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To: Dr Aaron Motsoaledi
Minister of Home Affairs
Minister@dha.gov.za

and

Mr Sihle Mthiyane
Chief Director: Policy & Strategic Management
osbppolicy@dha.gov.za

and

The Chairperson, Adv Bongani Bongo, MP
Committee Members
Parliamentary Portfolio Committee on Home Affairs
c/o Mr Eddy Mathonsi
emathonsi@parliament.gov.za

28 February 2021

Dear Minister Motsoaledi, Mr Mthiyane, and Members of the Parliamentary Portfolio Committee,

WRITTEN COMMENTS BY THE SCALABRINI CENTRE OF CAPE TOWN TO THE DEPARTMENT OF HOME AFFAIRS ON THE DRAFT ONE-STOP BORDER POST POLICY

We welcome the opportunity to make written comments on the draft One-Stop Border Post Policy, which was published in the Government Gazette No. 44048, Vol. 1426 on 31 December 2020 (the "draft Policy").[1]

[1] Department of Home Affairs, *Draft One-Stop Border Post Policy – Public Consultation Version (22 December 2020)*, Government Gazette No. 44048, Vol. No. 1426, 31 December 2020.

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These comments are based on our extensive experience in the area of refugee and migrant rights, and are submitted in light of the impact the draft policy stands to have upon migrants, asylum seekers, and refugees.

Endorsing these Written Comments & Scalabrini Centre's Endorsement of Other Written Comments

Where an organisation, individual or entity has endorsed these written comments, we have requested that they send a letter directly to the Chief Director: Policy and Strategic Management, indicating such.

Similarly, the Scalabrini Centre of Cape Town has not endorsed any other written comments, including any by organisations or consortiums to which the Centre may be a member. Where we do endorse written comments, we undertake to provide a letter to the Chief Director stating our endorsement and reasons for such endorsement.

Background to the Scalabrini Centre of Cape Town

The Scalabrini Centre of Cape Town (SCCT / Scalabrini Centre) is a registered not-for-profit organisation that perceives migration as an opportunity and is committed to alleviating poverty and promoting development in the Western Cape while fostering integration between migrants, refugees, and South Africans. Inspired by the teachings of John Baptist Scalabrini, the Scalabrini Centre embraces cultural diversity. The Scalabrini Fathers have been providing welfare services in Cape Town to displaced communities since 1994. In providing assistance, the SCCT advocates respect for human rights and utilises a holistic, integral human development, approach that considers all basic needs including advocacy, development, and welfare services. The SCCT offers six programmes: Advocacy, Employment Access, Welfare, Unite, Women's Platform, and an English School.

The **Advocacy Programme** of the Scalabrini Centre aims to promote and strengthen the rights and integration of migrants and refugees in South Africa, through providing individual advice, publishing research, raising awareness, and advocating for legislative and policy reform and its proper implementation. The Advocacy Programme offers a paralegal advice and referral service related to accessing documentation and services. Much of this advice

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centres on ensuring the proper documentation for asylum seekers in South Africa, and respect for international refugee law and South Africa's international obligations.

I. Summary of Comments and Recommendations on the draft One-Stop Border Post Policy

1. Our comments on the draft Policy relate to the **provision of international protection** to asylum seekers and refugees, and other persons of concern in the context of one-stop border posts; the draft Policy's **omission of plans to prevent bribery and corruption**; and **concerns regarding the Department of Home Affairs' capacity constraints** in the implementation of a one-stop border post.

2. We welcome the draft Policy's initiatives towards regional integration and greater mobility in the SADC region, and believe the Department of Home Affairs (DHA/the Department) should build on these by pursuing other initiatives originally proposed in the White Paper on International Migration (July 2017). Specifically, the implementation of Special Dispensation Permits and new visa options (including special work, trade, and Small Medium Enterprise visas) for SADC nationals, as well as by working towards the freedom of movement within SADC, as envisioned in the SADC Protocol on the Facilitation of Movement of Persons. The White Paper on International Migration acknowledged that migration can help South Africa reach its National Development Plan goals – the facilitation of greater mobility in the SADC region, including through the introduction of visa-free travel for African citizens, could assist with this, and this coupled with one-stop border posts may create a more efficient border post environment, making the passage of people and goods swifter, and easier. When coupled with complementary immigration regimes, the one-stop border post policy has the potential to align with White Paper on International Migration and the AU Agenda 2063, which calls for the abolishment of visa requirements for all African citizens.

3. The creation of a one-stop border post, as well as the implementation of measures to ensure greater efficiency at border posts, and in respect of visa processing, must always be in line with South Africa's obligations in terms of international law. More

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specifically, any one-stop border post policy must ensure that South Africa simultaneously respects its international protection obligations in respect of asylum seekers and refugees.

South Africa's International Protection Obligations

4. We recommend that the draft OSBP Policy identify compliance with human rights and humanitarian obligations as a key foundational principle, including adherence to the principle of non-refoulement.

5. We recommend that a special subcommittee be established to ensure that the establishment of OSBPs is in compliance with South Africa's national and international obligations in terms of the provision of asylum and international protection.

6. We recommend that the Parliamentary Portfolio Committee on Home Affairs together with the Portfolio Committee on International Relations and Cooperation require the Department of Home Affairs to provide regular updates and reports in respect of the abovementioned proposed subcommittee, including written progress reports illustrating that the OSBP policy and implementation is in compliance with South Africa's international law commitments.

7. We urge the Department of Home Affairs to engage with relevant stakeholders, including national and international organisations with a focus on migration and forced migration, on the topic of international protection during the establishment of OSBPs.

Omission of Anti-Bribery and Corruption Plan

8. The draft Policy's omission of plans to prevent bribery and corruption threatens to undermine the intended outcomes of the policy, particularly those relating to regional economic integration, the efficient movement of goods, conveyances and persons, and enabling conditions to facilitate trade, economic grow, and job creation.

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9. The White Paper on International Migration (July 2017) recognised the risk of corruption and provided:

> "Special provision should be made for a rigorously sanctioned offence in respect of granting of or allowing for unfair and illegal advantages to persons for financial consideration. The Immigration Service will be issuing documentation and permits, which have economic value and, therefore the risk of corruption exists. The Immigration Service should have an internal investigative unit which constantly monitors, tests and upgrades internal systems, conducts internal investigations and prosecutes frauds. This unit should not oust the jurisdiction of other organs of state with law enforcement responsibilities, so as to avoid that such unit becomes a mechanism to keep in-house and cover up, rather than expose, cases of corruption."[2]

10. Similar concerns are relevant in the implementation of a one-stop border post. It is axiomatic that corruption is a risk, particularly at South Africa's border posts. A one-stop border post does not change this. It is a space where the risk of corruption exists because of the economic value of the passage of goods and the movement of people. The Policy fails to address this.

11. We recommend that the One-Stop Border Post Policy include a plan or propose methods or mechanisms to address and prevent bribery and corruption during the establishment of one-stop border posts, and in the continued implementation and functioning of such border posts.

Concerns Regarding Capacity Constraints

12. We express concern that the establishment of one-stop border posts, in spite of capacity constraints, may undermine the Department's ability to adhere to the key foundational principles and intended outcomes of that policy, particularly honouring

[2] White Paper on International Migration, chapter 11, paragraph 2.1.2, available at: https://www.gov.za/documents/international-migration-white-paper

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human rights and humanitarian obligations in line with the Constitution and international agreements.

13. In a 4 February 2020 meeting of the Portfolio Committee on Home Affairs, the Auditor General briefed the Committee on the Follow-up Performance Audit of the Immigration Processes of Illegal Immigrants at the Department of Home Affairs.[3] The Report found that between 2007 and 2018 there had been a major regression in the functioning of DHA. The Report found, inter alia, that there were largely no formal systems and procedures in place at the DHA in respect of the management of migration or irregular migration and deportations; there was also a lack of integrated systems; wasteful expenditure; and that information systems were unreliable and out of date. In addition to the Auditor General's damning findings regarding the lack of functionality within the DHA, there have also been numerous reports regarding litigation and civil claims against the Department – which could result in the DHA having very few funds in which to finance its continued operation.[4]

14. Establishment of one-stop border posts will undoubtedly be costly. While they may facilitate trade and the movement of persons, if they are not effectively managed and run, such a border post may have the opposite effect. It is clear that the Department does not have a track record of efficacy or well-managed capacity. Such capacity concerns need to be carefully addressed before a one-stop border post is initiated, as well as during the establishment and running of such border posts.

15. We recommend that before the implementation of the OSBP policy, the Department first illustrate that it has addressed the 68 recommendations made by the Office of the Auditor General of South Africa in its November 2019 Performance Audit of the Immigration Processes of Illegal Immigrants at the Department of Home Affairs. Clear remedial measures should have been put in place in respect of these recommendations prior to DHA initiating any further processes in respect of the draft

[3] Parliamentary Monitoring Group report of the meeting, available here: https://pmg.org.za/committee-meeting/29634
[4] Felix, Jason "Service Delivery at Home Affairs could fall flat if civil claims continue to pile up – AG" [News24], available at: https://www.news24.com/news24/southafrica/news/service-delivery-at-home-affairs-could-fall-flat-if-civil-claims-continue-to-pile-up-ag-20210126

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OSBP policy. This should also remain the subject of regular oversight meetings by the Portfolio Committee on Home Affairs.

II. International Protection Obligations

The Principle of Non-Refoulement

16. Ports of Entry (POEs) are key points where persons in need of international protection, including asylum seekers and refugees, and other persons of concern, are able to avail themselves to authorities of the opportunity to receive such protection. In this regard, it is imperative that the draft Policy ensure effective refugee protection, and that the establishment and procedures of OSBPs do not undermine the South Africa's compliance with the principle of non-refoulement, and other national and international human rights obligations.

17. Section 2 of the Refugees Act, 130 of 1998, entrenches the international principle of non-refoulement, and further expands on it through the recognition of an extended definition of refugeehood, as provided for by article 1(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and as entrenched in section 3(b) of the Act.

18. Section 2 of the Refugees Act specifically provides that:

> "Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subjected to any similar measure, if as a result a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-
>
> (a) he or she may be subjected to persecution on a convention ground, on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

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(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, or other events seriously disturbing or disrupting public order in either part or the whole of that country."

19. The Constitutional Court in the matter of *Alex Ruta v Minister of Home Affairs* [2018] ZACC 52[5] and *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9[6] has reiterated the significance and importance of section 2 of the Refugees Act and the principle of non-refoulement that it entrenches. The principle of non-refoulement safeguards the rights of asylum seekers and refugees to human dignity, life, and freedom and security of the person, as provided for by sections 10, 11, and 12 of the Bill of Rights respectively, and other relevant rights provided for by the Constitution.

20. In addition to asylum seekers and refugees, victims of human trafficking, unaccompanied or separated children, or other persons of concerns may transit through Ports of Entry.

21. Strict procedures and guidelines should be set out for the identification of such individuals, and for the provision of reception and assistance within OSBPs. Designated staff members should be trained and clear and transparent procedures established so that such persons of concern may be processed, have an opportunity to identify their personal circumstances, and for the authorities to identify the relevant course of action, including referral to the relevant agency and the provision of relevant information, in the language spoken by the person concerned.

22. During the establishment of OSBPs, due consideration should be given to South Africa's national and international legal obligations that impact on asylum seekers and refugees, and the human rights of persons of concern in border environments. These should be articulated in the draft Policy, and specifically referenced. These include, but are not limited to:

[5] Available at: http://www.saflii.org/za/cases/ZACC/2018/52.html.
[6] Available at: http://www.saflii.org/za/cases/ZACC/2018/9.html.

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22.1. the Constitution of the Republic of South Africa;
22.2. the Refugees Act 130 of 1998;
22.3. the Children's Act 38 of 2005;
22.4. the 1951 UN Convention Relating to the Status of Refugees;
22.5. the 1967 UN Protocol Relating to the Status of Refugees;
22.6. the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa;
22.7. the 1948 UN Universal Declaration of Human Rights;
22.8. the African Charter on Human and Peoples' Rights;
22.9. the International Covenant on Civil and Political Rights;
22.10. the UN Convention on the Rights of the Child; and
22.11. other relevant legislation, conventions or international agreements relating to human rights.

23. During the establishment of one-stop border posts through bilateral agreements, it is imperative that participating neighbouring countries are signatories to the same international and regional legislation and conventions regarding asylum and human rights to which South Africa is a signatory.

24. In light of the above, we make the following recommendations:

24.1. We recommend that the draft OSBP Policy identify compliance with human rights and humanitarian obligations as a key foundational principle, including adherence to the principle of non-refoulement, and that specific international treaties and conventions to which South Africa is a signatory, be listed in the Policy.
24.2. We recommend that a special subcommittee be established to ensure that the establishment of one-stop border posts is in compliance with South Africa's national and international obligations in terms of the provision of asylum and international protection. Such subcommittee should be required to provide

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regular reports to the Minister, as well as to the Portfolio Committee on Home Affairs.

24.3. We urge the Department of Home Affairs to engage with relevant stakeholders, including national and international organisations with a focus on migration and forced migration, on the topic of international protection during the establishment of one-stop border posts.

III. Omission of Anti-Bribery and Corruption Mechanisms

25. We note that instances of bribery and corruption in the border environment, particularly in the context of customs procedures at Ports of Entry, has the potential to negatively impact on intra-regional trade, international exports, revenue collection, and a country's general business environment, as well as customs and border processing times.[7]

26. The draft Policy's omission of plans to prevent instances of bribery and corruption threatens to undermine the intended outcomes of the policy, particularly those relating to economic integration with neighbouring countries, the faster, more efficient and economical facilitation of movement for legitimate goods, conveyances and persons, and enabling conditions to facilitate trade, economic grow, and job creation.

27. We recommend that the OSBP Policy include a plan or propose methods or mechanisms to address and prevent bribery and corruption during the establishment of one-stop border posts.

IV. Capacity Restraints

28. We note the Auditor-General's audit outcome for the Department for the 2019/20 financial year found that the Department's debtors' impairment provision as a percentage of accrued departmental revenue is high and has increased from the prior year for DHA, and that this is an indication that the Department is experiencing

[7] Marie Chêne, Transparency International, *Corruption at Borders* (23 April 2018). Available at: https://knowledgehub.transparency.org/assets/uploads/helpdesk/Corruption-at-borders-2018.pdf

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challenges in the collection of outstanding amounts due to the state. The audit outcome further noted that claims against the department are "too high", and that if claims against the Department become payable in the next financial year, there will be little left to fund operations and service delivery, and that this may compromise service delivery and result in cash flow problems for the department.

29. We are concerned that ongoing non-compliance with the orders of various Courts in separate legal matters exposes the Department to further unpredictable and frivolous litigation costs, and would amount to fruitless and wasteful expenditure on the part of the Department.

30. We are particularly concerned that the implementation of a OSBP policy and the establishment of one-stop border posts in spite of capacity constraints may undermine the Department's ability to adhere to the key foundational principles and intended outcomes of that policy, particularly honouring human rights and humanitarian obligations in line with the Constitution and international agreements.

31. We recommend that the Department's capacity constraints be addressed and progress shown in this regard prior to the implementation of the OSBP policy. A one-stop border post would only have the desired efficacy if it is implemented in a feasible way by a Department that has the capacity to do so. The DHA's track record of late does not illustrate this track record. The DHA should be required to show improvement to its own capacity and non-regression within the Department as a whole, before further steps are taken to implement one-stop border posts at South Africa's Ports of Entry.

V. Conclusion

32. In summary, we welcome the draft Policy's initiatives towards regional integration and greater mobility in the SADC region, and believe the Department of Home Affairs should build on these by pursuing other initiatives proposed in the White Paper on International Migration as well as by working towards freedom of movement as

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envisioned in the SADC Protocol on the Facilitation of Movement of Persons, and in Africa generally.

33. We recommend that compliance with human rights and humanitarian obligations be recognised as a key foundational principle of the OSBP Policy, that special Subcommittee's be established to ensure the establishment and procedure of OSBPs is in compliance with such obligations, and that the Department engage with relevant stakeholders on human rights and humanitarian matters.

34. We recommend that the OSBP policy address the prevention of bribery and corruption.

35. We express our concern regarding capacity constraints on the part of the Department, and that these constraints may undermine the Department's ability to adhere to key foundational principles and intended outcomes of the OSBP policy, particularly honouring human rights and humanitarian obligations.

We thank the Department of Home Affairs for the opportunity to make these written comments, and welcome further engagements as a relevant stakeholder.

Yours sincerely,

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Scalabrini Centre of Cape Town

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