

***Submission to the
Home Affairs
Portfolio Committee
On the White Paper on
International Migration***



South African Human Rights Commission

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Introduction

The South African Human Rights Commission (SAHRC) welcomes the government's move towards revisiting policy and legislation affecting International Migration. The White Paper on International Migration¹ (the White Paper), however, is filled with inconsistencies, and we take this opportunity to place the SAHRC's views before the Home Affairs Portfolio Committee. The SAHRC, in its four years of existence, has had extensive involvement with both the immigrant, refugee and migrant populations in this country.² This submission is informed by our experience.

Our International Obligations

In terms of the Universal Declaration of Human Rights³ immigrants and migrants are afforded the protections as pledged by the member states. The pledge includes the intention to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms. Under international law, according to Article 2 of *The International Covenant on Economic, Social and Cultural Rights* and Article 13 of *The International Covenant on Civil and Political Rights*, once a state has admitted aliens into its territory (documented immigrants), it must treat them according to internationally determined standards. International human rights law gives many rights to lawful aliens. Some of these include:

- the right to residence;
- freedom of movement; and
- economic and social rights.

This means that aliens should be given the same human rights as state nationals, with the exception of certain aspects of:

- political rights;
- participation in political or public life;
- ownership of property;
- employment; and
- the right to remain in the territory.

¹ GG 19920 Notice 529 of 1999

² The Draft Green Paper on International Migration dated 13 May 1997 used these three terms and defined them as follows at page 2 in the Executive Summary: There are three streams of people crossing our borders. The first are *immigrants*, individuals who would like to settle here permanently. The second stream are *refugees*, people who flee persecution in their own country and seek asylum here. The third and most controversial stream of people is *migrants*, many of whom are not authorised to be here.

³ Articles 6, 9, 13, 15,

Illegal aliens are not lawfully in the territories of states other than their own. They can be removed once they are found to be illegal. However, because they are human beings, they are nevertheless entitled to some basic rights. These include the rights to:

- dignity;
- freedom and security of the person; and
- life.

South Africa has, since April 1994, ratified or acceded to several international human rights treaties that have a bearing on the treatment of aliens. These are:

- *The Convention on the Rights of the Child* (1989), ratified on 16th June 1995;
- *The Convention on the Elimination of All Forms of Discrimination Against Women* (1979), ratified on 15th December 1995; and
- *The African Charter on Human and Peoples' Rights* (1981) acceded to in January 1996.

South Africa has yet to sign and ratify the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.⁴ This Convention is based on the principles contained in the Universal Declaration of Human Rights.

The SAHRC's concerns with the White Paper

We have identified four areas of concern for discussion in this document. The SAHRC has identified many other areas of concern in the White Paper, but has chosen these four themes for specific attention.

The four areas of concern

1. South Africa's obligation to the region;
2. Xenophobia and Racism;
3. General human rights violations; and
4. Potential for corruption.

1. South Africa's obligation to the region

Much has been written about the 'push-pull' factors⁵, which have great impact on International Migration. In short, they determine why people want to leave their country of origin and why they are attracted to South Africa. With the discovery of minerals in South Africa, many people from neighbouring countries came to work in the mining industry. The mining sector continues to employ many people from our neighbouring countries. The economic situation coupled with high rates of unemployment in our neighbouring states has resulted in a great dependence on this form of employment, in the entire

⁴ The National Action Plan for the Promotion and Protection of Human Rights, Republic of South Africa, December 1998 at p 75

⁵ Clarence Tshireke *Revisiting the push-pull theory: Comment on the White Paper on International Migration* Southern African Migration Project; The White Paper at Chapter 6 paragraph 4.2.1; The Green Paper at section 2.2.

region. It is further proposed that unskilled migrants will undertake employment in sectors where South African employers would prefer not to employ South Africans and citizens would prefer not to work for example the mining industry and seasonal farm work.⁶ The White Paper proposes that:

The people who can add value to our growth and development are those who invest, are entrepreneurs and promote trade, those who bring new knowledge and experience to our society, and those who have the skills and expertise required to do the things we cannot properly do at this stage.⁷

This sort of policy formulation, as proposed by the White Paper, fails to take due regard of both the historical reality and our regional obligations. It encourages both illegal migration and negates the reality of the existence of many migrant workers already active in the country. Research has shown that:

'Costing' immigration implies that immigrants only consume resources: they do not create them. But anyone who engages in economic activity also creates wealth - and it is generally accepted that immigrants do engage in this activity. A Centre for Policy Studies report found, for example, that Mozambican immigrants in the Ivory Park informal settlement at Midrand are sought-after builders, and there is no shortage of evidence which indicates that many immigrants are engaged in trade and service industries.

For some, the fact that immigrants are creating wealth is part of the problem because they are seen to be "taking" jobs or trading opportunities needed by South Africans - often at lower rates of pay or by evading trading regulations.⁸

The solution proposed by the White Paper, that is, to criminalise this form of migration, can only fail. History has shown us that it has already proved to be an ineffective and inhumane way of approaching migration issues in the region. The revolving door approach taken by migrants has undermined this policy and proved it to be no more than a momentary solution, benefiting those involved in the repatriation of these migrants alone.

International economic prospects for countries are increasingly tied to their ability to function within regional groupings of states. Many of these emerging regional blocs are also developing new migration regimes with preferential treatment and mobility rights for citizens of member states. The *European Union* represents the most advanced model of such arrangements. The 12-member SADC is at a far less

⁶ The White Paper Chapter 6 paragraph 4.4.6. and 4.4.7.

⁷ The White paper, Chapter 4 paragraph 3.

⁸ Steven Friedman *Migration Policy, Human Rights and the Constitution* undated paper submitted to the Task Team drafting the Green Paper found at http://www.polity.org.za/govdocs/green_papers/migration/friedman.html

advanced stage of integration and needs to develop its own policies of economic co-operation, integration and population movement.

South Africa is a closely integrated member of a functioning region. The neighbouring states are linked to South Africa by long-standing economic ties. One of the most important linkages of mutual benefit historically has been the existence of labour flows to and from South Africa. Immigration policy should be sensitised to the history of the region and South Africa's long-standing economic ties to the SADC states.⁹

A more effective approach would be to adopt a humane management-orientated approach to migration policy which recognises both our moral and historical ties to the region. This could be achieved by ensuring that our development policies take into account our regional obligations, for example, the Maputo Corridor has benefits for both South Africa and Mozambique.¹⁰ A further solution would be the implementation of bilateral agreements between South Africa and its neighbours, whereby migrant workers would be subject to the same labour standards, benefits and wage agreements as South African citizens. In this way, the notion of 'cheap, non-unionised' labour for certain sectors falls away as a benefit, and this incentive to prefer migrants over citizens is removed. The migrants would benefit from these agreements as they would be entitled to the protection of both the South African labour laws and wage agreements in the industry.¹¹

The Southern African Development Community Council of Ministers recently considered the *Draft Protocol on the Free Movement of Persons* prepared by the SADC Secretariat. The *Protocol* is based on the European Union model and proposes that member states move towards the free movement of all citizens in a series of inflexible stages. Because of the enormous economic disparities between member states, the threat to national sovereignty and the uncertain consequences of the *Protocol*, a number of states including South Africa do not support it in its current form. Instead, the South African government proposes a separate streamlined channel of entry for SADC citizens at border and airport points.¹²

⁹ The Green Paper paragraphs 1.4.1. and 1.4.2.

¹⁰ The Green Paper paragraph 1.4.5.

¹¹ Dr Jonathan Crush in *Temporary Work and Migration Policy in South Africa* in a Briefing paper for the Green Paper Task Team on International Migration, February 1997 stated that "Undocumented temporary workers in the agricultural sector, construction, transportation and services, have either entered the country clandestinely or overstayed their temporary residence permits or secured false documentation. Employers in those sectors using temporary workers have traditionally been able to exert sufficient power over the central or local state to avert large-scale prosecution for their use of this labour. This is a calculated risk on the part of employers who either do not enquire too closely about the origins of their workers or do not particularly care as long as the labour is available and cheap. South African employers of temporary labour undoubtedly want to continue to employ workers from outside the country. Ironically, it is their very illegality that makes them attractive as employees although employers tend to claim that South Africans will not accept the work at the wage rates they can afford. It is this situation that South African policy makers are increasingly exercised about. The concern is not so much with the working and living conditions of temporary workers per se, but with the impact that undocumented workers have on unemployment and wage levels among South Africans. There is a widespread perception, amongst the general public as well as a broad spectrum of policy makers, that "illegal" temporary workers deprive South Africans of jobs and depress wage levels, as well as cause a whole host of other social problems. In fact, there is little or no concrete evidence to substantiate these claims." Found at http://www.polity.org.za/govdocs/green_papers/migration/crush2.html

¹² The Green Paper paragraph 2.4.2.

The SAHRC is of the view that that we should be opening our borders to the SADC member states in a responsible manner. We should avoid the "control" mentality in migration policy and rather enhance "management" of migration. This suggests a more open policy with a view to meeting the country's needs and a collaborative policy in cooperation with SADC neighbours.

Under the circumstances, the following assertion in the White Paper is, with all due respect, flawed and must be revisited:

Therefore, this White Paper has accepted the following additional main policy parameter: *under present circumstances it is not possible for South Africa to deal with the "push" factors acting in the rest of the continent nor build a migration system predicated on the improvements of these factors.*¹³

¹³ The White Paper, Chapter 6 paragraph 4.2.3.

2. Xenophobia and Racism

The SAHRC is currently involved in an advocacy programme entitled “Roll Back Xenophobia” which has been running since December 1998 and was initiated in response to the high levels of xenophobia currently found in South Africa.¹⁴ Xenophobia is defined as an irrational deep dislike of non-nationals. Our experience has shown us that xenophobia in South Africa is deeply steeped in prejudice and racism. The White Paper identifies that most illegal immigrants come from the rest of the African continent, therefore xenophobia is most keenly directed at Africans.¹⁵ The increase of foreigners into South Africa has resulted in an apparent rise in xenophobia, which has become increasingly evident since the April 1994 national election. Anti-foreigner sentiment at times expresses itself in violent attacks on those who are assumed by South African citizens to be illegal immigrants. No longer able to blame an unrepresentative government for their ills, the poor, homeless and unemployed are shifting the blame to alleged illegal persons who are also harassed by state officials and police, imprisoned without trial, and subject to corrupt practices.¹⁶

The White Paper fails to address the issue of xenophobia and how it interacts with migration policy, in any substance. Reference is made to education of communities and immigration officials to avoid xenophobia.¹⁷ There is a proposal that a special campaign against xenophobia should accompany the Immigration Services’ on-the-ground presence.¹⁸ Xenophobia has a destabilising impact, both domestically and regionally. It is a little understood concept and the White Paper takes the concerns no further. Firm policy considerations aimed at countering xenophobia should inform any legislation passed relating to International Migration.

The European Commission against Racism and Intolerance (ECRI)¹⁹ is a body of the Council of Europe which was set up by the Summit of Heads of State and Government of the member States of the Council of Europe held in Vienna in October 1993. The Commission forms an integral part of the Council of Europe's action to combat racism, xenophobia, anti-semitism and intolerance. In the course of its work, ECRI has started to build up a collection of examples of good practices²⁰ existing in the member States to combat racism and intolerance. Some further examples of proposals, to

¹⁴ Friedman op cit. note 8 notes that The high level of xenophobia amongst the general populace, as well as in some official quarters, is revealed in studies such as C. de Kock, C. Schutte and D. Ehlers, *Perceptions of Current Socio-political Issues in South Africa* Pretoria: Human Sciences Research Council, 1994; Craig Charney, *Voices of a New Democracy: African Expectations in the New South Africa* Johannesburg: Centre for Policy Studies, 1995; Chris Dolan and Maxine Reitzes, *The Insider Story? Press Coverage of Illegal Immigrants and Refugees* Johannesburg: Centre for Policy Studies, Research Report No 48, 1996; see also Maxine Reitzes, “Debunking Some of the Myths” In Richard de Villiers and Maxine Reitzes, Eds. *Southern African Migration: Domestic and Regional Policy Implications* Johannesburg: Centre for Policy Studies, 1995, 77-81.

¹⁵ The White Paper, Chapter 6 paragraph 4.2.2.

¹⁶ Maxine Reitzes *Towards a Human Rights-Based Approach to Immigration Policy in South and Southern Africa* January 1997 found at http://www.polity.org.za/govdocs/green_papers/migration/reitzes.html

¹⁷ The White Paper, Chapter 6 paragraph 5 and Chapter 11 paragraph 2.1.1.

¹⁸ The White Paper, Chapter 11 paragraph 13.

¹⁹ CRI (99) 56 final Strasbourg, September 1999

²⁰ The basket of “good practices” as proposed by ECRI can be found at <http://ecri.coe.int/en/04/02/01/e04020101b.htm>

combat racism, xenophobia anti-semitism and intolerance, made by the ECRI include:

- Ensuring that the national legal order at a high level, for example in the Constitution, enshrines the commitment of the State to the equal treatment of all persons and to the fight against racism, xenophobia, anti-semitism and intolerance;
- Signing and ratifying the relevant international legal instruments;
- Ensuring that national criminal, civil and administrative law expressly and specifically counter racism, xenophobia, anti-semitism and intolerance, *inter alia* by providing:
 - that discrimination in employment and in the supply of goods and services to the public is unlawful;
 - that racist and xenophobic acts are stringently punished through methods such as:
 - defining common offences but with a racist or xenophobic nature as specific offences;
 - enabling the racist or xenophobic motives of the offender to be specifically taken into account;
- Taking measures in the fields of education and information in order to strengthen the fight against racism, xenophobia, anti-semitism and intolerance;
- Adopting policies that enhance the awareness of the richness that cultural diversity brings to society;
- Undertaking research into the nature, causes and manifestations of racism, xenophobia, anti-semitism and intolerance at local, regional and national level;
- Ensuring that school-curricula, for example in the field of history teaching, are set up in such a way to enhance the appreciation of cultural diversity;
- Setting up and supporting training courses promoting cultural sensitivity, awareness of prejudice and knowledge of legal aspects of discrimination for those responsible for recruitment and promotion procedures, for those who have direct contact with the public and for those responsible for ensuring that persons in the organisation comply with standards and policies of non-discrimination and equal opportunity;
- Ensuring, in particular, that such training is introduced and maintained for the police, personnel in criminal justice agencies, prison staff and personnel dealing with non-citizens, in particular refugees and asylum seekers;
- Ensuring that the police provide equal treatment to all members of the public and avoid any act of racism, xenophobia, anti-semitism and intolerance;
- Developing formal and informal structures for dialogue between the police and minority communities and ensure the existence of a mechanism for independent enquiry into incidents and areas of conflicts between the police and minority groups;

- Encouraging the recruitment of members of public services at all levels, and in particular police and support staff, from minority groups.²¹

International Migration policy in South Africa should be informed by the European experience, in order to enrich our own legislation and to ensure that we are in line with international thinking in this arena.

The unfortunate tendency in the White Paper is to introduce a community based enforcement policy whereby the emphasis moves away from border control to community and workplace inspection.²² Although the SAHRC understands the notion that to tighten up the borders has proved to be ineffectual in the United States of America and expensive to implement, the community based policing proposal will result in a form of institutionalised racism, reminiscent of apartheid. Plainly put, the White Paper proposes that communities assist the Immigration Service monitors to identify illegal immigrants and perform the role of 'whistle blowers'. This system is open to abuse and has little scientific foundation. It may be used by people to further their xenophobic tendencies and result in unstable communities.

The history of migration policy in South Africa is deeply steeped in racism:

To start, it is necessary to recall that the Aliens Control Act, which makes residence here a gift bestowed by the authorities, was originally a racial law, since it stipulated that those granted permanent residence or citizenship must be "readily assimilable by the white inhabitants"; the authorities also had to satisfy themselves that immigrants did not threaten "the language, culture or religion of any white ethnic group". Even after this clause was abolished, the application of the law often excluded black immigrants.²³

It could, therefore, be argued that many black immigrants have failed to acquire legal status simply because of their race, since their length of residence and role in the job market would have ensured their legality were they white. While the amnesty implemented by the government last year attempted partly to rectify this, its effect has been limited. The fact that most immigrants against whom control is currently exercised are black can - and has - been seen as an indication that aspects of apartheid remain in force.²⁴

The White Paper makes no attempts to address this historical legacy as it has chosen to approach migration policy by looking at its form as opposed to its substance. It is only when we look at a substantively fair migration policy that we can begin to address both the historical racist policies and ensure that indirect racism does not persist.²⁵

²¹ The full policy proposals suggested by ECRI are located at <http://ecri.coe.int/en/02/02/03/e02020301.htm>

²² The White Paper, Chapter 1.

²³ Migrant miners, for example, did not qualify for permanent residence - more generally, a stipulation that self-employed immigrants require cash assets of R50 000 excludes most immigrants from neighbouring countries who lack these funds.

²⁴ See Friedman op cit. at note 8.

²⁵ Report of the SAHRC *Illegal? Report on the Arrest and detention of Persons in Terms of the Aliens Control Act* March 1999 at p xv

An even more alarming aspect of the community-based participation is the suggestion that citizens must produce their proof of citizenship, on demand.²⁶ This policy is firmly based on the apartheid policy where people were constantly harassed to assert their right to be in South Africa. Because of the nature of xenophobia in South Africa, as practised by both citizens and authorities, the largest number of people falling foul of this enforcement policy will be black South Africans. In particular, people who are darker skinned will more often be 'accused' of being illegal migrants and therefore subject to institutionalised harassment. To enact legislation which institutionalises this policy will fall foul of the Constitution and be open to Constitutional challenge.²⁷

The promotion of a 'dawn raid' policy whereby communities are policed in this harsh manner will promote both antagonism towards the SAPS, the proposed Immigration Services and foreigners: be they immigrants or migrants.

3. General Human Rights violations

Application of the Bill of Rights to non-citizens

It is well documented that most of the rights in the Bill of Rights, with the exception of political rights and the right relating to freedom of trade, occupation and profession are guaranteed to "everyone." Immigration and migration policy should affirm that, with the exception of those rights, the Bill of Rights does apply to all persons who are affected by government action, including non-citizens. The only legitimate way that one can derogate from the rights contained in the Bill of Rights is by reference to the limitations clause.²⁸ The exercise of limiting rights in the Bill of Rights should not be conducted by the legislature when enacting this legislation, but should be left up to the courts. The White Paper proposes that the limitation of rights in the Bill of Rights be conducted by the legislature and that the limitation on migrants' rights may be contained in this legislation.²⁹ This must clearly be contrary to the precepts of a constitutional democracy.

[T]he South African government is confronted with two sets of claimants: those defined outside its borders whom it attempts to keep there; and newly enfranchised citizens inside its borders. Both claim restitution against the legacy of apartheid. Responses to these two sets of claims cannot be mutually exclusive. As indicated previously, given the historical and current configuration of the southern African region, the socio-economic and political stability of South Africa is inextricably tied to that of the region as a whole. There are also those who claim the right to at least permanent residence if not citizenship, on the grounds that their families have lived and worked in South Africa for generations, contributing to its economic development. The question

²⁶ The White Paper, Chapter 11 paragraphs 4 and 4.1.

²⁷ For example, section 9(3) of the Constitution states that: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

²⁸ Section 36 of the Constitution

²⁹ The White Paper, Chapter 6 paragraphs 2.1. to 2.9.

they raise is whether or not it is just - and we are talking of creating a just society - for a state to benefit from peoples' political and economic contributions without a corresponding obligation to guarantee their human rights.³⁰

In essence any migration policy should be informed by a basic respect of individual human rights, not state sovereignty. The State should be compelled to guarantee the human rights of all those within its territorial domain. Subjecting illegal immigrants to harassment, bribery and corruption; divesting them of their property and earnings; imprisoning them without trial, and deporting them amounts to an undermining of their rights enshrined in the Constitution.³¹

The Constitutional Court in *Larbi-Odam v MEC for Education (North-West Province)*³² had occasion to weigh up the rights of citizens versus temporary and permanent residents in the field of employment in education. The Court held that foreigners who have temporary and permanent residence permits have as much right and protection of the Constitution as do citizens. The Court held that distinctions on the basis of citizenship could be discriminatory, even though citizenship was not a listed ground of prohibited discrimination in the Constitution. Three reasons were given for this: first, foreign citizens are a minority with little political muscle; secondly, citizenship is a personal attribute, which is difficult to change; and thirdly there were specific threats and intimidation that the foreign teachers in this case faced. All of these reasons made foreign citizens a vulnerable group.³³ Justice Mokgoro, in handing down the judgment, went further by stating:

Permanent residents should, in my view, be viewed no differently from South African citizens when it comes to reducing unemployment. In other words, the government's aim should be to reduce unemployment among South African citizens *and permanent residents*. As explained above, permanent residents have been invited to make their home in this country. After a few years, they become eligible for citizenship. In the interim, they merit the full concern of the government concerning the availability of employment opportunities. Unless posts require citizenship for some reason, for example due to the particular political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Thus it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens.³⁴

³⁰ See Reitzes op cit. Note 16

³¹ Report of the SAHRC op cit. note 25 at p xxxii

³² CCT 2/97 Constitutional Court 27 November 1997

³³ See *Larbi-Odam* at paragraph 19

³⁴ See *Larbi-Odam* at paragraph 31

Enforcement mechanism

Another concern raised in the White Paper is the proposed enforcement mechanism. It is suggested that an immigration court be established to hear all immigration matters.³⁵ Prior to a hearing in the immigration court, one may appeal a decision to the functional head of the Immigration Services who must confirm the decision of the functionary. The decision of the functional head of the Immigration Services may be appealed to the Minister of Home Affairs who is afforded “a matter of days”³⁶ to make a decision, failing which the appeal is rejected. In order to appeal a decision, the accused must post an amount equivalent to the cost of deportation.³⁷ The inequity in this procedure is self-evident and undermines the right to just administrative action, as found in the Constitution. The prospect of a person being able to afford the costs of an appeal is slim; thereby amounting to a process deeply steeped in discrimination.

Detention

The SAHRC has conducted much research into the treatment of immigration detainees.³⁸ The White Paper proposes that immigration detainees be kept separate from those accused of criminal offences³⁹ and that a short period of detention of immigration detainees, without warrants of arrest, is consistent with the Constitution.⁴⁰ The SAHRC is in agreement with these proposals, but is concerned with the further proposal that detention services be privatised with no mechanism in place to monitor these detention facilities.⁴¹ We are firmly of the view that monitoring of these detention centres be mandated and controlled. From our research we have established that the detention centres are rife with bribery,⁴² refugees are treated as immigration detainees, they are assaulted,⁴³ inadequate medical care and food are supplied and detainees are subject to degrading treatment and intimidation.⁴⁴ They are also subject to detention which extends beyond the legal time periods and have no right of recourse.⁴⁵

Our research indicates that over 10% of the immigration detainees in the Lindela Repatriation Centre⁴⁶ in Krugersdorp were in fact released because they were either citizens or legally resident non-citizens.⁴⁷ This statistic represents a grossly unacceptable rate of wrongful detention and it is only by close monitoring of these repatriation centres, that this problem can be meaningfully addressed.

³⁵ The White paper, Chapter 11 paragraph 9.1.

³⁶ The White Paper, Chapter 11 paragraph 9.2.

³⁷ The White Paper, Chapter 11 paragraph 9.2.

³⁸ Report of the SAHRC op cit. note 25

³⁹ The White paper, Chapter 11 paragraph 10

⁴⁰ The White Paper, Chapter 11 paragraph 9.4.

⁴¹ The White Paper, Chapter 11 paragraph 11

⁴² Report of the SAHRC op cit. note 25 at p xxviii ff

⁴³ Report of the SAHRC op cit. note 25 at p xlvii ff

⁴⁴ Report of the SAHRC op cit. note 25 at p iii and p xlix ff

⁴⁵ Report of the SAHRC op cit. note 25 at p xxxvii ff and p xlvi ff

⁴⁶ A privately funded repatriation centre under contract with the government.

⁴⁷ Report of the SAHRC op cit. Note 25 at p xix

The SAHRC is of the view that the drafters of the International Migration Bill must bear in mind the Constitution and its ready application to all persons within our borders.

4. Potential for corruption

The White Paper recognises that the risk of corruption exists in the current proposals.⁴⁸ It proposes that an internal check and balance system be implemented in order to oversee and eliminate the prospect of corruption. The SAHRC welcomes measures to eliminate corruption within the system but is of the view that the White Paper does no more than pay lip service to this scourge. Migrants are particularly vulnerable to the activities of corrupt officials as they are disempowered as a result of their migrant status and have no rights of recourse.⁴⁹ Corruption in the area of migration is endemic and any new legislation must tackle this issue head on and make constructive and effective proposals to rid society of it. Our history of corruption in this field is well documented:

Our immigration control regime is highly open to corruption. Reports show that some officials sell documents to immigrants who do not qualify - in one case, they are said to do so in a way which binds labourers to farmers in a feudal relationship. Allegations have been made that political parties register immigrants as voters to increase their share of the vote. It has been suggested that there is a widespread perception that anyone can become a legal immigrant if they pay an official enough money. Any system, which gives latitude to officials to regulate people's lives, is open to corruption. But immigration control is particularly susceptible since it requires officials to implement a form of control, which is unenforceable.⁵⁰

In order to address the issue of corruption it is essential to understand the context in which it occurs. It has been reported that:

[A] member of the Western Cape Aliens Investigation Unit has suggested that a possible reason for corruption in the police force when dealing with immigrants is that the police feel demoralised by their attempts to implement an unenforceable policy. Some have therefore given up, and instead attempt to use it to their own advantage.⁵¹

It is incumbent on this Committee to ensure that an effective, workable piece of legislation is enacted to ensure that the policy decisions of the South African government are not undermined due to their lack of enforceability.

⁴⁸ The White Paper, Chapter 11 paragraph 2.1.2.

⁴⁹ Report of the SAHRC op cit. note 25 at p xxviii ff

⁵⁰ See Friedman op cit. note 8 above; see also Report of the SAHRC op cit. note 25 at p xli ff

⁵¹ Maxine Reitzes *Undocumented Migration: Dimensions and Dilemmas* Paper prepared for the Green Paper Task Group on International Migration, March 1997 found at http://www.polity.org.za/govdocs/green_papers/migration/taskt.html

Conclusion

The SAHRC asserts that legislation on International Migration must have an emphasis on clear and coherent policy that is applicable, understood and where management systems are in place. This will ensure that information and counseling on migrating to South Africa is available from South African missions abroad; immigration officers should be trained to be more welcoming and informative about migration policy. In this way it may not be necessary to "avoid" legal entry if one is assured of appropriate and clearly understood consideration.

Attention should be paid to improving Home Affairs procedures, speed up processing and address corruption within the system. Penalties must be directed as much towards those who employ undocumented migrants as to the illegal immigrants themselves.

In the National Action Plan⁵² South Africa publicly committed itself to the following further challenges:

- We must sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
- We need to align legislation with international instruments and treaties.
- South Africa is struggling with the problems of a large number of undocumented immigrants. These are currently estimated at between 2.5 and 8 million.
- There is a need to address the rights of undocumented immigrants especially in view of international human rights provisions, while at the same time protecting the interests and rights of South African citizens.
- There is increasing xenophobia, especially against other Africans.
- We need to create greater public awareness among service providers and law enforcement officers on the rights of aliens and undocumented immigrants/migrants.
- The eradication of corruption and fraud.
- Trading and small business documentation.⁵³

Any legislation on International Migration must take into account our public commitments, in particular, our intention to sign and ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. The SAHRC has had many years of experience in the problems surrounding International Migration issues. We are supportive of government revisiting our current policies and legislation, which are clearly steeped in the history of this country. We would like to offer our

⁵² National Action Plan op cit. note 4

⁵³ National Action Plan op cit. note 4 at p 76

assistance, by way of supplying the Committee with copies of our documented research into this area, and, if the Committee requests, by making oral presentations on the issues. We would like to emphasise that we are available to supplement the Committee's resources by offering our expertise on the enormous task with which this Committee is charged. We trust that our above comments will prove useful to this Committee and we welcome the opportunity to comment on any proposed Bills which may have bearing on this area of law.

January 2000