**MEMORANDUM**

**In re: The Refugees Amendment Bill [B 12B-2016]**

Comments on behalf of the Cape Bar Council

1. **INTRODUCTION**
2. This memorandum sets out the comments of the Cape Bar Council (“*CBC*”) on the Refugees Amendment Bill [B 12B-2016] (“*the Bill*”).
3. The CBC has an interest in legislation which encroaches upon constitutional rights or impacts upon the administration of justice. In its current form, the Bill does so in at least[[1]](#footnote-1) the following two respects:
   1. First, a number of its provisions infringe, or threaten to infringe, the principle of *non-refoulement*, in that they bar applicants from being granted refugee status for reasons other than the merits of their claims. This may result in persons being sent back to countries to face persecution, contrary to both section 2 of the Act and the Constitution of the Republic of South Africa, 1996 (“*the Constitution*”).
   2. Secondly, the Bill makes serious inroads into asylum seekers’ constitutional right to work to support themselves. While a system is put in place to allow certain asylum seekers to work, it is both vague in its application (that is, it is not clear who will be able to work under what circumstances) and irrationally limited in its ambit (in that persons who should be allowed to work may be deprived of the right to work through no fault of their own).
4. Both of the abovementioned issues are addressed in more detail below. In light of the defects in the Bill, the CBC submits that the Bill cannot be promulgated in its current form, as it would be vulnerable to multiple constitutional challenges.
5. In this memorandum, a reference to a section of “*the Act*” should be construed as a reference to the applicable section of the Act as it currently exists, whereas a reference to a section of “*the Bill*” should be construed as a reference to the applicable section of the Act as it will exist after the Bill is promulgated.
6. **INFRINGEMENTS ON THE RIGHT OF *NON-REFOULEMENT***
7. The Bill introduces a range of provisions which infringe, or threaten to infringe, asylum seekers’ rights to *non-refoulement* and their rights under the Bill of Rights. These provisions are:
   1. Sections 4(1)(e) and 5(1)(f), which either exclude or cause a person to cease to qualify for refugee status if they have “*committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act [105 of 1997], or which is punishable by imprisonment without the option of a fine*”.
   2. Sections 4(1)(f) and 5(1)(g), which either exclude or cause a person to cease to qualify for refugee status if they have “*committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit*”.
   3. Section 4(1)(g), which excludes a person from refugee status if they are “*a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary*”.
   4. Section 4(1)(h), which excludes a person from refugee status if they “*entered the Republic, other than through a [designated] port of entry, [and fail] to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry*”.
   5. Section 4(1)(i), which excludes a person from refugee status if they have “*failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum*”.
   6. Section 5(1)(h), which provides that “*the Minister may issue an order to cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status*”.
   7. Section 21(6), which provides that “*an application for asylum, which is found to contain false, dishonest or misleading information . . . must be rejected”*.
   8. Section 22(12), which provides that an “*application for asylum of any person . . . must be considered to be abandoned . . . if such asylum seeker fails to present himself or herself for renewal of the visa after a period of one month from the date of expiry of the visa, unless the asylum seeker provides, to the satisfaction of the Standing Committee, reasons that he or she was unable to present himself or herself, as required, due to hospitalisation or any other form of institutionalisation or any other compelling reason”.*
   9. Section 22(13), which must be read with section 22(12) and provides that an “*asylum seeker whose application is considered to be abandoned in accordance with subsection (12) may not re-apply for asylum and must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act*”.
8. For convenience, the above provisions will be referred to as the “*exclusionary provisions*”.[[2]](#footnote-2)
9. Although the exclusionary provisions bar applicants from recognition as a refugee on grounds that may appear unrelated to one another, they all have a common – and constitutionally suspect – result: they result in an applicant being excluded, deprived, or otherwise denied refugee status for reasons other than the merits of the applicant’s asylum claim.
10. In other words, they can result in a person being sent to a country in which he or she will face persecution “*on account of his or her race, religion, nationality, political opinion or membership of a particular social group*”, or face the harms associated with being returned to a country suffering from “*external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order*”.
11. All of the exclusionary provisions therefore threaten the principle of *non-refoulement* and the constitutional rights associated with that principle.

***Non-refoulement***

1. The principle of *non-refoulement* is central to the protective regime created by refugee law, both internationally and nationally. In the Act (and the Bill) this principle is enshrined in section 2:

*“Notwithstanding any provision of this Act or any other law to the contrary, 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.”*

1. This principle derives from international instruments to which South Africa is a party,[[3]](#footnote-3) and has been described by the Supreme Court of Appeal as “*an international principle of cardinal importance*”.[[4]](#footnote-4) Academics refer to it as “*the most vital element of refugeehood*”.[[5]](#footnote-5) The United Nations High Commissioner for Refugees (“*UNHCR*”) holds the view that the principle has become a rule of international customary law.[[6]](#footnote-6)
2. Any statute or conduct that returns, or threatens to return, a person to face persecution of the kinds contemplated in sections 2 and 3 of the Act infringes the principle of *non-refoulement* and, depending on the facts of each case, the affected person’s constitutional rights, including to dignity, equality and/or freedom and security of the person.
3. It is for this reason that section 2 overrides “*any provision of this Act or any other law to the contrary*”. Section 2 applies not only to refugees, but to any “*person*”.
4. In this context, the exclusionary provisions as a whole are inconsistent with both section 2 of the Act and the Constitution, and cannot be enforced.
5. It cannot be gainsaid that, for example, a person who was fleeing ethnic cleansing in their home country should not be returned to that country regardless of whether he or she applied for asylum within five days of entry. Even if he or she failed without good reason to apply timeously, the prejudice to the person if returned so vastly outweighs the harm caused by their procedural misstep that to return (“*refoule*”) them would violate both the principle of *non-refoulement* and their constitutional rights.
6. There is no precedent or support for the exclusionary provisions in international law. The UNHCR has held that the limited set of exclusions contained in Article 1F of the Convention are exhaustive.[[7]](#footnote-7) Expanding the list of exclusions would contradict the very international statutes in terms of which the Act must be interpreted.[[8]](#footnote-8)
7. It is also consistent with South Africa’s constitutional and international[[9]](#footnote-9) commitments not to send persons back to countries where they will face death or other cruel and inhumane treatment.[[10]](#footnote-10)
8. And the jurisprudence of the Constitutional Court has consistently indicated that even foreign persons who commit heinous crimes cannot be sent to countries where they will face unconstitutional treatment. In *Tsebe*, [[11]](#footnote-11) two persons, Mr Tsebe and Mr Phale, separately committed murders in Botswana. Their extradition to Botswana from South Africa was sought, but Botswana refused to offer assurances that they would not face the death penalty. The Constitutional Court held:

*“We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things. One of those things is that no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killing as a punishment and we will not hand such person over to another country where to do so will expose him to the real risk of the imposition and execution of the death penalty upon him. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.”[[12]](#footnote-12)*

1. If the Constitution does not allow murderers to be returned to countries that might impose capital punishment, it equally will not allow the return of persons who have “*committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act [105 of 1997], or which is punishable by imprisonment without the option of a fine*”.
2. And if murderers cannot be returned to face unconstitutional treatment, there is no prospect that persons who have committed lesser offences, such as fraud, or who have committed only procedural missteps such as failing to apply for or renew their visas timeously, can be returned to the home countries if they have a well-grounded fear of persecution there.
3. This is a fundamental defect in all of the exclusionary provisions. While these provisions aim at diverse and ostensibly desirable outcomes (for example, the prevention of fraud), the consequence of these provisions is ultimately the same: denial of refugee status to a person who, on the merits, is deserving of recognition.
4. The CBC submits that bearing in mind that many asylum seekers will be fleeing violence, persecution and other terrible harms, this outcome is inhumane and will not pass constitutional muster. The exclusionary provisions should be removed from the Bill.
5. Some of the exclusionary provisions[[13]](#footnote-13) contain provisos which limit the impact of the exclusions by allowing applicants to seek condonation for their failures.
6. It may be suggested that these provisos “save” the exclusionary provisions, as persons who proffer “*compelling reasons*” for their non-compliance with the Act or their visas will not be penalised. But this is no answer. As *Tsebe* and *Makwanyane* make clear, even those who are at fault, and even those who have committed serious crimes such as murder, are still protected by the Constitution. And section 2 of the Act states that all persons, not only recognised refugees, are entitled to the protection of the principle of *non-refoulement*.
   1. Furthermore:
      1. These condonation processes will significantly increase the number of decisions that must be made by already-overburdened officials in the refugee system.
      2. The Bill fails to stipulate what the rights of the asylum seekers are pending determinations of the condonation applications. It appears that they will not be recognised asylum seekers, and not be in possession of any rights under the Act (or any other statute).
      3. Whether due to the inability of applicants to access decision-makers, delays in the decision-making process, or negative decisions at the end of the process, many applicants will find themselves in an invidious position: either as unrecognised foreigners, or as persons facing persecution in their home countries but who have been denied refugee status for procedural reasons.
      4. These applicants will in all likelihood seek the protection of the courts, drawing the Department of Home Affairs (“*the Department*”) into a plethora of litigation and clogging the court rolls.
7. This is neither in the interests of the Department or of the administration of justice.
8. **THE RIGHT TO WORK**
9. *Watchenuka[[14]](#footnote-14)* granted asylum seekers the right to work as an adjunct to their constitutional right to dignity:

*“But where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum. While the second respondent offers some assistance as an act of charity, that assistance is confined to applicants for asylum who have young children, and even then the second respondent is able to provide no more to each person than R160 per month for a period of three months. Thus a person who exercises his or her right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging. I do not suggest that in such circumstances the State has an obligation to provide employment - for that is not what is in issue in this appeal - but only that the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment”*.

1. Since *Watchenuka*, in effect all asylum seekers have been able to support themselves and their families by finding employment. This has been vital to allowing them to live lives of dignity, as it is well-recognised that:
   1. The overwhelming majority of asylum seekers are, at the time of their arrival in South Africa, impoverished; and
   2. The process of applying for asylum (including the exhaustion of appeal/review remedies) often takes years.
2. The Bill alters this position. The right to work may not, in terms of section 22(8) and 22(11) of the Bill, be granted to:
   1. Any applicant who is able to sustain himself or herself and his or her dependents for a period of at least four months;
   2. Any applicant who is offered shelter and basic necessities by the UNHCR or any other charitable organisation or person;
   3. Any applicant who seeks to extend their right to work but fails to provide a letter of employment; and
   4. Any applicant who was granted the right to work but who, after a period of six months, is unable to prove that he or she is employed.
3. This regime is vague, irrational, and still risks the infringement of applicants’ rights to dignity, to work, and to live “*without positive humiliation and degradation*”, contrary to *Watchenuka*.

**Vagueness**

1. The abovementioned provisions are replete with uncertainty on critical aspects:
   1. What does it mean to “*sustain*” a person and his or her family? How much money would this require, per person per month? If the amount is set too high, most asylum seekers will be excluded and the provision will become meaningless. If it is set too low, it will condemn asylum seekers to poverty and destitution without even the option to work. If it is not defined, arbitrary determinations will be made, and the door opened for abuse and corruption.
   2. Why must a person demonstrate that they can sustain themselves for four months? What about a person who can sustain themselves for five months, or longer, but thereafter will need employment to support themselves? Many asylum applications, especially those that go on appeal, require years to determine.[[15]](#footnote-15)
   3. No system appears to be in place for a person who was initially denied the right to work, but whose circumstances have changed (for example, due to the birth of a child) and who requires a reappraisal of his or her need to work.
   4. Who, and after what process, will decide that the UNHCR has offered shelter to an applicant? The UNHCR has publicly indicated that it can provide support only for a very limited number of persons and that it prioritises recognised refugees. It has also called for the removal of references to it in section 22 of the Bill.
   5. What are these “*other charitable organisations or persons”*? If a person is denied the right to work, becomes destitute as a result, and is given shelter by a charity that assists homeless persons, is this sufficient?
   6. If there is any kind of process, application, or delay in determining whether an applicant is or will be granted shelter and support by any body, what is the position in the interim? Can they work? If not, who are they to provide for themselves?
2. The Bill provides no answers to these questions. Without greater clarity, the system envisaged by the Bill cannot operate and/or will be the subject of significant litigation as parties contest the meaning of these provisions in court.

**Irrationality**

1. Section 22(11) of the Bill stipulates that any applicant who was granted the right to work but who, after a period of six months, is unable to prove that he or she is employed will have their right to work revoked.
2. It is submitted that this provision is irrational. It:
   1. Furthers no legitimate government purpose. What benefit is there in stripping a person who has been unable to find work, of the right to work?
   2. Is unjust, in that it penalises the applicant for something that is not their fault. It is a sad but unavoidable reality that structural unemployment in South Africa is high. Many people, whether South Africans or foreigners, desperately seek work but are unable to find any. There is no justifiable basis to treat such a failure as a reason to strip a person of an important right.
   3. Is disproportionate, in that any person who has been unable to find work is likely already impoverished. To strip them of the chance to be employed amplifies the prejudicial nature of their position.
   4. Ignores the nature of the South African employment market, particularly for asylum seekers, in which a significant portion of the employment opportunities are for temporary or informal work. A person who takes on a series of temporary jobs (for example, as a waiter) may not be able to prove that he or she is employed after a period of six months, but they may still have been working and earning a sustainable living.
3. To the extent that the regime proposed by the Bill reflects an attempt to ensure that employment opportunity are only taken by South Africans or by “deserving” asylum seekers, it is submitted that the answer does not lie in restricting the rights of asylum seekers to work.
4. Instead, the asylum system should be sufficiently capacitated to ensure that unmeritorious applicants are swiftly identified and their applications rejected. This will prevent any abuse of the asylum system to gain access to work in South Africa, while at the same time not disadvantaging genuine asylum seekers.
5. While the Bill has noble intentions, the exclusionary provisions place are not justifiable in light of section 2 of the Act and the Constitution, and the new limitations on the right to work are neither rational nor, in light of their vagueness, practicable.
6. It is the CBC’s respectful submission that the Bill will require serious reconsideration and re-structuring, as identified above, if it is to avoid being struck down as unconstitutional in whole or in part.
7. The CBC thanks Parliament for this opportunity to make representations to it concerning the Bill.

**LOUISE BUIKMAN S.C.**

**DAVID SIMONSZ**

**On behalf of the Cape Bar Council**

15 June 2017.

1. The fact that the CBC does not address concerns outside of the abovementioned four does not mean that such concerns might not have merit. The CBC focusses only on issues falling within its mandate. [↑](#footnote-ref-1)
2. This is a term of convenience and is not to be confused with exclusion in terms of section 4 of the Act/Bill. [↑](#footnote-ref-2)
3. Article 33 of the United Nations 1951 Convention Relating to Status of Refugees (“*the Convention*”); Article 2(3) of 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (“*the OAU Convention*”). Section 6 of the Act also requires that the Act be read in light of, *inter alia*, these international instruments. [↑](#footnote-ref-3)
4. *Minister of Home Affairs and Others v Saidi and Others* [2017] 2 All SA 755 (SCA) at para 23. [↑](#footnote-ref-4)
5. Khan and Schreier Refugee Law in South Africa (2013) at 3; referring, *inter alia*, to Goodwin-Gill The Refugee in International Law (1996) at 117. [↑](#footnote-ref-5)
6. And is therefore part of South African domestic law in terms of section 232 of the Constitution. [↑](#footnote-ref-6)
7. UNHCR Guidelines on International Protection No. 5: Application of the Exclusion Clauses at para 3. [↑](#footnote-ref-7)
8. Section 6 of the Act. [↑](#footnote-ref-8)
9. See article 4 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which South Africa ratified on 10 December 1998, and was domesticated via the Prevention and Combating of Torture of Persons Act 13 of 2013. [↑](#footnote-ref-9)
10. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (“*Makwanyane*”) at paras 229-230; *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) (“*Mohamed*”) at para 52. [↑](#footnote-ref-10)
11. *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) (“*Tsebe*”). [↑](#footnote-ref-11)
12. *Tsebe* at para 67. [↑](#footnote-ref-12)
13. Specifically, sections 4(1)(h), 4(1)(i), and 22(12) of the Bill. [↑](#footnote-ref-13)
14. *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) (“*Watchenuka*”). [↑](#footnote-ref-14)
15. See for example *Tshiyomba v Members of the Refugee Appeal Board and Others* 2016 (4) SA 469 (WCC) at paras 43-44. [↑](#footnote-ref-15)