

6 February 2018

Re: Written submission to the South African Human Rights Commission for the National Hearing on Social Cohesion and Xenophobia South Africa

1. The Scalabrini Centre of Cape Town (SCCT) is a registered non-profit organisation 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. The Scalabrini Fathers have been providing welfare services in Cape Town to displaced communities since 1994. In providing assistance, the SCCT advocates respect for human rights and utilises a holistic approach that considers all basic needs including advocacy, development, and welfare services.
2. We thank the South African Human Rights Commission (SAHRC) for the opportunity to participate in the National Hearing on Social Cohesion and Xenophobia. Our comments are based on our experience providing direct assistance to foreign nationals including support with local integration, supporting and assisting victims of hate crimes and xenophobic violence, and engaging with government on gaps in policy and legislation. Our submission is structured and based off of the questions supplied by the SAHRC for the National Hearing.

What in your view are the underlying causes of ongoing stigma and discrimination experience by migrant communities in South Africa?

3. The underlying causes of stigma and discrimination are no doubt complex and multi-faceted and include a variety of underlying structural political and historical causes as well as more specific factors such as socioeconomic conditions, distribution of scarce resources, policing, and political leadership. There has been significant debate in recent years about both the motivation for, as well as the prevalence of, violence directed against foreign nationals, or those who are perceived to be foreign nationals in South Africa. While acts of collective violence directed against foreign nationals, such as the events of May 2008, have drawn the most attention, it is worth noting that this type of violence has been an enduring characteristic of post-1994 Constitutional South Africa.¹ Since 2008, violence directed against outsiders has

¹ For a timeline of xenophobic incidents long pre-dating the May 2008 violence, see 'Appendix: Xenophobia Timeline' in J. Crush, 'The Perfect Storm: The Contemporary Realities of Xenophobia in Contemporary South Africa', Migration Policy Series No. 50 (Cape Town & Kingston, Southern African Migration Project, 2008) at pp. 44-54.

continued in both large acts of collective violence² as well as through attacks on individuals.³ It is also worth reiterating that xenophobic attitudes and policies are not unique to South Africa as evidenced by recent events in the United States, Europe and Asia.

4. In addressing the question of the causes of ongoing discrimination, the SCCT would like to focus on two factors that can foster and perpetuate xenophobic violence: local political leadership in relation to outbreaks of mass public violence and a more common 'everyday' presence of xenophobic attitudes and discrimination which takes its cue from the actions and statements of officials. In doing so, we hope to focus more on the 'ongoing' aspect of this issue and attempt to better understand why the role of 'xenophobia' continues to carry such a prominent role in South Africa.
5. One of the more empirically-informed research outputs into the 2008 attacks attempted to better understand why some locations had outbreaks of violence while other areas (similar to those where violence occurred in poverty, crime and other socioeconomic factors) did not have outbreaks. This research highlighted the role of local groups and individuals involved in local politics and in particular their role in either fostering violence or preventing violence.⁴ This enquiry found that while broad socioeconomic factors were important aspects that enabled the violence, the triggers were political and leadership vacuums, lack of conflict resolution mechanisms, and a culture of impunity in which local leaders (both official and self-appointed) mobilised community members to exert control over the local area.
6. In particular, the lack of conflict resolution mechanisms resulted in conditions where the police were unable or unwilling to engage with communities to address issues that arose prior to the attacks. This failure resulted in communities perceiving an unwillingness on the part of the police and other leaders to address their concerns and led to the use of violent methods by the community to address the issue as the criminal justice system, or the police more generally, appeared unable or unwilling to address their concerns (substantiated or not).⁵ The areas that were not affected by anti-foreigner violence were found to have community leaders abided by the rule of law and represented and protected the rights of all residents in the community, including foreign nationals. In doing so, community meetings held in these areas were meetings in which issues were discussed and the greater concerns of protecting the community itself prevailed over violence.⁶

² See for example the events in Durban in April 2015 and Grahamstown in October 2015: 'Several dead as xenophobic violence boils over in Durban', Mail & Guardian, 14 April 2015, available at:

<http://mg.co.za/article/2015-04-14-several-dead-as-xenophobic-violence-boils-over-in-durban>;

'Xenophobia in Grahamstown: "We are not leaving!"', The Daily Maverick, 29 October 2015, available at: <https://www.dailymaverick.co.za/article/2015-10-29-xenophobia-in-grahamstown-we-are-not-leaving/#.WJA62vn5hME>.

³ 'Cape Somalis 'still being threatened'', Mail & Guardian, 8 July 2011, available at: <http://mg.co.za/article/2011-07-08-cape-somalis-still-being-threatened>.

⁴ Jean Pierre Misago, 'Disorder in a Changing Society: Authority and the Micro-politics of Violence' in Loren B. Landau (ed.) *Exercising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa* (Wits University Press, Johannesburg, 2012) pp. 89-108.

⁵ Ibid, pp. 98-99.

⁶ Ibid, p. 103.

7. Many of the clients at the SCCT have outlined similar scenarios where prominent members of communities espouse anti-foreigner sentiments that make it more difficult for foreign nationals to realise their rights. In one case, a client of the SCCT suffered a shop looting and violent attack. Prior to the attack, a series of meetings were convened by community leaders where threats and xenophobic comments were made against the Somali shopkeeper. Our client struggled to get a case opened and once he did so, the investigation was half-hearted, despite overwhelming evidence regarding the individuals who incited the violence. As a police officer told one of our clients, he too had to live in the community, and because of that he was afraid to offer tangible assistance in an investigation into a crime that he himself had witnessed, despite the importance of his knowledge and his understanding of the rights of the victim. Another officer implored him to drop the case and find a new community to reside in.
8. While local leadership is critical to ensuring the rights of all residents of the community are upheld, particularly in cases of public violence, the presence of structural discrimination that foreign nationals experience on a daily basis acts as another enabling element that fosters the sorts of attitudes and feelings that can be mobilised into violence. At the same time, migrants themselves face these attitudes and experiences daily which constantly reinforces the notion that their presence is not wanted and even illegitimate, which has consequences for both migrant engagement in communities and long-term growth and development.
9. In terms of the everyday experience of non-nationals, the SCCT frequently observes discrimination in the public service sector, from public transport officials to the Department of Home Affairs to hospitals and clinics. Public service administrators and officials effectively allow or disallow an individual to exercise his or her basic rights. Structural discrimination by state officials in various sectors in turn shapes public sentiment and can reinforce anti-foreign national attitudes and sentiments. These front-line officials often act autonomously and implement national policies in an arbitrary and extra-legal manner. Perhaps this is nowhere as visible in the asylum system, where it has been observed that a variety of barriers are–

commonly produced by the individual effort of officials of the DHA, who act outside their legislative mandate to prevent asylum seekers gaining access to the reception system [...] Put simply, the DHA officials are embedded in an institution which sanctions its officials engaging in extra-legal practices that prevent foreigners from entering and residing legally in South Africa.⁷

Remarking on the Department of Home Affairs' broad policy goals which have increasingly diverged from actual legislation, Landau and Amit have remarked that given the *de facto* autonomy of the Department's bureaucracy, the bureaucracy itself has 'emerged as policy maker neither bound by nor accountable to law.'⁸

10. Such practices are not confined to the asylum system and there are many examples of similar obstacles in other government departments. For example, negative attitudes of health care workers and hospital administrative staff are displayed towards migrants by refusing service.

⁷ Darshan Vigneswaran, 'A foot in the door: Access to Asylum in South Africa', *Refugee* 25(2), 2008, p. 43.

⁸ Loren B Landau and Roni Amit, 'Wither policy? Southern African perspectives on understanding law, "refugee" policy and protection', *Journal of Refugee Studies* 27(4), 2014, p. 7.

Not only is this an abuse of discretion, but instils the sentiment that migrants have lesser rights and do not have a legitimate claim to realise their rights.⁹ Similar examples are found in service provided to migrants by SAPS and at public schools.

11. This discrimination is reinforced by some state officials at the local, regional and national level, who make public comments referring to asylum seekers as illegitimate and equate foreign nationals with crime, avoiding any consideration of their contribution to South Africa's economy, culture, and society. Such statements are not based on empirical facts or data, or worse, distort the available evidence. These statements have a long history and have been made by officials across the political spectrum and in various forums. In the media, such examples include:

11.1. In 1998, a former Defence Minister stated that: 'As for crime, the army is helping the police get rid of crime and violence in the country. However, what can we do? We have one million illegal immigrants in our country who commit crimes and who are mistaken by some people for South African citizens. That is the real problem.'¹⁰

11.2. In 2002 a former Director General of the Department of Home Affairs stated that 'Approximately 90 per cent of foreign persons who are in RSA with fraudulent documents, i.e., either citizenship or migration documents, are involved in other crimes as well ... it is quicker to charge these criminals for their false documentation and then to deport them than to pursue the long route in respect of the other crimes that are committed.'¹¹

11.3. In 2017, the Deputy Police Minister stated that foreign nationals were overtaking cities and businesses. He stated 'The question of dominance of foreign nationals in illegal trading and also businesses that are here in Hillbrow is an economic sabotage that is taking place against our people. We are supposed to be those who are running those particular businesses.'¹²

12. Such statements and thinking are even present in official policy documents, parliamentary debates, and court papers, demonstrating the pervasiveness of this mode of thinking. Further examples include:

12.1. In a case involving the immediate detention and deportation of failed asylum seekers, an official from the Department of Home Affairs stated generally that 'the fact that in many cases asylum seekers are not economic migrants but rather persons belonging

⁹ See for example Section27, 'Public Service Announcement: Access to healthcare for migrants', 20 June 2017, available at: <http://section27.org.za/2017/06/public-announcement-access-to-health-care-for-migrants/>.

¹⁰ Defence Minister Joe Modise as quoted in Human Rights Watch, ' "Prohibited Persons" Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa' (New York: Human Rights Watch, 1998), 124.

¹¹ As quoted in IRIN News, 'Act II of xenophobia waiting in the wings', 2009, available at: <https://www.irinnews.org/fr/node/245217>.

¹² Thapelo Lekabe, 'Mbalula's deputy accuses foreign nationals in Hillbrow of economic sabotage', The Citizen, 14 July 2017, available at: <https://citizen.co.za/news/south-africa/1574446/mbalulas-deputy-accuses-foreign-nationals-of-economic-sabotage-spouts-alternative-facts/>

to crime syndicates involved in human trafficking, drug smuggling, money laundering and other nefarious activities, extra burdens are placed on the resources of the country dedicated to combatting crime in this country and across borders';¹³ and

- 12.2. As a rationale for a 'new paradigm' in migration management, a powerpoint slide was presented in parliament outlining how a migrant would enter South Africa and break numerous laws including *inter alia* bribes to enter the country, the running of a small business linked to the illicit economy, and a fraudulent marriage; the process culminates in the migrant becoming a citizen and bringing his real wife to the country.¹⁴
13. Unfortunately there are far fewer examples of public officials highlighting the positive contributions despite research highlighting the contribution of foreign nationals to the development of South Africa. A notable contribution here is former Minister of Home Affairs Malusi Gigaba stating that it is wrong to say migrants are criminals and can contribute to South Africa positively.¹⁵ This is in line with recent research on foreign nationals contribution to economic development indicates the possible positive contributions of migrant entrepreneurship in terms of services and economic development.¹⁶ However, the continual cycle of negative statements regarding foreign nationals and migration more generally reinforces the unlawful conduct of some front-line officials, who deny statutory rights to foreign nationals, as well as to the general public and local leaders, and complicates integration efforts.
14. The role of xenophobic discourse in the public sphere fosters the conditions for everyday xenophobic attitudes and discrimination and can spark public violence. We believe these statements are a critical factor in the perpetuation of stereotypes and recommend that the SAHRC hold public figures to account where appropriate and advocate for inclusive public discourse in relation to migration and social cohesion.
15. The reoccurring feature of current discourse is the common description of foreign nationals being 'illegal' or illegitimately in the county. Casting them in this light therefore aims to make their illegality seem straight-forward and makes linking migration with serious crime an easy and logical connection. For migrants who may be undocumented, or for those whose documentation has lapsed due to the challenges in the asylum system as listed below in

¹³ Department of Home Affairs, Responding affidavit, *Tshianda and Others v Minister of Home Affairs and Others* (Case No 24293/11) at ¶ 32.

¹⁴ See Annexure 1 for a copy of the slide; Presentation by Director General of Home Affairs, Joint Meeting of the Portfolio Committee on Police, Portfolio Committee on Defence, Portfolio Committee on Home Affairs, Standing Committee on Finance & Joint Standing Committee on Intelligence, (National Assembly and National Council of Provinces) [Joint Meeting with South African Revenue Services (SARS): Assessing Borderline and Border Post Security, 8 November 2011].

¹⁵ 'It's wrong to say foreigners are criminals – Gigaba', Randburg Sun, 15 February 2017, available at: <https://randburgsun.co.za/315700/its-wrong-to-say-foreigners-are-criminals-gigaba/>.

¹⁶ See for example Roni Amit with Vanya Gastrow, 'Somalinomics: A Case Study on the Economics of Somali Informal Trade in the Western Cape', Research Report: Johannesburg: African Centre for Migration & Society, University of the Witwatersrand., 2013, available at: <http://www.migration.org.za/wp-content/uploads/2017/08/Somalinomics-A-case-study-of-the-economics-of-Somali-informal-trade-in-the-Western-Cape.pdf>; Sally Peberdy, 'International Migrants in Johannesburg's Informal Economy', SAMP Migration Policy Series No. 71, 2016, available at: <http://gcro.ac.za/media/reports/SAMP71.pdf>.

paragraph 29, this discourse fails to incorporate how the law, or the system in place to implement the law, might force individuals into 'illegality'.

16. Nicholas De Genova has labeled this dynamic as the 'Border Spectacle' where the law that renders migrants, or certain types of migrations, as 'illegal', remains invisible and displaces the illegality from its point of production – the law and the processes of lawmaking.¹⁷ This process renders the migrant 'hyper-visible' equally through conjuring images of migrants transgressing borders and through representations of migrants as the target of anti-crime operations and border policing. In this way, the migrants are included only through their illegalisation and as the object of the state's 'diligent but ever-beleaguered response to the (phantom) crisis [where] the nightmarish invasiveness, relentlessness, and ubiquity of illegal migration then serves to summon forth ever more intense and expansive intrusions of state power into everyday life'.¹⁸ This is evidenced in South Africa through some of the statements listed above, and through such policies like Operation Fiela which is aimed at fighting crime and undocumented migrants alike.
17. Combatting the Border Spectacle requires more responsible actions by politicians, policy-makers, and public figures. It also requires focusing on examples of migration as development. Unfortunately there are far fewer examples of public officials highlighting the positive contributions despite research highlighting the contribution of foreign nationals to the development of South Africa. A notable contribution here is former Minister of Home Affairs Malusi Gigaba stating that it is wrong to say migrants are criminals and can contribute to South Africa positively.¹⁹ This is in line with recent research on foreign nationals contribution to economic development indicates the possible positive contributions of migrant entrepreneurship in terms of services and economic development.²⁰
18. Toward this end, the Department of Home Affairs along with the International Organization for Migration has introduced the 'Mkhaya Migrant Awards' to 'acknowledge the positive economic, social and cultural contribution that migrants make'. While we applaud this initiative and encourage this form of public engagement, we believe such efforts would be more fruitful if they were embedded into a long-term action plan and was used as a point of reference when discussing migration policy and social cohesion. Such efforts, combined with more inclusive statements and acknowledgements of challenges in migration policy, may help advance social cohesion. However, the continual cycle of negative statements regarding foreign nationals and migration more generally reinforces the unlawful conduct of some

¹⁷ Nicholas De Genova, 'Migrant "illegality" and deportability in everyday life', *Annual Review of Anthropology*, vol. 31, 2002, pp. 419-447.

¹⁸ Nicholas De Genova, 'The border spectacle of migrant "victimisation"', openDemocracy, 20 May 2015, available at: <https://www.opendemocracy.net/beyondslavery/nicholas-de-genova/border-spectacle-of-migrant-%E2%80%98victimisation%E2%80%99>.

¹⁹ 'It's wrong to say foreigners are criminals – Gigaba', Randburg Sun, 15 February 2017, available at: <https://randburgsun.co.za/315700/its-wrong-to-say-foreigners-are-criminals-gigaba/>.

²⁰ See for example Roni Amit with Vanya Gastrow, 'Somalinomics: A Case Study on the Economics of Somali Informal Trade in the Western Cape', Research Report: Johannesburg: African Centre for Migration & Society, University of the Witwatersrand., 2013, available at: <http://www.migration.org.za/wp-content/uploads/2017/08/Somalinomics-A-case-study-of-the-economics-of-Somali-informal-trade-in-the-Western-Cape.pdf>; Sally Peberdy, 'International Migrants in Johannesburg's Informal Economy', SAMP Migration Policy Series No. 71, 2016, available at: <http://gcro.ac.za/media/reports/SAMP71.pdf>.

front-line officials, who deny statutory rights to foreign nationals, as well as to the general public and local leaders, and complicates integration efforts.

Does the existing conception and implementation of law and policy serve the interests of migrant communities and provide adequate protection? If not how can law and policy be improved?

19. In general, South Africa has a progressive legal framework, especially in terms of the Constitution and the Refugees Act (No 130, 1998). However, the Immigration Act (No 13, 2002) is restrictive and offers no legal avenues for lower and semi-skilled regional migrants to enter the country and conduct business and work. Many of these individuals end up applying for asylum as their only imperfect means to legalise themselves, even if temporarily. This is done through both desperation and a lack of knowledge amongst many asylum seekers regarding the intent of the refugee protection regime. This lack of knowledge is mirrored by many citizens who do not understand the differences between a refugee and a migrant, an issue that arose during the debates in the National Assembly over the Refugees Act and which continues to the present.
20. A critical component of the protection regime is in implementation, and in implementation is where the refugee regime faces its most daunting challenges. These challenges are certainly exacerbated by large numbers of applicants, but in our view, the Refugees Act would function more effectively if it had a complementary immigration regime and political will to execute the Act.
21. The laws and policy surrounding migration are currently in a process of flux with the release of the White Paper on International Migration in July 2017²¹ and the Refugees Amendment Act [B12-2016] being passed through the National Assembly in late 2017. There are some positive and negative developments in both of these pieces of legislation in relation to the protection of migrant communities.
22. In terms of the White Paper, there is a clear articulation of the need for a pragmatic approach to regional economic migration including the regularisation of those already present (some of these who are undocumented) and the introduction of special visas for various categories of migrants from regional countries.²²
23. The White Paper proposes several new initiatives to address regional economic migration including regularisation programmes in the vein of the Zimbabwean Dispensation Project and the Lesotho Special Dispensation. Such an initiative recognises the value in providing individuals an opportunity to approach the state and 'opt-in' and how such programmes mitigates corruption, reduces crime, and improves economic and development conditions for both South Africa and states in the region.²³

²¹ Department of Home Affairs, 'White Paper on International Migration for South Africa', July 2017, available at: www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf.

²² Ibid, p. 54.

²³ Ibid, pp. 55-56.

24. This approach would be supplemented by improved enforcement of labour laws and immigration law. The SCCT agrees that the current immigration enforcement approach, where detention and deportation remain the primary tools, is not achieving its intended policy goals and may in fact heighten xenophobic tensions in communities.
25. However, a negative proposal in regards to refugee protection and social integration is the introduction of ‘asylum seeker processing facilities’, which will in effect be detention centres, where asylum seekers will remain during the adjudication of their refugee claim. This is a step backwards and we believe it is likely to exacerbate rather than rectify the challenges in the asylum system, while significantly undermining people’s rights, dignity and humanity. The use of detention will not deter irregular immigration and will not facilitate a more effective asylum regime, especially given the current implementation challenges with a non-detention model. Lastly, policies and procedures that criminalise and segregate asylum seekers will engender and perpetuate popular hostility towards asylum seekers, again contributing to the conditions that foster and incite xenophobic sentiments and violence.
26. The Refugees Amendment Act²⁴ contains numerous restrictions and exclusions on core rights such as the right to education and the right to work as well as increase the risk of *non-refoulement*. The SCCT believes that the Bill contains unconstitutional provisions and is unworkable in practice. The likely outcome is increased numbers of undocumented asylum seekers and refugees which is unhelpful in countering xenophobia and advancing social cohesion.
27. The issue of policing and hate crimes is one where the existing legal framework is insufficient. The release of the Draft Hate Crimes Bill last year represents a positive step towards addressing this gap.²⁵ The SCCT submits that the hate crimes aspect (as opposed to hate speech) of this bill will be beneficial to the protection of migrant communities on several grounds:
- 27.1. The Hate Crimes Bill includes crimes committed on the basis of culture, language, nationality, and ethnic or social origin may constitute a hate crime as found in section 3(1). The protection of these characteristics will establish a solid foundation for prosecution of crimes committed against perceived ‘outsiders’, both foreign nationals as well as South African citizens. The SCCT believes that this inclusion will allow those serious crimes where hate is a prime motivating factor to receive the adequate attention they deserve in both the investigation and prosecution phases;
- 27.2. The recognition of the severity of these crimes in the Hate Crimes Bill will act as an awareness-raising tool within SAPS and the criminal justice system by raising the profile of xenophobic crimes which are so often given a low priority; and
- 27.3. It will require the disaggregation of statistics in relation to hate crimes and will provide more data to get a more accurate picture of the pursuit of justice in relation to xenophobic hate crimes.

²⁴ The most recent version is available here: <https://pmg.org.za/bill/659/>.

²⁵ Draft Prevention and Combatting of Hate Crimes and Hate Speech Bill, 2016, available at: www.justice.gov.za/legislation/bills/2016-HateCrimes-HateSpeechBill.pdf. (hereafter the ‘Hate Crimes Bill’).

28. In conclusion, the SCCT believes that legislation should have an inclusive orientation as opposed to exclusionary. In this regard, the White Paper's proposals on opening up legal avenues could be helpful in establishing a balanced framework. We submit the development of detention facilities is undesirable and the damage done by detaining vulnerable populations may be difficult to reverse.

What specific challenges do migrant communities face in relation to issues surrounding community integration?

29. As outlined above, migrant communities face many challenges in regards to community integration. For the purpose of the National Hearing, the SCCT will focus on two challenges which we have encountered in our work and believe are important to the SAHRC: the lack of enabling documentation which complicates integration and access to protection, and the lack of effective integration can lead to the creation of conditions where foreign nationals ascribe many of the stereotypes citizens commonly label them with onto citizens.

30. Documentation is a key aspect of one's ability to access their rights in South Africa. Without documentation, access to core services such as healthcare and institutions of justice is complicated and other services such as banking are unavailable. Even basic services such as accessing a library or securing a spot in a homeless shelter are complicated by a lack of legal status. An undocumented individual is at heightened risk for detention and deportation as well as harassment and exploitation.

31. The asylum system has all but collapsed in recent years through the closure of urban Refugee Reception Offices (RRO) and restrictive policies on the renewal of documentation.²⁶ Systemic challenges in the refugee status determination process remain entrenched²⁷ along with endemic corruption.²⁸ Individuals seeking international protection are often unable to apply for asylum in a timely manner or, after having done so, are unable to keep their documentation valid due to policy decisions mentioned above or due to administrative blocks within the system. This is especially relevant for those who do not reside near an RRO and have to travel significant distances for administrative action every one to six months.²⁹ The

²⁶ Tara Polzer, 'Policy shifts in the South African asylum system: Evidence and implications', LHR and ACMS Research Report, 2013, available at: <http://www.lhr.org.za/publications/policy-shifts-south-african-asylum-system-evidence-and-implications>.

²⁷ See for example Roni Amit's report based on refugee status decisions made in 2009, prior to several improvement projects implemented by DHA in status determination processes; Roni Amit 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions,' Forced Migration Studies Programme Research Report, April 2010, available at www.migration.org.za/uploads/docs/report-24.pdf. A follow-up report examined decisions issued in 2011 which reached similar conclusions; see Roni Amit 'All Roads lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' ACMS Research Report, June 2012, available at: www.migration.org.za/newcms/uploads/docs/report-35.pdf.

²⁸ Roni Amit, 'Queue here for corruption: Measuring Irregularities in South Africa's Asylum System', LHR and ACMS Research Report, 2015, available at: <http://www.lhr.org.za/publications/queue-here-corruption-measuring-irregularities-southafrica%E2%80%99s-asylum-system>.

²⁹ On the systemic difficulties of accessing the asylum system, see: Roni Amit, 'No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices', The African Centre for Migration & Society at the University of Witwatersrand, 2012, available at: http://fhr.org.za/files/5413/8503/7665/no_way_in_barriers_to_access_service_and_administrative_justi

closure of the Port Elizabeth and Cape Town RROs have been found unlawful by the courts and ordered to re-open, and we are hopeful that this may lead to a more effective and accessible asylum regime in the near future.

32. Regardless of documentation, all persons in South Africa, regardless of their immigration status are protected by the Bill of Rights as found in Chapter 2 of the Constitution. These rights are the foundation of a free and just democratic society and, with exception to the right to vote, apply to all persons in the Republic irrespective of their legal status. The Supreme Court of Appeal has stated unequivocally 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 reasons – it must be respected, and is protected, by section 10 of the Bill of Rights.³⁰

33. A major difficulty for those foreign nationals lacking proper documentation is the ability to open cases with SAPS and to follow these cases through prosecution to a conviction. Our offices often encounter undocumented individuals who have been the victims of hate crimes but have been refused assistance at SAPS stations due to their lack of documentation. In some instances, individuals are told to return to the station with their documentation for assistance (even if they suffered physical injuries during the attack) or are told that they cannot be helped as they lack documentation. Often, individuals who are the victims of hate crimes do not even attempt to report these crimes to SAPS as they are afraid of approaching the authorities as they believe they may face detention and deportation if they attempt to open a case as an undocumented foreigner.
34. Beyond the opening of a case and investigation, documentation, or lack thereof, can also complicate prosecutions. The lack of documentation for both victims and witnesses results in an inherently unstable situation where employment and day-to-day subsistence can be difficult. Given the protracted nature of many investigations and prosecutions, foreign nationals may struggle to maintain their legal status throughout the case; for those without documentation, participating in a meaningful way in the prosecution can be extremely difficult. As an example, one case was under investigation for over one year before being finalized. Due to the effects of the attack, the victim was forced to leave their former area of residence, complicating the investigation and follow-up by SAPS. The delays in this case were significant factors in the investigation concluding without charges.
35. The structural discrimination discussed above leads to a situation in which many non-nationals are constantly reminded that they are not welcome here and that their presence is illegitimate. This kind of environment obviously hampers integration and increases stress on refugees and migrants. It also forces foreign nationals to find alternative and often parallel networks to navigate daily life. These networks necessarily operate outside of official state frameworks, a problem for the modern state and bureaucratic efforts, but it also leads to a

[ce final report.pdf](#)]; Ra'eesa Pather, 'Cape Town refugees in limbo: "You can't stay here without your paper"', The Daily Vox, 30 June 2016, available at: <http://www.thedailyvox.co.za/cape-town-refugees-in-limbo-you-cant-stay-here-without-your-paper/>.

³⁰ *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (4) SA 326 (SCA) at ¶ 25.

fraying of the already tenuous relationship between foreign nationals and the state. In our work, we often see that community-based networks are relied on for tangible assistance across a variety of issues. Often, individuals say that the only reason they reported a hate crime to the police is to have a case file number to record the crime, but that they do not expect the perpetrators to even be identified, let alone tried and convicted.

36. One of the outcomes of this is that foreign nationals have a strong feeling of disconnection with the South African state. On the local level, a case study of Johannesburg found that state policies that were based on exclusion were resulting in foreign nationals establishing parallel extra-legal networks to meet basic needs. These networks often occur with the collusion of state agents.³¹
37. The entrenchment of parallel and extra-legal networks has obvious implications for the state and governance. In terms of social cohesion, the SCCT submits that a further consequence is a hardening of the break in the relationship between foreign nationals and the state. If migrants are faced with exclusionary practices and everyday discrimination, foreign nationals make a conscious effort to not fully incorporate themselves into South African society and further distance themselves from it, and therefore rely more heavily on other diaspora members and networks.³²
38. As an example, a march in Pretoria was called in February 2017 under the auspices of a group named Mamelodi Concerned Residents. The group circulated a flyer stating they intended to call for a march against 'illegal immigrants' and companies that only hire foreign nationals, referencing (among other things) the high unemployment rate and the government's issuance of asylum seeker permits to foreign nationals. On the day of the march, Pretoria was largely shutdown, shops were looted, and the march resulted in a stand-off between foreign nationals and protestors that was ultimately broken up by the police.³³
39. The SCCT has also seen evidence of this trend in our work. In order to counteract discrimination as a result of xenophobia and to advance social cohesion amongst refugees and migrants and within the larger South African community, the SCCT has begun implementing integration trainings throughout our programmes. These trainings include an intensive examination of one's own biases, prejudices, and power, in combination with practical conflict resolution skills. The trainings are aimed at deepening participants' knowledge of South African history, the Constitution, and the rights and responsibilities of both foreign nationals and citizens. Throughout the trainings, participants are encouraged to consider tangible actions they can begin taking in their communities, work places, and the SCCT itself to increase social cohesion and to develop a stronger sense of community.

³¹ Caroline Kihato, 'Governing the city, South Africa's struggle to deal with urban immigrants after apartheid', *African Identities* 5(2), 2007,

³² Loren B. Landau, 'Loving the alien? Citizenship, law, and the future in South Africa's demonic society' *African Affairs*, 109 (435), 2010, pp. 213–230.

³³ BBC News, 'South Africa clashes at anti-foreigner protest in Pretoria', 24 February 2017, available at: <http://www.bbc.com/news/world-africa-39076751>.

What steps can be taken to continuously advance social integration and ultimately reduce inequalities associated with exclusion in national identity? Which actors are best placed to take these steps?

40. In relation to the challenges described above, the SCCT submits that there are several concrete steps that can be taken to advance social integration and reduce exclusion including the creation of a more balanced, practical, and fair immigration regime; addressing the challenges in prosecuting hate crimes committed against foreign nationals; and broad advocacy efforts designed to increase engagement between citizens and foreign nationals on issues that affect all members of the community.
41. In terms of immigration policy, the Department of Home Affairs should receive credit for adopting a more holistic approach to regional migration dynamics, as mentioned above. The SCCT believes that the White Paper's regularisation programmes and regional work visas should be developed and implemented without delay to address the current challenges in migration policy.
42. The SCCT disagrees with the Department of Home Affairs' proposal to begin a regime of detention camps along the country's borders. It is our submission that this is not constitutional nor in the national interest – the creation of such camps, and the challenges that will go along with implementation, may stoke xenophobic tensions. Such policies further the exclusionary aspect of migration policy that has negative consequences for social cohesion.
43. The SCCT is also concerned about the Department of Home Affairs' recent publication Discussion Paper on the Repositioning of the Department of Home Affairs which proposes to reposition the Department in the security system of the state.³⁴ We are concerned that such a move would continue the securitization trend prevalent in migration policy but also have further consequences for the rule of law more broadly.
44. In conclusion, the SCCT believes that the Department of Home Affairs can play a key role in advancing social integration through providing an inclusive, pragmatic and effective immigration regime that adheres to the Constitution and international law. While we have concerns about some aspects of future policy, the SCCT is greatly encouraged by the fact that the Discussion Paper identifies as one of the five underlying principles that defines the mandate of the DHA the premise that migration is a fundamental aspect of human society and history and that:

The need to migrate is [...] fundamental. All societies have been formed by people who have moved to find security and resources. Movement of people and the related flow of ideas, technology and other elements of culture, have been and still are essential to human development.³⁵

³⁴ Department of Home Affairs, 'Discussion Paper on the Repositioning of the Department of Home Affairs', 19 May 2017, available at: <http://www.dha.gov.za:8087/index.php/notices/992-notice-on-repositioning-the-dha>.

³⁵ Ibid, p. 12.

45. We strongly support this line of reasoning and we welcome and agree with the Discussion Paper's references to the fact that migration is essential for South Africa to thrive and grow.³⁶ This is in line with the National Development Plan (NDP) which identifies a need to harness migration to break patterns of poverty and to ensure migrant communities can contribute to local and national development.³⁷ The SCCT submits that this line of thinking and policy aims are integral to advance social integration initiatives in South Africa.

46. Similarly, the Hate Crimes Bill offers an opportunity to create a foundation for a more effective and just response to hate crimes committed in the Republic. An effective means to prevent, investigate, and prosecute hate crimes would address the impunity that often accompanies such crimes.

Concluding Remarks

47. We thank the SAHRC for convening this hearing and for allowing us to contribute. We appreciate the complexity of the challenge of xenophobia and effecting migration policy more generally. We hope our contribution has shed some light on the current situation and may spark some ideas to foster a more inclusive society and advance social integration in a manner that simultaneously promotes South Africa's national interest, human rights, and development.

For further information please contact:

Corey R. Johnson
corey@scalabrini.org.za

Miranda Madikane
mmadikane@scalabrini.org.za

³⁶ Ibid, p. 6.

³⁷ National Planning Commission, 'National Development Plan 2030: Our future – make it work', 2012, p. 105.