



African Policing Civilian Oversight Forum

## **Submission**

### **Interim Critical Infrastructure Protection Regulations, 2022**

**6 May 2022**

#### **1. Introduction**

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to comment on the Interim Critical Infrastructure Protection Regulations (hereafter, 'the Regulations') as published in the Government Gazette on 22 April 2022. Our comments respond directly to the call for public submissions issued in terms of section 27 of the Critical Infrastructure Protection Act No. 8 of 2019 (hereafter, 'the Act'), issued by Hon. Cele. Our submission makes recommendations to strengthen the Regulations to achieve their intended purpose in relation to the following issues, which are discussed in turn, below:

- Purpose and objectives of the Regulations.
- Function of the Critical Infrastructure Council, including its relationship to the Minister, subcommittees and the vice chairperson.
- Ordinary meetings of the Critical Infrastructure Council in terms of s.8(1) of the Act.
- Special meetings of the Critical Infrastructure Council in terms of s.8(3) or 8(4) of the Act.
- Resolutions of the Critical Infrastructure Council in respect of an application for declaration of infrastructure as critical infrastructure.
- Resolutions of the Critical Infrastructure Council in respect of proposed guidelines referred to in s.7(1)(b) of the Act.
- Establishment of the Critical Infrastructure Protection Regulator.
- Functions of the Critical Infrastructure Protection Regulator.

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## **2. Purpose and objectives of the Regulations**

APCOF recommends that the purpose and objectives of the Regulations should be made clear. This will enable a better understanding of the context of the Regulations, and clarify their purpose and objectives.

## **3. Functions of the Critical Infrastructure Council**

### **3.1. Relationship to the Minister**

APCOF welcomes the provision in s.2(1) of the Regulations regarding the operational independence and impartiality of the Critical Infrastructure Council (hereafter, 'the Council'). We agree that the Council should function as an independent and impartial structure in the exercise of its legislative functions. However, to further insulate the Council from political interference we recommend that the word 'support' be changed to 'advise' in s.2(1), so that it reads:

'...the Council is established .... to **advise** the Minister in the exercise of his or her functions'.

In our view, the reference to supporting the Minister in the current draft may be interpreted as reducing the function of the Council to administrative, rather than advisory.

### **3.2. Relationship to subcommittees**

Regarding the establishment and functioning of subcommittees, we recommend that care be taken to ensure that subcommittees do not have powers to make decisions on behalf of the Council. Rather, they should be empowered to make recommendations which may be accepted or rejected by the Council. Furthermore, we submit that the recommendations of the subcommittee should not have a binding legal effect on the Council until such recommendation has been adopted and made the decision of the Council.

APCOF further recommends that when the Council establishes a subcommittee, that the Council must respond to all the recommendations made to it by that subcommittee by clearly accepting, rejecting or deferring its decision. This is important to ensure that there is certainty regarding the status of subcommittee recommendations, and whether they have become Council decisions, or are rejected.

We also submit that in the event that the Council rejects the recommendations of its subcommittee, such recommendations must be recorded as rejected, and the reasons for the rejection provided. Such recommendations will not have any binding legal effect on the Council. In this regard, the Minister should have a full record of the Council's deliberations on subcommittee recommendations.

Finally, we recommend that the Regulations clearly provide that the functioning of the subcommittee must dissolve when its recommendations are made, and its members not permitted to meet separately outside of the Council meeting to discuss any other issue with which the Council is seized.

### **3.3. Vice chairperson**

There is no provision in the Regulations regarding the position of the vice chairperson of the Council. APCOF recommends that the Council have the power to appoint within its members a vice chairperson to assist the Chairperson to fulfil their duties. However, we recommend that the vice chairperson should only be permitted to exercise delegated powers assigned by the chairperson. The vice chairperson should not have powers to call Council meetings or to chair Council meetings unless expressly delegated this function by the chairperson.

### **4. Ordinary meetings of the Council (s.8(1))**

APCOF submits that s.8(1) of the Regulations be amended to provide clarity on what constitutes a quorum for a Council meeting. We recommend that this should be clearly stated to avoid situations where decisions are made by Council meetings that are not properly attended by its members.

Regarding the convening of emergency meetings, APCOF recommends that the Regulations clearly state that emergency meetings can only be called by the chairperson.

Finally, we agree with the provisions of s.3(10) that decisions of the Council be based on consensus, and when consensus cannot be reached, that a decisions must be reached through a majority vote. However, we recommend that the reasons for the dissenting vote of members be recorded in the Council meeting minutes to enhance the transparency of Council decisions.

### **5. Special meetings of the Council (s.8(3) and s.8(4))**

APCOF recommends that the Regulations be amended to clarify who can call a special meeting of the Council. We recommend that this be the chairperson, with provision that when the chairperson is indisposed and unable to carry out their responsibilities as chairperson, that the vice chairperson can call and constitute a lawful meeting of the Council, and that they should be expressly delegated with the authority to do so.

When the subject of the special meeting pertains to the conduct of the chairperson, the Regulations should include provision that the Council may request the chairperson to recuse themselves to enable the Council to decide on the issue. The Council would then make recommendations to the chairperson, which must be communicated to the Minister as a recommendation of the Council.

## **6. Resolution of the Council in respect of applications for declarations of infrastructure as critical infrastructure**

APCOF welcomes the provisions in s.5(2)(a)-(d) that allows for the reasons for dissenting members to be recorded. We also welcome s.7(a)-(d) regarding appeals against the decision of the Council. Together these provisions will promote transparency and legitimacy of Council decisions. We also agree with the level of detail required from the Council when submitting their final resolution in s.5(8)(a)-(g).

However, APCOF is concerned about s.5(3) which provides that the Council notify the application of the resolution within 14 days of the resolution being adopted. We recommend that in the event of any infrastructure being declared critical infrastructure, that such decision be communicated in the Government Gazette, and that public participation be permitted, including the hearing of any objections to the declaration.

Furthermore, we are deeply concerned by the use of the phrase 'the recommendations of the National Commissioner' in s.5(8)(b). We submit that the Council should be accountable and communicate its recommendations to the Minister, not the National Commissioner. This will also address situations in which the National Commissioner and the Council may hold contrary positions regarding particular infrastructure. When the Council has made its recommendation, it is the Minister who can then issue a directive to the National Commissioner for implementation. The lines of communication and accountability between the Council and the National Commissioner needs to be clarified in the Regulations.

## **7. Resolution of the Council in respect of proposed guidelines referred to in section 7(1)(b) of the Act**

APCOF welcomes the provisions in s.6(1) and (2) of the Regulations, which provide a measure of insulation for the operational independence and impartiality of the Council in its decision-making. However, the role and involvement of the Civilian Secretariat for Police Services (hereafter, 'the CSPA') regarding draft standards, guidelines or protocols for approval by the Council is unclear. We therefore recommend that it be made clear in the Regulations that the CSPA can only develop policies and regulations related to the mandate of the Council in consultation with the Council. Such policies and regulations directly related to the mandate of the Council should be approved by the Council before being recommended to the Minister for approval. This will ensure avoidance of unnecessary duplication of roles.

We are concerned about s.6(2) which provides that any standard, guideline or protocol approved by the Council must be uploaded onto the CSPA website within 14 days unless to do so would prejudice national security. APCOF submits that this provision is confusing, as the approval of the Minister is not required. This provision may also be read as contradicting the function of the Council in s.4(1), and 7(1)(b) and (c) of the Act.

## **8. Assignment of functions by the Minister under s.7(1)(c) of the Act.**

APCOF welcomes the provision in s.7(1) that an assignment by the Minister to the Council in terms of s.7(1)(c) should be subject to Council rules and determinations regarding urgency. In this regard, the Minister may not compel the Council to meet urgently to consider an assignment referred to it by the Minister. This provision is important to ensure operational independence of the Council with respect of the Minister.

However, we are concerned by s.7(3) which provides that the chairperson ensure that the Minister is kept informed of the progress of any function assigned to it under s.7(1)(c). This may create unnecessary and undue pressure on the Council regarding its communication to the Minister, since provision is made in s.7(2)(b) of the Regulation that the Council inform the Minister of resolutions within 14 days.

## **9. Establishment of the Critical Infrastructure Protection Regulator**

APCOF is concerned that the only proposed selection criteria for the appointment of the head of the Critical Infrastructure Regulator by the National Commissioner is the officer's rank. APCOF strongly urges that the Regulations be amended to set out competencies that include other relevant skills, experience and qualifications. This will enable the appointment of a qualified person based on objective assessment of their suitability, and not just dependent on their rank.

## **10. Functions of the Critical Infrastructure Protection Regulator**

APCOF is concerned that the role and function of the Critical Infrastructure Regulator – which relates to developing uniform standards, guidelines and protocols for submission to the National Commissioner – is not aligned to the role of the CSPS, which is also tasked with providing support to the Minister in the development of policies and regulations. Without alignment, there is a risk of role duplication and confusion.

Furthermore, the function of the Critical Infrastructure Protection Regulator and the function of the Council may also cause confusion, given that s.9(2) assigns responsibility for the development of uniform standards, guidelines, and protocols, with sub-section (3) to the Regulator. We are concerned that this will have an impact on the operational independence and impartiality of the Council as it needs to interpret its function in accordance with the standards provided by the Regulator. This will weaken the independence and impartiality of the Council in the exercise of its duties. In our view, the function of the Regulator should be to ensure the implementation of Council resolutions, which have been approved by the Minister.

While APCOF welcomes s.9(4) insofar as it relates to the role of the Regulator in the implementation of Council Resolutions approved by the Minister, we are greatly

concerned by s.9(7)(e). This provides that any report on an application (and its accompanying documents must be submitted to the National Commissioner for approval. This provision is misaligned to the process for approval of any application to declare any facility as critical infrastructure under the Act. Our understanding of the role and function of the Council is that it will consider applications for consideration for such facilities to be declared critical infrastructure under the Act. The Council will then make its recommendations to the Minister, who will then (on the recommendation of the Council) declare such facilities as critical infrastructure. That declaration is then implemented by the National Commissioner through the Office of the Regulator. In that regard, the office of the National Commissioner should not have the power to approve any application, and submit such approval to the Council. The role of the Regulator should be clearly defined as an administrative function to implement Council decisions approved by the Minister. The Regulator can consult, cooperate and develop directives regarding the coordination of the implementation with other key departments as provided in s.9(7)(f)-(o) of the Regulations.

## **11. Conclusion**

Again, APCOF welcomes the opportunity to make a submission with respect to the Interim Critical Infrastructure Protection Regulations, 2022. Our comments aim to strengthen the proposed Regulations, and particularly to augment the elements of independence, accountability and coordination that will be necessary to ensure the processes proposed are in line with the objectives of the Act, and in the best interests of South Africans. We can provide more information on request.

### **Submitted by:**

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