

**Submission on the draft National Labour Migration Policy and the
Employment Services Amendment Bill**

Socio-Economic Rights Institute of South Africa (SERI) and
Lawyers for Human Rights (LHR)

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1. Introduction

This joint submission responds to a call for public comment on the draft National Labour Migration Policy (NLMP) and the Employment Services Amendment Bill (the Bill). The national Department of Employment and Labour released the NLMP and Bill on 28 February 2022 with 90 days for public comment.

Overall, these documents are aimed to regulate labour migration to and from South Africa, and to allow for the introduction of quotas for employment opportunities reserved for South Africans and foreign nationals.

The objectives of the documents are as follows:

The vision of the NLMP is:

“To give rise to efficient and effective Government leadership and intervention, supported by social partners and all major stakeholders, allowing for safe, orderly and regular migration for employment of highly, semi- and low-skilled workers to and from South Africa, in pursuit of the country’s national priorities.”¹

The objective of the Bill is:

*“To amend the Employment Services Act, 2014, so as to extend the scope of the Act to cover private employment agencies not operating for gain; **to regulate the employment of foreign nationals in South Africa in a manner consistent with the objects of the Act, the Immigration Act, 2002 and the Refugees Act, 1998; to expand the scope of the Act to cover employees and workers [emphasis added]; to expand the functions of the Employment Services Board and the powers of the Minister to make regulations in respect of matters related to labour migration; to provide for the governance of Supported Employment Enterprises; to provide for the improved enforcement of the Act and other laws regulating work by foreign nationals [emphasis added]; and to provide for matters connected therewith.”²***

The Socio-Economic Rights Institute of South Africa (SERI) and Lawyers for Human Rights (LHR) have considered both documents and make this submission because both the NLMP and Bill could potentially negatively affect our partners and clients.

Although SERI and LHR acknowledge that there is some merit to bringing clarity to issues in the formal employment relationship, and although we agree with government on the need to address the high rate of unemployment in the country, our critique of the policy and Bill relates largely to the following, which we set out in greater detail in the submission:

- The contemplated restrictions to the right to work go against South Africa’s obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) that protects the right to work regardless of nationality, legal status and documentation. The proposed measures are also inconsistent with various rights guaranteed in the Bill

¹ National Labour Migration Policy, point 4.2.2., p. 71.

² Employment Services Amendment Bill, Preamble, p. 5.

of Rights.

- The policy and Bill aim to regulate a broad spectrum of sectors and skills-levels (from critical skills to low-skilled work) under the same umbrella legislation, therefore not considering sector-specific challenges and nuances, as well as potentially varied outcomes.
- The policy and Bill are premised on a false assumption that the solution to the high unemployment facing the country lies in the restriction of migrant work and the reservation of opportunities for South African workers. This assumption has been repeatedly debunked through research and is also not supported in consultations that SERI and LHR have done with client groups in preparing this submission. It is a proposal that misses the complexity of the problem as well as its structural underpinnings.
- Pitting local workers against migrant workers, whether in public discourse or proposed legislation, has the potential to further fuel xenophobic tensions. This does not imply a lack of sympathy for South Africans who are struggling under the weight of unemployment, but this narrative shifts the full blame for unemployment onto migrants, while the reality is more complex and structural.

This submission is informed by consultations with partners and clients from three sectors or interest groups: domestic workers, farm workers, and refugees and asylum seekers. As set out in section 7 of this submission, in all three groups we found large-scale opposition to restrictions placed on the right to work of foreign nationals.

SERI and LHR therefore argue for a substantial reconceptualisation of the NLMP and Bill in relation to how its provisions affect the right to work of migrants, particularly in low-skilled work.

2. Organisations making this submission

2.1 Socio-Economic Rights Institute of South Africa (SERI)

SERI is a registered non-profit organisation and public interest law clinic that provides professional, dedicated and expert socio-economic rights assistance to individuals, communities, community-based organisations (CBOs) and social movements in South Africa. SERI conducts applied legal research, litigates in the public interest, facilitates civil society mobilisation and coordination, and conducts popular education and training. SERI's core work relates to the advancement and protection of socio-economic rights in poor communities.

One of SERI's thematic areas is 'Making a Living', which focuses on informal and precarious work and livelihoods. It is concerned with the struggles that many vulnerable people face in earning a living, including poor working conditions, the lack of social protections and the general insecurity associated with part-time, temporary or informal employment.

Over the last ten years SERI has been involved in legal, research and advocacy work in relation to the rights of informal traders, domestic workers, waste reclaimers and farm workers. SERI has published several resource guides, research reports and working papers.

In relation to informal trade:

- [Informal Trade in South Africa: Legislation, Case Law and Recommendations for Local Government](#) (June 2018), which unpacks court judgments which have substantially contributed to the rights of informal traders and identifies a range of legal principles governing the rights, duties and obligations of informal traders, law enforcement officers and local government.
- [Towards Recommendations on the Regulation of Informal Trade at Local Government Level](#) (June 2018), which provides recommendations to local government on how informal trade can be regulated in a manner that respects the rights of informal traders, and is just, humane and inclusive.
- [Informal Trade in Johannesburg: Your Rights](#) (March 2017), which sets out traders' rights and obligations according to the City of Johannesburg's by-laws in an accessible, pocketbook format.
- ['The End of the Street'?' Informal Traders' Experiences of Rights and Regulation in Inner City Johannesburg](#) (September 2015), which investigates the regulation of informal trade in the inner city, as well as traders' daily experiences of making a living there, in order to explore the impact of the prohibition and restriction of trade being pursued by the City.
- [Protecting the Rights of Informal Traders](#) (June 2014), which explains the process that a municipality must follow to legally prohibit informal trade in an area, or to relocate informal traders in terms of the [Businesses Act 71 of 1991](#).
- [Informal Settlement Upgrading in South Africa: Linkages to Livelihood Creation, Informal Sector Development, and Economic Opportunity Generation](#) (November 2012), which provides an overview of the current landscape with regard to informal settlement upgrading in South Africa, particularly the linkages between informal settlement upgrading, livelihood creation, informal sector development and economic opportunity generation.
- [Criminalising the Livelihoods of the Poor: The Impact of Formalising Informal Trading on Female and Migrant Traders in Durban](#) (February 2011), which investigates the negative effect on migrants and poor women of formalising economic activities since they struggle to meet the requirements for registration, permits and rentals.
- SERI served on SALGA's Informal Economy Reference Group and provided inputs to its Informal Economy Position Paper in 2018 and 2019.
- Alongside Women in Informal Employment: Globalizing and Organizing (WIEGO) and the Centre for Urbanism and Built Environment Studies (CUBES), SERI provided inputs to the City of Johannesburg's draft policy on informal trade. WIEGO provided inputs to the City's draft by-laws drawing from the SERI and SALGA publications.
- SERI has also provided advisory input to the GTAC-supported Capacity Building Programme for Employment Promotion's (CBPEP's) project on 'Creating a supportive regulatory environment for the informal sector: Improving regulatory tools and practise in local government'. The result of the project was the [Public Space Trading Guidelines for Local Government 2021-2016](#) released by SALGA in June 2021.

In relation to domestic work:

- [Employing a Domestic Worker: a Legal and Practical Guide](#) (August 2021) with Izwi Domestic Workers Alliance, which informs employers of domestic workers of their rights and obligations in the employment relationship, provides practical advice

towards creating a healthy working environment and supports them to improve their employment practices.

- A series of [fact sheets](#) with the Black Sash on the importance of the *Mahlangu* judgment and explaining the COIDA claims process to domestic workers.
- [Domestic Workers' Rights: A Legal and Practical Guide](#) (July 2018), which explains what the law says about domestic workers and gives practical advice on how domestic workers can engage their employers.

SERI litigates for informal traders, domestic workers, waste reclaimers and farm workers, for example:

- [South African Informal Traders Forum \(SAITF\) and Others v City of Johannesburg and Others \('SAITF'\)](#)
- [Transnet Soc Ltd v Mushandana Humbulani Victoria & 34 Others \('Mushandana'\)](#)
- [Mahlangu v The Minister of Labour \('Mahlangu'\)](#)
- [J.F. Rossouw Trading v CSAAWU & Others \('Rossouw'\)](#)
- [Philander and 2 Others and CSAAWU v La Maison Farms \('La Maison'\)](#)
- [Robertson Abattoir v Commercial Stevedoring Agricultural & Allied Workers' Union \('CSAAWU'\)](#)
- [Averda v The Unlawful and Unauthorised Individuals and Pickers \('Averda'\)](#)

During the COVID-19 pandemic and subsequent lockdown, and in response to regulations issued under the Disaster Management Act, SERI intervened through litigation and advocacy³ in relation to the rights of informal traders and others engaged in precarious work, for example:

- [Recommendations to the National Coronavirus Command Council \(NCCC\) on the COVID-19 regulations and directions to allow informal waste reclaimers to operate during the lockdown.](#)
- [Recommendations on legal remedies from the Unemployment Insurance Act available to unregistered domestic workers during lockdown on behalf of the South African Domestic Service and Allied Workers' Union \(SADSAWU\).](#)

Litigation and legal assistance during COVID-19:

- *HCI-Shell House Investments v City of Johannesburg and 4 others ('Shell House')*. SERI also provided legal assistance to retail market traders in eThekweni and to traders in Johannesburg.⁴

Foreign nationals have always been a subset within SERI's client groups of informal traders and domestic workers. More recently, SERI has been actively protecting against the infringement of the rights of foreign nationals, for example through a joint [submission](#) with LHR in November 2020 on the Gauteng Township Economic Development Bill, which together with

³ SERI convened the informal traders and spazas workstream of the Food Working Group of the C19 People's Coalition, which set out [Proposals on Informal Food System: Traders, Street Vendors & Spazas](#). In May 2020, SERI, together with the Centre for Applied Legal Studies (CALS), WIEGO and Asiye eTafuleni published [Experience of Food Vendors during Lockdown: A Snapshot of the Cape Town, Johannesburg and eThekweni Municipalities](#).

⁴ Working with SAITF, SERI intervened in persuading the municipality to open its retail markets and to allow traders, who traded in essential goods and services, to do so safely and with the correct health and safety measures in place prior to opening. SERI also worked with WIEGO and others to produce [Health and Legal Guidelines for informal trade](#), now published as posters in Zulu, English and Afrikaans.

advocacy efforts from other individuals, academic institutions, CSOs, and businesses resulted in the removal of the sections in the Bill restricting the participation of foreign nationals from certain economic activity in the townships, which SERI and others had been advocating for. More recently, SERI [acted](#) for Kopanang African Against Xenophobia (KAAX), an anti-xenophobia movement, who were initially prohibited from organising a march in Johannesburg on 21 March 2022 (Human Rights Day) to express a public rejection of xenophobia.

2.2 Lawyers for Human Rights (LHR)

Lawyers for Human Rights (LHR) is a registered non-profit organisation. LHR is an independent, non-governmental human rights organisation, started by a group of activist lawyers in 1979. LHR employs a holistic approach to social justice and human rights enforcement that includes strategic litigation, advocacy, law reform, human rights education, and community mobilisation and support. Each of these strategic areas is staffed by specialist legal practitioners and activists. LHR provides legal services through its law clinics and advice offices, located in Johannesburg, Pretoria, Musina, Durban, Cape Town, and Uppington.

LHR established the Refugee and Migrant Rights Programme (RMRP) in 1996. Walk-in law clinics provide legal advice and representation, to ensure due process for asylum seekers and refugees. The programme also builds networks and is part of the social justice movement to combat xenophobia through engagement and education at community level. LHR advocates for the prevention of xenophobia, and work to promote access to protection for asylum seekers and refugees.

This LHR programme is the largest legal service provider to refugees and asylum seekers in South Africa. Through the work of the walk-in law clinics, LHR provides access to legal recourse to approximately 10,000 refugees, asylum seekers and migrants annually. Our Refugee and Migrant Rights walk-in clinics can be found at our offices in Pretoria, Johannesburg, Musina, and Durban.

Reports:

- [Queue Here for Corruption](#) (2015), produced jointly by LHR and the African Centre for Migration & Society
- [Costly Protection: Corruption in South Africa's Asylum System](#) (2020)
- [A Practitioners Guide to Immigration Detention in South Africa](#) (2020)
- [Immigration Detention in South Africa](#)
- [Monitoring Policy, Litigious and Legislative Shifts in Migration and Detention in South Africa](#) (2020)
- [A Guide to Working with Vulnerable Children](#)
- [Costly Protection : Corruption in South Africa's Asylum System](#)

Litigation:

- [Chisuse and Others v Director-General, Department of Home Affairs and Another \[2020\] ZACC 20](#): The Court declared section 2(1)(a) and (b) of the South African Citizenship Act 88 of 1995 as amended by the South African Citizenship Amendment Act 17 of 2010 unconstitutional and invalid.
- [Somali Association of South Africa Eastern Cape and Others v Minister of Home Affairs and Others](#) – The Supreme Court of Appeal held that the closure of the Port Elizabeth

Refugee Reception Office was unlawful and it was eventually reopened in 2018 allowing for service provision for asylum seekers and refugees in the Eastern Cape Province.

- [*Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others*](#). Whether refugees and asylum Seekers who are lawfully present in this country are entitled to trade and operate businesses to earn a living in circumstances where they have no other means of livelihood.
- [*Lawyers for Human Rights and Others v Minister of Home Affairs and Others*](#). The Constitutional Court declared core aspects of the new Immigration Act concerning the arrest and detention of foreigners unconstitutional. The judgment is a milestone in that it confirms and protects the constitutional rights and procedural safeguards of foreign nationals, whether legal or illegal. Furthermore, the judgment prevents the Department of Home Affairs from arbitrarily arresting and detaining foreigners.

Submissions:

- [LHR/CORMSA Submission to the Portfolio Committee on Basic Education](#). Submission on the difficulties faced by refugees, asylum seekers and other foreign migrant children in accessing education.
- [Lawyers for Human Rights Submission on the Refugees Amendment Bill, 2016](#).
- Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR) Joint submission on the Green Paper on International Migration in South Africa.
- Lawyers for Human Rights Submission: White Paper on International Migration.

3. Contents of the submission

SERI and LHR hereby jointly submit comments in response to the call for public comments made on 28 February 2022.

Section 4 below provides a legal analysis of some of the provisions of the NLMP and the Bill in relation to South Africa's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR). It further critiques the provisions of the NLMP and Bill through the lens of domestic immigration and refugee legislation and case law.

Section 5 provides research evidence that illustrates the positive impact of migrants on the economy and dispels some of the myths around their economic participation.

Section 6 discusses the implications of setting South Africans against foreign nationals, and how the risks of doing this in legislation could unwittingly legitimise and fuel xenophobia.

Section 7 critiques the legislation from the perspective of three vulnerable sectors or interest groups: domestic work, farm work, and refugees and asylum seekers. This part of the submission is informed by consultation with SERI and LHR client groups and partners who would be directly affected by the policy and Bill.

Section 8 provides recommendations.

Section 9 concludes the submission, while section 10 lists those who endorse it.

4. Legal analysis

Section 3 of the NLMP details South Africa's international and regional obligations, as well as relevant national legislation and case law. This provides background to the "Key Areas of Intervention" (section 5 in the NLMP), and for the translation of these interventions into law in the Bill. SERI and LHR are of the view that these interventions in the NLMP and the Bill are inconsistent with South Africa's international law and constitutional obligations. For example, South Africa's obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide for the right to work irrespective of nationality and documentary status, while the right to work of asylum seekers and refugees has been secured in local legislation and jurisprudence. The Bill, on the other hand, in Chapter 3A (section 12A(2)(b)) precludes any employer from employing a foreign national without having satisfied themselves that the position could not be filled by a South African. This is a very high bar to meet for low-skilled work, such as domestic work and farm work, and effectively excludes asylum seekers from employment in those sectors.

South Africa's obligations as well as these contradictions in the policy and Bill are detailed below.

4.1 The right to work in international law

The Constitution requires the consideration of international human rights law in interpretation and evaluation of both existing law and policy, and even provisions and sections of the Constitution itself.⁵ Therefore, as a matter of both South African law and international human rights law, South Africa's binding treaty commitments are relevant to the evaluation of the constitutionality of the policy and Bill.⁶ This stems from the underlying principle of constitutional interpretation that when interpreting the law, we must consider international law.

The provisions of the policy and Bill that seek to limit the freedom of employment of asylum seekers and other migrants will contravene South Africa's international obligations as a state party to the 1951 Convention Relating to the Status of Refugees (1951 Convention).

Furthermore, ICESCR includes a binding "right to work".⁷ This right applies to both "formal" and "informal" forms of work.⁸

⁵ International Commission of Jurists, *A Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa*, International Commission of Jurists (August 2019), available at: <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf>; International Commission of Jurists, *Promoting Non-Citizens' Right to Work in South Africa*, International Commission of Jurists (April 2020), available at: <https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf>.

⁶ Constitution, s 39, s 233. The Vienna Convention on the Law of Treaties (VCLT) provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" and that a State "may not invoke the provisions of its internal law as a justification for a failure to perform a treaty".

⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR), Articles 6-8.

⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), "General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)", UN Doc. E/C.12/GC/23 (7 April 2016), available at: <https://www.refworld.org/docid/5550a0b14.html>; CESCR, "General Comment No. 18: The Right to Work (Art. 6 of the Covenant)", UN Doc. E/C.12/GC/186

South Africa ratified ICESCR in 2015, reinforcing South Africa's existing human rights commitments to a range of human rights and adding further commitments in terms of rights absent from the Constitution, such as the right to work and the right to an adequate standard of living. In doing so the government was explicit that "South Africa's accession of the ICESCR has and will continue to deepen the enforcement of socio-economic rights in the country".⁹

In terms of ICESCR, as authoritatively interpreted by the UN Committee on Economic, Social and Cultural Rights (CESCR), all people, irrespective of their citizenship or documentary status, enjoy the right to work. In General Comment 20, the CESCR Committee is clear that:

*"The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."*¹⁰

In its General Comment 18, CESCR reaffirms the right to work directly in the following terms:

*"States parties are under the obligation to respect the right to work by ... refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees, members of minorities and migrant workers."*¹¹

In General Comment 23, CESCR confirms that this applies not only to the right to work but to rights at work:

*"Laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work."*¹²

This clear legal position is based on the simple fact that ICESCR rights, like the overwhelming majority of constitutional rights in South Africa, apply to "everyone". The Constitutional Court has consistently taken a similar approach to the definition of "everyone" as holders of constitutional rights.¹³

Finally, it is also worth noting that the United Nations Global Compact for Safe, Orderly, and Regular Migration,¹⁴ adopted by the UN General Assembly in December 2018, includes an

(February 2006), available at: <https://www.refworld.org/docid/4415453b4.html>; International Labour Organization "Recommendation Concerning the Transition from the Informal to the Formal Economy" (2014).

⁹ CESCR, "Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/C.12/ZAF/1, CES (2017), para 5.

¹⁰ CESCR, "General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)", E/C.12/GC/20 (2 July 2009), para 30.

¹¹ General Comment 18, para 23.

¹² General comment No. 23 para 47(e).

¹³ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004); *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

¹⁴ The Global Compact is the first inter-governmentally negotiated agreement, prepared under the auspices of the United Nations, covering all dimensions of international migration in a holistic and comprehensive manner. It is a non-binding document that respects states' sovereign right to determine who enters and stays in their territory and

objective of migration as being “to facilitate fair and ethical recruitment and safeguard conditions that ensure decent work.” South Africa made extensive contribution to the drafting of the Global Compact, which it called “a framework for a comprehensive international agreement and cooperation on migrants and human mobility with respect to human rights and fundamental freedoms”.¹⁵

While the Compact is not an international convention and therefore not legally binding, it does represent a commitment to advance migration solutions globally, as well as the ambition of the international community to improve the response to the displacement situation and to the migration and movement of people. This includes ensuring that access to decent work is not limited because of one’s refugee or asylum seeker status.

The policy and Bill represent a significant step backward in this respect and stand in contrast to the principles of the Global Compact. In a briefing held at the Department of International Relations and Cooperation on 28 March 2018 on the Global Compact, former Minister Malusi Gigaba stated that “South Africa is committed to regional economic integration and is intrinsically part of the African Union’s Agenda 2063.” He further referred to the Global Compact’s emphasis on a “holistic and inclusive approach addressing underdevelopment and poverty” recognising the positive contribution migration makes to inclusive growth and development. He further called on Member States to strengthen their international support and cooperation to ensure safe, orderly and regular migration with full respect for human rights and fundamental freedoms.

The former Minister also stated that South Africa is regarded as a “leader on the African Continent by availing to recognised forcibly displaced persons (refugees) within its territory human rights and fundamental freedoms as contained in the Constitution, such as freedom of movement and the right to choose where to live, work, study and access social services” [own emphasis added].¹⁶

SERI and LHR further submit that the policy and Bill will also negatively impact on the well-being of children whose parents are currently employed or seeking employment but might be unable to work because of the policy and Bill. Where these parents are unable to earn an income, the impact on children will be severe and their rights in terms of the UN Convention of the Rights of the Child will be affected. South Africa signed the Convention in 1993, and ratified it on the 16th of June 1995. SERI and LHR call attention here specifically to the following provisions:

demonstrates commitment to international cooperation on migration. It presents a significant opportunity to improve the governance of migration, to address the challenges associated with today’s migration, and to strengthen the contribution of migrants and migration to sustainable development. The Global Compact is framed in a way consistent with target 10.7 of the 2030 Agenda for Sustainable Development in which Member States committed to cooperate internationally to facilitate safe, orderly and regular migration. The Global Compact is designed to: support international cooperation on the governance of international migration; provide a comprehensive menu of options for States from which they can select policy options to address some of the most pressing issues around international migration; and give states the space and flexibility to pursue implementation based on their own migration realities and capacities. See: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195.

¹⁵ Media Statement delivered by Minister Dr Siyabonga Cwele on UN Conference on Global Compact on Migration, 13 December 2018, available at: <https://www.gov.za/speeches/media-statement-delivered-minister-dr-siyabonga-cwele-after-monitoring-visit-home-affairs>

¹⁶ Speech delivered by Minister Malusi Gigaba at the Briefing on the Global Compact for Migration at DIRCO Headquarters in Pretoria, 20 March 2018, available at: <https://www.gov.za/speeches/minister-malusi-gigaba-united-nations-global-compact-migration-20-mar-2018-0000>.

- Article 18, which holds that “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”
- Article 27(1), which holds that (1) “States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development...[and] (2) [t]he parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.”

SERI and LHR conclude that the potential limitations of the right to work in both the Bill and the policy fall short of the requirements of international law.

4.2 Domestic immigration and refugee legislation and case law

South Africa's domestic policy on refugees and asylum seekers has historically been viewed as progressive and generally consistent with human rights.¹⁷ This is so because, *inter alia*, it does not contemplate the confinement of this vulnerable population to refugee camps, but instead makes provision for its urban integration into South African society.

The ability of migrant communities to sustain themselves is an essential element of this integration, particularly given that employment and social assistance are not available to asylum seekers and are severely limited for refugees.

The established legal framework concerning the rights of and protections for refugees and asylum seekers, interpreted and expanded by the courts over time,¹⁸ therefore provides entitlement to seek employment¹⁹ and to be afforded access to fair labour practice.

The right to dignity in section 10 of the Constitution also identifies a link to employment, including self-employment.²⁰ Respect for and protection of the dignity of all who live in South Africa is a cornerstone of the country's Constitution.²¹ To this end, case law confirms that right to dignity protects the rights, and entitlements of foreign nationals to seek employment and secure a livelihood in South Africa in accordance with the Constitution and the applicable international instruments.²² Without access to the work-related rights and entitlements, refugees and asylum seekers will not be able to sustain themselves or be able to integrate with the local community, which remains fundamental to the country's refugee policy. “Local integration”²³ is also promoted as a primary solution by the United Nations High Commissioner

¹⁷ In 2007, the United Nations High Commissioner for Refugees, António Guterres, commended the South African government for its progressive policy on refugees and asylum seekers, including a commitment to ensure their access to basic services. See UN News, “Top UN official lauds South Africa's ‘progressive’ refugee policy”, *UN News* (27 August 2007) available at: <https://news.un.org/en/story/2007/08/229122> downloaded 09/11/2020].

¹⁸ See discussions of the *Watchenuka* case in paragraph 7 and the *Somali Association* case in paragraph 8.

¹⁹ Sections 22(8) and (9) and 27(f) of the Refugees Act 130 of 1998.

²⁰ Section 10 of the Constitution, see footnote 8 below for the full citation of the Constitution.

²¹ Constitution of the Republic of South Africa, 1996.

²² *Ibid.*

²³ Jeff Crisp, *The Local Integration and Local Settlement of Refugees: a Conceptual and Historical Analysis*, United Nations High Commissioner for Refugees (2004), available at: <https://www.unhcr.org/407d3b762.pdf>

for Refugees (UNHCR) for refugees and asylum seekers in host countries with no encampment policies.

The legal history of refugees and asylum seekers' freedom of employment, to work or engage in wage-earning employment and freedom of self-employment, can be traced to the 2003 Supreme Court of Appeal (SCA) decision in the case of *Minister of Home Affairs and Others v Watchenuka and Another* ("Watchenuka case").²⁴ Before this case, asylum seekers were not allowed to work or study in South Africa. In the *Watchenuka* case, the SCA held that freedom to engage in productive work is an important component of human dignity.²⁵ One of the important outcomes of the case was that a prohibition against employment in circumstances where one has no other reasonable means of support is a material invasion of human dignity that is not justifiable in terms of section 36 of the Constitution.²⁶ As a result, the SCA confirmed that the Refugees Act Regulations, which prohibited asylum seekers from working (freedom of employment) and studying violated the right to dignity and were therefore constitutionally invalid.

In *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* ("Somali Association case"), the SCA also held in favour of asylum seekers and refugees, allowing them to be self-employed, with the right to trade and earn a living in the informal sector.²⁷ The case concerned an operation launched in Limpopo Province by the South African Police Services (SAPS) called "Operation Hardstick", in which security forces closed all spaza shops owned and operated by asylum seekers and refugees. In considering the matter, the SCA again linked the right to dignity with the ability to sustain oneself, holding that unjustified limitations to that ability are unlawful:

*"(t)he inherent dignity of all people is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights. The freedom to engage in productive work – even where that is not required in order to survive – is an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association..."*²⁸

Tuck shops or spaza shops are often the only means of income for refugees, asylum seekers, and other migrants. Accessing the formal trade or job market is difficult due to language barriers, non-recognition of formal foreign qualifications, and employers' uncertainty regarding documentation. As the SCA emphasised in the *Somali Association* case, "...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..."²⁹

Finally, the SCA admonished in the *Somali Association* case that state action in Operation Hardstick resulted in "the uneasy feeling that the stance adopted by the authorities in relation

²⁴ (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003).

²⁵ Para 27 of the *Watchenuka* case.

²⁶ Para 33 of the *Watchenuka* case.

²⁷ (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), Para 44 of the *Somalia Association* case.

²⁸ Paras 26 – 28 of the *Watchenuka* case.

²⁹ Para 32 of the *Watchenuka* case.

to the licensing of spaza shops...was in order to induce foreign nationals who were destitute to leave our shores”.³⁰ As a consequence, the SCA unequivocally cautioned state authorities against “unwittingly fuelling xenophobia”.³¹

South African courts have therefore been clear on the right of asylum seekers and refugees to work and on the link between that right and their basic human dignity. Indeed, state-imposed restrictions that have the effect of infringing on those rights fall beyond the bounds of well-established law. State action that may promote – even inadvertently – the spread of xenophobia within our borders must likewise be avoided.

The Bill is likely to face implementation challenges in relation to Chapter 3A, specifically section 12A (2)(b) that states that any person employing a foreign national must: “*satisfy themselves that there are no persons in the Republic, other than foreign nationals, with the requisite skills to fill the vacancy, before recruiting a foreign national to occupy such vacancy*”.³² Including asylum seekers within the definition of foreign nationals means that their employment opportunities could potentially be restricted, while they are left without any other means to support themselves. Further, as asylum seekers are by definition a vulnerable group, often coming from countries with high levels of conflict, they may lack basic education and skills, and having to illustrate that they have skills that South Africans do not have in order to be employed is a very high bar, especially for low-skilled work.³³

On these bases, there can be no rational connection between the potential exclusion of asylum seekers from economic activity and any legitimate government purpose. These provisions unjustifiably limit the right to dignity, the right to equality (constituting unfair discrimination) and are likely to violate related rights in the Bill of Rights. The overall implications of the policy and Bill in relation to this vulnerable group needs to be reconsidered.

5. The positive contribution of migrants to the economy

SERI and LHR argue that restricting the employment opportunities of foreign nationals overlooks the positive contribution of migrants to the economy and the economic interdependence between migrant workers and South Africans. The NLMP in point 1.2.4 argues that an absence of reliable estimates of migration trends and number of migrants makes it difficult to assess the impact of labour migration in South Africa. It then acknowledges a number of studies that do point to a positive contribution. In this section SERI and LHR contribute to this body of evidence by highlighting some salient points about the impact of migration. This evidence should not be overlooked while additional and larger scale data is being gathered as it already draws on credible datasets, such as census data and representative survey data:

³⁰ *Somali Association* para 44.

³¹ *Somali Association* para 44.

³² We acknowledge that a similar requirement already exists in section 8(2)(a) of the 2014 Employment Services Act, although there it is stated that the Minister may make regulations to this effect, while the amendment Bill makes this a definite requirement for all employers. As will be seen throughout our submission, our objections are based on the high barrier to entry this sets for low-skilled work as well as the enforceability of the provision in certain sectors.

³³ Sergio Carciotto, Vanya Gastrow and Corey Johnson. *Manufacturing Illegality: The impact of curtailing asylum seekers' right to work in South Africa* (2018) Scalabrini Institute for Human Mobility in Africa, Cape Town.

- Immigration has a positive impact on employment:** The World Bank and a joint OECD/ILO consortium analysed census data to assess the impacts of immigration on the South African economy.³⁴ Both found the impact to be positive. The World Bank study concluded that one immigrant worker generated approximately two jobs for South Africans and argued that immigrants and locals hold jobs that complement each other, rather than compete with one another. The data showed that immigrants are more likely to start businesses, which, if successful, increased opportunities for locals while contributing to the country's economic growth.³⁵ These findings are further supported by Gauteng-based evidence. A 2014 GCRO survey that found that 37% of international migrants and 32% of South African informal entrepreneurs interviewed provided employment, and on average, each international migrant employer in the survey provided 4.3 non-family jobs and each South African employer 2.7 non-family jobs.³⁶
- South African and non-South African entrepreneurs are interdependent:** Much is made of conflict and competition between South African and international migrant entrepreneurs. Yet, foreign businesses are deeply integrated and embedded into, for example, township economies such that it would be counterproductive to separate them. Research shows that the relationship between foreign nationals and South Africans is often “mutually beneficial” as foreign-run spaza shops were being rented from local landlords. Renting out their property allowed local landlords to expand their businesses. These businesses also employed South Africans.³⁷ Along similar lines, a 2014 GCRO survey found that 54% of South African interviewees rented business premises to an immigrant business alongside their current business; 47% of South Africans purchased goods for their businesses from immigrant owned suppliers; and 52% of South Africans said that they had learned from immigrant businesses. Other studies show that immigrant-owned township businesses source goods from formal South African suppliers and manufacturers.³⁸
- International migrants contribute to township rentals:** Migrant operated enterprises within townships are rarely standalone. Like other spaza shops and house shops, they operate from residential premises. The location of migrant operated trading spaces on residential properties owned by South Africans reveals an important partnering between local and foreign residents. The 2014 GCRO survey found that 43% of international migrants paid rent for their business premises (compared to 25% of South Africans), and that international migrants were more likely to pay higher rents. Similar proportions of both groups paid rent of less than R 500 per month. While 91% of South Africans paid R1,500 or less per month, only 56% of international migrants

³⁴ Note on data: Both reports use census data since to do this kind of analysis you need big sample sizes and representative data.

³⁵ World Bank, *Mixed Migration, Forced Displacement and Job Outcomes in South Africa*, Washington DC: World Bank Group (2018), available at: <https://www.worldbank.org/en/country/southafrica/publication/new-study-finds-immigrants-in-south-africa-generate-jobs-for-locals>

³⁶ See Sally Peberdy, *Informal sector enterprise and employment in Gauteng*.

³⁷ Vanya Gastrow, “Foreign traders are vital to township economies: Removing them is bad for economic growth”, *Daily Maverick* (14 October 2020).

³⁸ Abdu Sh Mohamed Hikam, *An exploratory study of the Somali immigrant's involvement in the informal economy of Nelson Mandela Bay*, MA thesis, Nelson Mandela Metropolitan University (2011); Vanya Gastrow and Roni Amit *Somalinomics: A case study on the economic dimensions of Somali informal trade in the Western Cape*, African Centre for Migration & Society (2013).

paid R1,500 or less per month.³⁹ A study carried out in the Western Cape highlighted that immigrant business rentals played an important role in supporting the livelihoods of vulnerable groups such as retired pensioners or single parents. Rental incomes from immigrants also enabled some South African township entrepreneurs to expand their business footprints.⁴⁰

- **International entrepreneurs engage in skills transfer:** If international migrants are denied the opportunity to trade, the opportunity to learn from them will be lost. Fifty two percent of South African informal sector operators interviewed in the 2014 GCRO survey said they had learned about doing business from international migrants.
- **International entrepreneurs benefit local consumers:** The primary beneficiaries of immigrant business activities are South African consumers who can access cheap and accessible goods and services, including necessities such as cheaper food, critical in the face of the economic impacts of COVID-19.

Peberdy summarises the positive contribution of foreigner nationals to the economy as follows:

“International-migrant entrepreneurs are integrated into many township and other urban economies in Gauteng and form an integral, if small, part of them. They do this as traders, suppliers of consumer goods in convenient locations and often at competitive prices, as renters of premises from South African landlords, buyers of goods from South African wholesalers as well as suppliers of goods to South African entrepreneurs and as employers.”⁴¹

In addition to the evidence about the positive role played by migrants in the economy, further evidence also exists that counters popular myths and misconceptions:

- **International migrants do not have an unfair advantage:** South Africa has the smallest proportion of entrepreneurs compared with other developing countries.⁴² A study of approximately 500 SMMEs in Gauteng showed that business performance was not informed by whether the owner is local or foreign, and neither was the motivation to start a business in the retail sector, for example, informed by nationality. The findings do not support the notion that foreign business owners perform better than local owners.⁴³
- **No evidence exists to support the notion that immigrants are ‘taking over’ business opportunities:** It is often claimed that immigrants are ‘taking over’ business

³⁹ See Sally Peberdy, *Informal sector enterprise and employment in Gauteng*.

⁴⁰ Vanya Gastrow and Roni Amit *Somalinomics: A case study on the economic dimensions of Somali informal trade in the Western Cape*, African Centre for Migration & Society (2013).

⁴¹ Sally Peberdy, “De-Bunking Myths? International Migrants, Entrepreneurship and the Informal Sector in Gauteng, South Africa”, in Cathy Yan Liu (ed), *Immigrant Entrepreneurship in Cities*, (2021) pp.125-151; quote on p. 149.

⁴² Global Entrepreneurship Monitor, *South Africa Report* (2010) reported South Africa as performing low (9.1%) in entrepreneurship, with total entrepreneurial activity (TEA) below the average of comparable economies around the world.

⁴³ Radipere, and Dhliwayo investigated ‘the motivation, intention, culture and business performance of South African and immigrant entrepreneurs in the small, medium and micro enterprises (SMMEs) sector in Gauteng. See Radipere, S and Dhliwayo, S, “An Analysis of Local and Immigrant Entrepreneurs in South Africa’s SME Sector”, *Mediterranean Journal of Social Sciences*, 5(9) (2014), p. 189-198.

opportunities, especially in informal retail. There is no province-wide data to prove or disprove these claims.⁴⁴

- **There is also no persuasive evidence to support the popularly held assumption that South Africans will be able to purchase or take over businesses** that immigrants would be forced to abandon. The policy and Bill provide no contingency plan for any decline in sectors where immigrants are concentrated and subsequently excluded by the provisions of the Bill.

The assumption that foreign migrants have easier access to the economy or have advantages over local entrepreneurs is not substantiated by research evidence. Foreign migrants are subject to the same challenges that South African informal operators face, including the absence of a conducive regulatory framework. International migrants, unlike their local counterparts, also encounter harassment and extortion by officials; lack of access to credit/financial services from banks; xenophobia; and hostility.⁴⁵ International migrants report being repeatedly subjected to attacks and/ or discrimination, and in the observation of LHR, these circumstances have at times been driven or supported by local authorities and law enforcement agents. In the formal economy the barriers to entry for foreign nationals are even higher and will be made even more difficult by the provisions put forward in the NLMP and Bill.

6. The dangers of the 'local' vs 'foreign' narrative

The Bill and the NLMP create the impression that government is reacting to recent mass anti-immigrant sentiments by adopting a policy that feeds into the narrative that immigrants occupy a large sector of the South African job market. South Africa has for long been battling to ensure peaceful socio-economic integration of immigrants in communities, and the NLMP and Bill run the risk of reversing the few gains that had been made in this respect and may well “unwittingly fuel xenophobia”.⁴⁶ Three instructive examples are set out below and caution that, if the draft Bill were to pass into law without substantive revision, it will foster xenophobia, despite the admonishment of the Supreme Court of Appeal in the [Somali Association](#) case that authorities must guard against this.

First, in the xenophobic attacks in Gauteng between July and September 2019,⁴⁷ most spaza shops under attack in Gauteng townships were operated by foreign nationals. During the

⁴⁴ See GCRO, “Quality of Life Survey” GCRO (2017). The survey found 13% of the total population sample interviewed owned a business and 60% of these businesses were informal; 20% were owned by foreign immigrants and 33% were owned by migrants from another province. This shows what is known already about the informal sector in South Africa and elsewhere – it is an entry point into the economy for newcomers.

The findings from existing survey data is inconclusive. Only 27% of informal sector retailers interviewed in the Quality of Life Survey from 2017 were immigrants. By contrast, enterprise surveys in specific townships - for example the Sustainable Livelihoods Foundation 2012 enterprise surveys in Ivory Park and Tembisa - found 67% and 62% of spaza's were immigrant owned respectively. While immigrants were active in the spaza market in these two townships at the time, they were near absent in other dominant informal sector activities – shebeens and educare. See Andrew Charman, “Micro-enterprise predicament in township economic development: Evidence from Ivory Park and Tembisa”, *South African Journal of Economic and Management Sciences* 20(1) (2017).

⁴⁵ Jonathan Crush, Abel Chikanda, and Caroline Skinner (eds), *Mean Streets Migration, Xenophobia and Informality in South African* (2015).

⁴⁶ *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014)*

⁴⁷ LHR screened 259 foreign nationals who were victims of xenophobic attacks in the East of Johannesburg, North of Pretoria, and Pretoria Central from July 2019 to September 2019.

period, in the East Rand townships of Thokoza and Palm Ridge, a total of 160 Ethiopian nationals were victimised and lost their livelihoods. One person was killed. In this case, the spaza shops were run in the backyards of local homes. Experts attributed the violence “to the fact that politicians continue demonizing foreigners, saying they undermine economic transformation, lead to heightened crime, expose the country to disease and organized crime, and somehow account for the almost 30 percent unemployment rate among the black population”.⁴⁸

Second, over the last several years, an increased zeal is apparent on the part of law enforcement in targeting foreign nationals at national level (SAPS), provincial and local level (Metropolitan Police Departments).

“Foreigners also reported to Human Rights Watch that government and law enforcement officials throughout the country have used counterfeit goods raids as a cover for xenophobic harassment and attacks. These raids are conducted by SAPS and Metro Police, but local civilians whose roles are to identify counterfeit goods routinely accompany them. A common practice is to storm shops suspected of selling counterfeit goods with the goal of destroying or removing such goods from the market. Non-nationals told Human Rights Watch that they believe their shops have been disproportionately targeted by authorities conducting counterfeit goods raids. Sometimes, they said their shops have been completely destroyed in the raids and police officers have beaten them and fired tear gas and rubber bullets on them.”⁴⁹

Third, this year has seen a surge in xenophobic movements and a heightened xenophobic rhetoric, including marches by xenophobic groupings, such as Operation Dudula and #PutSouthAfricansFirst, with apparent approval from JMPD and the South African Police Services (SAPS). Disturbing media reports allege that police authorities have been conducting raids and arrests targeted at undocumented foreign nationals during some of these demonstrations.

These examples illustrate that where there is hesitation by authorities to act against xenophobic attacks or discrimination, or where state authorities tacitly collude with exclusionary anti-foreigner sentiments, the vulnerability of international migrants is heightened, and the possibility of violence increased.

South Africa’s legal framework acknowledges that refugees and asylum seekers are an at-risk group,⁵⁰ and any amendment to the legal framework that increases their vulnerability will have significant consequences for these communities. The policy and Bill are two such proposals, and their likely impacts, which will be both far reaching and negative for these communities,

⁴⁸ Loren Landau, “Political rhetoric and institutions fuel xenophobic violence in South Africa”, Washington Post (11 May 2015), available at: <https://www.washingtonpost.com/news/monkey-cage/wp/2015/05/11/political-rhetoric-and-institutions-fuel-xenophobic-violence-in-south-africa/>

⁴⁹ Human Rights Watch, “They Have Robbed Me of My Life: Xenophobic Violence Against Non-Nationals in South Africa”, *Human Rights Watch* (2020), available at: <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south>

⁵⁰ An asylum seeker or refugee is someone who is in South Africa seeking protection either because of personal persecution based on one of the listed grounds, or persons who have fled war in their home country or country of habitual residence. By its very definition, this constitutes a vulnerable group.

are cause for significant concern. The NLMP and Bill risk legitimising negative positions against foreigner nationals.

7. The implications of the NLMP and Bill for specific sectors and interest groups

In this section of the submission, SERI and LHR articulate the implications of the NLMP and the Bill in relation to specific sectors and interest groups. As indicated below, these views draw on consultations with client groups.

7.1 Implications for domestic work

This section of the submission was drafted following consultation by SERI with the leadership of domestic worker unions and organisations, namely Myrtle Witbooi, General Secretary of South African Domestic Service and Allied Workers Union (SADSAWU) and President of the International Domestic Workers Federation (IDWF), Pinky Mashiane, President of United Domestic Workers of South Africa (UDWOSA) and Amy Tekie, Co-Founder, Izwi Domestic Workers Alliance (Izwi). Leadership shared their own submissions based on their experiences and observations as they did not have sufficient time to consult with union structures and members on the NLMP or the Bill.

This section also draws on international treaties which set out rights at work. South Africa has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2015; International Labour Organization (ILO) Conventions No. 81 (Labour Inspection, 1947) and No. 189 (Domestic Workers, 2011), both ratified in 2013, all legally binding treaties. By ratifying these treaties, South Africa undertakes to apply them in national law and practice.

Background on Migrant Domestic Workers

According to the International Labour Organization (ILO), of the world's 67 million domestic workers, 83% are women and many millions have migrated from their home countries to earn a living in another country.⁵¹ "Migrant domestic workers are particularly vulnerable to human rights abuses due to inequalities determined by gender, race, national origin and social status", especially those who "live-in" employers' properties.⁵² The number of migrant domestic workers residing and earning a living in South Africa is unknown.

Chapter 3A, "Employment of Foreign Nationals", Sections 12A (2)(b) and (c), 12B (1) in the Employment Services Amendment Bill

Firstly, regarding 12A (2)(b) and (c), employers of domestic workers should not be compelled to "*satisfy themselves that there are no persons in the Republic, other than foreign nationals, with the requisite skills to fill the vacancy, before recruiting a foreign national to occupy such vacancy*" and quotas for the employment of foreign nationals in the domestic work sector

⁵¹ Elisa Menegatti, "Protecting Migrant Domestic Workers: The International Legal Framework at a Glance", Global Action Programme on Migrant Domestic Workers and Families Research Series, *International Labour Organization* (2016), p. 1

⁵² Ibid.

should not be introduced. Based on international human rights standards, migrant domestic workers are entitled to their human rights as, in principle, unless otherwise stated, all international labour standards protect all workers regardless of immigration status.⁵³

As demonstrated in section 4.1 above, South Africa ratified ICESCR and as such is obligated to implement migrant domestic workers' right to work and rights at work in law and practice as reaffirmed in the CESCR's General Comments 18 and 23. Further, International Labour Organization (ILO) Convention No. 189, also known as the Domestic Workers Convention, does not distinguish between nationals and non-nationals.

Secondly, migrant domestic workers who reside in South Africa and are already employed as domestic workers will be disadvantaged by any new laws or policies even those that seek to protect migrant workers from abuse by employment agencies and employers. Article 8(1) of Convention No. 189 provides clarity on this matter: it requires member states to establish that migrant domestic workers receive a written contract enforceable in the country of employment, or a written job offer, prior to traveling to the country of employment, however, the introduction of these measures "does not apply to migrant domestic workers who are already within the territory of the country of employment".⁵⁴ Further, employers and their families, particularly where the domestic worker is performing childcare or elder care, should not be disadvantaged by the introduction of new laws given the intimate nature of the domestic employment relationship.

Thirdly, it is not realistic to expect domestic employers to have the capacity, resources and expertise to pursue a recruitment process and skills transfer as contemplated in sections 12A (2)(b) and (c). The domestic sector is inherently different from other sectors, and employers do not have the capacity to perform work comparable to a human resources department, even of a small business.

Regulation of Employment Agencies

Government's regulation of employment agencies (5.1.2.3 in the NLMP, pages 74-75) through the supervision and monitoring of the recruitment activities of private employment promoters or agencies is welcomed, to minimise malpractices and abuses against those seeking jobs in South Africa or abroad, especially domestic workers, a particularly vulnerable group. The Department of Employment and Labour is encouraged to incorporate article 15 of Convention No. 189 which states that members should ensure,

*"adequate machinery for the investigation of complaints by domestic workers; adopts measures to adequately protect domestic workers and prevent abuses, including laws or regulations specifying the respective responsibilities of the agency and the household and providing for penalties; considers concluding bilateral, regional or multilateral agreements to prevent abuses and fraudulent practices; ensures that fees charged by agencies are not deducted from the remuneration of domestic workers."*⁵⁵

⁵³ Ibid.

⁵⁴ See ILO Convention No. 189, Article 8.

⁵⁵ See ILO Convention No. 189, Article 15.

Regarding the presence of an authorised labour official in the recruitment process before a migrant worker embarks on his or her journey, we reiterate our position that employers should be free to recruit any person regardless of nationality and quotas should not be introduced.

Labour Inspection

Government is encouraged to enforce domestic worker legislation through labour inspections in line with Articles 17(2) and (3) in Convention No.189 which state,

“Each Member shall develop and implement measures for labour inspection, enforcement and penalties with due regard for the special characteristics of domestic work, in accordance with national laws and regulations”... “In so far as compatible with national laws and regulations, such measures shall specify the conditions under which access to household premises may be granted, having due respect for privacy.”

The proposal of joint inspections as articulated in 5.3.6.5 (page 89) in the NLMP is inconsistent with the Labour Inspection Convention No. 81 which states in Article 3 that:

- 1) *The functions of the system of labour inspection shall be:
“(a) to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors...” and*
- 2) *Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers.”*

Having dual inspection roles will both “interfere” and “prejudice” effectiveness and impartiality.

Labour and immigration inspections should be conducted separately to ensure that domestic workers’ labour rights are protected. Once an employment relationship has been established, that is, a service has been rendered, then that relationship is regulated by the law, regardless of the legal status of either party. Section 23 of the Constitution states that “(e)veryone has the right to fair labour practices”. This right applies to everyone living in South Africa regardless of their status. Further, ICESCR protects migrants’ rights *at work* including fair and equal remuneration, adequate conditions of employment, protection from unfair dismissal and reasonable working hours.⁵⁶ Joint inspections with immigration officials stand to interfere with the protection of migrant workers’ labour rights and as such labour and immigration inspections should be conducted separately.

⁵⁶ International Commission of Jurists, *Promoting non-citizens’ right to work in South Africa- Briefing paper*, International Commission of Jurists (April 2020), p. 7.

Recognition of Domestic Work as a Vulnerable Sector

We welcome the recognition of domestic work as a vulnerable sector in the NLMP (5.3.6.8, pages 90-91). It is imperative that government enforces employment standards in the Basic Conditions of Employment Act 75 of 1997, Labour Relations Act 66 of 1995, Sectoral Determination 7 and other labour laws to protect domestic workers from abuses especially the enforcement of written contracts and UIF registrations and contributions.

Social Protections for Domestic Workers

We support government's efforts to implement social protections for migrant domestic workers with respect to occupational injuries (5.3.7.3 in the NLMP, page 92). However, the implementation of social protections for all domestic workers, regardless of citizenship, has been a significant challenge due to widespread non-compliance by employers. For example, only an estimated 20% of employers have registered their domestic employees with the Unemployment Insurance Fund (UIF).⁵⁷ The following comments, therefore, seek to address this challenge which affects all domestic workers.

The recent [*Mahlangu v the Minister of Labour*](#) matter saw the inclusion of South Africa's domestic workers in the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) (SADSAWU is the second applicant in the matter). Through providing support to domestic workers who have been injured in the workplace to process current and retrospective claims with the Compensation Fund the following obstacles in the implementation of *Mahlangu* need to be addressed as a priority:

- Low levels of registrations by employers due to lack of publicity about the amendment of COIDA to include domestic workers.
- A lack of awareness amongst domestic workers of their right to claim from the Compensation Fund.
- Difficulties in processing claims where an employer is unwilling to comply. With employer's being the policy-holders with the Compensation Fund, domestic workers are unable to have their claims processed without their assistance. Domestic workers then need to enlist the assistance of pro-bono lawyer to compel compliance- a service which is not accessible to the majority of domestic workers.
- Difficulties in processing retrospective claims where employers are untraceable due to the employer being the policy-holder.
- Online registrations for migrant domestic workers are impossible because a 13 digit South Africa ID number is required to register.

Furthermore, government should apply the same considerations with respect to the Unemployment Insurance Fund.

7.2 Implications for farm work

This part of the submission was drafted following SERI's consultation with the national leadership of the Commercial, Stevedoring, Agricultural and Allied Workers' Union

⁵⁷ International Labour Organisation, "Making decent work a reality for domestic workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No. 189)." 15 June 2021.

(CSAAWU), that mobilises and organises farm workers in the Western Cape to address their working and living conditions. The leadership shared their own submissions based on their experiences and observations as they did not have sufficient time to consult with union structures and members on the NLMP or the Bill.

Background on Migrant Farm Work

Drawing on a report by the International Labour Organization (ILO) in 2015 to investigate the living and working conditions of farm workers in South Africa, the 2011 Census indicated that 759,127 households (which translates into an aggregate population of 2,732,605 people) lived in farm areas, of whom 592,298 households (2,078,723 people) lived on farms. Of those who lived in these areas, 91.2% were South African and 4.9% were not.⁵⁸ By the end of 2012, 7.5% of formerly white-owned farms had been redistributed to black South Africans.⁵⁹ The challenges affecting the employment of farm workers are complex and structural, and deeply rooted in the country's colonial and apartheid history. However, new challenges have arisen as producers turn to casualisation and the externalisation of labour in order to meet economies of scale.⁶⁰

Chapter 3A, "Employment of Foreign Nationals", Sections 12A (2)(b) and (c), 12B (1) in the Employment Services Amendment Bill

These sections in the Bill provide that any person who employs a foreign national can only do so once they have satisfied themselves that a South African cannot fill the vacancy (section 12A (2)(b)), that the employer should develop a skills transfer plan (section 12A (2)(c)), and that the Minister may set quotas for the employment of foreign nationals (section 12B (1)).

While recognising the high levels of unemployment that people face, the desire of government to address this, and the complex nature of the task, we caution that the NLMP and Bill have the potential to escalate xenophobic tensions between local and migrant workers. Further, pitting local workers against migrants divides workers, which makes it challenging for unions to mobilise workers in a united manner around shared challenges.

Although the NLMP and Bill might find traction among some local workers it will be because it, at a superficial and political level, speaks to the poverty, hunger, anger, and desperation that people experience. However, the policy and Bill do not address the complex and structural causes of unemployment and therefore do not provide long-lasting solutions. Where migrants are perceived to be "taking local jobs" it is because their vulnerable status is being exploited by labour brokers and employers, with the latter paying migrant workers less than the minimum wage, requiring them to work long hours, and reporting them to the authorities if a dispute arises. These challenges will not be remedied by restricting the ability of migrants to be employed or through the introduction of quotas.

⁵⁸ International Labour Organisation (ILO) (2015) *Farm Workers' Living and Working Conditions in South Africa: key trends, emergent issues, and underlying and structural problems*, p.i.

⁵⁹ Ibid. p. 36.

⁶⁰ Ibid. p.iv.

Strengthening the enforcement of existing laws, such as the Labour Relations Act 66 of 1995, addressing violations by employers, and stricter regulation of labour brokers, ideally doing away with them completely, are priorities.

Finally, discussions of employment on farms cannot be held separately from the question of land. To date too few farm workers have been the beneficiaries of land redistribution, thereby limiting their access to land as a resource and solidifying their position as employees on land owned by others.

Labour Inspection

Negative experiences with labour inspectors mean that joint inspections by the Department of Labour and the Department of Home Affairs as articulated in 5.3.6.5 (page 89) of the NLMP are problematic. The first critique relates to the practicality of enforcement. Existing experience is that there are currently insufficient labour inspectors and that when they carry out inspections feedback on matters is not always provided. This poses questions about whether, and how, this capacity can suddenly be increased. A second critique relates to the proposal of joint inspections. Rather than focusing on migrants, the focus should be on employers and their adherence to existing legislation and the payment of equal wages irrespective of nationality.

Recognition of Farm Work as a Vulnerable Sector

We welcome government's recognition of farm work as a vulnerable sector in the NLMP (5.3.6.8, pages 90-91). However, instead of introducing additional legislative measures such as the NLMP and the Bill, the focus of the Department of Employment and Labour should rather be directed at implementing existing legislation that protects the rights of workers such as the Basic Conditions of Employment Act 75 of 1997, Labour Relations Act 66 of 1995, Sectoral Determination 13. Acting against employers who exploit migrant labour by paying below the minimum wage and doing away with labour brokers with similarly exploitative practices, will better serve both local and migrant workers. A focus on enhanced implementation of existing legislation is needed, rather than a focus on migrants.

Social Protections for Farm Workers

Regarding government's efforts to implement social protections for migrant workers for occupational injuries (5.3.7.3. in the NLMP, page 92) the focus should be on farm workers irrespective of nationality. Compensation Fund claims face a number of existing obstacles (as outlined in 7.1 above) which is a priority to address for all workers, while a focus on claims by migrant workers might unwittingly fuel xenophobic tensions.

7.3 Implications for asylum seekers and other migrants

This section of the submission was drafted following a workshop with community leaders and other interested community members from LHR persons of concern (POCs) on the NLMP and Bill.

Section 4.2 of this submission has already detailed, within the framework of a discussion on domestic immigration law, areas of the NLMP and the Bill that will have a detrimental effect on asylum seekers. In addition to that discussion, SERI and LHR are of the view that:

- The Bill (through the insertion at section 13 (b)(5)) gives too much power to a labour inspector. This makes the inspection process open to corruption. This amendment also means that the inspector will perform duties that should ordinarily be performed by immigration officers, and which may lead to inconsistencies on the implementation of the law. This problematic attempt to potentially transfer responsibility in terms of section 38 of the Immigration Act (enforcing rules about the unlawfulness of employing non-citizens) to labour inspectors corrupts the fundamental purpose of labour inspections, namely protecting workers' rights.
- The Bill leaves asylum seekers with no social protection in the form of the right to work by curtailing their ability to access employment. In addition, asylum processes are taking longer than usual, and in some instances, they are taking years. This Bill excludes asylum seekers from the legal employment pool. As a result, asylum seekers will not be covered by social security measures while awaiting confirmation of their status.

8. Recommendations

Following the different areas covered in our submission as well as consultations with clients, partners and interest groups, SERI and LHR make the following recommendations:

- **Extended consultation on the policy and Bill and their implications.** While the NLMP states that: "*The development of a distinct policy on labour migration is a first in the history of our country and it was made possible thanks to a broad, inclusive and comprehensive process spanning over three years and allowing for consultation*",⁶¹ neither SERI nor LHR have been part of these consultations, but more importantly, none of the client groups that we have consulted with in preparing this submission have been aware of or part of the consultations either. However, they are listed as vulnerable groups in the policy.
- **Both the NLMP and Bill require reconsideration in their entirety** as any restrictions on the right to work contradicts South African's commitments under ICESCR and are also inconsistent with the Constitution.

⁶¹ National Labour Migration Policy, p.7.

Notwithstanding these recommendations, we make a series of specific recommendations next:

- **Section 12A (2)(b) in the Bill needs revision** as it implies a blanket restriction on employing foreign nationals because of the high bar it sets, particularly in low-skilled work. It will also be difficult to enforce as, for example, employers of domestic workers cannot be expected to perform the work of an HR department, while employees will likely struggle to distinguish between different categories of migrant workers.
- The suggestions around **dual labour inspection** by the Department of Labour and the Department of Home Affairs **should be removed** (point 5.3.6.5, page 89 of the NLMP) as well as transferring responsibilities in terms of section 38 of the Immigration Act to labour inspectors (section 13 (b)(5) of the Bill). This conflation or transfer of responsibilities corrupts the fundamental purpose of labour inspection (the protection of workers' rights) with targeting migrants and their legal status.
- **Social protections should be prioritised for all workers, irrespective of nationality, and COIDA reconfigured to ensure employees can access/claim COIDA benefits.**
- **Instead of focusing on restricting the employment of foreign nationals, priority should be given to the enforcement of existing legislation** such as the Basic Conditions of Employment Act 75 of 1997, Labour Relations Act 66 of 1995 and Sectoral Determinations.

9. Conclusions

This submission by SERI and LHR has been informed by our own analysis of the NLMP and the Bill as well as consultation with client groups such as migrant workers, domestic worker union leaders, and the leadership of a farm worker union.

SERI and LHR argue, in summary, that:

- The provisions in the NLMP and Bill restricting the access of foreign nationals to work are not in line with South Africa's obligations under ICESCR that protect the right to work irrespective of nationality, legal status, and documentation. These provisions are also inconsistent with the Constitution.
- The positive contribution of foreign nationals to the economy and the interdependence between local and foreign workers and businesses are clear, while many myths about the negative impact of migrants on the economy can be dispelled.
- Xenophobia poses a real and immediate danger to the lives and livelihoods of many, and the NLMP and Bill, similar to other legislation pitting South Africans against foreign nationals, run the risk of legitimising and fuelling xenophobia.
- In neither our consultations with domestic worker unions' leaders nor with leadership of a farm worker union did we find support for restricting employment opportunities for migrants through quotas or by any other means. Instead, both sectors argued for increased enforcement of existing legislation to be a priority, which is a position both SERI and LHR support.

- The policy and Bill aim to regulate a broad spectrum of sectors and skills-levels (from critical skills to low-skilled work) under the same umbrella legislation, therefore not considering sector-specific challenges and nuances, as well as potentially varied outcomes.
- The policy and Bill are premised on a false assumption that the solution to unemployment lies in the restriction of migrant work and the reservation of opportunities for South African workers. This assumption has been repeatedly debunked through research and is also not supported in consultations that we have undertaken with our client groups in preparing this submission. It is a single solution that misses the complexity of the problem as well as its structural underpinnings.

We make recommendations on:

- Extended consultation on the NLMP and Bill.
- The reconsideration of the NLMP and Bill in their entirety because of the undue restrictions placed on the right to work of foreign nationals.
- Specific sections of the NLMP and Bill that require amendment or removal.
- The prioritisation of social protections for all workers, irrespective of nationality.
- The enforcement of existing labour legislation rather than a focus on migrant workers.

The NLMP and Bill require comprehensive revision, particularly because of the potentially negative consequences it will have for the sectors in which we consulted, and because restrictions on the right to work of foreign nationals runs contrary to South Africa's obligations under ICESCR and is also inconsistent with the Constitution.

10. Endorsements

This submission is endorsed by the following organisations and networks:

- Africa Awake
- African Diaspora Forum (ADF)
- Consortium of Refugees and Migrants in South Africa (CoRMSA)
- Foundation for Human Rights
- International Labour and Research Information Group (ILRIG)
- Kopanang Africa Against Xenophobia (KAAX)
- Refugee Social Services
- Sonke Gender Justice
- Sophiatown Community Psychological Services
- ZEP Coordinating Committee