

8 September 2016

TO: Mr. Eddie Mathonsi
Secretary, Portfolio Committee on Home Affairs
Parliament
Cape Town
emathonsi@parliament.gov.za

ATTN: BL Mashile

Re: Comments on the Border Management Authority Bill [B9-2016]

Introduction

1. The Scalabrini Centre of Cape Town (SCCT) is a registered NPO that perceives migration as an opportunity and is committed to alleviating poverty and promoting development in the Western Cape while fostering integration between migrants, refugees, and South Africans. In providing our assistance, we advocate respect for human rights and use a holistic approach that considers all basic needs. The SCCT was founded in 2002 and roughly 2,000 clients use its services each month. Through this daily interaction the SCCT often hears of the experiences asylum seekers, refugees and migrants have in attempting to enter South Africa lawfully and our submission is based on this experience.
2. The SCCT submitted comments on the Border Management Agency Draft Bill in September 2015 which noted several concerns with that version of legislation; first, the Draft Bill did not clarify the obligations of officials in regards to the principle of *non-refoulement*. The Refugees Act (No. 130, 1998) incorporates the principle of *non-refoulement* into law at section 2 as:

General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any

similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

Non-refoulement is thus a critical component of refugee protection but was only mentioned briefly in an attached schedule in unclear language.

3. Secondly, the Draft Bill did not reference any relevant international legal instruments that border officials would be required to comply with and uphold. The most recent version of the BMA Bill alleviates some of our previous concerns through its reference to the need for officers to take due regard to the fundamental rights of persons and international law¹ and we thank the drafters for this inclusion.
4. We do however have a number of concerns with the current version of the Border Management Authority (BMA) Bill. Our main issues of concern with the BMA Bill relate to:
 - 4.1. The lack of clarity surrounding the current BMA Bill will result in unnecessary duplication of roles and powers of involved government agencies and in effect weaken border governance. We are also concerned that the introduction of the BMA Bill prior to the conclusion of the Green Paper on International Migration policy consultation process will result in legislation that does not align to a clear policy statement;
 - 4.2. The need for a robust commitment to the principle of *non-refoulement* and further acknowledgement of the vulnerabilities of asylum seekers and refugees;
 - 4.3. The lack of clarity regarding coordination and roles between state organs;
 - 4.4. The need for effective oversight and accountability;

¹As found in clause 15(3) of the BMA Bill.

- 4.5. The prevalence of corruption in the current border regime; and
 - 4.6. The costs of implementation and dangers of duplicating bureaucracy.
5. We thank the Portfolio Committee on the Department of Home Affairs for the opportunity to comment on the BMA Bill.

The lack of clarity surrounding roles of government in the current Bill

6. The most recent meeting on the BMA Bill in the Portfolio Committee on Home Affairs on 16 August 2016 revealed a lack of agreement between the key role players in the current configuration of the BMA Bill – the DHA, the South African Police Services (SAPS), and the National Treasury.
7. The SAPS presentation at the meeting focused on possible clashes with the Constitutional mandate of SAPS, the lack of clarity surrounding coordination, and the possibility of the BMA Bill conflating legal movements with illegal movements.² In particular, it was noted that clause 5 of the BMA Bill may clash with section 199(1) of the Constitution which requires there be a ‘single police service’ for the Republic.
8. The National Treasury's presentation was primarily concerned with the creation of ambiguity in the customs and tax regime and the creation of a parallel revenue-collection system that would be outside of the South African Revenue Service (SARS) and possibly fragment the tax collection system.³
9. A key concern of the SCCT respect of both presentations is the duplication of mandates and creation of parallel structures and processes. For example, it is unclear as to how the border guard will be constituted and work with existing SAPS members and South African National Defence Force (SANDF) members currently working on border management functions. We share the concerns raised in Parliament and believe that border management will be more effective if

² South African Police Services, *Briefing to the Portfolio Committee on Home Affairs – Establishment of the Border Management Authority*. Presentation to the Portfolio Committee on Home Affairs on 16 August 2016, p. 16.

³ National Treasury, *Border Management Authority Bill – Presentation by the National Treasury to the Portfolio Committee on Home Affairs on 16 August 2016*.

it harnesses the strengths of other departments and is not required to create new forces and structures from scratch.

10. While all departments agree on the principle aim of border management, there remain several significant disagreements with how the BMA Bill should be structured and implemented. From these presentations, these divisions appear serious and if not resolved prior to the finalization of the BMA Bill will weaken the governance of border management.

The introduction of the Bill prior to conclusion of Green Paper consultation process and White Paper

11. Secondly, we note that the BMA Bill has been released prior to the conclusion of the Department's Green Paper on International Migration consultation process (GP), begun in June of this year, which is intended to inform the formulation of a White Paper, currently set to be released in early 2017. In its Guidelines for Consultation document on the GP process, DHA notes that in regards to the current migration policy and legislative environment, it 'has been amending legislation without a proper review of the policy framework' and that 'there is a need for a proper policy review which will inform future changes on the legislation'.⁴ It notes further that 'the objective of a Green Paper is to build consensus and receive inputs before drafting the official policy document a White Paper. Thus the purpose of the Green Paper on International Migration is not to be definitive but to propose broad principles and raise key issues that need to be addressed by multiple stakeholders in each policy area'.⁵ It concludes by stating that the resultant White Paper 'will contain definitive proposals for specific policy areas that must be grounded on sound research and consultation. This will provide a solid foundation for the drafting of the new legislation'.⁶

12. The introduction of the BMA Bill prior to the GP policy process indicates that policy directions surrounding issues of migration, border management and security have already been made prior to consultation. We note that in the past policy changes by DHA, particularly at Refugee Reception Offices, have led to a myriad of problems at the nation's ports of entry with rippling

⁴ Department of Home Affairs. 'Towards a White Paper on International Migration in South Africa: Guidelines for Public Consultation' (15 June 2006), p. 6. Available at:

http://www.dha.gov.za/files/GUIDELINES_FOR_CONSULTATION_29062016.pdf

⁵ Department of Home Affairs, 'Green Paper on International Migration (24 June 2016), p. 78. Available at:

http://www.home-affairs.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf

⁶ Ibid.

effects throughout the region. For example, there is evidence that internal policies discussed by DHA regarding reception requirements for asylum seekers led to border authorities illegally restricting access to transit permits for asylum seekers who declare their intention to apply for asylum.⁷ These issues highlight the relationship between asylum policies and border operations and the consideration of the BMA Bill prior to dialogue on future migration policy may lead to a border management framework that is not aligned to migration policy.

13. This is of particular concern as the GP contains several proposals that would dramatically alter the current configuration of the asylum regime including detention centres for asylum seekers, the formalisation of bilateral agreements regarding responsibility for asylum seekers, and a general move towards the 'externalisation' of migration policy.
14. The SCCT recognizes the importance of border security and acknowledges that any legislative framework attempting to coordinate and integrate different departments requires clear spheres or responsibility among the agencies involved and necessarily requires each agency is in agreement. At the moment, it does not appear that there is consensus among government on the current version of the BMA Bill.
15. Additionally, we believe that the adoption of the BMA Bill prior to the GP consultation process will result in poor policy implementation at great cost to the State. These two challenges may result in legislation that instead of improving operations may in fact worsen border management and coordination. We firmly believe that to be effective any legislation involving multiple stakeholders and functions must start from a position of mutual agreement and align to a clear policy statement that is the result of a transparent and consultative policy process.

RECOMMENDATION 1: The SCCT recommends that the BMA Bill be withdrawn pending the clarification of the roles of government and agreement of these roles by all parties and the finalisation of the Green Paper consultation process and adoption of the subsequent White Paper on International Migration. This will ensure consensus on the resulting legislation and that all stakeholders can engage in the policy process and to ensure legislation aligns with policy.

⁷ IRIN News, 'Red tape ensnares asylum seekers in South Africa' (20 January 2012). Available at: <http://www.irinnews.org/report/94692/south-africa-red-tape-ensnares-asylum-seekers>. See also Tara Polzer, 'Policy Shifts in the South African Asylum System: Evidence and Implications', African Centre for Migration & Society and Lawyers for Human Rights Report (2013) pp. 20-31. Available at: <http://www.lhr.org.za/publications/policy-shifts-south-african-asylum-system-evidence-and-implications>

The importance of effective and protection-sensitive entry systems to admit asylum seekers in line with *non-refoulement* obligations and the connection between increased border controls and irregular migration

16. The SCCT recognizes that the control and management of South Africa's borders is essential for a variety of reasons including to facilitate legitimate trade and movement of people, to combat international crime, and to avert security threats. Thus the goals of border management are diverse and effectively addressing each requires a coherent approach that ensures risks are appropriately managed in such a manner as to promote regional trade and to ensure human rights obligations are met.
17. As mentioned in the introduction, the SCCT notes and endorses the BMA Bill's reference to the fundamental rights of persons, public international law obligations, and proper consideration of the rights and interests of vulnerable groups, including victims of trafficking, refugees and asylum seekers as found in clause 15(3).
18. The SCCT believes this is a positive step in the development of the BMA Bill; however, we believe that a direct reference to the principle of *non-refoulement* will both improve the BMA Bill's effectiveness in addressing priorities as well as ensure the rights of individuals are respected in line with Constitutional and international obligations.
19. The implementation of 'protection-sensitive'⁸ entry systems that ensure the principle of *non-refoulement* is upheld will have positive benefits for both the rights of individuals as well as for overall border security as it will ensure individuals with protection needs will not be forced to gain entry to South Africa through irregular means along with criminal cross-border operations.
20. Recent research has provided evidence of the correlation between increased border security measures and increased irregular entry. A study conducted by the University of the Witwatersrand in 2007-2008 suggested that 'increased policing or "tightening" of immigration controls would be unlikely to succeed in controlling clandestine immigration, and, indeed, might

⁸ In this regard, the United Nations High Commissioner for Refugees (UNHCR) notes that protection-sensitive entry systems are vital as a means of practical protection against possible *refoulement*: 'Border control is essential for the purposes of combating international crime, including smuggling and trafficking, and averting security threats. Practical protection safeguards are required to ensure that such measures are not applied in an indiscriminate or disproportionate manner and that they do not lead to *refoulement*.' UNHCR, 'Refugee Protection and Mixed Migration: A 10-Point Plan of Action' (2007) p. 3. Available at: <http://www.unhcr.org/protection/migration/4742a30b4/refugee-protection-mixed-migration-10-point-plan-action.html>

worsen immigration governance and increase the likelihood of human rights abuses in the border regions'. The study also suggested increased border controls were likely to 'increase the numbers of undetected and undocumented migrants in South Africa, since fear of strict border officials and misinformation about legal entry options drive undocumented border crossings'. This would also lead increases in demand for smugglers' services and incentives for corruption amongst border officials.⁹ The study concluded by strongly discouraging any 'reactionary tightening of immigration legislation or enforcement policy' as it would both fail to prevent cross-border migration but would also 'fail to address serious forms of cross-border criminality'.¹⁰

21. Other studies in states with similar border control needs have also found similar results. In the United States of America (USA), Massey, Pren and Durand argue that the USA's border control strategy, which they posit has evolved out of a panic over irregular immigration, has resulted in a self-perpetuating cycle of rising enforcement that does not mitigate the desire of migrants to access the USA. The strategy instead results in increased militarization of the border with increased costs to the state and increased use of smuggling syndicates.¹¹ A similar study by Cornelius found that the USA's control policy implemented in 1993 to reduce illegal entry resulted in the increase of mortality of migrants and re-channeled migration flows to more hazardous areas, increased fees for smuggling groups, and discouraged migrants already present in the USA from returning home; he found no evidence that the strategy deterred or prevented significant numbers of migrants from entering.¹²

22. In light of the above, we strongly believe that any type of border management policy must prioritize serious forms of international crime and cross-border criminality. An effective first-step to this goal is to ensure that individuals with protection needs present themselves at official ports of entry so as to separate refugee flows from criminal operations. A critical component of this will necessarily include a strong commitment to the principle of *non-refoulement*.

⁹ Tesfalem Araia, 'Report on Human Smuggling across the South Africa/Zimbabwe Border' Forced Migration Studies Programme, University of the Witwatersrand, MRMP Occasional Report (March 2009) pp. 6-7. Available at: http://archive.kubatana.net/docs/migr/fmsp_human_smuggling_zim_sa_0903.pdf

¹⁰Ibid., p. 51.

¹¹ Douglas Massey, Karen Pren, and Jorge Durand, 'Why Border Enforcement Backfired' 121(5) *American Journal of Sociology* 1557-1600 (March 2016). For a summary of the findings, see Joshua Mausolf 'The unintended consequences of border patrol: How US immigration policy backfired' Chicago Policy Review (15 April 2016), available at: <http://chicagopolicyreview.org/2016/04/15/the-unintended-consequences-of-border-patrol-how-us-immigration-policy-backfired/>

¹² Wayne Cornelius, 'Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy' 27(4) *Population and Development Review* 661-685 (December 2001).

RECOMMENDATION 2: The SCCT recommends that the principle of *non-refoulement* [as in section 2 of the Refugees Act (No. 130 1998)] is referenced in the Preamble, included in the list of definitions, and that clause 15(2) reads as follows:

15 (2) When performing any border law enforcement function, an officer must exercise his or her powers in a manner that takes due regard of the fundamental rights of persons as guaranteed under Chapter 2 of the Constitution, the principle of *non-refoulement*, and public international law obligations of the Republic, with proper consideration of the rights and interests of vulnerable groups, including victims of trafficking, refugees and asylum seekers.

The importance of coordination amongst stakeholders to ensure effective border management

23. An effective border management policy will necessarily require engagement and action from a variety of stakeholders. The need for the current BMA Bill itself is the result of the recognition of the need for 'integrated and co-ordinated border management'. We remain concerned that the BMA Bill does not yet clearly define functions and responsibilities among the different organs of state in an unambiguous manner which may negatively affect how vulnerable groups are treated along the border.
24. As discussed above in paragraphs 6 - 10, there remains a lack of agreement between role players in the current configuration of the BMA Bill which raises concerns about how different departments will coordinate actions, share information, and ensure effective management of border functions. We are particularly concerned about the coordination between departments in regards to the detention and treatment of vulnerable groups. The SAPS presentation in Parliament highlighted their concerns with the ambiguous arrest and detention processes in relation to clause 22(1).¹³ We note here that this has been an issue in the recent past, with the matter of unlawful detentions under poor conditions as well as unlawful deportations being brought before the Courts in *Lawyers for Human Rights v Minister of Safety and Security and Others* where *inter alia* the lack of coordination between DHA and SAPS had severe consequences for detainees at the SMG facility near Musina, including the detention and deportation of children.¹⁴

¹³ SAPS, above n 3, p. 17.

¹⁴(5824/2009) [2009] ZAGPPHC 57; judgment available online at <http://www.saflii.org/za/cases/ZAGPPHC/2009/57.html>. See in particular paragraph 4 for the problems encountered regarding coordination between agencies in regards to the treatment of vulnerable groups.

25. The current version of the BMA Bill includes the outline of a process for the detention and arrest of individuals in clause 22(1). The clause states that if an officer detains or arrests a person, the officer must then 'as soon as reasonably possible, bring that person to a police station under the control of the South African Police Service or, if a warrant expressly stipulates another place, bring the person to that place'. The requirements here are vague and it is unclear if this would process will apply to vulnerable groups.
26. While we understand that the BMA Bill is intended to establish a broad framework for border operations, we are concerned, given the history of abuses against non-nationals in border areas (as outlined above), that this vague delegation of power is not sufficiently detailed nor does it make mention of how vulnerable groups (such as unaccompanied minors, survivors of sexual and gender-based violence, and asylum seekers) should be addressed when apprehended by officers for irregular entry or for lacking the requisite documentation.
27. To exemplify the possible complications that could arise, research on unaccompanied minors and survivors of sexual and gender-based violence (SGBV) in the Limpopo province revealed that despite formal protections in legislation, 'unaccompanied minors are initially detained either at the border by SANDF, who then hands them over to SAPS, or by SAPS following a raid in town [Musina]. SAPS often detains these children until DSD [Department of Social Development] arrives to conduct the identification process.'¹⁵ Further, the report found that '[i]n some instances, SAPS has failed to identify and report that there are minors in detention' which is unlawful and contrary to the Constitution, the Children's Act, and the Immigration Act.¹⁶ For SGBV survivors, obstacles to justice and protection include refusal of entry at the border, detentions and deportations of survivors without medical treatment, and a lack of established procedures across government.¹⁷
28. We believe that the BMA Bill should work to improve coordination between government departments but are concerned that the current version may in fact weaken coordination. This is of particular importance for the rights of asylum seekers and refugees but also to the effective administration of border facilities. UNHCR also recognises that that to ensure asylum seekers and refugees are able to access protection in South African territory in a lawful manner that the

¹⁵ Rosalind Elphick and Roni Amit, 'Border Justice: Migration, Access to Justice and the Experiences of Unaccompanied Minors and Survivors of Sexual and Gender-Based Violence in Musina' African Centre for Migration & Society Report (2012) p. 51. Available at: www.migration.org.za/uploads/docs/report-36.pdf

¹⁶ Ibid., p. 52.

¹⁷ Ibid., pp. 90-104.

'effective approaches to mixed movements will inevitably depend upon full cooperation amongst key actors' including governmental bodies.¹⁸ In light of the effect of poor procedures and coordination between government departments on vulnerable groups referenced above, we believe the BMA Bill should be clear on procedures for this group. While the BMA Bill may be limited to more the broad function of establishing a framework for border management, we believe that it must be proactive in providing for the protection of vulnerable groups where possible.

RECOMMENDATION 3: The SCCT recommends that the BMA Bill clearly define the roles of government departments and agencies to facilitate coordination and effective governance of border management functions with the treatment of vulnerable groups as a special consideration.

Toward this end, the SCCT recommends references to the Refugees Act (No 130, 1998) for protection of refugees, asylum seekers and unaccompanied minors and references to the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32, 2007) and the National Policy Guidelines for Victims of Sexual Offences (1998) for the protection of survivors of SGBV.

Accountability and oversight of the BMA

29. The BMA Bill calls for the creation of a Commissioner (Chapter 3) that will be granted a wide range of functions and powers including the day-to-day running of the Authority, establishing and maintaining institutions for the control and maintenance of the Authority, managing labour relations, responsibility for the accounting and expenditure of the Authority, and command of the border guard. Officials in the border will also have extensive powers over entry, search and seizure (Chapter 6).

30. Our concern is that the difficulties in border enforcement operations listed above will continue or be transferred to new BMA institution and officials. In addition to the difficulties in border management cited above, we note DHA has faced challenges in adhering to the rule of law in immigration detention matters.¹⁹ As a means to address these issues, we strongly believe that

¹⁸UNHCR, 'Refugee Protection and Mixed Migration: A 10-Point Plan of Action' (2007). Available at: <http://www.unhcr.org/protection/migration/4742a30b4/refugee-protection-mixed-migration-10-point-plan-action.html>

¹⁹ See for example Roni Amit and Raul Zelada-Aprili, 'Breaking the Law, Breaking the Bank: The Cost of Home Affairs' Illegal Detention Practices' ACMS Research Report (September 2012). Available at: <http://fhr.org.za/resources/public-interest-law/breaking-law-breaking-bank>

the BMA Bill should have adequate oversight in regards to the fundamental rights of persons, especially in relation to some of the remote areas where border management operations occur.

RECOMMENDATION 4: The SCCT recommends that the BMA Bill should include specific mention to the South African Human Rights Commission (SAHRC) as having powers of oversight over the BMA to ensure critical human rights are protected and that security measures are not implemented indiscriminately or unlawfully, in line with the mandate of the SAHRC in terms of sections 184(2) and 184(4) of the Constitution.

The need to address corruption in the current border control regime

31. The SCCT's clients often recount how officials at border posts solicit bribes for lawful passage into South Africa. Through our interaction with these individuals it has become apparent that corruption is a major concern in the current management of the border. A number of reports in national media highlight the extent of corruption including:

- 31.1. In August 2016, an Assistant Manager within Home Affairs and an Immigration Official were among 17 individuals arrested in the past two months on fraud and corruption charges.²⁰
- 31.2. In May 2016, a number of officials were arrested for corruption including police officers, a Deputy Director of Home Affairs, and Immigration Officials after an investigation conducted by the Directorate for Priority Crime Investigation.²¹
- 31.3. In July 2015, the Minister of Home Affairs acknowledged that immigration officials at ports of entry were abusing their powers and not providing foreign nationals with the correct number of days to legally sojourn in South Africa. The Minister stated these officials were giving foreign nationals three days to lawfully remain in South Africa as opposed to the official policy of 90, and telling individuals they would be declared 'undesirable' if they overstayed. The Minister said these individuals are

²⁰ Rudzani Tshivhase, 'Home Affairs assistant manager to appear in court over corruption' (15 August 2016) Available at: <http://www.sabc.co.za/news/a/7ca836804ddedac08f92bf1caade0c3d/Home-Affairs-assistant-manager-to-appear-in-court-over-corruption-20161508>

²¹ Carla Bernardo, 'Prominent Limpopo officials nabbed for fraud' IOL News (26 May 2016). Available at: <http://www.iol.co.za/news/crime-courts/prominent-limpopo-officials-nabbed-for-fraud-2026799>

telling an 'untruth which is in effect ineffective' and that this was 'not the official position of the South African government, but officials do it at the border'.²²

32. The SCCT is concerned that any new structures created by legislation will not effectively address the serious problem of corruption at the border. We believe that corruption and maladministration in border patrols as well as ports of entry hinders an effective border management regime and that effective counter-corruption measures are imperative to good governance of the border. We recognize that legislation is not an effective method to counter corruption but implore all agencies involved in border management to continue to work on establishing effective systems and to root out networks of corruption.

RECOMMENDATION 5: The SCCT strongly urges DHA and other role players to continue to develop effective counter-corruption measures in the border management regime and to build an effective workforce that upholds their obligations and duties.

Costs of implementation

33. The attached 'Memorandum on the objects of the Border Management Authority Bill, 2016' briefly discusses on the financial implications of the BMA Bill for the State. Paragraph 5.1 references an estimation of R3,8 Billion in terms of funds required to be re-allocated to the Border Management Authority. The figure is the result of an Expenditure Performance Review (EPR) study which is being finalized by the Government Technical Advisory Centre.
34. We have several concerns regarding the financial implications for the state including a lack of clear guidelines or information on how the R3,8 billion figure was reached; the estimation's omission of overlapping costs due to the BMA Bill's overlapping functions; the cost of a significant reconfiguration of agencies involved in border management (amplified by discord between these agencies in terms of their roles and powers in relation to the BMA Bill); and the possible negative effects on revenue collection if the Authority begins to collect customs duties as opposed to SARS officials (this may have further implications for the State in terms of investor uncertainty and the negative perception of mismanagement).

²² Jonisayi Maromo, 'Ignore border officials' hogwash: Gigaba' *IOL News* (24 July 2015). Available at: <http://www.iol.co.za/news/crime-courts/ignore-border-officials-hogwash-gigaba-1890535>

35. In terms of the EPR estimation, there are no details as to how this estimation was calculated – this is concerning as there is no way to verify, or attempt to verify, the accuracy of the calculation which itself has significant implications for the state. Further, paragraph 5.2 in the Memorandum states that 'funds will follow functions' and that 'it is envisaged that additional funds may be required for the establishment of the Authority'. There are no further details provided on what these costs might be, where exactly they would be spent, or where the funds would come from. This shortcoming in the BMA Bill is particularly concerning given the recent challenges surrounding government expenditure and funding.
36. We believe that the costs of implementing the BMA Bill are likely to be significantly higher than the EPR estimation due in large part to the overlapping of functions between agencies. The cost estimate appears to not factor in the initial costs of change in management that will come with the creation of a new agency.
37. As a cautionary example, the creation of the Department of Homeland Security (DHS) in the USA (2002) has similar parallels to the current plan for border management in South Africa. The creation of that agency should be considered in light of the current BMA Bill in terms of actual, hidden, and unaccountable costs to the State. One investigation of the costs of the DHS found that its creation was the result of 22 existing governments departments being pulled together and that 'to knit these disparate parts together, officials built a mammoth bureaucracy over an already existing set of bureaucracies' that left a host of 'programs scattered across the rest of the federal government' resulting in many activities being duplicated by similar programs elsewhere. In effect, the creation of the new agency has resulted in 'tens of billions of tax dollars are disappearing into it annually, black hole-style, since it can't pass a congressionally mandated audit'.²³ While this does not speak to the efficacy of the DHS itself nor does it necessarily mean the BMA Bill will have a similar outcome, we believe that the current BMA Bill would benefit by a more rigorous analysis of costs and a more concerted effort to avoid duplication of roles. This may help in ensuring more transparency around costs and in streamlining operations.

RECOMMENDATION 6: The SCCT strongly urges DHA and other role players to further investigate the costs of implementing the BMA prior to the finalisation of legislation.

²³ Mattea Kramer and Chris Hellman, ' "Homeland Security": The Trillion-Dollar Concept That No One Can Define' *The Nation* (28 February 2013). Available at: <https://www.thenation.com/article/homeland-security-trillion-dollar-concept-no-one-can-define/>

Conclusion

38. We again thank the Portfolio Committee on Home Affairs for the opportunity to participate and comment on the BMA Bill. We agree that border management functions need to be streamlined and more effectively coordinated but have reservations about the current legislation achieving this goal. Along with other government departments and members of civil society, we are also looking forward to participating in the Green Paper process and believe that without a clear policy statement on migration the current BMA Bill will fall short of its goals at great cost to the State. We therefore believe the best course of action is to continue to refine the BMA through engagement with all stakeholders and to align the BMA with the outcomes of the Green Paper on International Migration process and subsequent White Paper.

Table of Recommendations

RECOMMENDATION 1: The SCCT recommends that the BMA Bill be withdrawn pending the clarification of the roles of government and agreement of these roles by all parties and the finalisation of the Green Paper consultation process and adoption of the subsequent White Paper on International Migration. This will ensure consensus on the resulting legislation and that all stakeholders can engage in the policy process and to ensure legislation aligns with policy.

RECOMMENDATION 2: The SCCT recommends that the principle of *non-refoulement* [as in section 2 of the Refugees Act (No. 130 1998)] is referenced in the Preamble, included in the list of definitions, and that clause 15(2) reads as follows:

15 (2) When performing any border law enforcement function, an officer must exercise his or her powers in a manner that takes due regard of the fundamental rights of persons as guaranteed under Chapter 2 of the Constitution, the principle of non-refoulement, and public international law obligations of the Republic, with proper consideration of the rights and interests of vulnerable groups, including victims of trafficking, refugees and asylum seekers.

RECOMMENDATION 3: The SCCT recommends that the BMA Bill clearly define the roles of government departments and agencies to facilitate coordination and effective governance of border management functions with the treatment of vulnerable groups as a special consideration.

Toward this end, the SCCT recommends references to the Refugees Act (No. 130, 1998) for protection of refugees, asylum seekers and unaccompanied minors and references to the Criminal Law (Sexual Offences and Related Matters) Amendment Act (No. 32, 2007) and the National Policy Guidelines for Victims of Sexual Offences (1998) for the protection of survivors of SGBV.

RECOMMENDATION 4: The SCCT recommends that the BMA Bill should include specific mention to the South African Human Rights Commission (SAHRC) as having powers of oversight over the BMA to

ensure critical human rights are protected and that security measures are not implemented indiscriminately or unlawfully, in line with the mandate of the SAHRC in terms of sections 184(2) and 184(4) of the Constitution.

RECOMMENDATION 5: The SCCT strongly urges DHA and other role players to continue to develop effective counter-corruption measures in the border management regime and to build an effective workforce that upholds their obligations and duties.

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