



**South African Human Rights Commission**

*Report on the National Investigative Hearing on Migration, Xenophobia and Social Cohesion*

7<sup>th</sup> and 8<sup>th</sup> February 2018

## FOREWORD

## ACKNOWLEDGEMENTS

## LIST OF ACRONYMS AND ABBREVIATIONS

ACMS	African Centre for Migration and Society
COGTA	Department of Cooperative Governance and Traditional Affairs
CSOs	Civil Society Organisations
CSVR	Centre for the Study of Violence and Reconciliation
Commission	South African Human Rights Commission
DAC	Department of Arts and Culture
DBE	Department of Basic Education
DHA	Department of Home Affairs
DIRCO	Department of International Relations and Cooperation
DOJ&CD	Department of Justice and Constitutional Development
GBV	Gender-Based Violence
IDC	International Detention Coalition
IJR	Institute for Justice and Reconciliation
IMCs	Inter-Ministerial Committees
IOM	International Organisation for Migration
JMAP	Johannesburg Migrant Advisory Panel
JRS	Jesuit Refugee Service
LHR	Lawyers for Human Rights
FHR	Foundation for Human Rights
NAP	National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance
NDH	National Department of Health
NDMC	National Disaster Management Centre
NGOs	Non-governmental Organisations

NMP	National Preventive Mechanism
NPA	National Prosecuting Authority
OPCAT	United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment
RROs	Refugee Reception Offices
RRU	Refugee Rights Unit
SARB	South African Reconciliation Barometer
SADC	Southern African Development Community
SALC	Southern Africa Litigation Centre
SAPS	South African Police Service
SAHRC	South African Human Rights Commission
SCCT	Scalabrini Centre, Cape Town
SGBs	School Governing Bodies
SDZP	Special Dispensation for Zimbabweans Project
Sonke	Sonke Gender Justice
UNHCR	United Nations High Commissioner for Refugees
WPIM	White Paper on International Migration

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## EXECUTIVE SUMMARY

Xenophobia remains one of the negative and widespread features of post-apartheid South Africa. Research shows that most xenophobic attacks are directed primarily against African migrants. However, attacks have also been recorded against Chinese-speakers, Pakistani migrants as well as against South Africans from minority language groups (in the conflict areas) such as those who speak *sePedi* and *isiTsonga*. Settlements that have recently experienced the expression of xenophobic violence have also been the site of violent and other forms of protest around other issues, most notably service delivery.

In May 2008, South Africa was in the international limelight following a wave of xenophobic violence, the worst sustained violence witnessed in the country since the end of apartheid. Although the victims of the attacks included both South African citizens and foreign nationals, the violence revealed the presence of powerful xenophobic sentiments that remain to this day. Prior to 2008, xenophobic attacks on foreigners were isolated and random at best, the 2008 attacks were sustained and the scale of the violence incomparable. In the aftermath of the 2008 violence the SAHRC instituted an investigation, and in March 2010, it released a report titled *Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-nationals*.

The report was critical of the state's response during and in the aftermath of the outbreak of violence. The SAHRC made a series of recommendations to relevant government departments as a result of the research study. While there are some government departments which have taken the recommendations seriously and have attempted to implement them, there is widespread consensus that some government departments have taken limited positive steps to implement the Commission's recommendations. The investigative hearing thus provided the Commission with an opportunity to investigate the extent of the implementation of its past recommendations but also the government's plans going forward in addressing the scourge of xenophobia.

The purpose of the investigative hearing was to interrogate the plight of migrants in South Africa with a focus on investigating:

- underlying causes and contributing factors to xenophobia and related intolerance;
- the extent of the prevalence of xenophobia and related intolerance in the country;
- the broader issues relating to the treatment of foreign nationals in the country, including the challenges faced by migrants in integrating into local communities;

- the extent of institutional xenophobia focusing on an investigation on the barriers faced by migrants in obtaining the necessary documentation; accessing support and basic services; the precarious and often harmful labour practices to which vulnerable groups such as migrants are subjected to and widespread stigmatisation of foreign nationals;
- the extent to which previous recommendations have been implemented, particularly the recommendations in the Commission's 2010 report, and an examination of measures taken post-2015 xenophobic violence to promote the social integration of migrants into local communities;
- the coherency of the legislative and policy environment from a rights-based perspective, and its impact on the rights of migrants;
- how the conception and implementation of law and policy proposed regulatory amendments and their contribution to the perpetuation of stigma and discrimination against migrants;
- the conceptualisation and role of the hate crimes legislation and the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, including the manner in which it may impact and/or contribute to current counter-xenophobia initiatives; and
- The role of the media and public figures in perpetuating or combatting stereotypes relating to migration; and
- The challenges faced by migrants in integrating in South African society and the measures that could be adopted to encourage social cohesion.

Below are the key findings and recommendations that emerged from the Commission's investigative hearing.

## Findings

### THEME 1: Underlying Causes of Xenophobia

- a. There is widespread denial of xenophobia in high levels of government and society.
- b. High levels of inequality still persist in South Africa and this is reflected by socio-economic challenges and poor service delivery in less affluent communities. Most migrants live in these communities where service delivery of basic socio-economic services still remains a challenge. The struggle for survival and competition for socio-economic resources are some of the causes of the stigmatisation of migrants, the labelling and also the violence that they experience in these communities.

- c. The presence of African migrants in South Africa is largely viewed in negative terms by the state and the public. This is reflected by: a dominant political discourse that has centered on overstating the scale of international migration to suggest an overwhelming problem for the country; presenting migrants as a threat to citizens' livelihoods and security; and fears that migrants plan to settle in South Africa permanently to the detriment of South Africa's scarce resources, which are deemed to belong only to its citizens.
- d. Denialism of xenophobia by senior government officials and a culture of impunity when dealing with perpetrators of crimes against migrants have exacerbated xenophobia in South Africa.
- e. The lack of definition of hate crime in the law, as well as the inability of the current system to count and to properly investigate and prosecute hate crimes, including crimes motivated by anti-foreigner sentiment, constitutes a very serious gap in the South African legal framework.
- f. The inability to finalise the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance indicates that there is a lack of political will at the highest levels to face and to address xenophobia in a meaningful way, with the preference for blaming violent incidents of this nature on vague elements of criminality.
- g. Local government is crucial to the realisation of many socio-economic rights not only of citizens but also of migrants. Maltreatment and xenophobic attitudes against migrants by local government authorities impedes migrants from accessing state-provided socio-economic goods.

#### Recommendations

- a. Government must acknowledge and accept the existence of xenophobia in South Africa.
- b. The Presidency must initiate a dialogue on xenophobia, its causes and responses - with all relevant stakeholders such as government departments, civil society, Chapter Nine institutions, migrant/refugee groups and affected local communities.
- c. The Commission should revisit and review its 2010 Rule of Law report on the 2008 xenophobic violence as a matter of urgency and use its legal powers to engage all role players and to encourage and enforce implementation of those very valuable recommendations, and this would include taking legal steps where necessary and appropriate. It would be helpful for the government departments which were addressed be requested to make written submissions indicating the level of compliance with those recommendations.

- d. The Commission should implement a fast, stricter and decisive process in managing complaints of bias or prejudice on the part of government, political and other leaders in South Africa.
- e. The South African Police Service must ensure that:
  - An early warning mechanism is in place to verify reports of incidents of xenophobic attacks and related violence;
  - Opening dockets for all foreigners, including the undocumented;
  - It effectively investigates cases of crimes committed by SAPS against foreign nationals;
  - Manage institutional xenophobia;
  - Review dockets to ascertain general crime victimization levels among foreigners in South Africa;
  - Work with the National Prosecuting Authority to address the low conviction rate from xenophobic attacks; and
  - During xenophobic attacks, employ stronger detective and first response systems to improve police investigation, including more targeted arrests.
- f. The South African Police Service must ensure that the crime statistics are made available to the public through the mainstream and social media so that a well-informed conclusion as to the percentage of foreign nationals involved in crime is clear to all.
- g. The Commission must monitor the South African Police Service and the National Prosecuting Authority in relation to prosecutions for hate crimes and xenophobia, given the low number of prosecutions related to xenophobic crimes.
- h. Parliament should use its powers to urgently table the proposed Prevention and Combating of Hate Crimes and Hate Speech Bill and should consider possible additional measures to address the root causes of hate crimes and xenophobia.

## THEME 2: The Role of Public Figures and Media in Combatting or Perpetuating Stereotypes about Migrants

### Findings

- a. There is a causal relationship between anti-migrant utterances by high-ranking public officials and a flair-up of xenophobic violence.
- b. The continued portrayal of migrants, specifically Africans, by media and the state as a threat to the nation's scarce resources perpetuates the existence of xenophobia.

## Recommendations

- a. The Commission should continue to pro-actively and publicly challenge leaders who make xenophobic utterances, even in the absence of formal complaints.
- b. The Commission should ensure that complaints lodged to it relating to xenophobia must very quickly and very decisively be investigated so as to avoid creating the impression that high ranking government and traditional leaders are above the law.
- c. The media should produce balanced reporting that is not over-simplified and/or that vilifies all migrants. It must not make or perpetuate stereotypes or incite violence.

## Theme 4: Conception and Implementation of Law and Policy Impacting on Migrants

### Findings

- a. The South African Government appears not to sure of the correct statistics of undocumented migrants in the country, and this has given a leeway for some officials to thumb-suck figures based on speculation.
- b. The proposal to begin a regime of asylum seeker processing facilities, which is in effect detention camps along the country's borders is unconstitutional and not in the national interest. The creation of such camps and the challenges that will go along with such an approach may actually stoke xenophobia against migrants.
- c. The amendments to the Refugee Act which stipulates that refugees should now apply for permanent residence only after ten years of residency, instead of the previous 5 years does not encourage integration of refugees into South African communities. The amendment is bound to make some migrants 'permanent' refugees, especially for those who may never be able to re-avail themselves of the protection of their country of origin.
- d. The amendments to the Refugee Act and the White Paper fail to address the current problems in the asylum system, such as access issues, bribery and corruption, ineffectual refugee status determination processes and lack of capacity to manage the system. The amendments will likely result in an increased number of individuals in detention centres or undocumented.
- e. A hostile asylum process which is fraught with maladministration and corruption makes it extremely difficult for asylum seekers to apply for and receive the permits to which they are entitled. The long duration of the asylum seeking process prejudices genuine asylum seekers who are in need of protection and increases their vulnerability to crime, exploitation and discrimination.
- f. Migrants are able to access employment but this is more often in the informal sector. They continue to face huge difficulties accessing bank accounts, admission to schools for

children, safe mechanisms for the transmission of remittances to their home countries and access to health care.

- g. Migrant children face a myriad of problems including the lack of a safe and protective environment particularly during outbreaks of xenophobic violence; being turned away from school and clinics due to lack of documentation; challenges for unaccompanied children's placement in foster care or children's homes and the absence of laws allowing for the integration of unaccompanied and undocumented children as they become adults.
  - h. The Refugee Amendment Act also creates onerous requirements for qualifying for work visa endorsements for asylum seekers, thus effectively denying them the right to work. This will impact adversely on social cohesion in South Africa, since it will limit the ability of asylum seekers to become integrated and active members of society.
  - i. Corruption continues to be an endemic problem which seriously impedes access to a fair process with respect to documentation of predominantly vulnerable foreign nationals from the African continent in general and of asylum seekers in particular.
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- h. Migrants face daunting barriers in accessing immigration services in refugee reception offices and these include long queues, bureaucratic indifference, delays in adjudicating asylum claims; delays in hearing appeals of rejected asylum applications; verification of asylum and refugee permits; issuing refugee identity documents and refugee travel documents.
  - i. Permit-related processes and the barriers to accessing services at the Department of Home Affairs also mean that the status of many asylum seekers in South Africa is unstable. Such practices expose asylum seekers to indigence as they struggle to earn sustainable livelihoods as they are unable to get jobs in the formal sector.

#### Recommendations

- a. The Presidency and the Department of Home Affairs are urged to consider extending regularisation processes accorded to undocumented Basotho and Zimbabwean nationals to other undocumented groups.
- b. The Department of Home Affairs must adopt a system of universal birth registration of all children born in South Africa.
- c. The Department of Basic Education must put in place necessary measures to ensure that all children are able to enrol in schools. The Department must work with the Department of Home Affairs to regularise undocumented learners and ensure that even undocumented learners can matriculate.
- d. Parliament must ensure that the executive rethink its plans to set up one-stop border centres which will attend to the processing of asylum applications in the border regions.

This could amount to unlawful detention of asylum applicants and is likely to lead to the creation of shanty towns in border regions where this processing will take place.

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#### Theme 4: Social Cohesion

##### Findings

- a. There is a lack of leadership with respect to developing social cohesion, especially as it relates to migrant and foreign national communities that are settled in South Africa.
- b. Social integration is hindered by a number of prejudices and misperceptions. The number of migrants in the country and the extent to which migrants compete with South African citizens for jobs are both exaggerated to the public.
- c. Although refugees and asylum seekers have the right to work and study in South Africa, many schools discriminate or make it hard to register refugee or asylum seeker's children.
- d. Many migrants particularly women find it challenging to access public healthcare facilities due to the xenophobic and discriminatory attitude of the frontline staff.
- e. Migrants who own and operate small businesses and have intentions of integrating into the communities they live in face a number of problems from the communities they live in as well as law enforcement agencies who would normally be relied on for protection. They receive vicious threats and illegal eviction notices as well as selective and discriminatory enforcement of laws at the hands of the police and local authorities.

##### Recommendations

- a. The Department of Arts and Culture must promote mutual learning of African and South African languages by both South Africans and migrants as this could aid in helping migrants from other countries integrate and navigate their respective communities more easily.
- b. The Departments of Arts and Culture and International Relations and Cooperation must promote of social cohesion initiatives in communities, including such initiatives that seek to educate citizens and migrants about South Africa and the African continent, cultures and languages.

- c. The Department of Home Affairs and the Department of Health must implement more specialised and sensitivity training for their officials who work on the frontline with migrants.
- d. The Department of Social Development must organise and hold a national summit or *indaba* on foreign nationals and immigrants in South Africa geared towards social integration and peaceful co-existence.

## 1. INTRODUCTION AND BACKGROUND

Xenophobia remains one of the negative and widespread features of post-apartheid South Africa.<sup>1</sup> Despite the recommendations of the 2010 SAHRC Report referred to below, xenophobic violence and stereotyping against foreigners remain part of South African life. Research shows that most xenophobic attacks are directed against foreign, primarily African migrants.<sup>2</sup> However, attacks have also been recorded against Chinese-speakers, Pakistani migrants as well as against South Africans from minority language groups (in the conflict areas) such as those who speak *sePedi* and *isiTsonga*.<sup>3</sup> Settlements that have recently experienced the expression of 'xenophobic' violence have also been the site of violent and other forms of protest around other issues, most notably service delivery.<sup>4</sup>

The common definition of xenophobia is 'the hatred or fear of foreigners, combining the Greek *xenos* (foreign) with *phobia* (fear).<sup>5</sup> The South African Human Rights Commission (SAHRC) defines xenophobia as 'the deep dislike of non-nationals by nationals of a recipient state'.<sup>6</sup> Xenophobia includes all forms of discriminatory attitudes towards non-nationals, whatever their source or rationality.<sup>7</sup> Accordingly, it results in the social and political exclusion of its targets from the rest of the population.<sup>8</sup> Xenophobia in South Africa is manifested in the prejudice,

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<sup>1</sup> CK Musuva *International Migration, Xenophobia and The South African State*, Dissertation presented for the Degree of Doctor of Philosophy in the Faculty of Arts and Social Sciences at Stellenbosch University (2015) 44.

<sup>2</sup> Ibid 44.

<sup>3</sup> See Human Sciences Research Council *Citizenship, Violence and Xenophobia in South Africa: Perceptions from South African Communities* (2008) 5.

<sup>4</sup> Ibid 6.

<sup>5</sup> Ibid.

<sup>6</sup> South African Human Rights Commission *Braamfontein Statement on Xenophobia* (1998).

<sup>7</sup> Musuva *International Migration* 44.

<sup>8</sup> M Neocosmos *From 'Foreign Natives' To 'Native Foreigners': Explaining Xenophobia in Post-apartheid South Africa: Citizenship and Nationalism, Identity and Politics* (2010) 13.

discrimination, hostility and violence directed towards perceived foreigners.<sup>9</sup> Xenophobia is embodied in discriminatory attitudes and behaviour, and often culminates in violence, abuses of all types, and exhibitions of hatred.<sup>10</sup> Studies on xenophobia have attributed such hatred of foreigners to a number of causes: the fear of loss of social status and identity; a threat, perceived or real, to citizens' economic success; a way of reassuring the national self and its boundaries in times of national crisis; a feeling of superiority; and poor intercultural information<sup>11</sup>. According to the latter argument, Moge kwu explains that xenophobes presumably do not have adequate information about the people they hate and, since they do not know how to deal with such people, they see them as a threat.<sup>12</sup>

The International Organisation for Migration (IOM) defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of the person's legal status; whether the movement is voluntary or involuntary; whatever the causes for the movement are; or what the length of the stay is.<sup>13</sup> From the above definition, it is clear that migration can also be internal within a country. In South Africa, domestic migrants include people who have two homes. Such migrants are referred to as circular migrants and a case in point is that of mineworkers. Migration where 'an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes,' is known as forced migration.<sup>14</sup> South Africa's Department of Home Affairs (DHA) defines an asylum seeker 'as a person who has fled his or her country of origin and is seeking recognition and protection as a refugee in South Africa, and whose application is still under consideration.'<sup>15</sup> The DHA further defines a refugee as 'a person who has been granted asylum status and protection in terms of the section 24 of Refugee Act Number 130 of 1998.'<sup>16</sup> All migrants holding valid residence visas or permits are referred to as documented migrants.<sup>17</sup> The DHA provides different types of temporary residence visas. Migrants that do not have valid residence visas are referred to as undocumented, irregular, illegal migrants or illegal aliens. Irregular migrants include people who have 'entered the country without documents, without the correct documents for the purpose of their visit, who have overstayed their permit or who have entered into activities not covered by their permit.'<sup>18</sup> Significantly, section 1 of the Immigration

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<sup>9</sup> Musuva *International Migration* 44.

<sup>10</sup> M Moge kwu 'African Union: Xenophobia as poor intercultural information' 2005 (26) *Ecquid Novi* 5-20.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> <https://www.iom.int/who-is-a-migrant>.

<sup>14</sup> Sintha Chiumia *GUIDE: Defining Migration, Migrants, and Refugees (and Why it Matters)*

<https://africacheck.org/factsheets/guide-defining-migration-migrants-refugees-matters/>.

<sup>15</sup> See definition of asylum seeker at <http://www.dha.gov.za/index.php/refugee-status-asylum>.

<sup>16</sup> *Ibid.*

<sup>17</sup> Sintha Chiumia *GUIDE: Defining Migration*

<sup>18</sup> *Ibid.*

Act 13 of 2002 (Immigration Act) defines a 'foreigner' as meaning an individual who is neither a citizen nor a resident but is not an illegal foreigner. The Immigration Act proceeds to define an 'illegal foreigner' as a foreigner who is in the Republic in contravention of this Act and includes a prohibited person. This report uses the term migrant as an umbrella term to include migrants and refugees/asylum seekers. Where applicable and depending on the context, specific terms such as 'asylum seeker' or refugee will be used in the report.

While the events of May 2008 and March 2015/17 became highly publicised, it is important to note that xenophobia is not an entirely new phenomenon in South Africa, and has manifested itself continuously in various forms since the mid-1990s. For example, just after the dawn of democracy in December 1994, protesters in Alexandra Township marched on their local police station to demand that all Malawians, Mozambicans and Zimbabweans 'go home', leading to the anti-immigrant riots known as '*Operation Buyelekhaya*' (Go Back Home) in December 1994 and January 1995.<sup>19</sup> Another notable event includes the killing of two Senegalese and one Mozambican national who were thrown from a moving train in Johannesburg in 1998.

The most recent spate of violence against foreign nationals spread throughout Gauteng and KwaZulu-Natal in March 2015 and 2017, leaving several people dead, hundreds injured, and thousands of migrants, primarily of African descent, displaced. Foreign national-owned shops in townships were looted and torched, while foreign nationals were attacked and driven out of local communities. Over 5 000 foreign nationals were reportedly left homeless, with countless livelihoods destroyed. The outbreak of violence, which was largely reflected as a manifestation of xenophobia in the country, triggered international outcry and condemnation. This has led to extensive debates on the effectiveness of the current migration policy and practice in the country. Addressing xenophobia through the review of migration policy, increased immigration control and revisiting the existing laws and international obligations, as emerges from this report, may not be the most appropriate solution to such a complex issue.

Migration frequently brings change and diversity to societies, leading to a re-evaluation of what it means to belong to a nation. Differences, including culture, language, religion, and ethnicity (amongst others) may become markers of exclusion from national identity, dividing societies along ethnic, racial and nationality lines and presenting significant challenges to the achievement of social cohesion.<sup>20</sup> This form of exclusion not only prevents integration, but is

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<sup>19</sup> Government of South Africa *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 326.

<sup>20</sup> Defined by the Department of Arts and Culture "as the degree of social integration and inclusion in communities and society at large, and the extent to which mutual solidarity finds expression among

likely to expose migrants to discrimination, corruption, exploitation and abuse, while leading to a denial of access to socio-economic opportunities. This reality confines migrants to precarious and vulnerable situations of poverty, a lack of access to basic services, unemployment, or alternatively, to the informal labour market and exploitative employment practices, inevitably resulting human rights violations.

The report is divided into 3 main parts. The first part is the executive summary which provides a synopsis of the key findings and recommendations. The second provides the introduction and background to the investigative hearing which, purpose of the hearing, methodology and procedures at the hearing. The third part evaluates and summarises the submissions made at the hearing (including written submissions) into four key themes, namely: Theme 1: *Underlying Causes of Xenophobia*; Theme 2: *The Role of Public Figures and Media in Combatting or Perpetuating Stereotypes about Migrant*; Theme 3: *Conception and Implementation of Law and Policy Impacting on Migrants*; and Theme 4 focusing on social cohesion, followed by the conclusion.

### **1.1 The South African Human Rights Commission's Earlier Initiatives to Address Xenophobia and Social Cohesion**

The South African Human Rights Commission ("SAHRC" or "Commission") has continuously been involved in monitoring and protecting the rights of everyone in South Africa, including the rights of migrants given their vulnerable position. The ongoing incidents of violence and allegations of other discriminatory conduct in the country was a cause of great concern for human rights-based organisations, and led to a consultative process between the Commission and other government and non-governmental stakeholders on 15 October 1998. The outcome of the process was the adoption of the *Braamfontein Statement on Xenophobia*,<sup>21</sup> which reaffirmed the commitment of the state and of all stakeholders to upholding the rights and legal obligations towards foreign nationals, particularly to refugees and asylum seekers, and to the eradication of xenophobia. The Statement adopted a programme of action which included, *inter*

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individuals and communities. [T]his is evidenced by the extent that the inequalities, exclusions and disparities based on ethnicity, gender, class, nationality, age, disability or any other distinctions which engender divisions distrust and conflict are reduced and/or eliminated in a planned and sustained manner. This, with community members and citizens as active participants, working together for the attainment of shared goals, designed and agreed upon to improve the living conditions for all": [http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20\(3\).pdf](http://www.dac.gov.za/sites/default/files/WHAT%20IS%20SOCIAL%20COHESION%20AND%20NATION%20(3).pdf).

<sup>21</sup> South African Human Rights Commission *Braamfontein Statement on Xenophobia* (1998).

*alia*, a coordinated approach between various government departments to address xenophobia and the various manifestations thereof. The Statement also called for a clear, coherent and implementable migration and refugee policies in line with constitutional and international obligations; nation-wide public information campaigns; a promotion of African cultural values such as *Ubuntu*; training for public officials and measures to address factors which encourage the manifestations of xenophobia.

This Statement later formed the basis of the *Roll Back Xenophobia Campaign: National Plan of Action* (RBX). The RBX Campaign was formed between the Commission, the United Nations High Commissioner for Refugees (UNHCR) and the National Consortium on Refugee Affairs (NCRA) and aimed to raise awareness on the rights and responsibilities of migrants in South Africa, facilitate local integration, and liaise with the media on refugee and migrant-related issues. The campaign was the upshot of a finding which identified xenophobia as a major source of concern to human rights and democratic values in the country.

Closely following the launch of the RBX Campaign, the Commission produced two reports in 1999 and 2000 relating to the conditions of arrest and detention of foreign nationals at the Lindela Repatriation Centre, which reports reflected widespread mistreatment of suspected undocumented migrants, and outlined a number of recommendations. At the request of then-President Thabo Mbeki, the Commission then hosted a National Conference on Racism later that same year, where a Programme of Action (POA) was adopted with numerous outcomes. These included imperative to combat xenophobia and Afrophobia in the country and the provision of social assistance for asylum seekers and refugees. Significantly, the POA also highlighted the importance of South Africans to identify themselves with the African continent in the realm of economics, human relations and sustainable development as well as emphasising the role of public institutions in combatting xenophobia. Importantly, South Africa further hosted the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban in 2001, where the Durban Declaration and Plan of Action was adopted.

Noting ongoing receipt of complaints relating to the treatment of foreign nationals despite the above-mentioned efforts and recommendations, together with ongoing reports of xenophobic incidents taking place,<sup>22</sup> the Commission, in collaboration with the Parliamentary Portfolio Committee on Foreign Affairs, hosted *Open Hearings on Xenophobia and Problems Relating to It* in November 2004.<sup>23</sup> Essentially, the hearings found that South Africans were exceedingly

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<sup>22</sup> Including the eruption of protests at Lindela Repatriation Centre over claims of beatings over the years and detainee deaths in 2004.

<sup>23</sup> The terms of reference were as follows:

xenophobic, and while the manifestations and underlying causes of xenophobia are complex, varied and interlinked, it is underpinned by unfounded myths and stereotypes fueling negative perceptions of migrants. It was further recognised that the manifestation of xenophobia in South Africa is particularly racialised, with black African foreign nationals in particular facing abuse and discrimination, and that foreign nationals in general suffered from systemic discrimination, social exclusion and political alienation. Overall the Report emphasised the fact that xenophobia was found to impact on the ability of foreign nationals to meet their socio-economic needs (including seeking employment, accommodation, healthcare, education and social security). As a result, such discrimination undermines the human rights culture of the Constitution through a perpetuation of exclusion, undermining of international commitments and discouragement of skilled migration. The role of government was viewed as key in any effort to meaningfully combat xenophobia. However, there is a general observation of the government's ambivalence in recognising and dealing with Xenophobia as a priority and in a systematic way and the disastrous consequences of May 2008 and subsequent outbreaks of violence are further testimony of this.<sup>24</sup> This also creates difficulties in systematically monitoring actions and progress on initiatives to fight xenophobia.

Again, and notwithstanding the ongoing efforts, xenophobia continued to violently manifest itself, particularly between 2006 and 2007 where small businesses owned by foreign nationals were attacked and repeatedly torched in Johannesburg and the Somali community expressed outrage at targeted killings taking place. In March 2007, the UNHCR expressed concern over the increased number of attacks against Somali nationals and the 2007 African Peer Review Mechanism's report on South Africa highlighted the fact that xenophobia against other Africans in the country was of serious concern.

## **1.2 The 2008 Violence Against Migrants and the Commission's 2010 Report**

In May 2008 South Africa was in the international limelight following a wave of xenophobic violence, the worst sustained violence witnessed in the country since the end of apartheid. The

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- a) To come to an understanding of the state of xenophobia in South Africa;
  - b) To respond to the concerns of South Africans;
  - c) To get a better understanding of the underlying causes and manifestations of xenophobia;
  - d) To assess the effects of xenophobia on non-nationals;
  - e) To consider the impact of xenophobia on South African society as a whole; and
  - f) To review measures taken so far to combat xenophobia and assess their effectiveness.

<sup>24</sup>The South African Institute of International Affairs 'Implementing the APRM: Views from Civil Society' *South Africa Report* (2011) 58.

May 2008 xenophobic attacks started in Alexandra, Diepsloot, and Tembisa and soon spread to other communities throughout South Africa. Between 11 May and June 14 an estimated 62 deaths, hundreds of injuries, and the displacement of more than 100,000 foreigners nationally had been reported.<sup>25</sup> Although the victims of the attacks included both South African citizens and foreign nationals, the violence revealed the presence of powerful xenophobic sentiment that remains to this day. Prior to 2008, xenophobic attacks on foreigners were isolated and random at best, the 2008 attacks were sustained and the scale of violence, incomparable.<sup>26</sup> The SAHRC instituted an investigation, and in March 2010, the Commission released a report titled *Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-nationals*.<sup>27</sup> The report was critical of the state's response during and in the aftermath of the outbreak of violence. The SAHRC made a series of recommendations to relevant government departments as a result of the research study. While there are some government departments which have taken the recommendations seriously and have attempted to implement them, there is widespread consensus that some government departments have taken limited positive steps to implement the Commission's recommendations. The investigative hearing will provide the Commission with an opportunity to investigate the extent of the implementation of its past recommendations but also the government's plans going forward in addressing the scourge of xenophobia.

Criticism persists with the manner in which certain operations, including *Operation Fiela* and ongoing deportations, have been conducted, raising a series of allegations concerning the rights of those affected. These practices remain largely unexamined to date, and while no other established body has been provided with a mandate to investigate these aspects, the provision of oversight remains an essential function of the Commission. The examination of such operations, including the policy and practice of the deportation of undocumented migrants further feeds into the current work being conducted by the Commission with regard to the Lindela Repatriation Centre. In addition, the Commission is in the process of extensively exploring the adoption of a National Preventive Mechanism (NPM) under the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (OPCAT). This further strengthens the current work being conducted

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<sup>25</sup> SAHRC Report on the SAHRC Investigation into issues of Rule of Law, Justice and impunity arising out of the 2008 Public Violence against Non-Nationals (2010) 21.

<sup>26</sup> G Friebel, JM Gallego & M Mendola 'Xenophobia attacks, Migration Intentions and Networks: Evidence from the South Africa (2013) 555-591.

<sup>27</sup> *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals* (2010).

in so far as detention centres are concerned but especially with regard the vulnerability of foreign nationals in detention.<sup>28</sup>

### **1.3 The Mandate of the South African Human Rights Commission**

The SAHRC is a National Human Rights Institution established in terms of section 181 of the Constitution of the Republic of South Africa, 1996 (the Constitution). In terms of section 184 (1) of the Constitution, the SAHRC must:

- a) promote respect for human rights and a culture of human rights;
- b) promote the protection, development and attainment of human rights; and
- c) monitor and assess the observance of human rights in the Republic.

In carrying out this mandate, the Commission is empowered by section 184 (2) of the Constitution to:

- a) to investigate and to report on the observance of human rights;
- b) to take steps to secure appropriate redress where human rights have been violated;
- c) to carry out research; and
- d) to educate.

Further powers and functions of the Commission are derived from, among others, the South African Human Rights Commission Act, No. 40 of 2013 (the SAHRC Act). Section 13(3)(a) of which provides that the Commission is competent:

- a) to investigate on its own initiative or on receipt of a complaint, any alleged violation of human rights.

These provisions are further strengthened by the specific competencies contained in section 15(1) of the SAHRC Act, which provides that the Commission may:

- a) conduct or cause to be conducted any investigation that is necessary for that purpose;

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<sup>28</sup> In the case of *South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others* 2014 (11) BCLR 1352, Department of Home Affairs was ordered to provide regular reports to SAHRC about the number and status of detainees at Lindela and to permit SAHRC regular access to Lindela Repatriation Centre.

- b) through a commissioner, or any member of staff duly authorised by a commissioner, require from any person such particulars and information as may be reasonably necessary in connection with any investigation;
- c) require any person...to appear before it...and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation;
- d) through a commissioner, administer an oath or take an affirmation from any person referred to in paragraph (c) ... and question him or her under oath or affirmation.

In terms of section 15 of the SAHRC Act:

(6) ...the procedure to be followed in conducting an investigation must be determined by the Commission with due regard to the circumstances of each case.

(7) The Commission must make known publicly the particulars of the procedure which it has determined.

Thus, the Commission has developed a set of Complaints Handling Procedures, published in the *Government Gazette*<sup>29</sup> and on the SAHRC's website. These procedures allow for the convening of hearings in the event, *inter alia*, that it may be deemed to be in the public interest or that the request for a hearing might be deemed to be based on reasonable grounds.

Among the other important provisions which bear mentioning are section 13(1)(a)(i) of the SAHRC Act, which states that:

- i. The Commission is competent and is obliged to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights.

Finally, section 13(1)(b)(vii) of the SAHRC Act envisages a role for the SAHRC in respect of South Africa's compliance with international human rights norms and standards, requiring that the Commission to report to the National Assembly on the country's progress in meeting commitments made under international law.

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<sup>29</sup> Department of Justice. (2012). Complaints Handling Procedure of the South African Human Rights Commission. Government Gazette No. 34963, No. 55, 27 January 2012.

## 1.4 Purpose of the Hearing

The Commission continues to receive ongoing complaints relating to the discrimination, poor treatment and instances of violence committed against foreign nationals across the country. Complaints relating to discrimination on the basis of ethnic or social origin have constituted between 7% and 10% of all equality related complaints, constituting a significant portion. While a number of initiatives and inquiries have been implemented in response to the outbreak of violence in previous years as highlighted above, these have largely focused on violence, immigration control, crime-control and business regulation.

The purpose of the investigative hearing was to interrogate the plight of migrants in South Africa with a focus on investigating:

- underlying causes and contributing factors to xenophobia and related intolerance;
- the extent of the prevalence of xenophobia and related intolerance in the country;
- the broader issues relating to the treatment of foreign nationals in the country, including the challenges faced by migrants in integrating into local communities;
- the extent of institutional xenophobia focusing on an investigation on the barriers faced by migrants in obtaining the necessary documentation; accessing support and basic services; the precarious and often harmful labour practices to which vulnerable groups such as migrants are subjected to and widespread stigmatisation of foreign nationals;
- Investigation on the extent to which previous recommendations have been implemented, particularly the recommendations in the Commission's 2010 report, and an examination of measures taken post-2015 xenophobic violence to promote the social integration of migrants into local communities;
- Consider the coherency of the legislative and policy environment from a rights-based perspective, and its impact on the rights of migrants;
- Ascertain how the conception and implementation of law and policy proposed regulatory amendments and their contribution to the perpetuation of stigma and discrimination against migrants;
- Understanding the conceptualisation and role of the hate crimes legislation and the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, including the manner in which it may impact and/or contribute to current counter-xenophobia initiatives; and
- The role of the media and public figures in perpetuating or combatting stereotypes relating to migration; and

- The challenges faced by migrants in integrating in South African society and the measures that could be adopted to encourage social cohesion.

## **1.5 Methodology**

### **1.5.1 Stakeholder Engagement**

Prior to the national hearing, and in the wake of the violence in Rossettenville and Pretoria West in February 2017, the Commission's Legal Services Unit hosted a stakeholder engagement with civil society and community-based organisations on 27 February 2017 as part of a fact-finding mission. This was done as an immediate response to the violence and the threats of violence against foreign nationals in and around Gauteng.

### **1.5.2 Section 11 Committee Meeting**

As provided for in the SAHRC Act, the Chairperson of the Commission convened a Section 11 Committee on Social Cohesion, Xenophobia and Migration meeting on 23 January 2018 with identified experts and stakeholders. The purpose of the meeting was to enable the Commission to seek inputs from experts and stakeholders on pertinent issues confronting migration and related intolerances.<sup>30</sup> The following points were emphasised at the Section 11 hearing:

- The need for a cooperative approach towards the issue of xenophobia and social cohesion hence the importance of holding an investigative hearing;
- Human rights vulnerabilities of migrants in South Africa have not been resolved;
- The hearing will give the Commission an opportunity to explore and bring those issues to the fore and to make recommendations to relevant stakeholders as well as take stoke on the implementation of previous recommendations;
- The importance of civil society to take forward these recommendations as civil society is better suited than the Commission to monitor at the community level;
- The need for the Commission to develop a post-hearing strategy on how to monitor the recommendations emanating from the hearing; and
- The need for the Commission to investigate the reasons why its historic recommendations have not being implemented.

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<sup>30</sup> Members of the section 11 Committee who attended the meeting are Chairperson Bongani Majola, Father Smangaliso Mkhathshwa, Michelline Minani Muzaneza Bagon, Prof. Dumisani Moyo and Lizette Lancaster as well as other commissioners and secretariat staff of the Commission.

### 1.5.3 National Investigative Hearing

The SAHRC convened a national investigative hearing on the 7 and 8 February 2018 having undertaken preliminary preparations for the hearing in the form of stakeholder engagements with experts, affected persons and civil society actors and public bodies. In addition, monitoring information from the provincial offices of the SAHRC was documented for the purposes of the inquiry.

The hearing sought to reach a wide range of identified stakeholders to secure diverse experiences and perspectives impacting on migrants. On that basis, the Commission invited stakeholders nationally and from local levels deemed to have experience and expertise in migration and social cohesion. Stakeholders included policy makers, civil society organisations, regulatory bodies, communities, researchers, academics and social commentators. For the purposes of the hearing, identified stakeholders were invited to present information, by providing both oral and written submissions to the SAHRC.

## 1.6 Procedures at the SAHRC Hearing

The panel was composed as follows:

- a. Mr Andrew Chris Nissen, Commissioner of the South African Human Rights Commission and Panel Chair;
- b. Ms Angelina Makwetla, Commissioner of the South African Human Rights Commission; and
- c. Ms Laura Freeman, Migration and Conflict Expert and Research Associate, University of Cape Town.

### 1.6.1 Nature and Structure of the Proceedings

The proceedings were inquisitorial in nature. Respondents were obligated to make written and oral submissions. Before the respondents could make their oral submissions to the Commission, they were formally placed on record, by either taking the prescribed oath or affirming that their submissions were true and binding on their conscience. The submissions made by the respondents were in response to the questions posed in their respective invitations. After hearing the oral submissions, the panellists had the opportunity to ask further questions of clarity pertaining to the submissions.

## **2. SUBMISSIONS FROM RESPONDENTS**

### **2.1 THEME 1: UNDERLYING CAUSES OF XENOPHOBIA**

The following were highlighted by Respondents as some of the underlying causes of xenophobia:

- Socio-economic issues such as unemployment, lack of skills and lack of visible youth programs in particular. High levels of inequality that still persist in South Africa, as highlighted by socio-economic challenges and poor service delivery in less affluent communities in South Africa. Most refugees, asylum seekers, and migrants live in these communities where service delivery of basic socio-economic services still remains a challenge. The struggle for survival and competition for economic rights and resources are some of the causes of the stigmatisation of non-nationals, the labelling and also the violence that they experience in these less affluent communities. In most cases where service delivery protests take place non-nationals become the scapegoats of such frustrations.
- Lack of political will from the government to condemn xenophobia and develop ongoing anti-xenophobia campaigns.
- A lack of understanding amongst many communities in South Africa as to why people become refugees and seek asylum in South Africa.
- Lack of adequate and relevant training of public servants regarding complex issues experienced by refugees/ migrants and their rights, especially home affairs officials, hospital and clinic administration staff, police and staff at educational institutions;
- Public scapegoating of migrants by prominent leaders and politicians and ongoing perpetual stereotyping of migrants – especially as criminals or housing issues that surfaced in Mamelodi recently;
- It was further pointed out that an important factor that feeds scapegoatism includes poor living conditions in the informal settlements, in the townships, as well as in the inner cities. Other factors include poor public service delivery on road infrastructure; water and sanitation; electricity; security; education and healthcare. All these issues are linked to the presence of migrants in the minds of other residents, and particularly in the minds of those who are directly affected by socio-economic hardships.

- The alleged corruption between the South African Police Service (SAPS) and alleged drug traffickers or smugglers as a major problem fueling the negative attitudes of South Africans towards migrants, for example the recent unrest in Rosettenville.
- Another reason cited is the absence of a formal government policy on the reception and integration of migrants and refugees into local communities as an issue impacting negatively on migrants. Additionally, the situation is exacerbated by the hostile provisions of the immigration laws which do not permit low-skilled migrants to apply for and receive work permits.
- A hostile asylum process which is fraught with maladministration and corruption makes it extremely difficult for asylum seekers to apply for and receive the permits to which they are entitled. The long duration of the asylum seeking process prejudices genuine asylum seekers who are in need of protection and increases their vulnerability to crime, exploitation and discrimination.
- The stereotyping of immigrants and other outsiders as illegals and criminals feeds into a climate of suspicion and reinforces false narratives about foreigners being a threat to physical security. This includes discriminatory and inflammatory views promulgated by public figures and people in authority.
- One example is, soon after the crime statistics were released in 2017 Gauteng Police Commissioner, Lieutenant General Deliwe De Lange made a statement asserting that about 60 percent of suspects arrested for violent crime in the province were illegal immigrants. This was accompanied by headlines, stating that more than half of violent crimes in Gauteng were committed by illegal immigrants. Commissioner De Lange also insisted that most of the repeat crime offenders in the province were illegal immigrants, despite there being no evidence to support such an assertion. It was submitted that the statement is incorrect as foreigners convicted of violent crimes make up only a small proportion of the prison population.
- Crime statistics are not currently recording hate speech and hate crime, so there is not much evidence available about people who have been victims of hate crimes. Consequently, there is no evidence available in current statistics on the numbers of hate crimes, the perpetrators and the nature of the victims.

## 2.1.1 Implementation of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance

In its presentation the Department of Justice and Constitutional Development (DOJ&CD) highlighted that the finalisation of the NAP is at an advanced stage. The DOJ&CD is currently concluding the final phase of the synthesis and incorporation of comments received from the public. This will be followed by the finalisation and submission of the document to Cabinet. It was further explained that the draft NAP proposes four options of governance models for the NAP.

- The first option would be for the SAHRC to be the implementing body. In line with its constitutional mandate and the Paris Principles, the Commission may participate as an impartial consultative body.
- The second option envisages the creation of a new independent body. The United Nations (UN) Guidelines state that, taking into consideration the national institutional framework and available resources, states should consider the establishment of a national institution for racial equality. However, this option is not a preferred option. South Africa already has a large number of State Institutions Supporting Democracy.
- It has already been found that a proliferation of bodies has the potential to lead to unnecessary duplication. As Parliament's Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions chaired by the late Professor Kader Asmal found, *"a multiplicity of institutions results in an uneven spread of available resources and capacities, which has unfortunate implications for effectiveness and efficiency."*<sup>31</sup>
- The third option would entail sole responsibility for the NAP within one department or Ministry. It was however pointed out that this is also not a preferred option as racism and racial discrimination is a transversal issue. It cuts across various government departments and can therefore not be placed solely within the responsibility of a single department. Furthermore, the issue of partnerships is vital to the success of the NAP and therefore various government departments, civil society and other sectors must be included.
- For this reason a fourth option is being proposed, namely that of a national coordinating structure, consisting of government and civil society. This structure is to comprise of core government departments Justice and Constitutional Development, Women, Labour, Social Development, Human Settlements and Police. The different sectors such as labour,

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<sup>31</sup> Committee Report, p.37.

business, media, academia, and civil society will nominate representatives to serve on the national structure.<sup>32</sup> The structure can have operational committees (sub-committees) that may meet more frequently and where broader sectoral and civil society engagement will take place. It will be important to ensure provincial and local government linkages.

- The national coordinating structure will have a clear mandate to establish a national monitoring and reporting centre using a database as a national tool. Such a coordinating structure should be responsible for collecting information from various departments on their programmes. The coordinating structure will report to Cabinet and Parliament on how government departments have fulfilled their constitutional obligations regarding building a society free of racism, racial discrimination, xenophobia and related intolerance. It was however explained that a final decision on the establishment and structure of the national coordinating structure will be included in the final NAP to be submitted to Cabinet.

### 2.1.2 Monitoring of xenophobia-related cases

It was pointed out that South Africa has become a major transit point and destination for mixed-migration flows. Foreign nationals enjoy all rights enshrined in the Constitution, except for certain civil and political rights reserved for citizens only.

Attacks on foreign nationals experienced in the past and, recently, in 2015 and 2017, resulted in the loss of life and damage to property.

The DOJ& CD explained that issues related to violence and discrimination against foreign nationals are being addressed through three main Inter-Ministerial Committees (IMCs), namely the Inter-Ministerial Committee (IMC) on Migration, the IMC on Social Cohesion and the IMC on Population Policy.

The National Joint Operational and Intelligence Structure (NATJOINTS) and PROVJOINTS were activated to address the recurring incidences of violence in Rosettenville and Pretoria West as well as sporadic incidences in other parts of the country in early 2017. A priority Committee was established - the Joint Operations Committee (JOCOM) which met twice daily at the time of the incidents. Government's response comprised of five pillar action steps and each involved multiple government departments and organs. The five pillars were:

- Safety and security;
- Humanitarian services for social development, reintegration and health services;

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<sup>32</sup> Other examples of similar structures are to be found in the areas of Child Justice, Sexual Offences and LGBTI government initiatives.

- Legal and regulatory framework;
- Communication, community outreach and mobilisation; and
- International cooperation.

It was further explained that the DOJ&CD is also a member of the UN Protection Working Group. The UNHCR leads the UN PWG with role-players from both the private and public sectors involved. Participation includes attendance of monthly meetings and outreach activities.

The UNHCR provides updates on incidents of violence against foreign nationals during these meetings, with reports presented by metro councils and stakeholders when applicable. Hotspots are identified and community outreach planned in collaboration with stakeholders. New and planned government policy is also discussed at meetings.

### 2.1.3 Disaggregated of hate crimes data

It was highlighted that the draft NAP has as one of its goals, the collection of data regarding racism, racial discrimination, xenophobia and related intolerance. The DOJ&CD secured technical assistance from the European Union under the Socio-Economic Justice for All (SEJA) programme to analyse methods of data collection on incidents of racism, racial discrimination, xenophobia, and related intolerance.

The Prevention and Combating of Hate Crimes and Hate Speech Bill has been adapted after taking into consideration the many thousands of comments received during the public dialogue on the Bill. The revised Bill was submitted to the JCPS Development Committee (DEVCOM) in October 2017 with the view to obtain approval to submit the Bill to Cabinet and thereafter to Parliament. DEVCOM raised numerous questions and made a number of proposals and these have been attended.

The DOJ&CD's related key activities include developing and implementing constitutional rights awareness campaigns and programmes targeting the public with a focus on vulnerable and marginalized groups. Other activities include conducting anti-xenophobia campaigns to change attitudes and behavior in relation to xenophobia, and conducting programmes to build non-racialism through community dialogues.

#### 2.1.4 Policing and xenophobia

In its presentation, the South African Police Service (SAPS) explained that xenophobia *per se* is not a crime under South African Law. Rather, xenophobia refers to the motive why a person commits a particular crime. It was further explained that SAPS' constitutional mandate is to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property. The execution of such a mandate does not discriminate on the basis of nationality.

The presentation highlighted that in 2004, Cabinet approved a Service Charter for Victims of Crime in South Africa (thus including victims who are migrants), as well as Minimum Standards of Services for Victims of Crime. The latter standards are intended to assist in the implementation of the Victims Charter. The Victims Charter and the Minimum Standards serve as a means of protecting and promoting the rights of victims in compliance with South Africa's obligations under various international and regional human rights instruments.

However, it was pointed out that SAPS members come from different backgrounds and communities in South Africa. It is to be expected that members may be influenced by the prejudices and dislikes prevailing in the community they come from. It was further explained that SAPS members are encouraged to be aware of these prejudices and to be vigilant and guard themselves against such prejudices in the performance of their duties.

It was further pointed out that the Constitution specifically provides that everyone (thus including non-nationals) is equal before the law and has the right to equal protection and benefit of the law. The Constitution requires the state to not unfairly discriminate directly or indirectly against anyone on one or more grounds, such as 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.<sup>33</sup>

#### 2.1.5 Best practice guidelines regulating SAPS members

The following instruments were highlighted:

##### *Code of conduct*

In terms of the Code of Conduct regulating SAPS members, every member commits him or herself to the creation of a safe and secure environment for all the people in South Africa. This is done through preventing action which may threaten the safety or security

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<sup>33</sup> Section 9 of the Constitution of South Africa, 1996.

of any community, investigating criminal conduct which has endangered the safety or security of the community and bringing the perpetrators thereof to justice. Members are required to, at all times to uphold the Constitution and the law and undertake to 'uphold and protect the fundamental rights of every person', 'act impartially, courteously, honestly, respectfully, transparently and in an accountable manner' and 'exercise the powers conferred upon them in a responsible and controlled manner'. Non-compliance with the Code of Conduct constitutes serious misconduct.

*Standard operating procedure regarding the arrest and detention of undocumented persons (illegal foreigners)*

The standard operating procedure sets out the circumstances under which an undocumented person may be arrested and detained, as well as the manner in which the person must be treated until handed over to the Department of Home Affairs for repatriation.

*National Instruction 2 of 2012 (victim support)*

National Instruction 2 of 2012 (Victim support) sets out the minimum standards for dealing with victims of crime. Any person who is a victim must be treated with sensitivity, dignity, care and respect. Every member conducting interviews, recording statements or conducting investigations must listen attentively to the victim's account of events and refrain from victim-blaming, comments and expressions. Members must ensure that a victim does not suffer secondary traumatisation.

*National Instruction 4 of 2014: Public Order Police: Crowd management during public gatherings and demonstrations*

Public order policing requires the maintenance of public order firstly by ensuring public order during public gatherings and demonstrations and secondly by intelligence driven crime combating and prevention operations. The purpose of the Instruction is to regulate the crowd management environment and the restoration of public order, if violence is anticipated or has occurred during any gathering or demonstration.

The SAPS, in partnership with the community, metropolitan police services and other agencies, devises effective methods to promote public safety, as well as reassuring the community that they are protected. To ensure this, the SAPS must play a pro-active role in attempting to identify

and diffuse any possible conflict before it escalates into violence. This is to be done by communicating with the public, organisers and participants.

*National Instruction 5 of 2014: Reporting the detention, death or complaint of a foreign national (and the Standard Operating Procedure)*

The purpose of the National Instruction is to ensure incidents relating to the arrest of a foreigner; death of a foreigner while in the custody of the SAPS; death of a foreigner due to unnatural causes; and a foreigner as a complainant (a victim of crime), are reported to the embassy or consulate of the foreigner.

#### 2.1.6 Partnerships between SAPS and DHA and information sharing

The following were highlighted by the presenters:

- It was explained that the SAPS, DHA and Disaster Management are part of the Justice, Crime Prevention and Security Cluster role-players and are coordinated through JOINTS;
- Priority Committees established at both provincial and national levels;
- Community outreach programs where members of the community were displaced;
- Reintegration of foreign nationals back to the communities; and
- Mobilisation of community leaders, political parties, religious organisations, and other stakeholders to discourage attacks on foreign nationals.

#### 2.1.7 Measures to address xenophobic-related violence

The presenters highlighted that the public was informed through Government Communication Information System, being communication arm of government, about-

- actions of the Government to prevent attacks;
- assistance offered to victims, and
- arrests of criminals.

- It was further explained that *Operation Fiela 2* launched in January 2018 will see the DHA, departments of International Relations and Cooperation (DIRCO), Social Development (DSD) and Defense, work together along with the National Prosecuting Authority (NPA), State Security Agency, local governments, various state agencies, the SAPS and many others.
- It was explained at the launch of *Operation Fiela 2* that the operation will be focused on, but not limited to, illicit drug trafficking and contraband, undocumented migrants, human trafficking and prostitution. Other areas highlighted include liquor control, second-hand goods, hijacking and illegal occupation of buildings, illegal firearms and ammunition, violent crime and illegal occupation of land among others.

With regard to addressing xenophobia in the education sector, the Department of Basic Education (DBE) explained that it has adopted three key approaches to address the issues of xenophobia and social cohesion. The first one is the preventative approach. With this approach, focus is on promoting the curriculum as a preventative measure for xenophobia and also as a measure to promote social cohesion and nation-building. Some of the key principles that are regarded as the founding principles for the curriculum include social transformation, human rights, inclusivity, environmental and social justice, equal educational opportunities and valuing indigenous knowledge systems. These are the basic principles that cut across the whole curriculum irrespective of the subject.

It was explained as an example that in the foundation phase, grades R to 3, there is a life-skills curriculum which forms part of the teaching and learning process and the themes that are taught are based on rights and responsibilities. During the intermediate phase, which is grades 4 to 6, learners also taught on the aspects of rights and responsibilities in terms of eradicating discrimination, stereotypes, bias, promoting diversity and respect for the dignity of people. Focus is on teaching how to be caring to other people, nation building and cultural heritage.

During the senior phase, which is grades 7 to 9, learners are taught aspects of rights and responsibilities, nation building, human rights and issues on cultural diversity. These topics and themes instil values and raise awareness in learners on being responsible citizens.

For the senior level, which is grades 10 to 12, geography and history learners are taught on issues relating to human rights, identity, exclusion, xenophobia, war, conflict and restorative justice.

### 2.1.8 State of preparedness for any future xenophobic disturbances

The DHA explained that it continues to collaborate and support other relevant stakeholders, and these include the UNHCR, DIRCO, the Department of Cooperative Government, the DOJ&CD and SAPS in formulating and drafting contingency plans. The department also participates in the different forums where issues of asylum seeker management - including economic migrants, women, children and people with disabilities from foreign countries and LGBTI are discussed.

The DHA also highlighted in its presentation that it is also part of the coordinated action plan of government which monitors attacks against foreign nationals under the JCPS cluster the National Joint Operations Intelligence Structure (NATJOINTS). There is also an Inter-Governmental Cooperation on Migration forum which is chaired by the Office of the Minister in the Presidency. This Office monitors all migration activity including issues of social cohesion and other matters that contribute to effective management of migration.

It was further explained that critical to ensure that there is an effective response to xenophobic violence are the following:

- An early warning mechanism which includes a scientific based system to verify reports of incidents of xenophobic attacks and related violence, including the capacity to respond to immediate medical needs related to the outbreak of violence.
- A mechanism to trigger a response which will include the availability of resources.
- The role of peace keepers – learning from the role that *Black Sash* played in mitigating the repressive violence of the apartheid state and its agents.
- Building democratic organisations to build solidarity in the struggle for social justice to hold government accountable at all levels. There is a critical role for Chapter Nine institutions in carrying out their mandates to strengthen constitutional democracy in South Africa.

## 2.2 Findings

- a. There is widespread denial of xenophobia in high levels of government and society.
- b. High levels of inequality still persist in South Africa and this is reflected by socio-economic challenges and poor service delivery in less affluent communities. Most migrants live in these communities where service delivery of basic socio-economic

services still remains a challenge. The struggle for survival and competition for socio-economic resources are some of the causes of the stigmatisation of migrants, the labelling and also the violence that they experience in these communities.

- c. The presence of African migrants in South Africa is largely viewed in negative terms by the state and the public. This is reflected by: a dominant political discourse that has centred on overstating the scale of international migration to suggest an overwhelming problem for the country; presenting migrants as a threat to citizens' livelihoods and security; and fears that migrants plan to settle in South Africa permanently to the detriment of South Africa's scarce resources, which are deemed to belong only to its citizens.
- d. Denialism of xenophobia by senior government officials and a culture of impunity when dealing with perpetrators of crimes against migrants have exacerbated xenophobia in South Africa.
- e. The lack of definition of hate crime in the law, as well as the inability of the current system to count and to properly investigate and prosecute hate crimes, including crimes motivated by anti-foreigner sentiment, constitutes a very serious gap in the South African legal framework.
- f. The inability to finalise the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance indicates that there is a lack of political will at the highest levels to face and to address xenophobia in a meaningful way, with the preference for blaming violent incidents of this nature on vague elements of criminality.
- g. Local government is crucial to the realisation of many socio-economic rights not only of citizens but also of migrants. Maltreatment and xenophobic attitudes against migrants by local government authorities impedes migrants from accessing state-provided socio-economic goods.

### **2.3 Recommendations**

- a. Government must acknowledge and accept the existence of xenophobia in South Africa.
- b. The Presidency must initiate a dialogue on xenophobia, its causes and responses - with all relevant stakeholders such as government departments, civil society, Chapter Nine institutions, migrant/refugee groups and affected local communities.
- c. The Commission should revisit and review its 2010 Rule of Law report on the 2008 xenophobic violence as a matter of urgency and use its legal powers to engage all role players and to encourage and enforce implementation of those very valuable recommendations, and this would include taking legal steps where necessary and

appropriate. It would be helpful for the government departments which were addressed be requested to make written submissions indicating the level of compliance with those recommendations.

- d. The Commission should implement a fast, stricter and decisive process in managing complaints of bias or prejudice on the part of government, political and other leaders in South Africa.
- e. The South African Police Service must ensure that:
  - An early warning mechanism is in place to verify reports of incidents of xenophobic attacks and related violence;
  - Opening dockets for all foreigners, including the undocumented;
  - It effectively investigates cases of crimes committed by SAPS against foreign nationals;
  - Manage institutional xenophobia;
  - Review dockets to ascertain general crime victimization levels among foreigners in South Africa;
  - Work with the National Prosecuting Authority to address the low conviction rate from xenophobic attacks; and
  - During xenophobic attacks, employ stronger detective and first response systems to improve police investigation, including more targeted arrests.
- f. The Commission must monitor the conduct of officials in *Operation Fiela 2* to ensure that the human rights violations committed during *Operation Fiela 1* are not repeated. *Operation Fiela 1* resulted in foreign nationals being made scapegoats for crime in the inner city and this further perpetuated xenophobic attitudes and hostilities.
- i. The South African Police Service must ensure that the crime statistics are made available to the public through the mainstream and social media so that a well-informed conclusion as to the percentage of foreign nationals involved in crime is clear to all.
- j. The Commission must monitor the South African Police Service and the National Prosecuting Authority in relation to prosecutions for hate crimes and xenophobia, given the low number of prosecutions related to xenophobic crimes.
- k. Parliament should use its powers to urgently table the proposed Prevention and Combating of Hate Crimes and Hate Speech Bill and should consider possible additional measures to address the root causes of hate crimes and xenophobia.

### **3. THEME 2: THE ROLE OF AND PUBLIC FIGURES AND MEDIA IN COMBATTING AND/OR PERPETUATING STEREOTYPES**

There was a general consensus from most of the respondents that senior political and traditional leaders contribute to the problem of xenophobia by making very problematic utterances that stoke the flames of xenophobia. Another serious concern is the general denial of xenophobia by some senior political leaders. Both the media and public figures have a huge role to play in combatting or perpetuating stereotypes relating to migration and migrant communities. Public figures and the media often link the prevalence of crime to apparently high migration figures.

It was explained that the egregious manner in which leadership at various levels have perpetuated negative stereotypes against migrant communities and the impact thereof on social cohesion and xenophobia cannot be overemphasised. Societal leaders must be called to exercise their powers and influence in an ethical manner with respect to beliefs, values, dignity and rights of all. Furthermore, those who make inflammatory comments which incite division and violence must be held accountable. There can be no doubt that there is a direct correlation between the inflammatory statements by senior public figures and the increased levels of xenophobic violence in South Africa over the past decade.

There are several recent and notable instances in which no public apologies were made, statements were not publicly retracted or corrected, and there were no disciplinary or other consequences that followed from these statements, either through the state mechanisms, or through the political parties to which these individuals belong. The HCWG highlighted the following examples:

- i. King Goodwill Zwelithini and the outbreak of xenophobic violence in 2015 just days after a speech delivered by the King;
- ii. The City of Johannesburg Mayor, Herman Mashaba has made numerous statements claiming that many foreign nationals are living in dilapidated hijacked buildings. Quoting unknown statistics, Mayor Mashaba has asserted that around 80 percent of people living in hijacked buildings are foreign nationals. Such statements are factually incorrect and inflammatory. Further, they perpetuate the myth that foreign nationals are an ever-growing criminal scourge that is draining resources away from South African Citizens;

The HCWG argued that such statements stoke the fires of xenophobia and impede social cohesion in the country, particularly when they are made in an official capacity by high ranking government officials that command considerable public platforms;

- iii. The third example is that of Deputy Police Minister Bongani Mkongi who made inflammatory remarks concerning the increasing numbers of foreign nationals residing in South Africa on 14 July 2017. The Lawyers for Human Rights and Sonke Gender Justice, both members of the HCWG, lodged a formal complaint with the Commission regarding the remarks in August 2017, and addressed letters both to the police ministry and the Deputy Minister himself. Despite the Commission making numerous requests for a response from the Deputy Minister, to date, no response has been received and it would seem no action was ever taken.
- iv. The HCWG emphasised the importance of acting very quickly and very decisively when complaints about sensitive matters are lodged so as to avoid creating the impression that high ranking government and traditional leaders are above the law. Such inability to act undermine the authority and the efficacy of the Commission in demanding accountability, both in the eyes of complainants specifically and then also in the eyes of the broader public.

Regrettably, the behaviour referred to above, is not limited to political leaders. Sometimes, certain sections of the media is also complicit by perpetuating negative anti-foreigner stereotypes when they selectively highlight the nationality and migrant status of alleged perpetrators for the purpose of sensationalism. This feeds into the narrative that the presence of migrants and foreign nationals contributes to the high levels of crime in South Africa.

It was further pointed out that the wording of the government announcement that *Operation Fiela Two* will address '*the safety concerns of the citizens of the country*',<sup>34</sup> echoes the same xenophobic and exclusionary process which took place in 2015. That episode witnessed hundreds of foreign nationals unlawfully arrested and detained across the country.

It is these sentiments which perpetuate the narrative that undocumented people are the cause of crime, fuelling the hatred that is witnessed in violence targeting black foreign nationals. Use of military words like 'operation' – is reminiscent of 'state of emergency' under apartheid, when

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<sup>34</sup> <https://www.gov.za/speeches/government-launches-operation-fiela-ii-pretoria-19-jan-17-jan-2018-0000>

the rule of law was suspended and repression and force was used to counter political opposition.<sup>35</sup>

Misconceptions about the impact of migration on the South African economy and sustained myths that foreign nationals steal jobs and take away government resources from citizens often ignite violent attacks, looting and widespread criminality. This leads heightened tension within communities. Instead, research supports the contrary and studies show how migrants also make a positive contribution to the South African economy.

However, official crime statistics released by the SAPS do not have a category identifying the perpetrators of crime as migrants nor is there one looking at crime related to immigration offences. Despite this, public figures routinely draw links between migrant communities and the prevalence of violent crime for which they are blamed.

The most comprehensive set of statistics available do not support the conclusion that migrant communities are responsible for the rise in violent crime. This set of statistics was presented to Parliament on 23 June 2017 by the Minister of Justice and Correctional Services, Michael Masutha.

The statistics revealed that of the total prison population of 157 013 at the end of 2016, only 11 842 were foreign. This means that only 7.5% of the entire prison population is foreign. Further, of the 11 842 foreign prisoners, 7 345 had been sentenced and 4 497 were awaiting trial, with 1 380 being prosecuted for being in the country illegally. Of the 7 345 foreigners sentenced for crimes only 3 434 were convicted of contact crimes, a major concern of most South Africans. This would suggest that only 29% of foreign prisoners have been convicted of contact crimes; this makes up only 2% of the entire prison population in South Africa. Additionally with an estimated 1.6 million foreign-born individuals living in South Africa in 2016, those sentenced for contact crimes make up only 0.21% of the migrant community. This is hardly sound basis for blaming the entire community for the increase in crime. And yet, all too often both the media and public figures continue to perpetuate the myth that the rise in crime, particularly violent crime, is attributable to migrations. These assertions are not borne out by the facts.

There is a general failure on the part of government, political and community leaders to regularly speak out against xenophobia, and to debunk some of the myths related to migrants. This

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<http://www.lhr.org.za/news/2018/press-release-lhr-expresses-its-concern-over-announcement-cabinet-justice-cluster-operatio>

failure has generally promoted a culture of impunity in South Africa. Those who discriminate against migrants, in any way, do not believe that they will face meaningful consequences and continue to feel justified in holding prejudicial beliefs and engaging in prejudicial actions. Where there has been proactive investigations, recommendations and initiatives taken, there has generally been a failure to take those initiatives to their completion and to implement any recommendations. A few examples can be made.

- i. After the 2008 xenophobic violence, it was left to the SAHRC to conduct a thorough investigation into the causes and consequences of that violence. Disappointingly, there were no police-led investigations at the time, yet the police has the constitutional mandate to protect communities and maintaining law and order.
- ii. In 2010, the SAHRC published a comprehensive report analysing the conditions prior to, during and after the attacks and made some very valuable findings and recommendations on how to address xenophobia in the future. However, very few of those recommendations, if any, were actually implemented. Consequently, very important learnings and opportunities for prevention and intervention were lost. When the country witnessed a similar outbreak of violence in April 2015, the government's response was just as inadequate as it was back in 2008.

The Hate Crimes Working Group (HCWG) submitted that if the 2010 SAHRC report had been regarded with the seriousness that it deserved at the time and its recommendations properly implemented, the extent of the 2015 violence could have been mitigated and perhaps even avoided.

- iii. Another example of the lack of implementation or action is the NAP. It was explained that in the 3 years since the framework was launched in 2015, there has been no visible progress in the drafting of the NAP and not enough has been done to finalise and publish the plan as a government policy. It was argued that the Government has failed to take ownership of the drafting of the plan by failing to fund the mandate; to monitor the development of the mandate; and also failed to engage relevant stakeholders. This suggests that there could be absent the political will to take real positive action on social cohesion and xenophobia in South Africa.
- iv. The HCWG also made submissions on the Prevention and Combating of Hate Crimes and Hate Speech Bill. It was pointed out that it has been over a year since the draft bill has been available for public comment, and it seems that the bill has

not been approved by cabinet.<sup>36</sup> The HCWG explained that civil society has advocated for a law to deal decidedly with hate crimes for almost 10 years now. The lack of definition of hate crime in our law, as well as the inability of the current system to count and to properly investigate and prosecute hate crimes, including crimes motivated by anti-foreigner sentiment constitutes a very serious gap in our law.

### **3.1 Xenophobia denialism by public leaders**

The third aspect, according to the HCWG, is that there seems to be a denial of xenophobia in high levels of government. As an example:

- i. In the wake of the 2008 xenophobic violence, then President Thabo Mbeki remarked that the shameful act of a few had blemished the name of South Africa. In making this statement, President Mbeki effectively attributed responsibility for the mass violence to a handful of criminal individuals. This was a denial of the community sentiment underlying much of the attacks and the violence and openly interrogating the underlying causes. This denial, unfortunately, still characterises many important leaders' responses to xenophobic violence and sentiment in South Africa.
- ii. In early February of 2017 violence broke out in Rosettenville targeting businesses and homes owned by Nigerians. Less than a month later, violence broke out in Pretoria West as community members raided what they alleged were drug dens, again supposedly run by foreign nationals. As a response, both then President Jacob Zuma and the Minister of Home Affairs Minister Malusi Gigaba used these instances as a platform to fight crime, rather than call out any xenophobic sentiments behind these attacks.
- iii. It was further pointed out that, in the aftermath of a march against migrants held on 24 February 2017, then President Zuma again claimed that the event was anti-crime in the main, and that it was not an anti-foreigners march and denying that South Africans are in any way xenophobic. Thereafter, the Minister of Home Affairs Malusi Gigaba issued a statement categorically stating that the vast majority of South Africans are not xenophobic.

The HCWG argued that such denialist statements point to a trend in leadership of ignoring xenophobic sentiment. There is seemingly an unwillingness to accept or to admit that a considerable number of South Africans find it easy to blame crime and the scarcity of resources directly on the presence of migrants. This is often done without any proper evidence to back

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<sup>36</sup> It was reported in the media on 15<sup>th</sup> March 2018 that cabinet had approved the Bill. See a report in the Citizen newspaper dated 15<sup>th</sup> March 2018 available at <https://citizen.co.za/news/south-africa/1857835/cabinet-approves-hate-speech-hate-crimes-bill/>.

such assertions. This in turn indicates that there is again a lack of political will at the highest levels to face and to address xenophobia in a meaningful way, with the preference for blaming violent incidents of this nature on vague elements of criminality.

The relationship between public sentiment and media portrayals is often reciprocal. Inasmuch as citizens are likely to be influenced by media portrayals, media frequently acts as a reflection of already-existing views. However, the continued portrayal of migrants, specifically Africans, by media and the state as a threat to the nation and a detriment to local growth perpetuates the existence of xenophobia.

News-media is furthermore integral to the continued perpetuation of xenophobic attitudes. It was highlighted that studies have shown that newspapers in particular, including English-language newspapers which attract more affluent audiences, have covered issues surrounding migrants very negatively. It is not wholly uncommon for news stories to claim that foreigners are 'encroaching on the livelihoods of our huge number of unemployed people' or that 'the high rate of crime and violence... is directly related to the rising numbers of illegals in South Africa', without ever citing evidence to support these xenophobic assertions.

Although it is understandable and even required that public media reports on these events, media should be aware of its responsibility in shaping the image that the public has of migrants. Grand scale media attention on this topic creates the public perception of fundamental incompatibility of migrants with South African culture and practices. In reality, most migrants in South Africa live a peaceful, constructive and productive life in the country.

### **3.2 Findings**

- a. There is a causal relationship between anti-migrant utterances by high-ranking public officials and a flair-up of xenophobic violence.
- b. The continued portrayal of migrants, specifically Africans, by media and the state as a threat to the nation's scarce resources perpetuates the existence of xenophobia.

### **3.3 Recommendations**

- a. The Commission should continue to pro-actively and publicly challenge leaders who make xenophobic utterances, even in the absence of formal complaints.

- b. The Commission should ensure that complaints lodged to it relating to xenophobia must very quickly and very decisively be investigated so as to avoid creating the impression that high ranking government and traditional leaders are above the law.
- c. The media should produce balanced reporting that is not over-simplified and/or that vilifies all foreign nationals. It must not make or perpetuate stereotypes or incite violence.

#### **4. THEME 3: CONCEPTION AND IMPLEMENTATION OF LAW AND POLICY IMPACTING ON MIGRANTS**

##### **4.1 Legislation and policies which promote the rights entrenched in the Constitution**

A representative from the Lawyers for Human Rights (LHR) explained that the Constitution of South Africa is the yardstick by which all laws should be judged. Similarly all laws, procedures and policies should be consistent with the ethos, objectives and principles of the Constitution and should give effect to the rights entrenched therein.

It was pointed out that the Refugees Amendment Act 11 of 2017 (Amendment Act), passed on 18 December 2017, contains a number of provisions which undermine the constitutional rights and legal protection of those fleeing persecution and insecurity. One particular concern is the severe limitations on the right to work, which is in direct disregard of court decisions on the right to work and the freedom to choose a trade and occupation as intrinsically linked to the right to human dignity.<sup>37</sup>

The Amendment Act also creates onerous requirements for qualifying for work visa endorsements for asylum seekers, thus effectively denying them the right to work. This will impact adversely on social cohesion in South Africa, since it will limit the ability of asylum seekers to become integrated and active members of society. The inability to obtain a work visa as an asylum seeker will result in increased reliance on state resources and social assistance from non-governmental organisations (NGOs). It was argued that this constitutes a derogation of the right to health, housing and social protection of asylum seekers in South Africa. The result is the perpetuation of negative stereotypes of migrants depleting state resources and taking away resources from South African citizens.

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<http://www.lhr.org.za/news/2014/sca-upholds-appeal-somali-association-south-africa-5-others-v-ledet-minister-police-minist>

In addition to the restriction of the right to work, the proposed processing centres for asylum seekers in the White Paper on International Migration (WPIM) will essentially isolate refugees and asylum seekers and further impede their integration. Reference was made to a report by UNHCR on alternatives to camps, where the UNHCR notes that 'community-based protection activities and livelihoods and education programmes that also involve local people can promote social cohesion, reduce xenophobic attitudes and create a better protection environment. Where people work, study and play together, they are better equipped to resolve differences and live peacefully.'<sup>38</sup>

The above two points illustrate the need for all laws, practices and policies to protect and promote constitutional rights, which apply to South African and migrants equally. If these constitutional ethos are not respected, the arbitrary implementation of laws is likely to undermine social cohesion. This will also perpetuate the impunity of government officials who stoke racial hatred and xenophobia in clear violation of constitutional and legislative prescripts. LHR also reiterated the importance of the government to respect the rule of law when conducting police operations such as *Operation Fiela*, and to adhere to its constitutional duties and obligations.

#### 4.2.1 An analysis of the Refugees Act

The presenter pointed out that South Africa's domestic obligations in terms of refugee protection stem from its international obligations. South Africa is a party to both the 1951 Convention Relating to the Status of Refugees, including the 1967 protocol. South Africa is also a party to the 1969 OAU (AU) convention, which governs specific aspects of refugee problems in Africa. South Africa combined the best aspects of the two conventions and came up with the Refugees Act. It is important to note that the 1951 Convention only relates to providing asylum to persons fleeing persecution. The 1969 OAU Convention deals much broadly with those who are fleeing generalised violence, which is predominantly the majority of people fleeing violence in Africa. On paper, when one looks at the letter of the law, South Africa most likely has one of the most progressive and liberal refugee protection frameworks.

More broadly, the current formulation of Refugees Act is the hallmark refugee protection in Africa, because there is no camp system. South Africa is one of only two jurisdictions in the entire African continent that do not have camps, the other being Uganda. This means that refugees and asylum seekers are allowed to roam freely in South Africa. This is an important initiative as it allows refugees and asylum seekers to be self-sufficient. It also provides for a

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<sup>38</sup> <http://www.unhcr.org/5422b8f09.pdf>

much better environment to live in and promotes community integration. South Africa also provides access, at least in theory, to basic social services, such as education and the right to health care and employment.

It was however pointed out that there is a huge disjuncture between those rights that are encompassed in law, and how people actually access those rights. One of the major reasons is the huge sense of ignorance in South Africa on who asylum seekers and refugees are. It was pointed out that people in South Africa do not know these people and why they are in South Africa. Many state institutions do not know this as well.

There are several examples of the incredible disjunction between the manner in which the Refugees Act is formulated and the way that it is actually implemented. Some of those challenges arise from the basic level, like access to the asylum system. The plight starts from when a newcomer's ability to access a refugee reception office to lodge an application where there are very long lines outside the offices, especially in Gauteng. Presently, there is a lot more pressure at the remaining refugee reception offices, because the Cape Town Refugee office was closed, but after a very long and tedious court battle, which ended up in the Constitutional Court. It was pointed out that the Cape Town office will be opened in 2018 as there is a clear need to keep that office open. However, before that office could officially open in 2018, there remains a huge burden on the remaining refugee reception offices. The Departments also tried closing the Port Elizabeth reception office, but there is a Supreme Court of Appeal order which held that the Port Elizabeth office must remain open. It was pointed out that, on the ground the office has not been taking new applications. Consequently, to be able to get inside a refugee reception office to make an application remains a huge challenge.

It was submitted that in some cases asylum seekers spend up to a week sleeping outside the office, just to gain access. Getting documented as an asylum seeker is important - it is integral, and possibly the most important aspect in the road to being integrated into South Africa. Without documentation they are invisible. It is difficult to access health care, impossible to open or operate a bank account, difficult to be employed, their children cannot go to school. Further, undocumented asylum seekers are vulnerable to be arrested, detained and deported. So the first step is getting documentation, but it remains a very huge challenge.

It was further pointed out that corruption eats at the core of our asylum protection framework. Corruption hampers the process because those who genuinely deserve asylum are not granted asylum if they do not pay the officials. Corruption starts right at the bottom from the security guards who determine who gets into the office as they illegally demand payments. The Refugee rights Unit (RRU) explained that it has put measures in place to combat corruption. Part of the

measures is dealing and engaging quite rigorously with Corruption Watch, an NGO that specifically deals with corruption, as well as working in conjunction with law enforcement agencies. Further, the RRU submitted that it intends on engaging quite rigorously with the Department of Home Affairs, in order to weed out officials that are corrupt.

Due to corrupt practices of officials, asylum seekers and refugees are often left vulnerable as they are left to feel as if they have no option but to bribe the officials. After camping outside for long periods and with no hope of ever getting in unless one pays the demanded fee, it would be difficult for them not to pay where one has a valid refugee claim. The presenter highlighted a recently released report titled "*All roads lead to corruption*" which documents corruption in the immigration system.

It was argued that some of the barriers and the challenges come with the manner in which the DHA approaches refugee status determination. A study on refugee status determinations in South Africa has found that there is an overwhelming tendency by refugee status determination officers to decline applications regardless of the merits. It was pointed out that the rejection rate is between 95 and 98 per cent, the highest in the world.

There is a need for an improvement of the asylum laws to provide access and protection to refugees. This has not been the case for many years. Over 2016/17 the DHA produced the WPIM which was approved by the Cabinet on 29 March 2017 and gazetted on 28 July 2017 for public comment. The WPIM provided a new policy framework that would guide the comprehensive review of immigration and related legislation. These plans include the setting up of one-stop border centres which will attend to the processing of asylum applications in the border regions. The result is that asylum seekers will not be permitted to enter the country until their application has been finally adjudicated. In essence this will amount to administrative detention of asylum applicants and is likely to lead to the creation of shanty towns in border regions where this processing will take place.

Additionally, whilst the NAP is commendable, it lacks a focus on xenophobia and an inadequate account of the challenges faced by foreign nationals, including refugees and asylum-seekers in South Africa. The NAP also lacks a focus on addressing the national and local structures that affected individuals come into contact with as well as the processes which are meant to assist them in navigating immigration and employment barriers. Further, it does little to address the culture of impunity and lack of accountability which was clearly revealed following the 2008 attacks.

The respondents highlighted the following challenges in South Africa's refugee protection system:

#### 4.2.1.1 Amendments to the Refugees Act

It was pointed out that due to a number of amendments that have been made to the Refugees Act, South Africa's refugee protection system has fallen into a state of limbo. The current formulation of the Refugee's Act without the amendments is very progressive and very liberal, but the amendments are retrogressive and erode at the valuable work that has been done in refugee protection since 1998.

From the amendments of 2008 there has been erosion and a witting away of the rights afforded to asylum seekers and refugees in line with South Africa's international obligations which has resulted in the expansion of exclusionary provisions. For example, section 4 of the Refugees Act, which lists people who can be excluded from Refugee protection, has been expanded to exclude even people who may have genuine fears.

It was further pointed out that one of the more worrying 2017 amendments, as highlighted by the RRU, is the taking away the automatic right to work for asylum seekers. One of the amendments is that before an asylum seeker is permitted to work, an assessment will be first done when the asylum seeker first arrives, to determine whether they can support themselves for a period of up to four months. If they cannot, then they will determine if the UNNCR cannot provide them support, and if UNNCR cannot, they will see if any other NGO can support them. Thereafter the right to work will be granted.

It was argued that this provision does not make any sense when one considers that South Africa does not have a camp system, which means asylum seekers and refugees must become self-sufficient. If they cannot work, they cannot be self-sufficient. Requiring them to get hand-outs is simply impractical. First, there is no NGO that is going to be able to take on that kind of burden. In any case, it must be pointed out that the Constitutional Court held that the right to work is akin to the right to human dignity as it allows one to be self-sufficient and support themselves through gainful employment. It is not clear how the Department of Home Affairs will go around that should the amendments come into effect.

It was further pointed out that one cannot help but interpret these amendments as being a form of institutional xenophobia, even more so when one has regard to the provisions around permanent residence. Previously the provision allowed refugees that would have been in South Africa for five years to apply for permanent residence. This is in line with international refugee *ethos* that nobody should remain in the state of refugee forever, instead, they should be allowed

to naturalise and integrate into the local community. However, the 2017 amendments have increased that period to 10 years from 5 years. This means one has to be in South Africa for a period of at least 10 years before they are eligible to apply for permanent residence, and it was argued, such a stance is unreasonable and completely unfair to leave people in that kind of limbo for that long.

#### 4.2.2 Challenges in the asylum adjudication system

##### 4.2.2.1 Inordinate delays

The submission explained that while South Africa claimed to register the highest numbers of new asylum seekers from 2008-2010, these numbers have steadily declined to 106,000 in 2011 and 51,000 in 2012. Despite a reduction in numbers, a reciprocal improvement in the refugee status determination process or reduction of the appeal backlog has not been seen. As at March 2013, there were still 230,486 pending asylum applications; 86,833 pending Refugee Appeal Board (RAB) appeals and 58,000 cases pending before Standing Committee for Refugee Affairs (SCRA). The RAB and SCRA backlogs continue to be a bottleneck in this process and neither body has sufficient capacity to deal expeditiously with the cases before it.

##### High rate of rejection of asylum applications

Year	Overall Recognition rate	Musina RRO
2013	10.7%	2 out of 10,043 received refugee status
2014	12.1%	3 out of 14,586 received refugee status
2015	4.1%	0 out of 9,927 received refugee status

The high rate of rejection is ostensibly used to demonstrate that migrants are abusing the asylum process. It was further reported that 2016 was one of the toughest years as very few asylum seekers in South Africa were able to access any documentation. Nationalities most affected were asylum seekers from Burundi, DRC and Ethiopia. The challenges that the LHR teams were facing were borne directly out of the impact on our work of the policy shift that is already being implemented by the DHA. According to the LHR, Marabastad has suffered the consequences of the closures of the different RROs over the last period.

In a 2012 Report, the African Centre for Migration and Society (ACMS) found that the poor quality of refugee status determination proceedings was a violation of the constitutional right to just administrative action. In another report from ACMS in the same year, hundreds of RSD

decisions were analysed and specific problems relating to the determination procedure were found to violate both domestic constitutional law regarding just administrative action and good decision-making as well as international standards relating to RSD.<sup>39</sup>

#### 4.2.2.2 Corruption

It was highlighted that in 2015, LHR launched a comprehensive report on the issue of corruption within the asylum process, entitled *Queue here for Corruption: Measuring Irregularities in South Africa's Asylum System*.<sup>40</sup>

Following years of anecdotal evidence regarding corruption at the Refugee Reception Offices (RROs), LHR and ACMS conducted a quantitative assessment of the scope of corruption at these offices. The assessment revealed significant levels of corruption involving multiple actors, occurring at all stages of the asylum process, and continuing even after an individual had obtained refugee status. Results varied by office, but overall almost one-third of respondents experienced corruption at an RRO. The Marabastad RRO in Pretoria showed the highest levels of corruption. This continues to be an endemic problem which seriously impedes access to a fair process with respect to documentation of predominantly vulnerable migrants.

#### 4.2.2.3 Disregard of court rulings

The DHA disregards court rulings. It was explained that in 2015, LHR successfully challenged the closure of the Port Elizabeth Refugee Reception Office (PE RRO) in the Supreme Court of Appeal. Despite LHR's judgment in the Supreme Court of Appeal (confirmed by the Constitutional Court) regarding the unlawful closure of the PE RRO, DHA remains in contempt of Court and has failed to re-open the PE RRO throughout 2015, 2016 and 2017. LHR is currently preparing papers to request that the court intervene in this matter as the PE RRO remains closed to date.

#### 4.2.2.4 Stamping the asylum permit on the back

In many occasions, when asylum seekers go to renew their permits, instead of receiving a proper renewal of a permit, their expired permit is stamped on the back with a future date which indicates when they should return to the RRO. This practice puts the asylum seekers in a very vulnerable situation, as he/she is at risk of detention or deportation.

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<sup>39</sup> Amit, Roni. "All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination." *African Centre for Migration & Society*. June 2012:

[http://www.lhr.org.za/sites/lhr.org.za/files/all\\_roads\\_lead\\_to\\_rejection\\_research\\_report.pdf](http://www.lhr.org.za/sites/lhr.org.za/files/all_roads_lead_to_rejection_research_report.pdf)

<sup>40</sup> <http://www.lhr.org.za/sites/lhr.org.za/files/272268061-queue-here-for-corruption.pdf>

Rejection of the application for asylum because the asylum seeker does not have a passport

Although according to national and international law the inability to produce an identity document should not preclude one from applying for asylum, the RRO only allows those with passports to apply for asylum. This practice is totally unlawful and in many cases very difficult to adhere to. Due to the circumstances in which asylum seekers are forced to leave their country of origin, they often find themselves without any identity document. Moreover, they cannot turn to their country of origin to help them in obtaining such documents.

#### 4.2.2.5 Refugee status determination decisions full of errors

A considerable number of refugee status determination decisions have been observed to contain serious errors of law and do not answer the claims of asylum applicants. As a result, the adjudication process drags on for too long, as asylum seekers must resort to protection through judicial review in the High Court.

#### 4.2.2.6 Refusal to provide the final decision

Many asylum seekers who have received a final rejection from the SCRA do not receive the final rejection in writing and instead, they only receive a written 'upheld' on the expired permit. This practice leaves the asylum seeker in a vulnerable situation, since it prevents them from pursuing a judicial review application.

#### 4.2.2.7 Experiencing problems when trying to open a bank account

Until recently, most banks in South Africa only allowed recognised refugees to open a bank account if they were in possession of a valid refugee identity document. In some cases, banks are not even aware of the various documents that DHA issues to refugees and asylum seekers, which is problematic. Also, it is up to each bank to decide whether it will open an account or not. As a result, many asylum seekers are unable to apply for jobs, leaving them to the informal sector which exposes them to abuse and exploitation.

#### 4.2.2.8 Experiencing problems in accessing education

Although refugees and asylum seekers have the right to work and study in South Africa, many schools discriminate or make it hard to register refugee or asylum seekers' children. In this regard, some schools insist that the child must have her/his own asylum permit or he/she will be expelled or unable to write matric. This situation is exacerbated when the DHA denies issuing the permits for the children because they consider them too young.

#### 4.2.2.9 Difficulties in accessing health care

On some occasions, hospitals refuse to assist asylum seekers or refugees and demand payment upfront. This problem is even more acute for the Somali refugee women who may have suffered female genital mutilation. Due to their condition, they require special health care, particularly during childbirth, but when they go to the hospitals they do not receive proper treatment.

#### 4.2.2.10 Childhood statelessness

Statelessness in South Africa is on the increase and generally unaddressed. Unfortunately, South Africa's legislative framework creates and perpetuates statelessness. Many children come into the country as minors, but attain majority before they get documentation, becoming stateless. These cases often take time to get resolved and, in the meantime, children are unable to sit for matric or are turned away from schools. Those who have attained majority struggle to find jobs or make a living without documentation.

#### 4.2.2.11 Problems faced by the LGBTI refugees and asylum seekers

South Africa is the only African country that grants refugee status on the basis of sexual orientation. However, this progressive legislation is not always implemented for several reasons, such as corruption, inaccessibility of the system and poor decision making by the Refugee Status Determination Officers. The asylum application process is fraught with problems and a lack of transparency. For instance, asylum seekers are sometimes asked to "prove" their homosexuality which denotes a lack of knowledge of international jurisprudence, guidelines and best practices. At the same time, some LGBTI asylum seekers do not mention their sexual orientation or gender identity in their claims because they feel ashamed or scared in front of the DHA officials or interpreters. Therefore, if homophobia is added to the insecure legal status of asylum seekers, the lack of recognition of refugee and asylum seeker documentation by some of those charged with granting access to benefits and rights, as well as racial or ethnic discrimination, this group is placed in an especially vulnerable position.

### 4.3 Findings

- a. The South African Government appears not to be sure of the correct statistics of undocumented migrants in the country, and this has given a leeway for some officials to thumb-suck figures based on speculation.

- b. The proposal to begin a regime of asylum seeker processing facilities, which is in effect detention camps along the country's borders is unconstitutional and not in the national interest. The creation of such camps and the challenges that will go along with such an approach may actually stoke xenophobia against migrants.
- c. The amendments to the Refugee Act which stipulates that refugees should now apply for permanent residence only after ten years of residency, instead of the previous 5 years does not encourage integration of refugees into South African communities. The amendment is bound to make some migrants 'permanent' refugees, especially for those who may never be able to re-avail themselves of the protection of their country of origin.
- d. The amendments to the Refugee Act and the White Paper fail to address the current problems in the asylum system, such as access issues, bribery and corruption, ineffectual refugee status determination processes and lack of capacity to manage the system. The amendments will likely result in an increased number of individuals in detention centres or undocumented.
- e. A hostile asylum process which is fraught with maladministration and corruption makes it extremely difficult for asylum seekers to apply for and receive the permits to which they are entitled. The long duration of the asylum seeking process prejudices genuine asylum seekers who are in need of protection and increases their vulnerability to crime, exploitation and discrimination.
- f. Migrants are able to access employment but this is more often in the informal sector. They continue to face huge difficulties accessing bank accounts, admission to schools for children, safe mechanisms for the transmission of remittances to their home countries and access to health care.
- g. Migrant children face a myriad of problems including the lack of a safe and protective environment particularly during outbreaks of xenophobic violence; being turned away from school and clinics due to lack of documentation; challenges for unaccompanied children's placement in foster care or children's homes and the absence of laws allowing for the integration of unaccompanied and undocumented children as they become adults.
- h. The Refugee Amendment Act also creates onerous requirements for qualifying for work visa endorsements for asylum seekers, thus effectively denying them the right to work. This will impact adversely on social cohesion in South Africa, since it will limit the ability of asylum seekers to become integrated and active members of society.
- i. Corruption continues to be an endemic problem which seriously impedes access to a fair process with respect to documentation of predominantly vulnerable foreign nationals from the African continent in general and of asylum seekers in particular.

- j. Migrants face daunting barriers in accessing immigration services in refugee reception offices and these include long queues, bureaucratic indifference, delays in adjudicating asylum claims; delays in hearing appeals of rejected asylum applications; verification of asylum and refugee permits; issuing refugee identity documents and refugee travel documents.
- k. Permit-related processes and the barriers to accessing services at the Department of Home Affairs also mean that the status of many asylum seekers in South Africa is unstable. Such practices expose asylum seekers to indigence as they struggle to earn sustainable livelihoods as they are unable to get jobs in the formal sector.

#### **4.4 Recommendations**

- a. The Presidency and the Department of Home Affairs are urged to consider extending regularisation processes accorded to undocumented Basotho and Zimbabwean nationals to other undocumented groups.
- b. The Department of Home Affairs must adopt a system of universal birth registration of all children born in South Africa.
- c. The Department of Basic Education must put in place necessary measures to ensure that all children are able to enrol in schools. The Department must work with the Department of Home Affairs to regularise undocumented learners and ensure that even undocumented learners can matriculate.
- d. Parliament must ensure that the executive rethink its plans to set up one-stop border centres which will attend to the processing of asylum applications in the border regions. This could amount to unlawful detention of asylum applicants and is likely to lead to the creation of shanty towns in border regions where this processing will take place.
- e. Parliament must ensure that the executive rethink its plans to set up one-stop border centres which will attend to the processing of asylum applications in the border regions. This could amount to unlawful detention of asylum applicants and is likely to lead to the creation of shanty towns in border regions where this processing will take place.

#### **5. THEME 4: SOCIAL COHESION**

The Department of Arts and Culture (DAC) in its submission explained that the National Strategy for Developing an Inclusive and Cohesive South African Society (Strategy) was approved in 2012. The Strategy, it was pointed out, responds to the on-going and unfinished

national project that began with the transformation of South Africa into a constitutional democracy in 1994. The focus is on building of a just society, which upholds and embodies the principles and values of an inclusive, non-racial democracy. More specifically, it responds to Outcome 12 of the set of 12 outcomes adopted by Cabinet in January 2012.

In 2012, the Government convened a National Summit on Social Cohesion which reviewed progress made towards creating a caring and proud South African society and to provide a platform to discuss the National Strategy for Developing an Inclusive South African society. The summit recognised that social cohesion depends, in large measure, on the ability of communities, as part of society, to address this challenge. The outcome was the adoption of a Programme of Action and a Declaration which acknowledged the challenges faced by South Africa in building a non-racial, non-sexist and united society after 1994.

The Strategy, it was highlighted, is oriented towards the South African meanings of social cohesion and nation-building embedded, as they happen to be, in African social ideas and cultures, and their dynamic interaction with other cultures. All human societies, at both local-community level and larger intercommunity and national life level, require sets of shared values, norms, visions, and goals to secure cooperation and foster bonds of belonging. Noteworthy is that:

The Strategy defines social cohesion as ‘the degree of social integration and inclusion in communities and society and the extent to which mutual solidarity finds expression among individuals and communities’. Accordingly, in terms of the definition, a community or society is cohesive to the extent that the inequalities, exclusions and disparities based on ethnicity, gender, class, nationality, age, disability or any other distinctions which engender divisions distrust and conflict are reduced and/or eliminated in a planned and sustained manner. Such a process should take place with community members and citizens as active participants, working together for the attainment of shared goals, designed and agreed upon to improve the living conditions for all.

Nation building is defined as ‘the process whereby a society of people with diverse origins, histories, languages, cultures and religions comes together within the boundaries of a sovereign state.’ Social cohesion, it was explained, manifest on a voluntary basis – buttressed by shared values, norms and identity. Importantly, social cohesion cultivates a collective consciousness in terms of who we are as a people. It was explained that the role of the DAC is to coordinate, support, monitor and report on progress periodically to Cabinet in terms of the Programme of Action.

## **5.1 Efforts to advance social integration**

- i. Community dialogues / conversations – It was explained that these dialogues are carried out as a way to provide a dialogic platform for people of diverse communities and histories to come together as a way to breach the socio-historical divisions.
- ii. Social Cohesion Advocates – involves select eminent people, some of whom are non-South Africans, who carry out advocacy work on social cohesion and nation-building through reaching out to communities, including immigrant communities.
- iii. Africa Month programme - this is a program by DAC which is mainly looking at cultural exchange and an appreciation of the histories, the cultures, and the people both of South Africa and the continent at large.
- iv. It was further explained that established African scholars are invited, as part of the programme, to address young people in South Africa, especially in Universities and in communities, about pertinent matters that relate to Africa's development.
- v. Government needs to make greater effort to research and develop fairer, more efficient and just laws policies regulating the asylum and refugee process.
- vi. More specialised and sensitivity training for public servants who work on the frontline with migrants or who make decisions about policy related to migrants.
- vii. Making sure healthcare and educational facilities in local communities do not discriminate against migrants through education initiatives sponsored by government and implemented in partnership with relevant NGO's.
- viii. Develop partnerships with and support programmes that foster social cohesion between South African and migrant youths.
- ix. The media can play a huge role in combatting stereotypes, telling stories and giving a voice to migrants. In addition, they can publicise those stories that highlight positive outcomes and benefits of integration amongst people and communities.
- x. The media and civil society could work together to play a larger role regarding advocacy and awareness campaigns.

The DBE, on also submitted that the promotion of constitutional values and social cohesion in schools through the curriculum helps integration of migrant students. Social cohesion is viewed as the ability of the society and institutions to ensure the welfare of all its members. This implies designating all persons and all stakeholders to realise the importance of caring, on the basis of shared responsibilities and values. It enables others to be concerned about the welfare and well-being of others.

In 2011 the DBE conducted a research on social cohesion in order to identify and assist the department understand social cohesion implies. It was explained that some of the critical aspects which were continuously observed and given attention within the schooling system to accomplish social cohesion are social trust, social capital and social inclusion. The dimension of social cohesion, it was explained, would assist the DBE in decoding a socially cohesive society and institutions focused on belonging, inclusion, participation, recognition, legitimacy, shared values, cooperation and belief.

The DBE submitted that, through its curriculum it encourages and promotes a sense of belonging for all learners, educators, parents and the community at large by ensuring that whatever activity done should ensure that every person, including migrants equitably participate. A broadly shared set of public values and norms for social conduct, positive valuation of diverse cultures, languages and religions is also encouraged. Respect and tolerance for political and ideological differences is prized. A high level of awareness of the rights and obligations of citizens and migrants, not only to focus on rights, but also obligations. This should not be responsibility of educators alone, rather, everyone, including the various NGOs and communities should assist as this will ensure that our learners can emulate their behaviour and value.

## **5.2 Challenges faced by migrant communities in relation to community integration**

There generally is a low readiness by the host communities to accept migrants, based on prejudices on what migrants contribute or represent. There is a general perception that migrants compete with South African nationals for jobs, entitlements and other opportunities. The pressure that migrants encounter from the host communities include public intimidation and verbal threats; threats and extortion; intimidation or direct physical violence against their families or properties; displacement to areas of mass shelter or forced repatriation to their country of origin.

SALC highlighted the following challenges faced by migrant communities thereby impeding community integration.

Even though migrants are able to access employment, this is more often in the informal sector. They continue to face huge difficulties opening bank accounts, admission to schools for children, safe mechanisms for the transmission of remittances to their home countries and access to health care.

Migrant children face a myriad of problems including the lack of a safe and protective environment particularly during outbreaks of xenophobic violence. They also get turned away from school and clinics due to lack of documentation. There are also challenges for unaccompanied children's placement in foster care or child and youth care centres. Another recurring concern is the absence of laws allowing for the societal integration of unaccompanied and undocumented children as they become adults.

Migrants who own and operate small businesses and have intentions of integrating into the communities they live in face a number of problems - from the communities they live in as well as from law enforcement agencies. They receive vicious threats and illegal eviction notices as well as selective and discriminatory enforcement of laws at the hands of the police and local authorities. They are often blamed for crimes, their shops and businesses targeted for looting and burning during outbreaks of xenophobic violence.

The DHA explained that over the years, it has also undertaken initiatives to encourage integration and social cohesion amongst communities that live with migrants and continues to collaborate with other government departments, international agencies and civil society on matters affecting foreign nationals. Efforts developed and implemented by the DHA to promote social cohesion in migration-management approach to Immigration include;

#### 5.2.1 Refugee Amendment Act of 2017

It was explained that the new law seeks to unblock the protection regime in South Africa, allowing clients to receive fast and improved services. This is carried out through coordinated assistance to indigent asylum applicants through working with UNHCR and other stakeholders in the provision of basic necessities to asylum seekers who demonstrate the need.

#### 5.2.2 Certification of refugees

The Refugee Act provides that refugees that have remain in the refugee situation in the country for a continuous five year period without a possibility of a resolution of their individual circumstances in the country of origin can apply for certification as a refugee indefinitely.

### 5.2.3 World refugee day celebrations

The Department, in partnership with the UNHCR and other stakeholders hosts annual commemorations of refugees on 20<sup>th</sup> June of every year. The objectives of the celebrations are to highlight the plight of refugees, educate local communities about the presence of refugees in their communities and celebrate human triumphal of refugees that have found peace amongst South Africans.

### 5.2.4 Issuance of enabling documents

It was pointed out that the department also issues enabling documents to migrants residing in South Africa to facilitate their integration and ability to transact whilst residing in the country. The categories that benefit from these documents are permanent residence holders, asylum seekers and refugees in the main.

### 5.2.5 South African Migrant Awards (Mkhaya Awards)

It was explained that in July 2015, the Minister of Home Affairs launched the inaugural South African Migrant Awards aimed primarily at recognising outstanding migrants residing in the country who contribute immensely to South Africa's development in various fields.

### 5.2.6 Promotion of regularisation programmes

SALC explained that South Africa has implemented two regularisation processes directed at Zimbabwean and Lesotho nationals. These processes have been progressive and have recognised the need to find a mechanism to regularise economic migrants who are in South Africa but who are unable to regularise their immigration status.

The Special Dispensation for Zimbabweans Project (SDZP) – this project was initially introduced in 2009 and has undergone two incarnations; the first was met with much suspicion and skepticism and resulted in 294 511 applications and 242 731 permits granted. The second ran from 2014-2017 and was called the Zimbabwe Special Dispensation Permit (ZSP), applicable to those already in South Africa and who participated in the first SDZP process. In 2017, the

Zimbabwe Exemption Permit (ZEP) was launched and open to those already in possession of the ZSP. The new permits will be effective from January 2018 to December 2021.

The Lesotho Special Permit (LSP) was launched in February 2016 and will run until December 2019. The permit is open at all Lesotho nationals who work, study or carry out business in South Africa and had been in the country in such capacity before 30 September 2015. However, the registration process posed some challenges for some Lesotho nationals due to the requirement to register online and the fact that not all Lesotho nationals wishing to regularise their stay in South Africa had identity documents. One of the commendable features of the LSP was the amnesty provided to all Lesotho nationals who had previously obtained ID documents fraudulently.

It was pointed out that these processes recognise that there are significant numbers of undocumented SADC citizens in particular in South Africa who are already part of the work force and who are contributing to the growth of the country. SALC argued that similar regularisation programmes should be extended to vulnerable migrants from other SADC countries.

#### 5.2.7 Promotion of universal birth registration in South Africa and SADC

Low levels of birth registration in Southern Africa Development Community (SADC) countries have resulted in many nationals being unable to access identity and travel documents. Changes to South African laws have resulted in undocumented migrant mothers being unable to register the births of children born in South Africa. Without a birth certificate these children will be unable to claim their citizenship. This could potentially result in a whole generation of stateless persons—who will be unable to access basic rights—like health care and education and be unable to pass on citizenship to their children. An inability to register the births of children born to undocumented parents in South Africa ensures that these children will remain stateless and would be unable to regularise their immigration status. In its submission, SALC recommended that a system of universal birth registration be promoted throughout the SADC region in order to alleviate the problem of statelessness as well as increased vulnerability of migrants.

#### 5.2.8 Promotion of the free movement of people: SADC Free Movement Protocol

SALC pointed out that in January 2014, the Government of South Africa publicly stated that it was considering a visa for SADC economic migrants, which may reduce new asylum applications. The WPIM proposes among other things to:

- provide a legal route for SADC economic migrants;
- provide reciprocal visa-free travel for SADC citizens;
- expand special dispensations for economic migrants from certain SADC countries;
- introduce a SADC special work visa. This is a visa which will allow the holder to work in South Africa for a prescribed period of time;
- introduce a SADC traders' visa - a long-term, multiple-entry visa for cross-border traders who enter and exit the Republic frequently is proposed; and
- introduce a SADC small and medium enterprise (SME) visa. This visa would be for self-employed people and small business owners.

### **5.3 Findings**

- a. The South African Government appears not to be sure of the correct statistics of undocumented migrants in the country, and this has given a leeway for some officials to thumb-suck figures based on speculation.
- b. The proposal to begin a regime of asylum seeker processing facilities, which is in effect detention camps along the country's borders is unconstitutional and not in the national interest. The creation of such camps and the challenges that will go along with such an approach may actually stoke xenophobia against migrants.
- c. The amendments to the Refugee Act which stipulates that refugees should now apply for permanent residence only after ten years of residency, instead of the previous 5 years does not encourage integration of refugees into South African communities. The amendment is bound to make some migrants 'permanent' refugees, especially for those who may never be able to re-avail themselves of the protection of their country of origin.
- d. The amendments to the Refugee Act and the White Paper fail to address the current problems in the asylum system, such as access issues, bribery and corruption, ineffectual refugee status determination processes and lack of capacity to manage the system. The amendments will likely result in an increased number of individuals in detention centres or undocumented.
- e. A hostile asylum process which is fraught with maladministration and corruption makes it extremely difficult for asylum seekers to apply for and receive the permits to which they are entitled. The long duration of the asylum seeking process prejudices genuine asylum seekers who are in need of protection and increases their vulnerability to crime, exploitation and discrimination.
- f. Migrants are able to access employment but this is more often in the informal sector. They continue to face huge difficulties accessing bank accounts, admission to schools

for children, safe mechanisms for the transmission of remittances to their home countries and access to health care.

- g. Migrant children face a myriad of problems including the lack of a safe and protective environment particularly during outbreaks of xenophobic violence; being turned away from school and clinics due to lack of documentation; challenges for unaccompanied children's placement in foster care or children's homes and the absence of laws allowing for the integration of unaccompanied and undocumented children as they become adults.
- h. The Refugee Amendment Act also creates onerous requirements for qualifying for work visa endorsements for asylum seekers, thus effectively denying them the right to work. This will impact adversely on social cohesion in South Africa, since it will limit the ability of asylum seekers to become integrated and active members of society.
- i. Corruption continues to be an endemic problem which seriously impedes access to a fair process with respect to documentation of predominantly vulnerable foreign nationals from the African continent in general and of asylum seekers in particular.
- j. Migrants face daunting barriers in accessing immigration services in refugee reception offices and these include long queues, bureaucratic indifference, delays in adjudicating asylum claims; delays in hearing appeals of rejected asylum applications; verification of asylum and refugee permits; issuing refugee identity documents and refugee travel documents.
- k. Permit-related processes and the barriers to accessing services at the Department of Home Affairs also mean that the status of many asylum seekers in South Africa is unstable. Such practices expose asylum seekers to indigence as they struggle to earn sustainable livelihoods as they are unable to get jobs in the formal sector.

#### **5.4 Recommendations**

- a. The Department of Arts and Culture must promote mutual learning of African and South African languages by both South Africans and migrants as this could aid in helping migrants from other countries integrate and navigate their respective communities more easily.
- b. The Departments of Arts and Culture and International Relations and Cooperation must promote social cohesion initiatives in communities, including such initiatives that seek to educate citizens and migrants about South Africa and the African continent, cultures and languages.

- c. The Department of Home Affairs and the Department of Health must implement more specialised and sensitivity training for their officials who work on the frontline with migrants.
- d. The Department of Social Development must organise and hold a national summit or *indaba* on foreign nationals and immigrants in South Africa geared towards social integration and peaceful co-existence.

## 6 CONCLUSION

The investigative hearing established that xenophobia remains one of the negative and widespread features of post-apartheid South Africa. It is not only racialised, but it is also Africanised, with black African migrants being disproportionately the targets of xenophobia. Significantly, denialism of xenophobia by senior government officials and a culture of impunity when dealing with perpetrators of crimes against migrants have exacerbated xenophobia in South Africa.

What is clear is that the presence of African migrants in South Africa is largely viewed in negative terms by the state and the public. This is reflected by a dominant political discourse that has centered on overstating the scale of international migration to suggest an overwhelming problem for the country; presenting migrants as a threat to citizens' livelihoods and security; and fears that migrants plan to settle in South Africa permanently to the detriment of South Africa's scarce resources, which belong to its citizens.

The historical inequalities in South Africa will take many years to resolve, as will the building of trust between various groups, these processes take time and require the involvement of various sectors, business, government, NGOs, academia and on individual levels. The investigation established that tensions resulting from such divisions need to be managed in a way that conflict plays out constructively rather than destructively. In this regard, trusting institutions that are managing such processes is vital, particularly in elected representatives and the governmental institutions. High levels of inequality that still persist in South Africa, as highlighted by socio-economic challenges and poor service delivery in less affluent communities. Most refugees, asylum seekers, and migrants live in these communities where service delivery of basic socio-economic services still remains a challenge.

As xenophobic tendencies play out, media outlets in particular, but not exclusively, aim to get the attention of the public on the friction and violence between migrants and South African nationals. Although it is understandable and even required that public media reports on these events, media should be aware of their responsibility in shaping the image that the public has of

migrants. Grand scale media attention on this topic creates the public perception of fundamental incompatibility of migrants with South African culture and practices.

What is particularly noteworthy is that social integration of migrants is hindered by a number of prejudices and misperceptions. The number of migrants in the country and the extent to which migrants compete with South African citizens for jobs are both exaggerated to the public. Migrants also introduce new economic activities that help reshape and increase the size of the South African economy. This information does not reach the public, and therefore does not correct the prejudices and the negative image that many South African nationals have of migrants.

As a way forward, the Commission should not only ensure the implementation of the recommendations in this report, but also revisit and review its 2010 Rule of Law report on the 2008 xenophobic violence as a matter of urgency. It must use its legal powers to engage all role players and to encourage and enforce implementation of those very valuable recommendations, and this would include taking legal steps where necessary and appropriate. Significantly, Parliament should ensure that the NAP is finalized and the necessary measures are put in place to ensure that it is implemented.

Addressing the plight of vulnerable groups amongst us is the responsibility of everybody, particularly those who wield public power. They have a sacred responsibility to ensure that the Bill of Rights which guarantees human dignity and rights to all living in South Africa is more than a utopian ideal of an imagined community.

## 7. List of Respondents

African Centre for Migration and Society, University of the Witwatersrand  
Adonis Musati Project  
African Diaspora Forum  
ALPS Resilience  
Association for Refugee Communities and Organisations in South Africa  
Centre for the Study of Violence and Reconciliation  
City of Johannesburg Migrant Advisory Panel  
Foundation for Human Rights  
Commission for Gender Equality  
Department of Basic Education  
Department of Cooperative Governance and Traditional Affairs  
Department of Home Affairs  
Department of Justice and Constitutional Development  
Foundation for Human Rights  
Freedom House  
Hate Crimes Working Group  
Jesuit Refugee Service  
Lawyers for Human Rights  
International Detention Coalition  
Institute for Justice and Reconciliation  
International Organisation for Migration  
Médecins Sans Frontières (Doctors Without Borders) South Africa  
National Department of Arts and Culture  
National Department of Health  
National Department of Social Development  
National Disaster Management Centre  
Refugee Rights Unit, University of Cape Town  
Refugee Social Services  
Scalabrini Centre, Cape Town  
Sonke Gender Justice

Southern Africa Litigation Centre

South African Police Service

