

29 March 2024

**TO: Office of the High Commissioner for Human Rights**  
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**Email subject line:**

CERD CMW Joint General Comment/Recommendation - Submissions

**Submission to UN CERD-CMW Joint General Comment/Recommendation on Obligations of State Parties on public policies for addressing and eradicating xenophobia and its impact on the rights of migrants, their families, and other non-citizens affected by racial discrimination**

1. The Scalabrini Centre of Cape Town (SCCT) is a registered NPO whose mission is to welcome, to protect, to promote and integrate people on the move in local society. In providing assistance to people on the move, we advocate respect for human rights and use a holistic approach that considers all basic needs. We strive to challenge, influence, and improve law, policy and practice impacting people on the move, and to ensure their agency, belonging and integration, in order to achieve a welcoming South Africa where the rights of people on the move are realised. The SCCT works with asylum seekers, refugees and other migrants on a daily basis, addressing obstacles many face to meaningfully contribute to society.
2. We welcome and appreciate the opportunity to provide written submissions for the CERD-CMW Joint General Comment/ Recommendation on the Obligations of State Parties on public policies for addressing and eradicating xenophobia and its impact on the rights of migrants, their families, and other non-citizens affected by racial discrimination. Our submissions are based on our extensive experience in the area of refugee and migrant rights and our day-to-day engagement with people on the move.
3. We note that guidance questions have been provided to facilitate submissions on the concept paper and we have accordingly arrested these submissions answering various of the questions posed:

**1) How xenophobia should be defined<sup>1</sup> ?**

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<sup>1</sup> Question 1. How xenophobia should be defined nowadays, in a social and political meaning that could lead to developing public policies directed to address its impact on the rights of migrants -within the scope of this  
The centre is registered with the South African Department of Social Development as a non-profit organisation (021-079 NPO), as a Child and Youth Care Centre (C7569) and as a Public Benefit Organisation with the South African Revenue Services (930075335) and governed by a Trust (IT2746/2006). Auditors: PKF Constantia Valley Cape Town Inc. VAT number: 4780251437.

As set out in the concept paper for submissions xenophobia is a “social and political pandemic that fuels discrimination, hate, social exclusion, and inequality. While we do not intend to define xenophobia more fully, we reflect on what it should include in relation to policy drawing from the South African context. Xenophobia manifests broadly and goes far beyond xenophobic violence and hate speak to include institutionalised xenophobia, the denial of access to services by state and private actors and nationalist rhetoric and scapegoating of people on the move for service delivery failings by government leadership. Xenophobia may also be evident in policy or draft policy itself such a provincial health policy that excluded access to health care to people on the move including for migrant pregnant or lactating women and children under the age of 6, marking a regression in the law from free access to health care for these groups prior to the policy.<sup>2</sup> The policy was litigated on and the Court ordered that: ALL pregnant women, ALL women who are lactating, and ALL children below the age of six are entitled to free health services at any public health establishment, irrespective of their nationality and documentation status.<sup>3</sup> Despite the court order, in practice, the implementation of the court order was slow and challenging as hospital admission staff, and health practitioners in some state facilities were refusing to assist young children and pregnant or breast-feeding mothers, based on their nationality or documentation status in part based on the xenophobic previous policy and in part because of xenophobic perspective of those assisting. We have observed including through research findings, that xenophobia is present at every level of South African Society and across most communities.

Xenophobia may be extreme in the form of violence, displacement and killing. In 2022 Xenowatch recorded 38 xenophobia murders and 110 incidents of xenophobic violence with over 127000 instances of displacement in the last 20 years.<sup>4</sup> In developing policy there should be provision made for reporting, collecting, mapping and sharing of data on xenophobic incidents..

Policy must also target groups, movements and/or political parties with a xenophobic agenda. For instance, in South Africa there is movement called Operation Dudula and a political party called the Patriotic Alliance both of which espouse anti-migrant sentiment and xenophobia and incite abuse and/or violence against people on the move in South Africa. It is also important that there is responsible media and social media engagement in instances of xenophobic violence perpetuated. Pending hate speak, hate crimes legislation<sup>5</sup> may assist in part, in addressing such movement's or party's conduct. In this respect it would be good for legislation and policy makers to make express provision for the prosecution of hate crimes and hate speak including xenophobia motivated crimes and speech and the activities of parties or movements causing or exacerbating xenophobia.

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General Comment/Recommendation-1, their families, and other non-citizens affected by racial discrimination?

<sup>2</sup> The policy was challenged by Section 27, an NGO focus on the constitutional right to Health.

<sup>3</sup> The policy was a return to the law in place prior to the instruction of discriminatory provincial policy. Free access is available to all in the mentioned categories save for very limited exclusions being unless: they are members or beneficiaries of medical aid schemes; or they have come to South Africa for the specific purpose of obtaining health care.

<sup>4</sup> <https://www.xenowatch.ac.za/statistics-dashboard/> - xenowatch is an African Centre for Migration & Society (ACMS) developed open source system for information.. mapping of xenophobic discrimination incidents in South Africa.

<sup>5</sup> <https://www.justice.gov.za/legislation/hcbill/B9-2018-HateCrimesBill.pdf>

Public policy needs to take cognisance of the multiple contexts in which xenophobia is present and awareness of the extreme repercussions and provision must be made for implementation of policy that protects and guards against xenophobia and discrimination and that insofar as possible addresses underlying causes of xenophobia.

It is also important to note that in some countries there is a concerted and deliberate effort to deny or downplay or mislabel xenophobia. For instance, police in South Africa not recording xenophobic violence as xenophobia but report merely as the crime to which it relates such as an assault or a murder<sup>6</sup>. The importance of labelling correctly and/or accurately reporting xenophobia and xenophobic crime should be included with in policy and accurate information will guide and direct focus to ensure the most impactful policymaking.

## **2) What elements should a comprehensive and holistic public policy have... and [w]hich ministries... should be involved? <sup>7</sup>**

In order for law and policy to be comprehensive and holistic it must apply at a national level and not merely at a provincial or local government level. There are instances where law or policy at a provincial level may be xenophobic (see aforementioned discriminatory health policy referred to above). National level law and policymaking should help ensure that provincial or local law and policy is compliant with national law and policy. In addition, to law and policy at a national level it would also be good to establish or draw on existing regional or continental level policy and instruments to apply and or to guide the development of national policy.

Additionally, states should develop national action plans to combat and eradicate xenophobia. Ideally the national action plan should be a xenophobia specific plan, but if not feasible the plan should at the very least be a national policy document that include express reference to xenophobia and how to combat it eg South African's National Action Plan (NAP) to Combat Racism Racial Discrimination Xenophobia and Related Intolerances<sup>8</sup>.

Any policy or action plan developed must be financed and there must be sufficient capacity and political will to rollout the policy. All government departments need to include and must apply the policy within the context of their work. For instance, the Depart of Social Development with the madate to care for and protect children must intervene and have policy in place to guard against xenophobia motivated bullying in schools in partnership with the department of basic education. Additionally, there must be a focal point department like the Department of Justice and Constitutional Development that coordinates the national

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<sup>6</sup> <https://law.uct.ac.za/media/216462> Working paper on Criminal Case Watching Briefs for access to Justice for Refugee Victims of Crime, Vicki Igglesden with Tal Schreier.

<sup>7</sup> What elements should a comprehensive and holistic public policy have aimed at preventing and eradicating xenophobia in migrant-receiving societies? Which ministries, secretaries, and other public bodies should be involved in the design, implementation, and periodic evaluation of such policy?

<sup>8</sup> [https://www.gov.za/sites/default/files/gcis\\_document/201903/national-action-plan.pdf](https://www.gov.za/sites/default/files/gcis_document/201903/national-action-plan.pdf)

action plan or policy and that focal point must have the authority and power to hold implementing departments to account.

In practice we have seen that when it comes to implementation of the NAP the focus is on Racism and Racial Intolerance with little in the way of addressing and combatting Xenophobia. Moreover, departments are not sufficiently financed to conduct social cohesion training and dialogues as provided for in the NAP.

State institutions supporting Constitutional Democracy referred to as Chapter 9 institutions in South Africa<sup>9</sup> like the Human Rights Commission have a role to play in guiding or overseeing implementation of policy, in monitoring and evaluating policy and in receiving and investigating xenophobic incidents and making findings and recommendations in response.

Legal frameworks must consider and address where xenophobia exhibits in law and policy. The South African legal framework and its implementation do not go far enough in addressing the problem of xenophobia in the workplace. As a result, the rights of migrant workers are infringed upon and not sufficiently protected during, and at the end of their employment. In our line of work, we have documented instances of institutionalized xenophobia where migrant workers face discrimination and this manifests at a time when they are due to claim benefits in the form of pension funds or unemployment benefits. SCCT continues to engage the Department of Labour (DoL) and employers to query non-payment of unemployment benefits to deserving employees who after years of labouring in South Africa hit barriers when claiming their benefits. Until recently, the Department of Labour withheld UIF (Unemployment Insurance Fund) benefits from asylum seekers who had made contributions to the fund. Given that the courts ruled in favour of asylum seekers receiving benefits there should be a concerted effort by the DoL to ensure a speedy finalization of claims, however bureaucratic red tape results in a delay or non-payment of benefits. Deserving claimants have their rights infringed upon at a time when they are in need of support due to loss of work, death or ill health. We have undertaken client accompaniment a number of times and we have found that the waiting periods are longer due to a delay in verification of documents and this anomaly could be mitigated by having the departments linked to allow for speedy finalisation of claims. It is of paramount importance to have the departments of labour and home affairs linked to allow for speedy payment of benefits.

Lastly there should be scope and recourse for civil society to hold the state to account in instances of xenophobia perpetuated by the state or by state officials. For instance, human rights based and right to health focused civil society organisations reported and escalated provincial health minister's xenophobic attack on a patient to the health professions council and referred the case to the Human Rights Commission for investigation.<sup>10</sup>

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<sup>9</sup> <https://www.justice.gov.za/constitution/SACConstitution-web-eng-09.pdf>

<sup>10</sup> <https://www.dailymaverick.co.za/article/2023-02-15-health-professions-council-of-sa-sanctions-limpopo-mec-phophi-ramathuba-over-xenophobic-diatribes/> and <https://www.news24.com/news24/southafrica/news/watch-limpopo-health-mec-under-fire-over-comments-blaming-zimbabweans-for-huge-strain-on-hospitals-20220824>

### **3) How to measure the impact of these policies? Should indicators be needed? Which practices could better assess the progress, challenges, setbacks, and other outcomes?**

It is important that policies that combat xenophobia and policies that are discriminatory and exacerbate xenophobia are both assessed and challenges derived there from must be addressed. For instance, South African has in recent years drafted bills for comment on national health insurance, state funded road accident insurance (road accident fund) and on Education Access at schools, and migration policy guidance paper all of which exclude or limit access to asylum seekers and other vulnerable migrant groups.<sup>11</sup>

Moreover, the point of measuring impact progress, challenges and setbacks must be at the point of implementation or the absence of implementation, at the point where implementation ought to have commenced. For instance, in the South African context we find a number of draft bills or policy documents which are implemented partially or extensively prior the passing of the law or publication of policy. Hence it is important to measure from the point of implementation of law or policy that is xenophobic in nature as soon as possible, even at draft stage, to respond to and challenge it.

In South Africa the department of Home Affairs has published the [White Paper](#) on Citizenship Immigration and Refugee Protection: Towards a complete Overhaul the Migration System in South Africa (hereafter the White Paper) which includes intention to withdraw from the 1951 Refugee Convention, its protocol and the 1969 OAU Refugee Convention. The White Paper seeks to guide law and policy to substantially further limit access to rights and services available to people on the move including the deprivation for socio-economic rights. We have made extensive [comments](#) on the White paper.<sup>12</sup> The White paper and public consultations on it by the Minister of Home Affairs expressed clear anti-migrant sentiment and scapegoating, erroneously blaming people on the move for many of the countries challenges. The Scalabrini Centre made extensive comments on the White paper yet regrettably the impact on the State of submissions by civil society organisation like the Scalabrini Centre is limited. In developing guidelines for states, it is imperative that states develop and are called to develop policy and policy guidance documents like white papers, in a way that is responsible, protects and safeguards the rights and dignity of people on the move and helps stem and eradicate xenophobia.

Indicators or assessment of impact may need to include period of implementation that is prior to the official passing of or policy as aforementioned. Policy needs to give voice to voiceless and ensure a lack of penalisation of those coming forward (e.g. an undocumented or irregularly documented person on the move raises a complaint and gets arrested for deportation without the complaint being attended to). As part of accountability to affected populations the practice of hearing directly from those affected by xenophobia would ensure better assessment of 'progress, challenges, setbacks, and other outcomes'.

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<sup>11</sup> See [submissions](#) on white paper 2023 and other policy or draft legislation.

<sup>12</sup> [https://www.scalabrini.org.za/wp-content/uploads/2024/02/White\\_Paper\\_Submission\\_2024.pdf](https://www.scalabrini.org.za/wp-content/uploads/2024/02/White_Paper_Submission_2024.pdf)

#### **4) Which follow-up mechanisms...<sup>13</sup>**

#### **5) How xenophobia should be addressed through an intersectionality lens?**

Intersectionality lens should be applied in complementary manor with recognition of compounding layers of discrimination. It is important not to raise one lens to the exclusion of another.<sup>14</sup>

We appreciate the opportunity to provide joint submissions and confirm our availability to make further submissions and recommendations or to address any questions in relation to these submissions.

Yours faithfully

Scalabrini Centre of Cape Town

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<sup>13</sup> Which follow-up mechanisms should be put in place? Which stakeholders should have a role on these mechanisms? See previous sections including in relation to establishment and implementation of National Action Plan and that accountability to affected population should be part of decision making processes, evaluation and recourse.

<sup>14</sup> eg 20<sup>th</sup> anniversary of the World Conference Racism discussions and agenda points were at the forefront to the exclusion and sidelining of xenophobia with Racism condemned and to face the full might of the law as should be the case but xenophobia and xenophobic violence were not prioritised nor adequately discussed.