Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

Submission

to the

Portfolio Committee on Police

on the

Critical Infrastructure Protection Bill [B22 – 2017]

November 2017

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Introduction

The Catholic Parliamentary Liaison Office (CPLO) is an office of the Southern African Catholic Bishops' Conference, tasked with liaising between the Church and Parliament/Government, commenting on issues of public policy, and making submissions on legislation. The CPLO welcomes the opportunity to comment on this Bill, which has important implications for both the rights and the security of the public.

We acknowledge the fact that the Bill seeks to create a constitutionally compliant replacement for the National Key Points Act 102 of 1980, and we believe that it goes a long way to achieving that end. However, as we will set out below, there are still some troubling aspects in the Bill.

We also note that many of the comments made to the Civilian Secretariat for the Police Service by ourselves and others last year, on the Draft Critical Infrastructure Bill, have been incorporated into the Bill now before Parliament. We commend the Civilian Secretariat for its willingness to accept such inputs from civil society.

We make the following comments.

1. Application of the Act

Clause 3(2) provides that the Act will not apply to infrastructure under the control of the Department of Defence. This is a departure from the 2016 Draft Bill, as well as from Act 102 of 1980. We question why this provision has been introduced. Much of the infrastructure that would ordinarily fall under the definition of 'critical' belongs to the SANDF. Will such infrastructure be subject to different controls? Will such controls be more onerous and restrictive of the rights of the public (access, movement, assembly, expression) than the controls set out in this Bill?

It will be a matter of great concern if defence-controlled infrastructure is dealt with separately and in a manner that infringes more deeply on the rights and freedoms of the public.

2. Critical Infrastructure Council

2.1. We note that ***clause 4(3)(b)(i)*** provides that an official of the Department of Justice and Constitutional Development will be a member of the Council. We welcome this addition to the list of officials in the Draft Bill, and hope that it will mean that constitutional and rights matters are properly considered by the Council.

2.2. We also note that a more consultative procedure has been introduced for the selection and appointment of the five private-sector members of the Council. This reflects submissions made on the Draft Bill. However, we are concerned that there is still no active role allocated to Parliament. ***Clause 4(6)(f)*** merely provides that the Minister must submit a report on the five chosen members to the Police Portfolio Committee "for noting". We would like this Committee to exercise greater oversight – including taking public comment – over who is appointed to the Council.

3. Functions of Inspectors

Clause 11(1) provides that an inspector may "at any reasonable time, conduct an inspection at a critical infrastructure…". In the Draft Bill this clause included the qualification "with the consent of the person in control of [the] critical infrastructure. We submit that this qualification should be retained. Since many premises and installations that will be classed as critical infrastructure are private property, it is appropriate that the consent of the owner or controller thereof should be sought.

If such consent is withheld, or if the person in control refuses to give the inspector access, ***clause 11(3)*** provides that the inspector may issue a "compliance notice" requiring that he or she be given access. In the Draft Bill it was provided that, in cases of refusal of access, the inspector could approach a magistrate in chambers for a warrant authorizing access.

We submit that the procedure in the Draft Bill is far preferable to that set out in the Bill. If an inspector can simply issue a compliance notice on his/her own initiative, he/she is in effect a judge in his own cause. If, on the other hand, the inspector has to approach a magistrate, he/she will at least have to persuade an uninvolved party (the magistrate) that the access is being sought reasonably or refused unreasonably. This constitutes an important safeguard of privacy rights and a check against undue official interference with private property. The principles and procedures would be similar to those that the police are obliged to follow in securing a search warrant.

We note in passing that ***clause 11(9)*** refers to "the notice referred to in subsection (7)"; the reference should be to "subsection (8)" instead.

4. Declaration as Critical Infrastructure

Clause 16(2) provides that the Minister must take into account the potential negative consequences of the "loss, damage, unlawful disruption or immobilisation" of the infrastructure which is sought to be declared as critical. ***Clause 17*** sets out various factors that need to be taken into account in making the decision; most of these relate – as in ***clause 16*** – to the negative consequences that might flow from the "destruction, disruption, failure or degradation" of the infrastructure concerned.

In effect, these clauses require the Minister to consider whether the infrastructure is important enough to be declared critical. We suggest that this is only half of the question. The other half – which is not provided for – is an enquiry as to the potential negative consequences of a declaration for the public's rights of movement, assembly, access, information, etc.

There needs to be a proper balance between the imperative to protect important infrastructure, on the one hand, and the imperative to safeguard and promote public's rights on the other. This balance is not encouraged when the Minister is required only to consider the first of these imperatives.

We suggest that a sub-clause be added to ***clause 16(2)*** along the following lines:

> "*(e) whether declaration of such infrastructure as critical infrastructure will disproportionately prejudice the rights of members of the public,* inter alia, *to freedom of movement, freedom of assembly, demonstration, picket and petition, freedom of expression, and of access to information."*

We further suggest that a similar sub-clause be added to ***clause 17*** either in place of or in addition to ***17(j)***:

> *"(j) the extent to which declaration as critical infrastructure might impact negatively on the rights of members of the public,* inter alia, *to freedom of movement, freedom of assembly, demonstration, picket and petition, freedom of expression, and of access to information."*

Clause 20(2)(b) provides that a person whose property is under consideration for declaration as critical infrastructure must be afforded "no less than 30 days" to make representations. We submit that this is too short a period. Such a person may have to seek legal advice, trace documents, obtain authority from superiors, etc., before being in a position to make representations. A minimum period of 60 days would be more appropriate.

5. Certificate of Declaration as Critical Infrastructure

We note that ***clause 21(5)*** provides that there will be a register into which details of critical infrastructure must be entered, and that this register must be accessible to the public. This is an improvement on the comparable provision in the Draft Bill, which did not specify public access to the register, and we strongly welcome it. At present, the absurd situation prevails that the public has no way of knowing whether or not an infrastructure is a National Key Point, and yet is liable for penalties if they contravene regulations pertaining thereto.

We also welcome the provision on ***clause 21(6)*** that the Minister must publish in the Gazette the particulars of infrastructure that has been declared critical.

6. Duties of Persons in Control of Critical Infrastructure

We note that ***clause 24(1)*** provides that, when someone's property is declared to be critical infrastructure, such person must "take such steps as may be necessary to secure such critical infrastructure at the person's own expense." This provision echoes Section 3 of Act 102 of 1980, which also forced owners of 'key points' to secure them at their own expense.

We submit that the purpose of declaring infrastructure to be critical is a public purpose. This is clear from the definition of "basic public service" and from the wording of the Preamble, which refers to "public safety", "national security", and "the provision of basic public services". There is no reason why private entities, be they businesses or individuals, should have to shoulder the costs of carrying out these public purposes. Public purposes should be paid for from the public purse.

7. Access to Critical Infrastructure

We submit that the provisions of ***clause 25*** are too wide and amount to blanket prohibitions which are unnecessary and unduly invasive of the rights to freedom of movement, assembly, expression and protest. Some items of critical infrastructure may indeed warrant these far-reaching security provisions, but others will not. In terms of the definition of "basic public services", for example, a pharmacy or a taxi-rank could be classed as critical infrastructure. It would be absurd to restrict access to such places in the same way that access might be restricted to a prison, a firearms storage facility or an oil refinery.

We suggest that ***clause 25*** should be reframed to take proper account of the range of infrastructure that might be declared critical, as well as the varying degrees of risk associated with allowing public access to them.

8. Offences and Penalties

The periods of imprisonment mentioned in ***clause 26(1), (2)*** and ***(3)***, being 30, 20 and 10 years respectively, are unduly harsh. It is noticeable, for example, that the 20-year penalty envisaged in this Bill for hindering, obstructing or disobeying a person in control of a critical infrastructure, or for unlawfully furnishing information relating to the safety security measures applicable at a critical infrastructure, is more than six times the penalty prescribed for the same offences in the National Key Points Act 102 of 1980. The latter Act was a typical piece of draconian apartheid-era legislation; that its replacement legislation in democratic-era South Africa should seek to impose vastly greater penalties is, to say the least, questionable.

It may be argued that the penalties laid down are maximums, and that it is open to the courts to impose much lighter sentences, according to the circumstances of each case. However, it is well-established that the provision of such harsh maximum penalties can exert a general upwards pressure in the sentences actually imposed. We would accordingly submit that the penalties be replaced with much lighter ones, especially bearing in mind that the worst offences of destruction of critical infrastructure can also be charged under the common law offence of malicious damage to property.

A further concern under ***clause 26*** is that it criminalises the photographing or filming of a critical infrastructure with intent to use such pictures or film "for an unlawful purpose". We accept that this is not meant to restrict the rights of the public to take pictures of, for example, Parliament or the Union Buildings. However, it is not clear what "an unlawful purpose" might be, since this expression is not defined. Individuals may be concerned that posting their pictures on social media, for instance, might be unlawful. It is desirable that the Bill provide greater clarity in this regard.

9. Regulations

We note, and strongly welcome, ***clause 27(7)***, in terms of which the Minister must publish draft regulations, and invite and consider written comment thereon, before finalising them. This is an important step allowing greater public involvement in the process of controlling and regulating critical infrastructure, and in safeguarding the rights of the public.

10. Transitional Arrangements

Clause 30(1) provides that existing "national key points" in terms of Act 102 of 1980 must be deemed to be "critical infrastructure" until a decision is taken whether or not to declare them as such under the new Act. We submit that, if this is to happen, a list of such "national key points" must be published simultaneously with the coming into effect of the new Act. Otherwise, the public will once again find itself in the untenable position of having to do, or refrain from doing, certain things in connection with "points" which it has no way of identifying as being "critical infrastructure". This would largely defeat the purposes of the publication requirements of ***clause 21(5)*** and ***(6).***

Conclusion

We believe that the Bill is a considerable advance on the unconstitutional Act 102 of 1980, and we welcome the attempts that have been made to balance genuine security needs with the rights and freedoms of the public. Nevertheless, we believe that more needs to be done to bring the Bill into line with the requirements of a free and open society in which people's civil and political rights enjoy priority.

We wish the Committee well in its deliberations, and we would appreciate an opportunity to address the Committee verbally.

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