Submission on the Refugees Amendment Bill, 2017

Select Committee on Social Services

National Council of Provinces

Submitted by

Consortium for Refugees and Migrants in South Africa (CoRMSA)

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A. Introduction:

CoRMSA is a national network of organizations working with asylum seekers, refugees and migrants. CoRMSA member organizations include legal and social service providers; research institutions; law clinics and refugee and migrant communities who have expertise on migration and broader human rights issues at local, national, regional, and global levels.

CoRMSA welcomes this opportunity to comment on the Refugee Amendment Bill 2016 and below makes recommendations on specific sections. Whilst it is acknowledged that there are dysfunctional elements in the current asylum management system, recent empirical research has shown that the challenges lie primarily in the implementation of the provisions in the Refugees Act, rather than the underlying assumptions of the Act[1]. Our main concern therefore are around the proposed amendments that limit the rights of asylum seekers in South Africa.

CoRMSA is available to make oral presentations regarding this submission should such an opportunity arise.

B. Comments on specific sections of the Refugee Amendments Bill, 2016:

- **Under 1. Definitions, "dependent"**

The proposed amendments seek to limit dependents that are able to be included in the asylum seeker's claim. Only children who are minors, children legally adopted in the country of origin, a spouse legally married in the country of origin and only parents that are destitute, aged or infirm and that are named in the claim will now be eligible to be included as dependents. This precludes children above the age of majority, children that are under guardianship of the asylum seeker, common law partners and elderly family members other than parents. It also requires the asylum seeker to fully understand that they must name all those in the above categories on

[1] Amit, R. (2015) 'Queue Here for Corrruption: Measuring Irregularities in South Africa's Asylum System'. *A Report by Lawyers for Human Rights and the African Centre for Migration & Society;* ACMS (2012) No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices. Research Report September 2012 ACMS, Wits: Johannesburg.

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their application even if they have become separated from family members in the course of their journey to ensure family reunification is possible in the future.

- **Section 4. Exclusion from refugee status**

The additional exclusions in **Section 4(1) (f), and (h)** create confusion around irregularities under the Immigration Act, the humanitarian principles of the Refugee Act and obligations under the UN Refugee Convention. These provisions are also open to subjective interpretation by the Refugee Status Determination Officer (RSDO), for instance arriving without documentation or entering the country other than through a designated port of entry should not be impediments to seeking asylum. However 4(1)(h) puts the onus on the asylum seeker to convince the RSDO that "there are compelling reasons" for not entering through a designated border post. **Section 4(1)(g)** is problematic for asylum seekers as the nature of forced migration means that an asylum seeker may well be "a fugitive from justice in another country where the rule of law is upheld by a recognized judiciary". LGBTIQ asylum seeker, taking just one category as an example, may indeed be facing just such a situation and should not be excluded on this basis.

Section 4(1)(i) is also problematic, given the closure of Refugee Reception Offices (RROs) and the well documented difficulties (including the documented high levels of corrupt practices at some RROs) of entering these offices to lodge a claim. Offices that designate a specific day for specific nationalities mean that in fact there is only one day out of the five stipulated on which the asylum seeker must gain entrance to the RRO, thus making applicants more susceptible to bribery in order to access the asylum system.

- **Section 5. Cessation of refugee status**

More thought should be given to the situations that can arise in the case of a person with refugee status having committed a crime stipulated in **Section 5(1)(f)** or an offence stipulated in **5(1)(g).** Opening up the refugee to deportation would violate the principle of *non-refoulement* which should be upheld even if the person is convicted or has been deemed to have committed an offence under the relevant Immigration, Identification, Passport and Travel Documents Act.

The intention of **Section 5(1)(h)** is unclear and concerning. If an individual, or indeed a "category", has been deemed a refugee by an RSDO through the asylum

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management system then their status should not be further contingent on the subjectivity of the Minister without at the very least being required to consult the Cabinet. More clarification is needed regarding the factors and parameters that dictate and influence the ceasing of refugee status and revoking of status of refugees at the will of the Minister.

- **Section 8. Refugee Reception Offices**

Section 8(1) appears to give the Director-General the possibility to open and close RROs without recourse to any other legislation such as the Promotion of Administrative Justice Act. In light of the current challenges arising from the closure of RROs and the short time period of 5 days for lodging a claim, this amendment seems to be opening the door to further compounding the difficulties in lodging an asylum claim.

The intention behind additions to **Section 8E(g)(h) and (i)** regarding the disqualification from membership of the Refugee Appeals Authority is welcomed as it is presumed to be in line with the Department of Home Affairs' recent crackdown on corrupt practices at ports of entry and by officials in the department itself. These additions are an acknowledgement of the extent of the problem of corruption at RROs and an indication that such practices are unacceptable.

- **Section 20A. Crime prevention and integrity measures**

CoRMSA fully supports the addition of this section expanding on strategies combating the ongoing challenges of fraud and corrupt practices at all levels of the asylum and refugee process. Specifically in Subsection **(1)(a)** and **(b)** the Director General must direct members of the Standing Committee and Refugee Appeals Authority to be subject to integrity testing for purposes of **(a)** "combating or preventing fraud, corruption or any crime of which dishonesty is an element; and **(b)** enhancing the integrity of, and confidence in, the asylum seeker and refugee system". We welcome the recognition by the department of the need to take strides towards recovering confidence in the asylum system.

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- **Section 21. Application for asylum**

The issuance of a transit visa at the port of entry should not be a requirement for seeking asylum. As mentioned in Section 4, entering the country other than through a designated border post should not be an impediment to seeking asylum. Whilst this layer of bureaucracy can assist the asylum seeker to avoid arrest and detention whilst moving from a point of entry to an RRO, it should not be considered necessary for making a claim. Moreover making the transit permit compulsory for lodging a claim is open to corruption, both by the officials issuing the permits at the border and in the power vested in the immigration officers at Refugee Reception Offices to determine if an asylum seeker has a "valid reason" not to have a transit visa.

- **Section 22. The right to work and study**

The proposed amendments in this section seek to restrict the rights of asylum seekers to work. **Section 22(6)** states that the asylum seeker "may" be means tested to see if they are able to support themselves and dependents for up to four months. There is no detail about what will trigger the means test, how this will be done or what happens after the four months. **Section 22(7)** stipulates that if the asylum seeker is unable to support themself and their dependents for up to four months, the UNHCR "may" offer assistance. There is no indication if the UNHCR has already agreed to providing such assistance. **Section 22(8)** then implies that the asylum visa will be endorsed with the right to work if the asylum seeker cannot support themselves and dependents for up to four months and the UNHCR and partners do not offer to provide assistance. However this is qualified in **Section 22(9)** by the fact that the asylum seeker must provide a letter of employment within fourteen days of taking up employment or, under **Section 22(11)** forfeit their right to work within six months of the endorsement being granted.

These amendments mean that asylum seekers are effectively prohibited from legally undertaking piecework, work in the informal sector or self employment of any kind as they would not be able to comply with **Section 22(9)**. The policy imperative for this seems to be based on a common misconception that non-nationals dominate the informal sector at the expense of South Africans. Gauteng is the Province with the highest number of migrants in the country. Yet research from the Gauteng City Regional Observatory (GCRO) indicates that 82% of informal business owners were born in Gauteng or moved from elsewhere in the country and only 18% moved to Gauteng from another country (not all of whom are asylum seekers)[2].

[2] Peberdy, Sally (2015). *Informal Sector Enterprise and Employment in Gauteng*, Gauteng City-Region

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Care should also be taken that amendments to the Refugees Act do not counter the direction of the Department of Home Affairs current migration policy process, which will look at the positive role that migration can play in the development of countries of origin and destination. The role of in-migration in strengthening economies should not be disregarded. GCRO data indicates that not only does Gauteng have the highest number of migrants, but also has the second lowest unemployment rate and is the biggest and fastest growing economy in the country[3]. Furthermore, data from Johannesburg shows that non-national traders are more likely to employ more people in their businesses at a ratio of 1 non-national entrepreneur: 1.97 employees and 1 South African entrepreneur: 0.82 employees. It should also be noted that amongst the non-nationals surveyed, only 29% were asylum seekers[4]. Simply excluding asylum seekers from this sector does not, on the basis of the existing evidence, seem to be addressing a genuine policy imperative. The impact of this amendment will negatively affect asylum seekers' ability to look after themselves and legally contribute to the South African economy, including through job creation.

- **Section 27. Protection and general rights of refugees**

The amendment proposing that refugees must now apply for permanent residence, which might not be granted, and only after ten years of residency rather than 5, does not reflect or encourage integration of refugees into South African communities. The fact that this application must be approved by the Standing Committee, rather than the regular processes for permanent residence applications, create additional hurdles for refugees compared to other applicants. The wording under **Subsection (c)** that the Standing Committee should give consideration *inter alia* to "efforts made to secure peace and stability in the refugee's country of origin" is vague and open to interpretation and should not have a bearing granting permanent residence as the person must be allowed to stay in the country unless a cessation agreement has been agreed.

Observatory (GCRO), Data Brief No.6 **http://www.gcro.ac.za/media/reports/gcro_data_brief_informal_sector_enterprise_and_employment.pdf**.

[3] Peberdy, Sally (2015). *Gauteng: a province of migrants*, Gauteng City-Region Observatory (GCRO), Data Brief No. 5 **http://www.gcro.ac.za/media/reports/gcro_data_brief_migration.pdf**

[4] Peberdy, Sally (2015). *Cross border migrant entrepreneurs and South African entrepreneurs in the informal sector of the City of Johannesburg,* Gauteng City-Region Observatory (GCRO) draft report

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- **Section 28. Removal and detention of refugees and asylum seekers**

This section has been amended to include asylum seekers, not just those with refugee status. It should not be assumed that an asylum seeker does not qualify for refugee status prior to a status determination interview. This brings into question to what country an excluded asylum seeker would be deported. If they are deported to their country of origin this would be considered refoulement and in contravention of international obligations under the Charter. **Subsection (1)** refers to “national interest”. This phrase is undefined and open to a vast variety of interpretations. This section also gives complete power to the Minister of the day to make a decision on the removal of an asylum seeker or refugee. It is inappropriate in this regard to invest exclusive powers in one person.

The amendment referring to the removal of a spouse or dependent of an asylum seeker or refugee **(4)** without allowing them a reasonable opportunity to make their own claim amounts to collective punishment.

Subsection (5) should include the provisions in relevant legislation that stipulates the time period that a person can be held in detention, access to legal representation and other domestic commitments.

- **Section 36. Withdrawal of refugee status**

CoRMSA is concerned that this amendment proposes getting rid of an oversight system of appeals for those who have had their refugee status withdrawn. This does not align with the Promotion of Administrative Justice Act (2000) as it suggests that instead, such a person “makes a written submission”, presumably to the Standing Committee, which is the same body that has determined that their status should be withdrawn. Furthermore, **Section 5 subsection (2)** recognises that a refugee has the right to challenge return to their country of origin, in which case **clause (1)(e)** will not apply. Without an appeals process, there is no channel through which such a challenge can be made. Again, this opens up the possibility of refoulement for refugees, contravening the principle of *non-refoulement* under international law.

C. Conclusion:

This submission has focused on the amendments which will limit the rights of asylum seekers in South Africa. There seems to be no evidence that the proposed

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limitations will address the current challenges within the asylum management system. Indeed the amendments that limit the right to work add on additional administrative functions to the system. Many of the amendments listed above will make it harder for asylum seekers to access the asylum system and remain legally documented within it. As has been repeatedly shown around the world (one has only to look at the desperate measures asylum seekers are currently resorting to at European borders) limiting access to protection does not reduce the numbers of people seeking asylum. It must be reiterated that prohibiting asylum seekers from self employment will not create jobs for South Africans. Policies and legislation should not be based on misconceptions around the numbers and function of asylum seekers in the economy but should be considered on empirical evidence and the humanitarian principles enshrined in the UN Refugee Convention and existing domestic legislation.

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