University of the Witwatersrand
African Centre for Migration and Society

Submissions to the Portfolio Committee on Home Affairs on the Immigration Amendment Bill
B32 – 2010

20 January 2011

The African Centre for Migration and Society (ACMS—formerly the Forced Migration Studies Programme) would like to thank the Portfolio Committee for providing this opportunity to make submissions on the Immigration Amendment Bill. Based at the University of the Witwatersrand, ACMS conducts inter-disciplinary research on migration, development, and social transformation.

ACMS believes that migration can have a positive impact on the economic and social development of South Africa, and that the country's immigration policy and legislation should acknowledge and encourage these positive influences. Specifically, immigration legislation can be used to address the skills gap in the country, rather than contribute to it. The current system puts in place significant barriers to skilled migration, and proposed amendments to the Immigration Bill may create still greater barriers.

With respect to unskilled labour, ACMS encourages a regional approach to migration that promotes the movement of skills and goods, which will contribute to overall economic growth and development. The current regulatory approach focuses on detentions and deportations, resulting in significant expenditures that have little effect on overall migration movements and provide few mechanisms for managing migration productively. A more effective immigration policy is one that acknowledges South Africa's role in regional migration, rather than seeking to stem it.

With this perspective in mind, comments on particular provisions of the Immigration Amendment Bill are summarised below:

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1. **Clause 7(c), amending section 10 (6) of the Act**

The provision states that a foreigner may change his or her status under 'exceptional circumstances.' While ACMS recognises the need to regulate changes of status, the use of the 'exceptional circumstances' language suggests that this is an extraordinary path to reguralise one's status. The effect may be to discourage skilled migration by creating an almost insurmountable barrier for individuals who may already be contributing to South Africa's economic and social development and wish to further regularise their status.

2. **Clause 11, amending Section 15, and Clause 18, amending Section 27**

These amendments limit the provision of business visas and permanent residence permits to businesses deemed to be in the 'national interest.' ACMS believes that the term 'national interest' is overly ambiguous and subjective, as there is no information on how this interest is defined. This term may allow for xenophobic or discriminatory interpretations, as businesses established by some foreigners may be deemed to not be in the national interest by virtue of their being foreign-owned. ACMS supports the establishment of specific criteria for determining eligibility for business visas and permits, but believes that these criteria must be clearly specified. The use of general terms such as 'national interest' make the determination a discretionary one that opens the door for discriminatory outcomes not linked to clearly specified criteria.

3. **Clause 15, amending Section 23 of the Act**

This provision reduces the period of validity of the asylum transit permit from 14 days to 5 days, and establishes a process to assess whether or not a person qualifies to apply for asylum before receiving an asylum transit permit.

The establishment of a process to assess whether a person qualifies to apply for asylum violates the fundamental right of all individuals to apply for asylum under both international and domestic law. It also directly conflicts with the Refugees Act, which states that only refugee status determination officers are authorized to determine whether an individual qualifies for asylum. The process described in this provision constitutes a pre-screening measure. South Africa's courts have found the use of pre-screening procedures to determine whether an individual qualifies to apply for asylum to be unlawful and unconstitutional, and have held that an individual may not be denied asylum without a proper status determination

interview.[1] Accordingly, this provision is unlawful, and increases the risk that unqualified immigration officers who are not properly trained in asylum and refugee law will incorrectly return an individual to face persecution.

The curtailing of the validity period of the asylum transit permit is also problematic. Asylum seekers face significant problems accessing the refugee reception offices, and limiting their period to do so to five days ensures that they will be unable to apply before the transit permit expires.

Moreover, an individual who has stated an intention to apply for asylum remains an asylum seeker for the purposes of the non-refoulement protection. Both international law and South Africa's Refugees Act clearly state that no person may be returned to a country where he or she may face persecution or a threat to his or her life, safety or freedom. This provision applies regardless of an individual's ability to obtain documentation.

The proposed amendment increases the risk of refoulement by limiting the ability of asylum seekers to apply for asylum permits, and raising the prospect that once declared an illegal foreigner, an individual in need of asylum protection will be unable to legalise his or status by subsequently obtaining an asylum seeker permit and may be deported. DHA has indeed taken the view that once a person becomes an illegal foreigner, he or she remains an illegal foreigner regardless of any steps taken to legalise his or her status or establish his or her asylum claim. While the Supreme Court of Appeal has rejected this view,[2] DHA continues to detain and deport such individuals, in violation of the international prohibition against refoulement. The proposed amendment increases the likelihood that this will happen.

4. Section 34 on the Detention and Deportation of Illegal Foreigners

This provision is not being amended, but it is important to note that the procedures laid out in this section are routinely not followed.[3] As a result, a system of illegal detentions has become the norm, as evidenced by the numerous successful detention cases brought in the last two years. The Act makes no provision for what happens when these provisions are not followed, and it has been left to public interest lawyers to monitor the situation and seek adherence on an individual basis. ACMS believes it is crucial to establish a monitoring mechanism to ensure that the system of detentions and deportations accords with the law,

[1] *Tafira and Others v Ngozwane and Others* 2006 ZAGPHC 136.
[2] See, e.g., *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA).

both to protect the Constitutional rights of detainees, and to limit the fairly significant litigation costs incurred by the Department.

ACMS would also like to highlight the need to clarify the division of responsibility and authority in immigration detention, the role of private contractors, and the obligations of all actors under the Immigration Act. The delegation of certain responsibilities to private contractors has allowed DHA to evade responsibility for violations of the law, and to argue that it has no authority over some immigration detentions, despite its clear mandate under the Immigration Act. As a result, individuals have been left in indefinite detention, or have been illegally deported, while each actor involved in the detention denies accountability and authority over the action in question.

5. Clause 23 repealing Section 46 on Immigration Practitioners

ACMS recognises that there is a need to address the problem of unlicensed immigration practitioners. However, we believe that the situation calls for licensing and regulation of immigration practitioners, rather than their elimination. A large portion of skilled migrants rely on reputable practitioners to manage the immigration system, given the significant time commitment this system requires. These legitimate practitioners have an interest in the system being regulated. While ACMS supports reforms targeting illegitimate practitioners, the elimination of legitimate practitioners will create further barriers to skilled migration and increase the skills gap in South Africa. Any provision intended to regulate the problem of immigration agents should thus take into account the effect that such measures will have on those seeking to migrate legally to South Africa in order to contribute to the country's development. It is essential that such individuals are not deterred from doing so by the inability to navigate the application process.

6. Clause 24, Amending Section 49 to revise penal provisions

The drastic increase in sentences outlined in this section exceeds the bounds of proportionality. Rather than deterring individuals from breaking the law, the highly punitive measures, such as those laid out in Clause 24 (6), may instead deter law-abiding South Africans from facilitating the provision or work or study visas, creating still further barriers to legal migration.

[3] See, e.g., 'Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa,' FMSP Research Report (June 2010), available at http://www.migration.org.za/research-outputs/reports.

The increased prison sentences for illegal foreigners also increases the potential for human rights violations and contraventions of the fundamental right to individual liberty. DHA has adopted the practice of laying immigration charges against individuals being detained as illegal foreigners to avoid justifying otherwise illegal detentions. Often these charges emerge only after the legality of the detention has been challenged, creating significantly longer detention periods. The risk that such charges may be levelled to circumvent adherence with the provisions of the Immigration Act raises the possibility that individuals will be detained for disproportionate and extended periods of time.

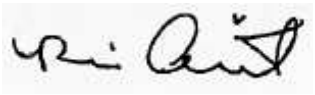
7. **Clause 25, Amending Section 50 (1) on administrative penalties**

In light of the current backlog in processing permit and visa applications and the failure to meet established deadlines, ACMS believes this provision should add the following qualifying language: 'unless such person has applied for an extension or change of status within the prescribed time periods.' This will ensure that individuals are not unfairly punished after following established procedures in accordance with the law.

ACMS recognises the importance of effectively managing legal migration while at the same time controlling illegal migration. The comments above are intended to assist in this process, and we hope that you will consider our views, and the contribution that a well-managed system of migration can make to South African society, as you deliberate the proposed amendments to the Immigration Act.

Thank you for your time.

Sincerely,



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