LAWYERS FOR HUMAN RIGHTS SUBMISSION

ON THE REFUGEES AMENDMENT BILL, 2015

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1. Introduction

Lawyers for Human Rights ("LHR") is an independent human rights organisation with a 35-year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. LHR welcomes the opportunity to make submissions on the Refugees Amendment Bill, 2015. We note that this is the second Amendment Bill ("the Bill") which has been introduced this year. These submissions will be confined to the Bill which appeared in the Government Gazette Vol. 602, No. 39067 of 6 August 2015.

We note that the original date for submissions was 31 August 2015. We appreciate the extension granted to us by one week (7 September 2015).

LHR has a number of concerns regarding the amendments to the principal Act introduced in this Bill. These changes represent a wholesale change to refugee protection and adjudications in South Africa and present a massive deviation from the urban refugee policy. The urban refugee policy has been the cornerstone of refugee protection in South Africa since the inception of refugee protection in South Africa in 1993. The development of this policy and the Refugees Act of 1998 was the result of widespread public consultations with stakeholders, government departments and civil society during the Green and White paper process of the mid-1990's. We submit that changes of this nature to refugee and asylum policy should be based on a similar consultation process.

We are aware that, at the same time as these legislative changes are being introduced to Parliament, the Minister of Home Affairs has engaged in a migration policy review. As part of this review, LHR was invited to attend the Migration Policy Colloquium which took place at Kiewietskroon Estate on 30 June and 1 July 2015. The substance of the amendments contained in the Bill are such that they will drastically change refugee protection in South Africa and the rights accorded to refugees and asylum seekers. We are surprised that such amendments are being introduced before the Green paper is introduced in March 2016 and the White Paper process is finalised before the end of 2016, as stated by the Minister at the Colloquium.

Considering the changes which are being considered in the above process, we submit that such drastic changes to asylum and refugee policy should be considered within the context of that

process and introducing such changes at this point is counter-productive and anathema to the consultation process already underway.

We submit that at this stage of development of the asylum adjudication process, it would be better to focus internally on capacity development and efficiency as a means to prevent abuse of the system. At present, research has shown that the level of decision-making lacks quality and does not meet the basic standards of administrative justice.[1] This creates backlogs in the review and appeals processes which, in the end, results in extended sojourns of applicants with asylum seeker permits. This has negative consequences for:

- The Department which must renew temporary status for extended periods;
- The Standing Committee which must review extremely high numbers of manifestly unfounded cases with little resources and an extended mandate;
- The Refugee Appeal Board which must hear numerous appeals without the benefit of a good first instance decision; and
- Asylum seekers who may have had valid claims at the time of arrival but for whom the situation in their country of origin changes and may not qualify for refugee status by the time a final decision is taken, but are included in the statistics as "abusers" of the asylum system.

Good quality RSDO decisions would prevent much of the backlog in the system. Adequate counter-corruption capacity which, in our experience, does not exist within the Department at the moment, would also prevent abuse. Finally, an asylum system which is properly situated within a reformed migration policy, as outlined above, would allow for reforms which would alleviate pressures on both the asylum and immigration systems. This would allow for a proper allocation of resources to deal with the realities of Southern African migration.

In any event, LHR deems in appropriate at this time to make submissions on the current Bill as it stands in the hope that the asylum system will be included in any future migration policy reform as undertaken by the Minister.

2. Submissions on the Bill

DEFINITION OF "DEPENDANT"

Ad section 1(b) and section 14

1. This section limits the definition of "dependent" to include only unmarried minor children (younger than 18 years old) as well as children "legally" adopted *in the asylum seeker or refugee's country of origin*.

[1] Amit, R., "All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination," African Centre for Migration and Society, June 2012.

1.1. This definition will essentially exclude children who were not adopted in the country of origin. For example, it will exclude children who are adopted in South Africa or another country and will require those children to be documented in another manner. However, the Immigration Act and the Citizenship Act provide few alternatives for foreign children who are adopted by refugees or asylum seekers. This is not in the best interests of such children in terms of section 26 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

1.2. In addition, it may exclude children who have not been adopted, but who are under the care of a refugee or an asylum seeker as contemplated by the decision of the North Gauteng High Court in *Mubake* (see below).

2. It is our submission that the amendment to the definition of 'dependant' in the Refugees Act cannot be deemed to be constitutionally sound insofar as it:

2.1. Excludes minors that have been separated from their biological caregivers and are being cared for by a relative who has not formally adopted them.

2.2. Excludes spouses that were not married in their country of origin.

Exclusion of Separated Minors being cared for by a relative who has not formally adopted them

3. The definition of *'dependant'* should encompass separated children who accompany their related caregivers into the Republic, including children who have not been formally adopted.

4. There are many minors who live with and are cared for by close relatives, but have not been formally adopted. In war torn countries where a minor's biological parents are killed and a relative takes the role of being the parent of the child there is usually no time for the relative to avail himself/herself to the relevant authorities for formal adoption procedures because their continued presence in the country is too dangerous and they have no option but to immediately flee from their country.

5. It should further be noted that many countries, particularly which have suffered war or other events seriously disrupting public order, may not have formal adoption processes. It would not be in the best interests of such children to exclude them from their "parents'" or other caregiver's care.

6. Some asylum seekers, who travel to South Africa, are not aware of the legal procedures relating to formal adoption. Many live in rural or remote areas where such procedures are unknown or access is limited.

7. Many people adopt children according to their tradition and culture and as a result will not go through the "legal" process of adopting the child.

8. For those asylum seekers who have formally adopted a child, we submit that in many cases of flight, it may be too burdensome to require proof of a formal adoption. This is the case where many asylum seekers usually flee their country leaving all relevant documentation behind in their country of origin.

9. The amended definition is contrary to international law which recognizes separated minors as dependants of relatives who have not formally adopted them. It is pertinent to note that Statutes must be construed consistently with South Africa's international obligations, pursuant to section 233 of the Constitution. South Africa's international law obligations favour a conclusion that separated children be recognised as dependants of their care-givers and thus be granted asylum permits. This is in the best interests of the children as required by section 26 of the Constitution.

Relevant International Law Pertaining to the Rights of the Child

10. The United Nations Convention on the Rights of the Child[2] (hereafter "the CRC") provides for the protection of children who seek refugee status. Article 22(1) states that:

    10.1. *State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by another person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.* (*Our emphasis).*

    10.2. The United Nations Committee on the Rights of the Child's General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6 ("the General Comment"), at para 8, provides, the definition of "Separated Children", who are children who have been separated from both parents, or from their previous legal or customary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.

    10.3. Para 66 of the General Comment states that asylum-seeking children, including those who are unaccompanied or separated shall enjoy access to asylum procedures and other complementary mechanisms providing international protection, irrespective of their age.

    10.4. Para 68 of the General Comment requires that an asylum-seeking child should be represented by an adult who is familiar with the child's background and who is competent and able to represent his or her best interests. (*Emphasis added)*

    10.5. Para 70 of the General Comment requires status applications filed by unaccompanied and separated children to be given priority and every effort should be made to render a decision promptly and fairly.

11. The African Charter on the Rights and Welfare of the Child[3] (hereafter "the ACRWC"), at Article 23 of the ACRWC provides for the protection of refugee children. Article 23(1) provides that:

    11.1. *State Parties shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians*

[2] Ratified by South Africa on 15 June 1995.
[3] Ratified by South Africa on 7 January 2000.

or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.

12. The Inter-agency Guiding Principles on Unaccompanied and Separated Children of 2004 ("the Guiding Principles"),"[4] In terms of these principles family unity is highlighted, and unaccompanied and separated children must be provided with services aimed at reuniting them with their parents or primary legal or customary caregiver as quickly as possible. In the context of the Guiding Principles, family is accorded a broader meaning and therefore includes care by persons other than biological parents of children. (*Emphasis added*)

The Children's Act 38 of 2005

13. The Children's Act has an expansive approach insofar as the recognition of the fact that children may find themselves in the care of persons other than their biological parents. Section 1 defines a family member as:

"(a) a parent of the child;

(b) any other person who has parental responsibilities and rights in respect of a child;

(c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or

(d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship."

14. It is quite clear that the Children's Act takes a broader, more African approach to the definition of family than is generally understood in Western concepts of the nuclear family. In light of the above, it is our submission that the abovementioned definition supports the argument for the adoption of a more flexible approach to the interpretation of the word 'dependant'.

Separated Children and the Mubake Judgment

15. While there is no section in the Refugees Act that specifically provides for the treatment of separated children, we would interpret section 14 of the Amendment Act to include the situation where an asylum seeker is the caregiver of a child who may not be his or her biological or adopted child.

16. It is submitted that due to the lack of clarity for separated children in the Refugees Act the definition of dependant under section 1 of the Act should be extended to include separated minors. This will provide legal protection for the child and will not prevent further investigation by authorities.

17. Including separated children in the definition of a dependant will not entitle them to rights that they are not already entitled to, but those of any other asylum seeker. The difference is that they will be documented which will provide them access to the social services which can ensure

[4] The Guiding Principles were developed and endorsed by the International Committee of the Red Cross, the International Rescue Committee, Save the Children, UNICEF, UNHCR and World Vision International in order to guide future action concerning unaccompanied and separated children.

their protection and access to primary education. Any concerns about mistreatment or abusive conditions must be reported to the Department of Social Development, however this will not be achieved by simply excluding such children from documentation.

18. The children who accompany their related caregivers into the country have a right to apply for asylum, provided that section 3(a) and (b) of the Refugees Act is applicable. Thus, allowing them to be included in the asylum application of the caregiver (who has not formally adopted them) that they accompany is not extending any additional rights to them. Rather, it is a practical measure aimed at giving them immediate protection through temporary documentation.

19. These submissions have been accepted by the High Court of South Africa (Gauteng Division, Pretoria) in the case of *Mubake & 7 others v the Minister of Home Affairs and 3 others* Case No: 72342/15 where the Court declared that the separated children are dependants of their primary caregivers in terms of the definition of 'dependant' in section 1 of the Refugees Act and its accompanying regulations. The Court also declared that the Department of Home Affairs should inform all Refugee Reception Offices by way of departmental directive to issue the relevant permit to separated children as dependants of their care givers. This judgment has been included in these submissions as **Annexure "LHR1"**.

20. The amended definition of 'dependant' is contrary to the order that was made in the abovementioned case.

The Exclusion of Spouses who were not married in their Country of Origin

21. The amended definition of dependant results in asylum seekers who have not married in their countries of origin being denied the opportunity to be recognized as each other's dependants.

22. Ultimately this definition has the fatal result of denying asylum seekers who are married to refugees in South Africa and whose refugee claims have been finally rejected from applying on new grounds in terms of section 3 (c) of the Refugees Act.

23. According to Article 16(3) of The Universal Declaration of Human Rights, 1948 "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*". Furthermore, article 18(1) of the African Charter on Human and Peoples' Rights, 1981, '*The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health*.'

24. This is also reflected in the 1951 UN Convention on the Status of Refugees which provides for the principle of family unity at Conference Recommendation B of the Convention.

25. In light of the above, it is LHR's submission that the amended definition is unconstitutional and contrary to international law.

26. In addition, the new definition also restricts the definition of "spouses" to spouses who have been "legally" married in their country of origin. This present numerous difficulties:

    26.1. Firstly, it excludes spouses married in South Africa thereby separating families. South Africa law permits the marriage of foreign nationals within South Africa and there is no reason to exclude such spouses from the definition of a spouse.

26.2. This will further have negative effects for children of such families who may be forced to choose between one of the parents for legal status.

26.3. Secondly, this may exclude spouses whose inability to marry is the basis of their claim for refugee status. This would include spouses of the same sex who could legally marry in South Africa, but whose same-sex relationship may be the basis of their claim for refugee status. Another basis may be where members of different tribes or races are prevented from marrying one another.

26.4. Thirdly, the definition of "legally" is not prescribed by the Act. "Legal" marriages may include customary marriages which are recognised in their country of origin, but perhaps not in South Africa. The definition of "legally" should be defined as referring to the laws *and customs* of the country of origin.

27. The definition also limits the destitute, aged or infirm members of a family to the "parent" of the asylum seeker. This is a limitation which may not be the reality of many families who take care of the destitute, aged or inform as members of the family, even if they are not biologically related. This limitation may be unfair and not reflective of the realities of many families, particularly those which arise from areas of conflict.

28. The inclusion of the qualification "and who is included by the asylum seeker in the application for asylum" intends to create a view of a family which is static at the moment of application. This is certainly not the reality of the majority of families, and particularly those which come from areas of conflict. We submit that the requirement to include members of the family at the time of application should not be included in the definition, but should rather be a requirement of the application form. This would allow a certain amount of discretion given to the RSDO or the Standing Committee to include dependant who may not have been included in the initial application for asylum (such as children born to the applicant or dependents who were previously presumed dead), but are dependent on the main applicant.

29. It should be noted that exclusion in legislation cannot replace adequate investigations and evaluations by Departmental officials. By shifting the burden entirely to the asylum applicant rather than allowing for some discretion on the part of the Department to take into account the living and changing reality of many families, coupled with proper investigations to prevent fraud or abuse, is unfair and will violate the principle of family unity as enunciated by the UNHCR Handbook[5] and international best practice.

EXCLUSION FROM REFUGEE STATUS

Ad section 2

[5] The UNHCR Handbook has been considered as "soft law" in asylum adjudications. In the case of *Tantoush*, the Handbook was considered in determining whether the proper appeal procedures had been followed. It was found that the UNHCR Handbook can be seen as soft law and may be used by courts in determining best practice. It would behove the Department to take cognizance of the Handbook to avoid unnecessary litigation.

30. The amendments to the Act seek to introduce provisions which would exclude asylum seekers from the protection of the Act as well as introduce new grounds for cessation of refugee status. These new grounds for exclusion and cessation are problematic as they do not meet the "seriousness" test under international law, and particularly under the 1951 UN Convention Relating to the Status of Refugees. To exclude an asylum seeker from refugee status is a serious decision which presents risks to the asylum seeker's life and liberty. It is for this reason that international law and, we should mention, the South African Constitution, requires that such exclusions be limited and based on a test of seriousness before it is imposed.

Offences under Schedule 2 of the Criminal Law Amendment Act, 1997

31. The amendments introduce a provision which states that those who have committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (act No. 105 of 1997) are excluded from refugee protection.

32. The 1951 UN Convention permits exclusion from refugee status of any person for whom there is serious reasons for considering that they have committed a "serious" non-political crime in any country prior to their admission to the country of refuge. The offences enumerated under Schedule 2 of the above Act are no doubt serious.

33. The wording of the amendment, however, does not clearly define the burden or standard of proof for assessing whether someone has committed a crime contemplated in this section or whether a particular offence meets the "seriousness" test under the UN Convention *for exclusion* from refugee status and its ramifications.

34. The effect of excluding individuals for crimes committed in South Africa would be to expose individuals with genuine persecution concerns to potential refoulement which is inconsistent with the constitutional right to life and the country's international obligations.

35. It should also be noted that individuals who may face the death penalty in their country of origin, or any other country, where they may be suspected of or have committed a capital crime cannot be returned to their country of origin.[6] It should be noted that neither the Refugees Act nor the Immigration Act make provision for permitting such individuals who may not return to their country of origin.

Offences under the Immigration Act, Identification Act or SA Passports and Travel Documents Act

36. The amendments introduce a provision which states that those who have committed an offence in relation to the Immigration Act, the Identification Act, 1997 (Act No. 68 of 1997) or the South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994) are excluded from refugee protection.

37. The nature of these offences is administrative in nature and would not meet the "seriousness" test under Article 1F of the 1951 UN Convention.

38. This provision fails to take into account the often irregular migration of individuals who are fleeing persecution. Many refugees are often forced to use irregular migration methods to

[6] Minister of Home Affairs and others v Tsebe and others 2012 (5) SA 467 (CC)

secure their safety and privacy. Such methods have been recognised under the 1951 UN Convention[7] and principal Refugees Act.[8] Such acts would often fall within acts that are considered offences in the Immigration Act, the Identification Act, 1997 (Act No. 68 of 1997) or the South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994). The net effect of excluding people who commit offenses under these Acts would be to exclude a good number of genuine refugees from refugee protection for the simple nature of their flight from persecution.

39. The wording of the amendment is overly broad and encompasses every offense in these three Acts, some of which only merit a minor fine and cannot be a justifiable reason for making someone undeserving of refugee status. The severity of the effect of exclusion requires greater care in the drafting of any exclusionary clauses to ensure they might constitutional scrutiny.

Fugitives from Justice

40. The amendments introduce a provision which states that fugitives from justice in another country where the rule of law is upheld by a recognised judiciary are excluded from refugee protection.

41. Applications for refugee status are frequently made by persons who have fallen foul of their ruling governments. The basis for an applicant's asylum application (political activities, religion, and membership of a particular social group) can also be the same basis for a criminal charge being levelled against an individual. The proposed amendment fails to cater for the authenticity of a criminal charge against an applicant or the nature of the criminal charge which should not necessarily have the effect of declaring an applicant undeserving of refugee status. The rational for

42. The standard set by the wording of the amendment does not adequately factor in the independence and impartiality of the judiciary from which the applicant might be a fugitive from and does not factor in the seriousness and/or nature of the crime. This together with other provisions in the exclusion clauses set an inconsistent standard of severity of crime that qualifies to declare an applicant underserving or excludable from refugee status.

Exclusion based on Entry other than through a Port of Entry

43. The amendments introduce a provision which states that an applicant who that entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, and fails to satisfy the Refugee Status Determination Officer that there are compelling reasons for such entry is excluded from refugee protection.

44. The wording of this provision is inconsistent with section 2(f) of the amendments which do not provide any proviso for the application of that amendment. Therefore someone able to satisfy a Refugee Status Determination Officer of a compelling reason for not using a port of entry could still be excluded in terms of section 2(f) for committing an offense in terms of the Immigration Act.

[7] Article 31(1) of the 1951 UN Convention on the Status of Refugees
[8] Section 21(4) of the Refugees Act 130 of 1998

45. The amendment provides the Refugee Status Determination Officer a wide discretion for determining what qualifies as a compelling reasoning. Such unfettered discretion for such an unnecessary exclusion provides opportunity of exploitation and corruption.

Exclusion for not Applying Within 5 Days of Entry

46. This provision is particularly harsh considering that most refugee reception offices only allow certain nationalities to apply for asylum one day of the week. This essentially means that asylum seekers have one day in order to apply for asylum.

47. This is coupled with the asylum seeker's lack of knowledge of where refugee services are provided as well as travel time to centres such as Pretoria, Durban, Port Elizabeth or Musina where the support structures, such as family or friends, are located in order to maintain one's file at those offices and not incur the additional expense of frequent travel to RRO's based at border points during the asylum process.

48. In any event, this would not meet the "seriousness" test as required by the 1951 UN Convention.

49. It also runs afoul the findings in *Ersumo*[9] which found that the 14 days, as prescribed under Regulation 2(2) of the Refugee Regulations, 2000 was a starting point and not determinative of who may apply for asylum.

Conclusions regarding Exclusion

50. The rationale for the exclusion clauses in Article 1F of the 1951 Convention relating to the Status of Refugees and Article I(5) of the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa is that certain acts are so grave as to render the perpetrators underserving of international protection as refugees. The proposed amendments relating to exclusion from refugee status assign exclusionary status to a variety of acts that inherently attach to many genuine refugee by virtue of the difficulty of their flight and their status in their country of origin.

51. The amendments create a broad vague list which would have the effect of eroding the integrity of the institution of asylum and unfairly excluding a great potion of asylum seekers from refugee protection in the name of administrative convenience. Given the severity of the consequences of exclusion to applicants, the rationale behind amendments of the exclusion clauses must be consistent with the objects of the Refugees Act and the Constitution. The rationale for this amendments which do not serve to protect the institution of asylum from abuse but rather exclude applicants from the refugee protection for acts naturally inherent in refugee flight and minor administrative transgression cannot be seen as consistent with the objectives of the Refugees Act, the Constitution or the international refugee conventions of which South Africa are signatory to.

[9] Ersumo v Minister of Home Affairs and others 2012 (4) SA 581 (SCA)

CESSATION OF REFUGEE STATUS

Ad section 3

52. LHR is concerned by some of the additions in the grounds for cessation of refugee status.

53. We submit that it is unnecessary to include the term "in any way" in section 5(1)(a) of the principal Act. This will inevitably create situations where a refugee may innocently interact with his or her embassy (for example to obtain a birth certificate) with no intention of re-availing themselves to the protection of that State, yet may fall foul of this provision. If additional grounds are necessary regarding re-availment, they should be specific in the law so that refugees know what they may or may not do.

54. This is particularly the case in section 3(b) claims where the agent of persecution may not be the state itself, but the state is unable to protect the individual. Interacting with one's embassy in those circumstances cannot amount to re-availment.

55. It is further unnecessary to include "visits" to a country of origin as a grounds for cessation. Regular visits may be indicative of changed country of origin conditions meriting the cessation of status, but one visit may be out of necessity to bury a family member who has passed away or to deal with other family emergencies. It may also be a precursor to determining whether it is safe for a refugee to return to his or her country. Rather than punishing such trips, they should be encouraged where it is safe to do so. These trips have been cited in various international texts as "look-see" trips and provide a safe way for refugees to determine when it is safe to return.

56. We submit that whether a "visit" amounts to re-establishing oneself should be taken on a case-by-case basis, but should not result in automatic cessation of refugee status.

57. We further submit that the cease status based on a conviction under the Immigration Act, the Citizenship Act or the SA Passports or Travel Documents Act is out of proportion and irrational. Returning someone to face death or a serious deprivation of their liberty due to such relatively minor administrative offences is disproportional to any objective and would therefore not meet the limitations test under section 36 of the Constitution.

ESTABLISHING AND DISESTABLISHING REFUGEE RECEPTION OFFICES

Ad section 5(b)

58. We note with concern the attempt by the amended provision to exclude the constitutional requirements of the Promotion of Administrative Justice Act ("PAJA") 3 of 2000 from the Director-General's authority to establish and disestablish refugee reception offices.

59. The term "(n)otwithstanding the provisions of any other law" cannot be used to exclude the application of PAJA from administrative decision-making, particularly where such decisions have such a prejudicial and adverse effect on a large segment of the population, including refugees and asylum seekers. It should be noted that PAJA is the implementing legislation as contemplated by section 33(3) of the Constitution of the Republic of South Africa, 1996 and

therefore has a quasi-constitutional stature. The right to just administrative action, including the right to public consultations, procedurally fair decisions and administrative action that comply with the principle of legality, cannot be excluded by the inserted provision and the requirements set out by the courts, most notably the Supreme Court of Appeal in *Minister of Home Affairs and others v SASA (EC) 2015 (3) SA 545 (SCA) (25 March 2015)*, must be complied with.

APPLYING FOR REFUGEE STATUS

Ad section 13

60. The proposed Refugee Amendment Act that relates to the undertaking by the Department of Home Affairs to issue asylum seekers with asylum transit permit at the port of entry it is a noble initiative, provided that it is implemented in a manner that is fair and non-discriminatory. Unfortunately, from LHR's observations at various ports of entry, this is often not the case.

61. Section 23 (1) of the Immigration Act of 2002 provides for the issuing of an asylum transit permit that is valid for five days. However from our observations of the general practice currently, such permits are no longer issued at the port of entry, especially at Beitbridge Border Post. The underlying problem that is associated with transit permits appears to be that officials deliberately do not provide these permits to asylum seekers at the port of entry. Although an excuse that is often stated that those individuals who enter the country do not use the official port of entry. But the reality is that if the individual concerned approaches the officials and present such a request, it risks being summarily refused in the absence of valid passport / visa. Such *non-entrée* practices are clearly unlawful.

The Impact of the Unavailability of Asylum Transit Permits

62. The deliberate refusal by Department of Home Affairs officials to issue transit permits at the port of entry to asylum seekers has had extreme severe consequences which will be exacerbated by the provisions of the Amendment Act.

Irregular routes

63. LHR lawyers have observed that more often than not people who are refused entry at the border resort to desperate and dangerous measures of opting to use irregular routes in order for them to enter South Africa in order to present themselves as a refugee reception office.

64. Hence they risk being robbed and assaulted by the gangs who operate along the border. In addition to these concerns there is high rate of sexual gender based violence incidents that mainly affects vulnerable groups such as women and children become victims. Hence other service providers such as Thutuzela which is aligned to National Prosecuting Authority can attest to a number of people whom they assisted who were violated when they were trying to enter the country through irregular routes.

Limited choice of Refugee Reception offices

65. Asylum seekers who are not in possession of transit permits have a limited choice when it comes to access to the refugee reception offices. For example an individual who entered into the country through Beitbridge border may be forced to lodge his application in Musina, despite having intention to apply in places such Pretoria, Port Elizabeth and Durban because if he or she attempts proceeding inland without any form of identification he might be arrested and face deportation.

Arrest and Detention

66. In places like Musina many asylum seekers are arrested and detained before they could reach Refugee Reception Office which is located only 8 kilometres away from the border. However if transit permits were issued promptly and efficiently to asylum seekers at the port of entry such arbitrary arrest would be avoided, as they would be in position of documents that give them legal right to remain in the country pending their application for asylum at the refugee reception office closest to where they intend to reside.

67. Apart from the above mentioned scenarios we have also witnessed cases were individuals were taken hostage and kept in houses until they pay ransom in order for them to access the refugee reception office.

68. The Bill's amendment in section 13 (amending section 21 (a) of the Principal Act) provides that an application for asylum must be made in person in accordance with the prescribed procedures, within five days of entry into the Republic.

69. The limitation of five (5) days for an individual to report to the nearest Refugee Reception Office for the purpose of applying for asylum is of substantial concern. This development will have a negative impact for asylum seekers who had intention of applying for asylum in other areas such Pretoria, Durban and Port Elizabeth as compared to RROs based on the border. As file transfers are either not allowed or inconsistently granted, it will require asylum applicants to return to Musina on a regular basis at great expense and prejudice.

70. And, as stated above, many RROs designate one day per week to certain nationalities which, in the end, only gives an applicant one chance to make an application for asylum.

71. These concerns were raised during the consultation with the Deputy Director-General of Home Affairs by LHR and other stakeholders during the public consultation process regarding the closure of the Cape Town Refugee Reception Offices in December 2013. We attached those submissions as **Annexure "LHR2"** and ask that they be read herein.

72. Individuals who fail to lodge their claims within the prescribed period due to reasons beyond their control will be excluded from refugee status as stated above. Section 2 of the Refugees Act would clearly still protect such individuals from return to their country of origin, but there would be no permit either under the Refugees Act or the Immigration Act to regularise their sojourn in the Republic. It cannot be the intent of the legislation to prevent the return of people at risk of persecution, but leave them undocumented and subject to harassment, arrest and / or indeterminate detention. Such a situation would clearly be unconstitutional.

73. In addition, South Africa cannot afford to dismantle its international obligations to provide protection to asylum seekers and refugees. At present, immigration officials at port of entry tend to conduct *de facto* status determination that may prevent asylum seekers from accessing refugee reception offices by not issuing asylum transit permits. Clearly, only properly trained refugee status determination officers are permitted to conduct refugee status determinations and either grant or refuse refugee status. In other words the duties of the official at the port of entry must be to facilitate access of asylum seekers in the country and not to embark on a screening process to limit access to refugee reception offices.

DIRECTING CATEGORIES OF ASYLUM SEEKERS TO PARTICULAR OFFICES

Ad section 13(b)

74. LHR notes with particular concern the authorisation which is given to the Director-General to require "any category" of asylum seeker to report to a specific Refugee Reception Office "or other place specially designated as such" to lodge an application for asylum. Such categories may be based on the applicant's country of origin, or the specific ground of persecution including gender, religion, nationality, political opinion or social group.

75. This provision is troubling in a number of respects:

    75.1. Firstly, it appears to allow the Director-General the authority to create addition burdens on individuals by requiring them to report to a certain office, despite the fact that the Constitution provides for freedom of movement throughout South Africa and the right of asylum seekers to reside in any part of the country. Such a power is difficult to reconcile with the desire to have asylum seekers depend on "friends and family" but creating obstacles to applying for asylum.

    75.2. Secondly, it allows the Director-General to discriminate based on the very grounds of persecution from which individuals are fleeing.

    75.3. Thirdly, there is no indication for the rationality of such an authorisation "necessary for the proper administration of the Act". This is something that should have been considered with civil society and other stakeholders to determine whether services are available in those parts of the country.

    75.4. Lastly, and perhaps most seriously, this power allows the Director-General to require these categories to report to a refugee reception office "or other place specially designated as such". This clearly opens to door for the Director-General to establish refugees camps, either *de facto* or *de jure* which is squarely contrary to the urban refugee policy which is the basis of South Africa refugee protection policy or to allow for certain categories to be detained in places of detention. Such a power clearly has serious constitutional ramifications and should have been considered after proper consultations with service providers to the refugee community.

76. We submit that the Constitution will not permit arbitrary and irrational deprivation of liberty of an entire class of persons, particularly based on the very grounds of persecution from which they are fleeing. In addition, South Africa has not registered any reservations to the 1951 UN Convention which provide for non-discrimination[10] and the free movement of refugees within the territory of the Republic[11].

FINANCIAL ASSESSMENT OF ASYLUM SEEKERS AND THE RIGHT TO WORK

Ad section 15

77. The amendments to the Act under this section seek to introduce provisions which would essentially divide asylum applicants into two groups – those who can sustain themselves and their dependants for a period of four months (with the assistance of family and friends) and those who cannot sustain themselves for a period of four months.

78. The amendments introduce a provision which states that those who cannot sustain themselves and their dependants may be offered shelter and basic necessities from the UNHCR and its partners. This amendment is problematic as set out below.

Vague nature of the assessment process

79. No information is provided on the nature of the assessment to be conducted into an applicant's ability to sustain him/herself and his/her dependants. There is a vague reference to support which an applicant may receive from "family and friends" – but no provision is made for how the ability of such family/friends to support the applicant will be assessed, nor are any other criteria listed as admissible in the assessment.

80. When read together, the effect of the amendments is to limit the right of asylum seekers to work.

The viability of a "sustainability determination"

81. The amendments suggest that on application for asylum, an asylum seeker would be subject to a "sustainability determination". The asylum seeker would then be classified into one of two groups: those who **can** sustain themselves (with the assistance of family or friends) for a period of four months and those who cannot sustain themselves for a period of four months.

82. If it is found that the asylum seeker **can** sustain themselves, they are denied the right to work presumably for four months, although the amendments are problematically unclear on this. What is particularly unclear is how they can be thereafter granted authorisation to work.

83. If it is found that the asylum seeker **cannot** sustain themselves, they "may" be offered shelter and basic necessities provided by the UNHCR and any of its participating partners. If they are able to obtain such assistance, they too are denied the right to work. The amendments are not

[10] Article 3 of the 1951 UN Convention Relating to the Status of Refugees
[11] Article 26 of the 1951 UN Convention Relating to the Status of Refugees

clear on whether, while the asylum seeker is ascertaining whether UNHCR and their partners can assist, they are granted authorisation to work.

84. Further, the amendments are unclear as to how the "sustainability determination" will take place. From the manner in which it is phrased, the only practical way for a meaningful determination to take place would be for a newcomer to find their family and friends and obtain confirmation of their support.

85. Since the "sustainability determination" is made on application for asylum (subsection 6) the asylum seeker would need to have communicated with friends and family and obtained confirmation of their support before they lodged their application. This would give the asylum seeker five days to exhaust these actions, since the amendments require an asylum seeker to make an application for asylum within five days of entry into the Republic. The practical difficulties that asylum seekers, newly arrived in a foreign country, would face to make these efforts in their first five days in South Africa cannot be overemphasized.

86. It is not hard to conclude that a meaningful sustainability determination is not possible under the circumstances and a finding that an asylum seeker **can** or **cannot** sustain themselves cannot practicably be made. Under the circumstances a sustainability determination is neither viable nor capable of implementation.

The impracticability of the legislative scheme envisaged by the amendments

87. If, despite the impracticability of a "sustainability determination", a determination is made, and it is found that an asylum seeker either can or cannot sustain themselves, the effect is to in any event deny both groups the right to work.

88. If it is found that an asylum seeker can sustain themselves, they are denied the right to work (hereinafter referred to as the "first group"). If it is found that they cannot sustain themselves, they are referred to UNHCR and its partners for social assistance. If this is obtained, then the asylum seeker is again denied the right to work (hereinafter referred to as "the second group").

89. With regards to the first group, the amendments are not clear on whether, when the initial four months is over, the group becomes entitled to the right to work or has to then seek assistance from UNHCR and its partners *before* they can be endorsed with the right to work. Whatever the case may be, the fact remains that for four months, this group of asylum seekers is totally denied the right to work and must rely on the support of friends and family. As the amendments do not clarify what being "sustained" by family and friends looks like and with no minimum threshold having been set, a finding that they can sustain themselves may very well see asylum seekers living in marginal conditions - a situation which undoubtedly impairs the dignity of asylum seekers and restricts their ability to live without positive humiliation and degradation.

90. Since section 11 of the Principal Act has been repealed, which placed in the hands of the SCRA, the ability to determine the conditions relating to work and study under which an asylum seeker permit could be issued, this determination – of enormous importance to the ability to survive –

is now handed over the lower level officials. The competence of these individuals to make such a determination, with no apparent oversight, training or guidelines, must necessarily be questioned.

91. With regards to the second group, they too are denied authorisation to work. The amendments contain no definition of what "assistance from UNHCR or its partners" would constitute that could justify the denial of the right to work. From the amendments, it appears that being offered shelter and basic necessities by UNHCR and its partners would justify a denial of the right to work.

92. The government does not provide any social assistance to asylum seekers while their applications are being processed, and asylum seekers are therefore given the right to work and the opportunity to support themselves in this way. What these amendments do is restrict the right of these two groups to work without providing any social assistance and shifts the social responsibility to the asylum seeking community and non-governmental organisations.

93. Seemingly, the only group that is entitled to work are asylum seekers who are unable to sustain themselves through family or friends, or UNHCR and its partners (subsection 8(a) and (b)) (hereinafter referred to as "the third group"). The amendments are worryingly unclear on how an asylum seeker *can* become the holder of the right to work. The amendments appear to envisage a situation in which an asylum seeker, who has no support from friends or family, must make multiple trips to the UNHCR and its partner organisations to obtain confirmation from them that they cannot be assisted, and then return to the RRO to be endorsed with the right to work.

94. It appears that only once the asylum seeker has done this, can they become the holder of the right to work. The amendments do not clearly state how long this right will be accorded for, but subsection 11 implies it will only be accorded for 6 months, after which it can be "revoked" or "extended".

95. The amendments appear to indicate that the right will be revoked after the initial endorsement of six months if the asylum seeker cannot show that they are employed. If they can show that they are employed (by letter from their employer confirming their employment) then the right to work will be extended.

96. The effect of this requirement is to make the right to work contingent on actually having salaried work, which appears to exclude self-employment and other informal piece work.

97. The amendments appear to envisage a situation in which once work has been found, the asylum seeker must again return to the RRO to have their endorsement extended. The onerous requirements placed on asylum seekers to be granted authorisation to work will in reality have the effect that they will face great difficulties to become holders of the right:

    97.1. As set out above, in order to become the holder of the right to work, an asylum seeker must be in a position to show the RRO that they have sought and have been denied the

assistance of UNHCR or its partners. These are asylum seekers we know not to have support from family or friends and who are unemployed. Exhausting these requirements could involve more than one trip to UNHCR or its partners under circumstances where some asylum seekers may not live in the same city as those agencies. Once UNHCR and its partners have confirmed they cannot assist, the asylum seeker must make (possibly multiple) trips to the RRO on the day for their nationality (which is only once or twice weekly), before they are accorded the right for a period of six months.

97.2. The asylum seeker must then find work and obtain confirmation from their employer that they are employed after the endorsement ends, for the right to be "re-endorsed". That an employer must provide a letter that the asylum seeker is employed and that that employment must continue six months after the initial endorsement was given places enormous restrictions on the type of work that can an asylum seeker can realistically engage in.

These difficulties must be traversed by a group of people whom our highest courts have acknowledged as having "special vulnerability".[12]

98. Quite aside from the unlawful restrictions placed on the right to work which will be dealt with more fully below, the legislative scheme which asylum seekers must negotiate before being endorsed with the right to work is clearly impractical and will not work if any regard is had to the vulnerable conditions in which asylum seekers find themselves.

The right to work and the dignity of asylum seekers

99. As has been demonstrated above, the legislative scheme envisaged by the amendments is wholly impractical and is not capable of implementation without impairing the dignity of asylum seekers.

100. As mentioned above, the amendments envisage three groups of asylum seekers (the three groups are defined in paragraphs 10 to 14 above). Despite the fact that the amendments appear to place each group in a position in which they can live with comfortably and with dignity, on closer inspection, this is not the case. This has already been alluded to in some detail above, but for the sake of clarity and emphasis, the submissions will canvass this again.

101. The **first group** of asylum seekers is totally denied the right to work (for at least the first four months of their stay in South Africa) and must rely on the support of friends and family. The amendments do not clarify what being "sustained" by family and friends looks like and without a minimum threshold having been set, asylum seekers may find themselves living

[12] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) at paras 28 – 31; *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* [2014] 4 All SA 600 (SCA) (26 September 2014) at paras 33 – 34.

below the breadline - a situation which undoubtedly **impairs the dignity of asylum seekers** and restricts their ability to live without positive humiliation and degradation. To the extent that there are asylum seekers who will live well or comfortably on the support of their friends and relatives, those individuals must be seen as a small and exclusive minority of the asylum seeking population. That there are some people who may live comfortably in this way cannot be a reason to impose the overly broad restrictions on the majority of the asylum seeking population.

102. The **second group** of asylum seekers are also totally denied authorisation to work as they have presumably have obtained social assistance from UNHCR and its partners. Again, the amendments contain no definition of what "assistance from UNHCR or its partners". Therefore, it is not defined what "social assistance" would constitute that could justify the denial of the right to work. The amendments appear to indicate that being offered shelter and basic necessities by UNHCR and its partners would justify a denial of authorisation to work. These rudimentary means cannot be considered a reasonable amount and a blanket prohibition against employment under these circumstances is again **an invasion of human dignity that cannot be justified and is therefore unconstitutional**.

103. Lastly, the **third group** of asylum seekers, while not outright denied authorisation to work, in reality, face trying obstacles to ultimately become the holder of the said right. As mentioned in detail above, to become a holder of the right, one must first show that they cannot rely on their families or friends to support them, then that they cannot obtain assistance from UNHCR and it's partners (under circumstances where they are new in the country and have no financial support from their families or friends) and lastly, they must actually find work to be granted the right for a period of more than six months (under circumstances in which the work must be the type of work in which an employer can provide a letter confirming employment and which therefore implicitly has the effect of unlawfully restricting asylum seekers from self-employment and piece work).

104. The obstacles and restrictions imposed on newly arrived asylum seekers in this regard must necessarily be seen as insurmountable for a majority of asylum seekers. When taking into consideration:

104.1. the hurdles the asylum seeker must overcome to be granted the right to work (including actually *finding* work and the implied unlawful restrictions on the type of work that can be entered into); and

104.2. the delays in the adjudication of asylum seeker claims (and therefore the length of time an asylum seeker can expect to live under these conditions) as well as the restrictions on the type of work an asylum seeker is entitled to engage in it is not difficult to conclude that the manner in which the legislative scheme bestows (or realistically, *prohibits*) the right to work is an unjustifiable invasion of human dignity.

105. The relationship between asylum seekers' right to work and dignity has already been highlighted in several seminal cases, *Minister of Home Affairs and Others v Watchenuka and Others* ("Watchenuka")[13], *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* ("Union of Refugee Women")[14] and *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* ("Somali Association")[15]. In Watchenuka the Supreme Court of Appeal had to decide whether a prohibition imposed by the SCRA on the right of asylum seekers to work constituted an unjustifiable infringement to asylum seekers' human dignity.

106. The court made two important findings in Watchenuka. First, it found that "*where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation*".

107. Second, it found that because the prohibition was a blanket prohibition (I.e. excluding all asylum seekers from working) that it "*[would] inevitably include amongst those that it affects applicants for asylum who have no reasonable means of support other than through employment. A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of* ***s 36*** [of the Constitution]*."*

108. *Watchenuka* was confirmed in the *Somali Association* case.

109. The findings in *Watchenuka* are of application to the legislative scheme envisaged by the amendments. The thrust of *Watchenuka* is to declare that restrictions on one's ability to live without positive humiliation and degradation are unjustifiable invasions into human dignity. As the asylum seekers in groups one and two are generally prohibited from working under circumstances where there is no guarantee that they will live above the breadline (even with reliance from UNHCR partners and their friends and family), the amendments are thus a far way away from sidestepping the findings in *Watchenuka* and cannot guarantee that asylum seekers will live with dignity. Accordingly, the amendments would not withstand constitutional scrutiny and are unlawful.

110. *Watchenuka, Union of Refugee Women* and *Somali Association* also finds application within the legislative scheme surrounding the asylum seekers in group three (those that can work). These cases made findings in relation to dignity and the special vulnerability of refugees.

111. In *Union of Refugee Women* O'Regan J in paragraph 117 stated that "*Discrimination on the ground of refugee status thus may well violate the dignity of refugees or impair their rights in a serious manner. Excluding them from work opportunities as private security service providers is a form of discrimination that may exacerbate the situation in which refugees find themselves and be harmful to them as a group"*. This statement rings true in the context of depriving

[13] [2004] 1 All SA 21 (SCA) (28 November 2003).
[14] 2007 (4) BCLR 339 (CC).
[15] [2014] 4 All SA 600 (SCA) (26 September 2014).

asylum seekers from opportunities to work too – and would in many respects be more harmful to the group (of asylum seekers) than the deprivations spoken of in *Union of Refugee Women*.

112. Importantly, paragraphs 28 and 29 of the case mentions the special vulnerability of refugees, saying particularly that:

> "[28] *Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.*
>
> [29] *The condition of being a refugee has thus been described as implying "a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse….*"

113. As mentioned above, the hurdles that a new asylum seeker must overcome to be granted the right to work is unworkable and irrational in light of their practical circumstances (no support from family, friends or UNHCR partners, newly arrived in a foreign country and likely having escaped traumatic experiences) and the vulnerability expressed in *Union of Refugee Women*.

114. Similarly, *Watchenuka* and *Somali Association* finds application to the third group too – because despite the fact that the third group is able to find work, the obstacles they must overcome to work necessarily entails their humiliation and degradation. LHR cannot foresee circumstances under which an asylum seeker – who is very likely traumatised and without the ability to speak a South African language – will not feel humiliated and degraded in attempting to

    i. find help from family and friends and UNHCR partners,
    ii. fail to obtain this assistance;
    iii. find wage-earning employment

    to be given the right to work.

115. To the extent that this can be done without a sense of desperation and degradation, we submit it is possible only for a minority of asylum seekers and again cannot be a reason to impose the overly broad restrictions on the majority of the asylum seeking population.

116. Very lastly, the implied restrictions on trading and piece work are overly broad and has already been dealt with in *Somali Association* which stated that:

"In any event, paragraph 32 of Watchenuka…makes it clear that in circumstances such as this, where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated. I can see no impediment to extending the principle there stated in relation to wage-earning employment to ***self-employment*** *(our emphasis). Put differently, if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid. In fact in those circumstances it would be the very antithesis of the very enlightened rights culture proclaimed by our Constitution for us by resorting to s 22 of that very Constitution (as contended by the respondents and appears to have found favour with the high court) to condemn the appellants to a life of humiliation and degradation. That I do not believe our Constitution ought to countenance."*

117. If the amendments were to be promulgated, we would in no time find ourselves within the realm of what is described above – that asylum seekers would likely find themselves unable to obtain wage-earning employment, which would bring with it humiliation and degradation, and that they would attempt to apply for business licences but find themselves blocked from so doing – and as stated in *Somali Association*, they would be able to rely on the constitutional right to dignity to advance a case for the granting of that business licence. It is an inevitable situation which the amendments cannot circumvent.

118. The Department would do far better in attempts to equip its officials with tools to properly consider applications for asylum in a timely manner than restricting the right of asylum seekers to work in the awkward fashion suggested in the amendments.

ABANDONMENT OF CLAIMS

Ad sections 15(12) and (13)

119. LHR recognises the need for a process regarding abandoned applications for asylum. Such abandoned claims tend to skew the statistics and risk presenting an unrealistic view of South Africa's burdens regarding asylum seekers and refugees.

120. However, it should be noted that the amended provisions are far too narrow to be justified and reasonable, especially considering the multitude of reasons why a permit may not be renewed on time.

121. A one-month period is clearly unreasonable, even when an individual has not be hospitalised or other institutionalised. Such renews may have resulted from difficulties in accessing a refugee reception office due to corruption or difficulties in accessing refugee reception offices as they close.

122. We submit that a longer length of time to prove an actual *abandoned* claim would be more reasonable in the current circumstances. We would submit that one year would be a more appropriate approximation of an abandoned claim.

123. Shorter time periods where an asylum seeker or a refugee permit expires (i.e. less than a year) is in fact governed by section 37 of the Refugees Act and is a criminal offence. At the Marabastad and TIRRO Refugee Reception Offices, such offences are governed by the Admission of Guilt Fines Schedule issued by the Chief Magistrate for Pretoria in November 2012. However, immigration officials at those offices as well as the SAPS officials are Pretoria Central Police Station are not issuing fines properly. They are only issuing fines to people willing to pay the fine immediately and not to those who wish to contest the fine in court, as they are permitted to do under section 57 of the Criminal Procedures Act. This is clearly unlawful and until such time as the fines procedures are clarified, presuming that such applications have been abandoned after one month is clearly irrational, unreasonable and procedurally unfair.

WITHDRAWAL OF REFUGEE STATUS

Ad section 19

124. LHR is further concerned with the ability of a RSDO to re-open the decision making process on account of an error, omission or oversight.

125. Decisions by administrators are *functus officio* and should only be re-opened in the most serious circumstances. This is to create some stability in the decision-making process.

126. In addition, where information of this sort comes to light, the burden must be on the official to prove that the error, omission or oversight was the fault of the applicant and not the decision-maker. To keep a refugee in limbo by constantly question his or her status through no fault of their own would be unfair and prejudicial.

DEALING WITH CORRUPTION

Ad sections 5(c) and 20

127. LHR welcomes initiatives by the Department of Home Affairs to deal with corruption.

128. We are concerned with the dependence on a polygraph machine as a means of detecting corruption. Such machines are unreliable and will not act as a disincentive to act in a corrupt manner. The Department should rather capacitate its counter corruption unit which has shown itself not to have the skills and resources necessary to provide a chilling effect on officials willing to engage in corrupt activities.

129. We welcome the additional criminal offences that have been included in the Amendment Bill regarding corruption. While it is true that corruption happens from both the departmental

official as well as applicants, it should be noted that there is a power differential between a state official, who in some cases literally holds the life of an applicant in their hands and an asylum applicant. The Department must ensure that those who abuse their position of trust are thoroughly and professionally investigated to ensure that proper prosecutions and convictions take place. Well publicised arrests which appear in the media are one thing, but the success of counter corruption operations are measure in *convictions* not arrests.

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