



TO: DEPARTMENT OF HOME AFFAIRS

Attention: Mr Sihle Mthiyane

Email: whitepaper@dha.gov.za

**CALL FOR SUBMISSIONS ON THE WHITE PAPER ON CITIZENSHIP,
IMMIGRATION AND REFUGEE PROTECTION: TOWARDS A COMPLETE
OVERHAUL OF THE MIGRATION SYSTEM IN SOUTH AFRICA**

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A. INTRODUCTION

1. SECTION27 (Incorporating the Aids Law Project) welcomes the opportunity to make submissions to the Department of Home Affairs on the White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa (“White Paper”).
2. SECTION27 is a public interest law clinic that works to influence, develop, and use the law to further the rights to health and basic education in South Africa through research, advocacy, and litigation.
3. The White Paper calls for an overhaul of the current immigration laws, specifically calling for a single piece of legislation that will replace the current Citizenship Act, Immigration Act, and Refugees Act. The justification in the White Paper is that the current system is not properly managing the number of migrants in the country. While there may indeed be a need for legislative reform, it appears that the admitted failures of the Department of Home Affairs are being justified by blaming the legislation that binds it, without consideration of how a mere change in the law would be capable of overcoming the incapacity of the department implementing it. Exactly how a single piece of legislation, in the absence of other interventions, is intended to remedy these failures is unclear and the lack of evidence in this regard is concerning.
4. We note at the onset that any overhaul of the immigration laws cannot be used to curtail the constitutional rights of foreign nationals. We are concerned that such a curtailment is what is envisaged here. Pan-African values were fundamentally part of the conception of the new South Africa. South Africa's commitment in this regard is vital to the society and state that was envisioned post-apartheid.
5. Indeed, the Constitution of the Republic of South Africa, 1996 makes provision for asylum seekers and refugees to enjoy the rights and freedoms contained in the Bill of Rights in the same way as ordinary citizens. Section 10 of the Constitution

safeguards the right of everyone to have their dignity respected and protected. Section 9(1) of the Constitution guarantees the right of everyone to equal protection and benefit of the law. Section 9(3) of the Constitution asserts that the state may not unfairly discriminate directly or indirectly against someone's ethnic or social origin and birth.¹

6. Therefore, SECTION27 responds specifically to the White Paper's failure to incorporate the importance of the rights of foreign nationals and to uphold their rights to access basic education and healthcare in the remainder of this submission.

B. THE RIGHT TO ACCESS BASIC EDUCATION

7. The White Paper notes that the case of *Centre for Child Law v Minister of Basic Education*² ensured that migrant learners would be afforded access to basic education. The Court in the case held that the Eastern Cape Department of Education's circular preventing migrant learners from being enrolled at school without the relevant documentation was an infringement of their rights to access basic education in terms of section 29 (1)(a), equality in terms of section 9 and the dignity in terms of section 10 of the Constitution.
8. Clause 32.9 – 32.10 of the White Paper states that our neighbouring countries have, in contrast with South Africa's constitutionally compliant and court-ordered approach, taken the decision not to allow migrant learners into schools due to a lack of resources. The White Paper suggests that South Africa is experiencing the

¹ Ibid.

² *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG) (“Phakamisa judgment”).

same resource constraint and enrolling migrant learners would be a further constraint to the fiscus.

9. No evidence of this claim is provided. Even if it had been, however, we note that such a claim does not justify restrictions to the enrolment of migrant learners, for the following reasons.

10. First, the Constitution protects the right to access basic education of all learners. In *Governing Body of the Juma Masjid Primary School v Essay N.O.*,³ the Constitutional Court emphasised the importance of the right to basic education. The Court stated:

“Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child’s personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child’s lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.”⁴

11. Limiting rights to basic education based on a person’s immigration status would be in contravention of the Constitution, as interpreted in both *Juma Masjid* and the *Phakamisa* judgment to which the White Paper refers. The State must ensure that

³ *Governing Body of the Juma Masjid Primary School v Essay N.O.* 2011 (8) BCLR 761 (CC) (“*Juma Masjid*”).

⁴ *Juma Masjid* judgment at para 43.

immigration laws are effected in a manner that enables migrant learners to access education.

12. Second, the right to basic education is ‘immediately realisable’ and is afforded to ‘everyone’. This wording emphasises not only the importance of the right to education but also how the state must protect this right. In *Minister of Home Affairs v Watchenuka*⁵ the court evaluated the link between dignity and education and noted that dignity is something that has ‘no nationality’. Accordingly, one cannot afford the right to basic education to only citizens.⁶
13. Third, the White Paper’s submission that it is resource-constrained is no reason for the State to limit the realisation of socio-economic rights. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,⁷ a case dealing with the right to access to housing, Froneman J held that “it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.”⁸
14. We note also in this regard that resource availability problems arise not only from inappropriate budgeting for basic education but also from governmental choices to disinvest from social services. Civil society has expressed concern that the aggressive fiscal consolidation path that South Africa’s government has undertaken over the past decade in response to increasing debt service costs as

⁵ *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA).

⁶ *Ibid.*

⁷ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (“*Blue Moonlight*”).

⁸ *Blue Moonlight* judgment at para 74.

well as weakening economic growth has constrained the government's ability to realise constitutional rights for all in the country.⁹ In 2018, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) experts expressed concern that the austerity in our budget could further exacerbate inequality and restrain the redistributive capacity of our fiscal policy.¹⁰ This phenomenon extends to basic education where the budget for education infrastructure had fallen by 11.5% in a context where many learners still attend schools made of inappropriate materials like mud and where the dangerous pit latrines remain in schools. National Treasury has acknowledged that insufficient budget allocations to compensation of teachers could lead to "larger class sizes, higher teacher-learner ratios, and possibly weakening education outcomes". Rather than saving money by excluding vulnerable migrant learners, Treasury must explore alternative financing models that foreground the realisation of rights and advance the investment in the education of all learners in the country.

15. Finally, given that migrant learners currently have access to education, any decrease in access would constitute a regressive step, prohibited both in South African and in international law. Guidance for how to manage necessary budget reductions is available.¹¹ Among others, if there is to be a cut to education budgets, it is crucial that participatory human rights impact assessments of the budget be

⁹ Budget Justice Coalition Submission to the Submission to Standing Committee on Appropriations on the Adjustments Appropriations Bill 2023 22 November 2023 https://static.pmg.org.za/231201BJC_ADJUSTMENTS_APPROPRIATIONS_SUBMISSION_22_11_23_FINAL.pdf (Accessed on 22 January 2024).

¹⁰ Press Statement of Committee on Economic, Social and Cultural Rights considers the report of South Africa (October 2018) <https://www.ohchr.org/en/press-releases/2018/10/committee-economic-social-and-cultural-rights-considers-report-south-africa> (Accessed On 22 January 2024).

¹¹ See, for example, the UN Committee on Economic Social Rights Letter dated 16 May 2012 <https://www2.ohchr.org/english/bodies/cescr/docs/lettercescrtosp16.05.12.pdf>

enacted, which compel the government to explain to the people of this country how it will ensure that constitutional rights will be protected.

16. In failing to consider the rights of migrant learners and in apparently seeking to use an amendment to immigration law to circumvent the realisation of these rights, the White Paper undermines South Africa's constitutional obligations to vulnerable children.

C. THE RIGHT TO ACCESS TO HEALTH

17. Access to health care services is vital to all person's resident in any state irrespective of their immigration status. The White Paper does not consider the impact of the amendments to the immigration laws on the right to access to health care services for migrant persons. SECTION27 submits that the state must acknowledge and promote migrant person's rights to access to healthcare in any legislative amendment.
18. The Bill of Rights safeguards the rights of all individuals, irrespective of their citizenship. Specifically, section 27(1) of the Constitution affirms the entitlement of every person to access healthcare services, including reproductive healthcare. Furthermore, section 27(3) of the Constitution provides for everyone's right to emergency medical treatment. These rights in the Constitution are afforded to every person and not just to citizens. Accordingly, it is the state's responsibility to ensure that migrants receive the same quality of treatment as citizens, including reproductive care and emergency treatment. Failure to provide such care is unconstitutional.

19. In addition to being codified in the Constitution, the right to health can also be found in the Universal Declaration of Human Rights (UDHR) 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966. Signed by South Africa in 1994 and ratified in 2015, the Covenant obliges State parties to recognise the right of everyone to the highest attainable standard of physical and mental health. The White Paper emphasises the use of reservations/declarations to abdicate from international obligations. However, it is notable that there are no other countries that have made any reservations/declarations to Article 12 of the ICESCR, which is the right to health of everyone under a state's jurisdiction.
20. Domestically, section 4(3) of the National Health Act¹² (NHA) provides that subject to any condition imposed by the Minister of Health, the State and clinics and community health centres funded by the State should provide free health services to the following categories of persons:
- a) pregnant and lactating women and children below the age of six years, who are not members or beneficiaries of medical aid schemes, with free health services;
 - b) all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, with free primary health care services; and
 - c) women, subject to the Choice on Termination of Pregnancy Act, 1996,¹³ free termination of pregnancy services.

¹² 61 of 2003.

¹³ 92 of 1996.

21. The right to access health care services is essential for any well-functioning society. It is linked to the realisation of other rights, both political and socio-economic. Therefore, the knock-on effect of a restriction on migrants' right to health will be felt by all persons residing in South Africa, citizens and non-citizens.
22. In *SECTION27 vs MEC for Health Gauteng*,¹⁴ the court ordered that free health services are to be provided to all pregnant and breastfeeding women and children under the age of six, irrespective of nationality and documentation status. Furthermore, it confirmed that free health services can be accessed at any public health facility, including hospitals. The court observed that discrimination exists in hospitals towards migrants and therefore ordered that materials be circulated providing information on migrants' right to access to healthcare.
23. The health rights of migrants are, therefore, clear in both domestic and international law and are in line with public health imperatives to the benefit of everyone in the country. Despite this, the White Paper does not acknowledge the rights of migrants and obligations of the state in this regard, electing instead to reference budgetary shortfalls and to blame these shortfalls on migrants.
24. Budget cuts to health care have constrained the available resources to realise the right to access health care for all in the country. Just last November, health care investment had been cut by 2.7% in real terms in addition to the already proposed real budget cut of 4.9% in the February 2023/24 budget. Similar to Basic Education, health personnel funding has suffered erosion over the years with the latest being a real-term reduction of 4.8%. While funding had been made available

¹⁴ *SECTION27 vs Member of the Executive Council* (Case No 19304), 14 April 2023.

to cover wage increases, restrictions on recruitment will make it difficult to address the human resource needs in the sector. Under this austerity approach to healthcare funding, nurses in clinics and hospitals will be stretched even thinner to ensure that the healthcare needs of all in the country are met. In addition to the hiring freeze, it is expected that the gaps in funding will be addressed through limitations on areas such as overtime payments, leaving the healthcare sector without the benefit of hiring additional staff or the ability to use its existing staff overtime to meet the health care demand of patients. It is clear that a fiscal framework approach that erodes healthcare investment is the leverage point to be addressed. Resource constraints cannot be used to curtail migrant persons' rights to healthcare. Such an approach would fail to meet the State's constitutional obligations.

D. RECOMMENDATIONS

25. We recommend the following:
 - 25.1. The right to basic education and access to health care services must be protected and enhanced when amending immigration law.
 - 25.2. Equity-oriented human rights impact assessments should be used to help articulate the relationship between policy measures, costs, and benefits.

E. CONCLUSION

26. The White Paper as it stands anticipated a limitation of migrant persons' rights to education and health and is regressive in the face of the strides made in protecting

the rights to access basic education and healthcare. SECTION27 submits that the overhaul of the immigration laws cannot curtail migrant person's constitutional rights. Any amendments to the legislation relating to migration must consider the rights to access basic education and healthcare. The Constitution requires that the enhancement and protection of socio-economic rights remain central in the legislative reform.

SECTION27

31 January 2024