

CONSOLIDATED PUBLIC COMMENTS RECEIVED AND INPUTS BY THE DEPARTMENT OF HOME AFFAIRS

BORDER MANAGEMENT AUTHORITY BILL, 2016 [B9B—2016]

SELECT COMMITTEE ON SOCIAL SERVICES

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LIST OF PERSONS AND INSTITUTIONS THAT SUBMITTED COMMENTS ON THE BORDER MANAGEMENT AUTHORITY BILL, 2016 [B9B—2016] AS PUBLISHED BY THE SELECT COMMITTEE ON SOCIAL SERVICES

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1. Elcort Matlala (“EM”);
2. Refugee Legal and Advocacy Centre (“RLAC”);
3. The South African Association of Freight Forwarders (“SAAFF”);
4. Business Unity South Africa (“BUSA”);
5. Member of Executive Council: Western Cape Government (Mr A Winde) (“WCG”);
6. Public Service Co-ordinating Bargaining Council (General Secretary, Frikkie de Bruin) (“PSCBC”);
7. United Nations High Commissioner for Refugees (“UNHCR”);
8. Lawyers for Human Rights (“LHR”);
9. Congress of South African Trade Unions (“COSATU”); and
10. National Education Health and Allied Workers’ Union (“NEHAWU”).
11. Institute for Security Studies (“ISS”).

Clause	Clause description	Commentor	Comments	Department's response
<i>Long title</i>	No comments received			
<i>Preamble</i>		<b>Refugee Legal and Advocacy Centre ("RLAC")</b>	RLAC has read and familiarized itself with the provisions of the preamble, and the objectives of the Bill. Whilst applauding the objectives of the Bill, we are a bit concerned to note that the preamble makes no mention of the non-refoulement principle, more so in light of the fact that the country receives large numbers of asylum seekers entering through its borders as opposed to airports. This is despite the argument that most asylum seekers are mala fide asylum seekers. We[,] therefore[,] recommend that the duty to recognise and uphold the non-refoulement principle be embedded in the objectives / preamble of the Bill.	The BMA will be focused on border law enforcement functions emanating from several pieces of legislation which, amongst others, will include the Immigration Act, 2002, as well as the Refugees Act, 1998, both of which adequately deal with issues of asylum seekers who declare their intention to seek asylum. Therefore, there is no need to make reference to the principle of <i>non refoulement</i> in the Bill, as this will set precedent for other specific policy statements on border management. Where a person declares his or her intention to seek asylum in the Republic, then such person will be processed on the basis of section 23 of the Immigration Act and section 22 of the Refugees Act.
<b>CHAPTER 1: DEFINITIONS, APPLICATION AND OBJECT OF ACT</b>				
1	Definitions	<b>RLAC</b>	We have also noted that the words asylum seekers and refugees are not included in the definitions section. This is despite the fact that reference is made to the latter groups in section 15(3) of the Bill. We[,] therefore[,] recommend that these terms be defined in the above section.	The BMA will be focused on border law enforcement functions with functions emanating from several pieces of legislation which, amongst others, will include the Refugees Act, 1998, which adequately deals with issues of asylum seekers and refugees. The definitions of asylum seeker and refugee

				are contained in the Refugees Act.
		<b>ISS</b>	Definition of border law enforcement area Section 1 (1)(a) and (b): Clarity is required on the actual extent of the border law enforcement area and how the 10km was determined and established. More importantly, if settled that 10km will be the demarcated zone, then “or any reasonable distance” should be removed from the definition, given the need for certainty on the extent of the zone in which the BMA will operate.	The “10km or reasonable distance” is not a new concept in the Statute Book (in the SAPS and Defence legislation currently). The reasonable distance is determined according to the circumstances such as an example of a hot pursuit that goes beyond the 10km radius.
2	Application of Act	No comments received		
3	Object of Act	No comments received.		
<b>CHAPTER 2: BORDER MANAGEMENT AUTHORITY</b>				
4	Establishment of Authority	<b>Business Unity South Africa (“BUSU”)</b>	During the engagements at NEDLAC on the initial and subsequent version of the Border Management Authority (initially, Agency) Bill, business consistently opposed the establishment of a new agency / authority for a number of reasons.	<ul style="list-style-type: none"> <li>• Government is of the view that the establishment of a BMA is priority to address multiple challenges in the management of the country’s borders. Various studies and National Intelligence Estimates have highlighted these challenges.</li> <li>• It should be noted that government spent 6 months deliberating on the BMA Bill at NEDLAC and held 4 separate bilaterals with BUSU. The final NEDLAC report on the Bill only recorded three areas of</li> </ul>

			<p><b><u>Agency Creation</u></b></p> <p>In the Socio-economic Impact Assessment Study (SEIAS) commissioned by DHA on the draft Bill, the establishment of a Border Management Agency was determined to be a substantially less cost effective option than capacitating the SANDF to perform the function (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. DHA has provided no information on the funding required for the establishment of the BMA. BUSA believes that availability of the necessary funding for the establishment of the BMA should be clarified well before its establishment.</p> <p>In addition, the key challenges that the Bill purports to resolve all relate to the movement of people rather than the movement of goods. Whilst BUSA acknowledges that there are serious challenges relating to the illicit movement of goods, measures to combat illicit trade should not be at the expense of efforts to facilitate legitimate trade. The Bill in its</p>	<p>disagreement.</p> <p>In 2015 the Government Technical Advisory Centre (“GTAC”) in National Treasury undertook a detailed study of public expenditure in the border environment. Current estimates of border control expenditure were put at R3.8bn.</p> <p>In 2016/17 DHA undertook additional work on the costs of establishing the BMA. These estimates were divided into the various phases that would characterize the incremental establishment of the BMA. The latest projections indicate that the BMA will require R10.5bn in the year 2032, and beyond, to perform its mandate.</p> <p>The BMA will give effect to a basket of border law enforcement functions covering the movement of persons and goods. By improving and streamlining the management of border law enforcement the BMA will directly support trade facilitation. A key problem in border management is the current fragmentation of</p>
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			<p>current form does not contain any measures to promote the latter. Different resources and solutions are required to regulate the movements of goods vs. people. BUSA therefore is of the view that the functions relating to the movement of goods and people should be kept separate, and functions relating to the movement of goods should not be assumed by the proposed BMA. Additional funding and resourcing for the existing model appears to be the solution to many of the challenges experienced in border management. Furthermore, the integration being sought by DHA should be possible within the existing framework consisting as it does of line departments representative of a single government. We would furthermore like to state for the record that 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.</p>	<p>various border law enforcement functions. This has contributed to a myriad of problems, including corruption, non-aligned operations by individual organs of state, different Standard Operating Procedures (“SOPs”) and different conditions of service between officials at ports of entry etc.</p> <p>The BMA will be informed by an integrated border management approach which will ensure seamless command and control management in the border environment for persons and goods.</p> <p>Government is of the view that the current coordination approach has failed to secure the country’s border where silo activities of Departments have contributed to the problems in the border environment.</p>
		<p><b>Public Service Co-ordinating Bargaining Council (“PSCBC”)</b></p>	<p>Trade Unions position is that BMA should be located within the Public Service. A public service department can fulfil the requirements of BMA. Trade Unions are against the creation of unaccountable agencies. Shifting the BMA from state security will set a dangerous precedent.</p> <p>Outsourcing of government functions. Prohibition on outsourcing be extended to all function of the</p>	<p>Government made a number of compromises during the NEDLAC process to address the concerns of labour. One key concession included the provision that requires the BMA to undertake collective bargaining within the PSCBC. This addressed the concern of labour that the BMA would be diluting the organized bargaining power of labour.</p>

			BMA.	<p>Government has addressed the advantages and disadvantages of various public institutional forms for the BMA. The main benefits of a public entity are the following:</p> <ul style="list-style-type: none"> <li>a) It offers a potential solution to governance and accountability arrangements.</li> <li>b) A single executive authority is provided for and oversight is performed by Parliament.</li> <li>c) The public entity could have a designated security and law enforcement status.</li> <li>d) Some of the staff that will migrate to the BMA would move from an existing public entity, rather than from a public entity to a government department.</li> </ul> <p>The BMA will not outsource government functions. The BMA will be a public entity that is fully governed by the PFMA. More the Bill has a clause, again emanating from the NEDLAC process, where it is stated that border law enforcement will be an exclusive function of the BMA.</p>
		<b>Lawyers for Human Rights (“LHR”)</b>	We note that there has been no costing attached to the Bill and we have been unable to find specific mention of the estimated cost of the Border Management Authority (“BMA”). This should be of concern to the Committee as the Department of	The costing of the BMA has been addressed above in our comment on clause 4 of the Bill.

			<p>Home Affairs' White Paper on International Migration suggests the establishment of detention centres along the border to house asylum seekers pending the adjudication process of their claims. These detention centres are highly problematic and may result in ballooning costs in terms of the social services which must be provided at such centres, including housing, food, medical treatment, education and transportation. As these centres are foreseen to be located within the 10 kilometre 'control zone' for the BMA, the budgetary implications of this policy will have to be closely examined. Parliament is, of course, the appropriate venue for such debate.</p>	<p>The White Paper on International Migration is a Policy document and the BMA is not, and will not be, a policy maker, but an implementation Authority. The issues raised will be dealt with when the Immigration Act is reviewed.</p>
		<p><b>National Education Health and Allied Workers' Union ("NEHAWU")</b></p>	<p>However, in all our engagements with government officials and in bilateral meetings with Minister Malusi Gigaba, we have made it clear that we are opposed to the hollowing of the state capacity through the creation of unaccountable agencies and the outsourcing of government functions. Throughout this process, government failed to present a sound rationale as to why this can only be created through a stand-alone agency. To our dismay, though having made progress on other areas of mutual interest, and NEHAWU suspending national protest against some sections of the bill, government seems to be arrogantly not prepared to compromise on one section of the bill which reads as follows:</p> <p><i>"The Border Management Authority is hereby</i></p>	<p>Government's view is that the BMA will be a state entity under the Public Finance Management Act (PFMA) and that there will be no "hollowing of the state capacity".</p> <p>Furthermore, a detailed BMA Business Case was undertaken assessing the advantages and disadvantages of various state institutional forms. The preference for establishing the BMA as a national state entity was adopted by Cabinet for, <i>inter alia</i>, the following reasons:</p> <ol style="list-style-type: none"> <li>a) It offers a potential solution to governance and accountability arrangements;</li> <li>b) A single executive authority is provided for and oversight is performed by Parliament;</li> <li>c) The public entity could have a designated</li> </ol>

			<p><i>established as a national public entity, as contemplated in Part A of Schedule 3 of the Public Finance Management Act, outside of the public service, and is an armed service established in terms of section 199(3) of the Constitution. The border law enforcement functions within the border law enforcement area and at ports of entry must be performed exclusively by the officers of the Authority”.</i></p> <p>There is absolutely no reason why the integrated and coordinated management of the ports of entry and enforcement of border law cannot be established within the public service. As NEHAWU we are suspicious of the arrogant push displayed by Minister Malusi Gigaba and his officials even amidst a broad opposition that comes from within government departments such as Treasury and SAPS. Given the intransigent and arrogant attitude of the Department of Home Affairs, NEHAWU and other aligned Public Sector unions will now be gearing for the mobilization of our members in the public service, including SARS. If needs be, we shall mobilise our members to prepare for a wider public service strike if the Department of Home Affairs remains intransigent - in defense of a strong public sector based, National Border Management Authority.</p>	<p>security and law enforcement status; and</p> <p>d) Some of the staff that will migrate into the BMA would move from an existing public entity, rather than from a public entity, to a government Department.</p> <p>Coordinated border management has failed since 1994 to effectively secure the country’s borders. The central problem is the lack of a single command and control structure in the border environment. The consequences of the coordinated model include the following:</p> <p>a) Non-aligned and often poor border control-related service delivery;</p> <p>b) Ineffective facilitation of the movement of persons and goods (unnecessary delays and cost to clients);</p> <p>c) Compromised joint efforts and outcomes resulting from different risk management tools and approaches;</p> <p>d) Ineffective utilisation of public resources due to limited information sharing;</p> <p>e) Inability to enforce a standard approach in dealing with border law enforcement transgressions;</p> <p>f) A higher volume of Illegal goods entering the country;</p>
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		<p><b>Congress of South African Trade Unions (“COSATU”)</b></p>	<p>COSATU's remaining areas of concern are the location of the BMA and the call to ban all outsourcing. COSATU's position has been that the BMA must be located within the public service and that this is non-negotiable for unions.</p> <p>Government has responded by renaming it from an Agency to an Authority and locating it within the broader public sector and the PFMA. Government's motivation is based upon wanting to exercise complete jurisdictional control over borders (e.g. to be exempt from Public Works and SITA) and to pay salaries higher than the public service, in particular for management. It is</p>	<p>Outsourcing of border law enforcement functions is a non-issue for the proposed BMA.</p> <p>Firstly, as outlined above, the BMA will be a full state entity accountable to Parliament via the Minister of Home Affairs. Secondly, the Bill makes provision that collective bargaining of the BMA will take place in the Public Service Co-ordinating Bargaining Council (PSCBC). Thirdly, clause 4(2) states that border law enforcement functions will be “performed</p>

			<p>impossible for COSATU to support removing the BMA from the public service to simply pay management exorbitant salaries far above the public service norm. More so when government pleads poverty and continuously blames the budget deficit on workers for wanting a living wages.</p> <p>COSATU has indicated that all these issues could easily be dealt with in the public service. COSATU and its affiliates remain strongly opposed to the BMA being removed from the public service and created as a public sector entity. COSATU feels that this will fragment and weaken the state and encourage other departments to follow suit.</p> <p>The BMA would be the only state security organ located outside the public service. The SAPS, SANDF, SSA and DCS are all public service departments. Shifting the BMA will set a dangerous precedent.</p> <p>We believe that a public service department can fulfil the requirements of the BMA. COSATU's</p>	<p><i>exclusively</i> by officers of the BMA”.</p> <p>Locating the BMA outside the Public Service is informed by multiple considerations as outlined above in Government’s response to NEHAWU’s comments. The issue of salary harmonization will be a long-term project within the BMA and will be guided by fiscal considerations. Moreover, the President is required to consult with the Minister of Finance in determining the salary structure for the BMA.</p> <p>COSATU's concern of the BMA potentially fragmenting the State and the power of Labour in collective bargaining was addressed through the following clauses welcomed by COSATU in the NEDLAC process: (a) the provision that border law enforcement functions will be an exclusive BMA function and (b) the insertion of the PSCBC clause.</p>
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			<p>members remain adamant that they want to continue to fall under the Public Service Act with all its conditions of service and protections. COSATU remains hopeful that the Select Committee will be able to assist in resolving our remaining issues of concern.</p>	
		<b>ISS</b>	<p><b>Securitisation of border zones</b></p> <p>The ISS recognises and appreciates the need for effective border management and law enforcement that is civilian-led. The proposed BMA, while under the direction of the Minister of Home Affairs, will effectively be an additional/auxiliary police service, which lends itself to the creation of oversecuritised zones within the Republic. There is need for clarity on the form and function of the authority: and what is meant and understood by the BMA being part of the “armed services” as stated in Section 4 (1) of the Bill.</p> <p>Section 4(2) restricts border law enforcement functions exclusively to the BMA. If so, what regulatory mechanisms will be in place to prevent other law enforcement to perform functions within their mandate that could be interpreted as border law enforcement functions, such as search, seizure, arrest and detention functions of the SAPS? Alternatively, the Committee should consider including here that the BMA must “cooperate and coordinate with other organs of the state [...] on its border law enforcement function”</p>	<ul style="list-style-type: none"> <li>• Section 199(3) of the Constitution permits the establishment of armed organisations or services may be established only in terms of national legislation, other the security services.</li> <li>• Clauses 3(b) and 5(d) of the Bill makes provision for co-ordination and co-operation with other organs of state.</li> </ul>

5	Functions of Authority	<b>BUSA</b>	<p><b>Movement of people vs. movement of goods / customs functions</b></p> <p>BUSA is concerned that the proposed BMA will not have the necessary financial and human resources to facilitate the movement of legitimate goods. This is in contrast to SARS, which is highly efficient in managing the cross border movement of goods. The integration of SARS' risk profiling systems into the BMA will also prove highly challenging, with consequent possible disruptions to trade.</p> <p><b>Absorption of functions</b></p> <p>BUSA is of the view that DHA has underestimated the logistical, financial and legal difficulties inherent in absorbing the various law enforcement related functions into the BMA. Whilst the BMA is understood to be an implementing authority, many of the functions which the BMA is envisaged to perform are captured in legislation where no distinction is made between enforcement in the border area and the rest of the country. The principal legislation would in many instances need to be amended as a simple assignment of functions will result in significant legal complications. Put simply, once a function is assigned to the BMA, what will happen to the portion of the provision that does not concern the border law enforcement area? The current</p>	<p>The comment of BUSA supports the current view of government that the tools of trade are not equitably spread between existing organs of state in the border environment. The BMA as the single border law enforcement entity in South Africa is the solution to this problem. The BMA will be established in an incremental manner, thus minimizing and mitigating the potential challenge of disrupting existing border control functions.</p> <p>Government has taken extensive legal advice on how to address the transfer of legal mandates to the BMA. The Office of the Chief State Law Advisor has supported the view that a Presidential Proclamation, in terms of section 97 of the Constitution of the Republic of South Africa, 1996 (the "Constitution") is the most appropriate legal mechanism to transfer functions to the BMA.</p> <p>The Bill is clear in circumscribing the BMA's functional and geographical mandate. Should the need arise to seek further amendments to achieve the broader mandate of securing the country's borders and protecting the country's sovereignty, then these options will be considered.</p>
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			situation of vertical integration of specialist decision making in line departments with responsibility for the cross border movement of goods will no longer exist, leading to likely complications in carrying out these functions.	
		<b>ISS</b>	While the BMA Bill speaks of the role of the BMA in “facilitating” revenue collection – a point that Treasury and the South Africa Revenue Services (SARS) have repeatedly raised before the parliamentary committee as a concern – it remains unclear how, in practice, this does not affect the exclusive responsibility of SARS to collect tax effectively. The ISS supports the submissions of Treasury on the need for mandatory coordination that is legally provided for through the Bill.	Currently, there is no “direct” collection of revenue at the ports of entry but compliance monitoring and enforcement to check if the goods at the port correspond with the ones already declared beforehand. Therefore, if there is a discrepancy, the penalty is then exacted and collected.
6	Composition of Authority	No comments received		
<b>CHAPTER 3: COMMISSIONER AND DEPUTY COMMISSIONERS</b>				
7	Appointment of Commissioner and Deputy Commissioners	<b>MEC FOR ECONOMIC OPPRTUNITIES, WESTERN CAPE GOVERNMENT (“WCG”)</b>	<p>Clause 7(2)(b) provides that whenever there is a vacancy in the office of the Commissioner, the President must appoint a person as the acting Commissioner. It effectively means that after an initial appointment, the incumbent will only ever hold office in an acting capacity. This may lead to unstable leadership and a lack of planning.</p> <p>It is proposed that the words “until a Commissioner</p>	Noted, however there are clear mechanisms in the Bill to deal with the acting capacity.

			is appointed in terms of subsection (1)" are inserted at the end of clause 7(2)(b).	
		<b>ISS</b>	<p>Institutional positioning of the Authority and need for effective oversight and accountability • Lines of reporting: From the Bill, it is clear that the Commissioner and Deputy Commissioners effectively report to the Minister of Home Affairs. However, given that these will be commissioned officers, it is imperative that clarity is provided on how their roles will relate to their service in SAPS. What, if any, consultation between the Minister of Home Affairs and the Minister of Police and the Police Commissioner. • Level of BMA Commissioner: Is this at the same level as a National Police Commissioner? If not, at what level would the BMA Commissioner be ranked? • Qualification of the Commissioner: To avoid a situation wherein a person who is not a commissioned officer is appointed by the president and subsequent to such appointment fails to comply with the entry requirements to be appointed as a commissioner rendering the appointment void, this section must clarify that at the time of appointment the person must be a commissioned officer. • Investigations and inquiries: the wording contained in Section 8 (3)(b) of the SAPS Act, 1995, should be used to at least provide for a determination by the president or the minister on the length of said inquiry is instructive. Thus "unless the minister, in consultation with the</p>	<p>There is no link between the envisaged Commissioner of the BMA and that of the SAPS Commissioner. The BMA will be a separate entity on its own.</p> <p>The Commissioner's level will be subject to a scientific job evaluation which will determine the actual level that the Commissioner may be determined.</p>

			<p>president, determines otherwise” is recommended. This ensure fast and cost-effective processes.</p>	
		<b>UNHCR</b>	<p>The draft BMA Bill provides for the appointment of a Commissioner as the chief executive officer and accounting authority for the BMA. UNHCR is of the view that an independent institution such as a Chapter 9 institution, like the South African Human Rights Commission (SAHRC), would be well placed to serve in this function and to play a supportive role to the BMA Commissioner’s monitoring and evaluating progress of the BMA.</p> <p>UNHCR recommends that there should be concerted efforts made to ensure that independent and oversight monitoring mechanisms are in place. Thus UNHCR recommends that the SAHRC should be included in the draft BMA Bill as the independent and oversight institution monitoring the BMA, in line with the constitutional mandate of the SAHRC.</p>	<p>The BMA will be subjected to the Constitution. The SAHRC, as a Chapter 9 institution, has a constitutional mandate over all organs of state in relation to the protection of human rights. This does not need to be specifically mentioned in the Bill.</p>
8	Terms of office of Commissioner and Deputy Commissioners	<b>WCG</b>	<p>Clause 8(2): It must be ensure that the subsequent period referred to in this clause ends before the agreed term expires so as to ensure seamless succession and facilitate proper planning.</p> <p>It is proposed that provision is made that the subsequent period referred to should be before the expiry of the agreed term.</p>	<p>Noted, this an operational matter being raised and same shall be dealt with once the BMA is established.</p>
9	Removal of Commissioner from office and Deputy	No comments received		

	Commissioners from office			
10	Condition of service and remuneration of Commissioner and Deputy Commissioners	<b>WCG</b>	<p>Clause 10(1): This clause requires that the President must, after consultation with the Minister and the Minister of Finance, determine the remuneration, allowances and other benefits of the Commissioner. In its current form this means that there does not need to be concurrence between the President and the Minister of Finance on the issue of remuneration, allowances and other benefits. It is submitted that the clause should be changed to “in consultation” so as to ensure that the concurrence of at least the Minister of Finance is required in order to ensure that the determination is financially sound.</p> <p>It is proposed that the words “after consultation” are deleted and substituted with the words “in consultation”.</p>	Noted, the President is empowered to appoint the Commissioner, as well as the Deputy Commissioners, and therefore, the determination of remuneration, allowances and other benefits of the Commissioner is a Presidential prerogative.
		<b>PSCBC</b>	<p>Clause 10 of the Bill compromises collective bargaining. The Bill confers jurisdiction on the PSCBC to act in matters of employee relations, this is in contradiction of the provisions of the LRA. The collective bargaining arrangements will bring complexity to the PSCBC there is a need of serious engagement on the issue of collective bargaining as the PSCBC is led by one employer which is the DPSA.</p>	See the comments above on the PSCBC.
11	Functions of Commissioner and Deputy Commissioners	No comments received		

12	Delegation by Commissioner	No comments received		
<b>CHAPTER 4: APPOINTMENT AND FUNCTIONS OF OFFICIALS</b>				
13	Appointment of officials	<b>RLAC</b>	<p>We have noted the provisions in Chapter4 of the Bill. We are a concerned with the fact that section 13 makes it mandatory for an official to undergo a security clearance process only. We are of the opinion that it is also essential for all prospective employees to undergo an assessment on refugee law and international law, considering the fact that refugees and asylum seekers are victims in need of international protection. We envisage that overlooking such a critical area will result in the infringement of some basic rights that ought to be accorded to refugees and asylum seekers, which may possibly give rise to costly litigation. We further recommend that in constructing the curriculum for the refugee and asylum seeker training, the Minister consults with stakeholders in the field, to ensure that the curriculum contains the best possible content to enhance the knowledge of the officials in this area. This is notwithstanding the fact that completion of “prescribed training” is mentioned in section 14(3)(d). We submit, in our humble opinion that this clause is vague, ambiguous and does not denote the Republic’s willingness to uphold the rights of refugees and asylum seekers.</p>	<p>To specify specific areas of training is an operational matter. border guard officers will need to undergo training in a range of areas. Subsequent regulations to be issued in terms of the Bill could consider specifying areas of training.</p> <p>It should be noted that the Bill was crafted as framework legislation. This means that it was consciously decided that operational matters would not be provided for in the principal legislation.</p>
14	Commissioned officers	No comments received		

15	Duties, functions and powers of officers of border guard	<b>RLAC</b>	<p>We are pleased with the fact that this section makes mention of “the rights and interests of vulnerable groups, including...refugees and asylum seekers.” Whilst noting this invaluable point, we humbly recommend that the section also makes mention of one essential right, which is enshrined in section 21(4) of the Refugees Act[, 1998 (Act No.] 130 of 1998[)], this being that any person who has expressed an interest to apply for asylum must / ought not {to} be penalised for their illegal entry and/or stay in the country and must be afforded an ample opportunity to lodge such an application. We[, ] therefore[, ] recommend that the following words be inserted at the end of the subsection:</p> <p><i>“...including the right of all desirous asylum seekers to be accorded an opportunity to apply for asylum and not to be punished for their illegal entry into the country”.</i></p> <p>We have further noted that despite containing the said provision obliging an official to take “proper consideration” of the interests of the mentioned categories of persons, the section does not provide what the consideration(s) ought to be. We submit, that in construing the Regulations, the lawmakers specify what the considerations may be, although we are cognizant that this cannot be</p>	Noted, see our comment provided regarding the Preamble.

			a closed list as the considerations may vary depending on the circumstances. We are merely advocating for an inclusion of guidelines and factors to be considered for the purposes of the said section.	
		<b>LHR</b>	LHR is satisfied to see the provision under section 15(3) of the Bill which specifically requires officers to “exercise his or her powers in a manner that takes due regard of ... fundamental rights...” However, we would recommend further the inclusion of a specific provision relating to the training of all BMA officers with regards to fundamental human rights, including the right to seek asylum under both South African and international law. A training provision exists in the current form of the Refugees Act, although this provision has been removed in amendments which have not yet been brought into operation. It may be appropriate to ensure that such training be included in the regulations to the Bill as a prerequisite to qualifying as an officer, however a specific provision would send a strong message of a rights-based enforcement ethos. Proper training is essential to ensuring that the BMA officers are properly equipped to comply with this section. The Department of Home Affairs has a learning academy which would be able to provide such training. As we have observed in our many years of working with various departments which do not received training on fundamental rights,	See the comments under Chapter 4, clause 13.

			inconsistent application of such rights leads to needless suffering for vulnerable groups within society and costly litigation.	
		<b>UNHCR</b>	The draft BMA Bill provides 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; and to provide for matters connected thereto. Under the draft BMA Bill at present, the functions and tasks of the BMA do not <i>explicitly</i> include the protection of fundamental rights including the right of asylum. However, the mandated activities of the BMA clearly impact on persons of concern to UNHCR, including asylum seekers, refugees and persons otherwise in need of international protection.	Noted, see our comment provided regarding the Preamble.
		<b>ISS</b>	Clarity should be provided on what the position of BMA officers will be in relation to the law enforcement of, among others, the Immigration Act and the Refugee Act (as amended)	The powers and function related to the Immigration Act will be delegated to the BMA.
<b>EMPLOYMENT TERMS AND CONDITIONS OF OFFICIALS</b>				
16	Terms and conditions of employment	<b>PSCBC</b>	In terms of chapter 5 of the Bill, clause 16(b) states that “officials are employed subject to the terms and conditions of employment ..... in accordance with any collective agreement concluded in the Public Service Co-ordinating Bargaining Council” it needs to be highlighted that the Public Service Co-ordinating Bargaining	One key concession made by Government during the NEDLAC process included the provision that requires the BMA to undertake collective bargaining within the PSCBC. This concession addressed labour’s concern that the BMA would be diluting the organized labour’s bargaining power within the PSCBC.

			Council (“PSCBC”) Resolutions only covers public service employees appointed in terms of the Public Service Act of 1994 as amended.	
17	Limitation of rights	<b>BUSA</b>	<p>Business is concerned about the implications of both [section] 17(a) and 17(c). Section 14 of the Constitution states that everyone has the right not to have their person (section 14(a)) or property (section 14(a)) searched nor to have their communications infringed (section 14(d)). Whilst this right can be limited if it is reasonable and justifiable to do so, there is a proportionality required in that the purpose of the limitation must be proportional to the means (limitation). Generally, our courts have been consistent in protecting this right, and although there are instances where it has been held to be reasonable and justifiable these instances have rested on a very compelling reason to limit the right. For example, in the Criminal Procedure Act[, 1977 (Act No. 51 of 1977)] a member of the SAPS can only search someone’s person if they suspect that a Schedule 1 crime is being committed or has been committed – and Schedule 1 crimes are the most serious crimes such as murder, rape, kidnapping etc. In other words, the more serious the crime and compelling the reason the more likely the courts are to regard it as ‘reasonable and justifiable’ to limit a person’s right to privacy. The reason provided for in the wording of the Bill is simply “for</p>	<p>The concerns of BUSA were dealt with during the NEDLAC processes, as well as during the Portfolio Committee on Home Affairs’ deliberations on the Bill.</p> <p>In the Bill, the focus is on the officials of the BMA and not the general public. The example provided relates to members of the public at large, which is not the intention of the clause. We believe the grounds for limitation of rights provided in the clause are reasonable and justifiable, and specific enough.</p>

			<p><i>purposes of border law enforcement and the safety of such officers...". This is so broadly phrased that one can limit the rights of BMA officers for almost any reason, provided you can argue it was for the 'purposes of border law enforcement' – such a scenario borders on an arbitrary limitation of rights which is certainly not constitutional.</i></p> <p>Even where a search is logically connected to border law enforcement, that is not to say that the means are proportional to the goal – the Bill obviously deems border law enforcement as a top priority but that is not to say that a court would agree. However in our view, it is unlikely that a court would find 'border law enforcement' sufficiently compelling a reason to permit such an invasion of privacy, particularly when one consider how seldom this has been allowed in the past. In short, business has serious doubts as the constitutionality of these provisions.</p>	
<b>CHAPTER 6: POWERS OF ENTRY, SEARCH, SEIZURE, ARREST AND DETENTION</b>				
18	Powers of entry, search, seizure, arrest and detention	<b>RLAC</b>	Our office has noted the provisions of this entire section, and is in agreement with the bulk of the provisions. We are however concerned with the fact the section empowers an official to arrest and detain a person on certain grounds, but does not oblige the officer to promptly inform the arrested person/s of his/her/their rights in terms of the section 35 of the Constitution [of the Republic of	The BMA will be subjected to the Constitution as the supreme law of the country, and therefore, conform to the provisions of section 35 of the Constitution and relevant case law.

			<p>South Africa, 1996], and in the case of refugees and asylum seekers, the rights contained in sections 2, and 21(4) of the Refugees Act[, 1998 (Act No.] 31 of 1998. We[,] therefore[,] recommend that another subsection,(g) be added, which reads as follow,</p> <p><i>“(g) in the event of an arrest of any person, the officer must promptly inform that person of his/her rights in terms of section 35 of the Constitution including the right of that person to a phone call, and must further ascertain whether that person is an aspiring asylum seeker, in which case, he/she should be informed of the right to non-refoulement, the right not to be detained and penalised for his/her illegal entry into the country, and his/her obligation to promptly lodge an asylum application.”.</i></p> <p>Our submissions also apply <i>mutatis mutandis</i> to sections 19, 20 and 21 respectively.</p>	
		<b>ISS</b>	<p>Generally on Section 18 on the powers of entry, search, seizure, arrest and detention: It is important that it is made clear that this relates to commission of offences, not a broad interpretation of the scope of arrests that goes beyond offences under SA law.</p>	<p>Arrest is always for a specific offence, and it cannot be for anything.</p>
		<b>ISS</b>	<p>Section 18 (1): “or without a warrant” should be removed as Section 18 (2) provides for the instances in which an officer may perform function</p>	<p>We respectfully disagree with the proposal and are of the view that clause 18(2) provides guideline or circumstances which an officer</p>

			without a warrant. This distinction is important. It may be useful to cross reference this Section with the Criminal Procedure Act 51 of 1977. As such, "In accordance with the provisions of the CPA in respect of entry, search, seizure, arrest and detention," ..." may be inserted at the start of the Section. Alternatively, "to be dealt with in terms of Section 50 of the Criminal Procedure Act, 1977)	may perform functions without a warrant.
19	Routine searches and seizures	<b>BUSA</b>	<p>Business disagrees with section 19 (Routine searches and seizures) and proposes that the same test applied in Section 18 should also be applied in relation to routine searches; namely that officials should only be permitted to search goods and persons 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. Business is of the view that omitting such a test would create the possibility of abuse as officials would be permitted to search and seize items without any reasonable suspicion on the basis that it is a 'routine' search. This approach opens the door for victimisation, inconsistent application and abusive practices. Business therefore proposes the insertion of a new section 19(2) and 19(3) as follows (with consequential amendments to subsequent numbering):</p> <p><i>"19 (2) "The written authorisation referred to in section 19(1) above shall at all times be available for such roadblock and be accessible</i></p>	<p>Routine searches will include, <i>inter alia</i>, roadblocks within border law enforcement areas. The mandate to perform routine searches is fundamental to the BMA's mandate.</p> <p>Routine searches are currently being conducted at ports of entry and are yielding positive results, for example at Oliver Reginald Tambo Airport ("ORTIA").</p>

			<p><i>for inspection by the public. The written approval must state the following:</i></p> <p><i>(a) The date on which the roadblock is authorised</i></p> <p><i>(b) The approximate duration of the roadblock;</i></p> <p><i>and</i></p> <p><i>(c) The place and object of the proposed action”</i></p> <p>Business believes that the above insertion would align the Bill with section 13(a) and 13(b) of the South African Police Services Act, 1995 (Act No. 68 of 1995).</p> <p><i>“19 (3) “An officer may, without a warrant</i></p> <p><i>(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></p> <p><i>(i) a warrant will be issued if applied for; and</i></p> <p><i>(ii) the delay in obtaining the warrant is likely to defeat the object of such warrant.”.</i></p>	
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20	Powers relating to vessels within maritime borders	No comments received.		
<b>CHAPTER 7: FUNDS AND IMMOVABLE PROPERTY</b>				
21	Arrested or detained persons and seized goods	<b>RLAC</b>	With regards section 21(1), we recommend that in the event of the arrested person being an asylum seeker who has indicated an intention to apply for asylum, the officials also transport the said person to the nearest Refugee Reception Centre just as they would transport the arrested person to a police station.	Any assistance to asylum seekers will be in line with the Refugees Act.
		<b>ISS</b>	On specific aspects related to the intersections between the role of the BMA and the role of SAPS, the BMA Bill outlines the process for the detention and arrest of individuals in Section 22(1). The clause states that if an officer detains or arrests a person, the officer must then 'as soon as reasonably possible, bring that person to a police station under the control of the South African Police Service or, if a warrant expressly stipulates another place, bring the person to that place'.	Reference to clause 22(1) is incorrect. However, it must be noted that this clause is subject to section 35 of the Constitution.
		<b>ISS</b>	Section 21 (1): To avoid the possibility of abuse in respect of places of detention, arrested people should only be detained at stations under the control of the SAPS. In this case, "or, if a warrant expressly stipulates another place, bring the person to that place." should be removed.	A warrant of arrest is issued at the discretion of the presiding officer, which may include the place at which a person may be detained.

		<p><b>LHR</b></p>	<p>LHR notes with concern that the detention provisions under section 21 of the Bill. In its current wording, it would only require that an officer bring an arrested or detained person to a police station or other place named in a warrant “as soon as reasonably possible”. Although there is a reference to section 35 of the Constitution (relating to the rights of arrested, detained persons and people who are imprisoned), the wording of the section is extremely vague and does not make a connection with either the Immigration Act or the Criminal Procedures Act, both of which make provision for the detention of “illegal foreigners” and those suspected of being “illegal foreigners” in South Africa.</p> <p>The Immigration Act in particular provides for a myriad of protections for persons who are, or are suspected of being, illegal foreigners under that Act. These provisions including strict timelines for seeking warrants and making representations to the Director-General or Minister of Home Affairs. It is unclear how the BMA Bill interacts with the Immigration Act regarding these protections.</p> <p>Importantly, the Constitutional Court in the recent judgment in <b>Lawyers for Human Rights v Minister of Home Affairs and others</b>, handed down on 29 June 2017 provides that any person who is detained under the Immigration Act must be</p>	<p>Noted, the BMA will be bound by the provisions of the Constitution, as well as relevant jurisprudence, in addition to what is mentioned above under clause 18.</p>
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			brought before a magistrate in person within 48 hours of detention. If the detainee is not brought within the 48 hour period, he or she must be released from detention. The BMA bill is silent on these requirements and the phrase “as soon as reasonably possible” is too vague to ensure compliance.	
22	Funds of Authority	<b>WCG</b>	<p>No obligation is placed on an officer who seizes goods to provide the person from whom the goods are seized with a receipt for the goods as proof that the goods were seized, when they were seized and by whom they were seized. The lack of such an obligation is problematic because the person from whom the goods were seized will have no record of the seizure.</p> <p>It is proposed that a written record is kept of all goods that are seized and that a written receipt is issued to the person whose goods were seized.</p>	Noted, however the submission relates to operational matters. Relevant legislation, such as the Customs and Excise Act, will guide the issuance of a receipt for the goods seized will be in line with the relevant legislation.
23	Immovable property	No comments received		
<b>CHAPTER 8: COMMITTEES AND IMPLEMENTATION PROTOCOLS</b>				
24	Inter-Ministerial Consultative Committee	No comments received.		
25	Border Technical Committee	<b>WCG</b>	<i>Clarity is required on whether the envisaged Border Technical Committee will include the Heads of Provincial Departments of Economic Development</i>	The Border Technical Committee is envisaged to comprise of Accounting Officers of relevant national organs of state.

				However, relevant provincial and municipal accounting officers may be requested to attend these meetings, as and when required.
26	Advisory committees	<b>WCG</b>	Clarity is required on whether the envisaged Border Technical Committee will include the Heads of Provincial Departments of Economic Development  <i>How will the remuneration of members of the Advisory committees be determined? Clarity is required.</i>	See comment provided under clause 25 above.  The Minister will determine how members of advisory Committees will be remunerated.
27	Implementation Protocols	<b>BUSA</b>	Business is concerned that 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. Business therefore proposes the insertion of the following provision as section 27(5):  <i>“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”</i>	Noted. It should, however, be borne in mind that the BMA will be responsible for its functions within the border law enforcement area. Outside of the border law enforcement area, the BMA will not have any mandate as this will fall within the functional jurisdiction of the relevant organ of state.
		<b>WCG</b>	How will the remuneration of members of the Advisory committees be determined? Clarity is required.  <i>Section 35 of the Intergovernmental Relations Framework Act, 2005, provides that “where the implementation of a policy, the exercise of a</i>	See comment on Chapter 8, clause 26.  Clause 28 does not deal with implementation protocol but delegation by the Minister. See our comment under clause 28 below.

			<p><i>statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, these organs of state must co-ordinate their actions in such a manner as maybe appropriate or required in the circumstances, and may do so by entering into an implementation protocol.”.</i></p> <p><i>Implementation protocols may be entered into between organs of state in different governments. Section 1of that Act provides that “government” means the national government, a provincial government or a local government. Clause 28(1)(b) empowers the Authority (located at national government level) to enter into protocols with principal organs of state (located at national government level). This is not what section 35 of the Intergovernmental Relations Framework Act, 2005, envisages which provides for the conclusion of protocols by organs of state in different governments. The implementation protocol envisaged in clause 28(1)(b) cannot[,] therefore[,] be required to be in accordance with section 35 as section 35 does not envisage the scheme which clause 28(1)(b) does. The two are incongruous.</i></p> <p><i>It is not clear what the rationale for clause 28(1) is when the executive authority of each of the affected departments is represented in the Inter-</i></p>	<p>The Inter-Ministerial Consultative Committee is a policy consultative forum of Ministers whereas an implementation protocol is a</p>
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			<p><i>Ministerial Consultative Committee and can consult, discuss and reach an agreement on implementation issues in that forum.</i></p> <p><i>It is proposed that clause 28 is reconsidered.</i></p>	<p>formal agreement between Accounting Officers giving effect to the execution of functions / policies.</p>
<b>CHAPTER 9: GENERAL</b>				
28	Delegation by Minister	<b>WCG</b>	<p>Section 35 of the Intergovernmental Relations Framework Act, 2005, provides that “where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, these organs of state must co-ordinate their actions in such a manner as maybe appropriate or required in the circumstances, and may do so by entering into an implementation protocol.”.</p> <p>Implementation protocols may be entered into between organs of state in different governments. Section 1of that Act provides that “government” means the national government, a provincial government or a local government. Clause 28(1)(b) empowers the Authority (located at national government level) to enter into protocols with principal organs of state (located at national government level). This is not what section 35 of the Intergovernmental Relations Framework Act, 2005, envisages which provides for the conclusion</p>	<p>The provision for implementation protocols will enable the BMA to enter into an agreement with any organ of state at any sphere of government in so far as it is permitted by the Bill and the mandates of any other organs of state. However, clause 28 does not deal with implementation protocols.</p>

			<p>of protocols by organs of state in <b>different</b> governments. The implementation protocol envisaged in clause 28(1)(b) cannot[,] therefore[,] be required to be in accordance with section 35 as section 35 does not envisage the scheme which clause 28(1)(b) does. The two are incongruous.</p> <p>It is not clear what the rationale for clause 28(1) is when the executive authority of each of the affected departments is represented in the Inter-Ministerial Consultative Committee and can consult, discuss and reach an agreement on implementation issues in that forum.</p> <p>It is proposed that clause 28 is reconsidered.</p>	
29	Review or appeal of decisions	<b>RLAC</b>	<p>We welcome the provisions of this section. We have noted though that the section is missing a crucial element, which is one of the cornerstones of administrative law. The section merely makes mention of a decision, to the exclusion of action of an officer. We submit, in line with the definition of administrative action that an infringement of rights does not only take place when an administrator makes a decision. In certain instances, a failure to either act or to take a decision may also result in infringement. This may be in the form of an officer delaying to confirm whether goods are unlawful or not, and merely retaining them under seizure for an unspecified period. We[,] therefore[,] recommend that the section be rephrased to make</p>	<p>The BMA will be bound by the administrative justice principles enumerated in the Promotion of Administrative Justice Act, 2000.</p>

			<p>a provision for the failure of an official to either act or make a decision.</p> <p>We have noted that the section reads further that the decision must be communicated to the affected person in the prescribed manner but makes no mention of the impact language is likely to have. We[,] therefore[,] recommend that such communication be made in the language that the person understands, failing which an effort is made to secure the services of an interpreter.</p> <p>We further recommend that the Agency establishes working relations with organisations or institutions that provide interpretation services to fulfil the provisions of this section.</p> <p>We also recommend that in being informed of the decision, the person be informed of the right to either review or appeal and to acquire an attorney as well.</p>	
		<b>BUSA</b>	<p>Business believes that written reasons for decisions should be provided and should meet certain criteria. Business therefore proposes the insertion of section 29(6) as follows:</p> <p><i>“(1) Every decision of the Commissioner must be in writing and be</i></p> <p><i>(a) consistent with the Constitution and all applicable laws;</i></p> <p><i>(b) in the public interest;</i></p> <p><i>(c) within the powers of the Authority, as set</i></p>	<p>The BMA will be bound by the administrative justice principles enumerated in the Promotion of Administrative Justice Act, 2000.</p>

			<p><i>out in this Act</i></p> <p><i>(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</i></p> <p><i>(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.</i></p> <p><i>(2) Any decision of the Commissioner and the reasons therefor must be made available to the affected party.”.</i></p> <p>Business proposes that the section on Appeals be amended to include an independent appeal body. In respect of claims for damages only being possible through the courts, Business is aware of other legislation which allows for Consent Orders to be confirmed by an independent appeal body and that such Consent Orders may include an award of damages to the complainant provided that both parties agree. In other legislation, Consent Orders refer to when both parties to the dispute agree to the proposed terms of an appropriate order after the matter has been resolved through:</p> <p>(a) The Ombud;</p> <p>(b) Alternative dispute resolution agent;</p> <p>(c) Agreement between the National Credit</p>	<p>The Bill provides for sufficient layers, internal remedies, of recourse in relations to appeals.</p>
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			<p>Regulator and the respondent; or</p> <p>(d) Agreement between the Competition Commission and the respondent, as the case may be.</p> <p>The Tribunals, established in terms of the legislation referred to above, confirm the appropriate order, on the terms agreed between the parties. Once the parties have agreed to a consent order and it has been confirmed by the Tribunal, no party may afterwards commence an action in a civil court for the assessment of the amount or awarding of damages. Business is therefore of the view that a similar “consent order” concept, and other dispute resolution processes could be built into the BMA Act. In this regard, wording for the dispute resolution provision is proposed as section 29(7), as follows:</p> <p><i>“(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.</i></p> <p><i>(2) The Commissioner must consider an application in terms of sub-section (1), and refer a matter for alternative dispute resolution only if-</i></p>	
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			<p><i>(a) the decision is appropriate for alternative dispute resolution;</i></p> <p><i>(b) the Border Management Appeal Board has not already considered the decision on appeal; and</i></p> <p><i>(c) the decision is not subject to any judicial proceedings or pending judicial proceedings.</i></p> <p><i>(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.</i></p> <p><i>(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.</i></p> <p><i>(5) In the event that the matter is referred to the Border Management Appeal Board in (4) above, the Border Management Appeal Board</i></p>	
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			<p><i>may;</i></p> <p><i>(a) Dismiss the appeal; or</i></p> <p><i>(b) Set aside the decision and replace it with a suitable, alternative decision; and</i></p> <p><i>(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.”.</i></p> <p>Furthermore, in respect of consent orders, Business proposes the insertion of a new section 29(8) as follows:</p> <p><i>“(1) If a matter has been –</i></p> <p><i>(a) resolved through an alternative dispute resolution process agent;</i></p> <p><i>(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.</i></p> <p><i>(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.</i></p>	
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			<i>(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.”.</i>	
		<b>WCG</b>	<i>Clarity is required on why provision is made for two levels of appeal</i>	This is in line with the provisions of the Promotion of Administrative Justice Act, 2000.
30	Ports, points or places of entry or exit with approval of Minister	<b>WCG</b>	Clarity is required on why provision is made for two levels of appeal	The BMA will be bound by the administrative justice principles enumerated in the Promotion of Administrative Justice Act, 2000 which requires that there should be set internal remedies prior to judicial review.
31	Annual report	No comments received		
32	Exemption from payment of fees or tolls	No comments received		
33	Confidentiality	No comments received		
34	Liability	<b>WCG</b>	Clarity is required on who is meant by “authorised official” as the terms (sic) is not defined.	The “authorised official” relates to the official of the BMA that has so been authorised to use the vehicle.
35	Offences and penalties	No comments received		
36	Regulations	No comments received		
<b>CHAPTER 10: TRANSITIONAL PROVISIONS</b>				

37	Transfer of employees from organ of state to Authority	<b>PSCBC</b>	The Bill is not clear under which legislation employees will be transferred.	It will be a negotiated process within the relevant bargaining councils, for example PSCBC, in line with relevant labour legislation.
38	Assets, liabilities and funds	No comments received		
39	Ports, points and places of entry or exit	No comments received		
40	Recognised trade unions	No comments received		
<b>CHAPTER 11: SHORT TITLE AND COMMENCEMENT</b>				
41	Short title and commencement	No comments received		
<b>GENERAL COMMENTS</b>				
	<b>Commentor</b>	<b>Comments</b>	<b>DHA Response</b>	
	<b>Elcort Matlala</b>	...the Bill must include the regulation of movements of asylum seekers and any other foreign national within the borders of our country. Currently, foreign nationals movements are not monitored or regulated that is why they are able to smuggle drugs and other illegal goods and substances in our country. To make matters worse, they are even allowed to have their own organisations in our country even to stage a protest march within our country, something that no south African can be allowed or was allowed to do in their countries. The Bill must enforce foreign nationals to report their movements to [the] Department of Home Affairs[,] Immigration Officers or the nearest Police Station on a daily basis to monitor their movements within the country. Failure to comply with this regulation must result in an immediate arrest, prosecution and deportation also be banned from entering the country again.	The comment is noted.	

		They should also not be allowed to stage protests, have their organisations or take government to court as it is the case now. The Bill must not provide any relief or sympathy to anyone from other countries entering the country illegally.	
	<b>PSCBC</b>	<p>Labour shares Government's concerns on the state of the border, customs and migration management. However, Labour remains opposed to locating the BMA outside the public service, it needs to remain within the public service and outsourcing of government functions.</p> <p>Labour has to ensure that employees concerns and fears are effectively addressed, hence the transfer of staff and conditions of service are of a concern.</p> <p>Labour therefore beg your indulgence, through the Council, for an audience with the NCOP/Portfolio Committee to allow Council to make input on the issues around collective bargaining, which as it stands in the Bill currently would bring complexity to the PSCBC, the location of the BMA, transfer of employees, conditions of service and outsourcing of functions.</p> <p>Council acknowledges the supremacy of Parliament and the processes of Parliament in agreeing to and adopting of legislation, however we do believe that the aforementioned request would be beneficial to your processes.</p>	<p>See comment under Chapter 2, clause 4.</p> <p>The Bill provides that no official transferred to the BMA from another organ of state may have his/her conditions of service negatively affected.</p> <p>The Committee should note that extensive discussions and compromises were reached with labour in the NEDLAC process.</p>
	<b>LHR</b>	<p>LHR will raise three issues, however, which we believe are missing from the Bill in its current form. These issues include:</p> <ol style="list-style-type: none"> <li>1. Detention provisions which do not appear to be in line with the Constitutional Court's recent judgment;</li> <li>2. Ensuring a rights-based approach to immigration and refugee</li> </ol>	<p>Items 1 and 2 of the submission are outside the scope of the BMA and same will be dealt with under the Immigration Act, 2002 and the</p>

		<p>protection;</p> <p>3. Oversight and Accountability issues.</p> <p>Vagueness in the BMA legislation will only lead to confusion and future costly, yet needless, litigation. The Bill should clearly outline the interaction between the various pieces of legislation, particularly those which may be applied within the 10 kilometre zone from the border.</p> <p>The Bill also fails to mentioned its relationship with the Refugees Act.<sup>1</sup> This is an extremely important piece of legislation which is currently undergoing sweeping changes in Parliament. Amendments to the Refugees Act will remove the ability of asylum seekers to work or study for the first four months of the adjudication of their claim. The Act appears to rely on international bodies such as the UNHCR to provide for them in the meantime. However, should the UNHCR not be in a position to provide for them, this will increase pressure on local services.</p> <p>In addition, the Refugees Act reflects South Africa's obligations to the international community as a state party to the United Nations 1951 Convention Relating to the Status of Refugees and the African Union's</p>	<p>Refugees Act, 1998.</p> <p>Oversight and accountability is dealt with extensively in the Bill</p> <p>Functions of the BMA will be transferred per Presidential Proclamation, in terms of section 97 of the Constitution, and the implementation protocols will come into play.</p> <p>Refer to our comments provided on the Preamble.</p> <p>The recommendations contained in the White Paper on International Migration will be given effect to during the review of the Immigration</p>
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<sup>1</sup> Refugees Act, 1998 (Act No. 130 of 1998).

		<p>1969 Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>2</sup> South Africa must ensure that it complies with its obligations and vague language relating to the interaction of various pieces of legislation risks creating further confusion.</p> <p>Finally, as mentioned in the introduction, LHR is concerned about the possibly implications of the Department of Home Affairs White Paper on International Migration and its implications for the proposed Border Management Authority regarding the use of detention centres along the border. Already, the Department of Home Affairs has started construction of a refugee reception office at near the Lebombo port of entry with Mozambique (near Komatipoort, Mpumalanga). The provision of asylum services at such an office will undoubtedly have an impact on social services in that area. Our experience in Musina, Limpopo has shown difficulties for the town of Musina to provide adequate resources, such as shelter and health care provision, for the large numbers of people who must regularly travel to Musina to renew asylum seeker permits. Such a centre will necessarily fall within the 10 kilometre 'control zone' of the BMA and the role of the BMA with regards to these centres has not been clearly spelt out.</p> <p><b>Oversight and Accountability</b></p> <p>LHR also notes with concern the lack of independent oversight and accountability mechanisms within the BMA. Our experience with not only the Department of Home Affairs, but other departments, has shown that a strong and independent oversight mechanism is essential to ensuring that</p>	<p>Act, as well as the Refugees Act and related pieces of legislations administered by the Department. The Bill cannot deal with these matters as they fall outside the functional scope of the BMA.</p> <p>The Bill provides for sufficient oversight mechanisms, i.e. Inter-Ministerial Consultative Committee, as well as the Border Technical Committee.</p>
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<sup>2</sup> These Conventions, and others, must be used when interpreting the Refugees Act: Section 6 of the Refugees, 1998 (Act No. 130 of 1998).

		<p>fundamental rights are protected in the day-to-day operations of various agencies. The lack of an independent oversight body at the Lindela Repatriation Centre has been singled out as one of the deficiencies in the operation of that centre. This is all the more necessary for the BMA which often works in rural areas throughout the country.</p> <p>Such an oversight mechanism should also be seen in light of the tremendous powers that are being given to officers within the 10 kilometre border enforcement area. This would, for example, include the entire town of Komatipoort. This is not a new provision as the South African Police Service Act already makes provision for law enforcement within 10 kilometres of the border,<sup>3</sup> however there are oversight mechanisms outside of police structures which give the public avenues to complain about overreaching or abusive behaviour by members. Although the same wide authorisation is being given to the Border Management Authority, which includes searching any person, place or thing, with or without a warrant, within the 10 km zone,<sup>4</sup> however the only oversight or complaints mechanism available to the public is internal.</p> <p>There are other mechanism which will also create a more accountable agency, including:</p> <ol style="list-style-type: none"> <li>1. A complaints mechanism that is recorded and can be reviewed by oversight bodies or Chapter 9 institutions;</li> <li>2. While the ID card provided for under section 13(6) of the Bill is necessary, the provision which provides that it must be shown upon demand risks being abused if officers refuse to show their card.<sup>5</sup> We recommend that the officer's name should be prominently displayed</li> </ol>	
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<sup>3</sup> Section 13(6) of the South African Police Service Act, 1995 (Act No. 68 of 1995).

<sup>4</sup> Section 18 of the Border Management Authority Bill, 2016.

<sup>5</sup> Section 13(6)(b) of the Border Management Authority Bill, 2016.

		<p>on their uniform for identification by the public.</p> <p>An oversight body that is independent should file its reports with Parliament to ensure that the legislative branch is also able to monitor the Authority and its compliance with fundamental rights.</p> <p><b>Conclusions</b></p> <p>As stated above, LHR supports the creation of a coordinated border management system, however it notes that the legislative is at times vague where it comes to the most fundamental of rights, including rights relating to arrest and detention, search and seizure of property and oversight.</p> <p>We further note that fundamentally, this legislature should not see the processing of goods and collection of duties and taxes at the border in the same light as the processing of people. The wide powers of the Act must be construed narrowly and in clear terms, particularly where the fundamental rights of citizens and non-nationals alike are implicated.</p> <p>We would also appreciate the opportunity to make oral submissions to the Committee, if hearings are to take place.</p>	<p>Bill is informed by the integrated border management approach and Government is of the view that the coordinated border management model has failed dismally in the last 20 years.</p> <p>The Bill adequately deals with the facilitation of movement of people and goods as a core principle of integrated border management.</p>
	<p><b>UNHCR</b></p>	<p>In view of the White Paper, UNHCR recommends that it would be important to align the policy and legislation review. UNHCR recommends that the draft BMA Bill should be harmonized with the White Paper.</p> <p>UNHCR recommends that the draft BMA Bill should be amended to</p>	<p>The BMA is not a policy maker, but an implementing authority. DHA retains the policy making mandate. In government's view there is no misalignment between the Bill and the White Paper on International Migration.</p> <p>Protection of asylum seekers is sufficiently</p>

		<p>include provision and procedures to incorporate safeguards to guarantee that persons seeking international protection are identified by the BMA and will be given access to the South African territory, as well as access to fair and effective asylum procedures.</p> <p>UNHCR strongly recommends that the draft BMA Bill should be redrafted in order to ensure that the obligations of the BMA and border management officials in regards to the principle of non-refoulment is clarified and clearly outlined in order to ensure consistency with the 1998 Refugees Act and the fundamental principles of international refugee law. Furthermore, an explicit provision of the principle of non-refoulment should be included to outline the obligations of the BMA and border law enforcement officials.</p> <p>UNHCR recommends that the draft BMA Bill clearly defines the roles of government Departments and the BMA to facilitate coordination and effective governance of border management functions in particular for persons seeking international protection at the ports of entry and borderline.</p> <p>In order to ensure the proper expertise and experience of the BMA officials, UNHCR further recommends that inputs from UNHCR and key stakeholders should be sought into the border law enforcement officials'</p>	<p>dealt with under the Refugees Act. The BMA will be responsible for the initial processing of entry of any person seeking to enter the Republic, including asylum seekers.</p> <p>Protection of asylum seekers is sufficiently dealt with under the Refugees Act. The BMA will be responsible for the initial processing of entry of any person seeking to enter the Republic, including asylum seekers.</p> <p>The BMA, as per the Bill, will assume full responsibility within the border law enforcement area, save for instances where there is a need for collaboration with other relevant organs of state. The Presidential Proclamation, in terms of section 97 of the Constitution, will further provide clarity regarding the roles and responsibilities of various organs of state within the border law enforcement area.</p> <p>The Bill envisages that the BMA will be the single border law enforcement entity in the border environment. The Inter-Ministerial</p>
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		<p>training, particularly on international human rights and refugee law. This is essential to ensure that there would be a timely and effective identification and referral of persons who may be in need of international protection.</p>	<p>Consultative Committee and the Border Technical Committee are the structures that will allow for structured interaction between the BMA and other organs of state.</p> <p>Future interactions between the BMA and the UNHCR are an operational matter that is not required to be addressed in legislation.</p>
	<p><b>BUSA</b></p>	<ul style="list-style-type: none"> <li>• The costs associated with the establishment of a new agency in a constrained fiscal environment. We are furthermore concerned that there is a substantial difference in the cost estimate provided for in the SEIAS and that which has been communicated by the DHA.</li> <li>• The fact that the findings and recommendations of the SEIAS commissioned by the Department of Home Affairs (DHA) have seemingly been ignored without adequate justification. 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 an implementing agency. BUSA agrees with the authors of that report that the establishment of such an agency is a high risk venture. We recognise the commitment of government to a risk mitigation strategy but are not convinced that the risk should be taken in the first place.</li> <li>• Business notes that the primary thrust of the legislation is to combat the illicit movement of people and goods across borders. Whilst this</li> </ul>	<p>See comment in Chapter 2, clause 4. Also note that the NEDLAC process addressed the issues raised by BUSA.</p> <p>Cabinet considered the full SEIAS report on the BMA and reiterated its full support for the establishment of a BMA as outlined in the Bill.</p> <p>The establishment of a BMA will enhance effectiveness and efficiency in border law enforcement. This will directly support and</p>

		<p>is certainly a policy priority, and we recognise that there is a need to address this, we are concerned that the Bill confuses the combatting of illicit trade and migration with the promotion of legitimate trade and migration. 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.</p> <ul style="list-style-type: none"> <li>• Business believes that 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.</li> <li>• Business further believes that functions related to trade facilitation such as customs and phytosanitary 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.</li> <li>• It is considered 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. If the 'vertical' relationship between the</li> </ul>	<p>benefit trade facilitation.</p> <p>The BMA will implement all relevant border law enforcement policies and legislation mandates of government, including the new Customs legislation when it comes into operation. This will be done in close collaboration with SARS.</p> <p>The relevant line function officials are envisaged to be transferred to the BMA, hence there should be a minimal loss of institutional border control memory and relevant expertise.</p> <p>Again it should be noted that relevant national border control officials are envisaged to be transferred to the BMA, so vertical integration risks should be minimized. Border coordination has been tried in various forms since 1994 in government and all have failed to yield optimal results. The latest example is a Multi-Party Agreement ("MPA") on Enhanced Border</p>
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		<p>border officials and the line departments can be maintained through MoUs, service level agreements and an inter-ministerial committee, then why is new legislation required for horizontal integration at the border? Why can the current lack of integration between officials from different departments at the border not be resolved through MoUs, SLAs or an inter-ministerial committee?</p> <ul style="list-style-type: none"> <li>• The 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.</li> <li>• Advice received by DHA from the Chief State Law Advisor's office explained that the only way that functions can be transferred from the Minister currently responsible for the function is by presidential proclamation. We accept that this is a lawful process provided for in the Constitution, however, such proclamations are not subject to public consultation. Notwithstanding business' reservation in principle about transferring the functions, we were willing in the NEDLAC</li> </ul>	<p>Coordination that was entered into between 22 organs of state. Only 17 organs of state have signed the MPA and implementation and enhanced coordination has been very uneven, if not very unsatisfactory.</p> <p>The model of separating policy making and implementation in government is an established one. For example, many Departments have policy authority over separate implementing agencies and entities. Best practice speaks to the appropriate oversight, governance and reporting arrangements being in place and the Bill provides for these relevant governance and oversight arrangements.</p> <p>Border law enforcement is closely linked to national security. As such, the Bill provides for the BMA to be accountable to Parliament through the Minister of Home Affairs. The drafters of the Constitution in their wisdom have provided for exclusive Presidential discretion on some matters, such as section 97 Presidential Proclamations. All the envisaged</p>
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		<p>process to engage on the schedule of functions to be assigned and provide comments as there were specific issues identified that must be dealt with. Now that the Schedule has been removed and replaced with the process of presidential proclamation, business will have no forum to raise these specific issues as the process provided for does not pass through NEDLAC or Parliament - nor does it provide for any mandatory public consultation or prior publication.</p> <ul style="list-style-type: none"> <li>• These specific comments included, but were not limited to: <ul style="list-style-type: none"> <li>✓ The original approach in the Bill which in business' view proposed transfer of a number of functions which in fact were undertaken outside the border law enforcement area or could be exercised concurrently within or outside of the border law enforcement area. We were concerned that a transfer of those functions will also affect the exercise of those functions within the country and not just within the border law enforcement area. The advice of the 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.</li> <li>✓ 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</li> </ul> </li> </ul>	<p>BMA functions are currently being discharged by different organs of state. The decision of government to rearrange the manner in which these functions are discharged should remain a government prerogative, especially where it relates directly to national security.</p> <p>It should be noted that these matters were extensively discussed at NEDLAC. In the final report of the parties at NEDLAC, the matter of the transfer of functions was <u>not</u> registered as a formal area of disagreement.</p>
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		<p style="text-align: center;">exercise oversight functions.</p> <p>Several other concerns were raised regarding legislation identified in the schedule. Once the schedule has been removed, BUSA has no indication whatsoever regarding which functions are to be transferred and which not. This makes it impossible for us to express a view as we do not know which legislation it is that the administration of which will be transferred via proclamation. And as stated, we may now not have a platform to raise these specific concerns.</p> <ul style="list-style-type: none"> <li>• Clarity provided by DHA that there will be two risk management units for trade; one the existing unit in SARS and the new one in the agency is welcome in that it is now understood that there will be two risk management units for trade. Risk management in trade is largely a pre-border control activity, which is taken outside the border control area. It remains unclear however what the relationship between the two risk management units will be. It is a significant concern that traders may be subjected to two different risk assessments, which cannot be acceptable. There also appears to be an intention to have SARS staff (in addition to the customs control officers that will be transferred) operating at the risk assessment unit at the border.</li> <li>• Business fully supports 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”.</li> </ul>	<p>These matters were exhausted in NEDLAC and in bilateral discussions with BUSA. Government's view is that it is inappropriate for BUSA to introduce matters that were dealt with, and concluded, over a period of 6 months in NEDLAC with BUSA.</p> <p>The issue of the relationship between the BMA and SARS has been clarified on a number of occasions. The BMA will assume frontline border law enforcement functions, including customs functions. Risk management will be performed pre-border, at the border and post-border, regarding the movement of persons and goods. In government's view, a cooperation agreement between the BMA and SARS on risk management could be instituted without major difficulty.</p> <p>The nature of and risks associated with border integrity and border challenges have changed significantly since 1994. Government's view is that the BMA could introduce greater, not less, certainty and efficiency to the management of the country's border with a positive impact on the economy.</p>
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		<p><b><u>Conclusion</u></b></p> <p>For the reasons articulated above, Business has serious misgivings about the establishment of a Border Management Authority. The reasons for this are primarily due to the inherent risks involved in possible disruptions to legitimate trade and the demands on a very constrained national fiscus. Business believes that certain of the legitimate concerns expressed by DHA relating to the movement of people can and should be resolved through the existing structures and mechanisms or through the establishment of a coordinating entity as recommended in the SEIAS. Given the inherent risks involved to the country in a financial and economic sense, caution should be exercised for the foreseeable future in considering any legislation that increases these risks.</p>	<p>Government is required to continually improve and adapt the way in which it does business, ensure national security and serve the best interests of all South Africans. The BMA will develop a comprehensive risk management strategy and plan to address various risks associated with the new entity. Government is of the view that business does not fully appreciate the full spectrum of risks and challenges facing all dimensions of border management. The BMA will do its best to work with all stakeholders to address their concerns and ensure that all people benefit from a single border law enforcement entity.</p>
	<p><b>ISS</b></p>	<ul style="list-style-type: none"> <li>• Regional harmonisation of border management – possible utility of SADC guidelines Draft SADC Guidelines on Coordinated Border Management are a useful guide on aspects covered in the Bill, but not elucidated on as it relates to the operational aspects of the BMA. Some key issues for consideration:             <ol style="list-style-type: none"> <li>1. The holistic approach to coordinated border management: This includes distinctions between Intra-Authority Cooperation (i.e. cooperation within the BMA across all border areas); Inter-Agency Cooperation (cooperation and</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• The issues raised by ISS are policy issues. The BMA will not be a policy maker but an implementing entity. However, the SADC Guidelines were considered but unfortunately do not deal with what the BMA is intended to do being a single command with an integrated approach.</li> </ul>

		<p>coordination between offices of the different agencies at the border); and International cooperation (with neighbouring states, Interpol etc. This is not at all provided for in the BMA)</p> <p>2. Inclusion of procedures for cooperation, as well as mechanisms of communication and information exchange.</p> <p>3. Infrastructure and equipment: in this respect clarity on whether the BMA will operate at existing infrastructure or whether additional facilities for the exclusive use of the BMA are envisaged. 4. Consider that other BMAs in the region include the following as key elements of the Authority</p> <ul style="list-style-type: none"> <li>• Immigration</li> <li>Customs</li> <li>• Bureau of Standards</li> <li>• Environment, sanitary and phytosanitary agencies</li> <li>• Department of Health</li> <li>• Agriculture</li> <li>• Police and Interpol</li> <li>• Vehicle Inspection Department</li> <li>• Drug enforcement agency</li> <li>• Border patrol</li> </ul>	<ul style="list-style-type: none"> <li>• The BMA will use the existing infrastructure.</li> </ul>
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