



African Policing Civilian Oversight Forum

Portfolio Committee on Police
National Assembly
Parliament of South Africa

Attention: Ms Babalwa Mbengo
Via email: bmbengo@parliament.gov.za

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Submission on the *Critical Infrastructure Protection Bill*

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to comment on the *Critical Infrastructure Bill* (Bill).

The Bill will replace the *National Key Points Act* (102 of 1980). In principle, APCOF supports efforts to replace the Act on the basis that it contains a number of provisions which are inconsistent with the Constitution and broader legislative framework. APCOF is particularly concerned about the Act's limitations on access to information, lack of clarity on what constitutes an offence, and lack of transparency and accountability for decisions by the Minister on what constitutes a designated key point. The Act has also been criticised for enabling corruption and unlawful spending.

A new legislative framework for critical infrastructure protection must not only address these specific concerns, but also ensure alignment with the Constitution (in particular, the Bill of Rights), and the legislative framework as a whole. While noting that critical infrastructure protection has a functional relationship to national security, consistency with established legal norms stemming from the Constitution are vital to ensuring that the public's rights and privileges are safeguarded in this context.

However, in its current form, the Bill proposes to legalise and entrench limitations on transparency, corporate and governance accountability, and public access to services and information. Of particular concern to APCOF is the delegation of aspects of public order policing to private companies and organisations. Critical infrastructure is, by its nature, of importance to the state and thus cannot legitimately be protected by any other party than the legitimate state-authorized policing service.

APCOF makes a number of recommendations for amendments to the Bill, which we set out below.

Appointment criteria for the Critical Infrastructure Council

Chapter 2 of the Bill sets out the appointment criteria for the Critical Infrastructure Council, which is given as '*appropriately qualified, knowledgeable and experienced in critical infrastructure protection, risk management, disaster management or basic public services*'.

African Policing Civilian Oversight Forum

Building 23b- Unit 16, Waverley Business Park, Wyecroft Road, Mowbray, Cape Town, 7925

PostNet Suite 63, Private Bag x11, Mowbray, 7705

Tel: +27 21 447 2415

www.apcof.org.za

Trust no. IT1900/2012

Trustees; T Tshabalala, E van der Spuy, M Marks

APCOF is concerned that the proposed selection criteria emphasises security-related skills and experience, which will limit the capacity of the Council to take a proactive, rather than a reactive, approach to the protection of critical infrastructure. In our view, the appointment criteria should be expanded to include a broad range of expertise in areas relevant to the proactive protection of critical infrastructure from, for example, natural disasters and climate change, as well as access to public services in the event of a declaration of critical infrastructure. This can include expertise in architecture and planning, design and maintenance of infrastructure, service delivery (broadly defined to include all basic service delivery), and community safety, with experts further drawn from both civil society and academia.

Definition of critical infrastructure

Chapter 3 of the Bill provides for declarations of critical infrastructure and the determination of critical infrastructure complexes.

APCOF is concerned that the definition of Critical Infrastructure in section 16 of the Bill is too broad and imprecise. In its current form, the Bill would allow public service institutions such as medical clinics, schools and universities to be declared critical infrastructure. Such a declaration would subject any person entering these premises to (a) the rigorous access controls and processes set out in section 25 of the Bill, and (b) the penalties for non-compliance in section 26.

In our view, limiting access to essential and basic services, including those guaranteed by the Constitution, under the auspices of state security without due public consideration or input is concerning. The definition of critical infrastructure should therefore be revised to expressly exclude places from which basic services are delivered, and, where a declaration of critical infrastructure has any impact on the provision of such services, to ensure that any limitations or restrictions on service delivery are consistent with the limitation of rights as contemplated in section 36 of the Constitution. This includes, in particular, the use of less restrictive means to achieve the purpose of such limitation (in this case, a declaration).

Powers and duties of persons in control of critical infrastructure

Chapter 4 of the Bill sets out the powers and duties of persons in control of critical infrastructure.

While the Bill stipulates that security companies must receive accreditation by the State Security Agency (SSA) to provide security-related services to critical infrastructure, it does not provide the criteria for such accreditation. No provision is made for the accreditation of private security companies under the Private Security Industry Regulatory Authority (PSIRA). Further, no provision is made for oversight, accountability and dispute mechanisms for security companies accredited for the purposes of the Bill.

Of further concern is section 25 of the Bill, which mandates for the provision of security to Critical Infrastructure to be subject to competitive process by the private security industry. However, the mandate of the protection of Critical Infrastructure is drawn from said features or buildings utility and importance to state security. APCOF is concerned that the Bill allows for private organisations to be contracted to perform such duties when they fall clearly within the mandate of the South African Police Service under section 205(3) of the Constitution.

APCOF is also concerned that aspects of section 25 of the Bill pose a challenge to the right to privacy as enshrined in section 14 of the Constitution. Private security companies with accreditation to provide security to critical infrastructure will have the power to access and scrutinise documents, and conduct searches, of persons entering critical infrastructure. Section 14 of the Constitution guarantees protection against unreasonable searches of the person and personal property in the absence of reasonable suspicion, and in its current form, section 25 of the Bill does not

APCOF recommends that the Chapter 4 of the Bill be amended to ensure that (a) public order policing remains a function of the South African Police Service (SAPS) and is not outsourced to private security

companies; and (b) that the powers granted to private security companies under section 25 are consistent with the right to privacy as guaranteed in section 14 of the Constitution.

Offences and penalties

Section 26 of the Bill criminalises the legitimate disclosure of information about critical infrastructure when such disclosure does not undermine state security. The effect of this provision is to limit access to information, which is protected by section 32 of the Constitution, and limits the ability of researchers, academics, journalists and activists to record and report on information about critical infrastructure, which is in the public interest. The penalties for disclosure are, in APCOF's view, draconian, and the consequences of the proposed sentences will have a wider effect for the public, media, people against corruption, academia, researchers and community activists, while further placing undue and irrational burden on the criminal justice system and corrections facilities.

APCOF recommends that section 26 of the Bill be amended to align to access to information protections in section 35(3)(n) of the Constitution.

Amendments to the Bill

While APCOF welcomes the replacement of the Key Points Act, we are concerned that the Bill both fails to address previous concerns with the implementation of the Act, and creates further challenges, particularly in relation to the protection of Constitutional rights. Accordingly, we recommend amendments to the Bill, as set out in this submission and summarised below:

- Chapter 2: expand the appointment criteria for the Critical Infrastructure Council to include a broader range of expertise in areas relevant to the proactive protection of critical infrastructure from, for example, natural disasters and climate change, as well as access to public services.
- Chapter 3: revise the definition of critical infrastructure to expressly exclude places from which basic services are delivered.
- Chapter 4: revise to expressly provide that public order policing remains a function of the South African Police Service (SAPS) and is not outsourced to private security companies;
- Chapter 4: revise to ensure that the powers granted to private security companies under section 25 are consistent with the right to privacy as guaranteed in section 14 of the Constitution.
- Section 26: amend to align to access to information protections in section 35(3)(n) of the Constitution.

Yours sincerely



Sean Tait
Director
African Policing Civilian Oversight Forum