

# MIGRATION AND DETENTION IN SOUTH AFRICA

A review of the applicability and  
impact of the legislative framework  
on foreign nationals

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POLICY BRIEF

18

November 2017





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## A review of the applicability and impact of the legislative framework on foreign nationals

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*If a society's respect for the basic humanity of its people can best be measured by its treatment of the most vulnerable in its midst, then the treatment of suspected illegal immigrants ... offers a disturbing testament to the great distance South Africa must still travel to build a national culture of human rights.<sup>1</sup>*

### 1. INTRODUCTION

In South Africa it is widely held that migration of foreign nationals into the country is both rampant and illegal.<sup>2</sup> Realistic estimates of migration based on triangulation from a variety of data sources indicate that two to three million foreign nationals currently live in South Africa. This number includes both documented and undocumented migrants, along with refugees and asylum seekers,<sup>3</sup> and is a relatively small fraction of South Africa's total population of 57 million. Most international migrants come from the African region, including significant numbers of refugees and asylum seekers, totalling over 576 000.<sup>4</sup> Predominantly, immigrants hail from Zimbabwe, Mozambique, the Democratic Republic of the Congo, Angola, Somalia, Rwanda and Malawi, many of whom come in search of economic opportunities or have fled conflict and persecution in the region.

The South African government's primary response to the increase in immigration since 1994 has been to arrest and deport undocumented migrants. Deportations of undocumented migrants have risen steadily since 2000, with Zimbabwean deportations reaching some 150 000 in 2005.<sup>5</sup> Since then, Zimbabweans, and recently Malawians, have been the largest national groups deported by the South African government and have driven a massive increase in the total annual deportation numbers, primarily as a function of the heightened activity of the police in immigration enforcement.<sup>6</sup> Indeed, by the end of 2015, over 15 000 migrants had been 'repatriated' by the South African government.

The processes leading to deportation often occur outside of the legal framework and violate the procedural guarantees put in place by both domestic and international law.<sup>7</sup> Most of those deported in the late 2000s were arrested soon after crossing the Zimbabwe/South Africa border. These deportees regularly included would-be asylum seekers and unaccompanied minors, many of whom were simply left on the Zimbabwean side of the border.<sup>8</sup>

These challenges are not simply administrative, but occur against the backdrop of continuing racism and xenophobia.<sup>9</sup> Since the 2001 Durban Declaration and Programme of Action, South Africa has

had a mandate to produce a National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance. A draft NAP was only presented to Cabinet 15 years later, in the 2015/2016 financial year, and is currently being reviewed by the Department of Justice. The purpose of the NAP is to provide South Africa with a comprehensive policy framework to address racism, racial discrimination, xenophobia and related intolerance on both a private and public level. Currently, the plan has not been finalised and does not clearly specify the goals, objectives and actions/activities, respective performance indicators, timeframes or the responsible body for implementation.<sup>10</sup>

While xenophobic violence is ongoing, foreign nationals struggle to access justice services and police protection. In response to the most recent large-scale xenophobic events in Gauteng in February 2017, the SAPS reported 136 arrests in and around Pretoria's city centre. Although no official explanatory documentation relating to the arrests has been released, it seems that the majority of arrests do not seem to be for criminally sanctioned actions, but rather for lack of official documentation.<sup>11</sup> The response by the police, then, focused on removing the victims of persecution rather than the persecutors. This is neither novel nor unprecedented. In its 1999 report on the arrest and detention of suspected undocumented migrants, the South African Human Rights Commission (SAHRC) documented the unnecessary and unlawful suffering of foreign nationals and South Africans caused by immigration enforcement procedures.<sup>12</sup> And investigative reports<sup>13</sup> by the SAHRC since 1999 continue to highlight endemic concerns in the detention of undocumented migrants in South Africa.

This review uses the standards set out in South Africa's national legal framework as well as in ratified regional and international treaties as a reference point in reviewing compliance with the legal framework for the arrest and detention of foreign nationals for infringements of the Immigration Act, No. 13 of 2002. Based on public reports by the SAHRC on the arrest and detention of suspected undocumented migrants, interviews and research by academic institutions and civil society, and reports of site visits to detention facilities by civil society and government officials, this review highlights endemic non-compliance with procedural and conditional safeguards for foreigners apprehended in South Africa.

More specifically, this review finds non-compliance with respect to procedures for arrest of foreigners; procedural rights, including sentencing procedures, the issuance of notice of deportation, extension of detention and the provision of interpreters; detention at police stations; and detention at the Lindela Detention Facility, including unlawful and arbitrary detention practices, the use of force, corruption, inadequate conflict management, general hygiene, access to health care, living conditions, access to phones, visitation and late-night searches.

While the Department of Home Affairs (DHA) is responsible for immigration services and deportations, multiple government departments are involved in the administration of these services. The main government institutions responsible for the care and management of foreign nationals detained in terms of the Immigration Act include the SAPS, Department of Justice, Department of Health, Department of Home Affairs and others. As noted by the SAHRC,<sup>14</sup> numerous departments are in a position to provide key services based on inter-departmental service level agreements and their respective responsibilities. This review concludes with specific recommendations to the prominent stakeholders, and is aimed at strengthening the protections for arrest and detention of migrants as well as strengthening the monitoring and oversight of migration detention.

## **2. COMPLIANCE WITH LEGAL FRAMEWORK ON ARREST AND DETENTION OF FOREIGN NATIONALS**

Chapter 2 of South Africa's 1996 Constitution guarantees to all persons, including citizens and those documented and undocumented, fundamental and procedural protections, expansively delineates the rights of immigrants, and provides for their protection from unconstitutional conduct and human rights violations.<sup>15</sup>

South Africa is also a signatory to the 1951 UN Refugee Convention, its 1967 Protocol, as well as

the 1969 African Union Refugee Convention. The African Charter on Human and Peoples' Rights (AChHPR), the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines)<sup>16</sup> and other international obligations stemming from the Universal Declaration of Human Rights require South Africa to respect and promote the human rights of all persons within its borders, regardless of national origin.<sup>17</sup>

The AChHPR guarantees to all people rights to life, dignity, equality, security, a fair trial and an independent judiciary.<sup>18</sup> The Luanda Guidelines promote a rights-based approach to criminal justice in Africa and provide an authoritative interpretation of the application of AChHPR rights from the moment of arrest until trial, focusing on decisions and actions of the police, correctional services and other criminal justice role-players such as the judiciary and prosecution.<sup>19</sup> The Guidelines make specific reference to the rights of refugees, foreign nationals and stateless persons since they are vulnerable to rights abuses in arrest, police custody and remand detention settings, and outline specific protections in relation to access to third parties and translation services.<sup>20</sup>

Immigration to South Africa is regulated by the 2002 Immigration Act. The Immigration Act regulates the immigration of skilled migrants, students, tourists and other categories of permanent and temporary migrants, as well as the processes related to immigration detention and deportation. This legislation retains the strong security and sovereignty-centred agenda of the Aliens Control Act,<sup>21</sup> influenced by the dominant themes of security, border control and the use of law enforcement to manage migration.<sup>22</sup> The Department of Home Affairs (DHA) is the administrator of the Immigration Act, the accompanying Regulations and the Refugees Act.

Under the 1998 Refugees Act (which incorporates the UN 1951 Refugee Convention and the African Union Refugee Protocol), South Africa has a policy of self-settlement and self-sufficiency for asylum seekers and refugees, including the right to work and the right to access public health care and education services.<sup>23</sup> Those seeking asylum or who have received refugee status in South Africa are not subject to detention in terms of the Immigration Act.<sup>24</sup> Where a person claims to be an asylum seeker, or where it appears to an arresting, immigration or detention officer that the person may well have a claim to asylum, the officer should advise such person of their right to apply for asylum and shall render all reasonable assistance in this regard.<sup>25</sup>

An asylum seeker is a person who has fled their country of origin and is seeking recognition and protection as a refugee in another, and whose application is still under consideration. In instances where their application is rejected, they are required to leave the country voluntarily or will be deported.<sup>26</sup> A refugee is a person who has been granted asylum status and protection in terms of section 24 of the Refugee Act, No. 130 of 1998. Under the 1951 United Nations Convention, a refugee can be a 'convention refugee' who has left their home country and has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or a membership in a particular social group. Under the same convention, a refugee can also be a person 'in need of protection' whose removal to their home country would subject them personally to a danger of torture or would be a risk to their life, or would be at risk of cruel and unusual treatment or punishment. Signatories to the convention have an obligation to grant protection to refugees and other persons in need of protection under a number of UN Conventions, such as the 1951 Convention Relating to the Status of Refugees.<sup>27</sup>

The current asylum protection system is, however, in crisis and is effectively not functional.<sup>28</sup> This is due to a lack of capacity within the DHA to deal effectively and efficiently with the high number of claims for asylum, a lack of resources to allow departmental officials to conduct their work independently and fairly, as well as widespread and endemic corruption.<sup>29</sup>

Some refugee reception offices in South Africa have a 95 to 100 per cent rejection rate of asylum applications, which raises concerns about the process for status determinations.<sup>30</sup> In 2016, the United Nations Human Rights Committee observed the increase in difficulties encountered in gaining access to a refugee status determination procedure due to the closure of several urban refugee reception offices and that the safeguards relating to the processing of applications were inadequate. Interviews

conducted by members of the Committee revealed that some immigration officers refused to provide asylum seekers with transit permits at the port of entry, putting them at risk of immediate arrest or deportation.<sup>31</sup> These obstacles have resulted in increasing levels of corruption, further augmenting the vulnerability of migrants, especially children, by rendering them undocumented and stateless.<sup>32</sup>

Despite the existing legal framework, asylum seekers experience extreme difficulties lodging their claims at the DHA and accessing government services. While asylum application decisions should take up to six months, most asylum seekers wait years, often filing multiple applications because the DHA has misplaced their records.<sup>33</sup> While awaiting application decisions, asylum seekers are frequently arrested and detained. If granted asylum, a refugee will receive a permit valid for two years, eligible for renewal after another review by a refugee status determination officer.<sup>34</sup> Research continues to point out the frequent use of bribery by DHA officials, adding to the common perception that asylum is 'bought' in South Africa.<sup>35</sup> With the asylum system delegitimised, few institutions, social services and employers recognise refugee or asylum papers.<sup>36</sup>

## 2.1 Arrest

The South African Police Service (SAPS) provides the country's primary immigration enforcement. In 2014/2015, SAPS arrested 13 474 individuals for violations of the Immigration Act, and 10 480 individuals in 2015/2016.<sup>37</sup>

The Immigration Act<sup>38</sup> empowers police and immigration officers to detain persons suspected of being in contravention of the Act in order to verify their status. Persons may be detained without a warrant for up to 48 hours while their status is verified, provided there are reasonable grounds for such detention. As the Act notes:

*Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General.<sup>39</sup>*

According to the Act's regulations, initial approaches must be based on reasonable suspicion that an individual is a foreign national.<sup>40</sup> All suspects should be advised that reasonable grounds exist that they are a foreigner and they should be advised of their right to satisfy the arresting officer that they are entitled to be in the country.

Section 34 of the Immigration Act prescribes that, once a person suspected of being in contravention of the Act is arrested and detained, the person must be notified of the reason for such detention. This right is also delineated in Section 35 of the Constitution, which further prescribes that police must provide information in a language the person understands.<sup>41</sup>

The immigration officer is required to conduct an investigation within 48 hours to determine the immigration status of each person.<sup>42</sup> Arresting officers should assist suspects, within reason, to obtain or retrieve documentation from their place of residence, employment or otherwise that would evidence their right to be present in the country. Where a person's immigration status cannot be immediately verified, an immigration officer should be called in person to determine the status of the individual.<sup>43</sup>

While the Immigration Act<sup>44</sup> affords discretion to officers who, on reasonable grounds, believe a person is in the country illegally, the scope of discretion was clarified in *Ulde v Minister of Home Affairs and Another*.<sup>45</sup> The Court confirmed that an officer who decides that an undocumented migrant is liable to be deported and has discretion whether or not to arrest and detain the person pending his or her deportation must construe the exercise of discretion *in favorem libertatis* when deciding whether or not to arrest or detain a person under Section 34(1) of the Immigration Act. The officer should also be guided by certain minimum standards in making the decision. In *SAHRC v Minister of Home Affairs*,<sup>46</sup>

the Court found that the exercise of the discretion must be consistent with Section 12(1)(b) of the Constitution, which prohibits the DHA from detaining undocumented migrants without trial.

Despite the 1999 SAHRC recommendations that spot checks and sweeps be excluded as a *modus operandi* in the apprehension of suspected foreign nationals since they fail to satisfy the criteria of reasonable grounds and contribute to the high rate of unfounded arrests,<sup>47</sup> these methods continue to be used. The national monitoring platform for xenophobic violence in South Africa, known as Xenowatch, has verified reports of a large number of overnight area sweeps and arrests of foreigners in Gauteng during the first half of 2017.<sup>48</sup>

Foreign nationals, who have to carry copies of their immigration papers to prove their legal status in the country, are often unlawfully arrested and detained. Such arbitrary and unlawful detention occurs in contravention of international and domestic human rights guarantees. Unnecessary and arbitrary use of arrest and detention violates the right to liberty and poses a risk of other human rights violations, such as denial of procedural rights. Interviews with detainees at the Lindela Detention Facility by the SAHRC have found that arresting officers do not appear to be advising detainees that reasonable grounds exist for their detention, nor are they advised of their right to satisfy the arresting officer that they are entitled to be in the country.<sup>49</sup>

While the SAHRC recommended compliance with arresting guidelines in 1999,<sup>50</sup> arresting officers still do not appear to be keeping proper records of arrests.<sup>51</sup> Either simultaneously with arrest or as soon as possible thereafter, officers should document the date, place and reasons for arrest, as well as any explanation advanced by the detainee, including details of any documentation produced. A copy of this sworn statement should be presented to the DHA upon the admission of the detainee to Lindela.

Whilst a legal and policy framework that supports a human rights-compliant policing model has been developed, implementation of the framework remains a problem. The recommendations adopted by the Portfolio Committee on Police in 2015 to improve professionalism and conduct point out areas of non-compliance and poor implementation.<sup>52</sup>

Many of the systemic problems undermining police efficiency and performance remain unaddressed.<sup>53</sup> SAPS experiences institutional challenges that hinder progress towards human rights-compliant policing and community safety. The problems plaguing the police have to do with systemic problems such as command and control, discipline and internal oversight.<sup>54</sup> Other factors have also weakened policing, such as the recruitment and training processes and the appointment of inexperienced commanding officers.<sup>55</sup> SAPS is also facing a crisis of legitimacy, with well-publicised accounts of police misconduct and brutality.<sup>56</sup>

## **2.2 Detention**

If it is confirmed that a person is undocumented, a notice of deportation must be served on the person. This triggers the detention period during which migrants can be lawfully detained in terms of Section 34(1) of the Immigration Act.<sup>57</sup> The Constitution mandates that a detainee be given a court hearing within 48 hours of arrest. At this first court appearance, every detainee has the right to be charged or to be informed of the reason for the detention to continue, or to be released.<sup>58</sup>

Once detained, the Constitution mandates that persons be detained in facilities that conform to standards of human dignity.<sup>59</sup> Persons must be detained in conditions that are consistent with human dignity, including at least exercise and the provision of adequate accommodation, nutrition, reading material and medical treatment at state expense. The recently updated UN Standard Minimum Rules for the Treatment of Prisoners, known as the 'Mandela Rules', also provide a comprehensive framework for the physical conditions of detention.<sup>60</sup>

According to Chapter 2 of the Constitution, every detainee<sup>61</sup> has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Immigration detention is limited to

the time periods prescribed by Section 34 of the Immigration Act, which include 48 hours' written notice of deportation, no more than 30 days' detention for deportation and no more than 90 additional days' detention upon issuance of a court order for extension.<sup>62</sup>

Like citizens, foreign nationals in South Africa have the right not to be detained arbitrarily.<sup>63</sup> Once detained, detainees must be notified in writing that they have been detained for the purposes of deportation. Upon request, detainees must be provided with confirmation that they have been issued with a warrant from court. If this is not provided within 48 hours, the detainee must be immediately released. Arresting officers are permitted 48 hours within which to verify and confirm the immigration status of the detained person who is suspected to be undocumented or release them.

This was recently confirmed by the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs and Others*,<sup>64</sup> which declared Section 34(1)(b) and (d) of the Immigration Act invalid and inconsistent with Sections 12(1) and 35(2)(d) of the Constitution. It held that Section 34(1)(d) of the Immigration Act had unconstitutionally permitted detention of foreign nationals for a period of 30 days without automatic judicial intervention, and an extension of the initial period of detention without the detainee appearing before the court in person. The Constitutional Court ordered that any foreign national detained under Section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours of the time of arrest. The Court further ordered that foreign nationals who are in detention at the time of its order be brought before a court within 48 hours of the order or on such later date as may be determined by a court.

Subject to the judicial safeguards above, anyone detained for the purposes of deportation can be held for no longer than 30 days. This may be extended for an additional 90 days upon issuance of a court warrant stating 'good and reasonable grounds' for the extension. This provision is usually invoked when delays are encountered in proving country of origin and securing the necessary travel documents. Overall, undocumented migrants cannot be detained for periods exceeding 120 days. The South Gauteng High Court has further clarified in *Kumah and Others v Minister of Home Affairs and Others*<sup>65</sup> that deportation cannot be delayed by reason of administrative incapacity on the part of officials.

To that effect, the Promotion of Administrative Justice Act of 2000 includes a detailed set of procedures to ensure that the detention and deportation of undocumented foreigners adheres to the requirements of a just administrative action, including prescribed notification forms that advise detainees about their legal status, the processes that will be followed, and their rights of review and appeal.<sup>66</sup>

According to the Immigration Act,<sup>67</sup> when a suspected undocumented migrant has been detained, the individual has the right to challenge his or her detention by requesting a judicial review and confirmation of detention by a magistrate. The arrested person may also make written representations or submissions as to why the detention period should not be extended.<sup>68</sup>

In enforcing the provisions of the Immigration Act, the DHA established detention facilities. Between 2006 and 2009, the Soutpansberg military base in Musina (a converted sports hall near the Zimbabwean border, known as SMG) was used as a detention facility for migrants, mainly Zimbabwean nationals.<sup>69</sup> In contravention of the Immigration Act, the detention centre was run and overseen by the Musina police instead of the DHA, after the DHA disclaimed oversight of SMG in 2008 and withdrew its officers from the facility.<sup>70</sup> In 2009, the High Court of South Africa ruled that the conditions at SMG were substandard and inhumane<sup>71</sup> and the facility was closed.

The Lindela Detention Facility was established in 1996 as an immigration detention facility with a capacity of approximately 4 000 detainees. The facility is currently the only operating immigration detention centre in South Africa and is administered on behalf of the DHA by a private company, Bosasa (Pty) Ltd. Bosasa is responsible for security, catering, health and safety, accommodation and provision of offices for use by consular and embassy officials and the SAHRC.<sup>72</sup> However, the DHA is legally and administratively responsible for all matters relating to the apprehension, holding, processing,



repatriation and release of undocumented migrants at Lindela. Therefore, it must ensure that all private entities with which it has enlisted certain of its functions comply with the Constitution and the law.<sup>73</sup>

Prior to transfer for deportation to the Lindela Detention Facility, undocumented migrants are detained at police stations throughout the country. According to Section 34(1) of the Immigration Act, the Minister of Home Affairs may determine any place as a holding facility for undocumented migrants. There are currently 1 143 police stations in South Africa, 453 of which are designated as places of detention (see Table 1).<sup>74</sup>

While in police custody, persons detained in terms of the Immigration Act should be held separately from criminal suspects.

<b>Province</b>	<b>Number of police stations</b>
Gauteng	20
North West	28
Limpopo	28
Northern Cape	31
Western Cape	139
Free State	48
KwaZulu-Natal	48
Mpumalanga	55
Eastern Cape	56

Despite the existing regulatory framework for the protection of detainees' rights, there are regular reports of human rights violations at Lindela. This includes the ignoring of the legal framework for the detention of foreign nationals, such as unlawful and arbitrary detention practices, the use of force, corruption, inadequate conflict management, general hygiene, access to health care, living conditions, access to phones, visitation and late-night searches.

Little is known about the detention of foreign nationals at police stations due to weak monitoring and oversight of police custody. However, recent site visits by Lawyers for Human Rights discovered the 'complete denial of any constitutional or civil rights at police station detention centres'.<sup>75</sup> Furthermore, varying numbers of detainees have alleged that human rights violations are pervasive at police stations.<sup>76</sup>

With the above in mind, the recurring areas of non-compliance are set out below.

### *2.2.1 Illegal sentencing*

During monitoring and oversight visits at the Lindela detention centre between January 2016 and March 2017, the SAHRC observed that some detainees had been sentenced in terms of Section 23(b) of the Aliens Control Act, despite the repeal of that Act.<sup>77</sup>

### *2.2.2 Unlawful detention periods*

There is continued unlawful detention of undocumented migrants at Lindela for periods beyond those prescribed by the law. Such practices appear to be systemic.<sup>78</sup> The SAHRC has observed that some undocumented migrants at Lindela are detained for more than 120 calendar days, which directly contravenes the Immigration Act and numerous court orders<sup>79</sup> and is unlawful.

In many cases, detainees at Lindela have been incarcerated at ports of entry and other detention centres, such as police stations, for periods ranging from weeks to months without their detention being extended as prescribed by the Immigration Act.<sup>80</sup> Interviews with detainees at Lindela revealed

that detained persons are only served with notices of deportation months after their arrest and detention. Some only received the notices after a week, while others received such notices after 30 days or more. Most people had been detained at police stations for a significant period and their cases were often not properly documented before being transferred to Lindela.<sup>81</sup> A similar situation has been observed by the SAHRC with persons released from correctional facilities who, upon release, are made to wait for a month before they are collected for deportation by immigration officers.<sup>82</sup>

Detention periods appear to continue to be incorrectly calculated despite directives from the courts on this issue. The SAHRC has observed that the number of days is calculated as commencing on the date on which the undocumented migrant was served with a notice of deportation in terms of the Regulations. The 30-day period should commence when the person is first arrested and detained. This detention period is applicable when a person is taken into custody for examination for a period not exceeding 48 hours, unless that period falls on a non-court day.<sup>83</sup>

### *2.2.3 Access to representation*

Although detainees must be provided with a fair opportunity to make submissions in relation to the proposed extension of their detention, the SAHRC recently observed that this practice is rare at Lindela. Detainees stated that they were not aware of such provisions. Detainees' rights are rarely explained to them in a language they understand, since no interpretation services are made available to them.<sup>84</sup>

The SAHRC also found that, while documentation informing persons of the procedure and confirming their election not to submit representations is frequently presented to persons detained at Lindela for signature, individuals appear to be unaware of their right to make such representations. In the absence of legal representation and interpretation services, detained migrants often feel intimidated and obliged to sign documents without understanding their content and implications.<sup>85</sup>

### *2.2.4 Availability of interpreters*

Overall, there is no policy in place for the provision of interpreters. The unavailability of interpreters makes access to information difficult and directly affects the ability to make written submissions when the extension of the detention of an undocumented migrant is sought.<sup>86</sup>

### *2.2.5 Unaccompanied minors and children*

In its 2017 report, the SAHRC found the persistent occurrence of arrest and detention of unaccompanied minors<sup>87</sup> at police stations (whether classified as places of detention or not) and at Lindela. Arresting and immigration officers do not exercise caution when arresting and detaining persons who may appear to be minors, though they are classified as children in terms of South African law as well as international law and require protection.<sup>88</sup>

Médecins Sans Frontières found that unaccompanied minors are being illegally detained at Lindela in terms of current age-determination practices, which are insufficient and inappropriate. There is a systematic failure in the screening of minors at the admission stage.<sup>89</sup> Arresting and immigration officers do not exercise caution when arresting and detaining persons who may appear to be minors and only request the Department of Social Development (DSD) to conduct age assessments when civil society organisations or the SAHRC intervenes.<sup>90</sup>

The detention of unaccompanied and separated migrant children is unlawful. The law<sup>91</sup> is clear that legal mechanisms for the protection of South African children found in the Constitution<sup>92</sup> and the Children's Act<sup>93</sup> apply to unaccompanied foreign children present in South Africa. The law requires that such children be brought before a Children's Court to determine whether they are in need of care and protection. DSD officials must conduct an inquiry in terms of Section 150 of the Children's Act in order to determine if the child is in need of care and protection.

The majority of unaccompanied minors in South Africa, however, are not identified or referred to protection service providers. Given the irregular manner in which children enter the country, many are

invisible to social services. For those who are in the system, temporary placement often becomes a long-term solution. A lack of clear procedures regarding documentation limits access to services, such as education, and family tracing and reunification is often done on an ad hoc basis.<sup>94</sup>

The SAHRC also established that, following their arrest, several women had left their minor children either unattended with a neighbour or at a crèche. Women with minor children should be detained at shelters before deportation as they cannot be detained with adult detainees. Consultations with mothers revealed a lack of procedure in terms of which arrested women with minor children may be kept in contact with their minor children. No enquiries appear to be made on the existence of minor children when women are arrested and/or detained at Lindela and procedures for the determination of minor children are being overlooked by arresting or immigration officials during arrests.<sup>95</sup>

In 2012, Lawyers for Human Rights noted frequent complaints about shelters that detain women and children awaiting deportation<sup>96</sup> after the courts found Lindela unsuitable for the detention of women and children.<sup>97</sup> The primary complaint was that detainees were often forgotten at shelters and remained detained at shelters beyond the statutory limit on detention for the purpose of deportation. In addition, security at shelters was insufficient. Lawyers for Human Rights also received reports of physical abuse at shelters as well as reports of neglect of unaccompanied children.

#### *2.2.6 Detention of asylum seekers*

During SAHRC visits and consultations with detained persons at Lindela between 2016 and 2017, it became apparent that a significant number of detainees maintained that they were, in fact, asylum seekers. This included persons who had been previously granted asylum and needed to apply for an extension of asylum after the expiration of current permits.<sup>98</sup> Field research conducted by the African Centre for Migration and Society<sup>99</sup> at the University of the Witwatersrand has revealed that over one third of detainees at Lindela are asylum seekers.<sup>100</sup> Where these individuals do not succeed in securing relief, they are eventually deported without a proper assessment of their asylum claim, in violation of the principle of non-refoulement.<sup>101</sup> Furthermore, since asylum seekers are governed by the Refugees Act and not the Immigration Act, they cannot be held as undocumented migrants for deportation.

Several court cases have upheld and clarified the rights of foreign nationals in detention. In *Arse v Minister of Home Affairs*,<sup>102</sup> the Supreme Court of Appeal clearly stated that individuals who are detained as undocumented foreign nationals may not be held for more than 120 days. The Court stated that an individual remains an asylum seeker throughout the appeal and review process and that the granting of a permit to an 'illegal foreigner' renders that person an asylum seeker. This view was approved by the High Court in *Amadi v Minister of Home Affairs*<sup>103</sup> where the Court stated that an asylum seeker could not be detained for the purposes of deportation.<sup>104</sup> In 2011, the North Gauteng High Court criticised the practice of arresting and detaining asylum seekers without verifying their status or allowing individuals access to the refugee system. The Court also found unlawful the undue delays in issuing documents under the Refugees Act, the practice of detaining asylum seekers pending the outcome of applications, and the re-arresting of detainees upon their release, thus circumventing of the 30-day limit of detention without a warrant under the Immigration Act.<sup>105</sup>

#### *2.2.7 Corruption and bribery*

Since 1999, the SAHRC has recommended that the DHA put in place effective strategies and use all appropriate legal means (including the investigation, prosecution and suspension of officials) to identify and eradicate corrupt practices, and investigate and prosecute complaints of assault or degrading treatment.<sup>106</sup> There have, however, been persistent allegations of corruption, bribery, and unnecessary and disproportionate use of force levelled against Bosasa security officials.<sup>107</sup> Allegations of corruption and/or bribery relate to extra food, blankets, accessing the storeroom, seeing visitors and keeping mobile phones.

#### *2.2.8 Use of force*

Allegations of both physical and verbal abuse appear to be widespread in migration detention. The

SAHRC has received reports that Bosasa security officials are often abusive towards detainees and physically assault them for trivial reasons. Médecins Sans Frontières also recently witnessed signs of physical abuse in many detainees as well as the use of segregation for several weeks as a form of punishment.<sup>108</sup>

This issue was recently noted by the United Nations Human Rights Committee which expressed concern about the number of reported cases of violence, including sexual violence, excessive use of force, torture and other forms of ill-treatment against detainees in South Africa, as well as deaths resulting from actions of police and prison officials. It also noted that few investigations into such reported cases have led to prosecutions resulting in the punishment of those responsible.<sup>109</sup>

The Lindela facility also lacks an adequate framework for conflict management. A violent riot occurred at the facility on 29 March 2016 during which several detainees sustained injuries. Similar subsequent violent riots have been reported to the SAHRC and are largely rooted in allegations of corruption, use of force and solicitation of bribes.<sup>110</sup>

The SAHRC recently observed the existence and use of specific rooms as isolation cells or units for detainees considered to be contravening the rules and regulations of the detention facility. The minimum standards of detention in the Immigration Act Regulations do not make provision for an isolation cell or any manner in which conflict should be regulated at Lindela. Proper guidelines to regulate the use of isolation as a form of a punitive or preventative measure have not been put in place. Nonetheless, detainees cannot be committed in isolation without a fair disciplinary hearing or standards by which individuals may be detained.<sup>111</sup>

#### *2.2.9 Access to health*

The DoH is a major stakeholder in the provision of adequate health care and monitoring at detention facilities, yet the personal hygiene of detainees at Lindela is often neglected. Unhygienic blankets and mattresses have been observed by the SAHRC, leading to widespread infestation of lice, bed bugs and contagious skin infections. Recent site visits further highlighted concerns relating to the distribution of sanitary wear to female detainees.<sup>112</sup> There are also continuous concerns relating to oral hygiene since some detainees have to endure a period of up to four months without brushing their teeth or practising a minimum level of mouth hygiene. Such conduct is demeaning and intrusive to the right to privacy and violates the human dignity of the person.<sup>113</sup> A broader public health approach to disease prevention appears to be absent.<sup>114</sup>

According to Médecins Sans Frontières, there is also inadequate screening upon admission at Lindela, insufficient staff capacity at the clinic, inadequate staff training and insufficient resources. Main findings from recent site visits included medical negligence that has led to avoidable deaths at Lindela, poor quality of and access to health care, evidence suggesting systemic medical negligence, inadequate prevention and management of sexually transmitted infections and HIV, putting detainees at risk of infection, illness and death, and inadequate infection prevention and control of airborne and food-borne diseases. This has led to outbreaks of diarrheal disease and puts detainees at high risk of tuberculosis.<sup>115</sup> As observed by the SAHRC, a failure to provide uninterrupted treatment for such conditions holds serious public health implications for the affected detainees, their fellow detainees, the broader South African public and communities at repatriation destinations.<sup>116</sup>

Detained persons have raised concerns over the adequacy of health care available at the facility, noting issues such as the failure to conduct thorough medical examinations before dispensing medication, the delay between the request to visit the clinic and being taken to the clinic, incorrect medication, and the unavailability of counselling and/or psychological services. The Lindela facility is not capacitated to deal with mentally unfit patients. However, the continued detention of persons presenting signs of a mental illness has been observed.<sup>117</sup>

There is a growing trend of detainees defaulting on their medication while in police detention. Detainees have raised complaints that they had attempted to inform arresting officers but were ignored. When

these detainees are eventually transferred to Lindela, they have missed a considerable amount of medication and pose a health risk since their condition has deteriorated.<sup>118</sup> There have been deaths of detainees at Lindela which were not reported to the SAHRC. The Commission was made aware of the deaths of three people in January 2016, allegedly owing to the breakout of an illness.<sup>119</sup>

#### *2.2.10 Overcrowding and conditions of detention*

Non-compliance was also found in relation to overcrowding, cleanliness and access to water and food at Lindela, with some of the cells at the detention facility being overcrowded. While one unit is designed to accommodate at least 45 detainees, the SAHRC observed that some rooms had more than 60 beds each during 2016, with some detainees sleeping on floors despite the facility being at half its capacity at the time. This does not meet the minimum standards of detention as contained in Annexure B of the Regulations promulgated under the Immigration Act, which state that every detainee should be provided with a bed, mattress and at least one blanket.<sup>120</sup>

The United Nations Human Rights Committee has also expressed concerns about the poor conditions of detention in South Africa's prisons more generally, particularly with respect to overcrowding, dilapidated infrastructure, unsanitary conditions, inadequate food, lack of exercise, poor ventilation and limited access to health services.<sup>121</sup>

Recent site visits at Lindela by the SAHRC also highlighted concerns relating to poor hygiene and sanitation standards at the facility. Multiple concerns were raised over the cleanliness of the showers, toilets and dining hall at the facility. The Immigration Act Regulations make provision for minimum standards of detention,<sup>122</sup> and detainees are constitutionally guaranteed the right to adequate accommodation, exercise, nutrition, medical treatment and reading materials. However, statements from detainees and observations from the SAHRC indicate that the current conditions do not meet the provisions in the Regulations, and constitute a violation of detainees' constitutional rights to human dignity and freedom from ill treatment.<sup>123</sup>

On several occasions, the SAHRC was informed of a continuous interruption of access to water at Lindela. Access to water is a human right which, when limited, must be justified accordingly. A shortage of water raises the likelihood of the spread of communicable diseases.<sup>124</sup> The Immigration Act Regulations provide that every detainee shall have clean drinking water at all times. The Constitution also guarantees everyone access to sufficient water.<sup>125</sup>

Detainees at Lindela are not provided adequate access to food. The minimum standards of detention in Annexure B of the Immigration Act Regulation provides that food should be well prepared and served at intervals not less than four and a half hours and not more than 14 hours between the evening and breakfast meals during a 24-hour period. By simultaneously serving lunch and dinner, a practice found at Lindela, the facility is in violation of the Immigration Act Regulations.<sup>126</sup>

Although detainees at Lindela have access to public telephones, this provision fails to cater for those who cannot afford to use them. Moreover, the telephones can only make domestic calls, leaving those wishing to contact their families outside South Africa unable to request assistance in arranging voluntary repatriation. Also, the contact details of the relevant pro bono law clinics are not made available to detainees, hindering access to legal representation and the opportunity to make submissions.<sup>127</sup>

Visitation at Lindela is limited to one person per detainee. It is alleged that bribes are solicited by security officials from detainees to be able to receive more than one visitor. Chapter 2 of the South African Constitution guarantees every detainee the right to communicate with, and be visited by, a spouse or partner, next of kin, chosen religious counsellor and chosen medical practitioner.<sup>128</sup>

Interviews conducted with detainees at Lindela by the SAHRC revealed that detainees are woken up late or in the early hours of the morning and their belongings and mattresses are searched several times a week. These searches amount to forced deprivation or interruption of sleep as well as degrading treatment, violating the right to be treated with human dignity.<sup>129</sup>

### 3. OVERSIGHT AND MONITORING

On paper, the South African framework for the oversight<sup>130</sup> of the criminal justice system represents one of the strongest accountability frameworks in Africa. In practice, there are significant gaps and challenges that hinder its implementation.<sup>131</sup>

Overall, oversight of South Africa's system for migration detention is weak. The United Nations Human Rights Committee recently highlighted concerns about the absence of independent and sustained monitoring of places of deprivation of liberty other than prisons in South Africa.<sup>132</sup> There is, moreover, no regular, systemic and independent monitoring of police cells. While standing orders and guidelines exist, without self-reporting or a system for the independent inspection of detention facilities under the management of SAPS, it is unknown whether SAPS is complying with these guidelines. Likewise, until the court order establishing the SAHRC oversight of Lindela, there was no independent monitoring of the DHA's detention facilities, where employees are largely unaccountable for violating the rights of detainees.<sup>133</sup>

There is also no provision for an independent complaints mechanism at the Lindela detention facility that would allow detainees to lodge complaints regarding their treatment, physical abuse and/or assault, detention periods, corruption or bribery. The SAHRC has previously recommended to the DHA to make provision for an accessible and safe manner for detainees and staff to lodge complaints. The Mandela Rules also provide that every prisoner be allowed to make a request or complaint regarding his or her treatment to the central prison administration and to judicial or other competent authorities, including those vested with the authority of remedial powers.<sup>134</sup>

#### 3.1 External oversight

##### 3.1.1 Civilian Secretariat for Police (CSP)

Independent monitoring of police cells and response to complaints that do not fall within Section 28 of the Independent Police Investigative Directorate (IPID) Act<sup>135</sup> should be monitored by the CSP.<sup>136</sup> Although the CSP is responsible for monitoring conditions in police custody and the treatment of detainees, a single coherent framework for police custody monitoring is yet to be developed. According to the CSP, the number and location of SAPS stations has created challenges in conducting widespread inspections.<sup>137</sup>

The Constitution provides that provinces are entitled to monitor police conduct, to oversee the effectiveness and efficiency of the police service, to promote good relations between the police and the community, to assess the effectiveness of visible policing, and to liaise with the cabinet member responsible for policing with respect to crime and policing in the province. Section 203(5) of the Constitution empowers provinces to investigate or appoint a commission of inquiry into any complaints of police inefficiency or a breakdown in relations between the police and any community, and to make recommendations to the cabinet member responsible for policing.

In the Western Cape, the Khayelitsha Commission of Inquiry<sup>138</sup> and promulgation of the Western Cape Community Safety Act<sup>139</sup> have galvanised some movement towards a more comprehensive system of inspecting and monitoring police cells. In its 2014 report, the Commission of Inquiry noted that the SAPS internal inspections under the Provincial Inspectorate and internal audits by the national Audit Committee did not meaningfully monitor the condition of detainees in police cells. It argued that, although the Civilian Secretariat is well placed to perform important oversight functions, it does not provide for regular inspections of police cells. The Commission recommended the Act be amended to provide for regular inspections of police cells as well as the adoption of a set of directives to provide standards of detention based on international and constitutional norms. Reports of inspections of police cells should be tabled in both the national and provincial legislatures and a system of lay visitors should be introduced, with the lay visitors being people with experience and knowledge of police and prisons.<sup>140</sup>

The Western Cape Community Safety Act provides for the establishment of the Office of the Western Cape Provincial Police Ombudsman.<sup>141</sup> The Ombudsman's office addresses issues such as poor service delivery, slow police response times, poor police investigations, loss of police dockets and the poor treatment of people in police stations.<sup>142</sup> Thus far, it does not monitor police cells or acts of mistreatment during detention.

### 3.1.2 *The South African Human Rights Commission (SAHRC)*

The Constitution<sup>143</sup> mandates the SAHRC to monitor and assess the observance of human rights in the country. In addition, the South African Human Rights Commission Act mandates the SAHRC to monitor the implementation of, and compliance with, international and regional human rights instruments.<sup>144</sup> Therefore, the SAHRC also monitors South Africa's international commitments to implementing human rights, including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights.

Executing its constitutional mandate, the SAHRC instituted legal proceedings against the DHA in 2012 relating to the systemic and persistent practices of unlawful detention of migrants at the Lindela Repatriation Centre in contravention of provisions of the Immigration Act.<sup>145</sup> In *South African Human Rights Commission v Minister of Home Affairs*, the Court directed the Minister of Home Affairs and Bosasa to provide the SAHRC with access to Lindela and detainees on a regular and at least quarterly basis. The Court also directed the DHA to provide the SAHRC with a written report on a regular and at least quarterly basis which must include: (a) the steps taken to comply with the court order on an ongoing basis and, in particular, the steps taken to ensure that no person is detained in contravention of this order; and (b) full and reasonable particulars in relation to any person detained at Lindela for a period in excess of 30 days from the date of that person's initial arrest and detention.<sup>146</sup> The SAHRC must ensure that the DHA reports comply with the court order in addition to ascertaining that the general requirements of the Immigration Act are adhered to for the protection of human rights.

In 2015, the SAHRC and SAPS signed a memorandum of understanding (MOU) on human rights in law enforcement and the reduction of violence and torture by police officials as a result of a 2011 Western Cape High Court ruling. In *Said and others v The Minister of Safety and Security and others*,<sup>147</sup> numerous asylum seekers and refugees claimed that the police discriminated both directly and indirectly against them in the exercise of their duties when, over two days in March 2008, groups of looters comprising of members of the Zwelethemba community looted all the foreign-owned shops in the informal settlement. It was argued that police actively guarded the South African-owned shops while refusing to provide the same assistance to the complainants on the basis of their nationality.<sup>148</sup>

The Western Cape High Court, sitting as the Equality Court, ordered the SAPS to establish a training programme aimed at instructing police officers on the rights of refugees in a sensitive manner, to be implemented by the SAHRC (which had joined the proceedings as a third party). Four years after the ruling, the SAHRC and SAPS signed an MOU that includes curriculum review and development; visiting lectures; training on human rights for police officers; overcoming resistance to change in the SAPS about adopting a human rights culture; research; monitoring and evaluation; and information and media. According to the SAHRC, the MOU focuses on human rights and responsibility and provides for a conflict resolution mechanism between the parties.<sup>149</sup> To date, the SAHRC has not performed these functions and the MOU is currently being revised by the SAHRC in collaboration with the SAPS.

## 3.2 *Internal oversight*

### 3.2.1 *The Management Interventions Unit*

Internal oversight is available within the SAPS in the form of the Management Interventions Unit (MIU), which is the division responsible for operational and organisational evaluations and inspections.<sup>150</sup>

The MIU does not investigate individual complaints against the police or conduct regular checks at police stations. It was recently established as part of the SAPS 'Back-to-Basics' approach to

policing.<sup>151</sup> The Unit identifies geographic and functional areas of underperformance and non-compliance with the policing regulatory framework and poor policing performance in the Visible Policing and Detective Service Divisions, focusing on 63 prioritised police stations in 2015/2016. The MIU implements specific interventions to prevent or correct non-compliance and underperformance.<sup>152</sup> Between 2015 and 2016, the Unit conducted a total number of 1 118 inspections – 789 of these inspections were planned and 329 were requested, mainly by provincial and divisional commissioners.<sup>153</sup> None of these related to migration detention.

### 3.2.2 *The Counter Corruption and Security Services Unit*

The DHA's Counter Corruption and Security Services Unit would be useful in monitoring and decreasing corruption of immigration officials, but the extent of the unit's work is unknown. The unit is responsible for investigation and prosecution of corrupt officials; providing support to mandated security structures such as the SAPS on crime- and corruption-related projects; research, analysis, implementation and monitoring of processes with a view of preventing corruption; raising awareness about fraud and corruption; enforcing the physical security of, safeguarding, and controlling access to DHA assets, staff and clients; and managing the integrity of all prospective and current employees and service providers.<sup>154</sup>

### 3.2.3 *PSIRA*

Bosasa is registered with the Private Security Industry Regulatory Authority (PSIRA)<sup>155</sup> and must comply with the regulatory requirements of the Private Security Industry Regulation Act, No. 56 of 2001, which stipulates the regulatory measures for all organisations within the private security industry.<sup>156</sup> The Private Security Industry Regulation Act provides for the establishment of the PSIRA, as well as a Council to govern it.<sup>157</sup> The PSIRA is directly accountable to the Council and the Council is directly accountable to the Minister of Police. The PSIRA and the Council must submit annual reports on activities and finances to the Minister as well as to Parliament.<sup>158</sup>

Beyond regulatory concerns, the PSIRA is also involved in a number of joint operations with different stakeholders, including the SAPS and DHA. These operations are initiated by the PSIRA or are attended on invitation from stakeholders such as the SAPS, DHA and Department of Labour. PSIRA operations focus on private security officers' compliance with the Firearms Control Act and the PSIRA Act, and include the deployment of registered and trained security officers and operations related to undocumented immigrants. Between 2015 and 2016, the PSIRA undertook seven joint operations in Gauteng with the DHA, SAPS, Tshwane Metropolitan Police Service and Tshwane Fire Department.<sup>159</sup>

While the PSIRA is responsible for enforcing the PSIRA Code of Conduct for Security Service Providers of 2003,<sup>160</sup> its powers of sanction are weak. The Code of Conduct is a set of binding rules for all private security employers and employees which states the general obligations of the private security industry towards the PSIRA, state security agencies, the public, clients and other private security companies, such as preventing crime and using only minimal force. The Code, however, does not explicitly aim to prevent threats, injury or even death.<sup>161</sup>

The PSIRA's sanction powers include the issuing of a warning or a reprimand to anyone found guilty of breaching the Code, suspending registration for a period of up to six months, withdrawing registration, imposing fines, and publishing details of improper conduct and of any penalty that was imposed by it. The PSIRA cannot criminally prosecute private security companies, but relies on the public authorities for this. The charging of instances of abuse by Bosasa officials such as those described in the present review would then be dependent on individual charges being laid, investigated by the police and brought to court. There is currently no information, or means of gathering data, about the number of people who have been injured or killed due to private security activities in any given year.<sup>162</sup> There are also few centralised channels through which members of the public can complain.<sup>163</sup>

The Private Security Industry Regulation Amendment Bill<sup>164</sup> provided an opportunity to address some of these deficits, but necessary amendments are absent from the current Bill. The Amendment Bill was



introduced by the Minister of Police in 2012 and approved by the National Assembly and the National Council of Provinces in 2014. It still awaits presidential signature.<sup>165</sup>

#### **4. CONCLUSION**

The current trajectory of the management of migration is untenable. South Africa has a legal and moral obligation to take action to protect and promote the rights of all foreign nationals within its territory. This includes safeguarding and protecting rights in the context of arrest, police custody, detention and deportation, as well as responding to violence against foreign nationals. The regulation of immigration has to be exercised in full respect for the fundamental human rights and freedoms of foreign nationals, which are granted under a wide range of international human rights instruments and customary international law.<sup>166</sup>

The South African government should view irregular migration as an administrative offence, reverse the trend towards greater criminalisation of immigrants and incorporate the applicable human rights framework into arrangements for managing migration flows and protecting national security interests. At the core of immigration policies should be the protection of migrants, regardless of their status or mode of entry. Where possible, detention should be used only as a last resort; in general, irregular migrants should not be treated as criminals.<sup>167</sup>

This review highlights numerous problems with regards to the arrest, detention and deportation of foreign nationals. These include persistent non-compliance by the SAPS and DHA with the legal framework for arrest and detention; missing information regarding details of arrests and detention; victimisation of foreigners; arrests and deportations; lack of an independent complaints mechanism at the Lindela Repatriation Centre; lack of oversight of arrest and detention of foreigners; the collapse of the asylum system; and the criminalisation of migration.

The recent case brought before the Constitutional Court by Lawyers for Human Rights and the Legal Resources Centre shows over a decade of disregard by the DHA of existing legislation and legal rulings.<sup>168</sup> In 2011, the Supreme Court of Appeal<sup>169</sup> chastised the DHA for its failure to respect individual rights and for forwarding false legal arguments suggesting that the Department did not show sufficient respect for the judicial process. This review also found the continuous disregard of numerous court judgments against the DHA, resulting in the pervasive violation of rights at Lindela on a continuous basis.

Recent requests for information from the DHA by the SAHRC have not been complied with, such as sharing files and the active list of detainees. The DHA has also recently required the SAHRC to pose any questions to officials in writing. This hinders the SAHRC's ability to complete its monitoring functions and the DHA's compliance with the court order. The SAHRC cannot verify the accuracy of information provided to it.<sup>170</sup>

It is concerning that a large amount of information concerning the arrest and detention of foreign nationals in South Africa is not publicly available. Accurate records must be kept by the DHA and SAPS and shared with the SAHRC, other civil society organisations and the public. For example, when a person is detained on suspicion of infringing the Immigration Act, information about the place and agent of apprehension (whether the SAPS, DHA or South African National Defence Force) must be recorded. So, too, must information about whether there were reasonable grounds for an apprehending officer to suspect that a person was a foreign national, the country of origin of those detained, the length of detention in cells at local police stations and specific information relevant to the status and protection of women and children.

Furthermore, recent initiatives from the government, such as the White Paper on International Migration and the Border Management Authority Bill, clearly display a movement towards the criminalisation of

migration in South Africa. Among other things, the White Paper on International Migration<sup>171</sup> removes the right to citizenship through permanent residency in South Africa, removes the right to work from asylum seekers, narrows the definition of a dependant, and requires asylum seekers to report to particular refugee reception offices. The White Paper also does not include any plan to combat associated corruption. The public consultation process for the Green Paper on International Migration was extremely short and required organisations to make submissions within a short period of time.<sup>172</sup>

In June 2017, the government passed the controversial Border Management Authority Act, concurrence pending. This Act will establish one centralised authority to handle all matters involving South Africa's ports of entry, including policing and customs, and has been characterised as 'one of the worst pieces of legislation that has come before the House'.<sup>173</sup> This stand-alone National Public Entity will include elements of the SAPS, the South African National Defence Force, the Department of Agriculture and Customs, all overseen by the DHA and presided over by a Commissioner appointed directly by the President.<sup>174</sup>

## **5. RECOMMENDATIONS**

Since multiple government institutions are responsible for the care and management of foreign nationals detained in terms of the Immigration Act, this report sets out broad recommendations for the Ministry of Police, the Justice, Crime Prevention and Security Cluster, the DHA, the Department of Justice and Constitutional Development, the Department of Health, the Department of Social Development (DSD), the Department of International Relations and Cooperation (DIRCO), the Department of Justice and Constitutional Development (DoJCD) and the SAPS. All these play a role in assisting the DHA to comply with the law and it is recommended that government departments actively participate and engage on issues of collective interest and responsibility.

This section sets out specific recommendations for rectifying the issues highlighted in this review, as well as for the SAHRC and other institutions to strengthen the monitoring and oversight of arrests and detention of foreign nationals.

### **5.1 Ministry of Police**

The Ministry of Police should:

- Promote a rights-compliant approach to policing beginning with leadership (the Minister and Deputy Minister of Police) and extending to station commanders and all spheres of police.
- Take measures to promote the implementation of the White Paper on Safety and Security and the White Paper on Policing and, specifically with regard to the latter, review and manage the SAPS Act, which currently predates the Constitution.
- Strengthen oversight of the private security industry. The PSIRA Act should include provisions that require:
  - The private security industry to submit all cases of death, rape or torture to an independent, external facility such as the Chapter 9 institutions, the IPID or the National Secretariat for Police.<sup>175</sup>
  - Any investigations, whether undertaken by SAPS or internally, to be subject to audit and or further investigation by an external oversight agency such as the IPID.<sup>176</sup>
  - Development of the PSIRA Complaints and Help Desk, which could be a valuable tool for 'triggered' inspections of misconducts in the public sphere.<sup>177</sup>

### **5.2 The South African Police Service (SAPS)**

The SAPS should:

- Comply with the 2008 Western Cape High Court ruling that requires that the police establish a

training programme aimed at instructing police officers on dealings with the rights of refugees in a sensitive manner, to be implemented by the SAHRC. Training programmes should include the rights of asylum seekers and all migrants, whether documented or undocumented.

- Ensure that arresting officers adhere to existing best practices, standing orders, policy directives, the provisions of the Immigration Act and surrounding legal framework on the arrest and detention of foreign nationals while performing their functions through training and focus by the Management Interventions Unit.<sup>178</sup>
- Implement stricter internal and monitoring controls. The Management Intervention Unit and its provincial divisions need to be further capacitated to conduct inspections and follow-up inspections at police stations, police units, clusters and provincial offices.<sup>179</sup>
- Render all reasonable assistance to persons facing deportation to allow them to retrieve personal belongings.
- Implement the recommendations made by the SAHRC since 1999, the Khayelitsha Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha, and the National Development Plan (NDP) with regards to the professionalisation of the police.
- Keep accurate records. Either simultaneously with arrest or as soon as possible thereafter, officers should document the date, place and reasons for arrest, as well as any explanation advanced by the detainee, including details of any documentation produced. A copy of this sworn statement should be presented to Home Affairs at Lindela upon the admission of the detainee to the facility.<sup>180</sup>
- Release custody statistics annually. SAPS should facilitate the release of police custody statistics that are disaggregated by age, gender, race, nationality, location (national and provincial) and, where relevant, level of court and type of offence. Records should include the date of initial arrest and date of request(s) for pick-up of detainees to the DHA, as well as information about who is detained in each cell.<sup>181</sup>

### **5.3 The Justice, Crime Prevention and Security Cluster**

The Justice, Crime Prevention and Security Cluster should:

- Develop a comprehensive set of indicators through the Office for the Criminal Justice System Review to guide data collection, dissemination and analysis across the criminal justice system chain in terms of arrest, police custody and detention in order to identify challenge areas and potential interventions, and track progress made.<sup>182</sup>

### **5.4 The Department of Home Affairs (DHA)**

The DHA should:

- Apply and enforce procedural safeguards and monitor enforcement of safeguards by Bosasa. Recommendations made by the SAHRC in reports in 1999, 2012 and 2016 should be implemented. These include ensuring that detainees are made aware of provisions in a language they clearly understand; ceasing all unlawful detentions (including unaccompanied minors and asylum seekers); serving detainees with notices of deportation within the prescribed timeframe; screening thoroughly to prevent detention of unaccompanied minors; ensuring adequate living conditions; conducting systematic health screenings; provision of adequate health care; and adequate provision of food.
- Render all reasonable assistance to persons facing deportation to allow them to retrieve personal belongings.
- Investigate and respond to allegations of corruption and abuse by both DHA and Bosasa officials.
- Introduce an independent complaints mechanism at the Lindela detention facility through which detained persons may submit complaints without fear of reprisals.
- Cooperate with the SAHRC in all its efforts to fulfil its constitutional mandate, including the provision of timely and accurate information in response to enquiries by the Commission.

- Include the following information in reports to the SAHRC: the number of days spent by detainees at police stations before they are brought to Lindela; all incidents that warrant the use of isolation cells and how they have been/are being dealt with; and all instances of the use of force and of deaths.
- Develop and implement a clear protocol for civil society organisations to access detainees at Lindela and offer information on access to legal representation and social services.
- Examine the outsourcing relationship between the DHA and Bosasa in order to assess the level of responsibility of each institution.<sup>183</sup>
- Formulate a process to assist persons in applying for asylum at the Lindela detention facility. Those seeking protection and claiming asylum should have their cases dealt with under the Refugees Act and should not to be deported.<sup>184</sup>
- Refer mentally ill patients to an adequately capacitated institution since the Lindela facility is not capacitated to deal with mentally ill detainees.

### **5.5 The Department of Justice and Constitutional Development (DoJCD)**

The DoJCD should:

- Adhere to SAHRC recommendations regarding the provision of interpreters to detainees.
- Encourage vigilant judicial oversight of cases concerning minors and immigration detention.
- Ensure that undocumented migrants are not charged and sentenced in terms of repealed legislation and that legal prescripts are uniformly applied. It is recommended that the DHA, DoJCD and SAPS review such cases and take corrective action.<sup>185</sup>
- Review and finalise the NAP to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, clearly delineating the role of the police.

### **5.6 The Department of Health (DoH)**

The DoH should:

- Commission an independent assessment of the provision of adequate health care at Lindela.

### **5.7 The Department of Social Development (DSD)**

The DSD should:

- Conduct age assessments at the Lindela Detention Facility.
- Work with the DHA and SAPS to develop and implement child-friendly mechanisms to curb the detention of unaccompanied minors. Principles of cooperative governance should provide guidance in the cooperation between the different departments.<sup>186</sup>
- Implement the SAHRC recommendation for the development of a memorandum of understanding (MOU) between the DSD and DHA to regulate the working relationship between the two departments.<sup>187</sup>
- Provide detainees awaiting deportation with access to social workers.

### **5.8 The Department of International Relations and Cooperation (DIRCO)**

DIRCO should:

- Take a proactive role in facilitating cooperation and access to consular protection between the DHA and embassies respectively.
- Ratify the OPCAT in order to establishment a national protection mechanism in South Africa.

## **5.9 The South African Human Rights Commission (SAHRC)**

The SAHRC should:

- Promote, protect and monitor the observance of the human rights of migrants and actively engage in the process of review of the Immigration Act. The monitoring of the rights of vulnerable groups such as migrants, asylum seekers and refugees is of the utmost importance.
- Ensure that the DHA reports on Lindela comply with the court order and that all missing information is included in future reports. Reports should include information about the number of days spent by detainees at police stations before they are brought to Lindela; all incidents that warrant the use of isolation cells and how they have been/are being dealt with; and all instances of the use of force and of deaths.
- Conduct an urgent investigation into deaths at Lindela. This should include participation of a forensic expert, as well as access to all hospital records and results of potential autopsies.
- Renegotiate the MOU between the SAHRC and SAPS as a matter of urgency and expand the MOU to include clear outputs and time frames in line with the court order. The current MOU includes advocacy, awareness and training, but lacks the desirable level of detail and has expired.
- Ensure that the revised MOU between the SAHRC and SAPS includes active monitoring of police stations and cells across the country. Existing standing orders should be re-examined by the Commission to avoid confusion.
- Ensure that the provincial offices of the SAHRC become active in the monitoring and oversight of SAPS immigration detention since head office alone is not adequately capacitated to monitor all detention facilities determined as places of detention in terms of the Immigration Act across the country. Provincial offices should coordinate with the Legal Services Unit at head office so as to consolidate statistics nationally and identify any systemic issues if they exist.<sup>188</sup>
- Put effective measures in place to respond to non-compliance with its recommendations, considering that most of the commission's observations have been identified and documented in the past.
- Make full use of existing non-compliance mechanisms, such as subpoena mechanisms to request information not provided by the DHA.

## **5.10 The Civilian Secretariat of Police (CSP)**

The CSP should:

- Strengthen its capacity at both national and provincial level to complete its oversight functions. It should also develop MOUs with the SAPS to facilitate inspections, sharing of information and compliance with reporting obligations.
- Consider the establishment of a Lay Visitor's Scheme as part of the CSP's mandate to inspect police cells.

## ENDNOTES

- 1 This statement made by the South African Human Rights Commission in 1999 remains true in 2017. South African Human Rights Commission (1999) Report into the Arrest and Detention of Suspected Undocumented Migrants. Available at <https://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf>.
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- 9 The United Nations Human Rights Council has highlighted the numerous manifestations of racism and xenophobia in South Africa, including violent attacks against foreign nationals and migrants, refugees and asylum seekers resulting in deaths, injuries, displacement and the destruction of property. The Council pointed out the inability of the authorities to prevent and address racist and xenophobic attacks and to hold perpetrators accountable. United Nations Human Rights Committee (2015) Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, South Africa CCPR/C/ZAF/1. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/025/30/PDF/G1502530.pdf?OpenElement>.
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- 18 Sections 2, 3, 5, 6, 7, 26, African Charter on Human and People's Rights, CAB/LEG/67/3 rev. 5, 21, I.L.M. 58 (1985).
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- 58 Constitution of the Republic of South Africa, 1996, Chapter 2, Bill of Rights, Section 35: Arrested, Detained and Accused Persons.
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- 90 Ibid.
- 91 *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) ('*Centre for Child Law v Minister of Home Affairs*') para. 23; Article 37(b) of the Convention on the Rights of the Child obliges states parties to ensure that children may only be detained as a measure of last resort and for the shortest possible time. This takes into account the best interest of the child enshrined in section 28(2) of the Constitution.
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- 139 The purpose of Western Cape Community Safety Act is to support the objects of the Civilian Secretariat and Provincial Secretariat and to regulate and provide for the carrying out of the functions of the province to: determine policing needs and priorities; monitor police conduct; oversee the effectiveness and efficiency of the police service, including receiving reports on the police service; promote good relations between the police and the community; assess the effectiveness of visible policing; investigate any complaints of police inefficiency or a breakdown in relations between the police and any community; require the Provincial Commissioner to report to and appear

- before the Provincial Parliament; and institute proceedings for the removal or transfer of, or disciplinary action against, the Provincial Commissioner. Western Cape Community Safety Act, 2013. Available at <http://www.breedevalllei.gov.za/bvmweb/images/Legislation/Provincial/western%20cape%20community%20safety%20act%203%20of%202013.pdf>.
- 140 Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha, August 2014.
  - 141 Western Cape Community Safety Act, 2013.
  - 142 African Policing Civilian Oversight Forum and South African Human Rights Commission (2016) Dialogue on Human Rights and Policing, 28–29 April 2016.
  - 143 Section 184(1).
  - 144 Section 13(1)(b)(vi) of the Act, Promotion of International Human Rights Law Standards.
  - 145 Proceedings were instituted before the High Court of South Africa, Gauteng Local Division, in Johannesburg.
  - 146 These particulars should include the following: 1) The person's full names; 2) The person's country of origin; 3) The reason for the person's detention; 4) The date on which the person was arrested; and 5) The basis on which they seek to justify that person's continued detention beyond the 30-day period and whether a warrant for extension of the detention beyond the 30 days has been authorised in terms of section 34(1)(d) of the Act (with a copy of such warrants to be provided). South African Human Rights Commission (2017) Report on Lindela Monitoring and Oversight Project, April 2016 – March 2017.
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  - 148 De Jager, J (2011) Litigating the rights of refugees in the Equality Courts. University of Cape Town Refugee Rights Unit Working Paper Series, paper 3 of 2011. Available at [http://www.refugeerights.uct.ac.za/usr/refugee/Working\\_papers/Working\\_Papers\\_3\\_of\\_2011.pdf](http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_3_of_2011.pdf).
  - 149 South African Human Rights Commission (2016) Human Rights and Law Enforcement. Available at <https://www.sahrc.org.za/index.php/focus-areas/human-rights-and-law-enforcement-prevention-of-torture/human-rights-law-enforcement>.
  - 150 Omar, B (2009) 'Inspecting' the SAPS National Inspectorate. ISS Paper 207, December 2009. Available at <https://oldsite.issafrica.org/uploads/Paper207.pdf>.
  - 151 The current Deputy National Commissioner of Management Interventions is Lieutenant General GJ Kruser. See SAPS placement of top management: [https://www.saps.gov.za/about/images/top\\_m\\_lrg\\_2017.jpg](https://www.saps.gov.za/about/images/top_m_lrg_2017.jpg).
  - 152 South African Police Service Annual Report 2015/16. Available at [https://www.saps.gov.za/about/stratframework/annual\\_report/2015\\_2016/saps\\_annual\\_report\\_2015\\_2016.pdf](https://www.saps.gov.za/about/stratframework/annual_report/2015_2016/saps_annual_report_2015_2016.pdf).
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## About the ACMS

The African Centre for Migration and Society (ACMS) is Africa's leading scholarly institution for research and teaching on human mobility. Established in 1993, the ACMS is an independent, interdisciplinary and internationally engaged institution focusing on the relationships among human movement politics, poverty and social transformation. While oriented towards southern Africa, the Centre conducts collaborative scholarly and policy-oriented work across sub-Saharan Africa, and has partnerships in Asia, Europe and the Americas. It offers Africa's only postgraduate degrees in migration and displacement studies and provides training to students and professionals on a number of topics including the sociology of migration, mobility and health, human rights, and research methods.

## ABOUT APCOF

The African Policing Civilian Oversight Forum (APCOF) is a Not-for-Profit Trust working on issues of police accountability and governance in Africa. APCOF promotes the values which the establishment of civilian oversight seeks to achieve, namely: to assist in restoring public confidence; developing a culture of human rights, promoting integrity and transparency within the police; and good working relationships between the police and the community. While APCOF is active in the field of policing, its work is located in the broader paradigm of promoting democratic governance and the rule of law.

APCOF achieves its goals through undertaking research, and providing technical support and capacity building to state and non-state actors including civil society organisations, the police and police oversight bodies in Africa.

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This publication was made possible through the support of the Open Society Foundation for South Africa.