



Submissions by Corruption Watch: Draft Immigration Amendment Bill

Introduction

1. Corruption Watch is a non-profit civil society organisation. It is independent, and it has no political or business alignment. Corruption Watch intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include fighting the rising tide of corruption, the abuse of public funds in South Africa, and promoting transparency and accountability to protect the beneficiaries of public goods and services.
2. Corruption Watch has a vision of a corruption free South Africa, one in which educated and informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice and importantly where public and private individuals are held accountable for the abuse of public power and resources.
3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within private sector and state institutions aimed at ensuring that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.
4. Corruption Watch welcomes the opportunity to make submissions on the Immigration Amendment Bill [**“the Bill”**].
5. We note from the Preamble of the draft immigration amendment bill explanatory note that the amendments are aimed at aligning the provisions relating to the detention of illegal foreigners for purposes of deportation with constitutional principles, to provide guidance to an immigration officer as to when he or she may arrest and detain an

illegal foreigner for purposes of deportation and to provide for matters connected therewith.

6. We respectfully submit that any amendment to detention and deportation processes in line with constitutional values and the principle of *non-refoulement* cannot be considered without due regard for the high levels of corruption and maladministration which undermine such processes and in many instances, render both the process and the protection it aims to achieve, meaningless.

Project Lokisa

7. In 2015, following a high number of reports on corruption at the Department of Home Affairs (“DHA”), particularly in relation to applications for asylum and refugee status we established an initiative to address corruption in the Department of Home Affairs, and experienced by foreign nationals who apply for asylum and refugee status. The project, called Project Lokisa was launched on 1 June 2015 and continues to date. Together with other NGO partners, we gathered reports of corruption in the Gauteng area, which were used to compile the final project report which can be accessed here: <https://www.corruptionwatch.org.za/wp-content/uploads/2016/11/Project-Lokisa..pdf>.
8. We conducted investigations which enabled us to refer four matters to our investigative firm who conducted sting operations in the matters. Video and photographic evidence were collected and we lodged criminal complaints against the DHA officials and one interpreter who were caught accepting bribes. Our report featured the outcomes of our investigations, data and statistics relating to corruption affecting refugees and asylum seekers, interviews with our whistle-blowers and recommendations on how to address corruption in this space. We also prepared a video which highlighted the arduous journey of refugees and asylum seekers applying for official documentation in South Africa and the manner in which corruption undermines their dignity and human rights.¹
9. We have to date received over 300 reports from foreign nationals which relate to extortion, threats and solicitation from government officials, with more than half of the

¹ See infographic here: <https://www.corruptionwatch.org.za/wp-content/uploads/2016/11/How-the-Asylum-System-Works.pdf> ; see video here https://drive.google.com/file/d/0B5DOyGMnKws_aUtOS1piQmFxNnM/view

reports indicating improper involvement with Refugee Reception Offices (“RRO’s”), including Home Affairs officials, security guards, administrators and interpreters.

10. A key trend in the reports is the abuse of power by police and immigration officials who take advantage of the extreme vulnerability of foreigners who are faced with the threat of deportation and detention, often with little knowledge or awareness of their rights and/or the obligations of the state. We have received a significant number of reports detailing a number of foreign nationals being detained awaiting for formal arrest or to be charged, or to receive any form of documentation, only to be solicited for money in order to be released.
11. It is within this context of corruption and maladministration that we respectfully submit that issues of good governance and proper procedure within the Bill be more carefully considered and taken into account when establishing and providing for mechanisms to be put in place to ensure that the detention and deportation of foreign nationals is in accordance with fair process and due respect for their basic human rights.
12. The high levels of corruption which occurs as a result of foreigners being placed in vulnerable and desperate situations, often without access to proper legal representation or information to aid their understanding of due process, means that any attempt to amend the legislation must be accompanied by focused effort by the Department of Home Affairs, the South African Police Services and other relevant departments to first address corruption and maladministration in the departments and within their ranks. Legislation and policy does not exist in a vacuum and must be accompanied with due regard for the practice which inhibits or aids the implementation of such policy. In this case, implementation of legislation and policy rests on the ability of all relevant departments to address the key challenge of corruption and maladministration while debating the semantics of the legislative amendments.
13. Although the amendments do not deal directly with addressing the issue of corruption and maladministration in the detention and deportation process, we suggest that this be considered for discussion together with the amendments, given the immense impact which such issues have on implementation. The Department of Home Affairs, which has a constitutional duty to ensure amendment of the Act in line with constitutional principles, should be requested to indicate how they together with other

relevant departments will ensure that the amendments are meaningfully implemented and what plan will be put in place to address corrupt practices and other forms of maladministration.

Comments on specific sections

14. We note the Constitutional Court judgment² which formed the basis for the amendments of s34 (1) of the Act. The case brought to light the constitutional violations in the procedures and safeguards governing the detention of people suspected of being illegal foreigners under s34 (1), and sought to declare the section invalid as is inconsistent with the Constitution of the Republic. The Constitutional Court held that persons arrested for purposes of detention in terms of s34 enjoyed the protection and rights entrenched in s12 and s35 (2) of the constitution. Therefore s34 of the Act in not allowing a detained foreigner to challenge the lawfulness of his or her detention in court is an unconstitutional limitation of rights, with no basis or legal justification.

15. S34 (1) (b) further states that foreign nationals may at any time request the attending officer to furnish a warrant confirmed by a Court of the arrest or detention with purpose of deportation. This is a problematic feature as it places a significant burden on the person who is detained, the foreign national to demand compliance with due process. To prescribe for foreign nationals to only have access of their warrant of arrest which informs the reasons for arrest to be made only on request by the detainee is an onerous burden, particularly because the request can only be made after an infringement of a constitutional right has occurred. ***We therefore submit that the foreign national must at all times be made aware of the reason and status of their arrest or detention. Further this feature must be implemented through reasonable and accessible means so as to allow foreign nationals to fully understand all material facts, for example the process must be available in the foreign national's medium of instruction.***

S 34 (1) (d)

² *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22

16. We accept the prescribed periods of detention and applaud the reasonable measures put in place to ensure foreign nationals are not detained for excessive periods without just legal process taking place which would inform their status. We further note the amendment calls for no more than two 30 calendar days extensions by a competent court can be made in instances where the deportation cannot be effected. ***We therefore submit, that in instances such as the latter clear process or procedure be included in the Act so as to prevent the release of a detainee only to later be arrested once again. Without the inclusion of a process in this instance present a gap which has the potential to fundamentally impact the human dignity and human rights of foreign nationals seeking relief in the republic.***

17. We hope our submissions are useful to the Committee and kindly note our request to participate in the parliamentary hearings and to make oral submissions before the Committee.

**Submitted by Corruption Watch on 23 July 2018
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