



African Policing Civilian Oversight Forum

The Chair
National Assembly Portfolio Committee on Police
Parliament of South Africa

5 February 2018

Dear Hon Beukman

Thank you for the opportunity to present to the Committee in its deliberations of the Critical Infrastructure Bill. A number of questions were raised by members regarding our concerns on the constitutionality of some of the provisions of the Bill and we use this opportunity to further clarify our concerns.

Constitutional issues with the Critical Infrastructure Protection Amendment Bill

Overview

APCOF has a number of concerns about the constitutionality of the Critical Infrastructure Bill. Broadly, these concerns relate to:

- (a) the scope of the definition of critical infrastructure – section 16(2)(a)(iii) of the Bill;
- (b) the delegation of responsibility for access control and public order management from the South African Police Service (SAPS) to private security services – section 24 of the Bill; and
- (c) limitations on the right of access to information – section 26 of the Bill.

These issues are set out in detail below with recommendations for amendments to the Bill to address APCOF's concerns.

Issue 1: Definition of Critical Infrastructure

The current definition of Critical Infrastructure in section 16(2)(a)(iii) of the Bill is broad and imprecise. This section provides that 'When declaring an infrastructure to be critical infrastructure, the Minister must also consider the provision of basic public services'. In its current form, the Bill would allow public service institutions such as medical clinics, schools and

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universities to be declared critical infrastructure.

APCOF is concerned that the current wording of section 16(2)(a)(iii) of the Bill could therefore result in the following:

- (a) Unreasonable restriction of access to basic public services which are guaranteed by the Constitution, including the right to health care (sections 27(1)(b), 27(3) and 21(1)(c) of the Constitution), and the right to basic education (section 29 of the Constitution) through the Bill's imposition of access restrictions and mandatory searches (section 25 of the Bill) on persons seeking to access the institutions designated as Critical Infrastructure.
- (b) Unreasonable restriction on the right to privacy which is guaranteed by section 14 of the Constitution. The provision of rigorous access controls and processes including the inspection of documents that will apply to a premises designated as Critical Infrastructure (section 25 of the Bill) may result in the forced disclosure of private and confidential information (such as personal medical files) to private security or SAPS as a condition of entry into the premises.

APCOF recommends that to address these concerns, section 16(2)(a)(iii) of the Bill be amended to expressly exclude places from which basic public services, such as medical clinics, schools and universities are accessed.

Issue 2: Delegation of responsibilities from SAPS to private security companies

Section 24 of the Bill provides for the powers and duties of persons in control of critical infrastructure, and in its current form, reads to permit the delegation of access control and other functions, such as public order management, from the purview of the SAPS to private security companies. Section 24(1) states that, "On receipt of a notice referred to in section 20 (5) (e), the person in control of a critical infrastructure must, subject to subsection (4), take such steps as may be prescribed to secure such critical infrastructure at that person's own expense."

In some situations, the delegation of responsibility for access control may be appropriate, with the caveat that it not infringe on an individual's right to privacy and to access basic public services, as set out in detail in relation to Issue 1, above. However, the delegation of traditional policing powers, such as the powers to arrest, detain, and to disperse, raises significant concerns in relation to Constitutional rights.

The international law on which the South African Constitution is premised and developed is itself premised on the notion that the State retains a monopoly on the legitimate use of physical force within its territory. That power is not absolute, and limitations on the use of force are provided in national law and subject to Constitutional considerations – such as the duty of the state to uphold, protect and promote the rights to life, dignity and security of the person. To achieve this balance, the architecture for policing in South Africa is subject to the Constitution, and expressed through SAPS' legislative framework, training regime, oversight and accountability mechanisms, and equipment provision and management. The delegation of core policing powers to private entities, such as arrest, detention and public order management, are problematic in that private entities are not subject to the same rigorous controls to ensure they meet basic human rights standards, nor are they bound by the framework for the use of force. Accordingly, the use of private actors to perform public functions presents a danger of eroding human rights safeguards for all South Africans.

Accordingly, APCOF recommends that section 24 of the Bill be amended to limit the powers of security companies to access and perimeter control of Critical Infrastructure, and expressly exclude private security companies from exercising the powers ordinarily held by SAPS under section 205(3) of the Constitution, and in particular, the maintenance of public order.

APCOF wishes to further use this opportunity to reiterate its concerns regarding the weakness in oversight of the Private Security Industry beyond compliance issues of companies. Individual security officers acting in policing like functions are subject to very limited oversight. The Private Security Industry Regulation Amendment Bill 27 of 2012 which introduced the most minimal provisions in section 10 of regular reporting to the minister of instances where firearms were discharged by a security officers in the performance of his or her duties causing death or injury and on information of criminal complaints and investigations relating to security service providers has still not been passed.

Issue 3: Access to information

Section 26 of the Bill raises significant issues in relation to section 32 of the Constitution, namely that it limits access to information. In its current form, section 26 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.

Accordingly, APCOF recommends that section 26 of the Bill be amended to ensure that the disclosure of information about critical infrastructure, where that disclosure does not undermine state security is not subject to criminal sanction.

Kind Regards



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