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Crossings

THE NATION
AND THE
REGION

South African immigration reform

DESPITE THE GROWING RECOGNITION OF THE NEED FOR COOPERATION AND HARMONISATION OF MIGRATION POLICIES IN A GLOBALISING WORLD, THE DOMINANT VIEW PERSISTS THAT STATES HAVE THE RIGHT TO SET AND IMPLEMENT THEIR OWN POLICIES WITHOUT INTERFERENCE OR CONSULTATION WITH OTHER STATES. IMMIGRATION POLICY REMAINS THE SOLE PRESERVE OF SOVEREIGN STATES, WRITES **JONATHAN CRUSH**. INDEED, NATIONAL IMMIGRATION POLICY IS, ALMOST BY DEFINITION, ABOUT WHAT POLICIES BEST SERVE THE NATIONAL SELF-INTEREST.

Governments may, and often do, consult a broad range of domestic stakeholders when formulating or reformulating policy. They rarely consider it necessary, or even advisable, to consult other countries about their national legislation and policy. The United Kingdom, for example, recently introduced a points system for selecting immigrants. The Home Office did not consult potential source countries to see if they agreed with the broad policy principle or substantive details of the new system. Similarly, in 2002, Canada changed the criteria for selection in its own points system to place greater emphasis on prior work experience and language ability.

Canada acknowledges that these changes will probably lead to a shift in the major source countries for immigrants (for example, making it more difficult for people to immigrate from China and easier for those from India). Neither India nor China, nor anyone else, was consulted in making this change.



TEMPORARY HOME: Over the years, hundreds of thousands of migrants from South Africa's neighbours have built the South African economy, underdeveloped their own and sent remittances home to alleviate poverty and hardship. *african-pictures.net*

The current acrimonious debate in the United States about tighter border controls, guest worker schemes and legalisation for undocumented migrants is also largely a domestic debate, even if Latino migrants themselves within the United States are making their voices heard on an unprecedented scale.

South Africa's long night of immigration reform between 1994 and 2004 followed a similar pattern. Between 1994 and the 2004 version of the Immigration Act there was a Green Paper and White Paper on International Migration, numerous revised drafts of immigration legislation to replace the Aliens Control Act and seemingly endless consultations, hearings and conferences in Parliament. In other words, there was an extensive domestic process of consultation and debate about the shape of post-apartheid policy.

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How far is SA willing to go on free movement of persons in SADC?

AFTER NEARLY TEN YEARS OF DEBATE ABOUT THE DESIRABILITY AND PRACTICABILITY OF THE FREE MOVEMENT OF PERSONS IN THE SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC), A DRAFT FACILITATION PROTOCOL WAS ADOPTED IN AUGUST 2005. **VINCENT WILLIAMS** AND **LIZZIE CARR** WRITE THAT SOUTH AFRICA WAS ONE OF THE SADC MEMBER STATES TO LEAD THE WAY IN FORMALLY SIGNING THE PROTOCOL, BUT CAUTION THAT IN PRACTICE THE COUNTRY MAY STILL BE LAGGING FAR BEHIND.

All Southern Africa Development Community (SADC) member states have generally accepted that cross-border migration is an important instrument to achieve regional integration and that the free movement of people is also the inevitable outcome of regional integration. However, there are still significant concerns about the potential negative economic and security implications of free movement.

While the Draft Facilitation Protocol represents a first step in promoting eventual free movement, it remains cautious about the extent of this free movement in the short to medium term.

Key to the provisions of the Protocol is the call for the harmonisation of migration policies, legislation and practices of SADC member states through amendments of national policies and regulations. Thus, the question faced by all member states that have or will become party to the Protocol is the extent to which they would need to amend their existing policies and legislation.

The harmonisation of policies and legislation is not just required between member states, but critically also between government departments within a particular state. For example, there has to be consistency between immigration policies and laws on the one hand and labour policies and laws on the other if the SADC Protocol is to be implemented successfully.

In this respect, South Africa has a distinct advantage in that its Immigration Act makes provision for the establishment of an Immigration Advisory Board (IAB)

which is made up of representatives from various government departments, private sector organisations and civil society organisations. Under the rubric of “cooperative governance” the function of the IAB is to provide policy advice to the Minister of Home Affairs, taking into account the impact that such policy will have on all spheres of government.

The table below, which compares the key policy elements of the Protocol and those of South Africa’s Immigration Act, demonstrates that South Africa’s Immigration Act is already highly consistent with the Protocol that it has endorsed and would not require any substantive amendments.

However, the concept of free movement in the region and the explicit subordination of domestic policies and legislation to a regional Protocol suggest that states that have signed and ratified the Protocol will have to relinquish a certain amount of internal control over migration policy, legislation and administration. It is at this level that the prospects for free movement on the basis of a regional Protocol could potentially become problematic for member states.

The principles that underpin immigration policies and laws are related to the sovereignty of the nation state, the integrity of national borders and the sole right of the state to govern entry into its national territory. This “protectionist” approach to migration will likely prevail in domestic policy as long as there remains the perception that migration generally, and free movement in particular, will have more

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POLICY ELEMENTS	PROTOCOL	SA IMMIGRATION ACT
Documentation	<ul style="list-style-type: none"> • 90 days visa-free entry for SADC state citizens; • Uniform border passes for citizens residing in border areas; • Machine-readable passports. 	<ul style="list-style-type: none"> • 90 days visa-free entry for all foreign nationals; • Uniform border passes for citizens residing in border areas; • Machine-readable passports.
Security	<ul style="list-style-type: none"> • State must provide for measures to prevent illegal immigration; • State must supply necessary security and immigration authorities to enforce Protocol. 	<ul style="list-style-type: none"> • Intends to prevent illegal immigration; • State will provide necessary security and immigration authorities to enforce migration policy.
Residence and Establishment	<ul style="list-style-type: none"> • SADC state citizens must be afforded privileges of residence and establishment in accordance with domestic policies of host country. 	<ul style="list-style-type: none"> • Provides domestic policies on residence and establishment which are applicable to all foreign nationals.
Population Register	<ul style="list-style-type: none"> • Consolidated register of all citizens and permanent residents. 	<ul style="list-style-type: none"> • Consolidated register of all citizens, births, and deaths.
Border-Crossing Sites	<ul style="list-style-type: none"> • Separate SADC desk at each major port of entry; • Bilateral agreements with mutual border states to coordinate operational hours of border-crossing sites. 	<ul style="list-style-type: none"> • No specific stipulation documented.
Expulsion of Individuals	<ul style="list-style-type: none"> • Expulsion of SADC state citizens with a valid residence permit may only occur for reasons of public order, public health or national security; • Written notice of expulsion; • Sufficient mechanism for appeal of expulsion notice in a domestic court; • Consultation of expelled individual with appropriate consular authority; • Protection from collective or group indiscriminate expulsion; • Suspension of expulsion upon notice of appeal. 	<ul style="list-style-type: none"> • Expulsion of any foreign national with a valid residence permit may only occur for reasons of public order, public health or national security; • Written notice of expulsion; • Mechanism for appeal in domestic court; • Establishes oversight Inspectorate to guarantee that all rights afforded to expelled individuals are properly granted.

South Africa a long-standing opponent of free movement of people in the region

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negative than positive outcomes.

In this regard, the implementation of the Protocol will require much more than alterations to immigration legislation or the introduction of mechanisms (such as SADC desks at ports of entry) to facilitate entry. In the longer term, it will also require a fundamentally different philosophical approach to migration in the region; an approach that emphasises and seeks to enhance the positive impact that migration could have.

As one of the more affluent SADC member states, South Africa has been a long-standing opponent of the free movement of people in the region. This has been in part because many South African citizens believe that if migration policy and law make it possible and easier for people to cross borders it will result in a one-way flow of migrants from the less to the more developed countries in the region, including South Africa.

The ongoing perception and belief among citizens and within government that migrants will drain precious social welfare resources, compete unfairly for jobs and generally place a burden on the South African economy has been a key factor in determining South Africa's position on free movement in the region.

In signing and supporting the Facilitation Protocol, South Africa has implicitly committed itself to countering these negative perceptions of migrants and migration, and to promoting the potential positive contribution that migration can have on South African society.

This is clearly consistent with the more liberal approach to migration in the region, which is what the Draft Protocol sets out to achieve. However, whether this is indicative of a substantially different philosophical approach – namely the willingness to relinquish control over certain aspects of migration in what appears to be a contradiction of the principles of state sovereignty and the integrity of national boundaries – remains to be seen.

Vincent Williams is a Project Manager with SAMP and Lizzie Carr was an IDASA/SAMP intern from the University of North-Carolina at Chapel Hill.

Kick-starting the debate

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At no point, however, did the drafters and drivers of the new policy systematically consult other countries in the Southern African Development Community (SADC). It was not considered necessary to consult beyond South Africa's borders by the Green Paper and White Paper Task Teams, the Portfolio Committee on Home Affairs or the Department and Ministry of Home Affairs.

At one level, this is completely unremarkable. South Africa's Immigration Act was a piece of legislation by and for South Africans. Why should countries from the SADC have had any say in its formulation? The problem, though, is that in assuming that SADC countries should have no voice in the making of the new policy, their input and their interests were assumed or ignored.

Other SADC countries do have a keen interest in the shape of South African immigration policy. Those policies have always affected them deeply. Over the years, hundreds of thousands of migrants from South Africa's neighbours have made the country their temporary home, built the South African economy, underdeveloped their own and sent remittances home to alleviate poverty and hardship.

Although they have had little say in making

South Africa's new policy, the impact on them is likely to be considerable. It is therefore imperative to understand exactly what the implications are of South African immigration policy on its neighbours. Will it make cross-border movement easier or more difficult? Will it mean fewer or more job and other economic opportunities in South Africa? Will it reduce or facilitate informal cross-border trade and the flow of remittances? Will it lead to a brain drain to South Africa from skills-starved neighbours? Will it decrease or exacerbate the xenophobia that makes the lives of many migrants a misery? Will its enforcement provisions protect or violate the basic rights of citizens of neighbouring countries? Will it, in seeking to serve South Africa's national self-interest, have negative implications for the national self-interest of its neighbours? These are critical questions requiring much additional discussion. This issue of *Crossings* is intended to kick-start the debate.

Dr Jonathan Crush is the Director of the Southern African Migration Project at Queen's University in Canada.

Editorial

In this edition of *Crossings* we focus on the contents and implications of South Africa's Immigration Amendment Act of 2004 that came into effect in July 2005 when the Regulations were finalised. In addition to providing a brief summary of the Act (see pages 5 and 6), we look at and comment on it from various angles.

First, we make the point that there was no active engagement with, or solicitation of input from, other Southern African Development Community (SADC) member states during the process of drafting South Africa's immigration law. We ask whether this might not have been a crucial step in the process, given that South Africa's immigration law will have a significant impact on the region as a whole.

We then focus specifically on the similarities and differences between South Africa's immigration law and the Draft SADC Protocol on the Facilitation of Movement of Persons. In this regard, we conclude that while the similarities between the provisions of the two documents outweigh the differences, it is not so much in terms of consistency that there is a problem, but rather in terms of orientation.

The general thrust of the argument is that the proper harmonisation of immigration policies, laws and practices at a regional level will require the voluntary surrender of a degree of sovereignty on the part of individual states, but that this is not likely to happen in the short term.

We speak to the Chief Director of the Immigration Inspectorate and ask him about his views on the purpose and objectives of the Immigration Amendment Act and whether he thinks that the current immigration legislation is appropriate in both a national and regional context.

Two articles focus on the implementation of the Act. The first argues that despite its noble intentions in facilitating the movement of persons, this is likely to be undermined by a preoccupation with enforcement. The second looks at the implementation of the Act since coming into effect and demonstrates the actual shortcomings in terms of service delivery.

We also report on a recent project in which we interviewed female migrants in South Africa, asking them about their experience of migration. We use this as a basis to look at whether, and the extent to which, the new Immigration Act may facilitate or complicate the migration of women.

Finally, we provide a chronological overview of the process of South Africa's immigration legislation drafting, which in and of itself is quite revealing in terms of helping us to understand the complexities of the process.

South Africa's approach to immigration, as legislated and implemented through the Immigration Amendment Act of 2004 and its accompanying Regulations, will have a profound impact on the country's ability to attract skilled people from other parts of the world and promote foreign direct investment and tourism – all key factors in ensuring sustainable economic growth, not only at a national level, but also at a regional level. It is too early to assess whether, in fact, the new immigration laws provide an appropriate and adequate basis upon which to achieve these objectives. Only time will tell.

In his own words

GNINUMZI NTLAKANA IS THE CHIEF DIRECTOR OF THE INSPECTORATE DIRECTORATE IN THE NATIONAL IMMIGRATION BRANCH THAT WAS ESTABLISHED FOLLOWING THE PASSAGE OF THE IMMIGRATION AMENDMENT ACT OF 2004. **NTOMBI MSIBI** ASKED HIM HIS VIEWS ABOUT THE PURPOSE AND OBJECTIVES OF THE ACT.

NM: What in your view are the key objectives of the Immigration Amendment Act 19 of 2004 and what are the factors that influenced or had an impact on the contents of the Act?

GN: There are two primary objectives. First, to achieve alignment between the Act itself and the Immigration Regulations. We have tried to ensure that the Minister's powers are established in the Act, as opposed to the previous Act where powers in the Regulations exceeded the powers that were in the Act. Secondly, the issue of facilitating movement. The President, in his 2004 State of the Nation Address, made it clear that our immigration regime has to facilitate trade and facilitate movement of persons into South Africa, so the amendments were also made to ensure that our Immigration Act, as far as possible, is facilitative in nature and allows for better movement of persons for various reasons into and out of South Africa.

NM: To what extent, do you think, will the contents and provisions of the Act contribute to the achievement of the objectives, particularly those objectives related to facilitating economic growth, attracting skilled foreigners, countering xenophobia, promoting a human rights-based culture of enforcement and preventing and reducing illegal immigration?

GN: I think this is the question that is being asked firstly by government itself in the context of ASGISA [the Accelerated and Shared Growth Initiative for South Africa] and JIPSA [the Joint Initiative on Priority Skills Acquisition]. The position of the Department has always been that the Act is adequately facilitative in nature. If you look at the array of permits that are in the Act, it covers almost all the reasons that should make it possible for one to invest in and travel to South Africa for economic reasons, including the issue of skills. We must concede that the issue, the biggest challenge that we have identified, even in our report to Cabinet, has been the mechanisms and ability of the Department to deliver those services. The policy is very clear, it is very facilitative. It is the implementation of that Act and the Regulations that is currently a matter of concern. But I must state that even in the whole array of permits and so on that we have to deal with, we have managed to isolate, in interaction with various stakeholders, the areas of concern. The first has been the intra-company transfer work period where business has said that those periods, the period of validity of two years, needs to be reviewed and we would need to consult with our stakeholders because that is not a Home Affairs determination, it will need to be done with the DTI [Department of Trade and Industry] and other stakeholders. And the only other permit is the general work permit, where it is felt that the process is cumbersome. Even that unfortunately is not only up to Home Affairs. There are

other stakeholders, like SAQA [the South African Qualifications Authority], that have to validate and verify foreigners' qualifications and so on. So I still insist the policy is responsive. Implementation is not what it should be but we are working on it.

NM: The Act makes reference to the need to make sure that "...security considerations are fully satisfied..." Can you elaborate on what this means?

GN: Immigration has a dual purpose. One is that of enabling and facilitating movement of people across borders and the second is really to ensure the integrity of those borders. So the provisions really are about saying that in the process of enabling movement there should be consideration of all related issues. When a person crosses borders into South Africa or out of South Africa, that person is a human being, a person with social and political and different dynamics. So when Gcinumzi comes into South Africa, even if he wants to invest, we need to make sure that Gcinumzi, for example, is not investing money that is stolen from another country. So our processes need to ensure that there is sufficient liaison between all the stakeholders, especially security stakeholders, so that in the process of facilitating movement of persons you do not place the lives of citizens of South Africa under threat; [that] due to an over eagerness to facilitate this movement [you are still] ensuring the protection of those citizens.

NM: The Act also makes reference to the role of South Africa in the continent and the region. In your view, does the Act sufficiently take into account and respond to the realities of migration in the region and the continent?

GN: When you deal with migration you are dealing with a social phenomenon so it is impossible [to] say the Act sufficiently covers the human condition, but we always take our cue from our foreign policy. We have said, and government has said, that South Africa's security depends on the security of the region and the security of the continent. We fully embrace the concept of migration and development as a key policy that we pursue, so it's a dual approach really to say that we can't just have immigration policies that are responsive. Your economic policy, for example, needs to reflect your commitment to the continent and to the region. So I would say comparatively speaking it has been said by even our counterparts in SADC [the Southern African Development Community] that our Act is generally very responsive. There are of course realities. You cannot please everyone all the time. So I do think that it is work in progress; your



Gnumzi Ntlakana, Chief Director of the Inspectorate Directorate in the National Immigration Branch. *Ntombi Msibi*

immigration policy can never be rigid and cast in stone otherwise you get the British experience which you do not want to see in Africa.

NM: What do you think are the major strengths of the Act?

GN: Remember that this Act is hardly a year old. So in terms of reviewing its impact, it will only be opportune in about a year to start saying what has been the impact of the Act. But to date I would say the biggest strength is that the changes that are there, contrary to popular belief, have not been so substantive that they have rendered the whole immigration regime unusable. There have been minor changes in the Immigration Act, it has therefore ensured that there is stability in terms of the implementation, in terms of the processes. Secondly the wide variety of permits and so on is very useful. The fact that the Act is responsive to the needs of South Africa is a strength because we're reviewing our policies on an annual basis, issues like the quota permits. Accommodation is made there for the Minister to publish quota permits at least annually so there can be reviews, so I think it's a very open-ended facilitative Act which does not look at immigration as a purely policing function but looks at it also as a facilitative function.

NM: What do you think are the Act's major weaknesses?

GN: I think the weakness primarily is that it has not been widely communicated; one of the things that

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you find is that the Act is not commonly known. When people argue about the Act they argue from a position of ignorance which is probably not a problem with the Act itself but with how we are managing the Act. I can't think of any material difficulties with the Act other than those that I have mentioned where business has raised problems with certain permits which are really operational and that can be resolved.

NM: *Are there any shortcomings in the Act? What might these be?*

GN: Other than the issues I have raised I wouldn't have any particular issues. But I think stakeholder liaison is important, we would depend on the stakeholders to highlight some of the areas that they deem to be problematic in terms of the implementation of the Act so that we, as a responsive government, would then be able to see what possible solutions can be implemented.

NM: *In terms of implementation – it is envisaged that not only the DHA [Department of Home Affairs], but several other government departments will be involved, either directly or indirectly. Do you think capacity for implementation exists within the DHA and other government departments?*

GN: One of the Act's objectives is to create an enabling environment for other departments or stakeholders to play their role in assisting with the enforcement of the Act, so I think insofar as there needs to be interdepartmental liaison, the Act is sufficiently empowering the Department [of Home Affairs]. Also in terms of the systems that government has put in place, the Department [is empowered], especially through the cluster processes of government. I think we need to remember that Home Affairs doesn't work in isolation. So as part of the clusters, for example, your security cluster or your international relations peace and security cluster, there is sufficient room for coordination, for consultation with government departments. It is a process that is basically a year old in terms of the mechanisms we are trying to put in place, but there is room for improvement.

NM: *What do you think are the most important needs/requirements in terms of implementation of the Act and its accompanying regulations?*

GN: I think the biggest challenge that faces the Department, which is probably related to the previous question, is that of capacity. And capacity is not just about the numbers. For example, there is currently a drive in Home Affairs to professionalise the Department, so it's about the skills and abilities of the people that you recruit to assist at your front desk. It is also issues of changing business models, to start saying how do we make sure that citizens are able to get documents, to get the assistance that they need within the required turnaround times. And I think that's where the challenge lies. The biggest challenge is to capacitate Home Affairs in terms of people, numbers, skills, human resources, the technology that we are using and also in terms of the infrastructure, I think it has been pointed out many times that your typical Home Affairs [office] is not necessarily a friendly place to be in, so I think it is those challenges of delivery that probably pose more of a challenge than the Act itself.

NM: *If you could rewrite South Africa's immigration laws, what are the most significant changes that you would make to the existing Act?*

GN: Fortunately I do not have to rewrite South Africa's immigration laws, and I wouldn't think that there are significant changes that would have to be made to the Act itself. As I said before, it is really about saying "how do we improve our obligation to deliver services" and I think as a manager more than a legislator I would be more concerned with that question. In terms of the Act now, what are the responsibilities I as a manager have in ensuring that the Act is implemented and is applied constantly throughout the Republic?

Ntombi Msibi is a Researcher at the Southern African Migration Project in Johannesburg.

Immigration Act 19 of 2004: A summary and review

AFTER NEARLY TEN YEARS IN THE MAKING, SOUTH AFRICA'S NEW IMMIGRATION LAW WAS EVENTUALLY FINALISED WITH THE PROCLAMATION OF THE IMMIGRATION AMENDMENT ACT NO 19 OF 2004. THIS ACT PROVIDES FOR SIGNIFICANT AMENDMENTS TO THE IMMIGRATION ACT NO 13 OF 2002 AND CAME INTO EFFECT IN JULY 2005, WHEN ITS IMPLEMENTING REGULATIONS WERE FINALISED. **VINCENT WILLIAMS** SUMMARISES THE KEY PROVISIONS OF SOUTH AFRICA'S NEW IMMIGRATION LEGISLATION.

The Preamble to the Immigration Act sets out the overall aims and objectives of South Africa's revised immigration law and provides important insight into the orientation, purpose and function of the newly-established immigration regime. In broad terms, the Act is designed to provide for the regulation of the admission of foreigners to, their residence in, and their departure from South Africa. In specific terms, the Act sets out various objectives, as follows:

- To ensure that the requirements and criteria for obtaining immigration permits are objective, predictable and reasonable, and to simplify procedures to ensure that permits are issued as speedily as possible;
- To enable the state to retain control over foreigners to satisfy security requirements;
- To promote economic growth through the employment of needed foreign labour, the facilitating of foreign investment, the promoting of tourism and increasing the development of South Africa's human resources capacity;
- To make sure that xenophobia is prevented and countered;
- To promote a human rights-based culture of enforcement;
- To ensure that South Africa complies with its international obligations; and
- To educate civil society on the rights of foreigners and refugees.

In terms of access to South Africa's labour market, which is one of the key imperatives underpinning the redrafting of the immigration legislation, the Act provides for several ways to legally migrate to South Africa for the purposes of employment:

General work permit

This is for individuals who have an offer of employment in their possession and need to obtain authorisation to enter and work in South

Africa. The Department of Labour must provide certification that no suitable South African citizen or permanent resident could be recruited for this job before issuing such a permit.

Corporate work permit

In terms of this provision, private sector corporations can apply to employ a predetermined number of foreign workers without having to apply for a separate general work permit for each. Both the Department of Labour and the Department of Trade and Industry must provide certification that the corporation is reliant on or in need of foreign workers.

Quota work permit

The regulations that accompany the Act determine that there are certain economic sectors that experience shortages of skilled personnel and establish that a certain number of foreigners may be employed by corporations in those sectors until the quota has been filled. The quotas are determined through consultations with the Department of Trade and Industry.

Intra-company transfer permits

This is a once-off, non-renewable permit, valid for two years, issued to employees of multi-national companies that allows them to work in South Africa without having to apply for a general or quota work permit

Exceptional skills or qualifications permit

This is a work permit issued to a person who is deemed to be exceptionally skilled or qualified. It was designed to fast-track applications for work permits for especially skilled individuals.

In addition to the above employment-related temporary residence permits, provision is also made for business permits, study permits and

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Immigration law

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visitors' (tourist) permits. An interesting addition to the visitors' permit is that these may now also be issued for up to three years for the purpose of research, sabbaticals and voluntary or charitable activities provided that the purpose of the visit does not coincide with remunerated employment.

In terms of permanent residence permits, permission can be obtained by people who have had a valid work permit for five years or longer and/or who have received an offer of permanent employment. Similarly, the spouse of a citizen or resident will be granted permanent residence after five years provided that a "good faith spousal relationship" continues to exist. A third category of "direct residence" covers people investing in or establishing a business in South Africa, on condition that they provide the necessary financial guarantees and undertakings. Permanent residence can also be granted to people planning to retire in South Africa or who have relatives in South Africa, on condition that they provide the necessary financial guarantees.

Like the previous version of the Act, the amended version makes provision for the establishment of an Immigration Advisory Board (IAB). The Act specifies that it must consist of the Director-General of the Department of Home Affairs as well as the head of the National Immigration Branch, representatives of a wide range of government departments including Foreign Affairs, Trade and Industry, Defence, Safety and Security, Education and Labour, a representative of organised business, a representative of organised labour and up to five individuals appointed by the Minister "on the basis of their knowledge, experience and involvement pertaining to immigration law, control, adjudication and enforcement".

In terms of its function, the Act stipulates that the Board will have an *advisory* role concerning immigration policy and regulations or any other matter related to the Act for which the Minister may request advice. Importantly, the Board also has the function of serving as the interdepartmental forum on all matters concerning immigration. In other words, it is envisaged that the IAB will be responsible for ensuring coordination and cohesion when it is required in the formulation and implementation of immigration policy, regulations and procedures.

Section 8 of the Act sets out the Review and Appeal procedures. It provides for two types of appeals. The first applies to people who have been refused entry to South Africa or, if already in the country, are found by an immigration officer to be "illegal foreigners". As part of the process of refusing entry or declaring a person an "illegal foreigner," an immigration officer is obliged, in terms of the Act, to inform the person that he or she may request the Minister of Home Affairs to review the decision. If a person has been refused entry and has appealed to the Minister, the Act specifies that the person must leave the country and await the Minister's decision outside the Republic. A person already in the country who has been found to be an "illegal foreigner" cannot be deported pending the Minister's decision.

The second appeal procedure relates to people, other than those referred to above, whose rights have been "materially and adversely affected" by a decision taken in terms of the Act. Such a person must be informed in writing of the decision and must be given reasons for the decision. An appeal may then be lodged with the Director-General of Home Affairs who may uphold, reverse or modify the original decision. If the person does not accept the Director-General's decision, he or she may appeal to the Minister, who will then uphold, reverse or modify the decision taken by the Director-General.

The significance of the review and appeals procedure is that it restricts the options of appeal to the Ministry and Department of Home Affairs. In other words, the Immigration Act does not provide for a person to appeal a decision or action of the Department or Ministry of Home Affairs through an independent body or the courts. This does not, however, preclude that person from using other legislation, such as the Promotion of Administrative Justice Act, to challenge the decisions and actions of the Department or Ministry of Home Affairs.

As the primary mechanism for enforcing immigration law, the Act establishes an Inspectorate to investigate any suspected contravention of the Immigration Act. The Inspectorate has wide-ranging powers of investigation, search, seizure, arrest and detention, including the power to compel people to appear before the Director-General and answer questions, give evidence or produce relevant documentation.

Several other provisions on enforcing immigration law are also contained in the Act. These include:

- The right of an immigration official or police officer to ask a person to identify him or herself as a citizen, resident or legal foreigner and, if the officer has reasonable grounds to believe that the person is not entitled to be in the country, he or she can take the person into custody to interview him or her and/or verify his or her identity or status. If necessary, the officer can detain that person until his or her status is determined;
- The obligation on organs of state and other prescribed institutions to try to verify the identity or legal status of a person receiving services. If they are unable to do so, they can report such a person to the Director-General of Home Affairs, provided that services shall not be withheld;
- The requirement that the owner or manager of premises that provide lodgings and/or sleeping accommodation for payment should keep a register of everyone using their services and produce that register when requested by an immigration or police officer; and,

- Making it an offence to fail to comply with any of the provisions of the Act or knowingly and wilfully to contravene any part of the Act or help anyone else to contravene any part of the Act.

- Anyone convicted of contravening the Act could be liable to a fine or imprisonment or both, the severity of which would depend on the nature, extent and frequency of the contravention(s).

The Act in its current form is certainly a significant improvement on the previous Aliens Control Act and the original version of the Act that was passed in 2002. Specifically, the objectives of the Act to facilitate legal entry and develop reasonable, objective and predictable criteria for entry should be welcomed, as should the objectives of promoting rights-based enforcement strategies, using immigration policy and law to promote economic

growth, countering xenophobia and engaging in public education programmes on the rights of foreigners. It is a more balanced set of objectives and desired outcomes, substantially different in both tone and intent from the original Act, which appeared to have as its primary emphasis the need to prevent illegal immigration to South Africa.

However, despite this, there is still an emphasis on enforcement in the current Act, with much detail on mechanisms and strategies for enforcement. Other than removing some of the more onerous requirements that were in the previous Act – such as the need for work permit applicants to submit certification from a chartered accountant – the current Act still does not go far enough in detailing how it intends to facilitate legal immigration, promote economic growth, counter xenophobia and develop a rights-based culture of enforcement.

While it is true that the finer details of implementation should be contained in the regulations, the fact that the Act does not elaborate on the more positive objectives described above is a substantial shortcoming. Arguably, just as the Act establishes an Inspectorate and defines its powers and authority for the purpose of enforcement, it could also institutionalise some of the other objectives. This may have been partly what was envisaged in the establishment of the IAB, but the IAB acts only in an advisory capacity to the Minister and, in terms of its composition, it is probably too unwieldy and represents too many diverse interests to deliver any effective results.

Perhaps, as the current Minister has pointed out on more than one occasion, the biggest problem with the Act is that its provisions are not informed by any substantively agreed on set of policy outcomes, given that the process of developing policy (in the form of a White Paper) was not completed before the process to draft legislation was put in place. As a consequence, amendments to immigration legislation since 2002 have been ad hoc and by default rather than by design.

The question remains – what are the objectives of South Africa's immigration regime? If the answers can be agreed on and written up as policy statements with desired outcomes, perhaps the immigration legislation itself, and particularly the implementation of it, would be less fragmented and it would be possible to establish regulations that promote the achievement of the policy objectives.

Vincent Williams is a Project Manager with SAMP

Law in practice may subvert its declared intentions

WHEN THE IMMIGRATION AMENDMENT ACT WAS PUBLISHED IN THE *GOVERNMENT GAZETTE* IN OCTOBER 2004, IT SEEMED AS IF CONCERNED STAKEHOLDERS MIGHT FINALLY BE ABLE TO BREATHE A SIGH OF RELIEF. AT FIRST GLANCE, THE LONG-AWAITED AMENDMENTS APPEARED TO PROVIDE SIGNIFICANT IMPROVEMENTS TO THE IMMIGRATION ACT OF 2002. HOWEVER, AS **EMILY BRICE** ARGUES, IT IS NOW APPARENT THAT EVEN WITH THE AMENDMENTS, THE ACT CONTINUES TO EMPHASISE ENFORCEMENT AND, IN PARTICULAR, CONCERNS ABOUT UNDOCUMENTED IMMIGRATION RATHER THAN THE FACILITATION OF MOVEMENT SUGGESTED IN THE PREAMBLE.



SOUTH AFRICAN POLICE DEMAND PROOF OF CITIZENSHIP: The Immigration Amendment Act's preoccupation with enforcement is demonstrated explicitly in terms of its provisions and implicitly with the use of particular language that appears to set the tone for the legislation as a whole. *PictureNet Africa*

Within the new immigration legislation, the preoccupation with enforcement is demonstrated explicitly in terms of certain provisions of the Act, but also implicitly with the use of particular language that appears to set the tone for the legislation as a whole. Whether consciously intended or not, the Act manages to erect subtle linguistic barriers between citizens and non-citizens – for example, section 2 situates foreigners within the context of their status as “non-citizens” rather than in relation to their categories of residence.

Clause xvii states, “foreigner means an individual who is not a citizen,” and pointedly does not include the previous Act’s caveat “nor a resident.” This has the effect of grouping legal permanent residents together with temporary residents as well as undocumented persons, though the Act does define illegal foreigners separately. While appearing to be minor, these changes carry more weight than a simple adjustment of diction; they appear to contribute to defining immigration policy on the basis of exclusion and protectionism.

The terminology of the Act is made all the more troubling by new provisions which allow for greater discretion by the Department of Home Affairs in enforcing the legislation. The Act contains a number of clauses that extend the control of the Director-General in determining immigration affairs. Section 35 allows for the arrest and detention of a suspected “illegal foreigner” without a warrant and at a location that is entirely at the discretion of the Director-General.

On a concrete level, the section permits the Department of Home Affairs to stop and hold any individual on what it alone deems to be “reasonable grounds,” with little judicial or public oversight to ensure fair practice. In this way, the Immigration

Amendment Act amounts to what Jonathan Klaaren calls “control creep”.

The legislation takes a bold step towards establishing nearly unchecked authority over the lives of immigrants, migrants and refugees. When it comes to enforcing immigrant law against undocumented persons, the Department of Home Affairs stands alone, without the benefit of the judiciary or civil society to provide checks and balances.

This notion that immigration must be firmly managed to prevent contravention of the law is reinforced in the Act’s discussion of non-citizens and documentation. Section 30 establishes as grounds of prohibited personage anyone found in possession of a fraudulent residence permit, passport or identification document. While acknowledging what appear to be fairly widespread levels of fraud and corruption in relation to legal documentation, given the large portion of the population who might have trouble accessing proper identification (particularly in rural areas) this is extremely problematic, for it removes flexibility in determining which people are knowingly and deliberately in contravention of the law.

For instance, a child who enters the country with fraudulent documents given by his or her parents would automatically be considered prohibited. Rather than approaching cases individually with an eye towards human rights concerns and the economic needs of the country, improperly documented people are seen as inevitably “criminal”.

This approach is echoed later in the section, which prohibits people who have been convicted of any drug-related charges, widening the net from the previous Act’s restriction on drug traffickers only. In this manner, the Act reveals a conscious decision to increase the number of foreign-born individuals who might be deemed

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Immigration law

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“criminal”. As a result, the state has the appearance of being justified in stepping up its efforts at enforcement - if more people are eligible to violate the law then it appears natural to crack down on the “hordes” of “illegals”.

Towards the end of the Act a strange contradiction comes into play. Earlier sections emphasise either the need for increased enforcement or describe the provisions that will allow the Department of Home Affairs to implement this process. Sections 36, 39, 42 and 43, however, place the responsibility for enforcement elsewhere; with individuals and institutions. While the Act provides for greater Department of Home Affairs discretion to guard against “illegal foreigners” and “criminals,” it also arranges for the burden of administrative duty to fall largely outside of the Department of Home Affairs itself.

First, the Act enhances the responsibility of individual citizens in executing immigration enforcement. Section 36, for example, makes the master of a ship liable for ascertaining the immigration status of the ship’s passengers. Any irregularity is to be reported to an immigration officer or other authorised people without delay - and to do otherwise could result in a fine or jail time for the ship master. The same holds true for the owners of accommodation, as delineated in section 39. The “person in charge of any premises” of accommodation must keep a register of everyone provided with lodging or sleeping accommodation. Failure to do so could result in prosecution in terms of the Immigration Act.

The trend persists in those sections of the Act dealing with public institutions and other government departments. Section 42 states, “When possible, any organ of state shall endeavour to ascertain the status or citizenship of the persons receiving its services and shall report to the Director-General any illegal foreigner....” Section 43 creates the same requirement with respect to “prescribed institutions or persons other than organs of state”.

In plainer language, this means that institutions ranging from public hospitals to schools to the Department of Transport now have a legal obligation to screen recipients or beneficiaries to determine potential illegality in the course of delivering services. The state has forcibly enlisted “help” to enforce its immigration policy.

In essence, the Immigration Amendment Act amplifies the powers of the Department of Home Affairs to strictly enforce immigration law, and it encourages this enforcement through its wording and tone. From a practical perspective, however, the Act does not make any substantive changes to the administrative capability of the Department of Home Affairs to actually enact its focus on enforcement. What could be the purpose of simultaneously extending the duties of non-Department entities and the powers of the Department of Home Affairs? Here lies the great trick of the Act: it gives the Director-General of the Department of Home Affairs virtually complete authority over the implementation of enforcement, but leaves much of the actual day-to-day enforcement to individual citizens and non-governmental entities. In this way, the Act allows more enforcement “bang for its buck” in that it gives the state licence to do more without overstepping its material constraints.

If this is the case, what is so bad about the Act? There can be no dispute that sufficient enforcement of immigration policy and law is both necessary and important, and enabling the implementation of laws with fewer resources is always a positive development. However, the real problem with the Act is the way in which it will negatively impact on certain groups of non-citizens as well as South African society and the economy as a whole.

Foremost among the negative effects of the Immigration Amendment Act is its “targeting” of non-citizens as objects of distrust. The fact that all “foreigners” are lumped together without distinction and assumed to have criminal intent sets the stage for two dangerous occurrences. First, there is the very real danger that South African citizens and legal permanent and temporary residents alike will be subject to human rights violations under the broad categories of the Act. If any police officer is able to detain a suspected “illegal foreigner” without a warrant and hold him or her in an undisclosed location, there can be little oversight to ensure that human rights abrogations do not occur. The only substantial safeguard against civil and

human rights violations takes the form of Department of Home Affairs supervision, and even this is limited in many cases to the jurisdiction of the Director-General.

Second, the Act leaves the door wide open for hold-ups in government or civil service delivery to non-citizens. For example, if public hospitals are required by the legislation to enquire about a patient’s status before providing care, many immigrants might be afraid to access services - whether they are legal residents with a right to public health facilities or not. The consequences of such a development are obviously serious, with the risk of denial of rights for non-citizens irrespective of legal status.

The Act also has the potential to critically damage the stability of South African society, which is still in a delicate state of transition in the wake of apartheid. In the context of the nation-building project which has been so important to building a new South Africa, immigrants and other non-citizens have emerged as scapegoats. Although the preamble to the Act commits government to fight xenophobia and intolerance in South African society, the Act negates this promise by reinforcing criminal stereotypes and encouraging vigilantism. When a piece of public legislation defines a group of people in direct opposition to the majority of society and then calls for individuals, businesses and institutions to act as watchdogs for the state, the results can only be disastrous. By placing the means for enforcement of immigration law into the hands of the people, the state goes a long way towards advancing the intolerance and discrimination it is supposedly committed to fighting.

Perhaps the most important consequence of the Immigration Amendment Act is that it may very well fail in one of its primary purposes: to efficiently facilitate the movement of people, goods and services across South African borders. The Act introduces a cumbersome and disorganised mechanism for the enforcement and regulation of immigration law. It places the control over immigration matters in the

hands of the Department of Home Affairs, but the responsibility for their implementation in the hands of an unspecified number of secondary parties. In both cases, there is little oversight to ensure the smooth operation of processes and protect against administrative corruption and misappropriation. This unwieldy structure for implementation does not easily allow for the rapid, orderly and safe movement of non-citizens to and from the country.

We see, then, that the Immigration Amendment Act of 2004 does not signify a major departure from the Immigration Act of 2002. Although certain sections have been altered for the better, the underpinnings of the Act are the same. The historical preoccupation with enforcement continues in the language of the Act and its provisions for Department of Home Affairs authority; this time it has been disguised by the delegation of responsibility to non-governmental parties.

Given that this enforcement-heavy Act is the only immigration legislation the country has for the time being, it is important to ask how stakeholders might cope until another

piece of legislation arises. Of course, there have been calls for the revision and clarification of South Africa’s immigration policy and legislation, but until such time as it is accepted that, while important, enforcement must not be the primary consideration in immigration policy, no real change will be effected.

To this end, it is key that a two-fold programme of action be embarked upon. First, stakeholders, including government, must intensify public anti-xenophobia campaigns to counter the possibility that the Act will encourage vigilantism and discrimination among individuals and institutions.

Second, policy-makers must be educated about the value of facilitating movement between countries; they need to understand that this issue is fundamental to South Africa’s new role as a continental leader in politics and economics.

Only when the human rights of migrants are fully protected and the flow of goods, people and services is productive and efficient can South Africa claim to have truly amended its immigration legislation. Enforcement is only part of the answer, but must not be emphasised to the exclusion of other equally important considerations.

At the time of writing, Emily Brice was an intern from the Human Rights Program at the University of Chicago.

Noble principles of the Act getting lost in the practice

THE IMMIGRATION ACT 13 OF 2002 (AMENDED IN 2004) IN ITS PREAMBLE COMMITS THE ACT AND ANY REGULATIONS TO FACILITATING THE FLOW OF SKILLED FOREIGNERS, INVESTORS, RETIREES AND OTHER CATEGORIES OF APPLICANTS INTO SOUTH AFRICA. THESE OBJECTIVES ARE NOBLE, WRITES JULIAN POKROY, BUT AT THE COALFACE THE PICTURE THAT EMERGES IS A VERY DIFFERENT ONE.

The Department of Home Affairs is suffering from what is probably its worst crisis in service delivery in recent history. Delays of up to three months or more for processing a work permit for skilled foreigners are not uncommon, which is a crisis in a global village situation where speedy responses for very mobile skilled people are critical. Other rapidly developing economies are competing with South Africa for skilled foreigners and undue delays in processing applicants will undoubtedly lead to losses of these potential skilled foreigners or investors.

This breakdown in service delivery within the Department can be attributed to the following factors:

- Lack of human resource capacity - this is partially a numbers problem as there are approximately 1 000 vacant posts in the Department of Home Affairs, despite extensive advertisement campaigns. Yet no effective plan has been tabled to deal with this;
- Lack of training and experience of Home Affairs officials;
- Inconsistency in the application of the Immigration Act and its Regulations at various consular missions and regional offices has led to confusion and further inhibition on the movement of people. The much awaited Standard Operating Procedure Manual has unfortunately not yet seen the light of day, which is regrettable as it would probably result in more consistency in the application of the law;
- Corruption at various levels of the bureaucratic chain and the inability or apparent unwillingness/intransigence of the Department of Home Affairs to deal with this worsens the situation.

A further complication relates to the failure by the Department of Home Affairs to effectively regulate immigration practitioners and, possibly more seriously, people who are not registered as immigration practitioners and are therefore operating outside of the law.

Section 46 of the Act provides that only an attorney, an advocate or a duly registered practitioner under the Act may conduct any work flowing from the Act. Attorneys are bound by the ethics and codes of conduct of the Attorneys Act as are trust monies paid to them which are also guaranteed by the Attorneys, Notaries and Conveyances Fidelity Guarantee Fund. Professional Indemnity Insurance is a statutorily required insurance that every attorney must have to practise law.

Surprisingly the Professional Indemnity Insurance for immigration practitioners registered under the Act was removed in the July 2005 Amendment Act. In addition, all authority, disciplinary and otherwise, which had been vested in the Association of Immigration Practitioners was also removed with this amendment.

Immigration “agents” are present in huge numbers at any Home Affairs office and operate with impunity. The public has no recourse against them, other than civil law. The Department has failed in enforcing the requirement that only an applicant in person, or his attorney/advocate or an immigration practitioner registered under the Act may lodge an application for temporary or permanent residence, and this is compounding the situation. It must be said that there are some very good, even excellent, immigration practitioners registered but most are either unregistered or unqualified to give advice which is essentially of a legal nature. Immigration law remains a minefield which should perhaps be reserved for attorneys and advocates only.

A further inhibiting factor regarding skilled foreigner applicants, specifically those falling within the quota categories, is that the Act brought about a requirement in July 2005 in terms of which the South African Qualifications Authority (SAQA) evaluation of qualifications became a statutory requirement which cannot

be waived without an amendment to the Act. Because of the suddenness in which the Act was implemented, SAQA did not have time to build up its human resource capacity to deal with the deluge of applications that suddenly started streaming its way. This has resulted in delays of anywhere between one and five months for a so-called “priority” application for evaluation.

For example, a structural engineer may be required for an urgent project starting in a month or two, yet that person will not be able to lodge a properly completed application until the SAQA evaluation has been received. The result is that such an application will be delayed, and the applicant may move on to “greener” pastures where his work permit is processed speedily. At the same time it is recognised that verification of qualifications is, and must remain, an important element.

The first contact a potential immigrant has with the Department, whether she or he plans a temporary or permanent visit, will largely determine their future views of the Department. It is therefore essential, in an economy that needs skilled foreigners and investors, that this first interface be pleasant and amiable, whether the contact is made with a consular official at an embassy or high commission or at a regional office of the Department. Whether or not this is happening, the fact remains that impressions can often be a deciding factor in choosing whether to migrate to South Africa or not.

Even after an applicant has decided to migrate, either as a skilled worker, an investor or even a retiree, they require some degree of certainty so that they can begin planning their move to South Africa. If there is uncertainty at an embassy, high commission or regional office on the interpretation of qualifying requirements potential immigrants might change their minds. This must be urgently dealt with by the Department and the release of the Standard Operating Procedures Manual is urgent as it could help bring about uniformity in setting the criteria.

Our country is in a regional developmental phase and massive skills shortages in certain sectors means we have to employ skilled foreigners until the country is producing enough skilled people locally. To achieve this there are a number of factors which have to be considered very seriously and urgently by the Department of Home Affairs:

- A recruitment drive is needed to capacitate the Department of Home Affairs. The many law graduates currently passing through the tertiary educational system who are not finding articles or employment would be a good recruiting ground as they are already equipped with legal knowledge and would have completed courses in Constitutional Law and Administrative and Immigration Law;
- An effective training programme for Department of Home Affairs officials must be implemented, regionally and worldwide, to ensure that officials interfacing with the public are familiar with the complexities of the Act and can advise potential migrants of the requirements;
- The anti-corruption campaign promised at various levels of government must be taken seriously by the Minister and the Department;
- Effective control over who is lodging applications is needed so that only the applicants in person, attorneys, advocates and immigration practitioners registered under the Act are allowed to represent potential migrants seeking work, investor and other permits.

Failure to deal with the above will undermine the implementation of the Act and all of the principles enshrined in its preamble.

Julian Pokroy is a specialist immigration and nationality law attorney who currently heads the Law Society of South Africa Immigration and Refugee Law Committee, the South African Chamber of Business Migration Policy Working Group and is a member of the Immigration Advisory Board to the Minister of Home Affairs.

Visa cost a major hurdle for cross-border traders

DURING HER PRESENTATION OF THE IMMIGRATION AMENDMENT BILL TO THE NATIONAL ASSEMBLY IN AUGUST 2004, THE MINISTER OF HOME AFFAIRS, NOSIVIWE MAPISA-NQAKULA, MADE A "COMMITMENT NOT TO DISCRIMINATE ON THE BASIS OF GENDER" IN THE DRAFTING AND APPLICATION OF MIGRATION POLICY. KATE LEFKO-EVERETT FINDS OUT WHAT THE WOMEN MOST AFFECTED BY THE LAW HAVE TO SAY.

As one of the most senior women in South African government, the Minister of Home Affairs has paid particular attention to the experiences of women migrants, recognising the "emotional trauma" suffered by female refugees and their vulnerability on the journey to South Africa.

To this end, some hurdles to gender equality have been overcome in the Immigration Amendment Act, with changes including revised definitions of "marriage" and "customary marriage" to be consistent with existing legislation.

As in the previous Immigration Act (13 of 2002), both heterosexual and same-sex partners are included in the definition of a "spouse" and the new Act removes the requirement of qualifying "cohabitation and mutual financial and emotional support" with a "prescribed affidavit substantiated by a notarial contract".

Showing particular foresight, the Immigration Regulations also anticipate application procedures for people who have undergone a sex change.

Somewhat worrisome, however, is the Department's retaining of the "good faith spousal relationship" clause relating to permanent residence in particular, which aims to clamp down on "marriages of convenience".

In the previous Immigration Act, permanent residence was available to spouses of citizens and permanent residents provided that the Department was "satisfied that a good faith spousal relationship exists" and on condition that residence would lapse if the spousal relationship ended within a period of three years.

This requirement had the negative impact of treating all spousal relationships as marriages of convenience in effect until the three-year mark was passed, irrespective of the initial spirit of these relationships. It may also have provided a legislated impetus for migrant women, as well as men, to stay in abusive relationships to keep their status in South Africa.

With the new Immigration Amendment Act, the required period of a "good faith spousal relationship" is even more protracted, with five years of marriage required before foreign spouses are eligible to apply for permanent residence. Again, this may lapse if the relationship ends within two years of the granting of residence.

Effectively the new Act therefore requires seven instead of three years of a spousal relationship before foreign spouses have secure status in South Africa. This will ultimately translate into far longer periods of insecurity for both South African and foreign spouses alike.

From a gender perspective, the changes brought about through the Amendment Act will have the greatest impact on women migrants wishing to settle in South Africa in the long term and with a spouse.

For women wishing to work or conduct business in South Africa, or even to settle independently, the skills- and wealth-based criteria for residence on the grounds of permanent employment, extraordinary skills, business establishment or retirement remain obstacles. Many women in the region still face limited access to education, training and resources such as credit and productive assets.

Cross-border traders in the region, for example, constitute a major group of women conducting business in South Africa. Research from across the continent has shown that women traders have become major agents of economic development on both sides of the border and that small-scale trade makes a sizable and rising contribution to national Gross Domestic Product.

A USAID estimate in 1998 valued cross-border trade between Malawi and neighbouring countries at US\$44 million. Addressing the 50th UN Commission on the Status of Women, Minister Mapisa-Nqakula stated that the "contribution of cross-border traders to the South African economy was recognised last year when we implemented our amended Immigration Act by providing special permits to cross-border traders".

In a subsequent Budget Speech, the Minister also referred to women cross-border traders as beneficiaries of policy changes aimed at making travel to South Africa easier.

However, while the Amendment Act does carry over the cross-border permits featured in previous legislation, applicants who are citizens of neighbouring countries are now also required to hold passports to qualify for the permit. Given that the 2002 Immigration Act only required a national identity document for applicants from neighbouring countries, it would appear that the Amendment Act in fact makes it more difficult for women to obtain a cross-border permit. Further, neither the Amendment Act nor the Immigration Regulations explicitly legalise trade for migrants once they have arrived in South Africa.

Women cross-border traders and shoppers in the region are therefore likely to continue to face many of the practical obstacles to entering, conducting business in and leaving South Africa than they have in the past.

In a heavily gendered sector of the informal economy, these obstacles include difficulties in obtaining travel documents, the prohibitive cost of visas and vulnerability to crime, often at the hands of opportunistic



Minister of Home Affairs, Nosiviwe Mapisa-Nqakula, has recognised the vulnerability of female refugees on the journey to South Africa. *PictureNet Africa*

immigration, customs and police officers. Ultimately, these obstacles prevent women in the region from benefiting from cross-border trade at a level on a par with male migrants.

In 2005, SAMP conducted a qualitative study on women's experiences in migrating to and from South Africa which revealed a number of gender-specific motives for migration, obstacles encountered and recommendations for policy at regional level.

Interviews showed that women in Southern Africa feel that migration, and their freedom to migrate, is extremely important. In many cases, small-scale cross-border trade was a critical household survival strategy and an economic activity that supported entire extended families.

However, outside of economic incentives, women also felt migration offered them an important opportunity for new experiences and encounters with different cultures. One cross-border trader from Zimbabwe told SAMP, "I know so many things and the good thing is that I now know different cultures. I'm very free. I've learnt so many languages, so it's very interesting. If I can skip a month without coming here, I feel like there is something incomplete in me."

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Nation and region

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Because of the high value women place on migration, participants in the SAMP study felt that migration policy should, in its essence, facilitate easy, safe and legal travel across borders. Entering South Africa was relatively easy for women nationals of countries no longer requiring a visa, and one Mozambican migrant felt South African policy had improved substantially when visas for visits under 30 days were waived between the two countries through a bilateral agreement in 2005.

However, for migrants from other countries in the region, obtaining a visa was difficult and costly. Most women interviewed by SAMP had passports, but some said that because of difficulties in getting visas, “you can have a passport and then never use it”. Zimbabwean women in particular felt the cost of visas were prohibitive and time periods allotted insufficient, even for cross-border traders and shoppers only looking to enter South Africa temporarily to buy goods to take back home to sell.

According to one, this “leaves you with nothing to feed the children at home, just trying to get a visa so

you can buy them something in South Africa”.

While most women interviewed wanted to travel to South Africa through legal and regular means, some chose to “jump the fence” when they felt a visa was an unattainable prospect, while others overstayed rather than returning home, feeling they would not be able to afford a visa again.

As described by one migrant who had entered South Africa illegally, “to have a visa you need money. So I couldn’t because I didn’t have money. It is difficult because women can’t follow it. So you find that they risk their lives because they want to cross and come this side”.

In spite of the value of trade, and the inroads it has made in combating poverty, creating jobs and promoting women’s empowerment in the region, small-scale cross-border businesses are also constrained by customs costs.

Women interviewed by SAMP were shopping and trading in goods ranging from clothing, to broomsticks, baskets, vegetables, cosmetics, garlic crushers, doilies and curios. Problems arising for migrants included

inconsistency in the valuation of goods by customs officials at the border, solicitation of bribes, difficulties in providing receipts and proof of value added tax, and the high duties charged, which threatened already slim profit margins. As one trader commented, “we are not refusing to pay duties, but they should charge us reasonably”.

Women suggested to SAMP that regional policy should aim to remove some of the barriers to cross-border movement and trade currently posed by existing migration legislation, but this has not happened in the new Amendment Act.

Many women entrepreneurs will therefore continue to face constraints on the expansion of small cross-border businesses. Others may ultimately choose not to use legal or regular means of travel. One cross-border trader made a pertinent suggestion: perhaps it is time for governments in the region “to sit down as Southern Africans and talk about ladies”.

Kate Lefko-Everett is a SAMP Researcher.

Immigration Policy Reform in South Africa

- November 1996:** Minister of Home Affairs, M.G. Buthelezi, appoints Task Team to draft Green Paper on International Migration.
- May 1997:** Publication of Draft Green Paper on International Migration for public comment. Green Paper recommends separation of immigration and refugee policy and legislation, and that immigration be a tool for development.
- August 1997:** Closing date for submissions and comment on Draft Green Paper. Department of Home Affairs receives 52 submissions from organisations and individuals.
- March 1998:** Minister appoints Task Team of Department of Home Affairs officials and non-governmental organisation representatives to prepare White Paper on Refugee Policy.
- July 1998:** Publication of Draft White Paper on Refugee Legislation. Public submissions received until 20 July 1998.
- August 1998:** Revised White Paper on Refugees submitted to Cabinet for approval.
- August 1998:** Minister appoints Task Team to prepare White Paper on Immigration Policy.
- November 1998:** Refugee Act published in Government Gazette and becomes law.
- March 1999:** Publication of Draft White Paper on International Migration, “modified and approved for public comment by Cabinet”. Closing date for public comment set for November 1999.
- November 1999:** Draft White Paper on International Migration tabled in Home Affairs Parliamentary Portfolio Committee. Committee resolves to conduct public hearings.
- February 2000:** Minister of Home Affairs announces and publishes Draft Immigration Bill and invites public comment. Deadline for public comment set for May 2000.
- May 2000:** Parliamentary Portfolio Committee on Home Affairs conducts public hearings on Draft White Paper on International Migration.
- July 2000:** Ministry of Home Affairs conference on Regulating Migration in the 21st Century held in Parliament to discuss Immigration Bill.
- August 2000:** Draft Immigration Bill submitted to Cabinet.
- August 2000:** Parliamentary Portfolio Committee conducts regional public hearings on Draft White Paper.
- September 2000:** Parliamentary Portfolio Committee releases Draft Interim Report on White Paper, criticising the process.
- November 2000:** Parliamentary Committee releases Penultimate Report on the International Migration White Paper, concluding that the process of policymaking was flawed and expressing the need to “go back to the drawing board”.
- March 2001:** Cabinet rejects Draft Immigration Bill and asks Ministry of Home Affairs to redraft. Cabinet prepares confidential “framework document” to provide guidelines for redrafting.
- April 2001:** Revised draft of Immigration Bill submitted to Cabinet.
- June 2001:** Draft Immigration Bill tabled in Parliament.
- September 2001:** Parliamentary Portfolio Committee on Home Affairs refers draft bill to State Law Advisers to test constitutionality.
- March 2002:** Portfolio Committee develops extensive programme of public hearings to consult on Draft Immigration Bill. Minister warns of impending Constitutional Court deadline requiring changes to existing immigration law. Hearings are conducted during April 2002.
- May 2002:** Immigration Act No 13 of 2002 adopted by Parliament and published in Government Gazette.
- December 2002:** Publication of Immigration Regulations to provide for implementation of immigration law.
- February 2003:** Immigration Regulations challenged in court. Court finds in favour of Department of Home Affairs, but matter referred to Constitutional Court.
- May 2003:** Immigration Advisory Board established.
- June 2003:** Constitutional Court approves immigration regulations. New immigration law comes into effect.
- April 2004:** New Minister of Home Affairs, Nosiviwe Mapisa-Nqakula, appointed. Process of revising immigration law initiated shortly after appointment.
- October 2004:** Immigration Amendment Act 19 of 2004 published in Government Gazette.
- July 2005:** New Immigration Regulations published. Immigration Amendment Act 19 of 2004 comes into effect.

No oversight powers for new board

WITH THE COMING INTO FORCE OF THE IMMIGRATION AMENDMENT ACT IN JULY 2005, THE COMPOSITION AND FUNCTIONS OF THE IMMIGRATION ADVISORY BOARD WERE CHANGED. **LYNDITH WALLER** WRITES THAT THE CHANGES REFLECTED A SOMEWHAT DIFFERENT INTENTION FOR THE BOARD, REMOVING EXECUTIVE FUNCTIONS AND EFFECTIVELY CREATING AN INTER-DEPARTMENTAL COOPERATION FORUM ON ALL MATTERS OF MIGRATION.

The first Immigration Advisory Board (IAB) was established in May 2003 in terms of the Immigration Act of 2002, which was South Africa's first effort at completely rewriting our immigration legislation. In adapting to a newly democratic environment, characterised by rapidly increasing movement of people, the Department of Home Affairs realised that the old Aliens Control Act was patently inadequate to meet immediate needs and imminent challenges.

It also recognised that the complexities of migration engage departments across the spectrum of government. To properly manage migration, coordination across departments was essential.

By establishing the Board, the Immigration Act created a forum in which a variety of department representatives could deliberate on specific matters and seek consensus, to give the Minister of Home Affairs advice that was properly canvassed, agreeable to all and workable.

In addition to the government component, the Board included representatives from civil society, organised business and organised labour, as well as individuals who were appointed on the grounds of their expertise in administration, regulatory matters or immigration law, control, adjudication or enforcement. The two components of the Board, civil society and government, were perfectly balanced to create a membership of 20.

Between May 2003 and July 2005, the Board advised on the formulation of the 2003 Regulations and the 2004 Amendment Bill and draft Regulations. It held four public consultations, visited the Lindela Repatriation Centre, engaged three key research projects, advised the Minister on various policy matters, considered the Department's Turnaround Strategy and overall progress, and deliberated on exemption applications for permanent residence as required by section 31 of the Act.

In addition to the Board's functions detailed under section 5 of the Act, several other sections required consultation with the Board prior to action. Section 4 required consultation before approving the delegation of powers and functions by the Department. Section 30 required consultation before identifying a foreigner as an undesirable person. Section 31 required that the Board deliberate on exemption applications for permanent residence and advise the Minister on whether or not to grant an exemption. All of these consultation requirements have been removed in the Immigration Amendment Act.

In a sense, the original Act gave the Board oversight powers of the Department of Home Affairs. Section 47 required that the Director-General inform the Board on measures and proposals to increase the efficacy, efficiency and cost-effectiveness of the Department. The section 5 functions required the Board to advise the Minister on the implementation of immigration policy by the Department, and to review the Department's decisions on adjudication, when requested by the Minister. The Amendment Act removes the Board's oversight of policy implementation, limiting its advisory scope to policy formulation. It also removes the Board's mandate to review the Department's decisions.

In removing the Board's oversight role, the Department gave consideration to the sufficient number of existing oversight measures. The reporting responsibilities of the Minister and Director-General within the Government Clusters and to Parliament, coupled with the role of the Portfolio Committee on Home Affairs, suggest that further oversight would be a duplication of functions, effectively diluting what could otherwise be a dynamic advisory body.

In terms of the Amendment Act, the functions of the Board are now two-fold: to advise the Minister and to offer a forum for interdepartmental cooperation. Advice to the Minister is limited to the contents of Regulations, the formulation of policy pertaining to immigration matters and any other matters relating to the Act on which the Minister may request advice. Section 7 reiterates the need for the Minister to consult the Board before making Regulations.

The narrowing of the Board's functions is accompanied by a change in the Board's composition. The balance among the 20 members has shifted through the inclusion of the Head of the National Immigration Branch, and representatives from the Department of Justice and Constitutional Development and the National Intelligence Coordinating Committee. The rank of all government representatives

has now been set at Deputy Director-General. Having included three more government members, the five civil society members were reduced to two; one each from organised business and organised labour. Public nominations are no longer explicitly required to appoint these members. In addition, the Minister may appoint up to five experts. From among this new Board, the Minister will choose a Chairperson and Deputy Chairperson, neither of whom will be fulltime appointments.

These changes to the Board's composition reflect its new role as an interdepartmental cooperation forum. The five experts will assist in developing sound advice, without representing a specific interest group or the public at large. The presence of business and labour will ensure that policies recommended by the Board are realistic on a practical level. No additional input is considered necessary, which also accounts for the deletion of subsection 4(3)(c), which allowed the Board to invite immigration officers and other employees of the Department to attend or participate in its meetings.

Migration is a complex and often controversial field. In dealing with it, an advisory board must have a clearly defined identity. Either it is a widely consultative forum, incorporating the broad and manifold interests of civil society and offering advice that is effectively a compromise of all interests, or it is a forum to seek consensus across departments to develop advice that is uniform, sound and able to complement government's foreign, social and economic policies. The 2002 Board was the former. The new Board seeks to become the latter.

Accordingly, the need for consensus and voting has been removed. The aims of government as a whole should ensure that policies of individual departments do not clash irretrievably. In theory, an unsolvable objection from any department would flag a fundamental policy problem that the Minister may see fit to take to Cabinet.

As a further assurance of comprehensive interdepartmental canvassing of issues, the Board may no longer establish and operate through Standing Committees. Ad hoc task teams may perform specific tasks for the Board, but cannot substitute the Board or usurp any decision-making power.

The full Board shall meet at least quarterly, without being specifically asked to do so by the Minister or Director-General, although additional meetings may be convened at their request. In terms of the Regulations, a meeting will now be validly constituted when at least 10 members are present, whether the Board is operating with 20 members or only 16. The Minister may appoint up to five individual experts, but need not appoint all five.

In effect, the Amendment Act has streamlined the Board, removing its capacity to conduct research, a function that is vested in the National Immigration Branch. It has taken away the oversight role, which is carried out through internal accountability structures as well as through the Department's reporting responsibilities. It has taken away a considerable amount of public representation, creating an interdepartmental cooperation forum in which all matters of migration – including those highly sensitive to the national interest – may be coordinated.

Indeed, the Board has been narrowed to its essential core. What remains is the potential for well-considered, workable, effective policy advice that enhances government's vision and meets South Africa's migration needs.

Nevertheless, this potential benefit is yet to be realised. While it has been a year since the coming into force of the Immigration Amendment Act, the new IAB is yet to be appointed. It would be a pity to see an undue delay in this Board's contribution to the migration debate.

At the time of writing, Lyndith Waller was the Secretary of the South African Immigration Advisory Board.

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