



African Policing Civilian Oversight Forum

Submission

White Paper on Citizenship, Immigration and Refugee Protection (2023)

31 January 2024

1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission on the White Paper on Citizenship, Immigration and Refugee Protection ('the White Paper'). We are a not-for-profit Trust based in Cape Town, working on issues of policing governance and accountability across the African continent. Since 2019, our work has included a programmatic focus on improving the detection, prevention and response by the South African Police Service (SAPS) to xenophobic violence and related hate crimes. The project includes partnerships and technical support with key justice-sector role players on preventing and responding to xenophobic violence, including the Department of Justice and Constitutional Development, SAPS, Community Policing Forums (CPFs), and the South African Human Rights Commission (SAHRC). In addition, we have provided technical support to the National Preventive Mechanism, coordinated by the South African Human Rights Commission, which has a mandate to prevent torture through monitoring all places of deprivation of liberty in South Africa. This includes immigration detention facilities.

Our submission draws substantially from our research on these, and related, issues, including in particular:

- 2017 analysis on migration and detention in South Africa, available [here](#).
- 2021 analysis on police prevention, detection and investigation of xenophobic violence, available [here](#).
- 2021 analysis on Community Policing Forums and xenophobic violence, available [here](#).
- 2022 analysis on external police oversight, accountability and xenophobic violence, available [here](#).

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2. Substantive comments on the White Paper

2.1. Overview

APCOF acknowledges the two overarching policy objectives outlined in the White Paper. First is the harmonisation of the Citizenship Act 88 of 1995, the Immigration Act 13 of 2002 and Refugees Act 130 of 1998. Second is the urgent need to address the current inefficiencies in the immigration and citizenship framework, which have resulted in inefficiencies, backlogs, uncertainty for migrants and refugees, and corruption by officials from the Department of Home Affairs.

In our view, however, the approach in the White Paper to achieving these policy objectives raises significant concerns. The proposed changes to the system are reactive to a policy narrative that lacks evidence, and the proposals for achieving the policy objectives are imprecise and vague. Furthermore, the approach outlined stands in contrast to both South African constitutional protections, and international law commitments, including customary international law which would still apply to South Africa were it to withdraw from conventions and treaties as proposed by the White Paper.

Our specific concerns are set out in detail below.

2.2. Policy narrative

APCOF has four concerns regarding the policy narrative contained in the White Paper.

First, the White Paper does not recognise migration is a natural and inevitable phenomenon that can present both challenges, and benefits, to South Africa. In its introduction, the Department frames migration to South Africa in negative terms, which fails to reflect the growing evidence available for how migration can positively contribute to South Africa's economy and social fabric (see [here](#), for example). Rather, the White Paper takes a defensive view of migration, with the centrepiece being the removal of international legal protections and restricting pathways to migration, asylum and citizenship. This does not reflect the complexities about modern migration, or the reasons why South Africa may be a destination of choice, or necessity, for migrants and asylum seekers and refugees. Nor does it reflect the principles of Pan-Africanism (cited positively in the White Paper) or the international legal framework for migration and asylum. Both recognise the inevitability, and positive contribution, of international migration, and the need for systems of law policy and practice that *facilitate* effective, efficient and rights-based systems of migration and asylum management.

Second, there are factual errors in the evidence provided to justify limitations on migration and citizenship pathways. The White Paper estimates that there are between 5 and 13 million immigrants in South Africa. However, based on available data this is not correct. The 2022 Census identified 2.4 million people as being foreign-born, which is about 4% of the total population. The full Census data is available [here](#). The White Paper also cites the number of people obtaining citizenship by naturalisation, and the number of people obtaining refugee status, as problems which justify limiting pathways to citizenship. However, official statistics show that only 0.2% of all South African citizens obtained their status through naturalisation, and that only 300,000 people have been granted refugee status since 1998, with few going on to obtain citizenship. There is ample data and analysis available to the Department the number of people arriving in South Africa and obtaining citizenship through naturalisation, some of which has been cited by academics at the University of the Witwatersrand in their initial response to the White Paper, available [here](#). Errors of fact should be corrected in the revised White Paper.

Third, we are concerned about the White Paper's framing of international law, and the proposal that South Africa withdraw from key international treaties and conventions, and rejoin with reservation. The White Paper favourably cites what are *exceptional* reservations to the current international legal framework for migration and asylum. The approach proposed in the White Paper undermines South Africa's reputation and standing as a country that champions international human rights at the global level, and does not respond to challenges inherent in the failure by the Department of Home Affairs (evidenced through the case law cited in the White Paper) to implement the protective framework which already exists, but has been plagued by capacity issues within the Department, and corruption.

Finally, the socio-political context within which the White Paper is drafted makes the absence of analysis regarding the continuing challenge of xenophobic violence startling. The Government's [National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance](#) (NAP), currently being implemented by the Department of Justice and Constitutional Development signaled a prioritisation by government to address xenophobia. In our analysis of the NAP, it is apparent that it does not address issues which underpin anti-foreigner sentiment in South Africa, including the conflation of irregular migration and crime, inefficiencies and lack of understanding about the Department of Home Affairs' permit systems, and the scapegoating of non-nationals for challenges in South Africa's economic development and basic services delivery. Our report, available [here](#), found that the lack of policy focus by national Government on issues of xenophobia limits the capacity of relevant institutions (in that case, the SAPS) to formulate evidence-based responses to it. Our concern is that the failure by the White Paper to accurately reflect immigration challenges within the broader context of anti-foreigner sentiment and economic inequality ignores this critical context and, by taking a defensive stance on the phenomenon of migration, will continue to undermine social cohesion in our communities.

2.3. Secondment of SAPS to DHA and broadening of statutory powers to DHA anti-corruption officials

We note with concern the White Paper's proposal to provide for the secondment of SAPS officials to DHA, and to broaden the statutory powers of DHA officials within the Anti-Corruption Unit and Security Services. APCOF has published research, available [here](#), regarding the existing challenges in the interaction between SAPS, DHA and foreign nationals. In summary, there is ample evidence that foreign nationals experience discriminatory profiling and targeting by the police in South Africa. Of particular concern is the role of SAPS in the enforcement of the Immigration Act and Refugees Act. Despite regular joint operations with DHA, SAPS members do not currently receive basic training in immigration or refugee law, or on issues related to the process and documentation of asylum-seekers, which can make verification of documentation difficult. There is also evidence of anti-foreigner sentiment within the rank and file of SAPS, which contributes to the well-documented risk to the procedural and other human rights of foreign-nationals. Corruption has also been identified as a contributing factor by the Independent Police Investigative Directorate (IPID) in the targeting of foreign-nationals for the purposes of law enforcement, whether in terms of ordinary criminal law, or in the enforcement of the Immigration Act or Refugees Act.

Bolstering law enforcement, as proposed in the White Paper, without addressing the challenges in the current approach by law enforcement to the policing of foreign-nationals, and particularly in joint operations between SAPS and DHA, risks increasing incidents of arbitrary stops and arrests. It will also continue to perpetuate distrust, stigmatisation, and socio-economic exclusion of impacted communities.

Similarly, the proposal to expand the statutory powers of DHA officials responsible for law enforcement raises significant concerns. More detail is required to understand what type of statutory powers are

proposed, and the procedural safeguards that will be afforded to targeted individuals. However, we maintain that any increase in enforcement or coercive powers to DHA officials should include adequate training, and effective and independent oversight and accountability. These elements are absent from consideration in the White Paper.

2.4. Cross-governmental advisory board for the Border Management Authority

APCOF notes the proposed establishment of a cross-governmental advisory board for the Border Management Authority. While we cautiously welcome increased cooperation and communication between relevant departments and agencies, we are concerned by the lack of reference to oversight and accountability mechanisms in the composition of the board. We have previously published research on the importance of ensuring effective oversight and accountability in various elements of migration management, including [policing](#), and [immigration detention](#). Oversight and accountability are critical elements of effective law enforcement, and of border management. Given the challenges relating to effective implementation of mandates as outlined in our reports and acknowledged by the Department in the White Paper, it is imperative that the proposed advisory board include both the South African Human Rights Commission (SAHRC), and other statutory oversight authorities with mandates that extend to the implementation of any aspect of South Africa's immigration and refugee frameworks (including, for example, the Independent Police Investigative Directorate).

2.5. Non-refoulement

We note with significant concern the proposal in the White Paper to limit the appeals process available to foreign-nationals who are subject to orders of deportation. The White Paper does not provide sufficient information regarding the claim that the Department of Home Affairs deports up to 20,000 'illegal' foreign nationals from South Africa every year. It also fails to provide disaggregated data on the categories of deportation, including whether deportations are being implemented in situations where a person may have a claim in terms of international law protections against non-refoulement. We refer to the submission by Lawyers for Human Rights which documents the current practice of deportation in situations where the process for ensuring protections against non-refoulement have been violated by the Department. The proposal to further limit or restrict the right to appeal poses a significant risk to asylum seekers who may be in need of protection in South Africa due to the risk of torture or other cruel, inhuman or degrading treatment or punishment in their country of origin, or persecution. We remind the Department that withdrawal from international treaties relating to migration and refugee protections does not negate the obligation under customary international law on South Africa to prevent torture through non-refoulement.

2.6. Oversight of immigration detention

Research (including by APCOF, available [here](#), and Lawyers for Human Rights, available [here](#)), and court decisions provide significant evidence of human rights violations, and a lack of accountability for such violations, within the current system of immigration detention. The White Paper does not reflect on the current challenges relating to the protection of detainees, or provide detail on how existing gaps in the oversight of immigration detention will be addressed. We do not support the use of detention for the purposes of immigration management, particularly as the current system does not promote the principle of 'last resort'. Alternatives to immigration detention are available, and we refer to the Department to [this report](#), which outlines both the need and availability of alternatives in the South African context.

Should immigration detention continue to be part of South Africa's border management policy, as signaled in the White Paper, we recommend that effective independent oversight over these facilities be established as a matter of urgency.

We are concerned about [recent research](#) which indicates a lack of internal controls by the Department of Home Affairs in the management of Lindela. The outsourcing of management to EnviroMongz (contrary to the initial arrangement of collaboration with the Department) has limited oversight, accountability and transparency, and resulted in procedural and other human rights violations. Access to Lindela for the purposes of monitoring and receiving complaints is provided to the South African Human Rights Commission, the National Preventive Mechanism. The role of these oversight mechanisms in providing monitoring and support to detainees should be emphasised in the White Paper as forming an integral part of any system for immigration detention. Access by these oversight mechanisms should be guaranteed, and recommendations and findings implemented by the Department.

3. Recommendations

We have read and endorse the submission on the White Paper made by Lawyers for Human Rights.

In addition to their recommendations, we make the following:

- Recommendation 1: the evidence regarding both the benefits of migration to South Africa, and factual information regarding the current numbers and pathways to citizenship be incorporated into the White Paper to ensure accurate policy responses to the current challenges and inefficiencies in the immigration system.
- Recommendation 2: further consideration should be given to the secondment of SAPS officials to DHA. Given the challenges outlined in this submission (supported by research) about the current SAPS approach to the policing of foreign-nationals, the White Paper should rather focus on improving SAPS training, supervision and oversight in the policing of the Immigration Act and Refugees Act. Our specific recommendations for improving SAPS' current approach is outlined in our research report, available [here](#).
- Recommendation 3: we do not support increasing the statutory powers of DHA Anti-Corruption Unit and Security Services personnel without further detail regarding the extent of these powers (particularly relating to arrest and coercive powers), and the provision of training, oversight and accountability in the exercise of new powers.
- Recommendation 4: the cross-governmental advisory board on the Border Management Authority should include the South African Human Rights Commission to ensure effective oversight and accountability in the implementation of South Africa's human rights and other international legal obligations in the management of its borders.
- Recommendation 5: the White Paper should emphasise South Africa's obligation under treaty law and customary international law to prevent refoulement of foreign-nationals, and provide data and other evidence on its current practices of deportation, including analysis of the processes for considering applications and appeals from individuals in need of protection under the principle of non-refoulement.

- Recommendation 6: alternatives to detention for immigration-related enforcement should be analysed and included for consideration in the White Paper. If immigration detention remains part of the policy framework for migration management in South Africa, significant investment should be made to improving the oversight and accountability of these facilities, including through revision of the current arrangement with the private management of Lindela, and enhanced cooperation with the National Preventive Mechanism, South African Human Rights Commission, and civil society monitors.

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