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29 August 2020

Dear Adv. Sebelemetja,

**ENDORSEMENT OF WRITTEN COMMENTS**

**WRITTEN COMMENTS ON THE DRAFT AMENDMENT REGULATIONS ON THE CITIZENSHIP ACT, 1995 BY THE SCALABRINI CENTRE AND OTHERS**

*“Citizenship and equality of citizenship is therefore a matter of considerable importance in South Africa, particularly bearing in mind the abhorrent history of citizenship deprivation suffered by many in South Africa over the last hundred and more years. Citizenship is not just a legal status. It goes to the core of a person’s identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person’s citizenship status affects their private and family life, their choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.”*

*Chisuse & Others v Director-General, Department of Home Affairs & Another [2020] ZACC 20*

In response to the call for written comments on the Draft Amendment Regulations to the Citizenship Act, I hereby endorse the submissions made by the Scalabrini Centre and others on the Draft Amendment Regulations to the Citizenship Act in my personal capacity as an academic who researches citizenship law and theories of justice. In addition, please find my submission below that summarises the key ways that the draft regulations undermine democratic principles essential to the South African democratic project.

The proposed draft regulations do not reflect the spirit and purport of the Constitution, are clearly not in the best interests of the child and undermine the values underpinning South Africa’s Bill of Rights. They are offensive to the sacrifices that so many people made for an inclusive democracy. We call on the Department to wholly revise the draft amendments and ensure that any amendments promulgated are in line with the Citizenship Act and the Constitution, as well as South Africa’s international legal obligations.

Yours sincerely

Dr Christine Hobden  
*University of Fort Hare*  
*Iso Lomso Fellow, Stellenbosch Institute of Advanced Study*

## WRITTEN COMMENTS ON THE 2020 DRAFT AMENDMENT REGULATIONS ON THE CITIZENSHIP ACT, 1995

Dr Christine Hobden (Oxon)

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1. The South African Citizenship Act of 1995 is foundational legislation in democratic South Africa. It provides for an equal citizenship and thus establishes a central feature of democracy: political equality. The current implementation of the Act, through regulations promulgated by the Department of Home Affairs, frequently undermines this political equality and is thus not in line with the spirit or purpose of the Act, the Constitution, or international law. The new draft regulations fail to rectify this disconnect with the Act, and in some cases exacerbate it.
2. I fully endorse the comments submitted by the Scalabrini Centre which offer a detailed analysis of the draft regulations and provide recommendations in line with current jurisprudence and on-the-ground experience. In this submission, I would like to draw attention to three ways that the draft regulations undermine South Africa's democratic project.
  - The draft regulations limit access to naturalisation without democratic mandate.
  - The draft regulations create second-class citizens.
  - The draft regulations fail to implement a key element of citizenship legislation.

### Executive Overreach:

3. As I have written in published academic work (Annexure A), there has been a steady reduction of access to naturalisation in recent years. One way in which this reduction of access is evident is through regulations that obstruct access in ways that reach beyond the mandate of the Act itself.

4. The draft regulations for S4(3) go beyond the scope and object of the Act, as detailed by the Scalabrini submission. For example here, the draft regulations limit acquisition through S4(3) to those who are not eligible for citizenship elsewhere. The purpose of S4(3) is to provide citizenship to those who were born and have grown up in South Africa and thus have genuine links to South Africa. This genuine link and membership in our society is not dependent on having no entitlement to another citizenship. The Act specifies that the provision applies to “[a] child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence”. S3(a)2(b) of the draft regulation is thus not in line with the spirit or object of the Act and represents an example of concerning executive overreach with intent to limit eligibility in a way not indicated within the Act.
  
5. Executive overreach is problematic not just because the regulations are then *ultra vires* the Act. Such overreach threatens our democracy because it does not fully respect the well-deliberated legislation produced by parliament, as representatives of the citizenry. The current and draft regulations are reducing access to citizenship but without clear democratic mandate to do so.

#### Creation of second-class citizens

6. Section 3A(6) of the draft regulations creates a form of second class citizen. The Act does contain some distinctions between citizenship by birth and by naturalisation with regards to deprivation. This addition of limits to transferal of citizenship, applied specifically to naturalisation through section 4(3), goes beyond these relatively minor distinctions to create an inequality likely to deeply affect citizens’ lives. There is no scope within the Act or the Constitution to establish a citizenship that does not permit citizens to transfer citizenship to their children, or to facilitate naturalisation of a foreign spouse. These are significant limitations on the citizenship granted through section 4(3). Such limitations create inequality between types of citizenship which undermines the democratic project.

7. It is a central good of citizenship that citizens can view themselves as equals – to each other and before the law. Creating special limitations for certain classes of citizens fundamentally undermines this central good of democracy. Citizenship is full membership in our society, with all the attendant rights and responsibilities; individuals who are entitled to join should be permitted to do so as full members, without specialised limitations created outside of legislation.

#### Gaps in implementation:

8. Section 2(2) of the Act makes provision for children born in South Africa without access to either South African citizenship or any other citizenship to become citizens by birth. This provision is in line with international law on statelessness and s28 of the Constitution that guarantees for every child the right to a 'nationality from birth'. The acquisition of citizenship for those who meet these requirements should be automatic and non-discretionary. The draft regulations do not rectify the long-standing absence of regulations to govern this procedure, despite court instruction to do so.
9. The failure to implement a key element of citizenship legislation undermines the democratic procedures that established that legislation. In practice, the absence of regulations directly prevents those entitled to citizenship from accessing it, and thus directly obstructs the will of parliament who passed this legislation.

#### Conclusion

10. The Scalabrini submission provides careful analysis of the regulations, highlighting the problematic nature within the details. This submission has drawn our attention to the way that these details add up to actions that undermine South Africa's democratic project. The regulations both overreach the Act and fail to fully implement it. In doing so, they fail to respect parliamentary procedures and thus the voice of the citizenry. In addition, the regulations threaten to undermine political equality, a definitional feature of democracy.

11. The draft regulations should be revised to include regulations regarding S2(2) of the Act, and with regulations for S4(3) that are in line with the provisions in the Act, our South African Constitution, and international law. The regulations should reflect and protect the central place that citizenship practice has in ensuring political equality and democratic legitimacy.

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29 August 2020