

Wilfrid Laurier University

## Scholars Commons @ Laurier

---

Southern African Migration Programme

Reports and Papers

---

2001

### No. 01: The South African White Paper on International Migration: An Analysis and Critique

Jonathan Crush

*Balsillie School of International Affairs/WLU, jcrush@wlu.ca*

Vincent Williams

*Southern African Migration Programme*

Follow this and additional works at: <https://scholars.wlu.ca/samp>



Part of the [African Studies Commons](#), [Economics Commons](#), and the [Migration Studies Commons](#)

---

#### Recommended Citation

Crush, J. & Williams, V. (2001). The South African White Paper on International Migration: An Analysis and Critique (rep., pp. 1-23). Waterloo, ON: Southern African Migration Programme. SAMP Migration Policy Brief No. 1.

This Migration Policy Briefs is brought to you for free and open access by the Reports and Papers at Scholars Commons @ Laurier. It has been accepted for inclusion in Southern African Migration Programme by an authorized administrator of Scholars Commons @ Laurier. For more information, please contact [scholarscommons@wlu.ca](mailto:scholarscommons@wlu.ca).

# **Southern African Migration Project**

## **The South African White Paper on International Migration: An Analysis and Critique**

### **Migration Policy Brief No. 1**

Series Editors: Jonathan Crush and Vincent Williams

2001  
Copyright: SAMP

## Contents

<b>1.0</b>	<b>Introduction.....</b>	<b>1</b>
<b>2.0</b>	<b>Procedural issues.....</b>	<b>2</b>
<b>3.0</b>	<b>Assumptions about Migration in the Draft White Paper.....</b>	<b>3</b>
<b>4.0</b>	<b>Principles of the Proposed New Policy Framework.....</b>	<b>5</b>
<b>5.0</b>	<b>Specific Issues and Concerns.....</b>	<b>7</b>
<b>6.0</b>	<b>The Aliens Control Act: Does It Work?.....</b>	<b>10</b>
<b>7.0</b>	<b>Labour, Skills and Migration .....</b>	<b>12</b>
<b>8.0</b>	<b>Gender and Migration.....</b>	<b>14</b>
<b>9.0</b>	<b>Management and Institutional Reform.....</b>	<b>17</b>
<b>10.0</b>	<b>Enforcement.....</b>	<b>19</b>
<b>11.0</b>	<b>Final Recommendations.....</b>	<b>22</b>

**1.0 Introduction**

- 1.1 SAMP<sup>1</sup> commends the South African government and the Department of Home Affairs (DHA) for their ongoing commitment to developing a new immigration and migration policy framework, exemplified most recently by the passage of a new Refugee Act and the gazetting of a Draft White Paper on International Migration (WP).
- 1.2 SAMP notes with encouragement the steps taken in the Draft White Paper to move to a more holistic view of the benefits of sound, effective and transparent immigration management. SAMP is supportive of continued immigration policy transformation and any initiatives that advance this aim.
- 1.3 SAMP possesses the experience and capacity to provide an informed critique of the Draft White Paper.<sup>2</sup> The comments which follow are directed towards this end and made in a spirit of constructive criticism.
- 1.4 The present document has been prepared in response to the document gazetted on 1 April 1999 as the White Paper on International Migration and the invitation to submit comment by 30 November.<sup>3</sup>
- 1.5 In order to promote public input on the Draft White Paper, SAMP has established a facility on its website for comment and debate. We wish to draw the attention of the

---

<sup>1</sup>The Southern African Migration Project (SAMP) is an independent research and policy network or organisations in South Africa, six other SADC countries and Canada. The SAMP partners include the Southern African Research Centre at Queen’s (Canada); IDASA (South Africa), Arpac (Mozambique), Sechaba Consultants (Lesotho), the International Training Programme in Population and Sustainable Development (University of Botswana), the Multidisciplinary Research Centre (University of Namibia) and the University of Zimbabwe. SAMP is funded by the Canadian International Development Agency (CIDA). The views expressed in this document are those of SAMP and not CIDA or the Canadian Government.

<sup>2</sup>The SAMP mandate is to provide information services and policy advice on the development, transformation and implementation of new migration policy frameworks and legislation in the Southern African region. Within this broader regional context, a primary aim of the project is to assist in the development of a new immigration policy for post-apartheid South Africa. To this end, SAMP has played a direct supporting role to the South African Department of Home Affairs. SAMP provided personnel expert inputs to the Green Paper and White Paper task teams; gave financial support to the public hearings of the White Paper task team; and financed two major migration policy conferences. In addition SAMP has conducted research, published reports and newsletters, conducted workshops and otherwise interacted with a wide range of role-players both inside and outside South Africa. Research results have been published by SAMP in a number of reports. These are listed elsewhere in this document. Together with associated debate and opinion, research results have also been disseminated through the medium of SAMP’s *Crossings* newsletter, as well as on the SAMP website (<http://post.queensu.ca/samp/>), in a number of books and journals and at workshops and conferences.

<sup>3</sup> *Government Gazette* (vol. 406, 1 April 1999).

Department of Home Affairs to this facility and its postings, as these provide further useful input to the process of policy development through public consultation. The website can be accessed at the following address: <http://www.queensu.ca/samp/>

- 1.6 While the Draft White Paper makes many valid points and has an admirable focus on practical policy mechanisms, there are a number of potential problems of design and implementation.

## **2.0 Procedural Issues**

- 2.1 There has been considerable public confusion about the status of the White Paper which was gazetted as “approved by Cabinet” and therefore thought to represent official policy. In a subsequent call for public comment, it was referred to as the Draft White Paper on International Migration. SAMP understands this to be the correct designation and that the Draft White Paper does not yet represent official South African government policy. SAMP therefore looks forward to the finalisation and publication of a revised White Paper and Draft Immigration Bill and welcomes the opportunity to make a substantive input into this process.<sup>4</sup>

- 2.2 As the Draft White Paper rightly emphasises, the need for revised policy and legislation on international migration is both clear and urgent. Less clear from the Draft White Paper is the envisaged process or timetable for such reform. The development of new policy to was slowed by the 1999 elections. We support the view that the finalization of international migration policy should be a top priority of the Department of Home Affairs and national government.

- 2.3 SAMP notes that the Draft White Paper responds to and develops the earlier recommendations of the Draft Green Paper on International Migration. However, the Draft White Paper explicitly asserts its independence from the Green Paper and it is clear that it departs from the Green Paper in several important respects, some positive and some negative.

- 2.4 The Draft White Paper’s continued separation of refugees into their own category is desirable, with separate policy and legislation (the 1998 Refugees Act) relating specifically to refugee issues. There is a potential danger, however, that various human rights considerations have been lost from broader migration policy in the process of that separation. Questions of possible policy conflict and institutional overlap also need to be given more careful consideration, particularly in terms of the relationship between the

---

<sup>4</sup> In the preparation of this document, SAMP has canvassed the opinions of member organisations of its network and commissioned analyses from South African experts in the field. These inputs are here summarised and consolidated into a single response. The document was coordinated by Jonathan Crush and Belinda Dodson with assistance and inputs from Vincent Williams, David McDonald, Clarence Tshitereke and Jonathan Klaaren.

Immigration Review Board, the Immigration Court and Refugee Status Determination Officers.

- 2.5 SAMP commends the Task Team for its willingness to draw from international experience in developing a South African immigration regime. South Africa can learn from the mistakes of other countries. However, models cannot simply be transplanted from one context to another. We note in particular the reliance in the Draft White Paper on the American model of immigration management. While there are things to be learned from the American or any other experience, American immigration policy is itself problematical and under review.

### 3.0 Assumptions about Migration in the Draft White Paper

Underlying the Draft White Paper is a partial understanding of the volumes, causes, and impacts of migration. Although the Draft White Paper rightly dismisses the formulation of policy based on ‘theory alone’ (Section 3, para. 3, p. 7), no policy can be formulated in a vacuum, and indeed a number of problematic theories run through the document.

- 3.1 Underpinning the Draft White Paper’s understanding of the impact of immigration on South Africa is an outdated neo-Malthusian view. In effect, the document claims that South Africa has reached its ‘carrying capacity’ and cannot accommodate significant further population increase. Of course the number of people that any country can support is not determined by a simple population:resources ratio, but includes a number of other variables such as the structure of the economy, level of economic development, skills base, rate of economic growth, pattern of resource consumption and so on.
- 3.2 The Draft White paper assumes that South Africa has been flooded by ‘illegal immigrants’ since 1994. In order to justify controlling ‘illegal immigration’ as the highest priority, the Draft White Paper repeats the findings of a discredited HSRC study that put the number of ‘illegal immigrants’ in South Africa at 5 million (Section 6, para. 4.3.2, p. 18). SAMP and other research suggests that such a high estimate is an exaggeration, yet the Draft White Paper does not mention any lower estimates.<sup>5</sup>
- 3.3 The Draft White Paper also blames ‘illegal immigrants’ for a whole variety of social ills (Section 6, para.3.1).<sup>6</sup> While the White Paper repeatedly stresses the importance of being

---

<sup>5</sup> Mathus Brunk, “Undocumented Migration to South Africa: More Questions than Answers” Public Information Series No.4, Idasa, 1996; Maxine Reitzes, “Counting the Uncountable: Undocumented Migrants in South Africa” Centre for Policy Studies, 1997; Jonathan Crush, “The Discourse and Dimensions of Irregularity in Post-Apartheid South Africa” *International Migration* ; and “Making Up the Numbers: Measuring Unauthorized Migration in South Africa” Paper for Lusophone Congress, Maputo, 1999.

<sup>6</sup> D. McDonald et al., 1998. *Challenging Xenophobia: Myths and Realities about Cross-Border Migration in Southern Africa*. SAMP Migration Policy Series no. 7.

- based in ‘reality’, there is little hard evidence to support its claims regarding the number, characteristics or behaviour of immigrants
- 3.4 The Draft White Paper assumes that the primary means of unauthorized access to South Africa is clandestine border crossing. The length of South Africa’s borders is given as the reason for de-emphasizing border controls. SAMP research shows that this is only a very small percentage of unauthorized migrants. Most enter legally through established border posts. Thus, border controls are not necessarily as redundant as the Draft White Paper makes out.
- 3.5 The Draft White Paper offers South Africa’s high unemployment rate as the primary justification for discouraging further immigration, even though SAMP and other research has shown that migrants to South Africa from other African countries are not the prime cause of unemployment and are often responsible for *creating* jobs, both for other migrants and for South Africans.<sup>7</sup> The impact of migrants on South Africa’s society and economy needs to be carefully examined if it is to be used as justification for either encouraging or discouraging immigration.
- 3.6 The recommendations are based on oversimplified push-pull model of migration which asserts that South Africa is powerless to affect push factors and must therefore concentrate on reducing pull factors:
- (a) research shows that the only pull factor for migrants is economic activity and employment opportunities in South Africa. Otherwise migrants have little interest in the country. Policies directed at making foreign labour less attractive to South African employers through enforcing equal treatment and standards are the only viable solution;
  - (b) the unfortunate reality is that xenophobic attitudes and actions will also reduce the attractiveness of South Africa. There is a danger, therefore, that xenophobia will not be acted against as forcefully as it should;
  - (c) this model completely ignores South Africa’s past and present role in creating some of the push factors. South Africa would not have a problem with Mozambican migration today if the apartheid government had not helped destroy the Mozambican economy in the 1980s. While the present government cannot be held directly responsible it must be remembered that part of the reason was Mozambique’s support of the liberation struggle;
  - (d) Contrary to the assertions of the Draft White Paper, South Africa can influence some push factors, especially within SADC. South Africa has a massive and growing trade imbalance with the source countries of migrant workers. This impedes development and reduces job opportunities in those countries, thus driving migration to South Africa.

---

<sup>7</sup>Rogerson, C, 1997. *International Migration, Immigrant Entrepreneurs and South Africa’s Small Enterprise Economy*. SAMP Migration Policy Series no. 3; Crush, J and S Peberdy, 1998. *Trading Places: Cross-Border Traders and the South African Informal Sector*. SAMP Migration Policy Series no.

- (e) Private investments by South Africa in the SADC region will also create jobs and reduce pressure to migrate to South Africa.
- (f) South Africa’s internal migration policy is also a push factor in neighbouring states. Lesotho and Mozambique show that as the number of mine jobs decreases, the flow of other migrants, especially women, increases.
- (g) Migration to South Africa acts as an agent of development in neighbouring countries through remittances. Again, this means that allowing controlled, legal migration is a means of reducing ‘push’ factors and thus of preventing uncontrolled, illegal migration.

- 3.7 An ambiguity in the Draft White Paper is the definition of what constitutes ‘the national interest’ and how this relates to immigration. The ‘interest’ is interpreted variously as that of the South African people, the South African state or the South African economy (with only limited reference to the potentially conflicting interests of role players such as business and labour, or rich and poor South Africans).

#### **4.0 Principles of the Proposed New Policy Framework**

As acknowledged in the Draft White Paper, transformation of national immigration policy demands a reconsideration of the basic principles and parameters that should guide and inform the formulation, legislation and enforcement of any new policy.

- 4.1 SAMP supports the four preliminary considerations and principles set out in Section 4 of the Draft White Paper (p. 9). These acknowledge the need to develop policy that is (a) based on national self-interest and territorial integrity; (b) sensitive to the opportunities and challenges of globalisation; (c) open to forms of migration and immigration that benefit South Africans; and (d) sensitive to regional issues and needs.
- 4.2 The Draft White Paper’s analysis of how *existing* legislation and policy should inform the development of new migration policy is perhaps the weakest section of the Draft White Paper (Section 5, , pp. 10-11). Specifically:
- (a) The Draft White Paper claims that GEAR is ambiguous on migration and immigration issues. The argument that GEAR could support a highly restrictive immigration policy in order to reduce the number of people for whom government and the economy need to ‘provide’ is fallacious, since it assumes that all immigrants are ‘parasites’ on services and contribute little by way of productive activity and tax revenue.
  - (b) The Draft White Paper claims that the Constitution only places ‘outer limits’ on policy. We disagree. To avoid endless litigation and court challenges, the preferred option must be to develop a constitutionally-sound immigration regime from first principles.
  - (c) The argument that Canadian and New Zealand immigration policy is driven by the need for ‘more people’ while further population growth through migration is ‘not desirable’ in the South Africa case is simplistic. No modern



state looks at immigration mainly in terms of population numbers, nor should South Africa.

- (d) The Draft White Paper notes that it found ‘insufficient guidance...for the formulation of migration policies from any other of the government’s major policies’ (p. 11). The recommendations on migration from other Departments including the National Labour Market Commission and from other White Papers could have been considered. This might suggest to the public that there is a lack of inter-departmental collaboration. Greater administrative co-ordination will be essential to give effect to the Draft White Paper’s recommendations and should ideally be built into the process from the start.

4.3 With the exception of (b) below, the central tenets that guide the Draft White Paper are sound (Section 6, paras. 4.1 to 4, pp. 16-20). But there are some problems in the way that these tenets are then interpreted and applied. These tenets are:

- (a) That government must be allowed to regain and retain control over who may enter the country as well as the conditions and length of their stay;
- (b) That under present circumstances it is impossible for South Africa to take action to address the ‘push’ factors that drive migration from the rest of Africa and the world, nor to construct a migration regime that is predicated on any improvement in these factors;
- (c) That the migration system must not rely heavily for its success on actions taken to secure the country’s land and sea borders from people willing to cross them illegally;
- (d) That the development of a migration system is closely interrelated with the management and regulation of labour dynamics and requires an interface with labour institutions.

4.4 To refine these tenets SAMP suggests the incorporation of the following guidelines in the revised White Paper:

- (a) In its own interests, South Africa can and should assist in dealing with some of the identifiable economic and political push factors that drive migration from the three neighbouring countries that produce most migrants: Mozambique, Lesotho and Zimbabwe.
- (b) A new immigration and migration regime should be rights-based and constitutionally sound.
- (c) South African immigration policy should be based on the development of a strong and sustained research capacity to collect, analyse and interpret national and regional migration data and statistics.
- (d) Migration policy does not have to be explicitly discriminatory in order to discriminate in effect. Migration policy must be formulated in a way that avoids such discrimination, for example on the basis of gender.
- (e) The relationship between migration and development is close. Both national and regional development will be affected by South Africa’s immigration policy.

- 4.5 Having set out its guiding principles and parameters, the Draft White Paper goes on to outline two major policy platforms:
- (a) The first is to develop immigration policy and law that facilitates the movement of people into and out of the country, unless for any reason they are prohibited from doing so. The Draft White Paper provides for liberalised entry requirements for particular categories of migrant and proposes various types of temporary permits. Criteria for permanent residence are also clarified and liberalised. We support the broad categories and conditions of entry and stay.
  - (b) The second platform, which to some extent contradicts the first, is the proposal that the enforcement of immigration law be shifted from border control to internal, community level. This means that immigration control will take the form of inspections in communities, workplaces, educational institutions and other places where migrants access services. Such strategy relies heavily on the participation and co-operation of the public, community organisations, employers and providers of services, as well as other branches of government. We have reservations about the practicability, ethics and constitutionality of this enforcement strategy.
- 4.6 The Draft White Paper further proposes radical institutional restructuring in order to implement its envisaged policy changes. Specifically, it proposes the establishment of an Immigration Services section within the Department of Home Affairs, an Immigration Court, an Immigration Review Board and additional professional security services. The status, powers and efficacy of these institutions needs elaboration.

## 5.0 Specific Issues and Concerns

- 5.1 The Draft White Paper places primary emphasis on ‘illegal immigration’ as the issue which should drive new policy. Rather than focussing on controlling ‘illegal immigrants’ as the primary policy objective, the Draft White Paper might have first developed a broad vision and plan for *legal* immigration, and then considered how that vision might be achieved and enforced. Enforcement should generally succeed and not precede policy.
- 5.2 Our studies show widespread South African hostility towards the presence of all non-citizens.<sup>8</sup> If South African policy were to be determined by popular vote, few foreigners would be allowed into the country at all. This would directly contradict the Draft White Paper’s recommendations for improved legal access to South Africa as in the country’s best economic interests. Public input is vital but the government and the Department should also develop and promote a long-term immigration plan. As in many other countries, public education and political leadership are essential in the field of immigration policy.

---

<sup>8</sup> R. Mattes et al., 1999. *South African Attitudes to Immigrants and Immigration*. SAMP Migration Policy Series no. 14.

- 5.3 A key recommendation of the Draft Green Paper was that policy should strive to make the immigration debate more rational and less emotional through the use of more objective and neutral terminology. The Draft White paper admirably defines a set of less emotive concepts and terms but, in practice, reverts to using apartheid-era terminology. In the climate of anti-foreigner feeling that has become so tragically characteristic of post-apartheid South Africa, the continued use of this language could be questioned.
- 5.4 In other areas the Draft White Paper reproduces the omissions of the Green Paper. Of particular concern is the continued silence on questions of gender. Many of the recommendations of the Draft White Paper have profound gender implications, yet these are not acknowledged.
- 5.5 We agree entirely with the Draft White Paper that there is a need for policy that is implementable and effective. Yet the specific framework proposed in the Draft White Paper does not meet these criteria. If legislated in its present form, it could provide an inflexible immigration regime that might be quite at odds with future realities, thus requiring a further overhaul of policy and legislation. In the short term, it risks driving international migration further underground, thus exacerbating rather than alleviating the problem of unauthorized migration and immigration.
- 5.6 Another concern is the workability of the actual control mechanisms proposed. The proposed mobilisation of the general public, employers, service providers and other government departments in controlling unauthorized immigration could be questionable in straightforward practical terms. Other proposed control measures such as fingerprinting, photograph identity cards and the maintenance of computer records also raise questions of cost-effectiveness and practicability.
- 5.7 Some of the proposed means of controlling unauthorized immigration could be questioned on ethical and legal grounds. Plans to mobilise members of the public to act as snoops and informers could be interpreted by the media and courts as official condoning of xenophobia as a strategy of discouraging foreigners from coming to the country. The legality of some of the provisions could also be questionable in terms of both South African constitutional law and international law.
- 5.8 While there is a need for administrative reform and reorganisation, any new institutions will need to be carefully structured and operationalised if they are indeed to streamline the management of international migration and contribute to a more cost-effective, humane and democratic immigration regime. The Draft White Paper leaves unclear the precise structures, functions and inter-relationship of the envisaged Immigration Service, Immigration Review Board and Immigration Court. Even less clear are the duties of the proposed ‘Additional Professional Security Service’. The respective roles of the military, national intelligence service and police in immigration management and control need to be specified.
- 5.9 The Draft White Paper argues for a geographically-based ‘hierarchy of immigration’ implied in the statement: ‘Our obligations are to serve our people first; the people of the

- region and the member states of the Southern African Development Community second; the people of Africa third; and the rest of the world last’ (Section 4, para. 4, p. 9). Yet nowhere is it explained how this order of preference might be attained, nor how it correlates with the skills-based selection of immigrants that is proposed. In addition to its practical feasibility, further questions arise as to the constitutionality of such a hierarchy, which would serve to entrench an overt form of discrimination.
- 5.10 The sections of the Draft White Paper that deal with terms of entry and conditions of stay are basically sound, although the credit card proposal is curious. The majority of South Africa’s visitors who own credit cards are generally not those who become ‘illegal immigrants’. The distinction between migrant and immigrant streams and the realistic approach to facilitating short-term migration for a variety of purposes is valid (Section 7, paras. 4.1 and 4.2, pp. 24-26). That said, the Draft White Paper proceeds under the assumption that South Africa is facing large-scale *immigration*, an assumption challenged by the results of SAMP research which indicates that most migrants maintain strong links with home and wish to return to their home countries.<sup>9</sup>
- 5.11 SAMP has closely examined the proposals scattered throughout the Draft White Paper on the issue of migration from neighbouring states for purposes of trade. The proposed policy on informal cross-border trade is consistent both with the findings of SAMP research and with moves to open up trade within the SADC region through the trade protocol.<sup>10</sup>
- 5.12 While the notion of tying immigration to skills and labour requirements is valid, there remain a number of problematic assumptions in the Draft White Paper’s proposals on skilled migration. Mechanisms for identifying and attracting the specific skills required are left unspecified, with an unresolved tension between market forces and government intervention. A ‘brain drain’ of skilled South Africans is taken as given, whereas SAMP research shows that the loss of skills through emigration is commonly over-stated. The issue of whether attracting skilled migrants might lead to a brain drain from other SADC countries is not addressed. Fundamentally, immigrants are effectively classified as either ‘good’ (skilled) or ‘bad’ (unskilled), with policies of attraction and expulsion devised accordingly.
- 5.13 The Draft Green paper made a persuasive argument for considering Lesotho as a “special case.” The Draft White paper ignores this recommendation. We recommend an

---

<sup>9</sup> D. McDonald, ed., 2000. *On Borders: Perspectives on International Migration in Southern Africa*. Cape Town and New York: SAMP and St Martin’s Press.

<sup>10</sup> C. Rogerson, 1997. *International Migration, Immigrant Entrepreneurs and South Africa’s Small Enterprise Economy*. SAMP Migration Policy Series no. 3; S Peberdy and J Crush, 1998. *Trading Places: Cross-Border Traders and the South African Informal Sector*. SAMP Migration Policy Series no. 6.

- investigation of the costs and benefits of policing the Lesotho border and an assessment of the positive and negative impacts of a reciprocal “open borders” arrangement with Lesotho.
- 5.14 The Draft White Paper is vague on the matter of naturalisation, stating simply that the present framework should be maintained but that a ‘greater threshold of integrity and loyalty to South Africa would be prescribed’ for acquiring citizenship (Section 9, p. 40).
- 5.15 The Draft White Paper does not draw sufficiently on existing research, nor does it prioritise a research function within the DHA in its proposed institutional reforms. This is unfortunate. A monitoring and information generation function is essential in order to assess the effectiveness of new policy and its enforcement and to respond effectively to new challenges downstream.

## 6.0 The Aliens Control Act: Does It Work?

Should or can the Aliens Control Act be ‘amended’ to accommodate the new policies or is a new Immigration Act needed? The Draft White Paper is ambiguous on this question. We respectfully recommend that a new Act is necessary. The reasons are more than symbolic. They relate (a) to the problems and failings of the ACA itself and (b) the fact that the Draft WP’s recommendations are so far-reaching that they cannot be accommodated without comprehensive redrafting and renaming of the existing ACA.

- 6.1 South Africa’s international migration policy continues to be implemented through the Aliens Control Act, passed in 1991 and amended in 1995. This Act is a direct legacy of the apartheid era and in its present form is ineffectual and, on a number of counts, potentially unconstitutional. Despite this, the Draft White Paper focuses almost exclusively on the Aliens Control Act and how it might be modified. Astonishingly, the Draft White Paper specifically asserts that ‘[I]n abstract, the migration policies of the old South Africa could work for the new one’ (Section 5, para. 4, p. 11), arguing that it is only the administration and not the legislation that needs to change (Section 13, p. 51).
- 6.2 As partially acknowledged in the Draft White Paper, there are a number of areas in which the Aliens Control Act almost certainly violates the Constitution and Bill of Rights. *Inter alia*:
- (1) The statutory requirement that a resident may be forced to pursue his or her occupation only in a certain province infringes the right to freedom of movement.
  - (2) Departure forms for citizens may violate the right to privacy.
  - (3) The classification of grounds for status as a prohibited person probably violates the right to equality.
  - (4) The requirement that hotel keepers keep a ledger with the identities of all their customers may violate the right to privacy.

- (5) The Minister’s power to issue a warrant and the power of an immigration officer to arrest undocumented persons with a view to deportation infringes constitutional protection.
- 6.3 The constitutional problems with the Aliens Control Act are deeper than admitted in the Draft White Paper. On a number of issues, the Draft White Paper comes to dubious legal conclusions. For instance, the conclusion that the right to a written justification does not apply to aliens outside of the country may well be misconceived. Moreover, there are a number of substantive Bill of Rights challenges to the Aliens Control Act either presently or potentially in litigation.
- 6.4 The Draft White Paper correctly recognises that there is intervening legislation which international migration legislation must take into account and which the Aliens Control Act does not. One such piece of intervening legislation is the Municipal Structures Act of 1998. Further challenges to the Aliens Control Act are posed by the Administrative Justice and Open Democracy Bills, both due to be enacted in February 2000.
- 6.5 The specific immigration policy proposals and institutional changes proposed by the Draft White Paper in the form of the Immigration Service, Immigration Court, Immigration Review Board and security service cannot readily be accommodated within the existing Aliens Control Act.
- 6.6 The Draft White Paper’s discussion of the constitutional constraints on the parameters for a new international migration policy (Section 6, paras. 2.1-2.9, pp. 12-14) reveals four problems:
- (a) The impact of the Constitution is considered entirely in respect of the Bill of Rights, rather than with respect to government structures or institutions, claiming that the Constitution ‘does not spell out any precise duty or mandatory policy’ (Section 5, para. 3, p. 10). This would appear to be incorrect, at least in terms of establishing a security service.
  - (b) The Draft White Paper argues that there is a possibility of withholding second generation rights from non-citizens (Section 6, paras. 2.2-2.4, pp. 12-13). Although the principle of this point is not controversial, its application is likely to be so.
  - (c) The Draft White Paper argues for the doctrine of limited territorial extent of the Constitution (Section 6, paras. 2.5 and 2.6, p. 13). This does not recognise that even at the point of entry aliens would be able to exert the provisions of the Bill of Rights, including the right of equality (although subject to the limitations clause). The rights of the Constitution must apply wherever the state is acting.
  - (d) The rights of non-citizens are seen as existing only as a consequence of the rights of citizens. However, even if the rights of citizens are not an issue, this kind of discrimination would be unconstitutional.
- 6.7 Given the numerous constitutional and legislative problems with both the existing Aliens Control Act and the proposals of the Draft White Paper, separately and in conjunction, it

seems clear that there needs to be a completely new legislative framework in the form of a single, comprehensive and coherent Immigration Act. The symbolic value of a “break with the apartheid past” in terms of the positive image of the DHA should also not be underestimated.

## **7.0 Labour, Skills and Migration**

- 7.1 The Draft White Paper deals differently with labour migration (‘unskilled’) and skilled migration. To some extent this is an artificial distinction, and while it may accurately represent the current structure of the South African economy it is likely to prove insufficiently flexible to deal with future structural changes.
- 7.2 The Draft White Paper states that ‘there is a recognition that we need to attract qualified people in South Africa to offset the brain drain and to promote economic growth’ (Section 7, para. 8, p. 30). While there are indeed potential economic benefits from such skilled migration, the identified need to attract skilled immigrants to replace departing South Africans has been exaggerated. Much of the media attention given to the ‘brain drain’ has been based on methodologically unsound research, and the issue needs more careful measurement and analysis before it can be used as the basis for developing policy and legislation.
- 7.3 One way in which the Draft White Paper addresses the ‘challenge’ of attracting skilled migrants is to make it easier for qualified persons to obtain visas, work permits and temporary resident status for themselves and their families. Such simplification of administration and greater consistency in policy is to be welcomed.
- 7.4 The Draft White Paper does not adequately address the potentially conflicting needs and priorities of business and labour when it comes to determining the number and type of immigrants who are to be encouraged or allowed to come to South Africa. Although it is acknowledged that ‘the development of a migration system is closely interrelated to the management and regulation of labour dynamics and requires an interface with labour institutions’ (Section 6, para. 4.4.2, p. 19), the precise operation of that interface is not spelled out and in several places it seems that the interests of employers are considered paramount. In the absence of political leadership on this matter, there is a danger that corporate interests may be served to the detriment of labour interests, both South African and foreign.
- 7.5 There are confused and contradictory statements in the Draft White Paper over the actual mechanisms by which skilled migrants are to be selected and admitted, with a tension between a *laissez-faire* market-based approach and government control. The Draft White Paper does not fully reconcile market- and state-driven immigration management strategies and leaves considerable uncertainty over how skilled immigration will operate in practice. The reliance of the mining and commercial agriculture sectors on foreign labour is accepted and endorsed, but otherwise the question of admitting foreign labour is left to an uneasy combination of ‘the invisible hand of economic fundamentals’ and ‘negotiation among social partners’ (Section 6, para. 4.4.5 and 4.4.7, p. 20). These issues must be

- resolved if South Africa is to attain its goal of using immigration policy to benefit the country socially and economically.
- 7.6 The Draft White Paper proposes the delegation of much of the administration of migration for employment purposes to the private sector through a system of corporate work permits. These would be available to both foreign corporations and domestic corporations authorised by the Immigration Service in consultation with the Department of Labour. The number and type of permits that could be issued by corporations would be determined by negotiation with the Immigration Service under parameters prescribed by the Immigration Review Board, with quotas set on a sector-by-sector basis. Both mining houses and commercial agriculture could be accommodated within this system. This policy would have to be carefully devised, implemented and monitored if it is not to favour certain employers and sectors over others, in violation of the constitutional right to equality. There are also certain constitutional questions over the delegation of state powers to the private sector (see section 10.9 below).
- 7.7 The proposal to seek equal employment condition guarantees is important: ‘Any employer seeking to obtain the services of a foreign worker should receive certification from the Department of Labour that the conditions under which he or she intends to hire the identified foreigner, including salary and benefits, are not below the applicable collective bargaining agreement or other standards regulating the labour conditions in respect of South African workers’ (Section 7, para. 8.4, p. 31). Employers of foreign migrants would also be required to pay a proportion of their salary into a national training fund to provide training to South Africans. The cost of hiring a foreigner would thus effectively be made higher than that of hiring an equivalently-qualified South African. While acceptable in principle, the practicalities of such a system are open to doubt and it would be almost impossible to enforce such a policy in a consistent and fair manner. Skilled foreign migrants are also already likely to be more expensive to hire so this will be seen as a punitive action for hiring workers that are actually needed.
- 7.8 Such a policy could act as a disincentive to immigration and settlement by skilled non-citizens, who are seen in the Draft White Paper as being expendable as soon as a qualified South African is available to fill their position. This is only partially resolved by the proposed five-year residence requirement for permanent citizenship.
- 7.9 There is a potential contradiction in the Draft White Paper between the identified need for skilled migrants, most of whom are likely to be drawn from non-African countries, and its claimed obligations ‘to serve our people first; the people of the region and the member states of the Southern African Development Community (SADC) second; the people of Africa third; and the rest of the world last’ (Section 4, para. 4, p. 9).
- 7.10 The Draft White Paper remains implicitly and explicitly negative towards the employment of ‘unskilled’ foreign labour, most of which does come from the Southern African region. Contrary to skilled migration, labour migration is treated



- as something of a ‘necessary evil’ to be strictly controlled in order to maximise employment opportunities and conditions for South Africans.
- 7.11 The recommendations of the Draft White Paper concerning labour migration should not be an excuse for perpetuating the old migrant labour system in a new guise. The Draft White Paper surprisingly does not discuss the fate of the bilateral agreements with neighbouring countries. The implication of the recommendations are that these are no longer necessary. The alternative quota-based and corporate work permit scheme is a major departure and may be difficult to implement, but it allows government a measure of potential control over industries like mining which it has not enjoyed hitherto. Any temporary work scheme of this nature should: (a) Meet international standards of best practice; (b) Observe individual and collective rights; and (c) Support basic employment standards, collective agreements and the constitutional rights of all workers. There is some concern that the mining industry and commercial farmers will continue to enjoy preferential access to foreign labour. This should be avoided.
- 7.12 The Draft White Paper’s recognition of the need to ensure identical working conditions for South African and non-South African workers is essential. Then, foreign workers will be employed when they are truly needed or add value. But the Draft White paper surprisingly accepts the erroneous argument, apparently made in private representations by the Chamber of Mines, that South Africans will not work on the mines. There is no evidence to support this claim. What is happening is the steady and uncontrolled “externalization” of the mine workforce for other reasons. The government must ensure that there are mechanisms to avert policies that harm South Africans.
- 7.13 Given that the overwhelming majority of existing and potential labour migration comes from SADC countries, the Draft White Paper acknowledges only that ‘SADC countries are moving towards a freer movement of people in the region’ and that ‘migration policy must register this trend while protecting the interests of South Africa’ (Section 7, para. 4.3, p. 26). South Africa’s international migration policy must take full cognisance of regional policy, relations and obligations. South Africa’s commitment to regional integration and co-operation within the SADC region means a commitment to freeing up the obstacles to movements of trade, investment, capital, technology and (in the longer term) people.
- 7.14 Greater legalisation of labour migration from SADC countries would also serve to reduce the attractiveness of non-South African labour to employers whose primary reason for employing unauthorised migrants is that they are vulnerable to deportation and therefore easily exploitable. Such linkages and feedbacks must be given greater attention in the redrafting of the White Paper.

## **8.0 Gender and Migration**

- 8.1 The Draft White Paper is almost completely silent on matters of gender. This makes it difficult to make any specific comments on the document’s gender implications, as these

- are left almost entirely implicit rather than made explicit. Nevertheless there are a number of important gender concerns that need to be raised.
- 8.2 Although the Draft White Paper takes obvious pains to use gender-neutral language (e.g. ‘their’, ‘his or her’, ‘spouse’ or ‘partner’), this is done in a way that is more suggestive of gender-blindness than gender-awareness. Although it is important that the eventual legislation be written in gender-neutral language, this makes it even more important that policy is formulated in a way that fully addresses its potential gender implications.
- 8.3 Any affirmative action policy that is suggested in the Draft White Paper is expressed in terms of regional and continental preferences rather than by gender. If this is indeed to be the only basis for affirmative action in migrant admission and immigrant selection, this must be by conscious and transparent decision rather than simply by neglect or evasion.
- 8.4 The international migration system envisaged in the Draft White Paper is one driven by labour demand and skills criteria. In both skilled and unskilled categories, the potential migrant is far more likely to be male than female. Discrimination against women in the acquisition of skills and access to certain types of employment is particularly prevalent in Southern Africa, so that the very criteria proposed as the basis for selecting immigrants and admitting migrant labour mean *de facto* gender discrimination. Students are another category where there is likely to be a bias in favour of males. In failing to acknowledge this reality, the Draft White Paper implies that a male bias in the composition of international migrants is not a problem.
- 8.5 Another area in which there may be *de facto* gender discrimination is in the implementation and enforcement of policy. Such discrimination may be against either men or women. For example, men may be targeted in raids to round up unauthorized migrants and immigrants, while skilled women wishing to immigrate may face difficulty convincing officials that they are a family’s primary or only breadwinner. This latter example is one area where the Draft White Paper acknowledges that there has been unfair discrimination by Home Affairs officials in the past. Such discrimination is seldom conscious, instead being based on deeply-embedded social stereotypes. Just as there should be education to change the official mindset regarding xenophobia, so too there needs to be education to ensure gender equity in how international migration law is applied in practice.
- 8.6 The Draft White Paper acknowledges that: ‘Family reunification should become an important element of migration policy. It must be noted that artificial colonial boundary lines and forced migration have disrupted many family units’ (Section 7, para. 14, p. 34). This is likely to prove beneficial to women by removing some of the obstacles to female migration that have hitherto characterised international migration policy. Foreign spouses (and not just wives) of South African citizens are finally and unambiguously to be given rights of permanent residence. Family relations ‘would also become the ground for a temporary residence permit for relatives’ (Section 7, para. 14.3, p. 34), with temporary residence permits being made available to people within the third step of kinship of a

- citizen or the second step of kinship of a permanent resident. These are progressive developments.
- 8.7 While the granting of permanent residence permits extends to the spouses and children of any person granted such residence rights, the Draft White Paper is unclear as to the status of family members of persons entering the country under temporary corporate work permits. This raises legal, administrative and practical questions. For example, it would be difficult to formulate policy that allows entry by family members of skilled migrants while restricting access by the family members of unskilled migrants. These questions need further consideration and debate.
- 8.8 Another progressive development, in keeping with constitutional requirements, is the proposal to recognise same-sex partnerships. ‘It is suggested that the statute contains a provision enabling but not requiring the Immigration Service to regard as spouses for the purpose of the granting of permanent residence permits, two people of the same sex who provide a certain type of commitment about their relationship in a form prescribed by regulations’ (Section 7, para. 14,2, p. 34).
- 8.9 The Draft White Paper contains a number of recommendations which facilitate various types of short-term migration to South Africa, including visits for the purpose of ‘tourism, business, trade, study or other activities not requiring work’ (Section 7, para. 4.2, p. 25). Such short-term migration is commonly practised by women from neighbouring Southern African countries, notably for purposes of informal-sector trade. The easing of restrictions on such migration will therefore be of particular benefit to women from the region. Visits by (female) family members to (male) migrant workers in South Africa will also be facilitated by these short-term entry permits, thus helping to overcome some of the social costs of such labour migration.
- 8.10 The Draft White Paper’s proposal to reduce the number of foreign migrants working in the South African economy, for example on the mines, has problematic yet unacknowledged gender implications. Reducing opportunities for male migration will destroy the livelihood of the households for which they provide. This risks forcing female household members into illegal migration and related exploitation by unscrupulous employers. Evidence from Lesotho suggests that this is already a serious problem. Migration is practised as a household strategy and migration policy should likewise be formulated and applied in household strategy terms.
- 8.11 Opening up sectors of the labour market other than mining and agriculture to foreign labour will serve to remove some of the existing gender bias and should therefore be encouraged, yet this is paid scant attention. This could also act to offset the negative impact of reduced employment opportunities for male migrants. The gender composition and impact of international migration must be carefully monitored as part of the broader monitoring of migration and the labour market.
- 8.12 SAMP research has shown that female migration from neighbouring countries acts as a positive force for development in those countries and that female migrants are by and

large law-abiding, responsible, entrepreneurial and resourceful.<sup>11</sup> Any policy that facilitates female migration should therefore be encouraged. The Draft White Paper does not go far enough in this regard.

- 8.13 If Southern Africa follows international experience, it is likely to witness a dramatic feminisation of international migration over the next few years or decades. This makes the Draft White Paper’s silence on gender an important omission to be rectified.

## **9.0 Management and Institutional Reform**

The Draft Green paper proposed major institutional reform of the existing system. The Draft White paper builds on these proposals in significant and, in principle, desirable ways.

- 9.1 The Draft White Paper proposes several new institutions to manage immigration. These include an Immigration Service, an Immigration Review Board, an Immigration Court and an additional professional security service. The Immigrants Selection Boards are to be abolished but the positions of the Minister and Director-General of Home Affairs are to be retained. The inter-departmental committee is to be maintained but transformed. As it stands, the Draft White Paper is unclear about the precise structures, functions and inter-relationship of these institutions, raising a number of practical, legal and procedural concerns.
- 9.2 The Draft White Paper proposes renaming the present Chief Directorate (Migration) as an Immigration Service. The Immigration Service would continue to fulfil the migration functions of the present Chief Directorate (Migration) of the Department of Home Affairs. Organisationally, it would differ in three principal respects from the present system:
- (a) It would have organisational autonomy from the Director-General of the Department of Home Affairs.
  - (b) It, and not the Minister of Home Affairs, would have the power to adopt regulations.
  - (c) Overseeing of the Immigration Service would be divided between the Director-General of Home Affairs (administrative), the Minister of Home Affairs (political) and the Immigration Review Board (regulatory).
- 9.3 While such administrative reorganisation is to be welcomed in principle, the Draft White Paper does not adequately outline the structure, functions and powers of the Immigration Service. For example, although the Draft White Paper proposes that enforcement of immigration legislation should take place largely at community level, it does not specify what organisational form (if any) the Immigration Service will take at the sub-national (i.e. regional or local) level.

---

<sup>11</sup>Dodson, B, 1998. *Women on the Move: Gender and Cross-Border Migration to South Africa*. SAMP Migration Policy Series no. 9.

- 9.4 One specific function allocated to the Immigration Service is the granting of permanent residence. The Immigration Selection Boards which presently serve this function would be abolished, and permanent residence would be granted under a general rule that persons with five years temporary residence and an offer of permanent employment would qualify. This is a desirable move towards greater efficiency, transparency and consistency in the granting of permanent residence.
- 9.5 The Draft White Paper proposes the constitution of an Immigration Review Board, appointed by the Minister and having ‘a broadly representative composition, including a representative of the national association of local government, the three components of NEDLAC and expert businessmen and social workers’ (Section 6, para. 5.2, p. 21). The role of the Immigration Review Board is stated as being to ‘monitor and advise’ the Immigration Service (Section 6, para. 5.2, p. 21). The Draft White Paper specifies that the Immigration Review Board will have only regulatory and not adjudicative functions, but does not make clear over what subject matter the Board will have jurisdiction. The impression given is that the Immigration Review Board is an institution that will not so much make or approve rules but rather that it will approve exceptions referred to it by the Immigration Service. The precise function and powers of the Immigration Review Board, and how these relate to both the Immigration Service and Immigration Court, need to be clarified.
- 9.6 The Draft White Paper proposes the establishment of an Immigration Court to conduct judicial review of decisions made by the Immigration Service, Immigration Review Board and the Minister. This would be a specialised division within the existing judicial system and with subject matter jurisdiction limited to immigration laws. While such an institution could play an important role in fostering a more just and equitable immigration system, the Draft White Paper instead perceives the role of the Court as primarily one of enforcement and punishment (through deportation): ‘[o]ne of the major tasks of the immigration court will be the issuance of warrants for the arrest of illegal aliens’ (Section 11, para. 9.4, p. 46). Disturbingly, the Draft White Paper states that as ‘illegal aliens are not regarded as accused persons...the immigration court could adopt simplified rules of procedure and the state may not be required to provide legal aid or an interpreter, and the decision of the court could be final’ (Section 11, para. 9.4, p. 46).
- 9.7 The Draft White Paper does not specify whether the Immigration Court will operate at the level of the High Court or at the level of the Magistrates’ Courts. While the difference between the two choices should be investigated further, only the provision of specialised jurisdiction within the Magistrates’ Court would appear to present a realistic institutional solution.
- 9.8 The choice between a specialised Immigration Court and an independent and impartial Immigration Tribunal should be investigated. There are numerous advantages to the provision of administrative justice by a tribunal internal to the Department as compared to an external court within the judicial system, including greater access and arguably efficiency.

- 9.9 The Draft White Paper is unclear on the precise relationship between the Immigration Court and Immigration Service. In several places in the document, the Immigration Service is referred to as playing a prosecuting role beyond its duties of monitoring and investigation. Apparently these prosecutions would take place in the Immigration Court, which seems to be perceived largely as a means of facilitating and expediting the deportation of unauthorized immigrants.
- 9.10 The Draft White Paper’s proposals for a formalised system of review and adjudication are inadequate from the point of view of the Bill of Rights. Further challenges to the measures proposed are posed by the Administrative Justice Bill, due to be enacted in February 2000, which demands that administrative action be ‘procedurally fair’. For example, the mere theoretical possibility of an application to a court does not substitute for an independent and impartial determination of one’s status as a person arrested or liable for deportation whether by a court or a tribunal. Either an Immigration Court with a greater role than that envisaged by the Draft White Paper or a Tribunal is therefore required. Such a Court or Tribunal should also play a role in ensuring constitutional accountability with respect to the detention of people detained under the authority of the Immigration Service.
- 9.11 Also of concern is the proposed establishment of ‘additional professional security services’ under the control of the Immigration Service. Separate from ordinary criminal policing, this new institution would have investigative and enforcement powers restricted to ‘immigration, border control and the protection of buildings and structures’ (Section 6, para. 7, p. 22). It would also have ‘its own intelligence unit to deal with specific aspects of large scale criminal phenomena associated with alien control’ (Section 6, para. 7.1, p. 22). SAMP is of the opinion that such an American-style service is unnecessary, but rather that the professional training of immigration officers in enforcement should be strengthened.
- 9.12 The Draft White Paper appears not to have realised that there are constitutional constraints on the establishment of security services. Indeed even the existing Aliens Control Act may be unconstitutional in terms of the enforcement functions presently exercised by immigration officers. Consideration of these constitutional constraints also raises the complex issue of the distribution of competence between the provinces and central government with respect to the enforcement of immigration laws.

A number of other concerns regarding the operation of the security service and other institutions responsible for the enforcement of immigration laws are dealt with in the section below.

## **10.0 Enforcement**

- 10.1 Contrary to the Draft Green Paper, which proposed that international migration be refocused as an issue of growth and development, the Draft White Paper continues to be preoccupied with control and enforcement. It is based on the assumption that South Africa is plagued by an immigration ‘problem’ and that resources must be directed at detecting, apprehending and deporting ‘illegal aliens’, claimed to have ‘a negative impact on the provision of services and on our society’ (Section 6, para. 3.1, p.16). SAMP research

- suggests that migration to South Africa is for the most part highly regularised and orderly, and that undocumented or illegal migration is neither as widespread nor as overwhelming as conventional wisdom suggests. Furthermore, the Draft White Paper ignores the argument that if legal entry for certain categories of migrant is facilitated, then the incidence of unauthorised migration is consequently reduced.
- 10.2 The mentality of control and expulsion has a number of unfortunate consequences in both ethical and practical terms. Far from solving the problem, the emphasis is likely to drive undocumented migration further underground. Ironically, the Draft White Paper itself acknowledges the failure of large-scale deportations in reducing undocumented migration under the present system. Yet this strategy remains at the centre of its proposals.
- 10.3 Of concern is the proposal to enlist the support of the South African public in detecting unauthorized immigrants and reporting them to the Immigration Service. Given the country’s notoriously high levels of xenophobia, it is possible that the actions of the public may not be restricted to surveillance and reporting, but will extend to acts of violence against any foreigner, whether they are here legally or illegally. Identification of ‘suspects’ will be based on factors including skin colour, language, accent, dress and mannerisms, thus reinforcing ethnic stereotypes and racial discrimination. Based on past experience, the victims of such discrimination and abuse are likely to include South Africans as well as foreigners legally in the country.
- 10.4 The relationship between the police and the proposed immigration security service needs to be more clearly defined. Unlike the Draft Green Paper, the Draft White Paper does not release the police from the task of enforcing immigration laws. Indeed it calls for constant liaison between the Immigration Service and police structures at community level and for police to be ‘trained to detect illegal immigrants and to verify nationality and residency upon arrest of suspects or during other...interaction with the public’ (Section 11, para. 2, p. 42). Police-community relations are already fragile and this policy is likely to further undermine relations, thus compromising the police’s ability to fulfil their primary function of serving and protecting communities (including foreigners). Also, migrants will be reluctant to report acts of abuse or violence against them to the police if they thereby risk deportation. Police should instead concentrate on combating genuine immigration crime, including official corruption, and on identifying unauthorized migrants amongst people already under suspicion of criminal offences.
- 10.5 The Draft White Paper calls for collaboration between the Immigration Service, employers and labour institutions in enforcing labour and immigration laws. Employer sanctions as a means of immigration control are widely accepted, despite reservations regarding their implementation and effectiveness.<sup>12</sup> There is a further danger that immigration laws will continue to be used as a threat against migrant workers. In sectors such as construction and agriculture, where employment of undocumented migrants is common, unscrupulous

---

<sup>12</sup>Demetrios G. Papademetriou, “Think Again: Migration”, *Foreign Policy Online*, Winter 1997-98, Edition 109 (<http://ceip.org/people/papthink/htm>).

- employers use existing immigration law to inhibit foreign workers from speaking out against low wages and poor working conditions.
- 10.6 The Draft White Paper fundamentally links the provision of public services and the enforcement of international migration legislation, requiring providers of public services to report to the Immigration Service any customer who cannot provide an entry permit. There are constitutional and legal problems with the application of this principle. As the Draft White Paper itself notes, it would certainly be unconstitutional to withhold essential services. In terms of the Bill of Rights, the use for migration control purpose of information initially supplied for administering the provision of public services may violate the right to privacy and the right of access to information.
- 10.7 While the shift from border control to internal enforcement of immigration laws is a positive development, the manner in which the Draft White Paper envisages such enforcement taking place is problematic. The proposed ‘inspections’ in schools, workplaces and communities could easily take the form of raids of any place where there is a concentration of non-citizens (documented or undocumented).
- 10.8 The Draft White Paper suggests that the Immigration Service may need to issue internal South African travel documents for traders and other migrants not in possession of passports or other documentation. Such separate documentation for purposes of identification and control would be clearly reminiscent of apartheid-era pass identification and would likely be looked on unfavourably by the citizens and governments of neighbouring states. Assuming such a policy were to be put in place, the issuance of such documents would need to comply with the 1997 Identification Act.
- 10.9 In a number of instances, the Draft White Paper envisages the Immigration Service delegating to non-state organisations the responsibility for handling visas and permits. For example corporations employing foreigners and places of learning accepting foreign students would become responsible for much immigration administration. Beyond the policy questions raised, there may be constitutional and legal obstacles to this delegation of state powers to the private sector. At a minimum, any visas or permits so issued will need to be endorsed by the Immigration Service to avoid an unconstitutional delegation of power as a violation of the principle of separation of powers.
- 10.10 The Draft White Paper proposes that the Immigration Service should operate separate detention facilities but does not provide further detail other than to say that such detention facilities could be privatised. Given past experience, close attention will need to be paid to the government’s system for monitoring private detention facilities.
- 10.11 The aim should be to achieve a management-oriented international migration system based on voluntary compliance with immigration law. If South Africa is to develop such a system, the attitudes and approaches of those responsible for immigration law enforcement need to change. While advancing some progressive measures toward this end, the Draft White Paper does little to undo the negative stereotyping of migrants and immigrants. If anything, the internal, community-based enforcement strategy set out in the Draft White



Paper will reinforce anti-immigrant attitudes. While the proposed liberalisation of the immigration regime is to be welcomed, it is simultaneously undermined by the draconian nature of the envisaged enforcement strategy.

## **11.0 Final Recommendations**

A large number of specific recommendations have been made throughout this discussion document and not all are repeated here. However a number of key recommendations warrant immediate attention in the next phase of policy development.

- 11.1 The Draft White Paper is a welcome discussion document but contains flaws and a lack of detail on some key issues. Redrafting the White Paper and translating it into effective, progressive and constitutionally sound legislation therefore demands some rethinking and not merely minor modification.
- 11.2 Our analysis suggests that the policy framework section of the Draft White Paper (Section 5) is especially weak, despite being crucial to the formulation of sound international migration policy. This section in particular needs to be rethought and reworked.
- 11.3 The Draft White Paper does not adequately consider other legislation already in existence or in the process of enactment. Co-ordination and harmonisation with other Acts is essential to the development of workable migration policy and legislation.
- 11.4 The Draft White Paper also contains a number of potential conflicts with the provisions of the Constitution. These require the attention of experts in constitutional law, who could be brought into the team responsible for the further development and refinement of the White Paper.
- 11.5 The Draft White Paper is based on certain problematic assumptions concerning the scale and impact of unauthorized migration. Policy must be more sensitive to ground-level realities, which can be ascertained only through methodologically sound research, and must not simply bow to unfounded popular perception of an immigration ‘problem’.
- 11.6 Assumptions of an ‘illegal immigrant crisis’ underlie the Draft White Paper’s prioritisation of enforcement and control rather than immigration management. In redrafting the White Paper, priority could be given to the development of a broad immigration vision and plan. In drafting such a plan, greater attention should be given to factors beyond the narrow economic sphere, as well as to considerations of gender.
- 11.7 The staffing of border posts with Lesotho only began in 1963. The cost effectiveness of the Lesotho border is questionable and exercises little inhibition on migration to and from South Africa. We recommend an investigation of the costs and benefits of policing the Lesotho border and an assessment of the positive and negative impacts of a reciprocal “open borders” arrangement with Lesotho. Likewise we recommend a study of the effectiveness of deportations in stopping revolving-door migration.

- 11.8 The Draft White Paper is largely silent on issues of training and service delivery. These are critical areas to improve the efficiency and capacity of the DHA and to improve public perceptions of the immigration and citizenship services. Adequate resources should be made available to the DHA to ensure (a) proper and adequate training of all field personnel at all levels from senior management to field operations; and (b) the development of an in-house capacity, through a new research department, to collect, process and analyse immigration data, to make recommendations and to monitor the impacts of new policy. SAMP is willing to make its expertise available to assist the Department in these areas.