COMMENTS

BY THE LAW SOCIETY OF SOUTH AFRICA

TO THE

PARLIAMENTARY PORTFOLIO COMMITTEE

ON THE

DRAFT IMMIGRATION AMENDMENT BILL

THE IMMIGRATION AMENDMENT BILL, B 32-2010

The Immigration Amendment Bill, B 32-2010 [hereafter "IAA"], has been tabled against the backdrop of significant developments from an immigration perspective, including the global depression, recurrent bouts of xenophobic violence around South Africa, the implosion of Zimbabwe and the lessons South Africa is learning from this process.

The Law Society of South Africa ["LSSA"] submits that it is far from ideal that some of the critical amendments being tabled now are being considered in the absence of a fundamental review of the country's immigration policy.

That being said, the LSSA makes the comments on the Immigration Amendment Bill 2010, as set out hereunder. .

1. CLAUSE 2: - DEFINITIONS:

    a. PARAGRAPH (g): ad (c) The words "by or" should be inserted before the words "on behalf of".

2. CLAUSE 3:

    a. PARAGRAPH 3(a)(ii): The use of the term *"whom [the Minister considers relevant]"* refers to a person and therefore here currently qualifies the phrase *"any representative"* as opposed to *"any Department of organ of state"* which is probably what was intended, as the current proposal seeks to repeal the current list of Government Departments.

    b. The word "whom" should therefore be replaced by "which."

    c. The LSSA is concerned that, whilst the Board obviously serves to assist the Honourable Minister, the proposed amendment appears to allow the Honourable Minister to decide which Government Departments should be formally cooperating with the Department of Home Affairs through the Board and which are perhaps seen as a hindrance or of being obstructive. It is recognised that

perhaps some Departments see their participation on the Board as being unnecessary. In such situations, the response should instead be to limit the Departments that need to be there to those that have a vested interest in the Department's work e.g. Trade & Industry, Labour and International Cooperation, whilst affording the Minister the discretion to invite other Departments (or allowing other Ministries to attend) if it is deemed necessary.

d. The LSSA would however make the following further submissions in respect of the Immigration Advisory Board:

   i. AD SECTION 5(b): The LSSA submits that, inasmuch as the Department does consist of representatives from the private sector, the Board is not a transparent body with meetings open to the public and that, as the private sector is the principal beneficiary of the temporary and permanent residence permit system, the Board should formally serve also as the forum for cooperation with the private sector in respect of immigration matters. Allowing for a formal channel of communication within the 'industry' may help to reduce the increasingly strident and in some cases irresponsible attacks on the Department, such as was seen in the media during the permit adjudication debacle in 2010.

   ii. In the same context, the LSSA points out that, despite the evident increasing complexities and inter-relationship of immigration, refugee, nationality, administrative and constitutional law, the organised legal profession is not represented on the Board.

   iii. Similarly, the LSSA points out that not one of the current members of the Board is a practising attorney working in the field of immigration, nationality or refugee law.

3. <u>AD CLAUSE 5</u>:

   a. PARAGRAPH 5(a) – ad (3)(a): No minor shall enter unless he is in possession of his own passport. Some countries (and particularly developing countries) as a matter of custom and/or law still endorse children on the passport of the responsible parent / guardian.

      i. This proposed amendment then sets up a potential conflict between this amendment and the current provisions of the Act that allow persons, including minors, to apply for permits to accompany their parents who are, for example, being transferred to SA.

      ii. Quite aside from the problems this would pose for the persons involved, this also has potential negative implications with the Republic's trading partners and foreign businesses operating in South Africa – or looking to do so.

   b. PARAGRAPH 5(a) – ad (3)(b): no person shall enter … the RSA except at a port of entry "unless exempted in the prescribed manner by the Minister."

      i. This provision needs to be juxtaposed against the provision in section 35(1) of the Act that recognises that in "extraordinary circumstances" conveyances – and consequently their passengers - may be compelled to enter South Africa other than at a port of entry.

ii. The proposed amendment does not cater for these possible exigent circumstances that section 35(1) already recognises, and should be adjusted accordingly.

c. PARAGRAPH 5(a) – ad (3)(d):

i. Who should conduct the examination of children at a port of entry. The Act must recognise the need to have the unaccompanied child assisted by someone more responsible other than merely a person of the same sex – that could permit the interview to be conducted and the child's status / fate to be decided in the presence a tea person, janitor or cleaner!

ii. Recent case law has highlighted the issue of language. In a recent incident before the courts, it emerged that the immigration officer conducted his 'interview' without the traveller understanding a single word of what was being said. Having regard to section 28 of the Bill of Rights, provision must be made to ensure that the unaccompanied minor understands the proceedings or that the interview is at least conducted in a language he/she and the person 'assisting' him/her, understand.

iii. Recognising the position of transgender persons, the phrase "same gender" should instead be "same sex".

d. PARAGRAPH 5(b) – ad clause (4)(b): The amendment proposes that, in order to be admitted, a foreigner must either be a permanent resident or be "issued with a valid visa."

i. Subject to the response to the LSSA's inquiries about the distinction the Amendment seeks to draw between a permit and a visa, the purpose for which one can apply for a "visa" is limited to one of those listed in Clause 1(n) of the Definition section – see also the proposed amendment of section 10(2).

ii. The wording of the proposed amendment seems to suggest that, if one applies successfully at an Embassy for a section 19 work permit, the work permit holder would not be allowed to enter South Africa in terms of this amendment as he/she does not have a "visa."

iii. The same submission would apply in respect of the other "temporary residence permits" that the amendment seeks to remove from the definition of "visa."

iv. If this reading of the proposed amendment is correct, this would also be in conflict with the wording of section 10(1) of the current Act, which the Department does not seek to amend.

4. <u>CLAUSE 7(b) – ad (3)(a): visas v permits</u>:

The LSSA records that it does not at this time fully appreciate why some permits are to be called visas whilst others will remain 'permits.' If there is a legal or policy rationale for this, this should be made known as it is not dealt with in the Memorandum to the Bill and it hinders proper consideration of the legality of some of the proposed amendments.

5. CLAUSE 7(c) – ad (6):

A foreigner may "in exceptional circumstances as prescribed by the Minister" apply whilst in the Republic of South Africa to change the status and/or conditions of his permit.

a. There are two important points of principle that must be made at the outset about this proposed amendment that stands to reverse entirely current law on the subject:

   i. Whereas this proposal currently stands to have massive negative and costly consequences for South African families, commerce and industry, it is a matter of considerable concern that the effect of the current amendment would be to permit the Minister *to legislate by regulation,* which is bad law, quite aside from the consequences of having Parliament defer its duty to the Minister. The whole import and impact of this proposed provision would hinge on the exercise of the Minister's regulatory discretion.

   ii. As currently formulated, the *norm* would be that applications to extend a permit or to change its conditions (or both) would be lodged outside the country – unless there are exceptional circumstances (as defined by the Minister). If approved in this form, the Minister could not, by Regulation, reverse the intent of Parliament by making those exceptions the *norm*.

b. There has been no indication in the Memorandum to the Bill or in the presentations to the Portfolio Committee, why such a sweeping change is considered necessary by the Department.

c. It will be helpful to illustrate the effect of the proposed amendment with regard to some of the visas and permits identified in Clause 2(a) and (b) of the Bill.

   i. A section 11(1) visitor visa: the person touring the country and region with his family and seeking to extend their stay, would have to incur the cost of flying everyone back to their country of origin just to get an extension of a couple of weeks. No-one would realistically do that.

   ii. A section 11(1)(b)(ii)(dd) visitor visa: this is the permit issued to the spouse or non-studying children of a person in the RSA for any other lawful reason e.g. to work. That is, the family would have to pack up and fly / travel home to submit the application and await the outcome. There is, we submit, no logical legislative objective to be satisfied by requiring this.

   iii. A section 11(6) visitor visa: this is the permit issued to the spouse of a South African citizen to permit the foreign spouse to accompany his spouse and to take up specified employment. This would impact directly on the South African spouse's constitutionally entrenched right to family life, to expect the emotional support of his spouse and to him for his financial support, assuming he could keep his job despite the disruption. The Department is well-aware that in the matter of *Makinana v Minister of Home Affairs*, the Constitutional Court ruled that this was unconstitutional.

iv. A study visa: study permits are not always issued conveniently to run from one school holiday or university vacation to another. The scholar / student would be required to take time off from his studies to fly or otherwise travel back home to apply for an extension of his permit – a process that could take weeks or worse.

v. A business visa: these permits are issued to persons looking to set up and run or invest in their own company. These companies can be of any size. But the effect of the proposal would be to have the company's key person – or perhaps only person – leave his business and return home and hope that his application to get an extension or change of conditions (e.g. if the name of the company has had to be changed for whatever reason), is approved – and approved speedily, quite aside from the cost to the company for no known obvious legislative objective.

vi. A medical visa: this is the permit issued to a person who comes to South Africa seeking medical treatment. It goes entirely without saying how prejudicial it could be to require the permit holder to interrupt the treatment to return home to seek an extension of the permit.

vii. A retirement visa: this is the permit issued to persons who are deemed to be sufficiently financially independent to be allowed to reside in the Republic as retired persons. These are normally issued for periods of three years or more. Here too there is no obvious objective to be achieved by requiring such persons to return home to seek an extension of their permits.

viii. A relative's permit: this is the permit issued to the spouse of a South African (which includes the foreign spouse) to accompany the South African family member. Particularly in respect of the separation of a couple, as dealt with above, there is no obvious objective to be achieved by requiring such persons to return home to seek an extension of their permits.

ix. A work permit: there are several sub-categories of work permits. It goes without saying that requiring the holder of a work permit to travel out of the country back home and there to apply for a further permit, is introducing a massive disruption into the work place and economy that flies in the face of the objectives of the Act as set out in the Preamble – and again for no obvious legitimate objective.

d. It is submitted that there is no obvious lawful benefit to be achieved by this proposed amendment in respect of almost every one of the visas or permits provided for in the IAA.

6. <u>CLAUSE 11 – ad section 15(a) Re "the national interest"</u>:

This section amends the requirements for a business permit to be self-employed and provides that a business permit may be issued to a person investing in a business, but only to one that is *"prescribed to be in the national interest"*.

a. Fatally, it is submitted, there is no indication as to what the Minister might prescribe to be "in the national interest." The Constitutional Court has indicated previously that Parliament must provide the Minister with clear guidelines and not merely a 'blank cheque.'

b. Limiting the types of business for which one may get a business permit to those that are in the national interest, raises problems in respect of the Republic's obligations in terms of free trade and its undertakings to encourage investment from other countries.

c. The Amendment is silent on what happens to the holders of business permits currently that do not fall within these 'national interest' parameters, when the holders seek to extend those permits or to change the conditions of those permits. Will those extensions etc. be refused and the business owner be forced to close his business and lay off his staff?

d. The LSSA recommends that the current statutory formula should be retained.

7. CLAUSE 11 – ad 15(a): Re permits for the families of holders of business permits / visas":

a. The Bill provides that an appropriate "visa" may be issued to the family member for the duration of the business visa.

b. In terms of the Bill, the term "visa" apparently expressly excludes any category of section 19 work permits – that the family member, irrespective of their skills or experience, cannot subsequently apply to work for another business, irrespective of whether all the requirements for the section 19 permit are met.

c. The Bill further provides that this limitation will apply for the *duration* of the term of the business permit, which presumably, unless the business fails, will need to be extended from time to time.

d. Noting that there is no special dispensation to the immediate family members of the holders of business permits, that all the usual requirements for such permit must be complied with, and whilst submitting that this ought to be reconsidered in any policy review in order to attract qualifying businesses, the LSSA recommends currently that the relevant portion of Section 15(1) of the Act be amended to read that-

"… and an appropriate visa or permit may be issued to the members of such foreigner's immediate family."

8. CLAUSE 11 – ad 11(b):

Currently section 15(3) allows the Director General to reduce or waive the prescribed investment level of R2,5 million that is to be available for investment. Cause 11(b) seeks to repeal this discretionary device available to the Department in appropriate cases.

a. The LSSA submits that this would hit SMME businesses and unfairly target that sector of the economy which is generally acknowledged to be the category of business best able to generate

employment. Surely, creating three jobs for South Africans is better for those three affected families than if none is created. All these businesses have to be registered with the South African Revenue Services and the fiscus is better off than if they were not created.

b. The LSSA strongly recommends that this discretionary remedy be retained.

c. The LSSA would however point out that in practice, the Department of Home Affairs does not draw a distinction between the terms "reduce" on the one hand and "waive" on the other. These clearly have distinct meanings. The LSSA submits that these terms should be read to mean that the Director General can "reduce" the amount required or he can "waive" the amount required, depending on the case made out for relief, and thereby reduce mischievous or undeserving applications.

9. CLAUSE 12(d) – ad section19(4):

The IAA seeks to repeal the current provision for granting permits to exceptionally skilled persons and to subsume this into a 'critical skills' permit that is a merely a renaming of the quota work permit currently provided for in section 19(1) of the Act.

a. The logic in terminating the exceptionally skilled permit is not immediately obvious.

b. The LSSA is aware that there has been abuse of this permit with advantage being taken of loopholes in the prescribed requirements to qualify for an exceptionally skilled permit.

c. However, noting that providing for an exceptionally skilled permit – that is properly regulated and managed – is in fact in line with international best practice in many other jurisdictions, the LSSA submits that the appropriate response to the abuse is to tighten up the qualifying and extension requirements in the Regulations.

d. The LSSA submits that central to the success of the critical skills permit will be the adequacy of critical skills list to be prescribed "from time to time" by the Minister.

i. Practice to date raises serious questions about the process of drawing up these lists. These lists have in the past been widely criticised as being haphazard and entirely out of date in respect of the categories of skills they include or exclude, with many stakeholders – even Government Departments – simply not being consulted.

ii. Whereas the current Act requires the Minister to prescribe these lists annually – albeit that the current list expired in May 2010 and the Department is still using it – leaving the list to be determined "from time to time" or essentially at the Minister's pleasure, could result in these lists becoming deeply flawed and impractical.

iii. The LSSA recommends that the requirement for an annual determination be retained.

e. The Amendment is also silent on what happens to the holders of exceptional skills work permits currently when they come up for extension. Will those extensions etc. be refused and the

economy be denied having access to such skilled persons? And what is to happen to the company that has employed such persons and their operations; must operations be put on hold; must they incur the cost of engaging temporary staff, etc?

10. CLAUSE 13: CORPORATE PERMITS

a. Section 13 of the Immigration Amendment Bill seeks to change the terms, conditions and rationale for the granting of Corporate Work Permits.

b. The draft Bill's explanatory memorandum deals with the reasons for seeking a drastic amendment.

c. By way of background, Section 21 of the Act came into being as a mechanism and/or tool to facilitate the easy movement of agricultural and mine workers from neighbouring countries into South Africa. This was expanded to include skilled foreigners coming into the country on contract in respect of specific technical projects and on the understanding that same would be in the national interest.

d. In other words, from a technical perspective, these would be skills not readily or easily available in the South African labour market. By way of specific example, coded welders have been required to work on the soccer stadia, constructions, the Gautrain and the refurbishments of current power stations and new power stations. Coded welders have not in the last 15 years qualified through the South African technical tertiary educational process.

e. Unfortunately, a practice evolved over the last few years in terms whereof certain sectors viewed the Corporate Permit as a "license" to bring in exotic dancers and other areas of non technical skills under this umbrella type of permit.

f. If the letter of the law and regulation had been adhered to, this would not have happened.

g. The proposed amendment now seeks to "punish" the *de facto* and *bona fide* corporate applicants from utilising this most attractive type of work permit which is certainly to the benefit of the economy.

h. A further example of exploitation is the situation regarding "labour brokers" who did not qualify as corporate applicants in terms of the Act and its Regulations and who were not the primary employers but were broking out the individual workers under the umbrella of their Corporate Work Permit. It is understandable that this must be stopped.

i. However, to now impose on the Director General of Home Affairs to declare which sectors will qualify for Corporate Permits will be a radical departure and will be most difficult to formulate and administer.

j. The Quota List in terms of which the Quota Permits in respect of Section 19(1) are issued, are currently almost a year overdue. The LSSA is seriously concerned with what could potentially happen with new lists how having to be compiled in respect of what type of permit in the Corporate Category should be granted, if a simple task such as formulation of this list had been late more than two or three times during the last five years.

k. Addressing the issue of labour brokers, it is welcome to note that the proposed Section 21(6) indeed states that "a foreigner employed in terms of a Corporate Permit shall work for the holder of that Corporate Permit". This provision is to be welcomed.

l. The LSSA is not in favour of the requirement whereby the Department of Labour and the Department of Trade and Industry have been excised from the consultative phase in determining who shall be a corporate employer and that this has been substituted once again with the discretion in the hands of the Director General.

m. It is the suggestion of the LSSA that the provisions of Section 21 and its corresponding Regulations should not be tampered with, but that a tighter control over determining who is and who is not a "corporate employer" should be considered.

n. At this time, the publication of the Standard Operating Procedures "SOP" of the Department of Home Affairs could certainly go a long way to eradicating the confusion that has arisen and to ensuring that only *de facto* and *bona fide* Corporate Permit employers are granted Corporate Permits in terms of this section.

11. CLAUSE 14 – ad section 22(b):

This subsection currently provides for an exchange permit to be issued to persons of 25 years or younger, allowing them to be employed by a named employer who has given the necessary repatriation and financial support undertakings, for up to a year. The Amendment seeks to have this provision repealed.

a. The LSSA has been given to understand that the Department seeks to have this permit repealed because it is sometimes used by employers within the adult entertainment industry. No figures have been tabled as to how often this occurs. Nevertheless, whatever the moral issues may be, there is nothing in the Immigration Act to suggest that the adult entertainment industry is not permitted to apply for or obtain permits for its employees so long as they otherwise comply with the provisions of the Act.

b. However, the Department will be aware that this category of permit is in fact also used by other less-contentious corporate stakeholders, organizations and businesses in the economy. Indicatively, the permit is used by companies that seek or need to attract young foreign graduates to temporarily fill 'intern' positions – which persons might not otherwise qualify for a work permit – or at least not without complying with a massively expensive process.

12. CLAUSE 15 – ad section 23(1):

This section allows an immigration officer at a port of entry to issue a permit to a would-be asylum seeker to travel and report to a refugee reception centre.

a. The Bill introduces a requirement that the official at the port of entry must first have established that the person at the port of entry qualifies to apply for asylum.

b. This proposal clearly contravenes and is in conflict with the provisions of the Refugees Act and is in breach of all relevant international instruments and the Constitution. This matter will be addressed further at the public hearings.

c. Establishing whether or not a person "qualifies for asylum" requires a particular expertise that the Refugees Act vests, currently, in Refugee Status Determination Officers and the Refugee Appeal Board, where a body of expertise has been built up over many years. Immigration officers at ports of entry are not trained to deal with this type of 'analysis'. There is also the 'challenge' that, where an asylum application is refused under the Refugees Act, there is an automatic appeal to the Refugee Appeal Board in addition to the review /appeal process contemplated in section 8 of the Immigration Act. What will happen at the port of entry? And given that an asylum seeker cannot be expelled or refused entry at the port of entry in the circumstances described in section 2 of the Refugees Act, what will happen to the asylum seeker pending the outcome of the appeal?

13. CLAUSE 18(b) – ad section 27(b):

The LSSA here repeats its concerns about setting limits on what types of businesses may be set up or invested in by foreign nationals, as dealt with in Clause 11 above.

14. CLAUSE 21 – ad section 35(2)(b):

This section requires the owners or persons in charge of conveyances to electronically transmit their passenger lists to the Department prior to departing for South Africa.

a. The term "conveyance" is defined in section 1(1) of the current Act as being "any ship, boat, aircraft or vehicle or any other means of transport."

b. The term is not limited to conveyances carrying people as part of their day to day business. This would therefore affect families travelling in their car to South Africa for tourism. The term is also not limited to conveyances that have access to such technology and would include long distance taxis.

c. The difficulties can be overcome by inserting the word "prescribed" before "conveyance" where it appears in the first line of section 35(2)(b) and thereafter having the Minister limit the list of affected conveyances to those that would logically be able to comply with the requirement, such as airlines, bus companies and shipping lines.

15. CLAUSE 21 – ad section 35(2)(c):

a. The term "boarding advice" is not defined in the Act, nor is there provision for there to be a prescribed form. This would raise compliance difficulties for the affected conveyances.

b. The requirement that the Director General's boarding advice must be complied with "in respect of each person" seeking to board the conveyance, raises several major constitutional concerns.

i. The decision to direct that someone be removed from a conveyance or not be boarded, is clearly a decision in terms of the Act. The proposed amendment does not make clear how there can then be compliance with sections 8(1), 8(2) and/or 8(3) of the Act and/or the

Promotion of Administrative Justice Act, 2000, in respect of ensuring that the person is given reasons in writing for the decision at that time and then allowing the person/s (and/or the carrier) to challenge that decision as provided for in the Act.

ii. The provision would have implications for the Refugees Act. It could ensure that, for example, a contentious character who wishes to seek asylum in South Africa is not permitted to even reach our ports of entry. Whilst this might bypass section 2 of the Refugees Act, it would contravene the Republic's obligations in terms of the 1951 United Nations Refugee Convention. This principle was in fact clarified by the European Court of Human Rights where the UK government introduced a system of pre-screening passengers in order to stop potential asylum seekers from boarding planes to fly to the UK.

iii. The LSSA recommends that, whilst it understands the need for such 'pre-screening', the proposal as currently formulated should be withdrawn until these substantive problems can be resolved.

16. CLAUSE 21 – ad section 35(3)(a):

a. No case has been made out for this proposed invasion of privacy of South Africans and others. Of what interest and value can it be to the Department of Home Affairs to know whether a person flew between East London and George, for example, instead of driving there or going by train or bus. And precisely for that reason, the data collected can serve no conceivable lawful policy / provision contemplated in the Immigration Act.

b. There is with respect no Objective in the Preamble to the Act which can be furthered by putting this information in the hands of the Department.

c. The LSSA urges that it be deleted.

17. CLAUSE 21 – ad section 35(8):

The term "certificate" is not defined in the Act, nor is there provision for there to be a prescribed form. This too would raise compliance difficulties for the affected conveyances.

18. CLAUSE 21 – ad section 35(10):

a. This provision mirrors the current section 35(8) of the Act.

b. The provision and the Department's application of same have come in for criticism from the courts.

c. In summary, the provision seeks to permit the Department to wash its hands of a person whom it has refused to admit – both in respect of costs and legal responsibility.

d. Such a practice was criticised by the Constitutional Court in the matter of *Lawyers for Human Rights v Minister of Home Affairs.*

e. A further problem is that the carrier does not have a right, in terms of section 8, to appeal the refusal to admit the person when it may well have a vested interest. The LSSA recommends that this should be provided for.

f. Because the Department has not admitted the person into South Africa, it argues that it has no responsibility in terms of managing legal access to the inadmissible at the port of entry – and particularly at airports – which creates an unlawful vacuum and situations where people can find themselves spending literally months in the transit area at a port of entry like OR Tambo Airport.

19. CLAUSE 23 – ad section 46:

a. This amendment seeks to repeal the current provision dealing with who may 'conduct the trade' of representing members of the public in the various processes arising from the operations of the Act.

b. Currently the Act provides that the trade may only be carried on by "attorneys, advocates and immigration practitioners". The Act and Regulations then proceed to regulate the 'immigration practitioner' (IP) industry.

c. The position of the LSSA on this matter, is as set out hereunder:

i. The LSSA considers that it is not the intent of the Amendment to seek to terminate the right of members of the public to choose to be represented and assisted by ***practising attorneys***, duly regulated as they are by the various statutory provincial law societies, to represent them in their dealings with what is internationally recognised to be an extremely complex area of law, wherein incorrect advice or decisions can have massive personal, financial and other implications for the affected person - and/or *vice versa*.

ii. The LSSA considers further that the Department of Home Affairs will acknowledge that it does not have a problem with the appropriateness of the provincial law societies' regulation of its members and various disciplinary processes, which has also to be read against the background of the years of training and annual compliance measures, including professional indemnity insurance and annual audits, that have to be fully complied with, without exception, in order to practise as an attorney in South Africa.

iii. On the subject of the involvement of the organised legal profession in the operations of the Act, the LSSA does point out that, just as the legislation ought instead to have referred to "practising attorneys," the use of the term "advocate" should have been "advocates who are members of an organised or recognised Bar". However, it is further pointed out that members of the various Bars are not permitted to take instructions directly from the public.

iv. The LSSA considers that, repealing the measures providing for the 'immigration practitioner' industry could be legally contentious and, in addition, also have tragic consequences in a time where the economy continues to shed jobs. The LSSA would however hesitate to endorse what some might perhaps describe as the possibly self-serving figures in this regard that has recently been bandied about in the media.

v. The LSSA recommends that, recognising that there are indeed competent IPs, irrespective of how many these might be – as the Department will also acknowledge – who do render a valuable service in the immigration processes, the better option lies in providing for the proper – and ongoing - training and regulation of these persons. Indicatively, there is a yawning chasm between the requirements to be an IP on the one hand and the requirements to be a practising attorney or a member of the organised Bar on the other; the two are literally years apart.

vi. The LSSA recommends further that, recognising that this is clearly not a core function of the Department of Home Affairs, an appropriate oversight structure with the necessary 'teeth,' needs to be provided for in separate legislation, as has happened in other sectors of the economy.

vii. The LSSA would also recommend that either such separate legislation or the Immigration Act should also provide for seniority and appropriate ongoing training, such as to limit the kind of work that can be done by IPs in terms of the Act, as some areas of the work in the Immigration Act are clearly considerably more complex than others.

20. <u>CLAUSE 24 – ad section 49(10)</u>:

a. The LSSA would like to express its concerns about such a massive upwards revision of penalties and sentences as is provided for here, in the absence of a more comprehensive review of immigration policy and what the country seeks to achieve by what types of enforcement.

b. Comparative practice globally has seen various countries adopting very different practices. For example, the United States opted some years ago to focus its enforcement on employers on the basis that illegal or undocumented workers cannot be placed and dealt with on the same basis as employers – both in law and in morality. An employer's motive for knowingly employing an undocumented worker may be considerably less well-meaning than those of a person seeking to feed his or her family. In addition, employers are far more 'visible' than are their employees. They are in the main duly registered with the tax and other authorities and there are far fewer 'employers' than there are employees, thus making enforcement via concentrating on employer-driven sanctions a far more efficient enforcement mechanism. This was in fact recognised in the Green and White Papers and in the 2002 Act. But as a reality, the Department instead targets employees and not employers as they are perhaps 'softer targets'. Nevertheless, some officials within the Department have also tacitly recognised that mass expulsions / deportations of SADC citizens (constituting the bulk of our undocumented populace) cost a lot of money and serve little or no practical purpose other than to feed the criminal human smuggling industry. The LSSA

would urge the Portfolio Committee to call on the Department of Home Affairs to present to the Committee details of figures and costs of their enforcement measures so that the effectiveness or value of this particular policy shift can be better assessed by the Portfolio Committee.

c. The words "and/or comply" should be inserted after "to contravene", because bribes are also solicited by, or offered to, civil servants to have services lawfully rendered.

21. TRANSITIONAL PROVISIONS: (Section 53 of the Principal Act)

The Amendment Bill does not make any provision for transitional arrangements relating to existing permits under the Act as it now stands, in relation to permits to be issued under the proposed Amendments.

22. CONCLUSION:

The LSSA would like to express its sincerest thanks to the Portfolio Committee for being allowed this opportunity to be heard on behalf of the attorneys' profession and its clients.