LAW SOCIETY
OF SOUTH AFRICA

22 October 2010

Attention: Mr E Mathonsi
The Secretary to Parliament
Portfolio Committee on Home Affairs
Cape Town

Dear Sir

REFUGEES AMENDMENT BILL [B 30 – 2010]

The Immigration and Refugee Law Committee of the Law Society of South Africa (LSSA) has considered the Refugees Amendment Bill and wishes to make the following comments:-

1. Matters arising from the background and objects of the establishment of the Bill:

The Memorandum on the objects of the Refugees Amendment Bill implies in item 1.3 that asylum seekers whose applications are regarded as manifestly unfounded, abusive or fraudulent are being done a favour by not having an appeal – they *"need not apply for an appeal"*:

a. This statement is misleading.

b. All stakeholders in this field acknowledge the questionable quality of far too many refugee status determinations in the Department at present.

i. Without wishing to deny that manifestly unfounded applications do get made, the LSSA submits that all too often findings of 'abusive, fraudulent or manifestly unfounded applications' are made in respect of *bona fide*, if poorly motivated, applications – and sometime even well-deserving applications - and reveal a regrettable ignorance of the Refugees Act, of the relevant countries, their country conditions and of the provisions of the United Nations High Commission for Refugees' definitive Handbook on how to assess applications.

ii. The LSSA submits that a further factor in this phenomenon may well be the time pressures under which overworked officials operate to get decisions

out as required by their supervisors, however laudable it may be to obtain speedy outcomes.

iii. It is submitted that Parliament will also appreciate, against the background of further seeking to understand the phenomenon and volume of manifestly unfounded applications, that -

1. Asylum applicants are required by law to present their applications in person; and

2. Refugee Status Determination Officers are not, in practice, required to ensure that asylum applicants are made aware by the Department of the requirements of the Refugees Act or Conventions in order to qualify for refugee status, much less of pertinent developments in case law. The Department does not even present the would-be applicant with an explanatory note.

iv. The Courts both here and in other countries have warned against applying what is termed "armchair logic" to critically assess the *bona fide* applicant's version of events, especially when some of these people may in fact be traumatised, physically ill and ill-equipped in English – if at all – and are the classic 'stranger(s) in a strange land.' But tragically that is what is happening.

c. An automatic review by the Director-General without the asylum seeker being afforded an opportunity to make submissions on the rejection of an application as manifestly unfounded, is procedurally unjust.

d. The current Standing Committee for Refugee Affairs will confirm that it was furnished with an opinion by an eminent senior counsel some years ago, confirming that these 'reviews' could not be conducted without affording the affected person a hearing, even if it was merely an opportunity to make written submissions.

e. It needs also to be borne in mind that the Director-General is hardly likely, on top of all his other duties, to attend to these personally – especially should the Department not want to increase the backlog and delays. The Director-General will inevitably delegate the function, which raises further concerns about the independence and practicality of the proposed internal Department process.

f. Such a procedure will, it is therefore submitted, lead to considerable substantive injustice.

g. The LSSA submits that this provision should be amended to provide that the asylum seeker shall be afforded an express right and given a reasonable opportunity to make submissions to the Director-General prior to the decision being reviewed.

2. The establishment of the Status Determination Committee (SDC) aimed at clarifying the situation and ensure that applications for asylum seekers in terms of the Act are dealt with "efficiently, promptly and in a less subjective fashion", is to be endorsed.

3. However, its establishment gives rise to deep concern especially given the backlog that has arisen, notwithstanding the large number of Refugee Status Determination Officers throughout the country.

4. Moreover, the LSSA is concerned about the lack of particularity in the Bill – and the proposal that the Minister will be invited to engage in the constitutionally dubious practice of legislating by regulation with regard to:-

   (i) the constitution of the SDC

   (ii) the number of members forming the SDC

   (iii) the functioning of the SDC

   (iv) how often the SDC will meet

   (v) the composition of the SDC

   (vi) the qualifications of the members of the SDC.

   Given the unfortunate low standard of adjudication by Refugees Status Determination Officers, it is particularly important to ensure that members forming the SDC are properly trained and qualified.

<u>Particular clauses:</u>

1. Clause 2 of the Bill:

   a. This clause is problematic in that clearly trivial, non-political crime committed outside the Republic may serve to exclude the asylum seeker – contrary to the express requirements of both the UN and OAU Conventions.

   b. Moreover, the proposed amendment appears to open the door to the refoulement of such an asylum seeker and of an asylum seeker who commits a non-serious non-political crime within South Africa.

2. Ad Clause 5:

   a. Asylum seekers and refugees cannot be expected to be knowledgeable about the law: the one (1) month provision will be impossible to comply with and is punishable as an offence.

   b. Creating a contravention of the Act in this manner is most undesirable and contravenes the spirit of refugee protection.

3. Ad Clause 9:

a. The word “indefinitely” is legally problematic given its self-evident vagueness in its plain language sense.

b. Logically nobody could ever prove that he or she will need protection from South Africa “indefinitely”.

c. The LSSA recommends that the Bill be amended to provide that any asylum seeker or refugee who has resided in the country for a particular period as an asylum seeker, be entitled to apply for permanent residence without need for further inquiry, unless the Department has evidence to the contrary, which can be tabled as part of the application for permanent residence.

d. In the decision of *Mayongo v Refugee Appeal Board (2007) JOL 19645 (T)* and at paragraph [8], the North Gauteng High Court noted, relying on the UNHCR’s Handbook:

> *“ A person is a refugee as soon as he/she fulfils the criteria contained in the [UN Refugee Convention] definition. That takes place before he/she applies for refugee status. Recognition of refugee status does not make a person a refugee but only declares that he/she is one.”*

e. As it is stated in the UNHCR Handbook:

> *“ He does not become a refugee because of recognition, but is recognized because he is a refugee.”*

f. It is unconscionable that, for example, Angolan refugees who have been in the country for 15 (fifteen) years or longer and now apply for permanent residence should be disqualified because it is not believed that they will remain refugees “indefinitely”.

g. Applications for exemptions in terms of section 31(2)(b) of the Immigration Act can take years to be processed and the section does not provide a viable alternative – nor was it intended to.

h. The provision is also unfair towards persons whose applications for asylum have taken years to be granted.

i. At the very least and as a matter of common decency and in order to provide for a durable solution to the condition of refugees (as the Government of the Republic is required to do in terms of its obligations under the Refugee Conventions) the Bill should provide that a person with refugee status may apply after five (5) years’ residence in South Africa - calculated from the time he or she has entered the Republic as an asylum seeker. This does not preclude the Department from opposing the application as is already the case.

j. As implied in this paragraph, the vague and unsatisfactory concept “indefinitely” should be removed and the emphasis placed on the time the asylum seeker or refugee has lived in South Africa.

4. Ad Clause 11:

    a. This provision should be deleted for the reasons advanced above with regard to the proposed automatic review provisions.

    b. From a logistical point of view, it is also our experience that it is somewhat unusual for asylum seekers to receive a decision from the Standing Committee for Refugee Affairs within five (5) days of the decision being made. The applicant may, due to the Department's logistical challenges, remain in ignorance of the decision for over a year.

The LSSA would like to express its heartfelt appreciation to the Parliamentary Portfolio Committee for this opportunity to make the above submissions. These submissions are based on the experiences of our members in the field of refugee law and their involvement in policy development on refugee protection.

It will be appreciated if you would kindly allocate a slot to the LSSA to make verbal presentations at the public hearings.