

## **COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE DRAFT REVISED WHITE PAPER ON CITIZENSHIP, IMMIGRATION AND REFUGEE PROTECTION (“THE DRAFT PAPER”).**

### **INTRODUCTION**

This commentary has been prepared by the Immigration and Refugee Law Committee of the Law Society of South Africa (LSSA) for submission by the LSSA in response to the Draft Revised White Paper on Citizenship, Immigration and Refugee Protection (“the Draft Paper”). The commentary consolidates immigration law practitioner input on selected policy proposals and focuses on issues of constitutional compliance, administrative justice, and practical implementation.

While the Draft Paper reflects an intention to modernise South Africa’s immigration framework, a recurring concern across multiple proposals is that structural and technological reform is prioritised over addressing persistent administrative failures, inconsistent decision-making, and non-compliance with court orders. These foundational issues must be resolved for any reform to succeed.

### **SECTION A: DIGITAL SYSTEMS, BUSINESS, RETIREMENT, HIGH NET-WORTH, SPORTS AND ARTS VISAS**

(Engaging paragraphs 3.3.3.1, 3.3.3.2 and 3.3.3.5 of the Draft Paper)

This section addresses proposals aimed at modernising visa administration and attracting economic, entrepreneurial, and skills-based migration. While the policy objectives are broadly sound, the proposals underestimate the extent to which existing administrative dysfunction — rather than legislative design — has contributed to systemic failure.

## **Visitor Visa Digitalisation**

### Proposal:

The Draft Paper proposes the full digitalisation of visitor visa processes, including application submission, adjudication, and issuance, with the stated objectives of improving efficiency, turnaround times, risk management, and system integration. The Draft Paper also refers to new legislation and a new renewable visitor's visa that will not allow applicants to work, study or conduct own business.

### Commentary:

The objective of digitalising visitor visa processes to enhance efficiency and system integration is supported. However, for the proposed digitalisation to achieve its stated policy outcomes, the design of the system must incorporate adequate safeguards to ensure lawful, consistent, and accountable decision-making.

Practitioners' experience with existing digital visa platforms demonstrates that, in the absence of appropriate human oversight and legally aligned decision criteria, automated processes may generate refusals based on requirements that are not prescribed in law or an oversight by adjudicators to properly peruse all the submitted prescribed documentation. Such outcomes risk undermining efficiency gains by increasing administrative errors, disputes, and reapplications or appeals.

It is therefore **recommended** that the policy framework expressly recognise the need for human adjudication, oversight, transparent decision-making standards, and internal corrective mechanisms within digital systems, in order to ensure that digitalisation enhances, rather than detracts from, the effectiveness and credibility of visitor visa administration.

Further comments on this policy are reserved until the proposed legislation changes are outlined.

## **Start-Up and Business Visas**

### Proposal:

The Draft Paper proposes the introduction of new visa pathways, including a “start-up” business visa, as part of a broader strategy to attract entrepreneurs, stimulate innovation, and promote economic growth and job creation. According to the Draft Paper the reason for the implementation of the “start-up” visa is that the current business visa requirements are “limited to established businesses”.

### Commentary:

The Immigration Act 13 of 2002, as amended (hereinafter "the Act") clearly provides under Section 15 that a business visa may be issued by the Director-General to a foreigner who intends to establish or invest in, or who has established or invested in a business in the Republic subject to the prescribed requirements. The existing legislative framework therefore already accommodates start-up businesses.

The current legislation allows applicants who intend to establish a business to sign undertakings confirming that certain requirements will be met, including registration with:

- (i) the South African Revenue Service;
- (ii) the Unemployment Insurance Fund;
- (iii) the Compensation Fund for Occupational Injuries and Diseases;
- (iv) the Companies and Intellectual Property Commission (CIPC); and
- (v) the relevant professional body, board, or council recognised by SAQA.

The Act further specifies that proof of compliance with these requirements must be submitted within 12 months of the issuance of the business visa. This demonstrates that the current legislation already accommodates start-up businesses.

If the intention is to adopt a less stringent approach and to distinguish between an established business and a business yet to be established, further clarity is required. Without such clarification, practitioners are unable to provide meaningful or informed feedback.

The proposed Draft Paper does not adequately explain the necessity for, or the requirements applicable to, a so-called “start-up” visa. Accordingly, further comment is reserved pending clarification from the Department of Home Affairs (hereafter “the Department”) regarding its position and underlying policy intent.

### **Retired Persons Visa**

#### Proposal:

The proposal raises concerns regarding the alleged abuse of retired persons visas, particularly where holders unlawfully engage in employment, and suggests addressing this through the imposition of age-based restrictions. The Draft Paper also indicates a plan to increase the retirement annuity in accordance with cost of living in South Africa

#### Commentary:

The Department’s concern regarding the potential abuse of retired person visas is acknowledged, however, such abuse where holders allegedly engage in unlawful employment is not evident in practice. It should be noted that this concern appears vague and is not aligned with the practical experience of immigration practitioners. In most instances, retired person visa holders are financially secure for the remainder of their lives. Such applicants are required to demonstrate a right to a pension, an irrevocable annuity, or a retirement account that provides a prescribed minimum payment for the rest of his or her life from the country of origin, alternatively a minimum prescribed net worth.

The majority of retired person visa holders do not seek employment and apply for this category specifically for retirement purposes. The requirements for a retired person visa are generally more stringent than those for most other visa categories. As a result, applicants seeking to circumvent the system may apply for a less restrictive visa, with simpler documentation requirements, while intending to engage in work that is not authorised under that visa.

Furthermore, it is unclear why the Department appears to single out retired person visas as being susceptible to abuse for work purposes while section 20(2) of the Act already provides that the Director-General may authorise a retired person visa holder to conduct work, subject to such terms and conditions as may be deemed fit in the circumstances.

Notwithstanding the above, addressing the perceived “abuse” solely through the imposition of an age limit on retired person visas is therefore misguided and is likely to give rise to unintended secondary consequences. Age-based exclusion does not address the underlying compliance problem and risks unintended economic consequences. Many economically strong jurisdictions produce individuals who are financially capable of retiring at a relatively young age. Such individuals often seek to relocate to South Africa and contribute meaningfully to the economy through property acquisition, tourism, vehicle purchases, and sustained living expenses.

The appropriate regulatory response lies in effective monitoring and enforcement of all visa conditions, rather than arbitrary age thresholds specifically for retired persons. Restrictive age limits risk diverting financially desirable applicants to competing jurisdictions with more flexible retirement regimes. Similarly, any increase to the prescribed minimum income or annuity requirement must remain commercially reasonable. Excessive thresholds would undermine South Africa’s competitiveness as a retirement destination and deter applicants who would otherwise make a positive and sustained economic contribution.

### **High Net-Worth / Financially Independent Visas**

Proposal:

The Draft Paper proposes replacing the Financially Independent Permanent Residence Permit with a temporary, investment-based residence visa.

Commentary:

This proposal is fundamentally problematic. Financially independent permanent residents have historically contributed significantly to the South African economy through business formation, property investment, vehicle purchases and long-term

financial commitments. There is furthermore also a R120 000.00 payment made by the applicant to the Director General for each permanent residence application that is approved and issued under the current financially independent category for permanent residence which is objectively a significant financial contribution to the Department. Many also pursue naturalisation, thereby deepening their economic and social integration. Replacing permanent residence with a time-limited, renewable visa structure introduces uncertainty that is incompatible with large-scale, long-term investment decisions.

It is unreasonable to expect high-net-worth individuals to commit substantial capital investment in South Africa without the security of long-term residency. The absence of permanence undermines investor confidence and creates a strong incentive to redirect capital to jurisdictions offering clearer and more stable residence pathways. Of particular concern is the position of applicants who have already invested significant funds in South Africa. Without assurances of long-term status, these investors may withdraw their capital, resulting in direct economic loss. Any reform in this area must carefully balance regulatory oversight with the practical realities of attracting and retaining high-value residents.

Further comments on this policy are reserved until the proposed legislation changes are outlined in more detail.

### **Sports and Arts Visas**

Proposal:

The Draft Paper proposes reforms to sports and arts visa categories to facilitate the entry of individuals with exceptional skills, with the aim of supporting national development objectives and enhancing South Africa's international standing.

Commentary:

The focus on attracting individuals with exceptional skills in the sports and arts sectors is supported. The developmental objectives of this proposal could be further strengthened by recognising mechanisms through which exceptional entrants contribute to broader skills transfer and capacity-building within South Africa.

In particular, policy guidance could encourage structured engagement by exceptional visa holders in mentorship, training, or institutional development initiatives, thereby amplifying the long-term developmental impact of their presence. Such an approach would remain consistent with the exceptional-skills focus of the clause, while maximising its contribution to sustainable sectoral development.

## **SECTION B: FAMILY-BASED VISA POLICY REFORMS**

(Engaging paragraph 3.3.3.4 of the Draft Paper)

Temporary residence visas issued on kinship grounds are an important component of South Africa's immigration law and such visas are regulated by the Act and the 2014 Immigration Regulations, 2014 published under GN R413 in Government Gazette 37679 of 22 May 2014, as amended (hereinafter "the Regulations").

Through sustained judicial intervention, particularly in matters concerning family unity, parental responsibilities, and dignity, the legislative framework governing family-based visas has evolved substantially.

This section addresses the Draft Paper's proposals relating to family-based visas, with specific regard to constitutional jurisprudence and binding Constitutional Court authority.

### **Relatives' Visas: Sponsorship and Applicant Status**

Proposal:

The Draft Paper proposes that a South African citizen or permanent resident should act as both sponsor and main applicant in a relative's visa application.

Commentary:

While it is appropriate that a South African citizen or permanent resident act as sponsor for a relative's visa, it is impractical and conceptually unsound to require such person to be the principal applicant. The visa application concerns the legal status of

the foreign national, not that of the sponsor. Requiring the sponsor to assume applicant status would introduce unnecessary administrative complexity without advancing any identifiable policy objective.

### **Relatives' Visas for Siblings**

Proposal:

The Draft Paper proposes the withdrawal of eligibility for relatives' visas in respect of siblings of South African citizens or permanent residents.

Commentary:

Under the current framework, a sibling of a citizen or permanent residence holder issued with a relative's visa is permitted to reside in South Africa for a limited period without the option to work, conduct own business or study and further does not acquire eligibility for permanent residence on the grounds of kinship.

Having due regard to the importance of family and cultural life, it is nonetheless reasonable to confine relatives' visas to spouses, parents, and children, where the constitutional and practical justification is strongest while still allowing other family members such as siblings to apply for a visitor's visa. The proposal is therefore supported .

### **Proposed Combination of Sections 11(6) and 18 of the Act**

Proposal:

The Draft Paper proposes the combination of section 18(1) (relatives' visas) and section 11(6) (visitor's visas with endorsements) in order to reduce administrative burden and enable spouses to work, study, or conduct business.

Commentary:

Foreign spouses and life partners are currently catered for under two distinct and well-understood mechanisms in the Act. Section 18 provides for a relative's visa, while section 11(6) allows a visitor's visa to be issued with an endorsement permitting work, study, or to conduct own business.

These two options serve different but complementary purposes and, in practice, provide flexibility both for applicants and for the Department.

The proposal to combine sections 11(6) and 18 is premised on the stated aim of reducing administrative burden. In practice, however, the opposite result is likely to follow.

First, a visitor's visa issued under section 11(6) is valid for up to three years, whereas a relative's visa is limited to two years. By shifting spouses and life partners into a single relative's visa framework, applicants will be required to renew their status more frequently. This will inevitably increase the number of renewal applications submitted to the Department and, rather than alleviating administrative pressure, will add to it.

Second, adjudicators are presently familiar with the structure and conditions applicable to section 11(6) visas, including the requirement that such visas contain a second condition dealing with the relevant endorsement. Relative's visas, by contrast, routinely include a condition prohibiting work. If all spousal and life-partner applications are channelled into a consolidated relative's visa regime, there is a real risk that visas will be issued with incorrect or inappropriate conditions. This will lead to an increase in rectification requests, appeals, and follow-up correspondence, all of which place additional strain on the Department's already limited administrative capacity.

Third, the proposed consolidation does not reduce the overall number of applications. Spouses and life partners will still need to apply for permission to work, study, or conduct business. The proposal merely changes the form of the application, without addressing the underlying demand. As such, the anticipated efficiency gains are unlikely to materialise.

Of further concern is that the Draft Paper speaks only to "spouses" and is entirely silent on the position of parents of South African citizens or permanent residents. This omission is notable given the Constitutional Court's judgment in *Rayment and Others v Minister of Home Affairs and Others; Anderson and Others v Minister of Home Affairs and Others* [2023] ZACC 40, which dealt specifically with the vulnerability of parents

of South African or permanent resident children and the need for a lawful mechanism enabling them to remain in the Republic and work where appropriate. The absence of any reference to parents suggests a missed opportunity to align the policy framework with recent constitutional developments and to provide clarity on how such cases are to be accommodated going forward.

Importantly, any reform of the family-based visa regime should proceed from the recognition that spouses and life partners must, as a general rule, be permitted to work, study, or conduct business, subject to appropriate regulation. Creating narrower or more rigid visa categories, or introducing additional layers of conditions, risks undermining this principle and increasing non-compliance, uncertainty, and administrative disputes.

While efficiency and streamlining are legitimate policy objectives, they cannot be achieved by collapsing distinct statutory mechanisms in a manner that creates confusion, increases renewal cycles, and generates avoidable administrative errors. Less restrictive and more constitutionally aligned alternatives exist, including refining existing processes, improving internal guidance to adjudicators, and expressly providing for all affected family categories within the legislative framework.

For these reasons, the proposed combination of sections 11(6) and 18 is unlikely to achieve its stated purpose and should be reconsidered.

## **SECTION C: SKILLED WORK VISAS, POINTS-BASED SYSTEM, AND PERMANENT RESIDENCE**

(Engaging paragraph 3.3.3.3 and 3.3.4 of the Draft Paper)

### **Consolidation of Work Visas and PBS Adjudication**

Proposal:

The Draft Paper proposes to merge critical skills and general work visas into a single skilled worker visa. This merged visa, known as the “skilled work visa” will be exclusively adjudicated through the Points-Based System (PBS).

Comments:

The Act currently distinguishes between critical skills visas in terms of section 19(4) and general work visas in terms of section 19(2). Consolidation of the categories and sections could risk diluting the targeted nature of critical skills visas, which aim to prioritize sectors with acute shortages.

A broad visa for “all skill levels” may compromise policy goals if low- or mid-level skills take spots that should go to highly skilled migrants. In addition, a consolidated points-based system may unfairly exclude applicants who currently qualify for critical skills visas.

If individuals with skills that the state has expressly identified as being in short supply do not meet the points requirements, South Africa risks losing precisely the workers it most needs.

This may lead to ongoing shortages in critical sectors, while allowing entry into sectors that are already saturated simply because applicants score well under the points-based system. Such an outcome would defeat the purpose of the critical skills regime and undermine the state’s ability to address genuine skills shortages.

### **Renewal Requirements**

Proposal:

The Draft Paper proposes that the renewal of work visas will be contingent on current and continuous employment. Should a visa holder no longer be employed, he or she will not be able to renew such visa or apply for permanent residence.

Commentary:

The proposal that the renewal of a skilled worker visa be contingent on continuous employment is a practically sound decision which we agree with. Continuous employment is an objective and verifiable criterion, making compliance checks and renewals easier for the Department.

### **Intra-Company Transfer Visas**

Proposal:

Intra-company transfer visas will be retained in order to facilitate multinational companies' ability to move staff across borders in support of operations. In short, the Draft Paper proposes that the position of Intra-company transfer visas will not change.

Commentary:

The proposal to retain the Intra-company Transfer (ICT) visa category in its current form is noted and supported. Maintaining this mechanism continues to facilitate operational flexibility for multinational companies and enables the efficient cross-border movement of key personnel in support of business continuity. No further amendments are proposed.

### **Points-Based System (PBS) Visa Policy**

Proposal:

The Draft Paper proposes that the application of the PBS will remain fundamental to the skilled worker visa as the exclusive criterion to adjudicate work visas, and will be flexible, allowing the adjustment of points criteria and thresholds without requiring legislative amendments.

Commentary:

The current PBS has unreasonably high requirements as very few applicants qualify there under. Which deters skilled workers who do not hold the relevant academic qualifications, but who would still be a great asset to the South African economy. We advise lowering the threshold of the current PBS for skilled workers seeking temporary residence to 80 points while retaining the 100 points thresholds for individuals in pursuit of permanent residence.

### **Permanent Residence Quotas and Window Periods**

Proposal:

The Draft Paper proposes that a quota and window-period-based system be introduced to regulate the number of permanent residence (PR) approvals annually, only allowing a certain number of applications to be approved annually.

Commentary:

The Act currently does not impose numerical caps on permanent residence approvals. PR eligibility is regulated substantively through sections 26 and 27, which define qualifying categories (e.g. work, business, family, refugee status). Introducing a quota system represents a fundamental structural shift from rights-based eligibility to numerical rationing.

Even assuming an entirely efficient system, the proposed quota model may still create unfair outcomes. For example, an applicant who submits a complete and qualifying application at a time when the annual quota has not yet been reached could, purely due to the timing of adjudication, have their application decided only after the quota has been filled. In such a case, the applicant would be refused despite having met all legal requirements at the time of application.

Further comments on this policy are reserved until the proposed legislation changes are outlined in detail.

## **SECTION D: ADMINISTRATIVE FINES FOR VISA OVERSTAYERS**

(Engaging paragraph 3.3.7.4 of the Draft Paper)

This section addresses the proposal to re-introduce administrative fines for foreign nationals who overstay their visas, as an alternative to the current regime of declaring such persons undesirable and requiring applications for the waiving of undesirability. While the stated objective of reducing administrative pressure on the Department and the Border Management Authority (“BMA”) is acknowledged, the proposal raises significant concerns relating to compliance, deterrence, governance, and long-term administrative efficiency.

Proposal:

The Draft Paper proposes replacing, in whole or in part, the current practice of declaring foreign nationals undesirable for visa overstays with a system of administrative fines. The stated intention is to streamline enforcement, reduce administrative backlogs associated with the waiving of undesirability, and improve operational efficiency within the Department and BMA.

Commentary:

Undermining the Legal Significance of Visa Expiry Dates

A fundamental concern with a predominantly fine-based approach is that it risks rendering visa expiry dates practically inconsequential, particularly for financially stable foreign nationals and employers of foreign nationals. If non-compliance can be regularised primarily through the payment of a fine, adherence to visa conditions becomes a matter of financial convenience rather than legal obligation.

This outcome would create an uneven system in which those with sufficient resources may knowingly disregard visa expiry dates, confident that the consequences are manageable. Such an approach undermines the rule of law and weakens the credibility and authority of South Africa's immigration control framework.

Erosion of Deterrence and Respect for Immigration Laws

An effective immigration system depends on meaningful deterrence and respect for legal authority. Under the current regime, the declaration of undesirability and the requirement to apply for the waiving of undesirability—despite acknowledged administrative challenges—serve as a strong deterrent against overstaying and encourage timeous compliance with visa renewal requirements.

Replacing this mechanism with a fine-based system risks normalising overstaying as an acceptable and administratively manageable outcome. Over time, this may erode respect for immigration laws, reduce voluntary compliance, and lead to an increase in deliberate overstays, thereby placing additional pressure on the Department and BMA rather than alleviating it.

### Revenue Generation Should Not Drive Immigration Enforcement

While administrative efficiency and cost recovery are legitimate policy considerations, revenue generation should not become a primary tool of immigration enforcement. Immigration control is a regulatory function concerned with managing lawful presence within the Republic.

Over-reliance on fines risks shifting enforcement priorities away from compliance and lawful status management toward income generation. This, in turn, may weaken the normative force of immigration laws and undermine public confidence in their purpose and fairness. Any revenue generated through enforcement mechanisms should remain incidental and subordinate to regulatory objectives.

### Governance, Control and Corruption Risks

The proposed fine-based system introduces significant governance and control risks. In the absence of a fully centralised, transparent, and auditable payment and verification system, the implementation of administrative fines may give rise to:

- Difficulty in verifying legitimate payments;
- The circulation of falsified or unofficial receipts;
- Increased opportunities for bribery or informal payments.

These risks are likely to generate additional administrative burdens for the Department, including payment verification processes, internal investigations, dispute resolution, appeals, and litigation. Such outcomes would directly undermine the stated objective of reducing administrative pressure associated with applications for the waiving of undesirability.

### Importance of Immigration Officers' Discretion

Any framework addressing visa overstays must preserve the essential role of immigration officers' discretion. Overstays arise in diverse circumstances, including

situations beyond the control of the foreign national, such as administrative delays or pending adjudication processes.

Immigration officers are best placed to assess the nature, duration, and context of an overstay, as well as the individual's compliance history. Where discretion is exercised consistently and in accordance with clear policy guidelines, it can materially reduce inappropriate declarations of undesirability and unnecessary waiver applications, thereby alleviating administrative congestion.

A rigid or automated fine-based system risks removing this discretion, potentially resulting in unjust outcomes and increased administrative burdens.

#### Recommended Proportional and Differentiated Enforcement Approach

To address administrative pressures while maintaining compliance and deterrence, a proportional and differentiated enforcement framework is recommended:

- Declarations of undesirability, together with the requirement to apply for the waiving of undesirability, should be reserved for cases involving clear, wilful, or repeated non-compliance.
- Foreign nationals who can demonstrate that an overstay occurred due to factors beyond their control should not be subjected to punitive sanctions.
- Any enforcement framework must retain meaningful consequences for deliberate non-compliance to ensure that visa expiry dates remain legally and practically effective.

While the objective of reducing administrative backlogs related to the waiving of undesirability is understandable, the proposed re-introduction of administrative fines—if implemented without robust safeguards—risks weakening compliance, eroding respect for immigration laws, increasing governance and corruption risks, and ultimately exacerbating administrative burdens.

## SECTION E: SPECIALISED IMMIGRATION COURTS

(Engaging paragraph 3.3.7.3 of the Draft Paper)

This section addresses the proposal to establish Specialised Immigration Courts as part of the Department's broader reform agenda. While the stated objective of ensuring the expeditious and expert resolution of immigration-related disputes is acknowledged, the proposal raises serious constitutional, institutional, and practical concerns. The establishment of specialised immigration courts is neither necessary nor advisable within South Africa's current constitutional framework.

Proposal:

The Draft Paper proposes the creation of Specialised Immigration Courts to adjudicate immigration-related disputes, with the aim of improving efficiency, reducing litigation backlogs, and enhancing specialist expertise in immigration matters.

Commentary:

### Misidentification of the Core Problem

The proposal proceeds from the premise that immigration litigation places an undue burden on the courts and that the creation of specialised courts is therefore required. With respect, this diagnosis is misplaced. The primary difficulty facing South Africa's immigration system is not a lack of appropriate judicial forums, but persistent administrative failure within the Department.

Immigration disputes arise predominantly because:

- applications are unlawfully delayed or ignored;
- decisions are taken without reasons or contrary to clear statutory provisions;
- internal remedies are ineffective or inaccessible; and
- court orders are routinely not complied with, necessitating repeated litigation.

In many instances, immigration litigation would be entirely avoidable if the Department complied with its constitutional obligations and with the Promotion of Administrative

Justice Act. Establishing specialised courts addresses the symptom—litigation—while leaving the underlying administrative dysfunction untouched.

### Constitutional and Separation of Powers Concerns

Immigration disputes frequently involve challenges to the lawfulness, reasonableness, and procedural fairness of administrative action. These are quintessential administrative-law disputes that fall squarely within the supervisory jurisdiction of the ordinary courts.

The creation of specialised immigration courts raises legitimate concerns regarding judicial independence and the separation of powers. Where a forum is established specifically to adjudicate disputes arising from the conduct of a particular executive department, there is an inherent risk—or at least a reasonable perception—that executive influence may be exerted through appointment processes, procedural rules, or institutional alignment.

Even the perception that the Department may have undue influence over such courts would undermine public confidence in their impartiality. This would be inconsistent with the constitutional principle of separation of powers and the right of access to courts under section 34 of the Constitution.

### Risk of Normalising Administrative Failure

There is a further structural concern that specialised immigration courts may normalise poor administrative decision-making. The existence of a dedicated forum to “resolve” immigration disputes risks creating an institutional expectation that unlawful or deficient decisions will simply be corrected through litigation.

This shifts the burden of administrative competence from the executive to the judiciary, at significant cost to litigants and the public purse. Courts are intended to be a forum of last resort. A system that anticipates routine judicial correction of administrative errors is neither efficient nor constitutionally sound.

This concern is amplified by the Department's long-standing pattern of non-compliance with court orders, often resulting in avoidable contempt proceedings. In circumstances where compliance with existing judicial authority remains a persistent challenge, it is unclear how the establishment of specialised immigration courts would meaningfully improve outcomes or restore respect for the rule of law.

### Capacity, Cost, and Fragmentation of the Justice System

The establishment of specialised immigration courts would require substantial resources, including judicial appointments, training, infrastructure, procedural frameworks, and ongoing funding. This is difficult to justify where existing courts are already constitutionally empowered to adjudicate immigration matters.

In practice, certain High Court divisions already operate specialised immigration rolls, allowing matters to be managed efficiently within the existing judicial framework without compromising judicial independence or fragmenting the justice system. Specialist expertise can, and does, develop through designated judges, focused court rolls, and targeted training initiatives.

There is also a real risk of jurisprudential fragmentation. Immigration law is closely intertwined with constitutional law, administrative law, and international law. Removing these matters from the mainstream courts may lead to insularity, inconsistent standards, and weakened doctrinal development—outcomes that are undesirable from both a legal and policy perspective.

By way of comparison, despite the extensive volume of litigation arising from the Road Accident Fund, no specialised RAF court exists. Instead, systemic issues are addressed through judicial oversight within the existing court structure, reinforcing the principle that administrative dysfunction should not be remedied through the creation of parallel courts.

## Preferable and Constitutionally Sound Alternatives

Rather than establishing specialised immigration courts, the following reforms would be more effective and constitutionally appropriate:

- **Administrative Reform and Accountability:**  
The Department must prioritise lawful, timely, and reasoned decision-making, supported by proper training of officials and enforceable internal accountability mechanisms.
- **Effective Internal Remedies:**  
Properly functioning internal appeal and review mechanisms would significantly reduce the need for judicial intervention.
- **Designated Judges or Court Rolls:**  
Where capacity constraints exist, the designation of specific judges or dedicated immigration rolls within the existing court structure would enhance efficiency without compromising judicial independence.
- **Strict Consequences for Non-Compliance with Court Orders:**  
A culture of compliance with judicial decisions would materially reduce repeat litigation, unnecessary contempt proceedings, and restore confidence in the system.

While the objective of improving efficiency in immigration adjudication is commendable, the proposal to establish specialised immigration courts is misguided. It raises serious concerns regarding judicial independence, separation of powers, and the dilution of effective oversight over executive action. More fundamentally, it risks entrenching administrative dysfunction rather than correcting it.

Meaningful reform should focus not on creating new courts to manage the consequences of unlawful administration, but on ensuring that the Department performs its statutory and constitutional functions properly—so that matters do not reach the courts in the first place.

## CONCLUSION

The Draft Paper reflects a genuine intention to modernise South Africa's immigration framework and improve efficiency. However, as demonstrated in this commentary, many of the proposed reforms risk misdirecting attention away from the central challenges, such as persistent administrative dysfunction, inconsistent and unlawful decision-making, application backlogs and ongoing non-compliance with court orders by the Department.

Structural, technological, and institutional reforms cannot succeed unless these foundational failures are addressed. Several proposals further raise serious constitutional concerns, including the erosion of administrative justice, family unity, judicial independence, and established Constitutional Court jurisprudence. Administrative convenience and efficiency objectives cannot justify departures from constitutional standards or the dilution of legally protected rights.

Meaningful reform must therefore prioritise lawful and accountable decision-making, effective internal remedies, respect for judicial authority, and constitutionally compliant enforcement mechanisms. The LSSA remains committed to constructive engagement to ensure that any revised policy framework strengthens, rather than undermines, the rule of law and the long-term integrity of South Africa's immigration system.