

**SUBMISSION ON THE REFUGEES AMENDMENT BILL, 2015, AS PUBLISHED IN THE GOVERNMENT GAZETTE NO. 39284**

**Introduction**

Amnesty International-South Africa (AISA) welcomes the invitation by the Portfolio Committee on Home Affairs for public comments on the Refugee Amendment Bill. This is particularly important given that South Africa is at the core of migration movements in the Southern African Region. This is also particularly important given our human rights track record.

Amnesty International South Africa is part of the global human rights movement of over 7 million members, supporters and activists who advocate for the protection and realisation of human rights. Many of our members, supporters and activists in South Africa are also migrants, asylum seekers and refugees; therefore Amnesty International has a direct interest in the country’s refugee regime and the protection of asylum seeker and refugee right

It is important however, before getting into the specific provisions of the proposed amendments that Amnesty International South Africa expresses its concern and caution regarding the presentation of the amendments at this particular point. The Department of Home Affairs is currently undertaking a review of the country’s migration policy under the International Migration Review process. The Department has recently called for comments from interested stakeholders to make inputs into the proposed International Migration Policy with the closing date having been at the end of September 2016.

Amnesty International South Africa is one of the stakeholders that made an input into this process. The International Migration Review as far as we can understand is meant to provide policy guidelines on which legislation related to both immigration and asylum protection must be based. It is thus our belief that any amendments to the Refugees Act must be held in abeyance pending the finalisation and adoption of the International Migration Policy which will provide broad policy frameworks for asylum protection. In having the process of amending the Refugees Act and the International Migration Policy Review go hand in hand, the country runs the risk of possibly adopting broad policy and legislation that are in conflict with each other. In this regard, Amnesty International South Africa would propose that any proposed amendments to the Refugees Act be considered once the International Migration Policy process has been finalised and the policy has been adopted provided it is in line with the Constitution and other international human rights frameworks aimed at protecting asylum seekers and refugees.

At this point, Amnesty International South Africa would like to note the following on certain provisions of the Bill:

**COMMENTS ON CERTAIN PROVISIONS OF THE BILL**

**Definitions section**

Section 1 (a) proposes the change in the definition of asylum seeker permit to asylum seeker visa. By nature, and definition, a visa permits an individual to stay in a country, for a specific reason and for a specified period. The length of stay of asylum seekers in a host country is often unknown depending on the circumstance surrounding the individual’s grounds for applying for refugee status. Therefore, the term asylum seeker permit should be retained and not replaced with asylum seeker visa as proposed in the Bill.

Section 1 (b) proposes the substitution for the definition of ‘dependant.’ The Bill limits the definition of dependantonly to minor children of asylum seekers. This excludes children above the age of majority and children who are under their guardianship. It is recommended that this definition also recognises the informal care giving relationships that often happens in some cultures. For instance, in cases where there is no formal adoption of a child by the asylum seeker or refugee but the said asylum seeker or refugee is the primary care giver of such a child or children.

**Section 4 – Exclusions from refugee status**

Amnesty International South Africa would like to note the following on the proposals to amend Section 4 of the Refugee Act 130, 1998:

**S 4 (e):** seeks to exclude those who have committed crimes listed in Schedule 2 of the Criminal Law Amendment Act. Any individual, whether South African citizen or asylum seeker who commits a crime should be prosecuted in accordance to the law. It is our recommendation that any decision to deny asylum to any asylum seeker must be based on fair administrative justice, observing the principles of innocence until proven guilty and that all due processes are followed before any exclusionary measures can be applied.

**S 4 (g):** An asylum may be seeking refuge in the country because of being a fugitive of **unjust laws** in his or her country of origin. For instance, an asylum seeker may be fleeing his/her country of origin because of the possibility of facing the death penalty for a crime committed in that country. Refusing such person asylum may result in them subjected to the death penalty. South African courts have ruled on the matter and held 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.”[[1]](#footnote-1)

Secondly, there are countries which do not uphold the rights of LGBTIQ persons, where ‘sodomy’ is a criminal offence. Therefore, in both instances, an asylum seeker may be denied refugee status by virtue of being a ‘fugitive from justice in another country.’

**S 4 (i):**

Amnesty International South Africa, recommends retaining the original time period as per Act 130 of 1998 allowing asylum seekers and opportunity to reach the nearest Refugee Reception Office. With all the challenges that have been well documented with regards to accessing the Department of Home Affairs including long queues, offices not being in all provinces, it has not been possible for all asylum seekers to be serviced at Refugee Reception Offices within the prescribed time period. Therefore the proposed amendment to reduce this time, may only compound the situation and prejudice the asylum seekers.

**Section 5 – Cessation section**

**S 5 (f) and (g):** We recommend that any negative action regarding an asylum seeker and/or refugees’s stay in the country be taken only after all legal processes have been concluded and the affected person has been afforded all legal recourse available to them, further noting the principle of innocent until proven guilty.

**Section 22**

Various subsections in this section raise many concerns. We wish to first focus on the right of asylum seekers to work.

The Court in The Minister of Home Affairs & Others v Watchenuka case (Watchenuka case) emphasized this point by stating: “The inherent dignity of all people-like human life itself- is one of the foundational values of the Bill of Rights”[[2]](#footnote-2) and that “The freedom to engage in productive work –even if that is not required to survive- is indeed an important component of human dignity, for mankind is prominently a social species with an instinct for meaningful association.”[[3]](#footnote-3)

It is common knowledge that the application process for asylum status in South Africa can be lengthy due to various delays. The appeal process is also a lengthy process currently being compounded by lack of adequate members in the Refugee Appeals Board. Restricting the rights of asylum seekers to work and/or study during this period would therefore be an infringement of their rights. 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.

**General comments:**

Amnesty International South Africa, notes that in order for any legislation and/or policy to be realised, there is a need for adequate resourcing of the government department or arms of government responsible for the implementation of that legislation. In this regard, we would like to emphasise that the realisation of adequate and comprehensive protection of the asylum seekers and refugees will require an adequately resourced Department of Home Affairs, with efficiently functioning systems, qualified personnel and a well-resourced and adequately constituted Refugee Appeals Board and Standing Committee on Refugee Affairs.

**CONCLUSION**

South Africa has one of the most progressive refugee legislations. Therefore, amendments to the existing legislation need to be an improvement to the already existing legislation. Legislation and policy regulating refugees, migrants and asylum seekers should be one which seeks to guarantee protection of their human rights, and not one which regresses their legal status and human rights.

Amnesty International South Africa wishes to express its willingness to make further verbal inputs to the Portfolio Committee should the opportunity be available. This written submission presents some of our recommendations which can be elaborated on and further inputs made.

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1. *Mohamed v President of the Republic of South Africa* [↑](#footnote-ref-1)
2. The Minister of Home Affairs & Others v Watchenuka [2004] 1 All SA 21 (SCA) para 26 [↑](#footnote-ref-2)
3. The Minister of Home Affairs & Others v Watchenuka [2004] 1 All SA 21 (SCA) para 27 [↑](#footnote-ref-3)