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**RE: SUBMISSIONS ON THE DRAFT REGULATIONS ON THE REGISTRATION OF BIRTHS AND DEATHS,
2018**

Introduction

The Scalabrini Centre of Cape Town ('SCCT') is a registered NGO offering specialised services to migrants, refugees and South Africans. The SCCT's services focus on key areas including para-legal advice, advocacy and research, development and integration, and well-being and welfare. The Advocacy Programme functions as a walk-in paralegal office, and as such, the SCCT receives individuals who present problems around access to basic rights, including issues of birth registration. We regularly provide assistance to foreign parents in registering birth of their children as well as advice to caregivers, social workers or any interested party, on the legal framework and documentation considerations. In our experience, foreign parents who have expired documents, or do not hold legal stay in South Africa, face numerous obstacles in registering births to the extent that many are unable to do so. This not only denies the child their constitutional right to birth registration but also creates a series of effects that perpetuate an undocumented state, which is not in the interests of the South African state or region.

We therefore welcome the opportunity to provide input to the Draft Regulations on the Registration of Birth and Deaths 2018 ('Draft Regulations'). Our submission first focuses on the challenges faced by foreign nationals in registering birth of their children and then provides recommendations to improve the framework.

Summary of Recommendations

Below, we summarise our recommendations, which are elaborated on thereafter.

1. The SCCT recommends that the Draft Regulations are amended to require that parents provide an identity document, issued either by the Department of Home Affairs or their country of origin. The requirement to prove current legal stay in South Africa should be removed. In the alternative, we recommend that the department of Home Affairs comply with the judgment in the case of *Naki and Others v Director General: Department of Home Affairs and Another* (Case No 4996/2016) that rewords the Regulation to require parents to show legal stay 'where possible'.
2. The SCCT recommends that the creation of the 'confirmation of birth certificate' is removed from the Draft Regulations, and that the Regulations ensure children born to foreigners in South Africa are issued with a birth certificate. All children born in South Africa should be issued a birth certificate, not a 'confirmation of birth certificate'.
3. The SCCT recommends that Draft Regulation 9, which speaks to orphaned and abandoned children, must not make any mention of the nationality of the parents concerned.
4. The SCCT recommends that Draft Regulation 12 be amended to allow fathers of children born out of wedlock to register the birth of their child.
5. The SCCT recommends that the Late Requisition of Birth requirements reflect the reality faced by parents making such an application. The requirement that birth registration should be done within 30 days has proven to be onerous for those living in rural areas, and for foreigners awaiting verification from the Department of Home Affairs – which can take months and is often subject to delays. We would recommend that the 30 day rule is relaxed to allow birth registration of children to take place, which is the best interest of the child.

1. General Considerations

It is submitted that the Draft Regulations further prevent the birth registration of foreign children in South Africa, which is not in the best interests of the child nor the South African state. We are concerned as the proposed Draft Regulations introduce discriminatory measures and are contrary to the findings of the High Level Panel which recommended that there should be legislative changes to the Births and Deaths Registration Act 51 of 1992 to ensure that children of foreign nationals are not discriminated against.¹ Instead of addressing the already existing barriers, the Draft Regulations set out unnecessary and discriminatory proposals that are in contravention of a child's right to a name and nationality, as set out at Section 28 of the Constitution of South Africa. Furthermore, the following conventions make it clear that all children regardless of their nationality, race, legal or other status are entitled to a name, nationality and immediate birth registration:

¹ Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, November 2017, p. 355. Available at: <https://www.parliament.gov.za/high-level-panel>.

- 1989 United Nations Convention on the Rights of the Child (Article 7);²
- 1966 International Covenant on Civil and Political Rights (Article 24);³ and
- 1999 African Charter on the Rights and Welfare of the Child (Article 6).⁴

South Africa is party to all these conventions and is bound to implement these provisions relating to birth registration. It is submitted that the Draft Regulations are at odds with these provisions in that they require valid documentation of foreign parents to register the birth of their child. Furthermore, the Draft Regulations do not take into consideration the vulnerabilities of refugees and are at odds with the legal refugee protection framework.⁵

An unabridged birth certificate provides a child with proof of birth, a nationality, a name and a place of birth. It does not provide legal stay to a child born to foreign parents, nor does it provide for South African citizenship. A birth certificate is vital to establishing the nationality of the child, thereby reducing the risk of statelessness. Children whose birth is unregistered are at risk of statelessness.

The registration of all births occurring within South African borders allows the South African government to quantify the numbers of children born. It is therefore in the interests of the state that all births are properly registered without overly restrictive requirements and obstacles. Birth registration is vital to avoiding childhood statelessness and, as the South African state seeks to quantify those within its borders, the creation of groups of children who are at risk of statelessness and thus invisible to the state is not in the best interests of the South Africa or the region.

The South African Citizenship Act (No. 88 of 1995) provides for citizenship to be conferred by birth to persons born in South Africa with no access to any other nationality. This is meant to prevent statelessness. However, birth registration is a prerequisite and the reality is that stateless people, or those at risk of statelessness, would not even be able to register their birth as they would not be able to meet the requirements of the Birth and Death Registration Act.⁶

² Available online at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

³ Available online at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

⁴ Available online at: www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf.

⁵ As set out in the Refugees Act (No 130, 1998). The vulnerability of refugees has been highlighted by the Constitutional Court where it held that refugees are ‘unquestionably a vulnerable group in our society and their plight calls for compassion’ in the matter of *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 CC at para 28.

⁶ South African Citizenship Act 88 of 1995 states at Section 2 (4)(b) ‘Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (2), shall be a South African citizen by birth, if- (a) he or she is adopted by a South African citizen in accordance with the Child Care Act, 1983 (Act No. 74 of 1983); or · (b) (i) he or she does not have the citizenship or nationality of any other country, or has no right to

The South African Citizenship (Act No 88 of 1995) as amended extends the ability of naturalisation to individuals born in South Africa to parents who are not citizens or permanent residents, subject to having their birth registered and being resident in South Africa for 18 years. This means a foreign child born in South Africa will become eligible for citizenship upon turning 18, provided they can produce an unabridged birth certificate and have resided in South Africa for 18 years.⁷ With the proposed change in the current Draft Regulations that only a 'confirmation of birth certificate' will be issued to foreign children, this means that foreign children who qualify to apply for citizenship in terms of section 4(3) of the Citizenship Act will not be able to apply since they will not be in possession of a birth certificate. It is submitted that the current Draft Regulations do not align in this regard with the current framework.

2. Concerns regarding the creation of a 'confirmation of birth certificate'

The Draft Regulations introduce a 'confirmation of birth certificate' which would be 'issued to a non-South African citizen confirming that the birth of his or her child occurred within the Republic'. The confirmation of birth would 'enable the holder thereof to approach the relevant authorities of his or her country of citizenship or nationality in order to register the birth of his or her child in his or her country of citizenship or nationality's population register'.⁸ The application for a confirmation of birth certificate would be made via Annexure 4 and on a DHA-19 form.

It is of great concern that the 'confirmation of birth certificate' document issued to children born to non-South Africans would not be a birth certificate, as stated on the DHA-19 form. In Draft Regulations 1, 7 and 8, the Draft Regulations now refer to 'confirmation of birth' instead of birth certificate.

A 'confirmation of birth certificate' will result in foreign children not being issued with birth certificates in South Africa. This is of great concern as it cannot be used to access services, to prove nationality or access basic rights in South Africa. More specifically, refugee children will not be able to approach their embassy (as the Draft Regulations direct them to so do) due to the very nature of

such citizenship or nationality; and (ii) his or her birth is registered in the Republic in accordance with the 40 Births and Deaths Registration Act, 1992 (Act No. 51 of 1992)

⁷ South African Citizenship Amendment Act (No. 17 of 2010), states at Section 4(3), 'A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent 30 residence, qualifies to apply for South African citizenship upon becoming a major if (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and (b) his or her birth has been registered in accordance with the provisions 35 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).'

⁸ As found in the Definitions of the Draft Regulations.

being refugees. Approaching your embassy, as an asylum seeker or refugee, would result in withdrawal of asylum/refugee status, as envisaged in the Refugee Amendment Act. Furthermore, some embassies do not issue birth certificates to children born abroad, and some states do not have diplomatic representation in South Africa. Those that do often are only able to provide limited services and, at best, are limited to offices in major metropolitan areas. There are a number of countries that only have diplomatic representation in Pretoria which presents serious logistical and financial issues for many individuals, particularly those with limited financial means.

Therefore, this Draft Regulation would result in all foreign children effectively being without birth certificates in South Africa, which would have detrimental effects both on the children – and the South African state itself.

The SCCT strongly recommends that the creation of the ‘confirmation of birth certificate’ is removed from the Draft Regulations, and that the Regulations ensure children born to foreigners in South Africa are issued with a birth certificate.

3. Draft Regulations 3, 4, 5 and 8: Requirement that parents produce valid identity documents and proof of legal stay

Regulation 3 of the Draft Regulations⁹ requires South African and foreign parents to produce an identity document, and where one parent is a foreign national, a valid visa or asylum/refugee permit, as a prerequisite to birth registration in South Africa. Draft Regulations 4, 5 and 8 also require that both parents produce a valid visa, asylum seekers permit or refugee status in order to register the birth of the child.

Furthermore, Draft Regulation 8(3)(c) requires that ‘the mother, or father, or both parents, require a valid passport and visa or permit to apply for a notice of birth’. It is submitted that a child’s right to a birth certificate should not be dependent on their parents’ status and that the current proposal would have severe negative consequences for foreign children. The current proposal is at odds with the recommendation of the Committee on the Rights of the Child concluding observations on the second periodic report of South Africa which recommended that all relevant legislation should be

⁹ Regulation 3 of the regulations to Birth and Deaths Registration Act set out which documents ‘must’ accompany an application to birth registration. They include a certified copy of the parent’s identity documents (regulation 3(3)(e)), a certified copy of a valid passport and visa or a permit where one parent is a non-South African citizen (regulation 3(3)(g)) or a certified copy of a death certificate where one parent is deceased. Regulation 3(5) states that an application that does not meet the requirements of 3(3) ‘shall not be accepted’.

amended so as to 'ensure their full conformity with the Convention, including through the removal of requirements that may have punitive or discriminatory impacts on certain groups of children'.¹⁰ The requirement to provide parents' identity documents is an important aspect of ensuring the integrity of birth registration mechanisms. However, it is submitted that the Draft Regulations must to reflect the reality faced by both foreigners and South Africans.

South African citizens might face issues with their identity documentation such as 'blocked IDs' in which cases the registration of their child's birth would not be possible.¹¹ The requirement of a valid passport and visa or permit in South Africa is onerous and also does not reflect realities on the ground or best international practices. The closures of Refugee Reception Offices across South Africa – the office at which asylum applications are lodged and asylum seeker permits are granted and extended - has made access to the asylum system extremely difficult for many asylum seekers. Asylum seekers have been forced to take regular, lengthy journeys to extend their asylum seeker permits. This leads to a situation in which many asylum seekers' permits expire, leaving them undocumented and in a vulnerable position.¹² For individuals who have visas issued under the Immigration Act (No 13 of 2002), obstacles also prevent many from maintaining valid documentation including delays in the issuance of permits, administrative errors, requirements to lodge applications from their country of origin, and high fees charged by VFS.

There are a number of reasons why people fall into undocumented status in South Africa. This does not only affect foreign nationals only as even South African citizens often lack identity documentation.¹³ This framework therefore inhibits the rights of a child to a nationality. Without a birth certificate, access to their basic rights – such as education and health – is jeopardised. Put simply, the framework envisioned is likely to create a sizeable population of stateless people in South Africa, presenting challenges to both South Africa in the near future as well as for neighbouring states.

¹⁰ UN Committee on the Rights of the Child (CRC), Concluding observations on the second periodic report of South Africa, 27 October 2016, CRC/C/ZAF/CO/2, at paragraph 32(a). Available at: <http://www.refworld.org/docid/587ce86b4.html>.

¹¹ See for example, Liesl Muller, 'ID Blocking – A Growing Threat to Nationality,' (September 2013) <http://www.lhr.org.za/blog/2013/9/id-blocking-growing-threat-nationality>. See also: 'No end in sight for man's seven-year wait for ID,' *Berea Mail* (4 September 2017). Available at: <https://bereamail.co.za/116360/no-end-in-sight-for-mans-seven-year-wait-for-id/>.

¹² Ra'eesa Pather, 'Cape Town refugees in Limbo: "You can't stay here without your paper" ', *The Daily Vox* (2 July 2015). Available at: <https://www.thedailyvox.co.za/cape-town-refugees-in-limbo-you-cant-stay-here-without-your-paper/>.

¹³ Siri Linn Brandsoy, 'They were never born on paper', *Mail & Guardian* (December 2010). Available at: <https://mg.co.za/article/2010-12-13-they-were-never-born-on-paper>.

We recommend that the Draft Regulations are amended to require that parents show an identity document, issued either by the Department of Home Affairs or their country of origin, to register the births of their children. The requirement to prove current legal stay in South Africa should be removed. In the alternative, we recommend that the department of Home Affairs comply with the *Naki* Judgement that rewords the Regulation to require parents to show legal stay 'where possible'.

4. Regulation 12: children born out of wedlock

Draft Regulation 12(1), which pertains to children born out of wedlock, is discriminatory in that it does not allow fathers born out of wedlock to register the birth of their child. In July 2018, the Grahamstown High Court in the case of *Naki and Others v Director General: Department of Home Affairs and Another* (Case No 4996/2016) declared Regulation 12 unconstitutional and changed the wording of the section to ensure that a father was able to register the birth of his child in the absence of the mother.¹⁴ In this case Bodlani AJ stated that

In order to cure the defects in the sub regulations mentioned in Regulation 12(1), the following remedy shall apply: immediately after the word "by" to sub regulation (1) of Regulation 12 the words "either" and immediately after the word "mother" in that sub regulation the words "or father".

The SCCT recommends that Draft Regulation 12 be amended to allow fathers of children born out of wedlock to register the birth of their child.

5. Regulation 9: Notice of birth of abandoned or orphaned children

Draft Regulation 9(2) differentiates the treatment between children born to non-South Africans and South Africans. In our opinion, there should be no differentiation between children born to South Africans or non-citizens when it comes to the registration of abandoned or orphaned children. According to the Draft Regulations, a child born to non-South Africans, who is abandoned or orphaned, would be obliged to fulfil the requirements of Draft Regulation 8. It is submitted that a child in this position would simply be unable to fulfil the requirements of Draft Regulation 8. Those children who are abandoned or orphaned and born to non-South African parents would be verified

¹⁴ For more information on the case, see: Kathleen Mpofu, 'High Court rules children born in South Africa can be registered, regardless of their parents' legal status', *GroundUp*, (28 August 2018). Available at: <https://www.groundup.org.za/article/high-court-rules-all-children-born-south-africa-regardless-their-parents-legal-status-can-be-registered/>.

as such by the thorough procedures set out in Draft Regulation 9(1). A court order, as set out in Draft Regulation 9(1), requires extensive investigation by the social worker – and this acts as a safeguard to ensure ‘foundling’ children are truly those who have been abandoned or orphaned.

The SCCT recommends that Draft Regulation 9 should make no mention of the nationality of the parents concerned.

6. Late Registration of Birth

The Draft Regulations set out procedures for applying to a Late Registration of Birth. Through our daily work with clients attempting to register the birth of their children, we have encountered several barriers to Late Registration of Birth including:

- **Verification of the foreign parents’ permits.** The Department of Home Affairs verifies asylum, refugee and temporary residence permits held by parents before they can register the birth of foreign children. In our experience, the verification of asylum and refugee permits can take up to more than a year as asylum and refugee permits are sent to Refugee Reception Offices for verification. In some cases some people had to wait for up to two years for verification and ultimate birth registration for their children.

The SCCT therefore recommends that the Department of Home Affairs undertake to expedite all verifications of asylum, refugee and temporary residence permits within the period time of allotted to register births and specify timeframes within the Regulations for this process.

- **Late birth registration interviews.** The Late Registration of Birth application procedure currently requires the parents to be interviewed by the Department of Home Affairs. These interviews can take months, or years, to be scheduled and occur. This causes prejudice to the children in that they remain without birth certificates for extended periods of time and cannot be joined to parent’s refugee file or asylum file without a birth certificate.

The SCCT recommends that the Regulations set out a timeframe within which such interviews must take place. The SCCT recommends that the 30 day rule is relaxed to allow birth registration of children to take place without extra requirements which is in the best interest of the child.

- **Re-issuance of hand written birth certificates.** Currently the Department of Home Affairs does not re-issue lost foreign birth certificate unless one has an old copy of the lost birth

certificate. Many parents who have lost their birth certificates through no fault of their own, including such incidents as house fires or xenophobic attacks. In some cases, they are not able to get birth certificates re-issued and ultimately are unable to have their children acquire legal status in the country through family joining process at the refugee office or through the immigration process. This gap also heightens a child's risk of statelessness.

The SCCT therefore recommends that the Department of Home Affairs should ensure its systems are capable of re-issuing lost foreign birth certificates, that a remedy is created for individuals who as of now are unable to have a birth certificate re-issued, and that the Regulations set out a framework for this process to occur under. It is the right of all children born in South Africa to be issued with a birth certificate.

Conclusion

We thank the Department of Home Affairs for the opportunity to provide comments on the current Draft Regulations. The SCCT strongly urges the Department of Home Affairs to ensure that the Regulations recognise and promote the rights of all children in South Africa, for the benefit of families, South African society, and the region more broadly. The constitutional right of a child to a birth certificate cannot be infringed on simply due to the legal or documentation status of their parents.

Toward this end, the SCCT recommends that the relevant sub-sections of Draft Regulations 3, 4 and 5 be reviewed and amended to ensure that every child, regardless of the legal status of their parent(s), can access nationality from birth, as well as other socio-economic rights conferred through the Constitution that require documentation.

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