

LAWYERS FOR HUMAN RIGHTS AND HELLEN SUZMAN FOUNDATION SUBMISSION TO THE
SOUTH AFRICAN LAW REFORM COMMISSION ON DISCUSSION PAPER 167 – REVIEW OF
THE CRIMINAL JUSTICE SYSTEM: REVIEW OF SOUTH AFRICA’S BAIL SYSTEM

14 MAY 2025

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INTRODUCTION

1. Lawyers for Human Rights (LHR) and the Helen Suzman Foundation (HSF) jointly welcome the opportunity to provide submissions to the South African Law Reform Commission (the Commission) on Discussion Paper 167, Project 151: Review of the Criminal Justice System: Review of South Africa's Bail System (Discussion Paper 167). Understanding that these discussion papers, serving as a platform for the Commission's preliminary research and tentative legislative proposals, are crucial for gauging public opinion on identified solutions. LHR and HSF appreciate the Commission's efforts in undertaking this vital review of South Africa's bail system and are eager to contribute to this important process.
2. LHR is an independent, non-profit, non-governmental human rights organisation founded in 1979 by a collective of activist lawyers. With a commitment to a holistic approach to social justice, LHR undertakes strategic work across six key areas of human rights law, employing strategic litigation, advocacy, law reform, human rights education, and community mobilisation. Through its national network of law clinics and advice offices, LHR identifies critical human rights issues and leverages impact litigation and law reform to align legislation with constitutional rights, while also prioritizing community-based outreach and coalition-building to amplify the impact of its legal interventions.
3. HSF is dedicated to promoting constitutional democracy, the rule of law, and human rights in South Africa. HSF strives to strengthen and protect key institutions of constitutional democracy to ensure the realization of the Constitution's promise. To achieve this, HSF engages in public interest litigation to safeguard the rights of vulnerable individuals, supports public advocacy and dialogue to foster informed decision-making, and works to end impunity for systemic criminal conduct that undermines the constitutional state.
4. This submission addresses Discussion Paper 167 within the broader context of South Africa's carceral system, highlighting the specific challenges posed by remand detention and the unique circumstances of immigration detention. We outline the systemic issues and operational realities that contribute to these problems, providing a detailed problem statement and contextual analysis. Conclusively, this submission offers concrete

recommendations for reform, grounded in LHR and HSF's experiences and commitment to upholding constitutional rights and the rule of law.

A Note About Language

5. For the purposes of this submission, LHR and HSF note the use of the term 'illegal immigrant' in the discussion paper. Unless a person or persons fall within the definition of 'asylum seeker' or 'refugee' as defined in relevant legislation, the terms 'migrant', 'migrants', or 'non-nationals' will be used generally to refer to individuals who are not citizens or nationals of South Africa.
6. The term 'illegal foreigner', as defined in the Immigration Act 13 of 2002 (Immigration Act), will only be used when directly quoting the Act. LHR and HSF recognize that the term 'illegal foreigner' is problematic for several reasons. Primarily, it dehumanises migrants and incorrectly implies that a person's very being can be 'illegal'. Furthermore, it carries a connotation of criminality, which is often inaccurate. A person cannot be inherently 'illegal', especially simply due to a lack of documentation under a country's immigration laws. The term is also highly inflammatory, particularly within the South African context, which has regrettably experienced repeated incidents of violent xenophobic attacks.
7. It is crucial to distinguish between an 'illegal foreigner' and an undocumented person. An undocumented person lacks government-issued proof regulating their stay in the country. However, being undocumented does not automatically equate to being an 'illegal foreigner' liable for detention and deportation.

CONTEXT

The Problem of Remand Detention

8. Remand detention is a significant driver of overcrowding in South African correctional facilities.¹ The Discussion Document notes that as of March 2022, remand detainees

¹ South African Law Reform Commission 'Discussion paper 167 – Review of the Criminal Justice System: review of South Africa's Bail System (2025) 40 para 2.47.

numbered 47 164 out of a total of 143 244 inmates – nearly one third. What’s more remand detention disproportionately affects the poor, with 2 724 of remand detainees unable to raise bail of less than R1 000.²

9. The Discussion Paper claims that these numbers have stabilised since the early 2000s. However, recent data shows that while this may be true of sentenced offenders, there is a comparative rise in the number of remand detainees relative to sentenced offenders.
10. From figures provided by the Judicial Inspectorate of Correctional Services, there has been a 32% increase in the remand detainee population between March 2022 and January 2025 – from 47 164 to 62 479. This suggests that the remand prison population presents a unique challenge to South Africa’s correctional facilities.
11. It is also notable that a disaggregated analysis of the remand detainee population reveals a startling number of persons incarcerated who have been awaiting trial for over one year, as the table below illustrates:

Table 1: Time Spent on Remand

| Period spent in correctional facility awaiting trial | Number of unsentenced offenders |
|--|---------------------------------|
| 0 - 6 MONTHS | 15014 |
| > 6 - 12 MONTHS | 9158 |
| > 12 - 24 MONTHS | 4484 |
| 2 YEARS | 614 |
| > 2 - 3 YEARS | 1998 |

² SALRC Discussion paper 167 (n 2 above).

| | |
|-----------------|-----|
| > 3 - 5 YEARS | 797 |
| > 5 - 7 YEARS | 231 |
| > 7 - 10 YEARS | 27 |
| > 10 - 15 YEARS | 0 |

Source: Latest figures from the Judicial Inspectorate for Correctional Services.³

12. The SALRC rightly attributes unreasonably long periods of remand detention to two main sources:

- (i) unreasonably delayed trials and bail applications; and
- (ii) unaffordable bail amounts. Moreover, the SALRC rightly acknowledges both of these drivers of South Africa's high remand detainees population can at least partly be addressed by legislative reform.

13. This submission will deal with each of these drivers – and the SALRC's proposals for legislative reforms – one at time.

Migrants Within the Carceral System

14. Discussion Paper 167 addresses issues within the bail legal framework that directly influence how migrants are treated in remand detention and their ability to access bail.

15. Furthermore, in LHR's experience, the past few years have seen a significant number of purported undocumented migrants being subjected to criminal detention for immigration-related offences under section 49 of the Immigration Act 13 of 2002 (Immigration Act).

³ These figures represent a snapshot at a point in time in 2022 and, therefore, may not match the final total of remand detainees reported by JICS.

16. In terms of migrants detained, the following figures are of assistance:

16.1. During the 2024/2025 financial years, the Department of Home Affairs reported that 48 490 foreign nationals were arrested;⁴ and

16.2. According to a presentation by the Department of Correctional Services in January 2025, there were 12 771 migrants in remand detention, constituting 20.14% of the total remand detention.⁵

17. Given the significant population of migrants in remand detention, HSF and LHR have addressed the specific provisions related to migrants below and made recommendations accordingly.

SUBMISSIONS

The Problem of Unreasonably Delayed trials and Bail Applications

18. The Discussion Document identifies three legislative provisions that enable actors in the criminal justice system to influence the number of remand detainees in South African correctional facilities:

18.1. **Section 49G of the Correctional Services Act (CSA)**, which creates two moderate protections for remand detainees. First, it provides that they cannot be incarcerated for more than two years, without their further detention being considered by a court. Second, it requires Heads of correctional centres to monitor detainees nearing a two-year stay on remand and apply to a relevant court for a decision on whether continued detention is warranted. In principle and in practice, therefore, this section does not provide an upper limit on time spent incarcerated on remand. Indeed, as Table 1 above shows, in 2022 at least, there were over three thousand remand detainees

⁴ 27 March 2025, Question NW918 to the Minister of Home Affairs <https://pmg.org.za/committee-question/28969/> (accessed on 13 May 2025).

⁵ 4 February 2025, Department of Correctional Services Briefing to the Portfolio Committee on Correctional Services, *Foreign Nationals Incarcerated in DCS Facilities*, <https://pmg.org.za/committee-meeting/40155/> (accessed on 13 May 2025).

awaiting trial for more than two years – and over one thousand awaiting trial for longer than three years.

18.2. Section 50(6)(d) of the Criminal Procedure Act (CPA), which allows courts to postpone bail proceedings, for periods of seven days at a time. As the Discussion Document notes, overburdened magistrate courts result in extended remand periods while bail hearings are postponed.⁶ Once a bail hearing has been finalised, however, this section does not a court to revisit the initial bail decision as time goes on. Some countries provide for mandatory reviews of bail decisions, South Africa does not.⁷

18.3. Section 342A of the CPA, which empowers the court before which criminal proceedings are pending to investigate delays affecting that case and to make an order that will remedy the delay and/or the prejudice that flows from it. In principle, this could include ordering the provisional release of an accused held on remand.

19. It bears mentioning that the Discussion Document does not reveal any empirical research regarding the extent to which these sections have enabled actors in the criminal justice system to reduce the population of remand detainees. In other words, from the Discussion Document alone, it is reasonable to infer that the SALRC does not know how often Heads of correctional facilities apply for early release of remand detainees under section 49G of the CSA; nor is it aware of how often section 342A of the CPA has been invoked in favour of a remand detainee suffering an unreasonably delayed trial.

20. This is important data and should form part of any assessment of South Africa's legislative framework governing remand detention.

21. Nonetheless, the SALRC offers the following positive legislative reforms:

⁶ SALRC Discussion Paper 167 (n above) 45 para 2.59 – 2.60.

⁷ SALRC Discussion Paper 167 (n above) 46 para 2.64 – 2.66.

21.1. That section 50(6)(d) of the CPA be amended so that cumulative postponements of bail hearings do not exceed a reasonable period of time; and that it incorporate criteria protective of an accused's interests that guide decisions to postpone bail hearings.⁸

21.2. That section 50(6)(d) and 342A both include maximum time limits, depending on the nature of the offence, beyond which "incarceration, postponement or delay should be considered presumptively unreasonable".⁹ Release such circumstances would not result in the prosecution falling away but rather a release on bail pending a trial.¹⁰

21.3. That provision for automatic bail review be explored.¹¹

22. LHR and HSF support these proposals but do not think they go far enough in reforming the three abovementioned legislative provisions. In addition to the SALRC's proposed reforms mentioned immediately above, LHR and HSF suggest that any proposed maximum time limits in section 342A of the CPA should be aligned with the time limits in section 49G of the CSA. Moreover, the maximum time limits across these sections should be lowered significantly, with the understanding that an accused can still be available for trial without being incarcerated.

The Problem of Unaffordable Bail

23. The Discussion Document rightly acknowledges that the CPA, in principle, provides judicial officers with the tools to ensure that poor accused persons are not punished for their poverty by lengthy stays on remand. In this regard, section 60(2B)(b)(i) of the CPA requires that an inquiry be held into an accused's ability to pay an amount of money when they are granted bail. Where the accused cannot afford bail, section 60(2B)(b)(i) of the CPA requires that "the court must consider setting appropriate conditions that do not include an amount of money" when granting bail.

⁸ SALRC Discussion Paper 167 (n 1 above) 54 para 2.85.

⁹ SALRC Discussion Paper 167 (n 1 above) 54 51 para 2.82.1.

¹⁰ SALRC Discussion Paper 167 (n 1 above) 52 para 2.82.2.

¹¹ SALRC Discussion Paper 167 (n 1 above) 55 para 2.85.2.

24. Nonetheless, as discussed above, the SALRC notes that in 2022, 2 724 remand detainees were unable to raise bail of less than R1 000. This either suggests that section 60(2B)(b)(i) is not being used as it should be, or that judicial officers find themselves simply without options other than monetary bail to incentivize an accused to be present for trial.
25. To the extent that the latter is the case, the SALRC suggests that South Africa provide that property be attached for the purposes of allowing an accused out on bail. While this solves the problem of small monetary amounts keeping accused persons incarcerated on remand in some cases, it still assumes that the accused has property worth attaching. If the accused has no property of value, then judicial officers may well be tempted to apply section 60(2B)(b)(i) in a way that makes use of monetary bail.
26. As such, while LHR and HSF are not averse to property bail we suggest that two more fundamental reforms be made to avoid the *de facto* criminalisation of poor accused persons:
- 26.1. First, South Africa should conduct an audit of legislation and municipal by-laws which criminalise petty offenses. In this regard, South Africa should use as its guide the African Commission On Human And Peoples' Rights 'Principles On The Decriminalisation Of Petty Offences In Africa' in defining those crimes considered as 'petty'.¹²
- 26.2. Second, decriminalise these offenses and instead require judicial officers to redirect offenders into alternative non-custodial remedial programs.
27. This will go a long way to ensuring that the criminal justice system does not *de facto* criminalise the poverty of an accused, in addition to their alleged conduct.

Verification of Particulars of the Accused

28. The discussion paper astutely highlights a critical problem wherein accused persons residing in informal settlements or without verifiable street addresses are frequently

¹² African Policing Civilian Oversight Forum 'Principles on the decriminalisation of petty offences in Africa' <https://apcof.org/wp-content/uploads/apcof-principles-on-the-decriminalisation-of-petty-offences-in-africa-eng-fr-pr-ar.pdf> (accessed 10 May 2025).

denied bail. This practice, as the Commission notes, has been flagged by stakeholders and substantiated by research, raising serious concerns about the state effectively criminalizing poverty by subjecting these individuals to prolonged periods of remand detention solely due to their residential circumstances.

29. This issue is further exacerbated when considering foreign nationals. Informal settlements are perceptible material expressions of internal and cross-border migration in South Africa, with new arrivals, often drawn to urban centres like Gauteng in search of economic opportunities, frequently residing in these high-density areas.¹³ Often lacking formal, easily verifiable addresses within South Africa and potentially facing language barriers or unfamiliarity with the legal system, non-national accused individuals are even more susceptible to being denied bail based on address verification challenges. This can lead to disproportionately long periods of detention, irrespective of the merits of their case or the risk they may actually pose.

30. Compounding this problem is the lack of a clear and standardized process for the verification of an accused's particulars, including their nationality and immigration status, during bail proceedings. The Criminal Procedure Act does not explicitly address the verification of documentation beyond basic identity, leaving a significant gap.¹⁴ While the Immigration Act deals with immigration matters, its application and integration into bail proceedings are inadequate to address the specific challenges of verifying non-national accused individuals' documentation at this crucial stage. This absence of a robust verification mechanism can lead to both the unwarranted detention of non-nationals who pose no flight risk and, conversely, the potential granting of bail to individuals who may abscond due to a lack of proper scrutiny of their status and documentation. Therefore, the lack of a clear legal framework and standardized procedures for verifying the identity and immigration status of all accused persons, particularly non-nationals, at bail proceedings

¹³ A Oksiutyc & CM Azionya 'Informal settlement: A manifestation of internal and cross-border migration' in P Ruyunanan & N Xulu-Gama (eds) *Migration in Southern Africa (2022)* 109.

¹⁴ Criminal Procedure Act 51 of 1977 sec 41 (1).

represents a significant problem statement that requires urgent attention and legislative reform.

Significance of Verification of Documentation and Status

31. As the Discussion Paper accurately stresses the importance of the provision of a verifiable address is crucial for the court to assess an accused's likelihood of appearing for trial,¹⁵ the clear verification of an accused's identity, nationality, and immigration status holds similar and, in some cases, even greater significance. Without a reliable mechanism to ascertain these fundamental aspects, the court's ability to make an informed decision regarding bail is severely compromised. Accurate verification of documentation and/or status allows the court to:

31.1. For non-nationals, verifying their legal status and ties to the country is paramount in evaluating the risk of abscondment. Without this information, the court lacks a critical element in determining whether the accused has sufficient incentive to remain within the jurisdiction.

31.2. Knowing the identity of the accused is fundamental to ensuring accountability throughout the legal process.¹⁶ Verified documentation help determine whether an accused should be kept in detention or not.

31.3. Understanding an accused's immigration status may necessitate specific bail conditions, such as reporting requirements to immigration authorities or restrictions on movement, to mitigate any potential risks.

31.4. A standardized and fair process for verifying documentation can help prevent discriminatory practices against non-nationals who may face additional hurdles in providing traditional forms of address verification.

¹⁵ SALRC Discussion Paper 167 (n 1 above) 70 para 2.110.

¹⁶ M Griffiths 'Establishing Your True Identity: Immigration Detention and Contemporary Identification Debates' (2013) in I About, J Brown & G Lonergan (eds) *Identification and Registration Practices in Transnational Perspective*.

Applicable Law

32. The legal framework governing the verification of an arrested person's identity is addressed in Section 41 of the CPA.¹⁷ This section outlines an obligation for arrested persons to provide their details; failure to do so, or the provision of false information, constitutes an offence, but it does not outline the specific procedures that law enforcement officials must follow to confirm the identity of an individual who has been taken into custody.

Section 41. Name and address of certain persons and power of arrest by peace officer without warrant

(1) A peace officer may call upon any person—

(a) whom he has power to arrest;

(b) who is reasonably suspected of having committed or of having attempted to commit an offence;

(c) who, in the opinion of the peace officer, may be able to give evidence in regard to the commission or suspected commission of any offence, to furnish such peace officer with his full name and address, and if such person fails to furnish his full name and address, the peace officer may forthwith and without warrant arrest him, or, if such person furnishes to the peace officer a name or address which the peace officer reasonably suspects to be false, the peace officer may arrest him without warrant and detain him for a period not exceeding 12 hours until such name or address has been verified.

(2) Any person who, when called upon under the provisions of subsection (1) to furnish his name and address, fails to do so or furnishes a false or incorrect name and address, shall be guilty of an offence and liable on conviction to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.

¹⁷ Criminal Procedure Act 51 of 1977.

33. Section 41 and regulation 43 of the Immigration Act Regulations outline the procedures for the identification and examination of individuals, as envisaged in Section 41 of the Act, to determine their nationality, status, identity, right to enter and sojourn in the Republic, and compliance with immigration laws. This regulation also addresses the handling of individuals detained by police officers and suspected of being afflicted with certain diseases, setting out the obligations of both immigration and police officers in these circumstances.

41. Identification

(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

(2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence.

Regulation 43 Identification

(1) (a) An immigration officer may subject a person envisaged in section 41 of the Immigration Act to an examination, which may include interrogation, photographing and fingerprinting, aimed at satisfying the immigration officer of

(i) the nationality or status of such a person;

(ii) the person's identity and right to enter and sojourn in the Republic;

(iii) the person's compliance with the Act and these Regulations; and

(iv) whether such a person is, has become or is likely to become

(aa) an illegal foreigner;

(bb) a prohibited person; or

(cc) an undesirable person provided that failure on the part of such a person to subject himself or herself to the above examination, may, for good cause, cause such person to be dealt with as an illegal foreigner.

(b) An immigration officer may require a foreigner suspected of being afflicted with a disease contemplated in regulation 34(l)(a) to submit to an examination by a medical practitioner designated by the Director-General, which examination shall take place as soon as possible at a place determined by the immigration officer.

(2) Where a person envisaged in section 41 of the Act is detained by a police officer, such police officer shall within 24 hours bring such person before an immigration officer. The immigration officer shall comply with the provisions of section 34(2), provided that the maximum period of detention envisaged in that section shall commence at the time of the first arrest. Where the warrant referred to in sub regulation 39(8), accompanied by the affidavit included therein, is not provided, or does not substantiate reasonable grounds for detention, the immigration officer shall not accept such a person into his or her custody.

Proposed Interventions

34. In the interest of justice, and to further protect and promote the rights of individuals there is a need for legal reform to provide interventions to Regulation 43 of the Immigration Act and Section 41 of the CPA that strengthens procedural safeguards, enhances judicial oversight, improves transparency and accountability, and importantly addresses vulnerable groups.

35. Individuals being examined under Regulation 43 should be explicitly informed of their right to legal representation and provided with access to it within a reasonable time.¹⁸ With clear time limit for examinations and detentions under Regulation 43, with oversight mechanisms to prevent prolonged or arbitrary detention. Additionally, examinations should be conducted in a manner that respects the dignity and privacy of the individual, prohibiting degrading treatment or discriminatory practices.
36. Section 41 and Regulation 43 should be amended to require mandatory and periodic judicial review of detention orders, even in cases where individuals are detained for the purposes of identification.
37. There is a need for detailed record-keeping of all examinations and detentions under Regulation 43, including the reasons for the detention, the duration of the examination, and the treatment of the individual.
38. An independent oversight body to monitor compliance with Regulation 43 and Section 41 and investigate allegations of abuse or misconduct by immigration officers or police officers should be established.
39. Specific safeguards for vulnerable groups, such as asylum seekers, refugees, and unaccompanied minors, to ensure that their rights are protected during the identification and examination process should be implemented. As well as provision to access to interpreters and culturally sensitive assistance to individuals who do not understand the language of the proceedings.
40. The implementation of these proposed interventions in South Africa can ensure that the application of Regulation 43 and Section 41 is consistent with the principles of justice, fairness, and respect for human rights.

Legislative Reform

¹⁸ Constitution of the Republic of South Africa, 1996 sec 35.

| Current legislative provision | Proposed amendment currently in discussion paper | LHR HSF proposed amendment/insertion |
|---|---|--|
| <p>Section 41 of the Criminal Procedure Act 41.</p> | <p>'59(1)(a)</p> <p>(iv) a receipt [shall be given] for the sum of money deposited as bail [and on which the offence in respect of which the bail is granted and the place, date and time of the trial of the accused].</p> <p>section 60(6)(a) of the CPA as follows:</p> <p>'In considering whether the ground in subsection (4)(a) has been established, the court may, where applicable, take into account the following factors, namely-</p> <p>(a) the emotional, family, community or occupational ties of the accused to</p> <p>the place at which he or she is to be tried as indicated by the history and details of the person's residence, occupation, and family</p> | <p>(1A) Verification of Identity Documents</p> <p>(a) When a peace officer, acting under subsection (1), is furnished with an identity document, the peace officer shall take reasonable steps to verify the authenticity of that document and the identity of the person presenting it.</p> <p>(b) In the case of a person who claims to be a South African citizen, verification may include, but is not limited to, checking the document against the national population register.</p> <p>(c) In the case of a person who claims to be a foreign national, verification shall be carried out in a manner consistent with the Immigration Act and its regulations. This may include:</p> <p>(i) Examining the validity of the person's passport, visa, or other relevant documentation;</p> <p>(ii) Consulting with an immigration officer, where necessary and feasible, to ascertain the person's status and the</p> |

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| | | <p>authenticity of their documents;</p> <p>(iii) Detaining the person for a period not exceeding 12 hours, as per subsection (1), only if there are reasonable grounds to suspect that the documents are fraudulent or that the person has provided false information, and such detention is necessary to allow for proper verification.</p> <p>(d) If, after verification, the peace officer reasonably suspects that the identity document is fraudulent or the person has provided false information, the peace officer may arrest the person without a warrant as contemplated in subsection (1).</p> |
| <p>Section 41 of the Immigration Act.</p> | <p>None</p> | <p>(1A) Verification of Identity and Status</p> <p>(a) The verification process shall be carried out in the following manner:</p> <p>(i) In the case of a person who claims to be a South African citizen, verification may include, but is not limited to, checking the document against the national population register.</p> |

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| | | <p>(ii) In the case of a person who claims to be a foreign national, verification shall be carried out in a manner consistent with this Act and its regulations. This may include:</p> <p>(aa) Examining the validity of the person's passport, visa, or other relevant documentation;</p> <p>(bb) Consulting with an immigration officer, where necessary and feasible, to ascertain the person's status and the authenticity of their documents;</p> <p>(b) If, after taking reasonable steps to verify identity and status, the immigration officer or police officer reasonably suspects that the identity document is fraudulent or the person has provided false information, the officer may, notwithstanding subsection (1), take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary, detain him or her in terms of section 34. Such detention shall not exceed 12 hours unless an extension is</p> |
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| | | granted by a High Court Judge or Magistrate with jurisdiction. |
| Regulation 43 of the Immigration Act Regulations | None | <p>Regulation 43: Identification and Verification</p> <p>(2) Verification Process</p> <p>(c) During the verification process, the immigration officer must:</p> <p>(i) Inform the individual of the purpose of the verification and the legal basis for it.</p> <p>(ii) Respect the individual's dignity and right to privacy. (iii) Provide the individual with a reasonable opportunity to explain any discrepancies or issues with their documents.</p> <p>(iv) Record all steps taken in the verification process and the outcome.</p> |

Foreign Nationals

41. Discussion Paper 167 does not make any recommendations regarding how the granting of bail to migrants should be dealt with. It goes on further to say that any amendments to the framework should be incorporated into the Immigration Act 13 of 2002 (Immigration Act).

42. As outlined above, a significant portion of remand detainees are migrants.¹⁹²⁰ It is thus trite that when considering a reform of the bail system, due consideration must be had to reforms that address the needs of undocumented persons.

43. In November 2024, the Portfolio Committee on Home Affairs invited submissions on proposed amendments to the Immigration Act dealing with issues of detention pending deportation. LHR made submissions on these proposed amendments, a copy of which is attached as Annexure 'A'. For purposes of these submissions, we highlight key recommendations applicable.

Provisions to address and ensure procedural safeguards

44. While section 35 of the Constitution does provide procedural safeguards that are applicable during pre-trial proceedings for migrants, including the right to access legal representation for free and the provision of information as declared by section 35 in a language of a detainee's choice, we propose that a special carve out be made in the framework governing bail that a magistrate ensure that migrants be afforded fair treatment and due process.

45. While the above suggestion was made in the context of the Immigration Amendment Bill, we propose that a similar clause could be inserted in the Criminal Procedure Act as that proposed in the Immigration Act²¹, where both the court of first appearance and the court before which bail proceedings are instituted where procedural safeguards are legislated as they pertain to migrants.

46. These procedural safeguards include that the presiding officer must, before proceeding with the substance of a matter, ensure that a migrant appearing before it is:

46.1. is informed of their rights in a language that they understand, including the right to legal representation, the right to an interpreter, and the right to appeal;

¹⁹ Question NW918 to the Minister of Home Affairs (n 3 above).

²⁰ Department of Correctional Services Briefing (n 4 above).

²¹ See page 40 of Annexure A where there is a proposed insertion of clause 34(1)(B).

46.2. understands the charges or allegations against them;

46.3. understands the potential consequences of the proceedings; and

46.4. has had a reasonable opportunity to consult with legal counsel or an interpreter.

Alternatives to Detention

47. In instances where a person is detained for immigration-related infractions, international law dictates that detention must be a measure of last resort.²²

48. In this regard, LHR proposed a number of models that alternatives to detention can take in the immigration detention context²³.

49. For purposes of Discussion Paper 167, and in line with LHR and HSF's submissions above, especially regarding the unaffordability of bail, we draw specific attention to the paragraphs of the submission regarding recommendations around State-funded bail and community-based accommodation and supervision²⁴ and release from detention pending voluntary return.²⁵

50. Overall, there are benefits to consideration of alternatives to detention, including economic advantages to the state.²⁶

²² UNHCR 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' <https://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776> (accessed 22 November 2024)

²³ See pages 25-38 of Annexure A.

²⁴ See page 31 of Annexure A.

²⁵ See page 32 of Annexure A.

²⁶ See page 35 of Annexure A.