LAWYERS FOR
HUMAN RIGHTS

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31 January 2024

TO: THE DEPARTMENT OF HOME AFFAIRS
230 Johannes Ramokhoase Street
Hallmark Building, Pretoria 0001
Attention: Mr. Sihle Mthiyane
Per email: whitepaper@dha.gov.za

Dear Honourable Minister Motsoaledi

LAWYERS FOR HUMAN RIGHTS SUBMISSION ON THE *WHITE PAPER ON CITIZENSHIP, IMMIGRATION AND REFUGEE PROTECTION: TOWARDS A COMPLETE OVERHAUL OF THE MIGRATION SYSTEM IN SOUTH AFRICA*

1. Lawyers for Human Rights makes this submission in response to The Department of Home Affairs (DHA) call for comments on the White Paper on Citizenship, Immigration and Refugee Protection in November 2023 with an invitation for interested parties to make written submissions by 19 January 2024.

2. LHR offers this submission to the DHA, bringing with it the breadth of LHR's experience and knowledge, and hope that it will help to guide South Africa towards a comprehensive policy that creates a humane system that offers long term solutions to the broad range of issues and challenges related to citizenship, immigration and refugee protection.

3. LHR was established 45 years ago as an independent human rights organisation with an aim of using the law to protect people in South Africa against the unjust laws and inhumane practices of the apartheid regime. LHR has a history of human rights activism and public interest litigation in South Africa that holds those in power to account. LHR also however, where possible collaborates with duty bearers to try to find lasting solutions to some of our nation's most intractable challenges. LHR provides free legal services to vulnerable, marginalised, and indigent individuals and communities who are victims of unlawful infringements on their rights.

4. Since 1994 LHR has continued to provide free legal representation to the most vulnerable. We represent land claimants who are fighting to regain and protect their land rights; we assist communities to ensure that any mining practices that are

ongoing or planned do not pose environmental or physical harm and to ensure that they are to make informed decisions when such ventures are proposed; we provide legal assistance to women who are victims of gender based violence; we provide legal assistance to people who are facing eviction from their homes; and we provide legal assistance to people who flee to South Africa seeking a safe haven and refugees and asylum seekers' protection.

5. LHR's Refugee and Migrant Rights Programme – established in 1996 - is the largest legal service provider to refugees and asylum seekers in South Africa, assisting between 10 000 and 15 000 clients per year in its three law clinics: Pretoria, Johannesburg, Durban. In 2023 LHR was forced to close its office in Musina due to funding cuts but retains our presence through a mobile clinic . The programme also builds networks and is part of the social justice movement to combat xenophobia through engagement and education at the community level and works on issues of access to socio-economic rights to asylum seekers and refugees and the rights of migrants who are discriminated against and persecuted because of their sexual orientation and gender identities . In addition, this programme also has projects focused on the rights of stateless persons and citizenship rights to address human rights concerns in, and monitoring of immigration detention. LHR advocates for the prevention of xenophobia, and works to promote the human rights of migrants in South Africa.

6. LHR notes that the deadline for submissions on this White Paper was extended to 31 January 2024. This extension was announced after LHR wrote to the Minister requesting an extension to the cut-off date for submissions. A follow up email was sent as we did not receive acknowledgement of receipt nor a response to the request.

7. LHR places on record that this is still an unreasonable time frame for preparing a submission of this importance as the period for submissions falls within the summer holidays when offices were closed and our staff, partners, stakeholders and clients were taking much needed breaks.

8. While LHR welcomes the opportunity to make a submission on harmonisation of the legal framework governing citizenship, immigration and refugee framework, LHR's overall submission is a call for the DHA to withdraw this draft and allow for more time for public consultations and a redraft of the paper with the assistance and leadership of the South African Law Reform Commission[1] The White Paper in its current form

[1] The objects of the South African Law Reform Commission includes bringing uniformity in the the law of South Africa (see https://www.justice.gov.za/salrc/objects.htm). In the Minister's opening statement on the White Paper, the Minister states that some of the institutional and structural challenges were mainly due to the three pieces of legislation – the Citizenship Act 88 of 1995, the Refugees Act 130 of 1998 and the Immigration Act 13 of 2002 – being in disharmony and so should invoke the assistance of South African Law Reform Commission.

fails to meet the requirements as set out in the National Policy Development Framework 2020 Approved by Cabinet on 2 December 2020. Of specific importance is the clause stating that the national policy framework will; '...also contribute to inculcation of a culture of evidence based policy making towards improved service delivery.' [2]

9. Lawyers for Human Rights places on record that this submission and its recommendations were solicited through organised community engagements that took place starting with a round table discussion in December 2023. Approximatey 60 people attended. In January 2023, LHR conducted 6 community consultations. We conducted community engagements in Musina and Durban and in Gauteng. We collaborated with the Consortium of Refugees and Asylum Seekers in South Africa [CoRMSA] in one such consultation, and we had more focussed engagement with young people and representation of children – representing vulnerable children and youth. We also had an online engagement with Community Based Organisations, faith based organisations, NGOs and representation by Chapter Nine Institution . Last but not least we had a consultion with the LGBTQI+ sector representing queer migrants, refugees and asylum seekers in South Africa. Critical to this engagement was the production of a Training Resource booklet on the White Paper. One of the key objectives of the Training Booklet as stated is to contribute to "strengthening our democracy: Ensuring that we create an enabling environment for public participation by those directly affected. This is a vital component of a successful democracy. It is also intended to build capacity to influence the formulation of policies, and in this way strengthen community capacity to to hold government accountable."

10. Many of the issues raised in this submission have been published by LHR in various reports, submissions, direct communication with the DHA and in court papers, some of which are referenced in the submission. More especially, LHR (with the Legal Resources Centre) made an extensive submission on the Green Paper on International Migration in South Africa, 2016,[3] a copy of which is attached to this submission. We direct the DHA to these submissions and incorporate their contents by reference to them.

11. We kindly request that you acknowledge receipt of our submissions and make ourselves available should the DHA require any further engagement on the issues set out in our submissions.

[2] https://www.gov.za/sites/default/files/gcis_document/202101/national-policy-development-framework-2020.pdf

[3] https://scalabrini.org.za/wp-content/uploads/2019/05/FINAL-Green-Paper-Submission-Lawyers-for-Human-Rights-Centre-for-Child-Law-and-Scalabrini-Centre-of-Cape-Town-30-September-2016.pdf

Yours faithfully,

LAWYERS FOR HUMAN RIGHTS

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31 JANUARY 2024

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INTRODUCTION

1. Lawyers for Human Rights ("LHR") hereby submits comments and recommendations in response to the Department of Home Affairs ("DHA") call for comments on the White Paper on Citizenship, Immigration and Refugee Protection ("White Paper") as advertised in Government Gazette No. 49661 on 10 November 2023.

2. LHR welcomes the opportunity to make these submissions and to engage with issues that pertain to the citizenship and migration framework, with a particular focus on the rights of stateless and undocumented persons, asylum seekers, refugees and immigration detainees.

PUBLIC CONSULTATION AND PARTICIPATION

3. LHR is a non-governmental, non-profit organisation that provides legal advice, assistance, and representation to poor, marginalised, and vulnerable individuals and communities within South Africa and the African region. At its core, LHR's mandate is to support the deepening of democracy and the entrenchment in society of core constitutional values including equality, non-discrimination, and respect for the human dignity, as well as to promote the realization of economic, social, and cultural rights for all. This is critical to the development of a culture where human rights and social justice thrive, and where access to justice is guaranteed to all.

4. LHR employs a holistic approach to social justice and human rights enforcement that includes strategic litigation, advocacy aimed at bolstering public awareness, law and policy reform, human rights education, and community mobilisation and support.

5. In recognition that LHR's mandate comes from the people we represent and our partners and stakeholders, LHR hosted a number of public information sessions and community consultations throughout Johannesburg, Pretoria, Durban, Musina and Cape Town to consult with affected persons and to empower them to make their own submissions on the White Paper. Participants included local community members (both South African and migrant community members), practitioners, academics, and representatives from international, regional and national civil society organisations. LHR further conducted a children and youth-focused consultation to gather insights from children, young people, and their parents that are reflected in this submission.

6. The South African Constitution was inspired by a particular vision of a non-racial and democratic society in which government is based on the will of the people. Public participation is a vital part of participatory democracy and the law-making process. The Constitutional Court in *Iron Stee*l stated that:

"*Public participation standards must be consistent with constitutional prescripts and legal requirements which include informing, education, and creating meaningful*

opportunities for the public to participate in decision making on issues that affect them. "[1]

7. It is LHR's submission that the current public participation process does not accord with this standard for various reasons:

   a. DHA published the White Paper for comment on 10 November 2023 with the deadline for submission initially being 19 January 2024. LHR submitted correspondence to the DHA requesting an extension, given that a significant portion of the time provided for submission was over the festive period. Despite numerous follow-ups, LHR did not receive a response.

   b. On 9 January 2024 the deadline for submissions were extended to 31 January 2024. We submit that this is still not sufficient time afforded for public consultations as prescribed by the Constitution and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). This unrealistic deadline is also largely problematic given that the White Paper has been in development for years and public participants cannot be afforded a proportionate amount of time to make submissions.

   c. DHA has conducted public provincial consultations, however, invitations and information on these consultations was not easily accessible. Furthermore, none of these consultations involved children and youth, whose rights are also implicated by the proposals in the White Paper. It is trite to note that child participation is one of the four cardinal principles of children's rights. Children have the right to actively participate in decisions, processes, programmes, and policies that affect their lives. The DHA has failed to ensure this consultative process takes place.

   d. DHA has failed to provide sufficient details of its proposals and the intended changes to the law to enable affected persons to respond in a meaningful manner. The White Paper includes numerous vague references and broad terms such as "other naturalisation sections must be reviewed", with no clear indication of which sections of the law will be reviewed and to what extent they will be reviewed.

8. To add to the above, in *Doctors for Life*, the Constitutional Court set out the relevant factors to be considered in determining whether public participation is meaningful and reasonable:

   "*The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement...What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to*

[1] *South African Iron And Steel Institute V Speaker Of The National Assembly 2023 (10) BCLR 1232 (CC) Para 30.*

participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of of the opportunities provided".[2]

9. The "intensity" of the White Paper, and its numerous implications on the human rights and dignity of all who live in South Africa, necessitated a meaningful and reasonable public participation process.

10. Notwithstanding this, we are confident that despite the limited time frame afforded to those wishing to make submissions, the recommendations in this submission reflect many of the concerns and feelings expressed in this consultation process about the White Paper.

A NOTE ABOUT LANGUAGE

11. LHR notes the misuse of the term of 'illegal foreigner' throughout the White Paper. For purposes of this Submission, unless a person or persons fall within the definition of 'asylum seeker' or 'refugee' outlined above, the term 'migrant' or 'migrants' will be used generally to refer to persons who are not citizens or nationals of South Africa. The term 'illegal foreigner' as defined in the Immigration Act 13 of 2002 ("Immigration Act") will only be used to accurately quote the term in the Immigration Act.

12. The term 'illegal foreigner' is problematic for a variety of reasons, most especially because it dehumanises migrants and assumes that any person could be 'illegal.' It also carries the connotation of criminality. A person cannot be 'illegal' and even more so, they cannot be "illegal" because they are not documented in terms of a country's immigration laws. It is also highly inflammatory in the context of a country that has experienced repeated violent xenophobic attacks. An 'illegal foreigner' should not be confused with an undocumented person who does not have government issued proof of identification that regulates their presence in the country. Being undocumented does not automatically imply that an individual is an 'illegal foreigner' who can be detained and deported from the country.

[2] *Doctors For Life International V Speaker Of The National Assembly* 2006 (6) SA 416 (CC) Paras 115, 128 And 129.

GENERAL COMMENTS ON THE WHITE PAPER

13. Many of the issues raised in this submission have been published by LHR in various reports, submissions, direct communication with the DHA and in court papers.[3] Notwithstanding issues raised in previous publications and submissions, LHR notes the following general concerns regarding this White Paper set out below.

14. As a general note, LHR wishes to express disappointment at the lack of readability of the White Paper. The White Paper does not read coherently, nor does it provide credible assertions for the statements it makes or the statistics it provides. As a public policy document, this is unacceptable.

15. LHR understands the many challenges of managing immigration and migration such as different visas; refugee and asylum seekers; undocumented workers; stateless persons; undocumented persons, including children and youth and other adults. We would however like to see a South African policy that is grounded in the core principles of the South African Constitution; that of respect and protection of human rights and dignity rather than one that has a starting point of illegality.

16. While we acknowledge these challenges, the White Paper does not fully address the cause of such challenges, nor does it fully unpack the link between those challenges and the proposed solutions which ought to be considered based on evidence that does not appear on the paper itself.

17. We believe this proposed policy shift falls short of what is needed to manage the challenges facing South Africa and also falls short of the constitutional principles and standards recorded throughout our jurisprudence.

18. Similarly, and related to this, the White Paper posits that the problems being faced by the DHA is due to disharmonisation between the citizenship, refugee and immigration legal and policy frameworks. However, LHR submits that it is an issue of

[3] See For Example *Civil Society Submission On The Right Of Every Child To Acquire A Nationality Under Article 7 Of CRC* available at https://files.institutesi.org/crc_southafrica_2015.pdf; *Submission To The Department Of Justice And Constitutional Development on SA's Third Country Report Under The International Convention Against Torture* available at https://www.lhr.org.za/lhr-resources/submission-to-the-department-of-justice-and-constitutional-development-on-sas-third-country-report-under-the-international-convention-against-torture/; *Submission To The Special Rapporteur On The Human Rights Of Migrants For The Report To The 53rd Session Of The Human Rights Council* Available At Https://Www.Lhr.Org.Za/Lhr-Resources/Submission-To-The-Special-Rapporteur-On-The-Human-Rights-Of-Migrants-For-The-Report-To-The-53rd-Session-Of-The-Human-Rights-Council/ ("Submission To SR On Migrants"); *Submission To The Special Rapporteur On Refugees, Asylum Seekers, Internally Displaced Persons And Migrants In Africa: Study On African Responses To Migration And The Guiding Principles On The Human Rights Of All Migrants* ("Submission On SR On Migrants Study On Human Rights In Africa") available at https://www.lhr.org.za/lhr-resources/submission-to-the-special-rapporteur-on-refugees-asylum-seekers-internally-displaced-persons-and-migrants-in-africa-study-on-african-responses-to-migration-and-the-guiding-principles-on-the-human-r/; *Lawyers For Human Rights v Minister Of Home Affairs* 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC); *Chisuse v Director-General, Department Of Home Affairs* 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC); *Centre For Child Law v Director General: Department Of Home Affairs* 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC); *Ex Parte Minister Of Home Affairs And Another In Re Minister Of Home Affairs v Lawyers For Human Rights*; *DGLR V Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13; *Minister of Home Affairs v Ali* (1289/17)[2018] ZASCA 169; 2019 (2) SA 396 (SCA); *Jose v The Minister of Home Affairs* (38981/17) [2019] ZAGPPHC 88; 2019(4) SA 597 (GP).

implementation of rather than the content of the existing legal and policy framework – something that the Minister of Home Affairs acknowledges in the opening statement to the White Paper. LHR proposes that the White Paper be withdrawn in its entirety and that the DHA concentrate its energy and resources into resolving the implementation issues currently faced by the DHA.

19. LHR welcomes the initial framing of the policy within principles of Pan Africanism and further recognises "that South Africa, as the largest host of migrants on the continent, has a key role to play in the African Commission on Human and Peoples Rights' objective to protect and realise the rights of migrants in South Africa."[4]

20. There is a need to ensure that all children in South Africa, including migrant children and South African children, are not trapped in a quagmire of statelessness with no access to social support and few opportunities to advance when they turn eighteen. Statelessness has been rightly defined as "the antithesis to the best interests of the child" and the most acute human rights violation. Although the South African Constitution and other domestic laws provide legal protection and guarantee the right to a name and nationality at birth, in practice these basic rights to citizenship and an identity are denied to many children in South Africa. LHR and other civil society organisations have found some relief for our clients in the courts, but we recognise that the National Government, led by the DHA must take the lead on ensuring that children's rights are promoted and protected. We write more specifically about children and youth below and highlight the gaps in the White Paper.

21. Special permit schemes for economic migrants from Zimbabwe and Lesotho are being rolled back or cancelled seemingly due to pressure from political parties with harder policies on immigration. The African National Congress ("ANC") has proposed tightening immigration policies such as removing citizenship through marriage and keeping RROs close to the border to discourage migrants moving into cities.[5] The DHA has also increased the militarisation of the border through the Border Management Authority, which oversees armed patrolling border guards. During the month of December 2023, the Border Management Authority reported that it stopped nearly 44,000 people trying to enter South Africa "illegally" and its border guards arrested over 2,000 migrants.[6] It failed to publish how many of those arrested were children, and if so, how they were protected.

22. One of the most concerning aspects of the draft White Paper is the stated intent to withdraw from international human rights instruments that alongside domestic law frames the spectrum of rights that should be afforded to migrants. The White Paper sets out an intent to implement the proposed measures that are directly taken from the unpublished 2022 ANC Policy Discussion Paper. Specifically, this paper calls for

[4] See Submission To SR On Migrants (Note 3). See Also Statista "Number of international migrants in Africa as of 2020, by country" available at https://www.statista.com/statistics/1237618/international-migrants-in-africa-by-country/ (accessed 31 january 2024).
[5] African National Congress "55th National Conference Resolutions – Peace And Stability" available at https://www.anc1912.org.za/wp-content/uploads/2023/02/anc-55th-conference-resolutions-peace-stability.pdf.
[6] eNCA "Holiday Traffic | Security Beefed Up At Beitbridge Border Post" 3 January 2024 available at https://www.enca.com/top-stories/holiday-traffic-security-beefed-beitbridge-border-post

South Africa to withdraw from the 1951 United Nations Convention relating to the Status of Refugees ("1951 Convention") and the 1967 Protocol relating to the Status of Refugees. LHR has noted in a previous submission that the "proposed withdrawal from the Refugee Convention…directly contradict the doctrine of non-retrogression in international human rights law."[7] The White Paper is also silent on what reservations it would make to the Convention, nor does it provide what protections and/or measures will be in place to protect asylum seekers awaiting adjudication and refugees that have been granted refugee status if South Africa withdraws from the 1951 Convention.

23. However, should South Africa seek to withdraw from the 1951 Convention and 1967 Protocol, it must be mindful that it still is obligated to uphold certain similar protections to migrants embedded in international customary law and other international human rights treaties, including the Convention on the Rights of the Child, International Convention on Civil and Political Rights and the United Nations Convention Against Torture. South Africa will not be able to circumvent its obligations.

[7] Submission On SR on Migrants Study on Human Rights in Africa (Note 3).

REFUGEE PROTECTION

24. The White Paper proposes South Africa's withdrawal from the 1951 UN Refugee Convention (and Protocol) and the 1969 OAU Convention, with a view to re-accede with reservations and exceptions that seek to restrict the rights to health care, education, and birth registration. This poses significant risks for refugees and asylum seekers, including stateless refugees, and violates South Africa's own Constitution and other international human rights laws it is bound by, as discussed below.

25. It further violates the principle of non-retrogression under the International Convention on Economic Social and Cultural Rights.

26. Broadly speaking, the White Paper proposes a number of measures that seeks to narrow pathways to regularisation and access to documentation for asylum-seekers and refugees. In addition, it seeks to withdraw the recognition of certain constitutional rights being afforded to migrants, including asylum seekers and refugees.

27. The DHA should consider that any amendment that is contrary to already established constitutional principles and rights afforded in our jurisprudence.

Non-Refoulement

28. The concept of non-refoulement is well established in international law.[8] The White Paper is clearly looking for a way to exempt South Africa from following this well-

[8] *ECtHR, Othman (Abu Qatada) v United Kingdom* 2012, para 235, 258 (8139/09 HCR, *General Comment No. 31: Paragraph 12 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant),* 18th Sess, adopted on 29 March 2004, UN Doc CCPR/C/21/Rev.1/Add. 13, online: < https://www.unhcr.org/media/human-rights-committee-general-comment-31-nature-general-legal-obligation-states-parties > ; *Inter American Convention on Human Rights*, art. 22(8). IACtHRJ, 1969 *IACtHR, Pacheco Tineo Family v. Bolivia* 2013, para 135; *CAT, Njamba and Balikosa v Sweden* 2010 para 9.5 (322/2007); *Human Rights CommitteeJudge v Canada* 2003para 10.3 (829/1998); *ECtHR, Soering v United Kingdom* 1989 para 111 (14038/880*; Human Rights Committee, Kaba v Canada* 2010, para 10.1; CEDAW, *General Recommendation No. 32: paragraph 23 (The gender-related dimensions of refugee status, asylum, nationality, and statelessness of women),* 14 November 2014, UN Doc CEDAW/C/GC/32, online: < https://www.ohchr.org/en/treaty-bodies/cedaw/general-recommendations >; HCR, General Comment No.20, Paragraph 6 (Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies), 44th sess, U.N. Doc. HRI/GEN/1/Rev.1 online: < http://hrlibrary.umn.edu/gencomm/hrcom20.htm> *ECtHR, MSS v Belgium and Greece* 2011 (30696/09) *Human Rights Committee, C v Australia* (900/1999); *ECtHR, Paposhvili v Belgium* 2016 (41738/10) , Advisory Opinion OC-21/14,Paragraph 229 *(Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection)* Inter-American Court of Human Rights (IACrtHR) 19 August 2014 online: <https://www.refworld.org/cases,IACRTHR,54129c854.html> ; *Human Rights Committee, A.H.G. v Canada* 2015 para 10.4(2091/2011); CRC, General Comment No. 6, paragraph 27 and 84 (Treatment of unaccompanied and separated children outside their country of origin) 39th Sess online: < https://www2.ohchr.org/english/bodies/crc/docs/gc6.pdf> ; CAT, General Comment No. 4, Paragraph 13 (General Comment on the implementation of article 3 of the Convention in the context of article 22) 62nd Sess, UN Doc. CAT/C/GC/4 online: < https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf > ; HCR, Paragraph 40 (Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment) 37th sess, UN Doc. A/HCR/37/50 online: < https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session37/Documents/A_HRC_37_50_EN.docx > CAT, General Comment No. 4, Paragraph *22 (General Comment on the implementation of article 3 of the Convention in the context of article 22)* 62nd Sess, UN Doc. CAT/C/GC/4 online: < https://www.ohchr.org/sites/default/files/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf > *; CAT, Seid Mortesa Aemei v Switzerland* (1997), Comm. No. 34/1995.

established principle so that the new policy can move toward exclusion of more migrants. In the *Ruta* case which Cameron J points out that:

"South Africa as a constitutional democracy became a State Party to the 1951 Convention and its 1967 Protocol when it acceded to both of them on 12 January 1996 – which it did without reservation. In doing so, South Africa embraced the principle of non-refoulement as it has developed since 1951. The principle has been a cornerstone of the international law regime on refugees. It has also become a deeply lodged part of customary international law and is considered part of international human rights law."[9]

29. The attempt by the DHA to argue that it is South Africa's obligations under the Convention that creates the unfair burden to protect refugees from refoulement to countries where their lives and safety would be under threat fails here. Even if South Africa withdraws from the Convention our obligations under well-established international law binds us to adhere to these existing international human rights norms.

30. The White Paper fails to offer a proposal that accepts South Africa's obligations under established international law regarding non-refoulement. Instead the DHA merely states some of the obligations South Africa has under the 1951 Convention and notes that "the principle of non-refoulement is firmly embedded in refugee protection laws in South Africa." Given the stated intent to withdraw from the Convention and the intent to repeal and redraft the refugee legislation, the DHA does not instil confidence that it will provide mechanisms in the envisioned new legislation that will make the DHA fully compliant with domestic and international law. More specific detail of the intention of the DHA is needed in this regard.

31. South Africa is a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In LHR's response to the call for input on the draft of South Africa's third period country report under the international convention against torture and other cruel, inhuman or degrading treatment or punishment, LHR called for the following actions to be taken by the South African government:

    a. "Specify how RSDOs are trained to identify victims of torture and interview them using trauma informed techniques;

    b. Describe the opportunities for timely applications for asylum when newcomer asylum-seekers are fleeing torture;

    c. Explain the safeguarding procedures in place to ensure that arrested undocumented individuals have a chance to express their desire to apply for asylum and are given a chance to do so;

[9] *Ruta v Minister Of Home Affairs* 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) ("Ruta").

d. Explain how law enforcement officers are being trained on the new asylum renewal and application online system to ensure that those with asylum claims pending are not at risk of refoulement."[10]

32. This White Paper does not respond to the concerns raised here. We therefore reiterate our call that the above actions be taken.

Good cause requirement, "first safe country principle", and more frequent use of the cessation of refugee status provisions

33. The White Paper proposes the adoption of the "first safe country principle" and further states that "cessation of refugee status" provisions "must be used much more frequently in order to lessen the burden that comes with recognition of refugees".

34. This reflects South Africa's intention to limit the number of asylum seekers by denying entry to those who have travelled through another country deemed safe by the DHA. However, this approach may conflict with the principle of non-refoulement, a critical obligation under international law, which prohibits a state from deporting or returning asylum seekers, including those who are stateless, to the country they fled due to persecution. There is no general recognised "first safe country principle" in international law, however, among the few states that have adopted the practice, it does not absolve states from ensuring the protection of refugees and the rights they are guaranteed under international law.[11] Unless there is a guarantee of fair asylum procedures in transit countries that are deemed 'safe', denying an asylum seeker entry based on this principle constitutes (indirect) refoulement and a violation of the first sending country's obligations under international law. The White Paper does not address the criteria to be used in deeming a third country "safe" nor does it outline the procedural guarantees DHA will establish to prevent refoulement.

35. The Constitutional Court has recently affirmed the critical importance of non-refoulement in international law, emphasising that deporting a child back to a country they fled not only endangers them but also contravenes their best interests.[12] The White Paper does not mention how DHA intends to ensure the protection of children on the move (including those who are unaccompanied by or have been separated from their parents).

"*The [first safe country] principle goes against the Children's Act (that by its nature includes all children) and the best interests of the child, there could be extenuating circumstances why the children move, and this needs to be considered. The "first safe country principle" does not take this into account*" - a participant from the child and youth-focused consultation hosted by LHR

36. The adoption of the "first safe country principle" and the proposal to use the "cessation of refugee status" provisions more frequently not only create palpable

[10] LHR CAT Submission (Note 3) At P 6.
[11] R Amit. 'The First Country Of Safety Principle In Law' Migration Issue Brief 7 African Centre For Migration And Society 3.
[12] *Scalabrini Centre Of Cape Town v Minister Of Home Affairs* [2023] ZACC 45.

protection risks for asylum seekers, including children, but it may also increase incidences of arbitrary arrests and unlawful detention, thus exacerbating their vulnerability.

Right to education

37. Section 29 of the Constitution expressly provides that everyone has a right to basic and adult basic education without qualification. In *Juma Masjid* the Constitutional Court held that "it is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable."[13]

38. This history of exclusion and discrimination led to the inclusion of education as a right that is freely accessible to all who live in South Africa, citizens and migrants alike. In addition, the Constitution, the enabling legislation regulating education system is the South African Schools Act 84 of 1996 and regulations. Section 5(1) of the Schools Act regulates admission to public schools and holds that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. The non-discrimination theme flows throughout the Schools Act.

39. Section 19 of the Admissions Policy states that this policy should apply equally to learners who are not citizens of the Republic of South Africa and whose parents are in possession of a permit for temporary permanent residence issued by the DHA. This would include asylum-seeker, refugee children and more recently, undocumented learners. The Constitution, alongside its enabling legislation, specifically make provision for the right to basic education and adult basic education in line with its non-discrimination mandate. In *Centre for Child Law (*the *Phakamisa* judgment), the court held that the Department of Basic Education and the Provincial Department were acting unconstitutionally in not permitting children to continue receiving education in public schools purely by reason of the fact that they lack identification documents.[14] Further to this, South Africa has ratified a number of international and regional treaties which uphold the right to education for all children, such as; the Convention on the Rights of the Child, the International Convention on Economic Social and Cultural Rights, the African Charter on Human and People's Rights, and the African Charter on the Rights and Welfare of the Child.

40. The Global Compact on Refugees calls for greater support for refugees from their host countries and aims to strengthen refugees' self-reliance and resilience, enabling them to contribute as much as possible both to their own future and the host society. In this context, the UN has called on higher education institutions (HEIs) to support the implementation of the Compact by playing a proactive role in supporting refugees in their journeys to inclusion and belonging. This approach is consistent with section 29(1) (b) of the Constitution which provides that the state must make access to higher education progressively accessible through reasonable measures.

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[13] *Governing Body Of The Juma Musjid Primary School v Essay N.O.* 2011 (8) BCLR 761 (CC) para 37.

[14] *Centre For Child Law v Minister Of Basic Education [*2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 para 2.

A participant at the children and youth-focused consultation hosted by LHR stated "*We want to finish matric and to pursue degrees in university, but not everyone can afford this, and we cannot apply for NSFAS*"

Right to health care

41. Section 27 of the Constitution guarantees everyone the right to basic health care, affirming that "everyone has the right to have access to health care services, including reproductive health care" and that "no one may be refused emergency medical treatment".

42. The court has reaffirmed that that pregnant and lactating women as well as children under the age of six are entitled to free health care services under section 27.[15]

Right to work

43. In addition to curbing or adding reservation to the rights to education and healthcare, the DHA further proposes that the right to work be restricted. The right to work is considered a basic human right globally through international and regional instruments. It promotes a higher standard of living and informs a person's ability to contribute to the growth and development of a country they consider home. There is dignity in the ability to work and earn a living for oneself.

44. In Watchenuka[16] the court emphasised that "Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights."

Location of Refugee Reception Offices at ports of entry

45. The White Paper proposes that Refugee Reception Offices be located at ports of entry to facilitate immediate assessment of asylum claims.

46. LHR notes this suggestion with concern, especially as there is a significant lack of information regarding the organisation, establishment and management of these Refugee Reception Offices. More specifically, it does not mention how these Refugee Reception Offices will cater to the basic physical, medical and psychological needs of asylum seekers who have fled persecution and are in dire need of their basic needs being met[17] nor does it specify how children and their rights will be protected.

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[15] *Section 27 v The Member Of Executive Council Gauteng Department Of Health & Others* (Unreported Case Number 19304/22).

[16] *Minister Of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA); 2004 (2) BCLR 120 (SCA) Para 25.

[17] In This Regard, We Specifically Refer And Note Our Concerns Listed In Paragraphs 163-177 Of The Joint Submissions By The Legal Resources Centre And Lawyers For Human Rights To The Department Of Home Affairs In Respect Of Green Paper On International Migration In South Africa, 2016, a copy of which is attached to this submission.

47. In addition, there is no mention of oversight and training that will be given to refugee status determination officers or whether refugee appeal bodies will also be located at ports of entry to ensure that refoulement does not occur due to poor decision-making and indiscreet rejections of *bona fide* asylum applications. The poor quality of information gathering and decision-making by refugee status determination officers has been conceded to by the Standing Committee for Refugee Affairs ("SCRA") and the Refugee Appeals Authority of South Africa ("RAASA") before the Portfolio Committee on Home Affairs.[18]

LGBTQIA+ Refugees Fleeing Persecution

48. The White Paper is unfortunately silent on the specific vulnerability of LGBTQIA+ people fleeing persecution and how they will be protected within the envisioned new legal framework. South Africa has some of the most progressive laws and policies offering protection of LGBTQIA+ people against persecution based on their sexual orientation. We note that South Africa adopted the first Constitution in the world to guarantee gay and lesbian rights.

49. Currently most countries in Africa criminalise homosexual relationships. In some countries the penalty is life in prison (Tanzania, Zambia, and Sudan). Four countries have made homosexual relations a capital crime (Somalia, Uganda, Nigeria, and Mauritania). Facing such risks in their home countries some LGBTQIA+ people often look to South Africa as a beacon of hope.

50. More recently, in 2023, Uganda President passed the Anti-Homosexuality Bill 2023. The Act criminalises same-sex conduct between consenting adults and has retained the death penalty in cases of "aggravated homosexuality". The consequences of this Act for people with diverse sexual orientations, gender identities, expressions, and sex characteristics ("SOGIESC") are dire as people with diverse SOGIESC may need to flee for safety and thus, being displaced.

51. Transgender people face additional challenges of having the correct gender assignment in their identity documents. When they flee their countries and arrive in South Africa, they often face discrimination when their physical presentation does not match the gender description in their identity documents. LHR and Gender Dynamix partnered in a campaign that highlighted the challenges transgender people face when seeking asylum in South Africa - #BreakingBorders&Binaries. One such case study highlighted below illustrates some of these challenges.

52. "Flavirina is a 41-year-old transgender woman from Burundi. She came to South Africa to seek asylum since her country criminalizes trans and gender diverse persons. She left her home country for Cape Town. She struggled to get asylum status and was assisted by different non-governmental organisations. She recalls the process as she highlights the problems of legal gender recognition that is not extended to refugees

[18] Portfolio Committee On Home Affairs "Briefing To The Portfolio Committee On Home Affairs By The Standing Committee For Refugee Affairs And Refugee Appeals Authority Of South Africa On Their Work And Challenges In Dealing With Refugees And Asylum Seekers In South Africa" 2 March 2021, available at https://pmg.org.za/committee-meeting/32404/

and asylum seekers in South Africa. This is creating complications for her especially in accessing gender affirming health care. She further stresses the idolization of South Africa as a "beacon of hope" by transgender persons in Africa. However, upon arrival her idolization of this country started to fade away as she started to be a victim of both transphobia and xenophobia. She further exposes various challenges and derogatory slurs that she has encountered on the streets of Cape Town. Flalvarina received asylum status, but she sheds light on the challenges she encountered making numerous calls, standing in lengthy lines to only be misgendered in the DHA office. Flavarina also highlights the struggle of getting legal gender recognition."[19]

53. The draft White Paper fails to acknowledge any of the challenges transgender people face in attempting to be recognised as refugees and to be afforded the legal protections they are entitled to. In her journey to obtaining asylum in South Africa Flavarina was told that the Alteration of Sex Description and Sex Status Act 49 of 2003 does not apply to foreigners. This was not accurate information and likely communicated to dissuade Flavarina from pursuing her application for asylum.

54. In the current legal framework, people with diverse SOGIESC face a number of challenges navigating life and the asylum system in South Africa. This is captured in LHR's report Paper Promises: an audit of the SA forced migration framework and its impact on women and the #BreakingBorders&Binaries media project which captured how the deep-rooted transphobia and xenophobia in the refugee status determination process results in transgender refugees navigating the country undocumented and at risk of detention.

55. In light of the above, we submit that failing to address the vulnerabilities faced by people with diverse SOGIESC in legislation or policy, or maintaining silence on these matters, inadvertently paves the way for the perpetuation of systematic queerphobia. This would also undermine the fundamental principles of human rights rights protections which we view as imperative and integral to the processes of the DHA. It is imperative that these vulnerabilities and other possible challenges are diligently regulated to ensure a fair and just system.

56. We note that regulating vulnerabilities specific to people with diverse SOGIESC would establish the necessary guidance for immigration officers in effectively catering to the distinct needs of the community including in the process of arrest and detention. It would further tackle issues surrounding "incongruent" gender markers on documentation, establishing ethical and dignified best practices within the DHA processes amongst other key issues that LHR has identified in working with asylum seekers who have lodged applications based on their SOGIESC.

57. It is crucial to highlight that any withdrawal or curbing of international rights for this particular group exacerbates their marginalisation. Stripping away these rights will expose them to heightened xenophobia and queerphobia, leaving them vulnerable to arrest, detention, abuse, and harassment. We submit that such actions stand in direct

[19] https://www.genderdynamix.org.za/breaking-borders-and-binaries-media-campaign

contravention to the principles of ubuntu, upon which the constitutional dispensation of South Africa is founded.

The Impact of Corruption on Proper Implementation of Law

58. Corruption in South Africa seemingly permeates all sectors of society including government. The impact of corruption is widely reported on in the press and the Zondo Commission further illuminated some of the extraordinary damage that state capture and other forms of corruption has done to the ability of state institutions to carry out their mandates to serve the South African public.[20]

59. Likewise, corruption in the border control systems, and amongst DHA officials impacts on the efficient, unbiased, and fair management of asylum seekers and refugees.

60. LHR acknowledges that the White Paper addresses the presence of corruption within the DHA. However, the solution is primarily focused on the "illegality" of migrants rather than on addressing the range of systemic failures that make a corrupt environment thrive.

61. In a recent New York Times article, the authors note that in Limpopo:

"*Musina, surrounded by farms and a copper mine, is where the government's muscular immigration policy collides with a tricky reality that many South Africans loath to concede that even people who cross the border illegally may be good for the country.*

Without them, "Musina is going to be a big ghost town," said Jan-Pierre Vivier, a South African who, with his family, owns a butcher shop that relies on migrant customers."[21]

62. The DHA should have a policy that takes into consideration the full range of migrant experiences. The current White Paper does not do this. Instead, through the establishment of a special tribunal, it seeks to criminalise migrants and empower a small contingent of law enforcement agents to hunt, harass, and detain migrants.

63. The Lubisi Report[22] was submitted to the Minister of Home Affairs in 2022. This extensive report documented a plethora of challenges with the system of issuing temporary and permanent residence visas. The report dedicated significant attention to corruption within the DHA, relying on analysed data from DHA files and reports from whistleblowers.

64. The Lubisi Report found that the DHA operates with inadequate systems, communication and integration that is largely driven by budget constraints, the different business units within the DHA operate in "people silos" which results in

[20] Judicial Commission Of Enquiry Into State Capture "State Capture Reports" available at https://www.statecapture.org.za/site/information/reports
[21] Lynsey Chutel And John Eligon "A Thriving Border Town Undercuts South Africa's Anti-Immigrant Mood" *New York Times* 24 December 2023 available at https://www.nytimes.com/2023/12/24/world/africa/south-africa-migrants-zimbabwe.html.
[22] Ministry Of Home Affairs "Report Of The Review By The Ministerial Committee On The Issuance Of Permits And Visas" 10 June 2022 available at https://static.pmg.org.za/review-issuance_of_visas_permits.pdf ("Lubisi Report").

information not being shared during phases of visa review resulting in delays, and also leaving open opportunities for corruption; outdated systems and methodologies used for data collection; information security risks in this area the report noted that key appointments had not been mad, poor policies and procedures, lack of security patches and updated software; poor user rights assignments.[23]

65. Looming over all the systems challenges within the DHA is the ongoing rot of corruption. The report notes "[t]he Committee has made some daunting discoveries, in which it has noted evidence of irregular and fraudulent conduct by department officials and external parties, who exploit loopholes in the DHA systems and thereby circumvent [] South Africa's immigration laws."[24]

66. The White Paper does not adequately address the crises of corruption within the DHA and does not present evidence that creating a more restricted environment and mechanisms to detain migrants at the borders will solve this crisis. Furthermore, the DHA gives no indication of budgets that would be needed to implement this proposed new policy shift and how that budget will be used to address the systemic challenges and corruption as presented to the Minister in the Lubisi report.

Access to Services and Systemic Xenophobia

67. The closure of the RROs and the digitization era is a form of systematic xenophobia when one considers who the face of this system is. Refugees and asylum seekers can barely navigate this system without assistance because of its difficulty, language barriers and lack of access to technology that it requires.

68. Refugees and asylum-seekers are one of the most vulnerable groups in South Africa because xenophobia shows itself in many forms in South Africa; scapegoating by politicians, pitting of citizens against non-nationals, denial of access to services and the DHA failing at its domestic and international duty as the custodians of the asylum protection system.

69. Possessing valid documents enables the holder to access education, healthcare, and other services. Since the introduction of the COVID-19 watermarked permits, the holders face new challenges.

70. Public hospitals do not trust the authenticity of the online permits. At Steve Biko Academic hospital the administrators engaged with the Desmond Tutu RRO and requested additional verification of the asylum and refugee documents. The hospital requested that asylum seekers and refugees go back to the RRO and obtain a stamp and a signature before they can access healthcare services, and the DTRRO agreed. This additional burden clearly limits the right to access healthcare. As of February 2024, the face of this document will change yet again and will undoubtedly have the holders under constant doubt and scrutiny yet again.

[23] Ibid At Page 135-6.
[24] Ibid At Page 134.

71. Further, the South African Social Security Agency ("SASSA") indicated a mistrust of these online issued documents. They too, limited access to social services because of their lack of understanding of these documents. Many refugees had their grants cut off or not approved when they presented these COVID19 permits. Some had their documents torn up by SASSA staff who did not trust the validity of the documents. LHR was compelled to call a meeting with SASSA national office management to resolve the issue. This action ought to have been prevented by the DHA properly engaging with various government departments to introduce the new permits and assure government and other stakeholders of their authenticity.

72. We have further noted that the Gauteng Department of Education grade 1 and grade 8 online applications are linked to the DHA system to allow verification of documents submitted online. To the extent that it is reasonably practical to do so, we would propose a similar system is implemented in hospitals and other service providers to enable delivery of services to holders of these documents. With the current xenophobic climate in the country, it is the DHA's duty to intervene. The request for verification using an email address that is included on Asylum Seeker permits is another opportunity for abuse and corruption, where bribes are solicited in return for documents to be verified.

73. In recent years, lack of resources, corruption, and institutional xenophobia within the DHA and other government agencies interacting with migrants has created major backlog and delays for services, resulting in widespread systematic human rights violations. We refer to the statement by Special Rapporteurs:[25] that was issued on the 15th January 2022: *The UN experts observed that discrimination against foreign nationals in South Africa has been institutionalised both in government policy and broader South African society. This had led to violations of the right to life and physical integrity and rights to an adequate standard of living and to the highest attainable standard of health, as well as elevated risks of arbitrary detention, torture and refoulement, they said*[26]. Over 95% of asylum applications are initially rejected by the DHA, requiring asylum seekers to institute appeals and deal with a host of access issues in the meantime as they are denied assistance at hospitals, schools, and from social assistance agencies.[27] LHR has seen clients whose asylum applications remain in process for decades before they even have an appeal date scheduled.

74. The White Paper does little to address the crises of institutional xenophobia within DHA. The offered solution of aligning the Border Management Authority with the proposed new legislative framework will only serve to deepen the perceptions of migrants as criminals and feed into the already high levels of xenophobia in South Africa.

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[25] Ms E. Tendayi Achiume, Special Rapporteur On Contemporary Forms Of Racism, Racial Discrimination, Xenophobia And Related Intolerance; Mr. Morris Tidball-Binz, Special Rapporteur On Extrajudicial, Summary Or Arbitrary Executions And Mr. Felipe González Morales.

[26] United Nations Human Rights Office Of The High Commissioner "South Africa: UN Experts Condemn Xenophobic Violence And Racial Discrimination Against Foreign Nationals" 15 July 2022 available at https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-condemn-xenophobic-violence-and-racial.

[27] Zoe Postman "96% of Refugee Applications are Refused, Say Lawyers" *Groundup* 8 February 2018 available at https://www.groundup.org.za/article/96-refugee-applications-are-refused-say-lawyers/

The Need for Disaggregated Data

75. The African Union has also recognised that migration is not just an issue of "demographics" and in 2021 released a statement in support of the launch of the Africa Migration Data Network.[28] The purpose of the network is to "strengthen the coordination and sharing of knowledge for the effective production of quality migration statistics in Africa."[29] LHR believes the white paper should at a minimum locate the collection and analysis of disaggregated data within this proposed policy shift. This would assist the South African Government to better understand the diverse needs of different migrant groups, for example refugees, and economic migrants. Within this data further analysis would be available such as gender, age, nationality, legal status, and reasons for migration. This data would also allow for targeted interventions, policies, that speak directly to the specific vulnerabilities and needs of various migrant groups. There is also currently no means to collect disaggregated data on internal movement of people. In contemporary South Africa, the prevalence of internal migration, which is largely labour related, far exceeds that of cross-border movement, with the most recent population census indicating 5% of the population had moved within the country in the 5 years preceding the census, compared with 1% of the population having immigrated from outside of the country's borders.[30]

76. The African Union Agenda 2063 has recognised the reality and positive contribution of free movement of individuals "for inclusive and sustainable development" and have called for improved data on migration.[31] The African Union, for example developed an action plan for 2018-2027 recognising that migration data is "key to mainstreaming migration into policy and planning frameworks and development initiatives, and essential for developing, effective, evidence-based migration policies."[32]

77. The White Paper does not provide disaggregated statistics on impact of immigration on job creation, tax payments, crime and other social challenges and how they relate to migrant populations. These omissions make the proposed policy changes appear to be a distraction away from the failure to properly implement existing laws and instead makes migrants the scapegoats for such failures. Large policy decisions such as this should be supported with sound data that ground the new direction in facts and allow for targeted, evidence-based interventions including budget allocations.

[28] African Union Directorate Of Information And Communition "Press Release: Accurate and Disaggregated Data Critical For Evidence-Based Policies: Launch Of Africa Migration Data Network" 12 May 2021 available at https://au.int/sites/default/files/pressreleases/40337-pr-africa_migration_network_press_release.pdf
[29] Ibid.
[30] C Ginsburg, MA Collinson, D Iturralde, L Van Tonder, FX Gomez-Olive, Et Al. 'Migration And Settlement Change In South Africa: Triangulating Census 2011 With Longitudinal Data From The Agincourt Health And Demographic Surveillance System In The Rural North East.'(2016) 17(1) South Afr J Demogr. 133-198 .
[31] African Union "Strategy For The Harmonisation Of Statistics In Africa (Shasa)" available at https://au.int/en/ea/statistics/shasa.
[32] Ibid.

CITIZENSHIP RIGHTS AND STATELESSNESS

78. The White Paper proposes the repeal of the Citizenship Act 88 of 1995 ("Citizenship Act"), criticising it as a colonial relic and a replica of the 1949 Citizenship Act. It argues that the current law contains loopholes enabling refugees and migrants to acquire citizenship "*prematurely, irregularly, and inappropriately*."

79. South Africa is not a signatory to the UN Convention on the Status of Stateless Persons (1954) and the UN Convention on the Reduction and Prevention of Statelessness (1961) but has pledged to accede to both conventions at the 2011 High-Level Segment on statelessness hosted by the UNHCR. Furthermore, in 2013 the then Deputy Minister of Home Affairs, Ms. Fatima Chohan, issued a statement at the 64th session of the UNHCR executive committee in Geneva, indicating South Africa's intent to "a*dhere to*" the two conventions and committing to South Africa's contribution to "*a world where no peoples are left stateless through the redefinition of political borders or non-registration of children at birth including the repudiation or non-recognition of citizenship of groups of peoples*."[33].

80. Nonetheless, South Africa has ratified a number of other international and regional treaties that protect the right to a nationality and the prevention of stateless. These include; the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of Persons with Disabilities, the African Charter on Human and People's Rights, the African Charter on the Rights and Welfare of the Child; and the Maputo Protocol. Thus, South Africa has already recognized its international duty to prevent statelessness and to protect the rights of those who are stateless.

81. The issue of statelessness is only vaguely referenced in the White Paper. Despite South Africa's lack of a formal mechanism to identify stateless persons, UNHCR estimates indicate that over 10,000 people are stateless in South Africa. This estimate overlaps with an even larger undocumented population of approximately 15 million people,[34] including both South Africans and non-South Africans. Various legal and practical barriers exist in the citizenship, immigration, and asylum frameworks that exacerbate the issue of statelessness and lack of documentation in South Africa.[35]

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[33] Department Of Home Affairs "Statement By H.E. Ms Fatima Chohan, Deputy Minister Of The Department Of Home Affairs, RSA At The UNHCR 64th Session Of The Executive Committee, Geneva - General Debate" 4 October 2013 available at http://www.dha.gov.za/index.php/statements-speeches/291-statement-by-h-e-ms-fatima-chohan-deputy-minister-of-the-department-of-home-affairs-rsa-at-the-unhcr-64th-session-of-the-executive-committee-geneva-general-debate.

[34] The World Bank Data Catalog "Identification For Development (ID4D) Global Dataset" available at https://datacatalog.worldbank.org/search/dataset/0040787.

[35] See Lawyers For Human Rights "Statelessness And Nationality In South Africa" 2013 available at https://citizenshiprightsafrica.org/wp-content/uploads/2013/03/lhr-statelessness-and-nationality-in-south-africa-2013.pdf; Lawyers For Human Rights "Promoting Citizenship And Preventing Statelessness In South Africa: A Practitioner's Guide" 2014 available at https://citizenshiprightsafrica.org/wp-content/uploads/2016/05/lhr_practitionersguide-statelessness_2014.pdf ; and Lawyers For Human Rights "Childhood Statelessness In Souh Africa" 2016 available at https://www.lhr.org.za/archive/publications/childhood-statelessness-south-africa.html

82. The 1995 Citizenship Act, in conjunction with section 3 of the Constitution, guarantees universal and equal citizenship for all South Africans (read together with section 28(1)(a) which guarantees the right to citizenship for all children and section 20 which states that no one may be arbitrarily deprived of their citizenship). Initially, it inclined towards the inclusive, permitting dual citizenship and various exceptions to restore citizenship to those disenfranchised during apartheid. However, since 1995, there has been a slow and steady shift towards restricting access to citizenship through regressive amendments (2004, 2007, 2010), reinforced by unduly restrictive interpretations of the law and a failure to effectively implement the law in practice.[36]

83. South African citizenship law primarily follows the jus sanguinis principle, where children inherit their parents' citizenship, as per Section 2(1) of the Citizenship Act. However, there are conditional exceptions allowing for citizenship based on the jus soli principle (i.e. birth in the country), for instance;

a. Section 2(2) grants citizenship by birth to children born in South Africa and who would otherwise be stateless

b. Section 2(3) allows children born in South Africa to permanent resident parents to obtain citizenship by birth (if they have lived in the country from birth to the age of majority and their birth is registered)

c. Section 4(3) allows children born in South Africa to non-South African parents and non-permanent resident parents to acquire citizenship by naturalisation (if they have lived in the country from birth to the age of majority and their birth is registered)

d. Section 5 enables permanent residents with 5 years of residency to apply for citizenship by naturalisation

84. These provisions recognise the strong connection of those born and raised in South Africa with the country and allows them to formalise this connection through citizenship. Former Minister of Home Affairs', Dr Nkosazana Dlamini-Zuma, acknowledged this by stating that: "If a child grew up and stayed in SA until 18 years old or older and knew no other country, it was only fair to allow that person the opportunity to apply for naturalization and then become a SA citizen". Moreover, these provisions also serve as crucial legal safeguards against childhood statelessness.

85. The White Paper's proposals tend more towards exclusion than inclusion, reflecting the government's intentions to continue "shrinking the state" and to exclude those who do not "belong".[37] We highlight the key concerns below.

[36] C Hobden 'Shrinking South Africa: Hidden Agendas In South African Citizenship Practice' (2020) 47(2) South African Journal Of Polical Studies.
[37] Ibid.

Access to citizenship

86. The White Paper proposes "reviewing" the pathways to citizenship, specifically section 4(3) of the Citizenship Act. DHA claims that the current citizenship law makes it easy for refugees and migrants to gain citizenship, thus necessitating "*more stringent criteria for granting citizenship*".

87. This claim is unsubstantiated and false considering that only 0.2% of the total population has obtained citizenship by naturalisation (the White Paper cites a figure of 150 997 naturalised citizens in a population of 62 million).[38] The claim overlooks the comprehensive parliamentary debates that preceded the adoption of the current law, including safeguards against abuse of process and fraud or misrepresentation that are incorporated in the law. Some of the consideration highlighted during these debates include:

    a. The need to establish "proper processes";

    b. The need to clearly define categories of persons born in South Africa who would be eligible for citizenship; and

    c. The need to not only consider birth in the country, but also continuous residence (i.e. if you have lived in the country from birth until age of majority or if you have held permanent residence status for at least 5 years) in determining eligibility for citizenship. It was argued that this would prevent cases of individuals who enter the country for short periods for the sole purpose of acquiring South African citizenship and its associated benefits.

88. The regressive nature of the White Paper, considering South Africa's history where black South African's were classified as second-class citizens and marginalised, raises several concerns. This is so because LHR's clients represent a particularly vulnerable group of children and young persons who are stateless or at risk of statelessness. Their sole legal pathway to secure documentation and legal status in South Africa lies in Section 2(2), 2(3), or 4(3) of the Citizenship Act. They are children of refugees, asylum seekers, irregular migrants, or stateless persons who were born and raised in South Africa and have no legal and/or social connections to any other country. But they are also the children of other black migrants who were historically excluded from regular immigration processes. The White Paper further entrenches the racist effects of our past. South Africa is their home but cannot forge a meaningful existence for themselves without secure documentation and legal status.

89. The failure to get clarity on the process for citizenship applications or to get their citizenship applications processed within a reasonable time has left them in limbo and

[38] L Landau And R Walker "South Africa's Immigration Proposals Are Based On False Claims And Poor Logic – Experts" 23 November 2023 *The Conversation* available at https://theconversation.com/south-africas-immigration-proposals-are-based-on-false-claims-and-poor-logic-experts-217941.

has severely prejudiced their lives. It has significantly affected their ability to access basic human rights and services including health care, education, social assistance, employment opportunities, freedom of movement and a sense of belonging and identity. [39]

90. The White Paper suggests that DHA has had difficulty in implementing the citizenship (and immigration and refugee) laws because of a lack of harmony between the three pieces of legislation. However, the failure to implement is due to other factors that can be easily remedied and that have been brought to the DHA's attention in various reports, submissions, and engagements. These include the following:

    a. Section 2(2) contains the "otherwise stateless provision". This is a crucial legal safeguard against childhood statelessness that has unfortunately been adopted by only a few states, including South Africa since 1995. However, effective implementation has been lacking as DHA has never established a statelessness or nationality determination process in order to determine eligibility, nor has it promulgated regulations providing an application form or outlining the practical steps applicants must take to access to citizenship. This is despite a court order issued a decade ago, instructing the promulgation of such regulations.[40]

    b. Section 2(3) enables children born in South Africa to parents with permanent residence status, and who have lived in the country from their birth until age of majority, to acquire South African citizenship by birth. Initially, such children would be eligible for citizenship at birth, but the 2010 amendments extended this to age of majority.[41]

    c. Section 4(3) provides for a pathway to citizenship by naturalisation for children born in South Africa to parents who are neither South African citizens nor permanent residents at the time of the child's birth. However, just like with Sections 2(2) and 2(3), the DHA has failed to promulgate regulations providing the practical and administrative steps as well as appropriate forms, that applicants can use to give effect to section 4(3), despite a court order instructing it do so.[42] From 2018 to date, LHR has submitted close to 250 applications, with just over 200 applications still pending. The lack of regulations has led to absolute confusion within the DHA where some offices outright refuse to accept applications, while others state they are" unaware" of the relevant application process to follow in the absence of clear directives from Head Office, and others insist on documentary requirements that are not prescribed by the law. Since DHA has not created an application form or made such forms available in their offices, LHR receives numerous requests for help with affidavits to apply for citizenship. In most instances, clients inform us that they have been referred to LHR by the local offices. Even when they are

[39] This Is Home Campaign available at https://awethu.amandla.mobi/petitions/this-is-home-preventing-statelessness-in-south-africa.
[40] See *DGLR* (Note 3) And *Khoza v Minister Of Home Affairs* [2023] ZAGPPHC 93.
[41] *Mulowayi v Minister Of Home Affairs* 2019 (4) BCLR 496 (CC).
[42] See *Ali* (Note 3) and *Jose* (Note 3).

assisted by other lawyers or attempt to use a police affidavit, they are instructed to get" the LHR affidavit". The confusion is compounded through the Minister's recent assertion in parliament on 7 November 2023, claiming that there are in fact regulations. We view this assertion as legally incorrect. If it is true that the regulations are in force, we contend that the substance of those regulations is unlawful and *ultra vires*.[43]

91. From the above, it is submitted that DHA's failure/refusal to effectively implement the citizenship law is not due to a problem with the law itself, but with the failures of DHA to; comply with court orders, establish clear and transparent policies and procedures to be communicated to local offices, and render effective service delivery to the public. Sections 2(2), 2(3), and 4(3) are crucial legal safeguards against statelessness for children born in South Africa to refugee, migrant, or stateless parents. Imposing stricter criteria for citizenship will increase the risk of statelessness, particularly among vulnerable groups like unaccompanied/separated/orphaned/abandoned children.

Access to birth registration

92. Section 28(1)(a) of the Constitution provides that every child has the right to a name and a nationality from birth. This is not only a constitutional right, but a right that is rooted in international law that South Africa is obligated to follow. The right protects the child and ensure that their birth is registered. This constitutional right applies to every child and is not limited to any particular category of children. Birth registration or the issuance of a birth certificate does not necessarily confer citizenship, however, birth registration is intrinsically linked to citizenship in that the birth certificate is the first form of legal identity a child receives and that contains two critical facts necessary to establish of claim citizenship: their place of birth or parentage. Therefore, a child who is not registered or documented, is at a heightened risk of statelessness.

93. DHA suggests repealing the Birth and Deaths Registration Act (2018). It contends that an interpretation of Section 28 of the Constitution - "*every child has a right to a name and a nationality*" – that encompasses all children born in South Africa, regardless of their parent's legal status, "*stretches the meaning…too wide*". This stance directly contradicts the Constitutional Court, as well as previous recommendations made to South Africa by the UN Human Rights Council, the UN Committee on the Rights of the Child, and the African Committee of Experts on the Rights and Welfare of the Child. It thwarts ambitions to achieve universal birth registration as children born in South Africa, whether South African or non-South African, already face significant barriers to birth registration for various reasons beyond their control.

[43] See Scalabrini Centre Of Cape Town And Others "Comments On The Draft Amendment Regulations On The Citizenship Act 1995" 29 August 2020 available at http://citizenshiprightsafrica.org/wp-content/uploads/2020/08/hobden.-citizenship-regulations-submission.-2020.-public.pdf

94. Some of the common barriers that remain unaddressed include the following:

d. children whose parents are stateless or undocumented themselves, or whose documents have expired or been invalidated (e.g. the blocked IDs)
e. Children who have been directed to provide DNA proof of their citizenship e..g those registered by single fathers or extended family members eg grannies, aunts and uncles
f. Children who have been orphaned or abandoned with little or no information on their place of birth or parentage

95. DHA recently disclosed in parliament that more than 250,000 children under the age of 15 are undocumented and researchers estimate this number to be at least double that. The White Paper fails to address these issues, instead making proposals that will exacerbate statelessness, entrench exclusion, and perpetuate the marginalisation of vulnerable children, including South African children (see LHR submissions on the draft regulations to the BDRA 2018).

Access to documentation and legal status for unaccompanied and separated migrant children

96. DHA neglects to address the crucial gap in the law for documenting unaccompanied migrant children in the care system, who are ineligible for citizenship or refugee status. These children are often placed the care of a child and youth care centre (CYCC) by a Children's Court order, after family tracing and reunification efforts have failed, but are not automatically assigned any form of documentation or legal status. They face a heightened risk of stateless in circumstances where; they have little or no information on their country of birth or origin, their birth was not registered or their birth records were lost in transit, they do not have family in their country of birth or origin to confirm their identity, they often live in the CYCCs until they "age out" but their long stay in the country also causes them to lose any links with their country of birth or origin. South Africa has been urged by civil society and treaty bodies to consider a special dispensation for this category of children, a need that remains unaddressed in the White Paper.

"*Children on the move are crossing international borders alone or arriving without documentation being born in the country and the currently the system also for international protection changing the law will not stop them moving, but rather should find effective ways of ensuring their rights are protected based on the best interests and the Children's Act.*" - a participant at the children and youth-focused consultation hosted by LHR

97. The only route such children have to obtain a legal status and documentation is through **section 31(2)(b) of the Immigration Act,** under which they rely upon the Minister's discretion. It is a complicated application that requires a lawyer and an application fee of at least R1 500,00 (VFS fee). This status is not widely applied and

even when it is, only provides permanent residence and not citizenship. Those who obtain permanent residence may be able to apply for citizenship after 5 years but remain stateless until then. This White Paper does not offer a solution to the crises of stateless children and youth falling into this category in South Africa.[44]

98. There is an acute need to develop a strategy around the regularisation of such children as they will grow up to be (or are already) stateless. Once they become adults they will be classified as illegal immigrants who are impossible to deport which will contribute to the amount of people unaccounted for in the country. These children also face barriers to schooling and health care services because of the lack of documentation and immigration status contrary to their constitutional rights.

"*Children and youth should automatically be documented with a special children's permit to ensure their rights that are protected and then it should be determined which process either citizenship or naturalization. South African children, foundlings are also at risk if their birth is no registered and could have their rights violated*." - a participant from the children and youth-focused consultation hosted by LHR

99. In 2016, the UN Committee on the Rights of the Child recommended that: "*South Africa should systematically identify all undocumented children currently residing in the Child and Youth Care Centres (CYCC) in the all parts of the State Party and ensure their access to birth certificates and their nationalities...South Africa should consider providing migrant children with the permanent settlement in the country to avoid deportation of children*.[45]" The White Paper should include measures towards the implementation of this recommendation.

Administrative justice and arbitrary deprivation of nationality

100. LHR notes the recent court decision that found the practice of 'ID blocking" by the DHA to be unconstitutional. LHR welcomed the judgement of the Pretoria High Court which will bring relief to millions of people in South Africa. In the past five years, LHR has assisted over 500 people with blocked IDs – with the majority being marginalised, black South Africans. None were aware of their blocked IDs until they attempted to access another service e.g. applying for passports or new IDs, renewing driver's licenses, opening bank accounts, or applying for social grants. None received prior notice of the DHA's intention to block their IDs or investigate their status, nor written reasons for the decision to block. Furthermore, none were given an opportunity to make representations before their ID was blocked, or before the finalisation of the

[44] Ibid.
[45] UN Committee On The Rights Of The Child "CRC/C/ZAF/CO/2: Concluding Observations On The Second Periodic Report Of South Africa" 27 October 2016 available at https://www.ohchr.org/en/documents/concluding-observations/crcczafco2-concluding-observations-second-periodic-report-south.

investigation. ID blocking can result in statelessness as it effectively strips affected individuals of their citizenship and dignity.[46]

101. The court highlighted that in blocking IDs in the manner it did, the DHA "ignored the jurisprudential value of ubuntu". The court ordered the DHA to put in place a just and fair process that is in line with the Constitution and the Promotion of Administrative Justice Act (PAJA). The court added that "while the passive violation of human rights by a State that fails to take steps to promote and advance human rights is unacceptable in a constitutional dispensation, the active violation of human rights by a State that infringes constitutionally entrenched human rights violates public trust in the institution of the State and undermines the Constitution".[47]

102. LHR represented 100 applicants in this matter and contended that DHA's ID blocking practice reflects a contempt for people, and a process that undermines the sanctity of the Constitution. The DHA claimed that ID blocking is an "administrative tool" used to maintain the accuracy and integrity of the National Population Register but could point to no fair and legal administrative process for the use of this "tool" . The "block" occurs when a marker is placed against an ID number, either indicating that it is tainted by an administrative or clerical error, or by suspected fraud or misrepresentation.

103. This case illustrates the failure of the DHA to fashion appropriate administrative solutions to just one of the challenges of citizen and migrant registration in South Africa. LHR has documented hundreds of case studies, over more than a decade, of people living in South Africa without any recognised nationality. With each case there is an underlying feeling of hopelessness and despair.[48] With this draft White Paper the DHA offers no concrete solutions.

104. On 20 June 2018, Lawyers for Human Rights published a letter addressed to the President to mark World Refugee Day[49]. In that letter the following was stated: *The department is in crisis, operating in flagrant disregard of constitutional values, cripplingly inefficient and poorly managed, with reports of widespread bribery and corruption. There is no complaints mechanism or transparency and a total disregard of the Batho Pele principles.*

105. Almost six years later this case reflects the maladministration and failure to provide services by DHA. It speaks to the lack of transparency, accountability, and what appears to be ad hoc/arbitrary decision making as illustrated by the shoddiness of this White Paper.

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[46] *PP Mazibuko V Minister Of Home Affairs* (Case Number 14238/21) available at https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2024/01/f-142382021-mazibuko-pp-ea-vs-min-of-home-affairs-j-1.pdf

[47] Ibid.

[48] See Note 38.

[49] Lawyers For Human Rights "Open Letter To President Ramaphosa On World Refugee Day" 20 June 2018 *Mail & Guardian* available at https://mg.co.za/article/2018-06-20-00-open-letter-to-president-ramaphosa-on-world-refugee-day/

IMMIGRATION

The term 'Illegal foreigners' and the use of statistics in the White Papers

106. As stated above, the White Paper incorrectly uses the term 'illegal foreigner' or the word 'illegal' to describe migrants throughout. 'Illegal foreigner' is a term as defined in the Immigration Act and as such should not be in any context other than that, if at all. In accordance with international best practices, the DHA should consider removing the word 'illegal' from its legislative and policy framework when referring to people. According to the IOM, illegal "*carries a criminal connotation, is against migrants' dignity and undermines the respect of the human rights of migrants. Migrants, as any human beings, can never be illegal; they can be in an irregular situation, but it is inaccurate to refer to a person as "illegal"*.[50]

107. In addition, and linked to this, the White Paper uses the language of "tracking down illegal foreigners", which is inflammatory and will serve as fuel to the existing environment of vigilantism and xenophobic witch hunts. This language has no place in policy documents that should be framed to promote the human rights and dignity of all who live in South Africa and of vulnerable people in particular.

108. The White Paper also does not use statistics accurately or clearly. Firstly, the White Paper does not acknowledge the recent Census 2022[51] which indicates that there are approximately 2,4 million international migrants – persons born out of South Africa – living inside South Africa, which equates to only just above 3% of the total population. Statistics South Africa produced a special report in August 2021 entitled: *Erroneous reporting of undocumented migrants in SA* [52] It provides statics to counter the narrative that South Africa is "flooded with increasing numbers of migrants". It stated that: *The number of those born outside SA were 958 188 in Census 1996, 1,03 million in Census 2001 and 2,2 million in Census 2011. It is important to note that the population census enumerates all persons within the borders of SA, irrespective of their citizenship, or migratory status.*

109. Secondly, the White Paper notes that 15 000 – 20 000 people are deported every year. This figure should be interrogated against the Minister's responses to Parliamentary questions posed regarding deportations: in November 2023, the response to the question as to how many people have been deported since the Constitutional Court judgement in *Lawyers for Human Rights and the Minister of Home Affairs*[53] was 139 269[54] and the response to a separate question in December 2023 was that "22 560 illegal foreigners were deported since 1 April 2022". Later in December 2023, the

[50] IOM UN Migration "Glossary On Migration" 2019 Available At *Https://Publications.Iom.Int/System/Files/Pdf/Iml_34_Glossary.Pdf*
[51] Stats SA "Census 2022" available at https://www.gov.za/about-sa/south-africas-people#:~:text=census%202022%20showed%20there%20were,lesotho%20with%2010%2c2%25.
[52] Stats SA "Erroneous Reporting Of Undocumented Migrants In SA" 5 August 2021 available at https://www.statssa.gov.za/?p=14569#:~:text=the%20number%20of%20those%20born,their%20citizenship%2c%20or%20migratory%20status.
[53] *Lawyers For Human Rights* (Note 3).
[54] https://pmg.org.za/committee-question/23997/

Minister responded to a separate question that there were 31 229 persons detained for the purposes of deportation between 29 June 2019 and 30 October 2023 and that 27 823 deportations were confirmed between 29 June 2019 and 30 October 2023.[55] There is a general incoherence to the presentation of these statistics which need to be reconciled.

Proposed secondment of South African Police Services ("SAPS") and increased powers of immigration officers and the Inspectorate - a failure to identify the problems with immigration detention

110. The right to seek asylum is a fundamental human right protected under international law. However, the practice of immigration detention in South Africa has persisted for decades, necessitating a critical examination of its necessity and proportionality. While the White Paper makes recommendations seconding members of SAPS to DHA and increasing the powers of immigration officers and the Inspectorate, it fails to address the abuse of power that is being perpetuated on a daily basis by SAPS and immigration officials, especially in relation to immigration detention.

111. In December 2023, LHR published a report on the Status of Immigration Detention in South Africa.[56] This report delves into recent trends in immigration detention in South Africa, shedding light on its impact on migrants and their interactions with various entities, including the SAPS, the DHA, legal professionals, and government officials.

112. Drawing on both quantitative and qualitative data from the Immigration Detention Hotline at LHR between March and October 2023, supplemented by interviews with 41 individuals, some directly affected by immigration detention, this report offers a comprehensive analysis. Additionally, insights from legal practitioners nationwide who have represented individuals under the Immigration Act contribute to a well-rounded perspective.

113. Despite the legal protections theoretically afforded to migrants in South Africa concerning immigration detention, a stark disparity exists between these protections and the harsh reality faced by migrants within the country. Challenges such as lack of access to documentation, corruption, irregular law implementation, homophobia and xenophobia render migrants – predominantly black African migrants - susceptible to arbitrary arrest and detention based on their documentation status.

114. Numerous arrests, as documented by LHR, are deemed unlawful and indicative of an abuse of power by state officials. Concrete examples underscore the urgent need for reform in the enforcement of immigration laws.

115. The immigration detention system has cultivated a climate of fear within migrant communities in South Africa. Migrants, already enduring challenging experiences

[55] https://pmg.org.za/committee-question/24593/
[56] Lawyers For Human Rights "Status Of Immigration Detention In South Africa" December 2023 available at https://www.lhr.org.za/lhr-resources/status-of-immigration-detention-in-south-africa/

before arriving in the country, find themselves traumatised by a system that fosters a sense of powerlessness and dehumanization. For most migrants, the reality is that the immigration detention system is wielded as a discriminatory and xenophobic tool for officials to exert power over them and extract money from them, regardless of their documentation status.

116. There is an urgent need for reform in the South African immigration detention system. The gap between legal protections on paper and the reality experienced by migrants demands immediate attention to rectify systemic issues, safeguard human rights, and ensure a fair and just immigration process.[57]

117. LHR has noted unlawful detention practices such as prolonged detention periods (including over the legal maximum of 120 days), restricted access to legal representation, a lack of interpreters, corruption and bribery, use of force, limited access to health, food and water, overcrowding, and unsanitary conditions. At Lindela Repatriation Centre, legal practitioners are required to give 48 hours' notice before conducting a legal visit, and sometimes migrants are deported during those 48 hours.[58] In this regard we note with concern that the draft White Paper calls for the use of "members of the Anti-Corruption…seconded from the South African Police Service (SAPS). The rationale being that members of SAPS enjoy wide statutory powers, including *search and arrest without a warrant."(Our emphasis)* The purpose of this proposed secondment is to fight corruption; however, we fear that police with extraordinary authority who are not properly trained, will overstep their mandates and cause additional harm to migrants.

118. LHR has received numerous requests for assistance from clients who are detained at Refugee Reception Offices (which are not designated places) immediately after receiving decisions at the Refugee Reception Offices from the Refugee Appeals Authority or the Standing Committee on Refugee Affairs, as applicable, that their asylums applications were finally rejected. This is contrary to the 180-day window prescribed by Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 in which a failed asylum seeker may launch a review of their rejection at the High Court.

Failure to make constitutionally mandated legislative changes to immigration detention framework

119. The White Paper fails to adequately address the existing legislative gaps in the immigration detention framework as highlighted by the Constitutional Court in *Ex Parte Minister of Home Affairs*[59] clarifying the rights of those detained under section 34(1) of the Immigration Act.

120. On 29 June 2017 the Constitutional Court handed down judgment declaring section 34(1)(b) and (d) of the Immigration Act inconsistent with sections 12(1), 35(1)(d) and 35(2)(d) of the Constitution. The declaration of invalidity was suspended for 24

[57] Ibid.
[58] Ibid.
[59] *Ex Parte Minister Of Home Affairs* (Note 3).

months from the date of the order to enable Parliament to correct the defect. Pending the enactment of legislation, the Court provided interim relief that any persons detained under section 34(1) of the Act was to be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.

121. Parliament failed to meet the 29 June 2019 deadline to enact the corrective legislation. This resulted in confusion and uncertainty in the application of section 34(1) of the Immigration Act – courts took divergent positions on the legal effects of the expiry of the suspension period with some Magistrates' Courts incorrectly applying the 2017 order by requiring detainees to prove the lawfulness of their documentation status while others have been unwilling to confirm detentions beyond 30 days resulting in almost automatic releases from detention. As a result of this some immigration officers have detained detainees beyond 30 days without bringing them before a court; and some Magistrates have been instructed not to handle section 34 applications.

122. The Minister and Director-General of Home Affairs approached the Constitutional Court in July 2022 on an *ex parte* basis seeking a revival of the 2017 Order for a further period of two years. Lawyers for Human Rights, the applicant in the 2017 proceedings, was admitted as an intervening party in these *ex parte* proceedings. The Constitutional Court affirmed LHR's contention that the Court's intervention was required to provide clarity on the proper interpretation of the 2017 Order, especially in light of the inaction and failure by the state to enact remedial legislation. In this regard, the Court ordered the following procedure to operate in instances where someone is detained pending deportation under section 34(1) of the Immigration Act:
    a. an immigration officer must apply the interests of justice criterion when considering the arrest and detention of a person in terms of section 34(1) of the Act;
    b. a detained person shall be brought before a court within 48 hours from the time of arrest;
    c. the court must apply the interests of justice criterion when this person is brought before it;
    d. the court may authorise the further detention of this person if it concludes that the interests of justice do not permit the person's release;
    e. if the further detention of this person is ordered, they must again be brought before the court prior to the expiry of the authorised detention period and the court must again apply the interests of justice criterion at this stage;
    f. the court may then again authorise the further detention of this person, but by no more than 90 days, if it concludes that the interests of justice do not permit the person's release; and
    g. whenever this person is brought before a court, they must be given an opportunity to make representations to the court.

123. Given that these amendments were constitutionally mandated and still stand to be enacted, it is unclear as to why they were not included in the proposed amendments made by the White Paper.

Immigration Courts

124. The White Paper again proposes that immigration courts be established to handle immigration cases. The White Paper notes that when the Immigration Act was enacted, provision was made for the establishment of immigration Courts, which were subsequently removed.

125. What the White Paper fails to highlight is that the establishment of Immigration Courts were contentious from the beginning. In 2002, during deliberations on the then Immigration Bill, the then Department of Justice and Portfolio Committee on Justice were significantly opposed to the adoption of Immigration Courts.[60] The problems identified included:

a. The creation of a new court structure would have resource implications: "*Each time a new court is created, there is the need for court infrastructure, court rooms, personnel, equipment and so forth, all of which is separate from the main court structure*". The Department of Justice did not have resources for this and noted the strain on the fiscus that the establishment of Immigration Courts would entail.

b. The contemplated new court system was not considered to be in line with the Constitution and was contemplated to be separate from the established constitutional judicial system.

126. In 2004, during deliberations on the Immigration Amendment Bill before the Home Affairs Portfolio Committee, it was noted that the Bill removed reference to Immigration Courts with the following reasoning:

> "*The Bill proposed the removal of all reference to immigration courts from the Act. The reason for this was that, as a result of analysis and consultation conducted in conjunction with the Department of Justice and Constitutional Development, the feeling was that these courts served no purpose. They were one of the remnants of the old Immigration Bill which at that stage sought to create a semi-privatised immigration service, as well as special immigration courts. The drafters of the Bill were of the opinion that this served no purpose as the existing court structure was adequate to have jurisdiction over any matter that related to this Act without creating special courts to do so. The only reference to the courts in the Act were now to the Magistrates Court for criminally related immigration matters. In the normal course of things any judicial review of administrative actions would in any case be referred to the High Court*.[61]

[60] Home Affairs Portfolio Committee; Social Services Select Committee: Joint Meeting "Immigration Bill: Briefing By Chairpersons; Public Hearings" 22 April 2002 available at https://pmg.org.za/committee-meeting/1313/.
[61] Home Affairs Portfolio Committee "Immigration Amendment Bill: Briefing Overview" 2 August 2004 available at https://pmg.org.za/committee-meeting/3745/.

127. The sections of the Immigration Act setting out the establishment of Immigration Courts were subsequently repealed by the Immigration Act 19 of 2004.

128. The White Paper does not mention this opposition, nor does it include the reasons why Immigration Courts were removed from Immigration Act. The problems highlighted both in 2002 and 2004 around the adoption of the Immigration Courts persist today, including the significant resource constraints faced by the Department of Justice and Constitutional Development, specifically the judiciary.[62]

Establishment of a cross-governmental department Advisory Board

129. The White Paper proposes the establishment of a cross governmental department Advisory Board, including representatives of the Departments of Trade, Industry and Competition, Labour and Employment, Tourism, SAPS, South African Revenue Services, Education, International Relations and Cooperation, Defence and Military Veterans and Director- Director General of the DHA and representatives of organised labour. While this proposed Advisory Board *might* lead to better coordination on issues of immigration, it may also create a backlog especially in immigration detention matters where cross-verification of information needs to occur.

130. In the proposed new Immigration Advisory Board, the Department of Social Development is not listed as a potential advisory board member. LHR is concerned that the exclusion of Social Development on the proposed Advisory Board and the inclusion of the South African Police Service and Defence and Military Veterans signals a continued militarisation of South African borders and deepening the presumption of illegality for migrants who have a right to seek refugee and asylum protection in South Africa. As we continue to observe through our work this burden of presumptive illegality is heaviest amongst migrants from other countries in Africa. Further criminalisation of migration will place children and other vulnerable migrants at greater risk of abuse and exploitation.

131. While LHR commends the DHA's proposal to include representatives from organised labour on this Board, LHR notes the absence of representatives from directly affected communities and civil society.

[62] Honourable Minister Ronald Lamola "Office Of The Chief Justice Budget Vote 2023/24" (Address By The Minister Of Justice And Correctional Services, Mr Ronald Lamola, MP, On The Occasion Of The Budget Debate Of The Office Of The Chief Justice At The Parliament, Cape Town, 9 Mary 2023) available at https://www.gov.za/news/speeches/minister-ronald-lamola-office-chief-justice%c2%a0dept-budget-vote-202324-09-may-2023

RECOMMENDATIONS

132. LHR's overall recommendation is a withdrawal of the White Paper and a concentration of the DHA's resources on focusing on implementation and upskilling of the Department.

133. In the absence of a complete withdrawal of the White Paper, LHR urges DHA to consider the following recommendations:

Recommendations regarding refugee protections [extracts from the submission on the Green Paper on International Migration referenced above]

- Withdraw the White Paper in its current form and allow for meaningful engagement with civil society including the community directly affected by the drastic measures proposed in the White Paper.
- We urge the DHA to instead focus its resources on streamlining and improving the current South African asylum system and integration of both refugees *and* asylum seekers. Every rejection of an asylum-seeker made without cause is unacceptable and violates South Africa's international and constitutional obligations; every asylum-seeker who is denied an education and employment is an opportunity wasted.

Corruption

- Include a whole chapter in the White Paper on combatting corruption within the Department of Home Affairs, and particularly in the asylum system.

Quality of Decision Making

- Specific policy guidelines to increase the skills capacity within the Department of Home Affairs, particularly with refugee status determination ("RSD") procedures and the constitutional right to just administrative action. Of particular importance is the allocation of resources (such as information databases, etc.) to improve knowledge of best practice for RSD and up to date country of origin information.

Transparency and Accountability

- Issuing annual statistical reports on the migration system (including both immigration and asylum statistics) with an accompanying baseline survey and impact assessment report in order to measure the effectiveness of policy changes in meeting the stated goals and objectives of the new migration policy.
- Improving intergovernmental communication and integrating information systems, including record keeping between the refugee system, civic services and immigration services within the DHA.
- Improve communication to Refugees and Asylum seekers by ensuring that all communication is translated into relevant languages and posted on all platforms.

Addressing psycho-social needs of people fleeing life threatening situations:

- The DHA should leverage partnerships with NGOs and UN agencies to provide refugees *and* asylum seekers with legal assistance, information, and counselling, and

should pay particular attention to families, children, and victims of trauma, torture, and human trafficking and trauma.

Crisis in the Asylum System

- Once again, in policy formulation the DHA has missed some of the important critiques on how South Africa's current refugee system has collapsed amongst which being corruption, capacity, and a serious skills deficit. It is therefore difficult to envisage a situation where the current flows in the system will be addressed without reference to some of the major causes of the problems. For this reason, we strongly recommend that the DHA acknowledges and takes into account some of these problems in an attempt to try and find solutions to the current problems.
- We recommend that the DHA increase the amount of time that an asylum-seeker permit is valid and link this period with service providers such as banks and learning institutions. Doing so would decrease both the DHA's daily caseload and the time and money asylum-seekers must spend on repeated trips to far-away RROs.

Recommendations regarding statelessness and citizenship rights

- establish a **Statelessness and Nationality Determination Procedure** - implement a formal mechanism to identify and protect stateless persons in South Africa. This procedure should include clear guidelines for determining statelessness and providing legal status, and ultimately nationality, to stateless individuals.
- enhance birth registration processes: strengthen the BDRA to **ensure universal birth registration** - this includes removing barriers that prevent children, especially those born to undocumented parents, or refugee, migrant, or stateless parents, from obtaining birth certificates. Mobile birth registration units could be deployed in remote areas to facilitate access. Compliance with Naki judgment and other birth reg related jurisprudence and recommendations of treaty bodies (UN CRC and ACERWC) – align all policies and practices with Constitution and jurisprudence – implement due process e.g. written reasons for rejected/dismissed applications and clear internal appeal/review processes, child friendly processes. DHA must do away with handwritten birth certificates for non-South African children and establish a digitised birth certificate for all children.
- maintain and strengthen current citizenship laws – **LHR advocates for the retention of inclusive provisions in the Citizenship Act**, particularly those that prevent statelessness among children born in South Africa i.e. sections 2(2), 2(3), and 4(3) – DHA must comply with *DGLR* and *Ali* judgments in promulgating clear and effective regulations for implementation. **LHR opposes any amendments that would impose overly stringent criteria for citizenship**, especially for vulnerable children and groups.
- promote compliance with international obligations - LHR urges the South African government to adhere to its commitments under international treaties, including the 1951 UN Refugee Convention and the 1969 OAU Convention. **LHR recommends against withdrawing from these conventions or adding reservations** that would weaken refugee and stateless person protections. LHR strongly advocates for the adherence to the **principle of non-refoulement**, ensuring that no individual is

returned to a country where they would face persecution, torture, or other serious harm.

- ratify the two **UN Conventions on Statelessness** in accordance with South Africa's 2011 pledge at the High-Level Segment on Statelessness hosted by UNHCR, and advocate for prompt adoption of the **AU draft protocol on nationality and statelessness in Africa**
- establish a **special l dispensation** for unaccompanied and separated migrant children living in South Africa, ensuring they have access to basic rights and services
- **conduct and support research to gather accurate data** on statelessness, undocumented individuals, and the refugee population, including children, in South Africa. Reliable data is crucial for informed policymaking and advocacy efforts.
- implement **training and capacity building** for officials in the Department of Home Affairs and other relevant agencies. This training should focus on human rights, child protection, statelessness, and ethical administration.
- establish **child-friendly processes** across all DHA offices and services
- LHR calls for reforms within the DHA to **address issues of corruption, inefficiency, and maladministration**. This includes implementing court orders and regulations effectively and transparently.

Recommendations regarding immigration

- LHR recommends that the language employed in the White Paper and in the DHA's discourse in respect of the migrants be re-examined to be in accordance with international standards. The DHA should refrain from using wording such as 'illegal' when referring to people.
- LHR recommends that SAPS not be seconded into DHA and that increased powers not be given to immigration officers and the Inspectorate, especially in light of the abuse of power by the aforementioned in instances of immigration detention and policing.
- LHR recommends that Immigration Courts not be re-introduced, especially given that they were removed from the immigration framework on account of them being impractical and unconstitutional.
- LHR recommends that any amendments to the immigration framework, especially to the extent that it covers immigration detention, include incorporation of the Constitutional Court's mandated legislative amendments in *Ex Parte Minister of Home Affairs*

134. As we noted above, LHR has submitted a plethora of comments and recommendations in response to DHA Green Papers, White Papers, Draft Legislation, and Draft Regulations. Many of the recommendations have not been adequately responded to by DHA and others plainly ignored. This draft White Paper continues what we believe to be a dangerous trajectory of the DHA towards an escalation of abuse of rights in South Africa.

135. Finally, with regard to Asylum seekers, refugees, and xenophobic attacks against migrants, LHR notes the continued relevance of the United Nations Committee

Against Torture's concluding observations on the second periodic report of South Africa[63]. The UNCAT recommendation that South Africa should:

a. Ensure that prospective asylum seekers are allowed to apply for asylum at any time they might express an intention to do so upon or following their arrival in the country, regardless of how long they have delayed doing so, and introduce legislative provisions that enable officials to consider the risk of procedural ill-treatment faced by an applicant who may qualify for refugee status;

b. Put in place more efficient enforcement mechanisms to guarantee that the principle of non-refoulement is not violated, and ensure that judicial mechanisms for the review of decisions of expulsion, return and extradition are in place such that under no circumstances will a person be expelled, returned or extradited to a country where he or she would be in danger of being subjected to torture or ill-treatment;

c. Eradicate corruption related to arbitrary cancellation and non-renewal of asylum transit visas and ensure that refugees and asylum seekers do not experience harassment and abuse by the authorities; facilitate the filing of asylum cases and, where necessary, the provision of legal representation; ensure the prompt, effective and fair processing of asylum applications with adequate consideration of the substance of the case while respecting the principle of non-refoulement;

d. Provide the Department of Home Affairs with adequate human and financial resources to conduct the process of refugee status determination and ensure the training of officials on the physical and psychological effects of torture that may affect victims participating in refugee status determination and refugee appeals board processes;

e. Refrain from detaining asylum seekers and foreign nationals in prolonged detention without a warrant at the Lindela Repatriation Centre, promote alternatives to detention and revise policy in order to bring it into line with the Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention;

f. Ensure adequate living conditions, including by reducing overcrowding and providing hygiene, medical and other services, at the Lindela Repatriation Centre, all other immigration centres and police detention facilities;

g. Ensure that refugees, asylum seekers and foreign nationals and migrants have full access to health care;

[63] Committee Against Torture "CAT/C/ZAF/CO/2: Concluding Observations On The Second Periodic Report Of South Africa" 7 June 2019 available at Https://Documents-Dds-Ny.Un.Org/Doc/UNDOC/GEN/G19/154/07/PDF/G1915407.Pdf?Openelement

h. Deliver child protection services to migrant, asylum-seeking and refugee children, and provide basic health and social services as well as specialized rehabilitation services to asylum seekers and refugees who have been tortured;

i. Take vigorous measures to eradicate manifestations of racism and xenophobia and prevent xenophobic violence, ensure the prompt investigation, prosecution and punishment of the perpetrators and provide protection and redress to the victims, with adequate remedies;

j. Speed up the adoption of the bill on preventing and combating hate crime and hate speech, which is currently under consideration in Parliament.

136. The White Paper provides an important and valuable opportunity to address systemic challenges and failures within the South African migration framework. Its main objective should be to promote and protect the rights and well-being of migrants within the country clearly articulating the rights migrants are entitled to when they are in South Africa.

137. This document however has scant data to show the extent of the economic or social burden that migrants place on South African institutions. Instead, it seeks to limit the established rights of migrants through creating the idea of migrants as criminals.

138. We believe this is an approach that is antithetical to the stated values of the South African Constitution and as such should be reassessed.

139. Finally, we note that as national elections are approaching and any proposed policy that flames the rhetoric of migrants crossing borders to drain limited resources will likely provoke xenophobic attacks, putting lives in danger.

140. Based on the limitations of the draft stated above, we repeat our call for the department to withdraw this draft and allow for more time for public consultations and redraft the paper. That in its current form it is fails to meet the requirements as set out in the National Policy Development Framework 2020 approved by Cabinet on 2 December 2020. Of specific importance is the clause stating that the national policy framework will; '...also contribute to inculcation of a culture of evidence-based policy making towards improved service delivery.' [64]

[64] The Presidency of the Republic of South Africa "National Development Framework 2020" 2 December 2020 available at https://www.gov.za/sites/default/files/gcis_document/202101/national-policy-development-framework-2020.pdf

CONCLUSION

This White Paper appears to be a red herring to detract attention away from what has been proven in court and through numerous submissions from LHR, other civil society organisations, and international institutions, to be a department that is crisis ridden. We are saddened to read a document that is clearly designed to try to win political points[65] rather than fully address the crises within the DHA.

LHR concludes its submission by highlighting the findings of the Auditor General's Report presented to the Portfolio Committee on Home Affairs in February 2020[66] made the following findings regarding the inefficiencies in the DHA:

- Regarding the holding facility that the DHA requires to hold persons under section 34(1) of the Immigration Act pending deportation, the Auditor General found that the contract with the service provider of the holding facility provided for a minimum threshold (the department had to pay an amount equal to the threshold, irrespective of the actual number of detainees). The threshold was only exceeded once in 29 months. This increased the effective average daily cost per person by 454% compared to the actual cost.
- The backlog in registering new asylum seekers after their original arrival at the refugee reception office was mainly due to the interpretation services being unavailable. In some cases, the backlog was up to seven months.
- Section 22 permits (legal document permitting stay whilst the status is determined), issued in terms of the Refugees Act, 1998 (Act No. 130 of 1998) (the Refugees Act), are generally valid for up to six months, and legalise an asylum seeker's stay in the country. It allows the asylum applicants to legally work and study in South Africa during their status determination process. The department did not know how many of the 946 314 inactive section 22 applicants (as of 31 December 2017) were still in the country as the various systems were not integrated. In some cases, courts issued minimal fines to illegal immigrants brought before court where their section 22 permits had expired and this effective as a deterrent.
- The Standing Committee for Refugee Affairs experienced backlogs of 40 326 (compared to 475 during the 2007 audit) and the Refugee Appeals Board 147 794 (compared to 893 during the 2007 audit) cases respectively. With their current capacity, the Standing Committee for Refugee Affairs would take just over one year and the Refugee Appeals Board 68 years to clear the backlog without taking new cases.
- The information systems were unreliable, not integrated and not in real-time, resulting in outdated information, and ineffective monitoring and decision making. The systems affected cut across all focus areas, namely port control, transportation, the holding facility, detention centres, deportation and the asylum regime.

It is prudent to note that each of these findings are an indication of an inefficiency and disharmony in implementation in the DHA, not a deficiency in the legal and policy framework.

[65] in fact most of this draft white paper is cut and pasted from the 2022 ANC Resolutions (see note 5) .

[66] Auditor-General South Africa " Report Of The Auditor-General On A Follow-Up Performance Audit Of The Immigration Process For Illegal Immigrants At The Department Of Home Affairs https – Portfolio Committee on Home Affairs Briefing" February 2020 available at //static.pmg.org.za/200204agsa_report.pdf

As we conclude this submission, we note the pride and inspiration that South Africa garnered globally when a team of brilliant lawyers advocated for the ICJ to order Israel to end its genocidal campaign. South Africa is a leader in the fight for the recognition of human rights and social justice globally, we ask that we also embrace those principles at home and in our protection of other persons being persecuted and seeking refuge in South Africa. This White Paper demonstrates the fact that the DHA in its practice and now in policy formulation is acting in stark contrition to what we have been lauded for globally with respect to our stance at the ICJ.

ENDORSEMENTS

Organisations

African Diaspora Forum
African Policing and Community Oversight Forum (APCOF)
Caritas South Africa
Congolese Civil Society of South Africa
Consortium for Refugees and Migrants in South Africa (CoRMSA)
Equal Education Law Centre
Foundation for Human Rights
Future Families
HIAS
International Labour Research and Information Group (ILRIG)
Neighbours NPO
Pax Afrika Network (PAX)
Refugee Social Services
Regional Psychosocial Support Initiative (REPSSI SA)
Section27
Socio-Economic Rights Institute of South Africa (SERI)
Sophiatown Community Psychological Services
Southern African Catholic Bishops' Conference (SACBC) - Migrants and Refugees Office
South African Refugee Led Network – GP
Southern Africa Human Rights Defenders Network (SouthernDefenders)
terre des hommes
The Centre for Child Law
The Fruit Basket
The Helen Suzman Foundation
Three2Six Project
Women in Need Organisation - WIN

Individuals

Dr Christine Hobden, Wits School of Governance
Diego Iturralde (MA, M.Phil) Migration Researcher
Advocate Jatheen Bhima
Dr Rebecca Walker, Research Associate and Consultant
Yasmin Rajah