

# PEACE AND STABILITY



**POLICY DISCUSSION DOCUMENT**

**March 2012**

## **INTRODUCTION**

The discussion document looks at reviewing and proposing new policy areas regarding Peace and Stability. It raises a number of critical issues, which warrant the attention of the African National Congress as we move towards the ANC Policy and 53<sup>rd</sup> National Conference. The document will focus on policy proposals from:

- A. Home Affairs- Positioning of Home Affairs to be the backbone of security , service delivery and the developmental state**
- B. Justice- Transformation of the Courts and Judiciary**
- C. Police – Single Police service**

## **A: Home Affairs**

### **POSITIONING HOME AFFAIRS TO BE THE BACKBONE OF SECURITY, SERVICE DELIVERY AND THE DEVELOPMENTAL STATE**

#### **Introduction**

Under the Apartheid regime, with its Bantustan offspring, the main objective of the department of Home Affairs was to control black people and deny them their citizenship, identity, dignity and freedom of movement among other injustices. What this paper speaks to is the role Home Affairs should play in achieving the goals set out in the Strategy & Tactics document adopted in 2007 ANC National Conference in Polokwane. That document affirmed that “in broad terms, the National Democratic Revolution (NDR) seeks to ensure that every South African, especially the poor, experience an improving quality of life. It seeks to build a Developmental State shaped by the history and socio-economic dynamics of South African society”

Home Affairs plays a decisive role as the backbone of the developmental state and is central to enabling security and service delivery. It plays a crucial role in enabling all South Africans to proudly claim their citizenship, their identity and dignity. For this to happen, the transformation of Home Affairs must be driven forward and the department must balance its security and service delivery functions and develop close ties with communities.

Any functioning state is made up of individuals. A crucial element in defining the status, position, participation and recognition of individuals is the question of identity. All modern social systems in health, education, welfare, security, employment, banking etc. are dependent on identities being well-defined and secure. A developmental state is unable to meet its essential goals without a detailed and secure identification system that incorporates both citizens and non-citizens who live, work and/or study within its borders. The identification system is crucial to a range of social, economic and cultural activities, and ensures that a state is empowered to organize itself, plan for the future and protect its citizens.

Another mandate given to Home Affairs is to regulate and facilitate immigration and to enforce the immigration act. No person can legally enter South Africa unless cleared by an immigration official, whether they seek to enter by land, sea or air. Within this mandate is the regulation of asylum

seekers and the granting of refugee status in terms of international protocols South Africa is signatory to.

Immigration impacts strongly on our security, economic, social and cultural development. The creation of decent work depends on trade and tourism and the flow of skills and knowledge, all of which is impossible without the movement of people. A better and safer life for all South Africans is only possible if we are integrated into the global community and if we develop together with our region. The ANC and the mass of our people have always stood against racism and embraced internationalism and a sense of belonging to humanity. At the same time, we must be ever vigilant and defend our state, our people and our independence. A well-managed immigration system is therefore crucial in achieving our national objectives.

### **Establishing a National Identity System**

Home Affairs is the backbone of national security, service delivery and development because it is the custodian of the unique identity of all citizens and documented foreigners residing in South Africa.

A national identity database enables any state to achieve these goals if it meets certain criteria. The population register must be comprehensive, accurate and secure. Births and deaths and any other changes must be recorded. Secondly, to secure a population register babies must be registered within 30 days of birth. Thirdly, all citizens should apply for and receive their IDs at age 16 and then they must take care of that ID to prevent identity theft and fraud.

The law in South Africa requires that newborns be registered within 30 days of birth. However, just over 50% of parents still take a year to register their children and sometimes even longer. Another problem is that orphans and other children who are vulnerable are sometimes not registered, making it difficult for them to claim their citizenship later on. Late registration of birth opens the way for fraud and leads to an insecure and inaccurate national identity database.

Registration of newborns within 30 days has been the central theme of the National Population Registration Campaign which the (Department of Home Affairs (DHA) has been running since March 2010. One aim of the campaign is to make the need for early birth registration part of the national consciousness and civic responsibility of all South Africans. In order to assist citizens register children, Home Affairs has established service points in 221 hospitals where online registration can take place. All ANC members and branches, especially the Youth and Women's Leagues, should actively assist in making sure that all babies are registered within 30 days of birth.

Stakeholder Forums have been launched in over 250 municipalities over the last 3 years bringing together communities, local government, provinces and national departments. These forums monitor the local offices of Home Affairs, help detect and solve problems and fight corruption. They ensure that even the most vulnerable persons get access to Home Affairs services and that the key messages around the NPR campaign get filtered to grassroots level.

Home Affairs, assisted by Stakeholder Forums, will intensify the work of educating and enforcing the law on registration of births. We must work towards narrowing the stream of late registrations of birth, which is open to abuse and the fraudulent acquisition of South African identity and citizenship. One of the measures the Department will implement is the removal of the function of late registration of birth from local offices to the head office. The broader context is that the acquisition of permanent

residence and citizenship by foreigners in general should manage in a way that ensures national security and public safety is not compromised; and the achievement of development goals advanced.

At the registration of birth a unique ID number is generated against an individual's biographical details. Another major threat to the NPR comes from citizens who are 16 years or older, but have not yet applied for an ID. Failure to apply for and collect an ID book at the age of 16 creates opportunities for unscrupulous officials of DHA to access these documents and sell them on to individuals or organized syndicates who do massive damage to our economy and may even commit acts of terror and sabotage. Once again, responsible citizenship is called for and South Africans who have attained the age of 16 must apply for and collect their identity documents. The aspect of abuse and fraudulent acquisition of SA identity/citizenship is made worse when citizens who having applied for ID books do not collect them at DHA offices. These uncollected IDs pose a threat to our collective security. Home Affairs has been using education and outreach campaigns to deal with this issue.

The Department of Home Affairs intends to establish a single **National Identity System** that includes every citizen and foreigner who lives or has lived in South Africa, whatever their status. The system must be secured through the use of biometrics, including digital photographs, fingerprints and signatures. The system and related processes will be designed to ensure that the status of persons cannot be fraudulently changed; and a secure register of citizens will be a key component of the system.

Combined with the live capture of biometrics and smart card technology, a National Identity System would be the backbone of *e-government* and can make service delivery more efficient, accessible, transparent, secure and cost effective. It will also be a powerful instrument for combatting domestic and international crime, fraud and corruption. Several government departments and recently banks are already linking to the Home Affairs National Identification system (HANIS) to verify identity and reduce fraud.

### **The secure and effective management of immigration**

While immigration is about the enforcement of laws, rules and regulations; it is of critical and of strategic importance that it be anchored and aligned to the promotion of economic development, jobs creation and trade investments in South Africa, within the SADC Region, the African continent and the rest of the world. It is a well-accepted fact that South Africa cannot survive as a small rich enclave surrounded by a sea of poverty and severe under development. We need to build South Africa in a better Africa and in a better world.

It is in the interest of South Africa that it should not abdicate its international obligations and its humanist approach. It is therefore imperative that a policy be developed that will seek to balance the need for economic, cultural and social development of the country against its security needs and the integrity of our state and society. Security must include the security of the country, communities and each one of us including the foreigners and immigrant communities who are part of South Africa. Social cohesion includes the integration of immigrant communities into South African life so as to enrich and grow our society.

South Africa has not been able to build sufficient capacity to manage immigration effectively by developing coherent immigration policies and legislation. South Africa, unlike most countries in the

region, adopted regional and international conventions without reservations, thus missing an opportunity to adapt them to meet the challenges confronting the state; and to governmental development goals. The management of migration has been largely based on legislative compliance and has failed to take into consideration dynamic changes such as the growth in transnational crime and new migration flows. Immigration needs to be managed holistically and proactively in order to be secure and effective. A major reason for the failure to manage immigration securely and effectively was the failure in 1994 to realise that the Home Affairs is a highly strategic security department. Instead, it was placed under the executive authority of a minister from an opposition party.

### **Managing Asylum Seekers**

South Africa is signatory to the Geneva and AU conventions on asylum seekers and refugees. A refugee is someone who is persecuted or has a well-founded fear of persecution that forces him or her to seek refuge in another state. This means finding a secure, efficient and humane way to adjudicate the claims made by asylum seekers before granting them refugee status. Currently SA receives large numbers of asylum seekers every year, most from SADC and the rest of Africa and a smaller but very visible number from as far as Bangladesh and China,. Most applicants do not produce any form of documentation which makes verifying identities and adjudicating claims difficult.

The main challenge currently is that over 95% of those claiming asylum in SA are not genuine asylum seekers but rather looking for work or business opportunities. South Africa has a no-encampment policy and asylum seekers are allowed to earn a living while awaiting adjudication of their applications, which with appeals that can take many months. While awaiting the outcome of their applications, many applicants endeavor to regularize their stay through other means e.g. marriage to South Africans which are often fraudulent, fraudulent late registration of birth and being the biological parent of South African children.

A combination of large numbers of asylum seekers, gaps in the law, weak systems and corruption has led to widespread abuse of an overloaded system by criminal syndicates who smuggle and traffic people from as far as the Horn of Africa and Asia. This has led to widespread corruption and social and security problems. These asylum seekers are often subject to abuse, super-exploitation and forced recruitment by organised crime.

In response to this situation, Home Affairs has made some improvements to the asylum system and amended the Refugee Act. For instance, work and study permits with limitations will have to be applied for under the immigration act. However, a number of additional steps need to be taken in order to manage the process effectively and minimize the risk to national security and stability. In this regard, the following policy is proposed with regard to asylum seekers:

- The acceleration of adjudication of applications especially manifestly unfounded applications.
- The current policy of non-encampment should continue as international experience is that permanent camps bring their own serious risks and challenges. However, instead of the current weak controls, South Africa must implement a risk-based approach. Those asylum seekers who present a high risk must be accommodated in a secure facility, until their status has been determined. The low risk asylum seekers will be processed while they are assisted by various organisations.
- An important consideration will be receiving assurances that the whereabouts of the asylum seeker must be known. A monitoring system will be established to ensure that the whereabouts of asylum seekers and their situation is known.
- South Africa must take robust steps to be able to refuse asylum to asylum seekers who have transited through one or more safe countries. Building appropriate relationships with other such countries, which are also signatories to the conventions on refugees and in particular our neighbours, is key to resolving this problem. The UN Conventions on asylum seekers provide for the 1<sup>st</sup> Country Rule which states that an asylum seeker should seek refuge in the first safe country that he/she reaches. Accordingly South Africa should exercise its right to refuse granting refugee status to asylum seekers who have travelled through safe countries; or who already have refugee status in another country unless prescribed procedures are followed.
- Currently asylum seekers and refugees are able eventually to acquire citizenship through marriage or other means that allow them to eventually apply for permanent residence, which can lead to obtaining citizenship through naturalisation. Such changes of status by asylum seekers and refugees should be made under the Immigration act with necessary amendments made to address any loopholes in that act.
- One of the ways asylum seekers currently earn a living is to rent or manage retail outlets such as “Spaza” shops. Strengthening and proper enforcement of municipal by-laws would control and regulate such activities. Ideally, municipalities should know who lives and works and runs businesses in their area as well their status.
- In many townships and rural areas some asylum seekers have been involved in informal trading – an activity that might contravene municipal by-laws and should not be legal under the Refugees act given that asylum seekers are persons whose status has not been determined. This informal trading is mainly in the form of hiring *Spaza* shops and houses from South African. Non-South Africans should not be allowed to buy or run *Spaza* shops or larger businesses without having to comply with certain legislated prescripts. By-laws need to be strengthened in this regard. Should a regulatory framework for small and larger businesses be developed in terms of municipal by-laws and provincial and national legislation? This would have to be done in a way that does impacts positively rather than negatively on the informal economic sector. Should by-laws apply equally to both asylum seekers and citizens?

- In respect of both asylum seekers and refugees, the respective responsibilities and roles of relevant departments in all three spheres of government must be made clear and embedded in Acts, regulations or formal agreements as appropriate.
- Effective participation in the UNHCR's program on the resettlement of refugees to other countries would also be beneficial.
- It is not usual for a country to have Refugee Reception Centres right in the middle to the extent that South Africa has. Consequently the Department of Home Affairs has announced that to alleviate this problem it intends to move these reception centres and relocate them along the border. A discussion needs to ensue as to the support that is needed for Home Affairs to efficiently execute this regarding, among other issues, the acquisition of land and building.
- There is a tendency of some people who have already been granted refugee status including those who are still seeking for asylum to travel to their home countries for visits and come back to South Africa, consideration should be made to refuse these individuals re-entry into the country because not only are they flouting UN Convention but it is an ample display that they have nothing to fear in their home countries.

### **Managing economic migrants with lower levels of skills**

Most of the economic migrants who abuse the asylum seeker process come from the SADC region. One of the reasons is that current immigration legislation provides very few opportunities for migrants with lower level skills to apply for permits. The urgent challenge is to separate genuine asylum seekers from economic migrants to enable immigration to be managed in the interests of national and regional security and development.

There are three reasons why this policy gap must be addressed. Firstly, there are strong historical flows of labour between certain Southern African countries and South Africa. Historically, labour from various countries from Southern Africa contributed in building this wealth of this country. A second and related reason is that nowhere in the world should a country with a stronger economy than its neighbors totally exclude migrants from neighbouring countries seeking work. America has spent billions of dollars attempting to do this and has failed. Exclusion of low skilled migrants is nether possible or desirable. The third reason is that no country that wants to grow its economy should do so in isolation from its region. South Africa is committed to integrated regional development, which includes increasing managed flows of people, capital and knowledge across SADC borders. The following policy is therefore proposed.

- South Africa already is faced with the reality of low skilled immigrants being active in many economic sectors. In the light of this reality there is a need to ask whether low skilled immigrants should be allowed to work in SA provided cognizance is taken of the existing legislation, the labour market and any policy in this regard.

- Should South Africa allow irregular economic migrants from SADC to work in the country in the light of the objective realities on the ground? In other words should we allow special dispensation for them within the present legislative framework? If so what should be the policy directives and if not how do we manage the influx of economic migration from these countries?
- Should migrants with lower level skills and amounts of capital from SADC countries be given work and business permits.
- The permits will be conditional on effective mechanisms being in place to ensure an acceptable degree of protection for local labour and commercial markets.
- The permits (in terms of number, type and conditions) will also be conditional upon bilateral agreements reached with each SADC country that participates. The strategy in this regard would be to support development; strengthen immigration systems; and jointly develop measures to strengthen security, ensure compliance and combat crime.
- A commitment to the above policy and strategy would mean that South Africa would have to capacitate the state to make it work with the support of key civil society stakeholders including labour and business. There would have to be investment at an institutional level to ensure management of the process and in establishing monitoring and research capacity. This is essential to ensure informed, co-ordinated, responsive, flexible and secure management of immigration in this context.

### **Maritime and other ports of entry**

No person can legally enter the Republic of South Africa without first being cleared by an Immigration Officer; and by Customs and Health and other Departments where required. In this regard, law enforcement and compliance are the responsibility of Home Affairs. Immigration Officers at sea ports must board each vessel in compliance with the Immigration Act to list, identify and document on the appropriate forms, all crew or other employed persons on board a vessel; all passengers carried by a vessel; and all infected, diseased or dead persons on board. This indicates that our border-lines and ports of entry need to be secured against a wide variety of risks and threats. At the same time, there should be efficient facilitation of persons through ports of entry to facilitate rather than disrupt economic, social and cultural activities.

In terms of capacity, training, systems and accommodation there are serious gaps in the ability of South Africa to secure our land, sea and air ports of entry. Sea ports and the maritime environment have been identified as the most urgent priority area and Home Affairs is playing a leading role in taking steps to mitigate the most serious risks. Short, medium and longer term measures being taken include closer cooperation between the many agencies involved; the deployment of additional Immigration Officers with appropriate training; and investment in infrastructure. The stakes are high, given the strategic importance of sea ports in terms of security and trade and investment linked to



job creation. The larger issues are dealt with below in the discussion of the border management agency.

### **Documenting undocumented foreigners**

National security depends to a significant extent on the effective management of immigration. This begins with ensuring that all foreigners visiting or staying in South Africa are properly documented in terms of their identity, conditions of stay and the purpose of their visit or residence. It is also important to know where they are staying.

In 2010 Home Affairs launched a project to document Zimbabweans and over 275, 000 Zimbabweans came forward by the given deadline. The Department worked closely with the Zimbabwean government and Zimbabwean stakeholders. Documentation does not imply giving a foreigner the right to remain or extend their stay in South Africa. However, Zimbabweans who met certain conditions could apply for work, study or business permits. This was a strategic decision aimed at normalising relations with Zimbabwe and the situation in Zimbabwe. There will be further initiatives taken to document other populations of undocumented foreigners. The involvement of local and national stakeholders, including communities, is a crucial to success and ANC members and branches should give their support through relevant structures. Mature political leadership and sensitivity is needed to ensure the process is secure while also being humane and free of hostility against immigrants.

### **Dual Citizenship**

The recent amendment to the Immigration Act (August 2011) requires that dual citizenship should only be allowed when both South Africa and the other country involved recognise dual citizenship. Given South Africa's history and situation it is not feasible to end the recognition of dual citizenship in all cases. The major issue is that divided loyalties can create security risks if the person with dual citizenship occupies positions in the state that impact on sovereignty and security. This is particularly so in relation to judges, MPs, members of the Executive and civil servants.

In the light of the above is there a need to review dual citizenship? There is a view that dual citizenship should be reviewed because it does result in split loyalties infringe on the country's security efforts. In reviewing dual citizenship there will be a need to take into consideration issues like how feasible will it be in removing the practice altogether does the present legislative and constitutional regime allow this? Will there be a need to instead review and propose that security clearance requirement be extended to Members of the Executive, Legislatures and the Judiciary as is the case in regard to senior managers within the public service.

There will be quite a number of foreigners who South Africa may want to honour. This may be due to their past, present and potential contribution in building the country that we need and as embodied in founding documents like the Freedom Charter and the Constitution. A discussion is required to determine whether it will be proper to have a special category of conferring citizenship taking into consideration special circumstances.

## **Border Management Agency (BMA)**

Many countries have taken steps to ensure that there is integrated and effective management of the border environment. The pressure to do so comes from the rapid increase in the number of people and goods that cross borders and the need to manage the resulting risks and exploit the opportunities. The risks are multiplied by the rise in transnational crime, conflicts, food insecurity and global warming.

The border environment has a number of dimensions that must be understood. The most basic is the distinction between the borderline and the air, sea and land ports of entry that are the only legal crossing points. There is also an international dimension, starting with areas adjacent to borders in neighbouring countries and extending to a foreigner applying for a visa at a foreign mission abroad. A fourth dimension is enforcing immigration and other legislation in areas adjacent to the border and in the rest of the country.

The SANDF has been mandated to secure the border line. Home Affairs has an Inspectorate that is specifically charged with enforcing the Immigration Act, which works closely with SAPS, the State Security Agency (SSA), the SANDF and SARS. It is also responsible for deportations and maintains a holding facility. Home Affairs also clears people at ports of entry; runs the consulate sections at all foreign missions and issues visas and permits to foreigners and passports to South Africans. It is also responsible for managing asylum seekers and determining who receives refugee status. SAPS, SARS, the SSA Agriculture, Health, Transport and sea Port Authorities also have specific responsibilities with regard to clearing passengers, goods or conveyances and in ensuring security.

All Departments and agencies mentioned are involved in producing and analyzing information that enable risks to be assessed and decisions made, with the SSA, SANDF and SAPS providing intelligence. Key systems that are used at all these levels are the responsibility of Home Affairs: the Movement Control System (MCS); the National Population Register, linked to a database of fingerprint and photographs (HANIS); and the system for registering and processing asylum seekers and refugees. These are the systems that the Department of Home Affairs will be integrating into a National Identity System over the next two years.

All the functions mentioned above need to be strengthened and coordinated as part of managing immigration securely and effectively. This is particularly the case at ports of entry where some or all of these departments are physically present or are involved indirectly. The Justice Crime Prevention and Security (JCPS) cluster of departments has established various structures, such as the Border Control Coordinating Committee and the Joint Committee responsible for implementing security strategies and coordinating operations. Given its mandate, the Department of Home Affairs should

have played a larger role in building and driving these structures but has not done so because of lack of capacity.

Given the challenges and the complex environment described above, the decision was correctly taken to establish a Border Management Agency (BMA), with the State Security Agency leading the process. The proposal being put forward is as follows.

- The DHA is a key element of national security as it is mandated to regulate and facilitate immigration and is custodian of the identity of all nationals and foreigners living in South Africa. Securing the border environment and facilitating the movement of persons must be an integral part of the holistic management of immigration in the interests of security and of development.
- As indicated above the State Security Agency is leading the process to establish of the BMA, there is for a discussion to further consider which department will ultimately be the lead in the coordination of the BMA once it is established. Whether this should require a separate policy document that should also be a subject of discussion. It is crucial that the BMA operates in an integrated way that links among others border security, the movement control system, the visa and permitting system, the role of foreign missions, the management of asylum seekers and refugees and immigration law enforcement.
- The structure and functions of the BMA should be defined within a clear policy and strategic framework that indicates the part it will play in achieving national security and development goals. Establishing a body without an agreed framework and without linking to Home Affairs systems and processes will result in fragmentation rather than integration.

### **Transformation of Home Affairs**

The vision of a transformed Home Affairs is one staffed by patriotic professionals who are fully committed to serving and protecting their people, caring and responsive, efficient, effective and people centered. As a security department, Home Affairs will contribute to achieving two overriding goals: national security and public safety. The Department must also be driven by the need to perform its service delivery functions securely and efficiently to every South African, including the most marginalized and remote. Every official must be aware and responsive to the needs of the people while maintaining a high level of vigilance with regard to national security and public safety. The National Identity System and immigration systems must be secure; and must be used to serve citizens and other clients and to achieve national development goals. To achieve this vision the Department of Home Affairs has taken a number of key steps, some of which are indicated below.

- A Learning Academy has been established and the first set of dedicated courses designed and accredited. Three hundred and fifty newly appointed Immigration Officials have been recruited from the SANDF and trained in a pilot project with the help of Cuban experts. Going forward, all staff will be reoriented in terms of security awareness and equipped with appropriate skills.

- In 2012 the Department will launch a large scale Systems Modernisation programme, which will include establishing a National Identity System and piloting and then rolling out a new ID Smart Card.
- The Department has restructured so that it can work more closely with national, provincial and local spheres of government. A top priority is to strengthen the Home Affairs Stakeholder Forums and relationships with local government so that their role can be extended to support civic and immigration functions, especially in border areas.
- In its assessment Home Affairs has identified that one of the critical risks to the security of the National Population Register is birth registration process. Consequently the National Population Registration Campaign has as its objectives the mobilization of parents to register their children within 30 days of birth in line with the Act, eliminating the present process of late registration and making more secure and ensuring that citizens who are 16 and above do apply for identity books.
- Home Affairs in partnership with local government at all levels has established Stakeholder Forums as a key platform through which the targeted communities participation is enhanced and are able to assist in the implementation, evaluation and monitoring of the campaign and Home Affairs services. These Forums have been a most effective and dynamic form of community participation in particular as they relate to the transformation of the department. The Home Affairs Stakeholder Forums are focused on Home Affairs issues and thus should not replicate the work of other forums. The intention is to feed into and work with forums like the IGR Forums, Premiers Forums to mention a few.
- The department has through the National Population Registration Campaign made extensive use of its Mobile Offices which are made up of trucks and 4x4's enabled with satellite dishes which have been deployed into rural areas and it is ramping up its campaign of connecting health institutions with maternity wards into the department's network system.
- Other strategic priorities include strengthening the capacity of the Department to manage and analyse information and conduct research, monitoring and evaluation. Steps will also be taken to build capacity to coordinate and liaise with other departments, especially within the JCPS cluster, and to work internationally to strengthen the management of immigration, especially within SADC.

## **B: JUDICIARY**

### **1. INTRODUCTION**

- 1.1 It was one of the constitutional compromise reached at the Multi-party negotiations for a free South Africa that certain aspects relating to the transformation of the courts and the judiciary would not be part of the immediate transformation landscape that led to the establishment of the Parliament that represents all people of South Africa and the democratisation of government and other state institutions. The aspects that required the attention of Government immediately after the adoption of the Constitution include the following:

- (a) the rationalisation of the court including their structures, composition and areas of jurisdiction with a view to establish a judicial system suited to the requirement of the Constitution. (item 16(5) of Schedule 6 of the Constitution);
- (b) the implementation of legislative and other measures to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness (section 165(4) of the Constitution); and
- (c) the enactment of legislation to provide for the training programmes for judicial officers, the procedure for dealing with complaints about judicial officers, the participation of people other than judicial officers in court decisions and for any other matter not specifically dealt with in the Constitution (section 180 of the Constitution).

1.2 It was part of the political settlement that the above and other matters pertaining to the transformation of the judiciary would follow the establishment of the Constitutional Court and the Judicial Service Commission brought into existence by the Interim Constitution and subsequently entrenched in the Constitution.

1.3 The Constitution is explicit that Government, through the Minister responsible for the administration of justice, would manage the transformation process in conjunction with the judiciary and other social partners.

1.4 The transformation of the judiciary extends beyond the initiatives and programmes geared to transform its racial and gender composition envisaged in section 174(4) of the Constitution. The transformation extends to processes that would change the mindset of the members of the judiciary and a complete overhaul of the legal system realize a goal of a unified South Africa, free of racism, sexism, poverty and deprivation. The Constitutional Principles adopted by the ANC in 1991 sought to establish a judicial system that advances the ideals of a national democratic society and social justice. In particular, the Principles provided for the following:

Without interfering with its independence, and with a view to ensuring that justice is manifestly seen to be done in a non-racial way and that the wisdom, experience and judicial skills of all South Africans are represented on the bench, the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of the South African society. In a free South Africa, the legal system shall be transformed to be consistent with the new Constitution. The Court shall be accessible to all and shall guarantee to all equal rights before the law.

1.5 These ANC's Constitutional Principles formed the basis of the 34 Constitutional Principles which in turn formed the foundation for the Constitution of the Republic of South Africa, 1996. The independence of the judiciary and the rule of law are the pillars on which the constitutional order is anchored. The separation of powers embodied in the Constitution provides checks and balances to safeguard these values. Each of the three arms of the State has a distinct mandate that emanates from the Constitution. In terms of the Constitution the

Legislature exercises legislative authority; the Executive The Executive is charged with political administration to ensure transformation and development for the attainment of the national democratic goals and oversees the implementation of policies and legislation; and the Judiciary interprets the law and excises judicial power in terms of which it could struck down laws enacted by Parliament and any conduct of the Executive which do not meet the constitutional muster. The courts must exercise their judicial authority in line with the injunction of the Constitution.

## **2. THE POLOKWANE CONFERENCE RESOLUTIONS ON THE JUDICIARY**

2.1 At its 52<sup>nd</sup> National Conference held in Polokwane in 2007, the ANC noted the resolutions of the previous Conferences in relation to the transformation of the judiciary and which have not yet been implemented and resolved that they be implemented forthwith. In relation to judicial and the administration of the courts in particular the Conference resolved as follows:

11. There needs to be an integrated system of court governance within a single judiciary, with the Chief Justice as the head of the judiciary;
12. While justice is an exclusive national competency, there is a need to look at the matter carefully in the context of co-operative governance with particular reference to access and equity. We re-affirm the need for everyone to respect the rule of law and the independence of the judiciary especially in so far as the adjudicative function of the courts is concerned. The judiciary must adjudicate without fear, favour or prejudice, but should also respect the responsibility of the other arms of state and not unduly encroach in those areas.
13. The principle of separation of powers and the independence of the judiciary must be respected by all spheres of government. In this context:
  - a. the Chief Justice, as the head of the judicial authority, should exercise authority and responsibility over the development and implementation of norms and standards for the exercise of judicial functions such as the allocation of judges, cases and court rooms within all courts in the court system.
  - b. the administration of courts, including any allocation of resources, financial management and policy matters relating to the administration of courts are the ultimate responsibility of the Minister responsible for the administration of justice”.

2.3 The ANC-led Government continues to implement laws and programmes to implement the Polokwane Conference resolutions to advance the national democratic principles that underlie our constitutional democracy. Among the proposed legislation is the Constitution Seventeenth Amendment Bill, its accompanying Superior Courts Bill both of which are being

debated by Parliament. The Constitution Seventeenth Amendment Bill, among others, seeks to affirm the Chief Justice as the head of the judiciary assigns on him or her responsibility for the establishment and monitoring of the implementation of norms and standards for all the judiciary. These norms and standards are intended to promote good governance, ensure efficiency and promote access to justice. The Constitution clearly contemplates a single judicial system at the apex of which is the Constitutional Court (“CC”). In section 166, the Constitution places the CC at the apex of the “judicial system.” The Magistracy is also expressly located by the Constitution within the judicial system. This is a far cry from the days of Apartheid when the Magistrates were part of and were controlled by the Executive.

2.4 Flowing from Constitution Seventeenth Amendment Bill, the Superior Courts Bill provides, among others, for a judicial governance framework under the leadership of the Chief Justice, as the head of the judiciary. The magistracy will in turn be under the governance of the Judges President of the Division of the High Court having jurisdiction over the lower courts in the division concerned.

2.5 At its NGC held in Durban of 2009, the ANC reflected on the need to review the conference resolutions relating to judicial and court administration with a view to establishing a judicial system that is commensurate with the separation of powers and independence of the judiciary enshrined in the Constitution. The review of these resolutions in particular, is intended to establish an effective and judicial administration which is necessary for the efficiency and effectiveness of the court system. The current policy and legislative framework in terms of which the administration of processes which are connected with the judicial functions of the courts are the responsibility of the Minister do not promote an efficient and accountable judicial system that is consonant with the ideal of an accessible justice system.

2.6 Therefore this document seeks to initiate a policy discussion in relation to the judicial governance and the administration of courts pursuant to the decision on the NGC and subsequent discussion by the Peace and Stability subcommittee.

### **3. Judicial governance**

3.1 There is currently no integrated judicial governance framework under the command of the Chief Justice for the effective management of judicial functions and that instills accountability required by the Constitution. Ad hoc governance structures which have no legislative basis and lack the necessary legal competence to carry out and governance responsibility continue to exist at the different hierarchy of the courts. There are no mechanisms through which these governance structures are answerable to the Chief Justice as the head of the judiciary.

3.2 Whereas at the level of the Superior Courts the traditional Heads of Court forum chaired by the Chief Justice and consisting of the President of the Supreme Court of Appeal and of



Judges President of the High Courts assumes the responsibility for the governance of the superior courts, there are no effective structures at the level of the Lower Courts. At the lower courts there is an overlap between the regulatory functions of the Magistrates Commission and ad hoc structures representative of the Regional Court Presidents and Chief Magistrates respectively.

- 3.3 The Chief Justice and the Heads of Courts have commenced with discussion intended to formulate firm proposals on judicial governance and court administration. The proposals will be taken into account when the Minister of Justice and Constitutional Development, guided by the outcome of this ANC policy process, prepares draft legislation that he would submit to Cabinet.
- 3.4 An area that would require careful consideration in relation to the desired policy framework relates to the distinction between the role and powers of the envisaged judicial governance structure and that of the Minister of Justice and Constitutional Development concerning policy formulation of certain aspects of the administration of justice. Of significance would be the oversight role of Parliament in relation to policy pertaining to the courts and the judiciary. This area constitute the nucleus of the South African model of separation of powers which would require an intelligible reflection in the final policy framework and the legislation that will be promoted through Cabinet to give effect to the desired policy. In view of the anticipated public interest and rigorous debate that this particular aspect is likely to generate during the consultation and Parliamentary hearings stages, it appears ideal and logical to develop a separate legislation on the judicial regulatory framework from the Superior Courts Bill. The latter Bill will, in the main, deal with the courts (the structure, composition, jurisdiction and functioning thereof), while the regulatory aspects relating to the Judicial Council and Court Administration may be dealt with effectively in a separate legislation in the form of the Judicial Authority Act (JAA).
- 3.5 As explained above, the Constitution Seventeenth Amendment Bill and the Superior Courts Bill provide a framework for the establishment of an integrated governance framework for the judiciary across the entire judicial system. Pending the enactment of these Bills an institution of the Office of the Chief Justice has been established through a Presidential Proclamation to provide capacity for the Chief Justice to perform his or her judicial leadership role.
- 3.6 Although the Office of the Chief Justice functions independently from the Department of Justice and Constitutional Development, it is a government department which is answerable to the Minister of Justice and Constitutional Development and Cabinet. The Office of the Chief Justice is therefore not an independent institution outside Executive. It is for that reason that the measures implemented through the Presidential Proclamation are perceived to be temporary in nature, pending the enactment of legislation that will be informed by clear policies that this document seeks to address.

#### **4. Court Administration**



4.1 Concomitant to the establishment of the judicial governance framework there is a need for the establishment of a court administration system that is consistent with the separation of powers doctrine. It is important that the envisaged court administration system is integrated into the judicial governance framework.

4.2 In designing the court administration system or model suited to the South African Constitution, it will be important to compare and adopt best practices from the models which have been adopted by the different jurisdictions in various democracies. A distinction is usually drawn between the United States' model that places court administration under the judiciary and Commonwealth countries where a statutory body which operates within the proximity of the judiciary is established to assume responsibility for the day-to-day administration the courts and their budgets under the direction of the judiciary. There are various forms of court administration agencies which exist in different jurisdictions. The main distinction between the US model and the model followed in most commonwealth jurisdictions lie in respect of accountability. In the US model judges, as elected representatives, are directly accountable to the electorate while in the agency model the judges are accountable to Parliament through the head of the Agency as the accounting officer of the Agency. The following general principles apply to the court administration agency and bodies:

- (i) the enactment of appropriate legislation is necessary to establish a court administration agency or an appropriate body to administer the courts;
- (ii) the agency or the appropriate body has administrative autonomy and is functionally answerable to the judiciary and account for its budget and performance to Parliament, through its head (Chief Executive Officer);
- (iii) the legislation establishing the court administration agency or body responsible for court administration would define the relationship between the Ministry and the Department of Justice;
- (iv) the head of the Agency or appropriate body is appointed by Chief Justice/ Minister/President, depending on the preference of the jurisdiction concerned;
- (v) the head of the agency or appropriate body is accorded sufficient delegations, budget and capacity for the effective management of the courts.

## **5. Impact of the court administration on rule-making**

5.1 Rules of court prescribe the procedure and processes applicable in court proceedings, including requirements and conditions that must be met by any person who approach the court as a litigant. They are therefore important for purposes of promoting access to justice.

5.2 A distinction is made between the inherent power of the Superior Courts to regulate and protect their own process (in terms of section 173 of the Constitution) and section 171 of the Constitution, which provides that all courts function in terms of national legislation, and their rules and procedure must be provided for in terms of national legislation. The latter rules amount to subordinate legislation and the participation of the three Branches of State in the

making of these rules is explained in the chapter.

- 5.3 The judiciary, leading functionaries in court proceedings have an important role in the making of rules. Similarly the other arms of the state and civil society who are affected by the rules must have a role in rule-making.
- 5.4 Based on the practices of the comparable foreign jurisdictions clear policy is desirable in respect of the following:
- (i) that the power to make rules of court relating to case management should reside with the judiciary and the rules must be approved by Parliament; and
  - (ii) that rules relating to matters which impact on public policy should be approved by the Minister and Parliament;
- 5.2 It is desirable to enact national legislation for the rationalization of the existing different rule-making structures to promote uniformity;

## **6. Aspects for policy consideration**

- 6.1 The discussion of the principles contained in this document should be geared towards the development of policies for the establishment of an integrated judicial governance framework providing for:
- (i) the establishment of a governance structure in the form of a council or appropriate body representative of the judiciary at all the hierarchy of the courts under the command of the Chief Justice as the head of the judiciary;
  - (ii) the extent of the powers and functions of the governance structure, having regard to the policy-related functions of the Minister responsible for the administration of justice;
  - (iii) the establishment of an appropriate court administration system in the form of an Agency or a body with administrative autonomy to provide administrative functions that are closely connected with judicial functions of the courts; and
  - (iv) the extent of the powers and functions of the court administration agency or appropriate body, having regard to the South Africa constitutional framework pertaining to among others, the oversight responsibility of Parliament and the accounting arrangement provided for under the Public Finance Management Act of 1999.

## **7. Access to justice as a guiding principle**

- 7.1 The transformation of the judiciary is a constitutional imperative premised on access to justice. Therefore the judicial reform initiatives seeking to provide for an independent judicial governance and court administration system must advance access to justice and respect for the rule of law.
- 7.2 The Constitution enshrines the right of access to justice, which includes access to courts and

other independent tribunals or forums. Unless ordinary people have access to courts and other independent forums or tribunals to resolve their disputes, the vision of a society based on the rule of law as envisaged in the Constitution will not be realised. The following elements are necessary to enhance access to justice for ordinary citizens:

- (a) Access to the legal profession;
- (b) Access to courts which includes:
  - the right to effective legal representation;
  - developing simple and effective rules governing the conduct of legal proceedings;
  - the promotion of use of all official languages; development of proper infrastructure; decentralisation of administration of justice services,
  - training of magistrates and judges in understanding the Constitution, values, aspirations and traditions of all the people

#### **Possible questions to guide discussions**

- What systems of judicial governance and court administration would be consistent with our separation of powers enshrined in our Constitution?
- What is an impact of the separate and independent judicial and court administration on access to justice having regard to the broad concept of access to justice?
- What are the potential gains and benefits of a separate and independent judicial governance and court administration for the three arms of the state and the community at large?
- How should the government enhance the principle of separation of powers?
- What is an impact of the separate and independent judicial and court administration on access to justice having regard to the broad concept of access to justice?
- What are the cardinal factors that should inform decisions relating to the process of developing rules of court

#### **C: SINGLE POLICE SERVICE**

**“The constitutional imperative that there be a Single Police Service should be implemented”  
and**

**“The municipal, metro and traffic police should be placed under the command and control of the National Commissioner of the South African Police Service, as a force multiplier”**

#### **INTRODUCTION**

The above two clauses of the 52<sup>nd</sup> Conference of the African National Congress have not yet been implemented. This document will provide the context in which the resolution was made, the origins of the debate on a Single Police Service, and concrete proposals on the most expedient route for implementation.

This document will also interrogate all the constitutional imperatives on policing in the Republic.

## **INTERROGATION OF CONSTITUTIONAL IMPERATIVE**

The only reference in the Constitution to a “single police service” occurs in Chapter 11, section 199 under the provision “Establishment, structuring and conduct of security services”. Section 199(1) reads as follows:

“The security services of the Republic consist of a single defense force, **a single police service** and any intelligence services established in terms of the Constitution”. At first glance, the provision appears quite clear and unequivocal. However, where the Constitution next mentions “police service”, there appears to be some equivocation. Section 205(1) reads as follows:

“The national police service must be structured to function in the national, provincial and, **where appropriate**, local spheres of government.”

The inference here is that some police services that may not be “appropriate” at the local sphere of government are not meant to be part of the national police service. It is therefore clear that not all police services are to be part of the national (single) police service. Furthermore, at the local sphere of government, only where such police services are “appropriate” can they be part of the national police service.

This raises two issues: Firstly, why is “single police service” mentioned in section 199(1) and secondly, what would constitute an “appropriate” police service. On the first issue it must be remembered when the constitution was drafted and what was going on in the country then and what had gone on before. During this period South Africa was going through a transition from apartheid to democracy and a new Constitution was being drafted with the adage “never again!” fresh in the drafters’ minds. The Constitution had to take into account the various homeland and “self-governing-territories” police forces. In addition, there were calls for a federal system from some quarters, Bantustan leaders were toying with the idea of secession and others were speaking of Volkstaats. It was therefore critical that, as far as possible, the Constitution would emphasise the unity of the country through, amongst others, the unity of its security services.

On the second issue, it is not clear what a non-“appropriate” police service would be. However, the only other police service that the constitution does mention, is municipal police service. In fact, the constitution is quite clear. Section 206(7) reads as follows:

“National legislation must provide a framework for the establishment, powers, functions and control of municipal police services”.

The clear implication of all of the above is that municipal and metro police are definitely among those at the local sphere of government that are considered “appropriate”. As such metro police should be part of the single police service. It is therefore not a co-incidence that they are specifically mentioned in the Conference Resolution. It is on the basis of the interrogation of the constitutional imperative, amongst other considerations, that the following proposals are made.

## **THE SUB-COMMITTEE’S PROPOSALS FOR IMPLEMENTING THE RESOLUTION ON COMMAND AND CONTROL**

The Sub-Committee is of the opinion that the implementation of the resolution should be guided by key principles. These principles should be informed by objective of maximising our capacity for effective and efficient policing. The use of the word “integration” can lead to a distraction in the debate on the matters at hand. It also evokes the different vested interests that commentators may have. It may also lead to the emphasis of differences in approach rather than harnessing the commonalities.

Whatever mechanisms are utilised to implement the resolution, they would necessarily include the application or amendment of legislation, the promulgation of regulation or even by means of an

agreement (Service Level Agreement e.g.). The most expeditious route to implementation would involve a forum/committee/entity. This could even be called e.g. National Committee for Operational Command and Control or The National Standards Committee as per Sect 64 L(1). Such an entity can be established in terms of Ministerial Regulations in conjunction with the National Commissioner's National Standards and legislative amendments if necessary. Whilst Sections 64 L and 64P, together with Sections 199(1), 205(1), 206(7), 207(1) & 207(2) of the Constitution can enable the Metro Police to be "placed under the command and control of the National Commissioner", without any additional primary legislative amendments, this may not be the case with Traffic Police of the different Transport departments. These may require some legislative amendments to comply with the resolution.

The Sub-committee acknowledges that more deliberations should be conducted with comrades in the Transport environment. The various Transport departments have their own Traffic Police departments. Recently, the National Traffic Police Department was established and launched under the RTMC. The RTMC also has Technical Co-operation Committees where all traffic departments and metro police voluntarily participate in and carry out directives. The relationship here is almost approaching one of command and control. The Sub-committee therefore proposes that the Peace and Stability Committee is briefed by the comrades within the Transport sector as to the enabling measures taken by them.

In any event, the first principle here is that the entity envisaged should have power – a statutory body – to enforce decisions. It should not be a voluntary association. The approach to command and control should not be dependent on the personality of the National Commissioner or any of the other police services' heads. It should be an institutionalised body and be an integral part of the way policing is conducted in the Republic.

The second principle is that the entity must deal with five non-negotiable issues that are the main sources of dysfunctionality:

## **DISCIPLINE**

Police have vast powers. Powers to stop and search. Powers to request identification. Powers to arrest. Powers to use force to arrest. In certain circumstances, powers to use deadly force. No other citizen or worker has such power. It therefore stands to reason that such power needs to be balanced with a higher degree of accountability than ordinary citizens or others workers. This maxim is recognised and agreed at national level where police have a different bargaining council than other public servants. Similarly, the disciplinary code for police is different and more stringent than for other civil servants. This is the situation all over the world.

Except for municipal/metro police in South Africa. South Africa is the only country in the entire world where a police (metro) service has the same disciplinary code as any other worker. Whilst Section 64 C (2)(d) of the SAPS Act gives authority to the Head of a Metro Police Department to be responsible for discipline, the Collective Agreement on Conditions of Service for municipal employees actually takes precedence on disciplinary matters for metro police officers. In short, an important element of the SAPS act is ignored by municipalities. The origin of the problem lies in the fact that the first Collective Agreement (1999) was concluded before Metro Police were established and the situation was never corrected. There has also been serious opposition from municipal trade unions to correct the situation.

In any event this situation is untenable and should be corrected by the forum. It is unacceptable that in the same country where the Constitution gives effect to a single police service, we still have different standards and levels of accountability when it comes to the backbone of any police service viz. discipline.

## **TRAINING**

Metro Police officers and traffic Police officers face the same dangers. Most serious and violent crimes are committed using a motor vehicle whether as a private vehicle or public transport and these crimes also involve the violation of one or other traffic law before, during or after the commission of the crime.

Metro Police conduct foot patrols at taxi ranks, hostels and shopping centres just as SAPS members. It is therefore imperative that that all police in South Africa have the same standard of basic training. They should have the same basic levels of tactical awareness and street survival skills. As such basic training levels should be enhanced and standardised for all police services in South Africa.

## **STANDARDISATION OF INSTITUTIONAL STRUCTURES**

The structures of Metro Police, in particular, differ from municipality to municipality. Very often these differences are based on the various vested interests at local government. Often they are a reflection of local government political dynamics also. It is quite clear that institutional structure impacts on functionality. Therefore a basic minimum standard on structural components must be established and these minimum standards should be uniform. These minimum uniform standards must address the issues of functionality. At present a situation exists where e.g. Metro Police have a National Standard for Domestic Violence (enacted by the National Commissioner in 2007), yet most Metro Police departments still do not have Domestic Violence Units. A similar situation exists with Social Crime Prevention Units.

## **APPOINTMENTS OF HEADS OF MUNICIPALITIES**

At present the National Commissioner plays no role in the appointment of Metro Police Chiefs or Traffic Police Chiefs. If there is to be a situation where “municipal, metro and traffic police are to be placed under the command and control of the National Commissioner”, it is clear that the appointments of the heads of these services must involve the National Commissioner, in one way or another.

## **STANDARD OPERATING PROCEDURES FOR CO-OPERATION AND MUTUAL ACKNOWLEDGEMENT**

At present the most junior SAPS officer is under no obligation to acknowledge the most senior Metro Police officer. More than a decade after the establishment of the Metro Police, their ranks have not been formalised or made official. No provision for commissioned officers exist in the Metro Police. It is no surprise that Metro Police are viewed with condescension. In any event, these anomalies also contribute towards institutionalising non-cooperation between the services.

Related to this is the handing-over process of crime scenes or other incident scenes. Key to successful prosecutions include preserving the evidential integrity of crime scenes. At present there aren't any prescribed standard operating procedures for the handing-over of an incident scene. Very often Metro Police or Traffic Police are first respondents on a crime scene and they have to secure the scene. The scene and all relevant evidence is then handed over without any compliance to any handing-over prescript or process. This has implications for securing the chain of evidence or the securing of witnesses. This could lead to unsuccessful prosecutions.

Similarly, whilst the National Standards for Metro Police for crowd-management is in force (with limited competency), there doesn't exist a standard operating procedure for the handing over of the scene. In the same vein, no prescript is provided for the situation where a demonstration changes into a riot. Or when SAPS doesn't arrive. Very often, this lack of clarity leads to indecisiveness and ineptitude with disastrous consequences. These aspects need to be clarified with urgency.

To enhance co-operation the communication systems need to be synchronised and standardised. At present SAPS and other police services use different systems and codes. This situation makes it very difficult to co-ordinate responses to alpha crimes (crimes in progress), hot-pursuit operations

and nationally-driven crime combating campaigns or operations. Where there have been ad hoc communications interfaces, the success rates for arrests have gone up exponentially. These interfaces need to be institutionalised.

The issues mentioned here are the bare essentials required to move towards the implementation of Conference Resolutions.

## **CONCLUSION**

By all accounts, the origin of the debate on a single police service was not intended to bring about the wholesale integration of Police Services in the Republic. The intention was to enhance the functioning of metro police, streamline command and control and to ensure uniform standards. Similarly, sections 205(1) ["... where appropriate ..."] and 206(7) ["National legislation must provide a framework ... municipal police service"] infer that in certain instances metro Police can exist and whilst they are part of the single police service they are still distinct from the Service. Otherwise there would be no necessity to specifically mention the concept in the Constitution. Furthermore there would have been no need to amend the SAPS Act in 1998 to include municipal/metro police.

Related to this, is the intention of the Conference Resolutions: the wording of the 52<sup>nd</sup> Conference resolution on this matter is identical to the wording contained in the Metro Police Chief's document. The intention could not have meant that all law enforcement agencies should be merged into one monolith. Certainly military police, the SARS Customs unit, Game Rangers of National Parks ( and non-"appropriate" police services) etc. could not have been meant to be in the "single police service". So wholesale integration could not have been the intention of the original debate and hence the specific wording of the resolution. The phrase "... as a force multiplier." is quite instructive. It clearly is intended to show how "the municipal, metro and traffic police" are to come under the command of the National Police Commissioner. The qualification "...as a force multiplier" is specifically directed at centralisation of command and control and not on other aspects.

If that aspect is agreed on and if there is consensus, the matter at hand, going forward, is to decide on the appropriate mechanisms to implement the centralisation of command and control. The sub-committee is firmly of the view that the above-mentioned proposals are the most expedient mechanisms to implement the Conference Resolutions. If there is agreement, the next phase would involve fleshing out specific enabling regulatory promulgations and a corresponding project plan with deadlines and clear time-frames.

## **SUGGESTED POINTS OF DISCUSSION**

- 1) Consensus is required on whether a Single Police Service means all Law Enforcement Agencies / Police Services or not.
- 2) Which ones should be regarded, at local spheres of government as "appropriate" and which ones should not? And why? What defensible criteria should we use to decide on this question? How do we decide on national and provincial sphere which services to include?
- 3) Should Centralisation of Command and Control take place at once or should it be incremental – in stages/steps/phases? Should we begin with the most expedient first?