Council of South Africa | (4) The Minister may only cancel a commission after notifying the Commissioner & the officer concerned of a complaint or charge made & after allowing the officer an opportunity to respond to the complaint or charge. “ the Commissioner & |
| **14. Commissioned officers** | Scalabrini Centre | (3) When performing any border law enforcement function, an officer must exercise his or her powers in a manner that takes due regard of the fundamental rights of persons as guaranteed under Chapter 2 of the Constitution, the principle of non-refoulement, & public international law obligations of the Republic, with proper consideration of the rights & interests of vulnerable groups, including victims of trafficking, refugees & asylum seekers.  (3) Insert reference to the Refugees Act (No. 130, 1998) for protection of refugees, asylum seekers and unaccompanied minors and references to the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32, 2007) and the National Policy Guidelines for Victims of Sexual Offences (1998) for the protection of survivors of sexual and gender-based violence. |
| **15. Duties, functions & powers of officers of border guard** | Tourism Business Council of South Africa | Reference is made to Section 4. To assist with correct interpretation specify: (1) Notwithstanding the provisions of Chapter 4, section 4 (2), |
| **15. Duties, functions & powers of officers of border guard** | Dept. of Justice & Constitutional Development | (1), 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. Rather limit 15(1) to the enforcement of the Bill ("this Act"), as it relates to the duties, functions and powers of an officer as provided for in the Bill.  A 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? |
| **16. Terms & conditions of employment** | Katleho Mogase | Agrees that power to arrest with or without a warrant would be good for those already working in border management. |
| **17. Limitations of rights of Officers** | Dept. of Justice & Constitutional Development | 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 law. Is it not substantive law which should be addressed in the Bill itself? |
| Scalabrini Centre | Numerous historical and recent examples of corruption and abuse of Power by border officials, therefore: Urge DHA and other role players to continue to develop effective counter-corruption measures in the border management regime and to build an effective workforce that upholds their obligations and duties. |
| **18. Powers of entry, search and seizure with warrant** | Dept. of Justice & Constitutional Development | 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.)  The heading of clause 18 should also reflect the arrest or detention of a person as it is a substantial power.  As already indicated in paragraph 8 above, the Bill provides for more than the powers, functions and duties of an officer of the BMA.  (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.  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. |
| **19. Powers of entry, search and seizure without warrant** | Dept. of Justice & Constitutional Development | 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? |
|  | Transnet | The Bill will have unintended consequences on the operations of Transnet Freight Rail ("TFR"), an Operating Division of Transnet SOC Ltd, in that chapter 6 of the Bill provides that the officer(s) to be appointed by the Authority will have powers to conduct search and seizure with or without a warrant. This will include powers to search any vehicle (this includes vessels, railway carriages and locomotives) within the border law enforcement area or at a port of entry. During a routine inspection an officer may, without a warrant order any driver of a "vehicle" to stop. This means that the drivers of locomotives may be ordered to stop within the border law enforcement area and at a port of entry as defined.  TFR is a freight rail logistics entity and its business model includes the transportation of goods through the South African borders by train (border law enforcement area or at port of entry) which will be the area where the Authority will have jurisdiction to exercise its functions.  Currently there is no railway station, siding, or service road leading to a railway line next to the designated port of entry or border enforcement area as defined. Transnet stations (last station before the border) are more than 10 kilometres away from the port of entry, with the exception of the Komatipoort station. However, the latter station has overhead track equipment which is used to transmit electrical energy to the locomotives. For safety reasons, it is not allowed for a person to climb on to the wagons since the person may come into contact with the electrical overhead lines.  It is for the above reasons that Transnet is of the view that it may be impractical for an officer to stop a train/locomotive and conduct inspections as contemplated in clause 20(1)(b)(i) of the Bill. Transnet recommends that the inspection of a train/locomotive be conducted at the last TFR designated railway station or siding before reaching the border law enforcement area or port of entry. |
| **20. Routine searches & seizures** | Dept. of Justice & Constitutional Development | (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 clause 10 on Limitations of Rights apply.  There appears to be a contradiction between clauses 18, 19 and 20 regarding 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. |
|  | Business Unity South Africa | Clause 20 should have the same test applied as in clause 19 in relation to routine searches; that officials should only be permitted to search should there be reasonable grounds that a warrant is likely to be granted if applied for, and that the delay in applying for such a warrant would defeat the object. Omitting such a test would create the possibility of abuse, victimisation and inconsistent application as officials would be permitted to search and seize items without any reasonable suspicion on the basis that it is a ‘routine’ search.  Therefore proposes the insertion of a new Section 20 (2) and 20 (3) as follows (with consequential number changes):  “20 (2) “The written authorisation referred to in section 20(1) above shall at all times be available for such roadblock and be accessible for inspection by the public. The written approval must state the following:  (a) The date on which the roadblock is authorised  (b) The approximate duration of the roadblock; and  (c) The place and object of the proposed action”  The above would align the Bill with Section 13 (a) and 13 (b) of the South African Police Services Act, 1995 (Act No. 68 of 1995).  20(3) “An officer may, without a warrant  (a) conduct a routine inspection or search of any person, goods, documents, premises, or vehicle within the border law enforcement are or at a port of entry for the purposes of ascertaining compliance with the provisions of this Act, provided the officer on reasonable grounds believes that-  (i) a warrant will be issued if applied for; and  (ii) the delay in obtaining the warrant is likely to defeat the object of such warrant. ” |
|  |  |  |
| **21. Powers relating to vessels within maritime borders** | Dept. of Justice & Constitutional Development | (g) 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.).  Offences in terms of 36 relate to inducing officials to contravene the Bill or other relevant legislation or to breach their duties etc. These offences in relation to a vessel, can only take place whilst the officer is on the vessel. Therefore consider 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;".  (j) 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. Hence refer to this section.  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. |
| **22. Detained or arrested persons & seized goods** | Katleho Mogase | Inter-Ministerial Committee ought to be abolished in favour of a Ministerial committee that is headed by the Minister of Home Affairs with representatives from all affected departments & also citizens. |
| **25. Inter-Ministerial Consultative Committee** | Kimberley Resources | Awareness campaigns for border communities to assist in prevention of border crimes should be supported by the establishment of the inter-ministerial consultative committee and border technical committee. |
| **25. Inter-Ministerial Consultative Committee**  **26. Border Technical Committee** | Dept. of Justice & Constitutional Development | (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. |
| Tourism Business Council of South Africa | (2) Organs of state specified in clause 25(3)(b) on Inter-Ministerial Consultative Committee not specified here. Suggest 26(2) to insert − either “relevant” before the word “heads” ,  − or specify which other organs of state are being referred to here. |
| **26. Border Technical Committee** | Scalabrini Centre | Should include the South African Human Rights Commission (SAHRC) as having powers of oversight over the BMA to ensure critical human rights are protected and that security measures are not implemented indiscriminately or unlawfully, in line with the mandate of the SAHRC in terms of sections 184(2) and 184(4) of the Constitution. |
| **31. Designation, determination, appointment prescription, withdrawal or cancellation of ports, points or place of entry or exit** | Dept. of Justice & Constitutional Development | 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. 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 i.e *Withdrawal of the Designation, Determination, Appointment and Prescription of Ports, Points or Place of Entry or Exit*. 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.) |
| **27. Advisory committees** | Fruit South Africa | Three separate committees be established with oversight and “technical” responsibility, two of which will be made up of state officials only.  Clause 27 provides for the Minister to appoint “Advisory Committees” to advise the Minister or Commissioner on border management issues and the functioning of the Authority.  The Minister is not obliged to appoint or consult with non-state parties directly affected by border controls. FSA believes that it is important that industry bodies such as FSA and others are able to provide input on regulations or other legislation which might impact on border efficiency and international trade or travel. The FSA submits that Clause 27 should be reviewed and a mandatory requirement for industry representative bodies to be appointed to Advisory Committees inserted. |
| **28. Implementation protocols** | Business Unity South Africa | Other organs of state may continue to undertake duplicate inspections once cargo has been moved from the border law enforcement area, thereby hampering legitimate trade. Therefore insert the following provision as Clause 28(5):  “establishing systems, forms, procedures and protocols to ensure that each organ of state does not duplicate the execution of functions carried out by any other organ of state in respect of a person affected by this Act” |
| **30. Review & Appeal of Decisions** | Business Unity South Africa | (6) Written reasons for decisions should be provided and should meet certain criteria. BUSA therefore proposes the insertion of Clause 30 (6) as follows:  “ (1) Every decision of the Commissioner must be in writing and be  (a) consistent with the Constitution and all applicable laws;  (b) in the public interest;  (c) within the powers of the Authority, as set out in this Act  (d) taken within a procedurally fair process in which affected persons have the opportunity to submit comments and present relevant facts and evidence to the Commissioner; and  (e) based on reasons, facts and evidence that must be summarised and recorded; and such factual and legal reasons must be explained clearly in the written decision.  (2) Any decision of the Commissioner and the reasons therefor must• be made available to the affected party.”  Appeals to be amended to include an independent appeal body. In respect of claims for damages only being possible through the courts, other legislation allows for Consent Orders to be confirmed by an independent appeal body when both parties to the dispute agree to the proposed terms of an appropriate order after the matter has been resolved through: (a) an ombud; (b) Alternative dispute resolution agent; (c) Agreement between the National Credit Regulator and the respondent; or (d) Agreement between the Competition Commission and the respondent, as the case may be.  (7) Wording for the dispute resolution provision is proposed as follows:  (1) A person aggrieved by a decision of the Commissioner, an officer or an official to which this section applies, or has any other dispute in terms of this Act, may apply in writing to the Commissioner to have the matter resolved through alternative dispute resolution procedures.  (2) The Commissioner must consider an application in terms of sub-section (1), and refer a matter for alternative dispute resolution only if-  (a) the decision is appropriate for alternative dispute resolution;  (b) the Border Management Appeal Board has not already considered the decision on appeal; and  (c) the decision is not subject to any judicial proceedings or pending judicial proceedings.  (3) The Commissioner must refer all appropriate disputes for resolution by mediation or conciliation to the ADR division of the Border Management Appeal Board or a Mediator accredited by accreditation agencies as determined by rule.  (4) If the Border Management Appeal Board, or an accredited Mediator, to whom a matter is referred for alternative dispute resolution concludes that either party to the conciliation or mediation is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the Border Management Appeal Board or accredited Mediator must issue a certificate in a prescribed form prescribed stating that the process has failed, where after it will be referred for determination by the Border Management Appeal Board.  (5) In the event that the matter is referred to the Border Management Appeal Board in (4) above, the Border Management Appeal Board may;  (a) Dismiss the appeal; or  (b) Set aside the decision and replace it with a suitable, alternative decision; and  (c) In the event that the appellant suffered injury or damage as a result of the decision overturned, refer the matter to court for the quantum of the compensation to be determined. Such a referral must be accompanied by a copy of the Appeal Board’s finding.  30(8) to be inserted in respect of consent orders as follows  (1) If a matter has been –  (a) resolved through an alternative dispute resolution process agent;  (b) determined by the Border Management Appeal Board [or the Commissioner], and an appropriate settlement to compensate for damages arising from the determination has been agreed between the disputing parties; the Border Management Appeal Board or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order.  (2) With the consent of a complainant, a consent order confirmed in terms of this section may include an award of damages to the complainant.  (3) A person who has suffered loss or damage as a result of any matter governed by this Act which the Border Management Appeal Board has jurisdiction to determine, may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has consented to an award of damages in a consent order.” |
| **31.**  **Designation, determination, appointment, prescription, withdrawal or cancellation**  **of ports, points or places of entry or exit**  **VERSUS**  **40. Ports, points and places of entry or exit** |  | From an Administrative Law perspective, these two clauses may be irreconcilable with each other. In terms of Administrative Law, the power to issue a determination would normally include the power to change, amend or withdraw such determination where the functus officio principle does not apply. In the current instance the power to determine a port, point or place of entry or exit would include the power to change or withdraw such determination.  Where the powers to determine a port, point or place of entry or exit under the laws referred to in clause 40 of the Bill do not reside with the Minister of Home Affairs, the power of the Minister of Home Affairs to take charge of this process in terms of the Bill and even withdraw or cancel a designation would be undermining the "original" statutory powers of the authority empowered with these powers under the laws referred to in clause 40.  Consequently, there appears to be a need to have proper statutory alignment between laws dealing with the determination of ports, points and places of entry or exit, therefore making provision for a consultation requirement in the Bill does not resolve the matter. Transnet recommends that the above clauses should be reconsidered and consideration be given to align the Bill with the regulatory requirements referred to in clause 40. |
| **36. Offences and penalties** | Dept. of Justice & Constitutional Development | (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.)  (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 obvious (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?  (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.  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. The provision is vague, and the 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. Therefore either remove clause 36(4)(b) or to specify the term of imprisonment, as was done in respect of the other offences in clause 36. |
| **37. Regulations** | Dept. of Justice & Constitutional Development | (11) states that the Minister may, after consultation with the Commissioner, make regulations regarding several aspects relating to the Authority. There is a distinction between the expression "after consultation with" and "in consultation with". 'in consultation with' another means no more than giving serious consideration to the views of the other."  Since the regulations concern the operations of the BMA with the Commissioner as its head, there needs to be concurrence between them and the Minister.  (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 this is the same code of conduct referred to in clause 36(4)(b)  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. |
| **37(g) Code of Conduct &** | Katleho Mogase | Tightening their code of conduct/ethical standards for BMA officers is needed, to avoid the issue of bribes & other corrupt behaviour. |
| **38. Transfer of employees from organ of state to Authority** | Business Unity South Africa | Paradoxical that a new agency is required in order to mend the lack of horizontal integration between different government departments at the ports of entry and exit, yet vertical integration between border officials and the relevant line departments is expected not to deteriorate if the border officials are separated from their parent line departments. Better to be maintained through MoUs, service level agreements and an inter-ministerial committee.  Separation between policy formulation and enforcement is considered problematic. Review of the functions to be transferred shows that functions that may be currently delegated to a front line staff member of a principal department does not remove the responsibility for the function from the senior official who remains in the principal department.  The only way that functions can be transferred from the Minister currently responsible for the function is by presidential proclamation. This process does not pass through Nedlac or Parliament - nor does it provide for any mandatory public consultation or prior publication.  Chief Law Advisor is that amendment of the principle legislation may not be required as the relevant powers will be undertaken concurrently, however we have our reservations as to the accuracy of this given the complexity of certain legislation. Moreover, Business’ general experience with concurrent powers is that it reduces efficiency.  Many of the powers transferred are powers which specific laws confer upon the highest administrative authority within a line department, which he or she then delegates to officials. By transferring this function to the BMA wholesale, the administrative authority in the line function will not be able to exercise oversight functions. |
|  | | |
| **General Comments** | | |
| Katleho Mogase | Agrees that Border officers need to envelope SAPS, SANDF, & SARS customs into the new BMA & give the new BMA officers the right to carry arms as well as arrest. | |
| Kimberley Resources | More consideration should be given to Border Communities for training programmes for young people for recruitment preference as immigration officers and other personnel.  Grandparents painfully witnessed the erection of colonial border fences which separated them from their loved ones (in Botswana). Families separated by borders should be considered so that colonial fencing do not disadvantage them from economic transformation by means of trading to enter main-stream economy. | |
| Scalabrini Centre | Withdraw the BMA Bill be pending the clarification of the roles of government & agreement of these roles by all parties & the finalisation of the Green Paper consultation process & adoption of the subsequent White Paper on International Migration. This will ensure consensus on the resulting legislation & that all stakeholders can engage in the policy process & to ensure legislation aligns with policy. | |
| Scalabrini Centre  AND  Business Unity South Africa | 5 (pg 23) Strongly urges DHA and other role players to further investigate the costs of implementing the BMA prior to the finalisation of legislation.   * Lack of clear guidelines or verification on how the R3,8 billion figure was reached * Estimation's omits overlapping costs due to the BMA Bill's overlapping functions the cost of a significant reconfiguration of agencies involved in border management (amplified by discord between these agencies in terms of their roles and powers in relation to the BMA Bill * Possible negative effects on revenue collection if the Authority begins to collect customs duties as opposed to SARS officials (this may have further implications for the State in terms of investor uncertainty and the negative perception of mismanagement) * 5.2 'funds will follow functions' and that 'it is envisaged that additional funds may be required for the establishment of the Authority'. There are no further details provided on what these costs might be, where exactly they would be spent, or where the funds would come from. This shortcoming in the BMA Bill is particularly concerning given the recent challenges surrounding government expenditure and funding. * The cost estimate appears to not factor in the initial costs of change in management that will come with the creation of a new agency.   Department of Homeland Security (DHS) in the USA had 22 existing governments departments being pulled together into mammoth bureaucracy over an already existing set of bureaucracies resulting in ‘tens of billions of tax dollars disappearing annually, since it can’t pass audit requirements, which the DHA already struggle with. | |
| Durban Chamber of Commerce  And  Business Unity South > Africa  And  Business Unity South > Africa | Canada only country with a single border agency. The Canada Border Services Agency integrate the functions of customs, immigration and food inspection/biosecurity similar to what is proposed in the South African BMA Bill. The United Kingdom established an integrated border agency in 2008 but abolished it in 2013 and split into more focused structures due to the performance “not being good enough” and developing a “closed, secretive, and defensive culture”. Integrated border agency has proven unsuccessful internationally therefore important that South Africa learns from these lessons and reconsider consolidating all border management issues directly under one Ministry.  Would be detrimental to business combining complexities of customs cargo control with that of immigration impact negatively on freight supply chains.  Revenue collection responsibilities through Customs are critical to the financial well-being of the country. Duty and VAT on imported goods is a complex managed by SARS wide range of electronic interventions including manifest control, declaration submission and risk management. Tampering with the control or management of these systems would have serious consequences.  DCC support integrated and coordinated border management that facilitates secure travel and legitimate trade. This is critical to the functioning of the economy and for economic growth. However, it is important not to fragment that existing tax system. SARS function extends beyond revenue collection and covers other functions such as control of goods at ports of entry, regulation and rulings, record keeping and returns, audits and investigation, dispute settlements, internal investigations and functions performed by the tax ombud. Therefore, BMA should not recreate a revenue collection infrastructure.  Fragmentation of the tax system may lead to:   * lack of clarity between SARS and BMA as to which entity should collect what taxes, * compromise the certainty that taxpayers require as to the tax collection entity in respect to various or all taxes. * result in some tax not being collected or some tax payments by tax payers being duplicated. * the integrity of the South African tax system being questioned. * introduce personnel that are not equipped on revenue collection matters. * SARS credible employment and training of 2498 customs personnel employees of SARS are involved in the implementation of SARS customs policies. If BMA seek to absorb this staff and they prefer to remain with SARS, BMA will be deprived of key skills to execute revenue collection.   During the last week of August 2015, SARS prevented R 78 million of foreign currency from illegally exiting the country via the Oliver Tambo Airport. SARS collection functions and activities with regard to the control of goods at the ports of entry into South Africa are always improving.  The assignment of the functions of SARS to the BMA is not strictly necessary to deliver on the key objectives of the Bill such as provide for the establishment, organisation, regulation, and control of the BMA, to provide for the transfer, assignment, and designation of law enforcement border related functions to the BMA, to perform border law enforcement functions within the borderline and at ports of entry, coordination of the implementation of its border law enforcement functions with the principal organs of state and to enter into protocols with those organs of state.  Should SARS not have the capacity to serve the points of entry it would be more feasible to improve their infrastructure as opposed to fragmenting the tax collection system. It is important that the powers of tax administration remain with the Commissioner of SARS, if transferred it may be in conflict with Constitution of South Africa and contrary to TAA (Tax Administration Act).  SARS the total of customs duties, import VAT and ad valorem import duties amounted to R 177 billion in 2013/14 (19% of total revenue collected). The view expressed by the Davis Tax Committee in respect of the transfer of SARS functions to the BMA, namely that “to put so significant a contribution to the fiscus in a position of uncertainty [if the Bill were to be implemented] is fiscally imprudent at this critical juncture for the South African economy”. | |
| Business Unity South Africa | DHA have seemingly ignored the Socio Economic Impact Assessment Model (SEIAS). SEIAS commissioned by DHA on the draft Bill, the Border Management Agency was determined to be a substantially more expensive option than capacitating the SANDF to perform the function (BMA R15 – 24 billion as compared to projections of R2.5 billion for the SANDF to perform the function). In the current constrained fiscal environment, with the prospect of an imminent sovereign debt rating downgrade, the fiscal space for the establishment of the BMA is simply not available.  This assessment recommended against proceeding because of the high risk and high costs associated with a wholesale transfer of functions. BUSA supported the recommendation made in the SEIA to establish the BMA as a co-ordinating agency only, without transferring the functions from the relevant line departments. No adequate reasoning was provided as to why this recommendation was discarded in favour of creating and implementing agency. BUSA agrees with the authors of that report that the establishment of such an agency is a high risk venture when it meant to be a risk mitigation strategy.  BUSA is in favour of the recommendation made in the SEIA to establish a BMA solely for the purposes of coordinating the various line departments in the border law enforcement area, but not to assume their respective functions. | |
| Business Unity South Africa & Tourism Business Council of South Africa | The Bill in no way whatsoever seeks to promote legitimate trade or assist in facilitating the legitimate migration of people. In line with these comments, we are concerned about the negative impact that the militarisation of the border environment will have on legitimate trade and migration. | |
| Business Unity South Africa  AND Fruit South Africa | The risk of a negative impact on legitimate trade is high particularly given the fact that the process of implementing the new customs Acts has only just begun.  Phytosanitary (agriculture) inspections conducted at ports of entry and exit will be harmed by the fact that the border officials will no longer be working under the supervision and instruction of the relevant line departments where the specialist expertise lies. Certain countries or groups of countries apply import conditions on exporters which require phytosanitary certificates issued by the appropriate state organ in the exporting country. In South Africa this requirement is the responsibility of the DAFF and is not assigned to the PPECB or other independent agency. As a result of this requirement inspections concerning phytosanitary requirements that products and producers must adhere to, are performed by the Department’s own inspectors. | |
| Fruit South Africa  (FSA) | The fruit industry is the largest contributor, by value, to South African agricultural exports. The industry has a high job-multiplier effect and creates in excess of 400 000 jobs throughout the value chain. The industry is also an important generator of foreign currency inflows – about 90% of income derived from fruit earnings is from foreign exchange, with Perishable Products Export Control Board (PPECB):  The PPECB is assigned by the Department of Agriculture Forestry and Fisheries (DAFF) to be the provider of product quality certification and cold chain management services for producers and exporters of perishable food products. It supplies critical services to FSA members ensuring that South African fruit meets required standards for export countries and that South African quality certification is recognized as credible globally.  The PPECB is responsible for managing the export cold chain. The PPECB provides a comprehensive service to fruit exporters that includes the inspection and approval of cold stores; refrigerated containers, specialized reefer vessels, the monitoring of loading processes and the on-route temperature management of produce. The PPECB provides third party assurance that the container, vehicle or vessel used to transport perishable products intended for export meets technical and hygienic standards. PPECB assessors ensure that the mode of transport is technically sound and inspect the cleanliness thereof.  The FSA submits that the activities of the PPECB will not fall within the ambit of the BMA, that the Boards interventions are “quality control” and not “border control” and that a substantial proportion of the work of PPEC Board officials is conducted inland, away from ports and borders.  FSA submits that the work undertaken by Board officials is of technical nature and requires specific knowledge relating, inter alia to fruit quality, cold chain requirements and plant diseases. It will be completely inappropriate and self-defeating to place this area of cold chain management and quality control under the direction or oversight of the Authority. The FSA submits that the PPECB must continue as an independent organ of state mandated by and responsible to the DAFF. | |