

REPUBLIC OF SOUTH AFRICA

IMMIGRATION BILL

*(As introduced in the National Assembly as a section 75 Bill;
draft Bill published in Government Gazette No. 22439 of 29 June 2001)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

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BILL

To provide for the regulation of admission of persons to, their residence in, and their departure from the Republic and for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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1. In <i>this Act</i> , unless the context indicates otherwise—	
(i) “ <i>admission</i> ” means entering the <i>Republic</i> at a <i>port of entry</i> on the basis of the authority to do so validly granted by <i>this Act</i> or by an <i>immigration officer</i> in terms of <i>this Act</i> , and the verb “ <i>to admit</i> ” has a corresponding meaning;	
(ii) “ <i>application</i> ” means a request in the <i>prescribed</i> form which complies with the requirements and provides the information and documentation which may be <i>prescribed</i> ;	20
(iii) “ <i>Board</i> ” means the <i>Immigration Board</i> contemplated in section 28 of <i>this Act</i> ;	
(iv) “ <i>border</i> ” means the national <i>borders</i> of the <i>Republic</i> and includes <i>ports of entry</i> , coastlines and the outer margin of territorial waters;	25
(v) “ <i>chartered accountant</i> ” means a person referred to in section 1 of the Chartered Accountants Designation (Private) Act, 1995 (Act No. 67 of 1993);	
(vi) “ <i>citizen</i> ” has the meaning assigned thereto in the South African Citizenship Act, 1995 (Act No. 88 of 1995), and “ <i>citizenship</i> ” has a corresponding meaning;	30
(vii) “ <i>corporate applicant</i> ” means a juristic person established under the laws of the <i>Republic</i> or of a <i>foreign country</i> which conducts business, charitable, agricultural or commercial activities within the <i>Republic</i> and which applies for a corporate permit referred to in section 16 of <i>this Act</i> ;	
(viii) “ <i>Court</i> ” means an <i>Immigration Court</i> established in terms of section 40 of <i>this Act</i> ;	35
(ix) “ <i>customary union</i> ” means a conjugal relationship according to indigenous law and custom and which is recognised and documented as <i>prescribed</i> ;	
(x) “ <i>Department</i> ” means the Department of Home Affairs;	
(xi) “ <i>departure</i> ” means exiting the <i>Republic</i> from a <i>port of entry</i> in compliance with <i>this Act</i> and the verb “ <i>to depart</i> ” has a corresponding meaning;	40
(xii) “ <i>deportation</i> ” means the action or procedure aimed at causing an <i>illegal foreigner</i> to leave the <i>Republic</i> involuntarily, or under detention in terms of <i>this Act</i> and the verb “ <i>to deport</i> ” has a corresponding meaning;	
(xiii) “ <i>Director-General</i> ” means the Director-General of the <i>Department</i> ;	
(xiv) “ <i>employer</i> ” includes the person contractually bound by the applicable employment contract as an employer or, in the case of a juristic person, its chief executive officer or the person to whom such officer has delegated the final responsibility in respect of personnel matters;	45
(xv) “ <i>foreign country</i> ” means a country other than the <i>Republic</i> ;	
(xvi) “ <i>foreign state</i> ” means the juristic entity governing a <i>foreign country</i> ;	50
(xvii) “ <i>foreigner</i> ” means an individual who is neither a <i>citizen</i> nor a <i>resident</i> , but is not an <i>illegal foreigner</i> ;	
(xviii) “ <i>illegal foreigner</i> ” means a <i>foreigner</i> who is in the <i>Republic</i> in contravention of <i>this Act</i> and includes a <i>prohibited person</i> ;	

- (xix) “*immediate family*” means persons within the second step of kinship, regarding *marriage* as one of such steps, but not counting any common antecedent;
- (xx) “*immigration officer*” means an *officer* of the *Department*, or another person having the *prescribed* requirements, appointed as such from time to time by the *Department*; 5
- (xxi) “*marriage*” means a legally sanctioned conjugal relationship intended to be permanent and concluded under the laws of the *Republic*, or under the laws of a *foreign country* as *prescribed from time to time*, and includes a *customary union*; 10
- (xxii) “*master*” means the *master* of a *ship* and refers to the person who at any given time is in charge or command of a *ship*;
- (xxiii) “*Minister*” means the Minister of Home Affairs;
- (xxiv) “*mission*” means an office of the Department of Foreign Affairs outside the *Republic*; 15
- (xxv) “*officer*” means a person employed in, or contracted by, the *Department* who has been authorised by the *Department* to exercise certain powers and perform certain functions in the name and on behalf of the *Department*;
- (xxvi) “*owner*” means the *owner* of record and, in the case of a *ship*, it includes the charterer of the *ship* and any agent within the *Republic* of the owner or the charterer; 20
- (xxvii) “*passport*” means any passport or travel document containing the *prescribed* information and characteristics issued—
 - (a) under the South African Passport and Travel Document Act, 1994;
 - (b) on behalf of a *foreign state* recognised by the Government of the *Republic* to a person who is not a *citizen*; 25
 - (c) on behalf of any international organisation *prescribed from time to time*, including regional or subregional ones, to a person who is not a *citizen*; and
 - (d) any other document approved by the *Director-General* after consultation with the *Minister* and issued under special circumstances to a person who cannot obtain a document referred to in paragraphs (a) to (c); 30
- (xxviii) “*port of entry*” means a place *prescribed from time to time* where a *foreigner* has to report before he or she may move, sojourn or remain within, or enter the *Republic*; 35
- (xxix) “*premises*” means any building, structure or tent together with the land on which it is situated and the adjoining land used in connection with it, and includes any land without any building, structure or tent and any vehicle, conveyance, or *ship*;
- (xxx) “*prescribed*” means provided for by *regulation*, the verb “*to prescribe*” has a corresponding meaning and “*prescribed from time to time*” refers to section 33(2); 40
- (xxxi) “*prohibited person*” means any person referred to in section 23 of *this Act*;
- (xxxii) “*publish*” means publish by notice in the Government Gazette and, to the extent possible and feasible under the circumstances, convey by mail or e-mail to parties or stakeholders who have requested their inclusion or have been included in mailing lists to be maintained by the *Department* in respect of subject matters in respect of which public input is called for by *this Act*, *prescribed*, advisable or expedient; 45
- (xxxiii) “*refugee*” has the meaning assigned thereto in the Refugees Act, 1998 (Act No. 130 of 1998); 50
- (xxxiv) “*regulations*” means general rules adopted by the *Minister* after consultation with the *Board* in terms of *this Act* and *published*;
- (xxxv) “*Republic*” means the Republic of South Africa and its territory;
- (xxxvi) “*resident*” means the holder of a permanent residence permit referred to in section 20 of *this Act*; 55
- (xxxvii) “*ship*” includes any vessel, boat, aircraft or other *prescribed* conveyance;
- (xxxviii) “*spouse*” means a person who is party to a *marriage*, or a *customary union*, or to a permanent relationship which calls for cohabitation and mutual financial and emotional support, and is proven by a *prescribed* affidavit substantiated by a notarial contract; 60
- (ixl) “*status*” means the permanent or *temporary residence permit* issued to a person in terms of *this Act* and includes the rights and obligations flowing

therefrom, including any term and condition of residence imposed by the *Department* when issuing any such permits;

- (xl) “*temporary residence permit*” means a permit referred to in section 3 of *this Act*;
- (xli) “*this Act*” means *this Act*, including its schedules, and includes the *regulations* made pursuant thereto; 5
- (xlii) “*training fund*” means the public record referred to in section 29(2)(g)(i) of *this Act*;
- (xliii) “*undesirable person*” means a person referred to in section 24 of *this Act*;
- (xliv) “*visa*” means the *prescribed* endorsement issued upon *application* on the valid *passport* of a *foreigner* granting such *foreigner* the authority to proceed to the *Republic* to report for a *prescribed* examination to an *immigration officer* at the *port of entry* with a view to *admission* on a specified *temporary residence permit*, which at any time before *admission* may be withdrawn by the *Department*; 10 15
- (xlv) “*work*” means business, commercial or remunerative activities within the *Republic*, excluding work on the basis of a permit referred to in sections 5 or 7, or work for a foreign *employer* pursuant to a contract which only partially calls for activities in the *Republic*, or work as a business or profession mainly based outside the *Republic* but requiring activities within the *Republic*, 20

which words are italicised and, when appropriate, the singular includes the plural and vice versa.

Admission and departure

2. (1) Subject to *this Act*, no person shall enter the *Republic* at a place other than a *port of entry*. 25

(2) Subject to *this Act*, a *citizen* or a *resident* shall *be admitted*, provided that he or she identifies himself or herself as such in the *prescribed* manner and, in the case of a *resident*, the *immigration officer* records his or her entrance.

(3) No person shall leave the *Republic*—

- (a) unless in possession of a *passport*, or a certificate issued by the *Department* upon *application* in lieu thereof; 30
- (b) unless, if he or she is a person under the age of 16 years who does not hold a *passport*, he or she is accompanied by his or her parent who holds a *passport* in which his or her name was entered in terms of the provisions of the South African Passports and Travel Documents Act, 1994, or on behalf of any government or international organisation recognised by the Government of the *Republic*; and 35
- (c) except at a *port of entry*, unless—
 - (i) in possession of a certificate by the *Department* granting permission upon *application* to leave the *Republic* at a place other than a *port of entry* within a certain period not exceeding six months at a time, provided that for good cause an *immigration officer* may withdraw such permission; or 40
 - (ii) exempted by the *Minister*, as he or she deems fit, on recommendation of the *Director-General*, which exemption may be withdrawn by the *Director-General* at any time; and 45
- (d) unless, in the case of a *resident*, the *departure* is recorded by an *immigration officer*.

(4) A *foreigner* may only enter the *Republic* if issued with a valid *temporary residence permit*, as set out in *this Act*, and may only *depart* as set out in *this Act*. 50

TEMPORARY RESIDENCE

Temporary residence permits

3. (1) Upon *admission*, a *foreigner* may enter and sojourn in the *Republic* only if in possession of a *temporary residence permit*.

(2) Subject to *this Act*, upon *application* and upon *prescribed* examination at the *port of entry*, one of the *temporary residence permits* set out in sections 4 to 18 may be issued to a *foreigner*. 55

(3) If issued outside the *Republic*, a *temporary residence permit* is deemed to be of force and effect only after an *admission*.

(4) A *temporary residence permit* is to be issued on condition that the holder is not or does not become a *prohibited* or an *undesirable person*.

(5) For good cause, as *prescribed*, the *Department* may attach reasonable individual terms and conditions to a *temporary residence permit*. 5

(6) Subject to *this Act*, a *foreigner* may change his or her *status* while in the *Republic*.

General entry permit

4. (1) A general entry permit may be issued by the *Department* in respect of a *foreigner* who— 10

(a) holds a *visa*; or

(b) is a citizen of a *foreign state prescribed from time to time*; and/or

(c) provides the financial or other guarantees *prescribed from time to time* in respect of his or her *departure*,

provided that such permit— 15

(i) cannot exceed three months and upon *application* may be renewed by the *Department* only once; and

(ii) may be issued by the *Department* upon *application* for any period not to exceed three years to a *foreigner* who has satisfied the *Department* that he or she controls sufficient available financial resources, which may be *prescribed from time to time*, and is engaged in the *Republic* in— 20

(aa) academic sabbaticals;

(bb) voluntary or charitable activities;

(cc) research; or

(dd) other *prescribed* activities. 25

(2) The holders of a general entry permit may not conduct *work*.

(3) An *illegal foreigner* receiving a general entry permit shall comply with any terms and conditions which may be *prescribed from time to time* and provide the *prescribed* deposit to be forfeited to the *Department* in case of his or her non-compliance with *this Act*. 30

(4) Unless otherwise specified therein, a general entry permit does not allow its bearer to be *admitted* more than once, provided that it may be *prescribed* that in the absence of such specification such permit may authorise multiple *admissions* from *prescribed foreign countries*.

(5) Special financial and other guarantees may be *prescribed* in respect of the issuance of a general entry permit to certain classes of *foreigners prescribed from time to time*. 35

Diplomatic permit

5. (1) A diplomatic permit may be issued by the *Department* or by a *mission* in the *prescribed* manner and form and as directed by the *Department*, to—

(a) an ambassador, a minister of a *foreign state*, a career diplomat or consular officer of a foreign government recognised *de jure* by the South African Government, or a representative of an international organisation *prescribed from time to time*, who is accepted by the Minister of Foreign Affairs; 40

(b) upon a basis of reciprocity, other officials or employees of a foreign government or international organisation contemplated in paragraph (a); 45

(c) a member of the family, as defined in the Diplomatic Immunities and Privileges Act, 1989 (Act No. 74 of 1989), of the *foreigners* contemplated in paragraphs (a) and (b);

(d) upon a basis of reciprocity, attendants, servants and personal employees of the *foreigners* contemplated in paragraphs (a) to (c); and 50

(e) other *prescribed foreigners* who are dignitaries of a *foreign state*.

(2) The holder of a diplomatic permit may not conduct *work*, provided that the *foreigners* referred to in subsection (1)(c) may combine such permit with a separately issued *work* permit.

Student permit 55

6. (1) A student permit may be issued to a *foreigner* intending to study in the *Republic* for longer than three months by—

- (a) the registrar office of an institution of learning where the *foreigner* intends to study, provided that such institution—
 - (i) has been approved by and is registered in good standing with the *Department*;
 - (ii) issues such permit upon *application*; 5
 - (iii) certifies that it has received guarantees to its satisfaction that such *foreigner's* tuition fees will be paid;
 - (iv) has received the *prescribed* guarantees that such *foreigner* will have sufficient means to support himself or herself while in the *Republic*;
 - (v) in the case of a minor, provides the name of the person in South Africa acting as the *foreigner's* guardian or who has accepted to act as such; 10
 - (vi) undertakes to provide a *prescribed* periodic certification that such *foreigner* is satisfactorily performing his or her curriculum of study; and
 - (vii) undertakes to notify the *Department* when such *foreigner* has completed his or her studies, or is no longer performing them satisfactorily; or 15
 - (b) the *Department*.
- (2) When so requested by, and after consultation with, the Department of Education, the *Department* shall determine an *ad hoc* fee for the issuance of student permits in respect of institutions publically funded or subsidised, to be paid into the National Treasury Fund. 20
- (3) A student permit does not entitle the holder to conduct *work*, provided that—
- (a) the *Department* may authorise the holder of a student permit to conduct *work* as practical training in a field related to that of his or her studies following his or her duly and timely completed studies, or during studies, not to exceed the *prescribed* period; and 25
 - (b) subject to the requirements of his or her study permit, the holder of a study permit may also hold a *work* permit.

Treaty permit

7. (1) A treaty permit may be issued to a *foreigner* conducting activities in the *Republic* in terms of an international agreement to which the *Republic* is a party. 30
- (2) The treaty permit may be issued by—
- (a) the *Department*; or
 - (b) the Department of Foreign Affairs or the other organ of the State responsible for the implementation of the treaty concerned, provided that—
 - (i) information relating to the failure of such *foreigner* to comply with the terms and conditions of the permit and *to depart* when required is conveyed to the *Department*; 35
 - (ii) the organ of the State concerned satisfies the *Department* that, under the circumstances, it has the capacity to perform this function; and
 - (iii) the requirements, procedures and forms for the issuance of such permit are *prescribed*. 40

Investor and self-employed person's permit

8. (1) An investor permit may be issued by the *Department* to a *foreigner* intending to establish a business in the *Republic* in which he or she may be employed, and to the members of such *foreigner's immediate family* provided that— 45
- (a) such *foreigner* invests the *prescribed* financial or capital contribution in such business;
 - (b) the contribution referred to in paragraph (a) be part of the intended book value of such business; and
 - (c) a *chartered accountant* certifies compliance with the provisions of *this Act*. 50
- (2) The holder of an investor permit may conduct *work*.
- (3) The *Department* may reduce or waive the capitalisation requirements referred to in subsection (1)(a) for businesses which are *prescribed from time to time* to be in the national interest or when so requested by the Department of Trade and Industry.
- (4) The holder of an investor permit shall cause the certification referred to in subsection (1)(c) to be renewed within 24 months of the issuance of the permit, and within every two years thereafter. 55

Crewman permit

9. (1) A crewman permit may be issued for a crewman by—
- (a) the *Department*; or 60

- (b) the *owner* of the vessel carrying such crewman, provided that such *owner*—
 - (i) is registered in good standing with the *Department*;
 - (ii) has provided the *prescribed* financial guarantees to the *Department* to ensure compliance of such *foreigner* with the provisions of *this Act*; and
 - (iii) accepts to be responsible for a *prescribed* fine, should the *foreigner* fail to honour the terms of such permit. 5

(2) A crewman permit may be issued on condition that the holder agrees to refrain from moving beyond a predetermined area.

(3) The holder of a crewman permit may not conduct *work*.

Medical treatment permit

10

10. (1) A medical treatment permit may be issued to a *foreigner* intending to receive medical treatment in the *Republic* for longer than three months by—

- (a) the registrar office of an institution where the *foreigner* intends to receive treatment, provided that such institution—
 - (i) has been approved by and is registered in good standing with the *Department*; 15
 - (ii) issues such permit upon *application*;
 - (iii) certifies that it has received guarantees to its satisfaction that such *foreigner's* treatment costs will be paid;
 - (iv) in the case of a minor, provides the name of the person in South Africa acting as the *foreigner's* guardian or who has accepted to act as such; 20
 - (v) undertakes to provide a *prescribed* periodic certification that such *foreigner* is under treatment; and
 - (vi) undertakes to notify the *Department* when such *foreigner* has completed his or her treatment; or 25
- (b) the *Department*.

(2) When so requested by, and after consultation with, the Department of Health, the *Department* shall determine an *ad hoc* fee for the issuance of medical treatment permits in respect of institutions publicly funded or subsidised, to be paid into the National Treasury Fund. 30

(3) A medical treatment permit does not entitle the holder to conduct *work*.

Relatives permit

11. (1) A relatives permit may be issued by the *Department* to a *foreigner* who is a member of the *immediate family* of a *citizen* or a *resident*, provided that such *citizen* or *resident* provides the *prescribed* financial assurance, certified by a *chartered accountant*, that he or she has the means available to support such *foreigner* for the duration of such permit. 35

(2) The holder of a relatives permit may not conduct *work*.

Work permit

12. (1) A *work* permit may be issued by the *Department* to a *foreigner* intending to conduct *work*, when his or her prospective *employer* has— 40

- (a) received certification from a *chartered accountant* that the terms and conditions under which he or she intends to employ such *foreigner*, including salary and benefits, are not inferior to those prevailing in the relevant market segment for *citizens* and *residents*, taking into account applicable collective bargaining agreements and other applicable standards, as determined by the Department of Labour, if any, provided that—
 - (i) a copy of such certification shall be conveyed to a *prescribed* office of the Department of Labour; and
 - (ii) such certification shall lapse if objected to for good cause by such office of the Department of Labour within 15 calendar days of its receipt; 45
- (b) committed to—
 - (i) pay an amount *prescribed from time to time* as a ratio of such *foreigner's* remuneration, to be shown in the *training fund*; and
 - (ii) notify the *Department* when such *foreigner* is no longer employed or is employed in a different capacity or role; and 55
- (c) submitted a certification from a *chartered accountant* of the job description and that the position exists and is intended to be filled by such *foreigner*.

(2) A *work* permit shall lapse if, within six months of its issuance, and within every year thereafter, its holder fails to submit to the *Department* certification from his or her *employer's chartered accountant* that he or she is still employed, of the terms and conditions of his or her employment, including the job description, and that such *employer* has made the payments referred to in subsection (1)(b)(i). 5

(3) Any increase of the payments referred to in subsection (1)(b)(i) shall be effective in respect of an existing *work* permit only after five years and six months from when such permit was first issued, provided that subsequent *work* permits issued to the same *foreigner* shall be deemed one for purposes of this subsection.

(4) The *Department* may reduce or waive the payment referred to in subsection (1)(b)(i)— 10

- (a) after consultation with the Departments of Labour and of Trade and Industry, if and for as long as it is satisfied that the *employer* concerned has in place an adequate training programme for *citizens* and *residents*; or
- (b) when so requested by the Department of Trade and Industry in respect of 15
foreign investments.

(5) Notwithstanding the requirements of this section, in addition, the *Department* may issue a *work* permit to a *foreigner* who has certain skills or qualifications which may be *prescribed from time to time* after consultation with the Departments of Labour and of Trade and Industry, provided that the annual number of *work* permits so issued for each 20
category so *prescribed* may not exceed the quota so *prescribed*.

Retired person permit

13. (1) A retired person permit may be issued for a period exceeding three months to a *foreigner* who is older than 60 years of age and intends to retire in the *Republic*, provided that a *chartered accountant* acting on behalf of such *foreigner* certifies that 25
such *foreigner* has—

- (a) the right to a pension or an irrevocable annuity or retirement account which will give such *foreigner* a *prescribed* minimum payment for the rest of his or her life; and/or
- (b) a minimum *prescribed* net worth. 30

(2) The *Department* may authorise the holder of a retired person permit to conduct *work* under terms and conditions as the *Department* may deem fit to determine under the circumstances.

(3) A retired person permit may—

- (a) allow its holder to sojourn in the *Republic* on a seasonal or continuous basis; 35
and
- (b) not exceed a four-year-period, at the expiry of which it may be renewed one or more times, subject to subsection (1).

Exceptional skills or qualifications permit

14. (1) Taking into account any *prescribed* requirement, a permit may be issued by the 40
Department to an individual of exceptional skills or qualifications and to those members of his or her *immediate family* determined by the *Department* under the circumstances or by *regulation*.

(2) The permit referred to in subsection (1) shall be issued under terms and conditions to be determined by the *Department* or *prescribed*. 45

Intra-company transfer permit

15. (1) An intra-company transfer permit may be issued to a *foreigner* who is employed abroad by a business operating in the *Republic* in a branch, subsidiary or affiliate relationship and who by reason of his or her employment is required to conduct *work* in the *Republic* for a period not exceeding two years, provided that— 50

- (a) a *chartered accountant* acting on behalf of the *employer* of such *foreigner* certifies that the *employer* needs to employ such *foreigner* within the *Republic* and such *foreigner's* job description;
- (b) the *employer* undertakes that it will take adequate or *prescribed* measures to ensure that such *foreigner* will at all times comply with the provisions of *this Act*, and will immediately notify the *Department* if it has reason to believe 55
otherwise; and

- (c) the *employer* posts the *prescribed* financial guarantees to defray *deportation* and other costs should such *foreigner* fail to *depart* when no longer allowed to sojourn in the *Republic*.
- (2) The holder of an intra-company transfer permit may conduct *work* only for the *employer* referred to in subsection (1) and in accordance with the job description and other elements contemplated in the certification referred to in subsection (1) or set out in his or her permit. 5

Corporate permit

16. (1) A corporate permit may be issued by the *Department* to a *corporate applicant* to employ *foreigners* who may conduct *work* for such *corporate applicant*. 10
- (2) After consultation with the Departments of Labour and of Trade and Industry, the *Department* shall determine the maximum number of *foreigners* to be employed in terms of a corporate permit by a *corporate applicant*, after having considered—
- (a) the training programme provided by the *corporate applicant* for *citizens* and *residents* and/or the financial contribution offered by the *corporate applicant* to be shown in the *training fund*; 15
 - (b) the certification prepared by a *chartered accountant* on the basis of the relevant prescription or information of the Department of Labour, if any, that at any given time the relevant *foreigners* are employed on terms and conditions not inferior to those offered to *citizens* and *residents* or prevailing in the relevant market segment, taking into account collective bargaining agreements and other standards, if any; 20
 - (c) the undertaking by the *corporate applicant* that it will—
 - (i) take adequate or *prescribed* measures to ensure that any *foreigner* employed in terms of the corporate permit will at any time comply with the provisions of *this Act* and the corporate permit; and 25
 - (ii) immediately notify the *Department* if it has reason to believe that such *foreigner* is no longer in compliance with subparagraph (i) above;
 - (d) the financial guarantees posted in the *prescribed* amount and form by the *corporate applicant* to defray *deportation* and other costs should the corporate permit be withdrawn, or certain *foreigners* fail to leave the *Republic* when no longer subject to the corporate permit; and 30
 - (e) corroborated representations made by the *corporate applicant* in respect of the need to employ *foreigners*, their job descriptions, the number of *citizens* or *residents* employed and their positions, and other *prescribed* matters. 35
- (3) In the *prescribed* form, the holder of a corporate permit may issue authorisations to the *foreigners* referred to in subsection (1) to be *admitted*, subject to such *foreigners* agreeing to the terms and conditions of the corporate permit.
- (4) The *Department* may withdraw or modify the corporate permit for good and reasonable cause, *mutatis mutandis* subject to section 12(3). 40
- (5) In consultation with the Minister of Trade and Industry or Minerals and Energy or Agriculture, as the case may be, the Minister of Labour may designate certain industries, or segments thereof, in respect of which the *Department* may—
- (a) reduce or waive the requirements of subsection (2)(a) and (e); and/or
 - (b) enter into agreements with one or more *foreign states* and set as a condition of a corporate permit that its holder— 45
 - (i) employs *foreigners* partially, mainly or wholly from such foreign countries; and
 - (ii) remits a portion of the salaries of such *foreigners* to such foreign countries; 50
 - (c) apply this subsection in respect of *foreigners* required for seasonal or temporary peak period employment; or
 - (d) waive or reduce the requirement of subsection (2)(d) under special conditions.
- (6) The *Department* may reduce or waive the payment referred to in subsection (2)(a) when so requested by the Department of Trade and Industry in respect of— 55
- (a) foreign investments; or
 - (b) industries or businesses when special economic circumstances exist.
- (7) The holder of a corporate permit may employ *foreigners* in terms of section 12.

Exchange permit

17. An exchange permit may be issued by the *Department* to a *foreigner*—
- (a) participating in a programme of cultural, economic or social exchange, organised or administered by an organ of the State, or a public higher education institution, in conjunction with an organ of a *foreign state*, provided that— 5
 - (i) after consultation with the *Board*, the *Minister* may delegate the authority to issue such permits to such organ of the State if such organ of the State has satisfied the *Minister* that it can ensure the compliance of such *foreigner* with *this Act* and report to the *Department* on the stages 10 and the completion of the relevant programme together with other *prescribed* information;
 - (ii) it may be *prescribed* that, in respect of certain programmes, upon expiration of such permit such *foreigner* may not qualify for a *status* until he or she has complied with the requirement of a *prescribed* period of 15 physical presence in his or her *foreign country* or of domicile outside the *Republic*;
 - (b) who is under 25 years of age and has received an offer to conduct *work* for no longer than one year, provided that—
 - (i) the prospective *employer* certifies that the position exists, and has 20 committed himself or herself to—
 - (aa) pay such *foreigner* remuneration which complies with applicable legal requirements;
 - (bb) provide for the welfare and the needs of such *foreigner* while in the 25 *Republic* under the aforesaid permit; and
 - (cc) report to the *Department* the failure of the *foreigner* to comply with the terms of his or her permit or to *depart* when so required;
 - (ii) such *foreigner* may not conduct *work* other than *work* for which the permit is issued; and
 - (iii) such *foreigner* may not qualify for a temporary or permanent residence 30 permit until he or she has spent two years outside the *Republic*, which requirement may be waived by the *Department* in extraordinary circumstances.

Asylum

18. The *Department* may issue an asylum permit to a *refugee* subject to the *Refugees* 35 Act, 1998 (Act No. 130 of 1998), and any *prescribed* term and condition.

Cross-border and transit passes

19. (1) The *Department* may issue a cross-border pass with the same effect as a multiple *admission* general entry permit to a *foreigner* who is a *citizen* of a *prescribed* 40 *foreign country* with which the *Republic* shares a *border* and who does not hold a *passport* but has received a *prescribed* identity document from the *Department* and is registered with the *Department*.
- (2) The *Department* may issue a transit *visa* authorising a *foreigner* travelling to a *foreign country* to make use of the transit facilities at a *port of entry*.

PERMANENT RESIDENCE 45

Permanent residence

20. (1) The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a *citizen*, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to *citizenship*.
- (2) Subject to *this Act*, upon *application*, one of the permanent residence permits set 50 out in sections 21 and 22 may be issued to a *foreigner*.
- (3) A permanent residence permit is to be issued on condition that the holder is not a *prohibited person*, and subject to section 26 of *this Act*.
- (4) For good cause, as *prescribed*, the *Department* may attach reasonable individual 55 terms and conditions to a permanent residence permit.

Direct residence

21. Subject to section 20, the *Department* shall issue a permanent residence permit to a *foreigner* who—

- (a) has been the holder of a *work* permit in terms of *this Act* for five years and has received an offer for permanent employment, provided that— 5
 - (i) such *foreigner* submitted a certification from his or her prospective permanent *employer's chartered accountant* of the job description and that the position exists and is intended to be filled by such *foreigner*; and
 - (ii) the Department of Labour certifies that the terms and conditions of such offer, including salary and benefits, are not inferior to those prevailing in the relevant market segment for *citizens* and *residents*, taking into account applicable collective bargaining agreements and other standards; 10
- (b) is the *spouse* of a *citizen* or *resident*, provided that—
 - (i) the *Department* is satisfied that a good faith spousal relationship exists; and 15
 - (ii) such permit is issued on condition that it shall lapse if at any time within three years from its *application* the good faith spousal relationship no longer subsists, save for the case of death;
- (c) is a child of a *citizen* or *resident* under the age of 21, provided that such permit shall lapse if such *foreigner* does not submit an *application* for its confirmation within two years of his or her having turned 21 years of age; or 20
- (d) is a child of a *citizen*. 20

Grounds for residence

22. The *Department* may issue a permanent residence permit to a *foreigner* of good and sound character who— 25

- (a) has received an offer for permanent employment, provided that—
 - (i) such *foreigner* submitted a certification from a *chartered accountant* acting on behalf of such *foreigner's* prospective permanent *employer* that the position exists and that the position and related job description was advertised in the *prescribed* form and no suitably qualified *citizen* or *resident* was available to fill it; 30
 - (ii) the Department of Labour certifies that the terms and conditions of such offer, including salary and benefits, are not inferior to those prevailing in the relevant market segment for *citizens* or *residents*, taking into account applicable collective bargaining agreements and other standards, if any; 35
 - (iii) the *application* falls within the yearly limits of available permits *prescribed from time to time* for each sector of industry, trade and commerce, after consultation with the Departments of Trade and Industry, Labour and Education; and
 - (iv) the permit may be extended to such *foreigner's spouse* and children younger than 21 years of age; 40
- (b) taking into account any *prescribed* requirement, has demonstrated to the satisfaction of the *Department* extraordinary skills or qualifications, and to those members of such *foreigner's immediate family* determined by the *Department* under the circumstances or by *regulation*; 45
- (c) intends to establish a business in the *Republic* investing in it the *prescribed* financial contribution to be part of the intended book value as certified by a *chartered accountant*, and to the members of such *foreigner's immediate family*, provided that—
 - (i) the *Department* may waive or reduce such capitalisation requirements for businesses *prescribed from time to time* to be in the national interest or when so requested by the Department of Trade and Industry; and 50
 - (ii) the permit shall lapse if the holder fails to renew such certification within two years of the issuance of the permit, and three years thereafter;
- (d) is a *refugee* referred to in section 27(c) of the *Refugees Act*, 1998 (Act No. 130 of 1998), subject to any *prescribed* requirement; 55
- (e) is older than 60 years of age and intends to retire in the *Republic*, provided that a *chartered accountant* acting on behalf of such *foreigner* certifies that such *foreigner*—

- (i) has the right to a pension or an irrevocable annuity or retirement account which will give such *foreigner* a *prescribed* minimum payment for the rest of his or her life; and/or
- (ii) has a minimum *prescribed* net worth;
- (f) has provided a certification by a *chartered accountant* that he or she has a *prescribed* minimum net worth and has paid a *prescribed* amount to the *Department*; or
- (g) is the relative of a *citizen* or *resident* within the first step of kinship.

EXCLUSIONS AND EXEMPTIONS

Prohibited persons 10

23. (1) The following *foreigners* do not qualify for a temporary or a permanent residence permit:
- (a) those infected with infectious diseases as *prescribed from time to time*;
 - (b) anyone against whom a warrant has been issued or a conviction secured in the *Republic* or a *foreign country* with which the *Republic* has regular diplomatic relations in respect of genocide, terrorism, murder, drug trafficking, money laundering or kidnapping;
 - (c) *citizens* of certain foreign countries *prescribed from time to time*;
 - (d) anyone previously *deported* and not rehabilitated by the *Department* in the *prescribed* manner;
 - (e) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and
 - (f) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends.
- (2) After consultation with the *Director-General*, for good cause the *Minister* may declare a person referred to in subsection (1) not to be a *prohibited person*.

Undesirable persons

24. (1) The following *foreigners* may be declared undesirable by the *Department* as *prescribed*:
- (a) anyone who is or is likely to become a public charge;
 - (b) anyone identified as such by the *Minister* after consultation with the *Board*, or in the case of urgency, by the *Minister* who, in such cases, shall inform the *Board* as soon as practicable;
 - (c) anyone who has been judicially declared incompetent;
 - (d) an unrehabilitated insolvent;
 - (e) anyone who has been ordered to *depart* in terms of *this Act*;
 - (f) anyone who is fugitive of justice; and
 - (g) anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the *Republic*, with the exclusion of certain *prescribed* offences.
- (2) Upon *application* from the affected person, the *Department* may waive any of the grounds of undesirability, provided that it reports such decisions to the *Minister* and the *Board*, with reasons.

Exemptions

- 25 (1) The following persons or categories of persons are not *illegal foreigners*:
- (a) a member of a military force of a country which has been granted consent by the Government to enter the *Republic*, while such consent subsists; and
 - (b) the *officers* and crew of a public ship of a *foreign state*, while such ship is in port.
- (2) Upon *application*, the *Minister*, as he or she deems fit, after consultation with the *Board*, may under terms and conditions determined by him or her—
- (a) allow a distinguished visitor and certain members of his or her *immediate family* and members in his or her employ or of his or her household to be *admitted* and sojourn in the *Republic* for a period not exceeding six months, provided that such *foreigners* do not intend to reside in the *Republic* permanently;

- (b) grant a *foreigner* or a category of *foreigners* the rights of permanent residence for a specified or unspecified period when special circumstances exist which justify such a decision, provided that the *Minister* may—
 - (i) exclude one or more identified *foreigners* from such categories; and
 - (ii) for good cause, withdraw such right from a *foreigner* or a category of *foreigners*; 5
- (c) authorise any person or category of persons to enter the *Republic* at a place other than a *port of entry*, in which case the *Department* shall issue to such person(s) the *prescribed* written permission or *passport* endorsement, provided that such authorisation may be withdrawn at any time by the *Minister* or the *Director-General*; and 10
- (d) for good cause, waive any *prescribed* requirement or form, provided that if such consultation requirement would unduly delay an urgent action, the *Minister* may inform the *Board* after the fact of any action taken under this subsection and of the reasons for the urgency. 15

Withdrawal of permanent residence

26. The *Department* may withdraw a permanent residence permit if its holder—
- (a) within four years of the issuance of such permit, has been convicted of any of the offences listed in Schedule 1;
 - (b) within twenty years of the issuance of such permit has been convicted three 20 times of any of the offences listed in Schedules 1 and 2;
 - (c) has been absent from the *Republic* for more than three years, provided that—
 - (i) upon showing good cause and upon prior *application* the *Department* may extend this period in specific cases;
 - (ii) the time when such holder— 25
 - (aa) was residing abroad while in the service of the State;
 - (bb) was residing abroad while a representative or employee of a person or association of persons *resident* or established in the *Republic*;
 - (cc) was residing abroad while in the service of an international organisation of which the State is a member; 30
 - (dd) in the case of the *spouse* or dependent child of a person referred to in subitem (aa), (bb) or (cc), such *spouse* or child was residing with such person; or
 - (ee) in the case of the *spouse* or dependent child of a person who is a South African *citizen*, such *spouse* or child was residing with such 35 person,
 - shall not be computed within such period;
 - (iii) the *Minister*, on recommendation of the *Director-General*, may grant an exemption from the requirement of residence in respect of certain *residents* or class of *residents*; 40
 - (iv) the period of absence may only be interrupted by an *admission* and sojourn in the *Republic*; and
 - (v) the requirement of residence in the *Republic* shall not affect any *foreigner* to whom exemption has been granted under section 25(2)(b) as a member of a category of persons, unless such *foreigner* previously 45 entered the *Republic* or sojourned therein for the purpose of permanent residence under the authority of such exemption; or
 - (d) has not taken up residence in the *Republic* within one year of the issuance of such permit.

OBJECTIVES AND STRUCTURES OF MIGRATION CONTROL 50

The Department

27. (1) Subject to this Act, the powers and functions vested in the *Department* in terms of *this Act* shall be exercised and performed as directed by the *Minister*.
- (2) The *Minister* may instruct the *Director-General* on how to exercise any of the powers and perform any of the functions vested in the *Director-General* by *this Act*. 55
- (3) The *Minister* may delegate to the *Director-General* any of the powers and functions vested in him or her in terms of *this Act*.

Immigration Advisory Board

- 28.** (1) The Immigration Advisory Board shall be chaired by the *Minister* or his or her designee and consist of—
- (a) one representative of the Department of Trade and Industry;
 - (b) one representative of the Department of Labour; 5
 - (c) one representative of the Department of Tourism;
 - (d) one representative of the Department of Finance;
 - (e) one representative of the Department of Safety and Security;
 - (f) one representative of the South African Revenue Service;
 - (g) one representative of the Department of Education; 10
 - (h) one representative of the Department of Foreign Affairs;
 - (i) the *Director-General*;
 - (j) up to eight persons from bodies requested by the *Minister* to nominate one representative each; and
 - (k) four individuals appointed by the *Minister* on grounds of their expertise in 15
administration, regulatory matters or migration law, control, adjudication or enforcement.
- (2) The *Board* shall meet when called by the *Minister* or the *Director-General*, provided that it—
- (a) shall meet regularly; 20
 - (b) may determine its procedures at meetings;
 - (c) may invite *officers* employed by the *Department* to attend or participate in its meetings; and
 - (d) may appoint committees from its members to assist in the performance of its 25
functions.
- (3) A member of the *Board* referred to in subsection (1)(j) and (k) shall—
- (a) serve for a four-year-term, at the expiry of which they shall be eligible for one or more reappointments, provided that the *Minister* may elect to fill any vacancy which may occur by appointing a person for the unexpired portion of the term of the member in whose place such person is appointed; 30
 - (b) at no time—
 - (i) be or become an unrehabilitated insolvent;
 - (ii) be or have been judicially declared of unsound mind;
 - (iii) suffer an infirmity of mind or body preventing him or her from the proper discharge of the duties of his or her office; 35
 - (iv) be convicted by final conviction or sentence of an offence without the option of a fine;
 - (v) be or become a political office bearer; or
 - (vi) be or have been removed from an office of trust on account of misconduct involving theft or fraud; 40
 - (c) cease to be a member—
 - (i) on resignation;
 - (ii) if requested by the *Minister* to resign for good cause;
 - (iii) if he or she fails to attend two consecutive meetings of the *Board*, unless his or her apology has been accepted by the *Minister*; or 45
 - (iv) if he or she becomes disqualified in terms of *this Act*; and
 - (d) be paid such remuneration and be entitled to such benefits and allowances as determined from time to time by the *Minister* after consultation with the *Director-General* and with the approval of the Minister of Finance.
- (4) The *Board* may request the *Department* to provide it with the necessary 50
administrative capacity and assistance.
- (5) The *Board* may establish and operate through committees to carry out its functions.
- (6) The *Minister* may disestablish the *Board* on such terms and conditions as he or she sees fit. 55

Objectives and functions of migration control

- 29.** (1) In the administration of *this Act*, the *Department* shall pursue the following objectives:
- (a) promoting a human-rights based culture in both government and civil society in respect of migration control; 60

- (b) facilitating and simplifying the issuance of permanent and *temporary residence permits* to those who are entitled to them, and concentrating resources and efforts in enforcing *this Act* at community level and discouraging *illegal foreigners*;
- (c) detecting and *deporting illegal foreigners*; 5
- (d) creating a climate of cooperation with other organs of the State in all spheres of government to encourage them to take responsibility in implementing *this Act* within the ambit of their respective powers and functions;
- (e) preventing and deterring xenophobia within the *Department*, any sphere of government or organ of the State and at community level; 10
- (f) creating a climate of cooperation with communities and organs of civil society, including trade unions, to encourage them to cooperate with the *Department* to implement *this Act*;
- (g) promoting a climate within the *Republic* which encourages *illegal foreigners* to depart voluntarily; 15
- (h) controlling the *borders*, as contemplated in section 39;
- (i) administering the *ports of entry*;
- (j) regulating the influx of *foreigners* and *residents* in the *Republic* to—
 - (i) promote economic growth by—
 - (aa) ensuring that businesses in the *Republic* may employ *foreigners* who are needed; 20
 - (bb) facilitating foreign investments, tourism and industries in the *Republic* which are reliant on international exchanges of people and personnel;
 - (cc) enabling exceptionally skilled or qualified people to sojourn in the *Republic*; 25
 - (dd) increasing skilled human resources in the *Republic*; and
 - (ee) facilitating the movement of students and academic staff within the Southern African Development Community for study, teaching and research; 30
 - (ii) encourage the training of *citizens* and *residents* by *employers*;
 - (iii) enable family reunification;
- (k) administering the *prescribed* fees, fines and other payments it exacts or receives in such a fashion as to defray the overall cost of its operations;
- (l) administering *refugee* protection and related legislation; 35
- (m) administering *citizenship* by naturalisation and incidental matters relating thereto; and
- (n) facilitating compliance with the *Republic's* international obligations.
- (2) In order to achieve the objectives set out in subsection (1), the *Department* shall—
 - (a) inspect workplaces in the *prescribed* manner to ensure that no *illegal foreigner* is employed and that *foreigners*, if any, are employed in the job description and at the terms and conditions set out in their *temporary residence permits*, and that the relevant *training fees*, if any, are paid; 40
 - (b) inspect institutions of learning to ensure that *illegal foreigners* are not enrolled therein; 45
 - (c) liaise with the South African Police Service to—
 - (i) ensure that the identity of people who are arrested, detained or convicted is checked for purposes of *this Act*; and
 - (ii) educate and instruct law-enforcing agencies to detect *illegal foreigners* and report them to the *Department*; 50
 - (d) liaise with the South Africa Revenue Service to ensure that the identity of people who contravene the provisions of the laws administered by the Commissioner for the South African Revenue Services is checked for purposes of *this Act*;
 - (e) educate communities and organs of civil society on the rights of *foreigners*, *illegal foreigners* and *refugees*, and conduct other activities to prevent xenophobia; 55
 - (f) in cooperation with the Department of Foreign Affairs—
 - (i) promote programmes in foreign countries with the aim of deterring people from becoming *illegal foreigners*; and 60
 - (ii) table the need for cooperation in preventing migration towards the *Republic* on the agenda of relations with *foreign states*, negotiating appropriate measures and agreements with such *foreign states*;

- (g) maintain public records showing funds received or collected—
 - (i) under *this Act* from *employers* as training fees or fines, which, in the *prescribed* percentage, shall be known as the training fund;
 - (ii) from *foreign states* to defray the cost of repatriating *illegal foreigners* originating from their country, as determined through international relations and agreements; 5
 - (iii) from donors or other sources; and
 - (iv) from other fees and fines imposed or exacted by the *Department* in terms of *this Act* which, in the percentage *prescribed from time to time*, shall be known as the judicial assistance fund; 10
- (h) monitor and exact compliance from any person or entity exercising responsibilities or bearing duties or obligations in terms of *this Act*;
- (i) *deport illegal foreigners* who are unwilling to leave the *Republic* voluntarily;
- (j) train its investigative unit to detect *illegal foreigners*, monitor compliance with the terms and conditions of permits, control *borders* and perform any other function under *this Act* or which may be delegated to it; 15
- (k) be empowered to contract through public tender with private persons to perform under its control any of its functions, including but not limited to detaining and escorting *illegal foreigners* for *deportation* purposes and manning *ports of entry*; and 20
- (l) conduct any other activity called for by *this Act* or necessary for or conducive to its implementation.

Powers of Department

- 30.** Subject to, and for the purposes of, *this Act*, through its duly authorised officers, the *Department* may— 25
- (a) enter workplaces and inspect employment records for the purposes of *this Act*;
 - (b) enter and inspect for purposes of *this Act* any place open to the public;
 - (c) exercise any powers relevant to, or necessary for, the functions set out in section 29(2);
 - (d) request any sphere of government or organ of the State to— 30
 - (i) take actions or adopt procedures to ensure that the recipients of their services are identified as *citizens* and *residents* or *foreigners*; and
 - (ii) request that *prescribed* services, or licences, or concessions or other actions be subject to proof of *status* or *citizenship*, provided that such requirements shall not prevent the rendering of such services to *illegal foreigners* when so required by the Constitution or a law; 35
 - (e) request anyone in the *Republic* to identify himself or herself as a *citizen* or *resident*, or as a *foreigner*;
 - (f) organise and participate in community fora or other community-based organisation to deter xenophobia and involve the citizenry in the application and implementation of *this Act*, and educate the citizenry in migration issues; 40
 - (g) apprehend, detain and *deport* any *illegal foreigner*;
 - (h) represent the State in any proceedings in a *Court*;
 - (i) assist the public prosecution of any offence under *this Act*;
 - (j) enter into an agreement with any person, including any department of State, in terms of which the *Department* will be authorised to make use of any of the facilities, equipment or personnel belonging to, or under the control, or in the employment of such person or department; 45
 - (k) exercise any other power called for by *this Act* or necessary for or conducive to its implementation; and 50
 - (l) delegate any of its powers and functions, provided that—
 - (i) the terms and conditions of such delegations are approved by the *Minister* after consultation with the *Board*; and
 - (ii) such delegation is performance audited by the *Director-General* and reviewed by the *Board* every twelve months to express a recommendation to the *Minister*, failing which it shall lapse. 55

Structure of migration control

- 31.** (1) For purposes of *this Act*, the *Department* shall be structured in regions to be determined by the *Minister* after consultation with the *Board* and presided over by an official of the *Department* appointed by the *Minister*.
- (2) The official referred to in subsection (1) shall—
- (a) carry the primary responsibility of administering and applying *this Act* in respect of cases and *applications*, and may delegate his or her functions to other officials as *prescribed*;
 - (b) subject to *this Act*, express the decision-making power of the *Department* in respect of cases and *applications*, and, in this respect, in his or her capacity, sue and be sued in the name and on behalf of the *Department*;
 - (c) when requested, personally or through his or her appointed officials, give reasons for a decision of the *Department* before the *Minister* or the *Board*; and
 - (d) through his or her appointed officials, represent the *Department* before a *Court*.
- (3) The *Director-General* shall—
- (a) ensure the uniform *application* of *this Act*;
 - (b) ensure the efficient and effective operation of the *Department*;
 - (c) liaise or interface with organs of *foreign states* or international institutions dealing with migration or law enforcement, especially, but not exclusively, to fight terrorism, arms and drug trafficking, *foreigner* smuggling, contraband and organised crime; and
 - (d) exercise and perform the other powers or functions set out in *this Act*.
- (4) The *Department* may have *officers* in *missions* to exercise the functions of the *Department*.

Powers and functions of Board

- 32.** (1) The *Board* shall—
- (a) advise the *Minister* in respect of the adoption of *regulations* in terms of *this Act*, or other legislation the administration of which has been delegated to it, or that is conducive to *this Act's* implementation;
 - (b) assist the *Minister* in the formulation of the policies of the *Department*;
 - (c) monitor the conduct of the *Department* and make recommendations to the *Minister* in respect of instructions to the *Director-General* when necessary or expedient;
 - (d) as requested, advise the *Minister* in reviewing a decision of the *Department* in terms of section 34; and
 - (e) exercise and perform the other powers or functions ascribed to the *Board* by *this Act* or other legislation.
- (2) Subject to *this Act*, the *Board* shall operate and meet as *prescribed*.

Regulation making

- 33.** (1) In adopting *regulations* in terms of *this Act*, the *Minister* shall—
- (a) *publish* his or her intention of adopting *regulations* specifying their subject matter and soliciting public comments during a period not shorter than 21 calendar days;
 - (b) having considered public comment received, *publish* draft *regulations* soliciting further comments during a period not shorter than 21 calendar days; and
 - (c) *publish* the final *regulations* together with a summary of comments which have not been accommodated and the reasons for their rejection.
- (2) Only subsection (1)(b) and (c) shall apply in respect of any *regulations* which *this Act* requires to be *prescribed from time to time*.
- (3) The *Board* may request the *Minister* to—
- (a) reconsider any intended *regulations* prior to their promulgation; or
 - (b) consider the need to adopt, repeal or amend *regulations*.
- (4) *Regulations* shall be consistent with *this Act*, and shall not disregard public comments in an arbitrary or capricious manner.

Adjudication and review procedures

34. (1) Before making a determination adversely affecting a person, the *Department* shall notify the contemplated decision and related motivation to such affected person and give such person at least 10 calendar days to make representations, after which the *Department* shall notify such person that either such decision has been withdrawn or modified, or that it shall become effective, subject to subsection (2). 5

(2) Within 20 calendar days of its notification, the person aggrieved by an effective decision of the *Department* may appeal it—

- (a) to the *Director-General*, who may reverse or modify it within 10 calendar days, failing which the decision shall be deemed to have been confirmed; or 10
- (b) within 20 calendar days of modification or confirmation by the *Director-General*, if any, to the *Minister*, who may reverse or modify it within 20 calendar days, failing which the decision shall be deemed to have been confirmed, and be final, provided that in exceptional circumstances or when such person stands to be *deported* as a consequence of such decision— 15
 - (i) the *Minister* may extend such deadline; and
 - (ii) at the request of the *Department*, the *Minister* may request such person to post a bond to defray his or her *deportation* costs, if applicable; or
- (c) within 20 calendar days of modification or confirmation by the *Minister*, if any, to a *Court*, which may suspend, reverse or modify it in accordance with its rules. 20

(3) If not appealed in terms of subsection (2), a decision of the *Department* is final.

(4) Any person adversely affected by a decision of the *Department* shall be notified in writing of his or her rights under this section and other *prescribed* matters, and may not be *deported* before the relevant decision is final. 25

ENFORCEMENT AND MONITORING

Illegal foreigners

35. (1) Any *illegal foreigner* shall *depart*, unless authorised by the *Department* to remain in the *Republic* pending his or her *application* for a *status*. 30

(2) Any *illegal foreigner* shall be *deported*.

Investigations

36. (1) An investigative unit shall be established by the *Department* through *regulations* and shall consist of such persons, including one or more commissioners, as may be determined by the *Minister* after consultation with the *Board*.

(2) The *Director-General* shall appoint a commissioner as the head of the investigative unit. 35

(3) The investigative unit shall investigate any matter falling within the scope of the *Department's* powers, functions and duties, subject to the directions of the *Minister*, and shall in the performance of its functions follow such procedure as may be *prescribed*.

(4) An *officer* may, for the purposes of *this Act*— 40

- (a) at any time before the commencement or in the course of an investigation conduct an inspection *in loco*;
- (b) by notice in writing call upon any person who is in possession of or has the custody of or control over any thing which in the opinion of the *Department* is relevant to the investigation to produce such thing, and the *Department* may inspect and retain any thing so produced for a reasonable time; and 45
- (c) by notice in writing call upon any person to appear before the *Department* and to give evidence or to answer questions relevant to the subject matter of the investigation,

provided that any of such notices shall specify the time when and the place where the person to whom it is directed shall appear, be signed by a commissioner, be served by an *officer* or by a sheriff by delivering a copy thereof to the person concerned or by leaving it at such person's last known place of residence or business, and shall specify the reason why the article is to be produced or the evidence is to be given. 50

(5) In the pursuance of *this Act*, an *officer* may obtain a warrant to— 55

- (a) enter or search any *premises* for a person or thing or to make inquiries, including the power to—

- (i) examine any thing found in or upon such *premises*;
- (ii) request from the person who is in control of such *premises* or in whose possession or under whose control any thing is when it is found, or who is upon reasonable grounds believed to have information with regard to such thing, an explanation or information; and 5
- (iii) make copies of or extracts from any such thing found upon or in such *premises*;
- (b) apprehend an *illegal foreigner*, subject to section 37(1); or
- (c) after having issued a receipt in respect thereof, seize and remove documentation or any other thing which— 10
 - (i) is concerned with or is upon reasonable grounds suspected of being concerned with any matter which is the subject of any investigation in terms of *this Act*; or
 - (ii) contains, or is on reasonable grounds suspected to contain, information with regard to any such matter, 15
- provided that—
 - (aa) any thing so seized shall be returned in good order as soon as possible after the purpose of its seizure has been accomplished; and
 - (bb) a person from whom a book or document has been taken shall be allowed reasonable access, including the right to make copies at his or her 20 expense.
- (6) A warrant referred to in subsection (5) shall be issued by a magistrate of a *Court* which has jurisdiction in the area where the *premises* in question are situated, and only if it appears to the magistrate from information on oath that there are reasonable grounds for believing that a thing mentioned in subsection (5) is upon or in such *premises*, and 25 shall specify which of the acts mentioned in subsection (5) may be performed thereunder by the person to whom it is issued.
- (7) A warrant issued in terms of this section shall be executed by day unless the magistrate who issues the warrant authorises its execution by night at times which shall be reasonable, and any entry upon or search of any *premises* in terms of this section shall 30 be conducted with strict regard to decency and order, including—
 - (a) a person's right to, respect for, and the protection of, his or her dignity;
 - (b) the right of a person to freedom and security; and
 - (c) the right of a person to his or her personal privacy.
- (8) A person executing a warrant in terms of this section shall immediately before 35 commencing with the execution—
 - (a) identify himself or herself to the person in control of the *premises*, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the *premises*; and 40
 - (b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.
- (9) (a) A commissioner or an *officer* may, without a warrant, enter upon any *premises*, other than a private dwelling, and exercise the powers referred to in subsection (5)(a) and (c)— 45
 - (i) if the person who is competent to do so consents to such entry, search, seizure and removal; or
 - (ii) if he or she upon reasonable grounds believes that—
 - (aa) the required warrant will be issued to him or her in terms of subsection (5) if he or she were to apply for such warrant; and 50
 - (bb) the delay caused by the obtaining of any such warrant would defeat the object of the entry, search, seizure and removal.
- (b) Any entry and search in terms of paragraph (a) shall be executed by day, unless the execution thereof by night is justifiable and necessary.
- (10) (a) Any person who may on the authority of a warrant issued in terms of subsection (5), or under the provisions of subsection (9), enter upon and search any *premises*, may use such force as may be reasonably necessary to overcome resistance to such entry or search. 55
- (b) No person may enter upon or search any *premises* unless he or she has audibly demanded access to the *premises* and has notified the purpose of his or her entry, unless 60 such person is upon reasonable grounds of the opinion that any thing may be destroyed or a person put at risk of bodily harm if such access is first demanded and such purpose is first notified.

(11) If, during the execution of a warrant or the conducting of a search in terms of this section, a person claims that a thing found on or in the *premises* concerned contains privileged information and refuses its inspection or removal, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the thing contains information which is relevant to the investigation and that such information is necessary for the investigation, request a person designated by a *Court* which has jurisdiction to seize and remove that thing for safe custody until a *Court* has made a ruling on the question whether the information concerned is privileged or not. 5

(12) A warrant issued in terms of this section may be issued on any day and shall be in force until— 10

- (a) it is executed; or
 - (b) it is cancelled by the person who issued it or, if such person is not available, by a person with similar authority; or
 - (c) the expiry of one month from the day of its issue; or
 - (d) the purpose for the issuing of the warrant has lapsed, 15
- whichever may occur first.

(13) In consultation with the *Minister* and through diplomatic channels, the *Department* may obtain permission from the relevant authority of a *foreign country* to receive evidence or gather information in or from that country.

Deportation and detention of illegal foreigners 20

37. (1) Without need for a warrant, an *officer* may arrest an *illegal foreigner* or cause him or her to be arrested, and shall, irrespective of whether such *foreigner* is arrested, *deport* him or her or cause him or her to be *deported* and may, pending his or her *deportation*, detain him or her or cause him or her to be detained in a manner and at the place under the control and administration of the *Department* determined by the *Director-General*, provided that the *foreigner* concerned— 25

- (a) shall be notified in writing of the decision to *deport* him or her and of his or her right to appeal such decision in terms of *this Act*;
- (b) may at any time request any *officer* attending to him or her that his or her detention for purposes of *deportation* be confirmed by warrant of a *Court*, which, if not issued within 48 hours of such request, shall cause the immediate release of such *foreigner*; 30
- (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs in a language that he or she understands; and
- (d) may not be held in detention for longer than 30 calendar days without a warrant of a *Court* which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days. 35

(2) The detention of a person in terms of *this Act* elsewhere than on a *ship* and for purposes other than his or her *deportation* shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-working day it shall be extended to 4 p.m. of the first following working day. 40

(3) The *Department* may order a *foreigner* subject to *deportation* to deposit a sum sufficient to cover the expenses related to his or her *deportation*, detention, maintenance and custody and an *officer* may in the *prescribed* manner enforce payment of such deposit. 45

(4) Any person who fails to comply with an order made in terms of subsection 3 shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 12 months.

(5) Any person other than a *citizen* or a *resident* who having been— 50

- (a) removed from the *Republic* or while being subject to an order issued under a law to leave the *Republic*, returns thereto without lawful authority or fails to comply with such order; or
- (b) refused *admission*, whether before or after the commencement of *this Act*, has entered the *Republic*, 55

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and *deported* under a warrant issued by a *Court* and, pending his or her removal, be detained in the manner and at the place determined by the *Director-General*.

(6) Any *illegal foreigner* convicted and sentenced under *this Act* may be *deported* before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

(7) On the basis of a warrant for the removal or release of a detained *illegal foreigner*, the person in charge of the prison concerned shall deliver such *foreigner* to that *officer* or police officer bearing such warrant, and if such *foreigner* is not released he or she shall be deemed to be in lawful custody while in the custody of the *officer* or police officer bearing such warrant. 5

(8) A person at a *port of entry* who has been notified by an *immigration officer* that he or she is an *illegal foreigner* or in respect of whom the *immigration officer* has made a declaration to the *master* of the *ship* on which such *foreigner* arrived that such person is an *illegal foreigner* shall be detained by the *master* on such *ship* and, unless such *master* is informed by an *immigration officer* that such person has been found not to be an *illegal foreigner*, such *master* shall remove such person from the *Republic*, provided that an *immigration officer* may cause such person to be detained elsewhere than on such *ship*, or be removed in custody from such *ship* and detain him or her or cause him or her to be detained in the manner and at a place determined by the *Director-General*. 10 15

(9) The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in that subsection, be deemed to be in the custody of the *master* of such *ship* and not of the *immigration officer* or the *Department*, and such *master* shall be liable to pay the costs of the detention and maintenance of such person while so detained if the *master* knew or should reasonably have known that such person was an *illegal foreigner*, provided that— 20

- (a) if such *master* fails to comply with the provisions of that subsection, or if required to pay such costs, such *master* or the *owner* of such *ship* shall forfeit in respect of every person concerned a sum fixed by the *immigration officer*, not exceeding an amount *prescribed from time to time*; 25
- (b) the *immigration officer* may, before such person is removed from such *ship*, require the *master* or the *owner* of such *ship* to deposit a sum sufficient to cover any expenses that may be incurred by the *Department* in connection with the *deportation*, detention, maintenance and custody of such person, if there are grounds to believe that the *master* knew or should reasonably have known that such person was an *illegal foreigner*; 30
- (c) if such person is not removed from the *Republic* on the *ship* on which he or she was conveyed to the *Republic*, except by reason of not being an *illegal foreigner*, and if the *master* knew or should have known that such person was an *illegal foreigner*, the *owner* of that *ship* shall at the request of an *immigration officer* convey that person, or have him or her conveyed, free of charge to the State to a place outside the *Republic*, and any person, other than an *officer*, charged by the *Department* with the duty of escorting that person to such place, shall be deemed to be an *officer* while performing such duty; and 35 40
- (d) if the *owner* of such *ship* fails to comply with the provisions of this section, he or she shall forfeit in respect of each such person a sum fixed by the *immigration officer*, not exceeding an amount *prescribed from time to time*. 45

(10) A person who escapes or attempts to escape from detention imposed under *this Act* shall be guilty of an offence and may be arrested without a warrant. 45

Ships

38. (1) Save for extraordinary circumstances necessitating otherwise, no *master* shall cause his or her *ship* to enter the *Republic* by landing or shoring at any place other than a *port of entry*. 50

(2) An *immigration officer* or other authorised person employed by the *Department* may—

- (a) board any *ship* which is entering or has entered into any port and for good cause prohibit or regulate disembarkation from, or the offloading of, such *ship* in order to ascertain the *status* or *citizenship* of its passengers; and 55
- (b) request the person in control of a *port of entry* or any person acting under his or her authority to order the *master* to moor or anchor his or her *ship* in such port at such distance from the shore or landing place or in such position as he or she may direct.

(3) The *master* of a *ship* entering a *port of entry* upon demand shall deliver to an *immigration officer*— 60

- (a) a list stating—
 - (i) the names of all passengers on board the *ship*, classified according to their respective destinations; and
 - (ii) such other details *prescribed from time to time*;
 - (b) a list of stowaways, if any have been found; 5
 - (c) a list of the crew and all other persons, other than passengers and stowaways, employed, carried or present on the *ship*; and
 - (d) a return, under the hand of the medical *officer* of that *ship* or, if there is no such medical *officer*, under the hand of the *master* himself or herself, stating—
 - (i) any cases of disease, whether infectious or otherwise, which have occurred or are suspected to have occurred upon the voyage; 10
 - (ii) the names of the persons who have suffered or are suffering from such disease;
 - (iii) details of any birth or death which occurred upon the voyage between such port and a previous port; and 15
 - (iv) any other *prescribed* matter or event,
- provided that such *immigration officer* may—
- (aa) exempt from the requirements of this subsection the *master* of a *ship* destined for any other port in the *Republic*, subject to compliance with the duty to deliver such lists or return at such port and with any directive such *immigration officer* may issue to the *master*; and 20
 - (bb) if satisfied that a name should be added to or deleted from any of such lists, authorise such addition or deletion.
- (4) If a *ship* arrives at a *port of entry* with a passenger on board bound for a destination outside the *Republic* who is not on board when the *ship* leaves such port and has not *been admitted*, the *master* or the *owner* of that *ship* shall forfeit a sum fixed by the *immigration officer* within a *prescribed* limit. 25
- (5) An *immigration officer* may require the *master* of a *ship* to muster the crew of such *ship* on the arrival of such *ship* in any *port of entry* and again before it leaves such port.
- (6) The competent *officer* of customs at any harbour may refuse to give to the *master* of any *ship* clearance papers to leave that harbour unless he or she has complied with the provisions of *this Act* and produced a certificate of an *immigration officer* to that effect. 30
- (7) A *master* shall ensure that any *foreigner* conveyed to a *port of entry* for purposes of travelling to a *foreign country* holds a transit *visa*.

Border control 35

- 39.** (1) The *Department* shall control the *borders* to ensure compliance with *this Act*.
- (2) The *Department* may receive a delegation from the South African Revenue Service or the Commissioner therefor, the Department of Safety and Security, the Department of Defence or the Department of Finance enabling and mandating it to exercise powers and perform functions exercised or performed under any law by any of such Departments relating to the control of movement of people or goods across the *borders*. 40
- (3) By proclamation, the President may order that certain assets and human resources of the *Department* allocated to *border control* be placed under the control of the Minister of Defence to be deployed as determined by the President in terms of section 201 of the Constitution. 45

IMMIGRATION COURTS

Immigration Courts

- 40.** (1) For purposes of this section “*Minister*” shall mean the Minister of Justice.
- (2) Immigration Courts are hereby established with exclusive original jurisdiction on any matter following from the *application of this Act*, including but not limited to— 50
- (a) the review of decisions of the *Department* in terms of this Act;
 - (b) the validity of *regulations*;
 - (c) actions against the *Department* for any cause, including damages; and
 - (d) matters of *status*. 55

- (3) A *Court* shall be established in the area of jurisdiction of a Magistrate's *Court* as determined by the *Minister* after consultation with the *Department*.
- (4) A *Court* shall be presided over by a magistrate to be assisted by one or more assistants as determined by the *Minister*, who may select such assistants from within or outside the Public Service, or by such magistrate provided that he or she selects them from qualified officials of the *Department*. 5
- (5) On application in the *prescribed* manner of—
- (a) a *Court* assistant;
 - (b) a person likely to be adversely affected by an order of the *Court* or his or her legal representative; or 10
 - (c) the person instituting or responding to the relevant proceedings,
- the clerk of the *Court* or registrar shall subpoena any witness to give evidence or produce a document in any form or any other information at the relevant proceedings of the *Court*, provided that—
- (i) such subpoena shall be served on the witness concerned in terms of sections 188 and 189 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); and 15
 - (ii) the *Court* on the application of a witness may direct that such witness be paid such allowance as may be paid to a witness for an accused person in criminal proceedings.
- (6) Subject to *this Act*, the provisions of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and of the rules made thereunder, apply mutatis mutandis to the *Courts* in so far as they relate to the— 20
- (a) appointment and functions of *officers*;
 - (b) issue and service of process;
 - (c) conduct of proceedings; 25
 - (d) execution of judgments or orders; and
 - (e) imposition of penalties for noncompliance with orders of a court, for obstruction of execution of judgments or orders, and for contempt of court,
- and in so far as no other provision has been *prescribed*.
- (7) All proceedings before the *Court* shall be conducted in open *court*, except in so far as the *Court* may direct otherwise for good cause. 30
- (8) Any person aggrieved by any order made by a *Court* may, within the *prescribed* period and manner, appeal against such order to the High Court having jurisdiction, which, on appeal, may make such order as it sees fit. 35

DUTIES AND OBLIGATIONS

Employers

41. (1) No person shall employ—
- (a) an *illegal foreigner*;
 - (b) a *foreigner* whose *status* does not authorise him or her to be employed by such person; or 40
 - (c) a *foreigner* on terms, conditions or in a capacity different to those contemplated in such *foreigner's status*.
- (2) An *employer* shall make a good faith effort to ascertain that no *illegal foreigner* is employed by him or her or to ascertain the *status* or *citizenship* of those whom he or she employs. 45
- (3) If it is proven, other than by means of the presumption referred to in subsection (5), that a person was employed in violation of subsection (1), it shall be presumed that the *employer* knew at the time of the employment that such person was among those referred to in subsection (1), unless such *employer* proves that he or she— 50
- (a) employed such person in good faith; and
 - (b) complied with subsection (2), provided that a stricter compliance shall be required of any *employer* who employs more than five employees or has been found guilty of a prior offence under *this Act* related to this section.
- (4) An *employer* employing a *foreigner* shall— 55
- (a) for two years after the termination of such *foreigner's* employment, keep the *prescribed* records relating thereto; and
 - (b) report to the *Department*—
- (i) the termination of such *foreigner's* employment; and
 - (ii) any breach on the side of the *foreigner* of his or her *status*. 60

(5) If an *illegal foreigner* is found on any *premises* where a business is conducted, it shall be presumed that such *foreigner* was employed by the person who has control over such *premises*, unless prima facie evidence to the contrary is adduced.

Learning institutions

42. (1) No person employed by or associated with any type of learning institution shall knowingly provide training or instruction to—
- (a) an *illegal foreigner*;
 - (b) a *foreigner* whose *status* does not authorise him or her to receive such training or instruction by such person; or
 - (c) a *foreigner* on terms or conditions or in a capacity different to those contemplated in such *foreigner's status*.
- (2) If an *illegal foreigner* is found on any *premises* where instruction or training is provided, it shall be presumed that such *foreigner* was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such *premises*, unless prima facie evidence to the contrary is shown.

Overnight accommodation

43. (1) Any business offering overnight accommodation shall make a good faith effort to identify its customers as *citizens* or *status* holders and shall report in the *prescribed* form to the *Department* any failure to effect such identification.
- (2) When subsection (1) is not complied with and an *illegal foreigner* is found on any *premises* referred to in that subsection, it shall be presumed that such *illegal foreigner* was harboured by the person who has control over such *premises*, unless prima facie evidence to the contrary is shown.

Identification

44. Any person shall identify himself or herself as a *citizen*, *resident* or *foreigner* when so requested by an *officer* or a police officer, and if on reasonable grounds such *officer* is not satisfied that such person is entitled to be in the *Republic*, such *officer* may take such person into custody without a warrant and if necessary detain him or her in a *prescribed* manner and place until such person's prima facie *status* or *citizenship* is ascertained.

Aiding and abetting illegal foreigners

45. Subject to *this Act*, no person shall knowingly aid, abet, assist, enable or in any manner help—
- (a) an *illegal foreigner*; or
 - (b) a *foreigner* in respect of any matter, conduct or transaction which violates such *foreigner's status*, when applicable,
- including but not limited to—
- (i) providing instruction or training to him or her or allowing him or her to receive instruction or training;
 - (ii) issuing to him or her a licence or other authorisation to conduct any business or to carry on any profession or occupation;
 - (iii) entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation;
 - (iv) conducting any business or carrying on any profession or occupation in cooperation with him or her;
 - (v) assisting, enabling or in any manner helping him or her to conduct any business or carry on any profession or occupation;
 - (vi) obtaining a licence or other authority for him or her or on his or her behalf to conduct any business or to carry on any profession or occupation;
 - (vii) doing anything for him or her or on his or her behalf in connection with his or her business or profession or occupation;
 - (viii) harbouring him or her, which includes providing overnight accommodation; or
 - (ix) letting or selling or in any manner making available any immovable property in the *Republic* to him or her.

Obligation of *foreigners*

46. A *foreigner* shall—

- (a) abide by the terms and conditions of his or her *status*, including any terms and conditions attached to the relevant permit by the *Department* upon its issuance, extension or renewal; and
- (b) *depart* upon expiry of his or her *status*.

5

Organs of State

47. When possible, any organ of the State in any sphere of government, except health care facilities, shall endeavour to ascertain the *status* or *citizenship* of the persons receiving its services and shall report to the *Department* any *illegal foreigner*, or any person whose *status* or *citizenship* could not be ascertained, advising through public notices or directly the person concerned of such reporting practice, provided that such requirement shall not prevent the rendering of services to which *illegal foreigners* and *foreigners* are entitled under the Constitution or any law, including the law of contract.

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Other institutions

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48. *Prescribed* institutions or persons other than organs of the State may be required by *regulation* to endeavour to ascertain the *status* or *citizenship* of the persons with whom they enter into commercial transactions, as *prescribed*, and shall report to the *Department* any *illegal foreigner*, or any person whose *status* or *citizenship* could not be ascertained, provided that such requirement shall not prevent the rendering of services or performance to which *illegal foreigners* and *foreigners* are entitled under the Constitution or any law, including the law of contract.

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MISCELLANEOUS

Agents

49. Subject to *prescribed* qualifications and criteria for good standing, the *Department* shall maintain a list of agents, other than attorneys, who are authorised to act on behalf of, or represent, other persons in respect of its procedures.

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Internal auditing

50. (1) The *Department* shall set up an internal anti-corruption unit charged with the task of preventing, deterring, detecting and exposing any instance of corruption, abuse of power, xenophobia and dereliction of duty by a person employed in the *Department*, provided that such unit shall—

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- (a) not oust the jurisdiction or the investigative authority of any other organ of the State; and
- (b) comprise of specialised members seconded from time to time and on a rotating basis by the National Commissioner of the South African Police Service.

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(2) The *Director-General* shall report to the *Minister* and inform the *Board* annually on—

- (a) measures and proposals aimed at increasing the efficacy, efficiency and cost-effectiveness of the *Department*; and
- (b) statistical data relating to the implementation of *this Act* and the *Department*.

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(3) The *Board* shall utilise the information referred to in subsection (2) in its annual report to Parliament.

Foreigners erroneously allowed to enter Republic

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51. No *illegal foreigner* shall be exempt from a provision of *this Act* or be allowed to sojourn in the *Republic* on the grounds that he or she was not informed that he or she could not enter or sojourn in the *Republic* or that he or she was *admitted* or allowed to remain in the *Republic* through error or misrepresentation, or because his or her being an *illegal foreigner* was undiscovered.

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OFFENCES

Offences

52. (1) Any *illegal foreigner* shall be guilty of an offence punishable by imprisonment not exceeding three months or a fine not exceeding R5 000 and, if he or she fails to depart when so ordered by the *Department*, shall be guilty of an offence punishable by imprisonment not exceeding nine months or a fine not exceeding R15 000. 5

(2) Anyone who knowingly assists a person to enter the *Republic* in contravention of *this Act* shall be guilty of an offence punishable by imprisonment not exceeding one year and/or a fine not exceeding R20 000.

(3) Anyone who knowingly employs an *illegal foreigner* or a *foreigner* in violation of *this Act* shall be guilty of an offence punishable by imprisonment not exceeding one year or a fine not exceeding R30 000, provided that— 10

(a) such person's second offence shall be punishable by imprisonment not exceeding two years or a fine not exceeding R100 000, and the third or subsequent offences by imprisonment not exceeding three years without the option of a fine; and 15

(b) a *prescribed* ratio of the fines collected in terms of this section shall be shown in the *training fund*.

(4) Anyone who intentionally facilitates an *illegal foreigner* to receive public services to which such *illegal foreigner* is not entitled shall be guilty of an offence punishable by a fine not exceeding R25 000. 20

(5) Any civil servant who provides false or intentionally inaccurate or unauthorised documentation or benefit to an *illegal foreigner*, or otherwise facilitates such *illegal foreigner* to disguise his or her identity or *status*, or accepts any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of *this Act*, shall be guilty of an offence punishable by imprisonment not exceeding two years or a fine not exceeding R75 000, provided that if such civil servant is employed by the *Department* such offence shall be punishable by imprisonment not exceeding three years without the option of a fine. 25

(6) Anyone failing to comply with one of the duties or obligations set out under sections 42 to 46 of *this Act* shall be guilty of an offence punishable by imprisonment not exceeding eighteen months or a fine not exceeding R75 000. 30

(7) Anyone participating in a conspiracy of two or more persons to conduct an activity intended to violate *this Act* repeatedly shall be guilty of an offence punishable by imprisonment not exceeding four years or a fine not exceeding R150 000, provided that if part of such activity is conducted or intended to be conducted in a *foreign country* the offence shall be punishable by imprisonment not exceeding four years without the option of a fine. 35

(8) Anyone who willfully or through gross negligence produces a false certification contemplated by *this Act* shall be guilty of an offence punishable by imprisonment not exceeding one year or a fine not exceeding R50 000, and shall be suspended from the relevant professional association for a period not exceeding two years. 40

(9) Anyone, other than a civil servant, who produces a document purporting to be a document issued or administered by the *Department* shall be guilty of an offence punishable by imprisonment not exceeding two years or a fine not exceeding R75 000. 45

(10) Anyone who through offers of financial or other consideration or threats, compels or induces an *officer* to contravene *this Act* or to breach such *officer's* duties shall be guilty of an offence punishable by imprisonment not exceeding eighteen months or a fine not exceeding R50 000, which shall be increased up to twice such length of imprisonment or amount of fine if consequently such *officer* in fact contravenes *this Act* or breaches his or her duties. 50

(11) Anyone guilty of the offence contemplated in section 37(10) shall be punishable by imprisonment not exceeding six months or a fine not exceeding R50 000.

(12) A *Court* may order that certain assets—

(a) within the *Republic* belonging to an *illegal foreigner* referred to in subsection 37(3); 55

(b) employed to contravene section 45 and belonging to the person contravening such section;

(c) employed to convey into the *Republic* a *foreigner* without the required transit visa; or 60

(d) employed to perpetrate the offences contemplated in subsections (5), (7), (8) and (10),
be forfeited to the *Department* to the extent necessary to defray the costs referred to in section 37(3) in respect of the *foreigners* concerned and the costs incurred by the *Department* to secure such a forfeiture, provided that third party rights which vested in good faith and for valuable consideration shall not be adversely affected. 5

Administrative offences

53. (1) Any *foreigner* who leaves the *Republic* after the expiry of his or her permit shall be guilty of an offence punishable by an administrative fine of a *prescribed* amount not exceeding R3 000, which fine shall be imposed by the *Department* on detection of the overstay and exacted when such *foreigner* is *admitted* or makes an *application* with the *Department*. 10

(2) Anyone who through negligence produces an incorrect certification contemplated by *this Act* shall be guilty of an offence punishable by an administrative fine of a *prescribed* amount not exceeding R8 000, which fine shall be imposed by the *Department*. 15

(3) Any *owner* or *master* of a *ship* who through negligence contravenes the provisions of section 38 shall be guilty of an offence punishable by an administrative fine of a *prescribed* amount not exceeding R10 000, which fine shall be imposed by the *Department*. 20

TRANSITIONAL PROVISIONS

Definitions

54. In respect of sections 55 to 59 the following additional or different definitions shall apply, unless the context requires otherwise:

- (i) “*prescribe*” means to provide through *regulations* and “*prescribed*” has a corresponding meaning; 25
- (ii) “*previous Act*” means the Aliens Control Act, 1991 (Act No. 96 of 1991);
- (iii) “*published*” means published in the Government Gazette; and
- (iv) “*regulations*” means both general and specific rules adopted by the *Minister* and *published*. 30

Restructuring of *Department*

55. (1) Notwithstanding any other law, within nine months of the commencement of *this Act* a new organisational diagram for the *Department* shall be *prescribed* which shall redefine ipso facto the terms and conditions of employment and the job descriptions of anyone employed in the *Department*, provided that— 35

- (a) such persons’ remuneration and other benefits shall neither be diminished nor worsen; and
- (b) any party aggrieved by the application of this section, may, in the *prescribed* manner, appeal to the *Minister* who, in his or her discretion, may take suitable action to protect such party’s rights and pursue the ends of justice and fairness, including, inter alia, changing the relevant *regulation* or portion thereof. 40

(2) In performing the function set out under subsection (1), the *Minister* shall take into account the—

- (a) need to delegate to municipalities the function of delivering the *Department’s* civic affairs services, thereby divesting the *Department* of this responsibility and distributing its resources employed to fulfill it between migration control and municipalities, provided that the *Department* shall retain the non-delivery aspects of its civic affairs functions, including, but not limited to, the operation, access to and implementation of the national identification system and the population and fingerprint registries, capacity building, monitoring and training functions and any policy matter relating thereto; 45
 - (b) need to restructure the *Department* to enable it to operate as set out in *this Act*;
 - (c) need to provide the *Department* with the necessary ancillary and support services and functions in order to perform its functions in terms of *this Act*; and 50
- 55

- (d) recommendation of the Department for Public Service and Administration, if any.

Functions of *Department and Board*

56. (1) Until the *Board* is duly constituted and operational, any *regulation* required in terms of *this Act* shall be *prescribed*. 5

(2) Subject to *this Act*, any *regulations* adopted under the *previous Act* shall remain in force and effect until repealed or amended.

Courts

57. (1) Pending their establishment, the jurisdiction of the *Courts* shall be exercised by the competent Magistrate's *Court* designated by the Minister of Justice, provided that the establishment of the *Courts* may take place at different times in different areas of the *Republic* as determined by the Minister of Justice for reasons of expediency and good judicial administration. 10

(2) In establishing the *Courts* and when applicable thereafter, the Minister of Justice shall— 15

- (a) after consultation with the Magistrates' Commission, designate certain magistrates, additional magistrates or assistant magistrates to serve in the *Courts* in the areas in respect of which they perform their respective functions;
- (b) take reasonable steps within the available resources of the Department of Justice to implement *this Act* and provide the *Courts* with the required administrative capacity; and 20
- (c) after consultation with the *Department* or the *Minister*, provide an opportunity for the persons referred to in paragraph (a) to receive training in the implementation of *this Act*.

Existing permits 25

58. (1) Any permanent residence permit validly issued in terms of the *previous Act* shall be deemed to have been issued in terms of, and in compliance with, *this Act*.

(2) Any permit issued in terms of the *previous Act* for a determined period shall continue in force and effect in accordance with the terms and conditions under which it was issued, but may only be renewed in terms of *this Act*, provided that— 30

- (i) the *Department* may waive the requirement to submit a new *application*; and
- (ii) for good cause the *Department* may authorise a permit to be renewed in terms of the *previous Act*.

(3) Any exemptions for an undetermined period granted in terms of section 28(2) of the *previous Act* shall be deemed a permanent residence permit for the purposes of *this Act*, and any exemption granted for a determined period shall continue in force and effect in accordance with the terms and conditions under which it was issued. 35

(4) Permits issued under section 41 of the *previous Act* shall continue in force and effect in accordance with the terms and conditions under which they were issued, but may not be renewed. 40

Border control and investigative functions

59. Notwithstanding any sections other law, in order to enable the *Department* to perform the functions set out in sections 36(3) and 39(1) and any delegated function referred to in section 39(2), within 42 months of the commencement of *this Act*, in consultation with the *Director-General*, the Secretary for Defence and the National Commissioner of the South African Police Service, as applicable, it shall be *prescribed* that— 45

- (a) certain individuals employed in such departments become ipso facto employed in the *Department*, redefining their respective terms and conditions of service and job descriptions as *prescribed*, provided that— 50
 - (i) their remuneration and other benefits shall neither be diminished nor worsen; and
 - (ii) provision be made for them to be appropriately trained or reconditioned to perform the functions contemplated in *this Act*; and
- (b) certain equipment held by such departments be transferred to the *Department*. 55

Repeal of laws

60. (1) The laws mentioned in Schedule 3 are hereby repealed or amended to the extent set out in its third column.

(2) Anything done under the provisions of a law repealed by subsection (1) and which could have been done under *this Act* shall be deemed to have been done under *this Act*. 5

Short title and commencement

61. (1) *This Act* shall be referred to as the Immigration Act, 2001, and shall come into force and effect on a date determined by the President by proclamation in the Government Gazette.

(2) Different dates may be determined under subsection (1) in respect of different provisions of *this Act*. 10

Schedules

Schedule 1

Offences referred to in section 26(1) of this *Act*

Treason
Murder
Rape
Indecent assault
Robbery
Kidnapping
Child-stealing
Assault when a dangerous wound is inflicted
Arson
Any conspiracy, incitement or attempt to commit an offence referred to in this
Schedule

Schedule 2

Offences referred to in section 26(2) of this *Act*

Sedition
Public violence
Culpable homicide
Bestiality
Malicious injury to property
Breaking and entering any premises
Theft
Receiving stolen property knowing it to have been stolen
Fraud
Forgery or uttering a forged document knowing it to have been forged
Offences relating to coinage
Any offence the punishment of which may be a period of imprisonment exceeding six months without the option of a fine
Any offence relating to the illicit possession, conveyance or supply of dependence-producing drugs
Any conspiracy, incitement or attempt to commit an offence referred to in this Schedule

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

Schedule 3

Laws repealed or amended

No and year of law	Short title	Extent of the repeal or amendment
Act No. 96 of 1991	Aliens Control Act, 1991	The whole repealed
Act No. 75 of 1995	Aliens Control Amendment Act, 1995	The whole repealed
Act No. 88 of 1995	South African Citizenship Act, 1995	<p>1. Amendment of section 1 Section 1 of the South African Citizenship Act, 1995 (hereinafter referred to as “<i>the principal Act</i>”) is hereby amended by the addition of the following definition: — “ ‘prescribed’, as used in section 5 of this Act, has the meaning assigned thereto in the <u>Immigration Act of 2001</u>;”.</p> <p>2. Amendment of section 5 Section 5 of <i>the principal Act</i> is hereby amended by— (a) the substitution of the word “Minister” with the word “Department” where such word occurs; (b) the substitution of the words “him or her” with the word “it” where such words occur in subsection (7); (c) the substitution of the words “his or her” with the word “its” in subsection (8).</p> <p>3. Amendment of section 26 The following subsection is hereby added to the end of section 26 of <i>the principal Act</i>: “(5) <u>In case of an inconsistency between this Act and the Immigration Act of 2001, the latter shall prevail.</u>”.</p> <p>4. Implementation The amendments to <i>the principal Act</i> shall come into force and effect at a date <i>prescribed</i> by the <i>Minister</i>, provided that the <i>Minister</i> may determine different dates for different provisions thereof.</p>
Act No. 130 of 1998	Refugees Act, 1998	<p>1. Amendment of section 1 Section 1 of the Refugees Act, 1998 (hereinafter referred to as “<i>the principal Act</i>”), is hereby amended by— (a) the addition or substitution of the following definitions:</p>

		<p> <u>“— ‘Board’ has the meaning assigned thereto in the Immigration Act of 2001;</u> <u>— ‘Court’ has the meaning assigned thereto in the Immigration Act of 2001;</u> <u>— ‘Department’ has the meaning assigned thereto in the Immigration Act of 2001;</u> <u>— ‘prescribed’ has the meaning assigned thereto in the Immigration Act of 2001;”;</u> </p> <p>(b) the deletion of the following definitions:</p> <p> — “Aliens Control Act”; — “Appeal Board”. </p> <p>2. Amendments to principal Act</p> <p>(1) <i>The principal Act</i> is hereby amended by substituting—</p> <p>(a) the word “Minister” with the words “Minister, acting after consultation with the Board,” where such word occurs in sections 7 and 11;</p> <p>(b) the word “Minister” with the word “Department” where such word occurs in sections 22 and 23.</p> <p>(2) <i>The principal Act</i> is hereby amended by deleting—</p> <p>(a) the words “and Board of Appeals” where they occur in sections 15, 16, 19 and 20; and</p> <p>(b) the words “or Board of Appeals” where they occur in sections 17 and 18.</p> <p>(3) <i>The principal Act</i> is hereby amended by deleting sections 12, 13 and 14 and by substituting section 26 with the following section:</p> <p>“Appeals</p> <p>26. [(1) Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24(3)(c).</p> <p>(2) The Appeal Board may after hearing an appeal confirm, set aside or substitute any decision taken by a Refugees Status Determination Officer in terms of section 24(3)(c).</p> <p>(3) Before reaching a decision, the Appeal Board may—]</p> <p><u>An Asylum seeker may lodge an appeal with a Court in the manner and within the period provided for in the rules, and such Court shall hear and determine any relevant question of law or fact in terms of this Act provided that, before reaching a decision, such court may—</u></p>
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		<p>(a) invite the UNHCR representative to make oral or written representations;</p> <p>(b) refer the matter back to the Standing Committee for further inquiry and investigation;</p> <p>(c) request the attendance of any person who, in its opinion, is in a position to provide the [Appeal Board] Court with relevant information;</p> <p>(d) of its own accord make further inquiry or investigation;</p> <p>(e) request the applicant to appear before it and to provide any such other information as it may deem necessary.</p> <p>[(4) The Appeal Board must allow legal representation upon the request of the applicant.]”</p> <p>3. Implementation The amendments to <i>the principal Act</i> shall come into force and effect at a date <i>prescribed</i> by the <i>Minister</i>, provided that the <i>Minister</i> may determine different dates for different provisions thereof.</p>
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MEMORANDUM

The Bill establishes a legislative framework for the issuance of temporary residence permits allowing foreigners to enter, sojourn and conduct certain activities, including but not limited to work activities, within the Republic. The Bill empowers the Department of Home Affairs to issue such permits and prevent, detect and deport illegal foreigners within the Republic, while performing functions relating to the prevention of xenophobia and education of communities. The Bill also provides for a human-rights based legal framework to deal with matters relating to foreigners within the Republic. Furthermore, the Bill provides for specialised border control.

Clause 1 of the Bill contains the applicable definitions.

Clause 2 sets out the general conditions and criteria for the admission of foreigners into the Republic and the departure of any person from the Republic.

Clause 3 provides for the general rules relating to the issuance of temporary residence permits.

Clause 4 provides for the general entry permit applicable when other permits are not required.

Clauses 5 to 17 provide for several types of temporary residence permits depending on the activities that a foreigner intends to conduct in the Republic, the length of his or her stay and the grounds on which he or she qualifies for the right to sojourn and conduct activities within the Republic.

Clause 18 cross-references other statutory provisions in terms of which the Department administers asylum and refugee matters.

Clause 19 provides for cross-border and transit passes to address the reality of people requiring to cross the borders on a routine basis or who are on transit to other countries.

Clauses 20 to 22 provide for the grounds and criteria applicable to the acquisition of permanent residence which are divided in two classes, one relating to the acquisition by right on the basis of grounds, such as having held a work permit for five years or being the spouse of a South African national, and the other relating to permanent residence which may be acquired under certain conditions and within certain limits.

Clauses 23 and 24 deal with foreigners who are either barred from entering the Republic or may be allowed into the Republic only under special conditions on account of their past conduct or present activities.

Clause 25 provides for discretionary powers to address specific cases and circumstances.

Clause 26 deals with the withdrawal of permanent residence.

Clauses 27 to 34 deal with objectives and structures of migration control which include the Minister, the Department and an Immigration Advisory Board, and set out their respective powers and functions as well as the objectives governing their exercise and performance. The structure of the Department in respect of migration control is set out on a regional basis. The Board is given advisory policy powers in respect of policy formulation and regulation making. The regulation-making process is provided for in a process requiring the necessary participation of the affected or interested parties, which is subject to judicial review on the grounds of reasonableness. Provision is also made for several stages of administrative review.

Clauses 35 to 39 deal with the enforcement and monitoring of the immigration laws setting out the parameters under which investigation of illegal foreigners may take place, together with the conditions of their deportation and detention. Provision is made for tasking the Department with the function of border control.

Clause 40 establishes Immigration Courts on the level of Magistrates Courts to deal with matters relating to the administration of immigration laws.

Clauses 41 to 48 set out obligations in respect of immigration matters on the side of certain individuals and institutions and provide for general duties applicable in respect of conduct violating the provisions of immigration laws.

Clause 49 provides for the status and accreditation of agents representing foreigners before the Department.

Clause 50 provides for the internal auditing of the Department to prevent corruption and improve efficiency and productivity.

Clause 51 provides for measures in respect of foreigners erroneously allowed to enter the Republic.

Clauses 52 to 53 set out sanctions applicable to the violations of the provisions of the Bill and define the relevant offences.

Clauses 54 to 61 contain transitional provisions and the short title and commencement of the Bill.

FINANCIAL IMPLICATIONS FOR STATE

The implementation of the Immigration Bill will be staggered over 3 to 4 years. The relevant financial implications for the Department of Home Affairs for such period has been budgeted for as follows:

- 2002-2003: R7 million, of which R3.5 million recurring
- 2003-2004: R7 million, of which R3 million recurring
- 2005-2006: R7 million, of which R3 million recurring
- 2006-2007: R9 million recurring

PERSON AND BODIES CONSULTED

Department of Labour
Department of Trade and Industry
Department of Justice and Constitutional Development
Department of Education
Department of Defence
Minister of Transport
Minister of Finance for the purposes of the Public Finance Management Act
Department of Finance
Department of Safety and Security
National Intelligence Agency
Department of Housing
South African Revenue Service
Department of Foreign Affairs
Minister of Minerals and Energy
Minister of Health
Department of Arts, Culture, Science and Technology
Department of Agriculture and Land Affairs
Department of Environmental Affairs and Tourism
Department of Public Service and Administration
Department of Provincial Affairs and Local Government
South African Police Service
Investment South Africa
South African Chamber of Business
Durban Chamber of Commerce and Industry
National African Federated Chamber of Commerce and Industry
British Chamber of Business in South Africa
KwaZulu-Natal Marketing Initiative
The Employment Bureau of Africa
Free Market Foundation of Southern Africa

Open Society Initiative for Southern Africa
The Human Rights Commission
The South African Law Society
The Institute of Chartered Accountants
Institute for Security Studies
Idasa — SAMP
Centre for Policy Studies
Carnegie Endowment for Peace: Migration Project
US Immigration and Naturalisation Service
The UN High Commission for Refugees
International Organisation for Migration
Business South Africa
Cosatu
Fedusa
Centre for Development and Enterprise
Nedlac
American Chamber of Commerce
Banking Council of South Africa
International Education Association of South Africa
University of the Witwatersrand
University of Cape Town
University of Pretoria
University of the Free State
Georgetown University
South African technikons
Chamber of Mines
Japanese Chamber of Commerce
Foreign Marriage and Family Protection Association
Church of Jesus Christ of the Latter-Day Saints
Chief State Legal Adviser
South African Institute for International Affairs
G Eisenberg
Prof. L Schlemmer

IMPLICATIONS FOR PROVINCES

None

PUBLICATION

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PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Home Affairs are of the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.