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AN OVERVIEW OF THE BORDER MANAGEMENT AUTHORITY (BMA) BILL, 2016

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1. BACKGROUND

The South African government in recent years has increasingly prioritised border safeguarding. For instance, the National Development Plan (NDP) articulate the need for people living in South Africa to feel safe and enjoy a community life free of fear, which has a direct impact on the need for border controls and effective internal control of the country. The NDP also articulate regional integration as a cross-border aspect and highlights the security concerns related thereto, including cross-border crime, piracy and the smuggling of counterfeit goods.¹

Similarly, the Medium Term Strategic Framework (MTSF) also highlights border safeguarding. Outcome 3 (sub-outcome 3) notes, for example, the target of ensuring that South Africa's borders are effectively defended, protected, secured and well managed. Outcome 6 also poses the requirement that the identity of all persons in South Africa be known and secured, and this would not be possible without effective border management and immigration control.²

The South African government is planning to have a single Border Management Authority (BMA), which will be established as a single implementation entity. Towards the realisation of this entity, the South African government (through the Department of Home Affairs), proposed the Border Management Authority Bill ("the Bill") in 2009 and was only tabled in

¹ National Planning Commission. (2013). p. 244-248.

² Republic of South Africa. (2014). p. 187.



Parliament in 2015. The Bill states that “there is a need for integrated and coordinated border management that facilitates secure travel and legitimate trade in accordance with the Constitution, [and] international and domestic law.”

In 2017, the National Assembly (NA) passed the Border Management Authority Bill. The Bill has since been referred to the National Council of Provinces (NCOP) for debate and processing before it goes to the President for final authorisation. It is argued that the Bill is drafted in accordance with the Constitution, international and domestic law, and to contribute to the socio-economic development of the Republic and ensure effective border law enforcement functions at ports of entry.³

This document provides a brief summary of the Border Management Authority Bill (BMA), which was referred to the Select Committee on Social Services by the Portfolio Committee on Home Affairs for concurrence. Firstly, the paper looks at the current border management in South Africa. Secondly, the paper provides an overview of the Border Management Authority Bill, 2016. The latter part of the paper provides issues for consideration by the Select Committee on Social Services.

2. BORDER MANAGEMENT IN SOUTH AFRICA

South Africa has an extensive border environment which include land, air, and maritime. It has land border of about 4, 471 kilometres (km), which it shares with six countries – Mozambique, Zimbabwe, Botswana, Namibia, and Swaziland. Its air border covers about 1.2 million km². Whilst the maritime border covers about 3, 924 km⁴. The vastness of the South African borders has created strategic gaps along the land borderline and in the air and maritime border environment i.e. limited permanent static surveillance⁵.

Since 1994, the South African government has introduced various organs of state to give effect to border management. These organs of states are responsible for various capabilities such as immigration control, customs control, border policing etc. However, the introduction of these organs of state has resulted in the emergence of a silo approach to border control, border law enforcement and border protection.

³ Border Management Authority Bill, 2016

⁴ Etienne Hennop et al., *The Challenge to Control South Africa's Borders and Borderline 4* (Institute for Security Studies, Aug.

2001), <http://www.iss.co.za/pubs/monographs/no57/CONTENT57.HTML>; *Border Countries*, Border Control Operational Coordinating Committee (BCOCC), [http://www.borders.sars.gov.za/Border Countries/BorderCountries.htm](http://www.borders.sars.gov.za/BorderCountries/BorderCountries.htm)

⁵ Home Affairs (2016)



Subsequent to the introduction of the various organs of states, the South African government created structures to coordinate the mandates and actions of these organs of states in the border environment. These include:

- Border Affairs Committee Coordinating Committee (1996).
- National Inter-Departmental Structure (1997).
- Border Control Operational Coordinating Committee (2001).
- Inter-Agency Clearing Forum (2010).

Studies and reports have pointed to the failure of the above-mentioned structures to address the systematic and structural challenges for coordination model associated with fragmented border management. These systematic and structural challenges are outlined below:

- Non-aligned and often poor border control related service delivery.
- Ineffective facilitation of the movement of persons and goods (unnecessary delays and costs to clients).
- Compromised joint efforts and outcomes resulting from different risk management tools and approaches.
- The ineffective utilisation of public resources due to limited information sharing.
- Inability to enforce a standard approach in dealing with border law enforcement transgressions.
- A higher volume of illegal goods entering the country.
- Corruption and organised crime thriving in a fragmented management environment.
- An increase of undocumented foreign nationals within the country.
- All relevant stakeholders working in South African border work in silos.

3. KEY ASPECTS OF THE BORDER MANAGEMENT AUTHORITY BILL

3.1. Purpose of the Bill

The BMA Bill, 2016, seeks to provide for the establishment, organisation, regulation, functions and control of the Border Management Authority (the “Authority”); to provide for the appointment, terms of office, conditions of service and functions of the Commissioner and Deputy Commissioners; to provide for the appointment and terms and conditions of employment of officials; to provide for the duties, functions and powers of officers; to provide for the establishment of an Inter-Ministerial Consultative Committee, Border Technical Committee and advisory committees; to provide for delegations; to provide for the review or appeal of decisions of officers; to provide for certain offences and penalties; to provide for annual reporting; to provide for the Minister to make regulations with regard to certain matters; and to provide for matters connected therewith.



3.2. Summary of the BMA sections and clauses

Table 1: Sections and clauses of the Bill

NO	SECTION	BMA BILL, 2016
1	Chapters	11
2	Clauses	41
3	Schedules	0

Source: extracted from the DHA presentation, August 2017

As shown on the table above, the Bill has 11 chapters and 41 clauses. Broadly, the BMA framework bill provides for the establishment of the BMA as Part A of Schedule 3 of the Public Finance Management Act, 1999 (Act No. 1 of 1999). It also provides for the appointment, powers and functions of the BMA Commissioner and officers; officials employment terms and conditions; funds, assets and liabilities of the BMA; the assignment of functions to the BMA and an inter-ministerial consultative committee and other committees⁶.

The table below provides a summary of a selection of clauses and upon reflection would require the Department to provide further details regarding the establishment of the border management agency.

Table 2: Summary of selected clauses

Section	Summary of clauses
Chapter 1 Definitions, Applications and Object	These sections provides definitions for various concepts and terminology utilised within the Bill to assist in defining the mandate of the authority. The Bill applies to enforcement functions at ports of entry- and within the border law enforcement area” (BMA)
Chapter 2: Border Management Authority Clause 4: Establishment of Authority; Clause 5: Functions of Authority ; Clause 6: Composition of Authority	“ Clause 4 outlines that border law enforcement functions within the border law enforcement area and at ports of entry will be performed exclusively by the officers of the Authority ”

Comments related to Chapter 2:

⁶ Ibid



BMA is proposing that the border law enforcement functions within the border law enforcement area and ports of entry must be performed exclusively by the officers of the Authority. Clarity concerning the functions of the South African Police Services (SAPS) should be provided. Chapter 2 does not say anything with regard to cooperation and coordination with the SAPS, other organs of state, and border communities.

Questions

- 1) According to the Financial and Fiscal Act, section (2A)(a), “an organ of state in one sphere of government which seeks to assign a power or function to an organ of state in another sphere of government in terms of a law must first, before assigning the power or function- (i) notify the Commission of the fiscal and financial implications of such assignment on-(aa) the future division of revenue raised nationally between the spheres of government as required by section 214 of the Constitution. Has the Department consulted the Fiscal Financial Commission (FFC) to consider this matter given that functions will be shifted from agencies and departments? If this is applicable, what was the outcome of the FFC in the matter?
- 2) Given the complexity of integrating existing institutions into one agency, what are the significant risks and challenges in shifting these functions?
- 3) According to the Expenditure Performance Review (EPR) study, it estimates that R3.8 billion currently is utilised by agencies and departments to discharge their ports of entry and law enforcements. However, it is envisaged that additional funds may be required for the establishment process of the authority. Given the tight fiscal constraints and the financial implications this may or may not have on the implementation of this project, did the Department hold consultation with National Treasury to discuss the additional funding required? If so, what was the outcome and recommendations from the National Treasury?

Table 3: Summary of chapter 3 to 11

Section	Summary of clauses
Chapter 3 Commissioner Clauses 7 - 12 a) Appointment of Commissioner b) Terms of office of Commissioner c) Removal of Commissioner from	This section relates to academic qualifications and skills levels, maximum age, citizenship, conditions of service and remuneration required to hold the position of Commissioner. The President appoints the Commissioner



<p>office</p> <p>d) Conditions of service and remuneration of Commissioner</p> <p>e) Functions of Commissioner</p> <p>f) Delegations of Commissioner</p>	
<p>Chapter 4: Appointment and Functions of Officials</p> <p>Clauses 13 -15</p> <p>a) Appointment of officials</p> <p>b) Commissioned officers</p> <p>c) Duties, functions and powers of officers of border guard</p>	<p>The clauses in this section relate to determining uniform recruitment and appointment procedure including undergoing appropriate security clearance, which constitute “<i>prima facie</i>” proof of appointment.</p>
<p>Chapter 5: Employment terms and conditions of officials</p>	<p>This clause outlines the terms and conditions of employment of all officials (i.e. both officers of the border guard and support staff) of the Authority, as determined by the Minister in consultation with the Minister of Finance.</p>
<p>Chapter 6: Powers of entry , search and seizure</p> <p>Clause 18 to 22</p>	<p>Clause 18 “provides for instances when officers may exercise their powers to enter, search or seize with a warrant”; Clause 19 “provides for instances when officers may exercise their powers to enter, search or seize without a warrant; Clause 20 “authorises an officer to, without a warrant, conduct a roadblock or set up a checkpoint within the border law enforcement area or at a port of entry with the written approval of the Commissioner”; Clause 21 “refers to an officer’s powers relating to vessels within maritime borders, which powers do not require a warrant”.</p>
<p>Chapter 7: Funds and Immovable property</p> <p>Clause 24</p>	<p>Clause 24 makes provision for the management of immovable property-determine the policy and procedure for the acquisition, maintenance and disposal of immovable property.</p>
<p>Chapter 8 : Committees and Implementation protocols</p> <p>Clauses 25 to 28</p>	<p>Clause 25 makes provision for the establishment of an Inter-Ministerial Consultative Committee to consult on any matter related to the Authority’s functions or any domestic or international legislation that may affect the Authority’s functions.</p>



<p>Chapter 9 to 11 Clause 29 - 42</p>	<p>These clauses relate to delegation of functions of certain listed functions and powers; provides for the designation, determination, appointment, prescription, withdrawal or cancellation of ports, points or places of entry or exit. Notwithstanding any other legislation, the power to designate, determine, appoint, prescribe, withdraw or cancel any port, point or place of entry or exit for the passage of goods or persons in and out of the Republic under any legislation may only be made with the approval of the Minister; reporting by the Minister to Parliament on an annual basis on the functioning of the Authority.</p>
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4. ISSUES FOR CONSIDERATION BY THE SELECT COMMITTEE ON SOCIAL SERVICES

- Concerns have been raised about the ability of one entity to manage the diverse requirements of border control, which would require a huge single body that may prove unmanageable, while it would also need to assume some of the functions of the police and defence force. It is imperative that the Committee is made aware of the implications of establishing a Border Management Agency which performs security functions similar to those of the SAPS and South African National Defence Force (SANDF). Wouldn't these proposed changes require a constitutional amendment?
- The need for the BMA arose in the first place because numerous national intelligence estimates had said the lack of co-ordination in the border environment resulted in "significant weaknesses, threats and challenges". How are these challenges going to be resolved under BMA?
- The Department of Home Affairs, the lead agent in the project, had established a project office to oversee implementation, heads of affected departments had signed a multiparty agreement and sat on a committee together to co-ordinate their efforts, while an inter-ministerial committee ironed out the policy questions. Can the Department share with the Committee on the progress made by this Project Office.

How is the BMA planning to resolve issues around the following challenges in South African borders?

- **Resources:** Insufficient capacity is a reality not only for the SAPS, but also for other departments involved in border control and is mainly related to the state of the country's revenue resources. This sometimes results in very poor levels of service delivery.



- **Collective information, intelligence and profiling systems:** The absence of these systems leaves operations with an insufficient information base. The lack of information is further compounded by the non-availability of interfaced and updated information systems.
- **Corruption:** The absence of a common value system leads to corruption and maladministration, which pose a serious threat to effective border control.
- **Co-operation with SANDF:** The SANDF supports the SAPS in borderline control (land, air and sea), but operates under severe financial and other restraints which restrict their operational capacity. Large parts of the South African borderline are thus in fact under limited control.

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