



02 February 2018

## SUMMARY OF CONCERNS ON THE CRITICAL INFRASTRUCTURE PROTECTION BILL, 2017

The Portfolio Committee on Police held public hearings on the Critical Infrastructure Protection (CIP) Bill, 2017 [B22-2017] on 30 and 31 January 2018, during which stakeholders raised various concerns. This paper provides a summary of the concerns raised during public hearings and areas for consideration highlighted by the research paper on the analysis of the CIP Bill. The paper intends to assist Members of the Portfolio Committee on Police during deliberations on the CIP Bill.

### Chapter 1: Definitions, purpose and application of the Act

Clause	Issues raised
1.	<ul style="list-style-type: none"><li>• The concept of '<i>Basic public service</i>' is too broad and could include schools, universities and hospitals (amongst others). The representative from Cosatu explained the change of <i>essential services</i> to <i>basic services</i>. There is a tendency for creep of essential services in the public sector.</li><li>• Banks fall outside the definition of <i>basic service</i>, but can be declared critical infrastructure under clause 16 of the Bill.</li><li>• The exclusion of infrastructure under the control of the Department of Defence should be clarified.</li><li>• The Cybercrimes and Cybersecurity Bill, 2017 [B6-2017] must clearly define its scope and that the CIP Bill only deals with infrastructure not covered by the Cybercrimes and Cybersecurity Bill, 2017.</li><li>• The CIP Bill does not provide a clear definition of precisely what critical infrastructure is. The definition refers to section 20(4) of the Bill.</li><li>• The Committee should consider whether a definition should be included, whether this inclusion would provide more clarity on what is considered as critical infrastructure or whether this is sufficiently addressed in the definition of a threat.</li></ul>
2.	<ul style="list-style-type: none"><li>• The Committee should consider the review of section 2(b) that refers specifically to information pertaining to security measures, as the clause currently reflects that all information pertaining to critical information remains confidential, subject to the Promotion of Access to Information Act, 2000 (Act No 2 of 2000). This is in contradiction with the rest of the Bill.</li></ul>

### Chapter 2: Critical Infrastructure Council and Structures

Clause	Issues raised
4(3)(c)	The selection criteria for members of the Critical Infrastructure Council should be strengthened.
4(6)(b)	The Committee should consider strengthening the appointment process of the panel that is responsible to make recommendations to the Minister on the individuals to serve on the Critical Infrastructure Council.
4(6)(f)	The oversight role of Parliament in the appointment of the Critical Infrastructure Council should be strengthened.
4(6)(d)	<ul style="list-style-type: none"><li>• The vetting of private-sector members of the Council is intrusive.</li></ul>



	<ul style="list-style-type: none"> <li>Public-sector members should also have a valid security clearance certificate.</li> </ul>
4(8)	Members raised concern about the 4-year term of the Council, as the norm is a 5-year term and the appointment process is onerous.
6.	The funding and remuneration of the Critical Infrastructure Council will be defrayed from the budget allocation of the Civilian Secretariat of Police should be reconsidered, as the budget of the Secretariat is already under significant strain.
7(h)	The CIC's role to promote public-private cooperation should be strengthened, as physical security measures are expensive and should be incentivised.
9(1)(a)	Clarity should be requested on the proposed administration system that the National Commissioner must establish for the implementation of the Bill. Will this be a new system? What will be the estimated cost of the system.
9(2)	The Council should not only consider the guidelines and standards developed by the National Commissioner of Police, but also approve the policies.
11(1)	Inspection of privately owned property declared as critical infrastructure should be conducted after the owner gives consent.
12(3)	<ul style="list-style-type: none"> <li>How will security clearances (from the SSA) be ensured for public-and-private-sector members serving on <i>ad hoc</i> or standing committees?</li> <li>Will members be subjected to a confidentiality clause?</li> </ul>
12(4)	<ul style="list-style-type: none"> <li>An <i>ad hoc</i> or standing committee can consist of only one member<sup>1</sup> and can be from the public or private sector.</li> <li>Will members of <i>ad hoc</i> or standing committee or working group be remunerated?</li> </ul>
12(8)	<ul style="list-style-type: none"> <li>Clarity should be sought on the inclusion of the Cyber Response Committee, a mandatory standing committee to advise the National Commissioner.</li> </ul>
12(9)	The Reserve Bank requested the insertion of a new clause 12(9) as follows: <i>Notwithstanding the provisions of subsections (1) and (2), the National Commissioner must in exercising any function contemplated under section 9(2) and (3) consult with the South African Reserve Bank in matters that may affect financial stability.</i>

### Chapter 3: Declaration as critical infrastructure and determination of complex

Clause	Issues raised
16(1)	The Committee should seek clarity on the reason for the advice and recommendations made by the Council not stated expressly in this section, but only later in the clause through section 16(2)(d). This inclusion later in the clause might confuse the role of the Council.
16(2)(a)(iv)	<i>National security</i> should be defined.
17	The Council and Minister should take into consideration any public comments and submissions when processing and deciding upon designated applications.
17(c)	The different risk categories should be defined as well as the terms on which the categories are determined.

<sup>1</sup> 12(4) If a committee or working group consists of more than one member, the National Commissioner must designate a police official, who is a member of such committee or working group, as the chairperson thereof.



17(d)	Why is the resources available to/at the disposal of the person in control of infrastructure to safeguard, repair or replace the infrastructure be taken into consideration when declaring critical infrastructure.
18(1)	The Gautrain Management Corporation requested an amendment to this section to effect that an application for declaration of infrastructure, that is subject to a Public Private Partnership, as critical infrastructure, may only be lodged by a head of an organ of state, which owns, is in control of, or is responsible for the administration of that infrastructure. The following is suggested: <i>18. (1) A person in control of an infrastructure may, in the prescribed manner and format, lodge with the National Commissioner an application contemplated in section 16(1) to have such infrastructure declared as critical infrastructure; provided that, in case of infrastructure in respect of which a Concession Agreement or similar arrangement exists, only the head of an organ of state that owns, is in control of, or is responsible for the administration of the infrastructure may lodge such an application.</i>
19(3)(b)	The section should state the amount of time given to a person to make a written representation to the National Commissioner after receiving a notification of the application to declare the infrastructure as critical infrastructure.
20.	The Banking Association South Africa (BASA) proposed that if the Minister declares a financial institution as defined in the Financial Sector Regulation Act 9 of 2017, a critical infrastructure it should be done in consultation with the Financial Stability Committee as defined in the afore mentioned Act.
20(2)(b)	The timeframe of 30 days to make a submission on a property under consideration for declaration as critical infrastructure should be extended to 60 days.
20(4)(a)(iv)	The subsection providing that the Minister can consider declaring critical infrastructure based on specific factors and any other information which the Minister deems appropriate could be open to abuse.

#### Chapter 4: Powers and duties of persons in control of critical infrastructure

Clause	Issues raised
24(1)	<ul style="list-style-type: none"> <li>The responsibility for expenditure on the implementation of security measures at critical infrastructure is unclear, especially regarding private owners.</li> <li>The purpose of declaring infrastructure as critical is a public purpose, which is clear from the definition of <i>basic public service</i>. Public purposes should be paid for from public funds.</li> </ul>
24(3)	The Bill should state that the security provider is private security and subjected to the Private Security Industry Regulation Act, 2001 (Act 56 of 2001).
24(4)	The co-financing of security measures applying to private owners of infrastructure declared critical infrastructure should be clarified.
24(6)	The determination of reasonable costs to be recovered when the Minister takes steps to secure critical infrastructure when the owner fails to do so, must be clarified and more detail should be provided.



24(8)	<ul style="list-style-type: none"> <li>The CIP Bill should state the penalty for an owner of critical infrastructure who fails to comply with sections 24(8) or 25(8) regarding the placement of a notice clearly indicating that a person is entering critical infrastructure. This is because section 26(2)(i) criminalises the entry or access to critical infrastructure in contravention of the notice contemplated in section 24(8) of 25(8).</li> <li>Clarity is needed on the placement of notices to inform persons that a premise is declared a critical infrastructure.</li> </ul>
24(9)	The Gautrain Management Corporation requested the inclusion of a new clause 24(9), which reads: <i>To the extent that a Concession Agreement, or similar arrangement, exists in respect of critical infrastructure, the Concessionaire, or its equivalent, shall be responsible for the discharge of the responsibilities prescribed in this section and section 25.</i>
25(1)(b)	Concerns were raised about the seemingly unfettered discretion as to what conditions may be imposed on individuals entering critical infrastructure.
25(6)	<ul style="list-style-type: none"> <li>This section should refer to section 29 of the Criminal Procedures Act in that “...a woman shall be searched by a women only, and if no female police official is available, the search shall be made by any woman designated for this purpose.”</li> <li>This will mean that the security provider must have a female security officer available at all times.</li> <li>Searches are open to abuse and violation of rights.</li> <li>The wording should be further tightened to specifically prohibit searches requiring workers to be stripped naked or have their orifices probed (Cosatu)</li> </ul>

#### Chapter 5: Offences and penalties

Clause	Issues raised
26(2)(c)	<ul style="list-style-type: none"> <li>Concerns were raised that the section can result in the criminalisation of acts of protest, information disclosure and free expression.</li> <li>Restrictions on the disclosure of information could be unconstitutional (section 35(3)) and whistle-blowers.</li> </ul>
26(2)(d)	<ul style="list-style-type: none"> <li>The Committee should discuss whether “unlawful purpose” should be defined in the CIP Bill, or whether a reasonable person should know what an unlawful purpose is.</li> <li>The photography of critical infrastructure was raised as a major concern. It was suggested that this section should apply to <u>sensitive</u> security measures and not those in plain sight, like turnstiles and metal detectors.</li> </ul>
26(2)-(4)	<ul style="list-style-type: none"> <li>The length of imprisonment was heavily criticised as draconian.</li> <li>Stakeholders warned that the provision for lengthy sentences could lead to “upwards pressure” on magistrates to impose strict sentences for minor offence because the maximum length of sentences are set very high.</li> <li>The validity of a 30 year sentence was questioned, as it is more than a life sentence (25 years served before consideration for parole).</li> </ul>

#### Chapter 6: Regulations

Clause	Issues raised
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27.	<ul style="list-style-type: none"><li>• The majority, if not all, of the regulations contained in clause 29 are necessary for the immediate implementation of the Act. The Committee should consider whether the three months allocated for the promulgation of the regulations allows for sufficient time for the drafting of the regulations and the mandatory public comments process.</li><li>• Nedlac recommended that the Act and Regulations should commence simultaneously.</li></ul>
27(5)	The Committee should consider whether notification to Parliament on the Regulations is sufficient or whether concurrence/approval is required.

### Cost implications

- The budget of the Civilian Secretariat for Police (CSP) is currently under significant pressure. The Department struggles to perform its core mandate with the allocated budget. The added responsibility to incur expenses related to the remuneration and travel expenses of private sector Council members, will affect negatively on the available resources of the Secretariat. (The Secretariat is also responsible for the remuneration and expenses of members of the National Forensic Oversight and Ethics Board).
- The CSP further also provides secretarial services to the Council. The requirements are similar to the secretarial services provided for the National Forensic Oversight and Ethics Board under section 15Y of the SAPS Act, 1995 (Act 68 of 1995). The secretarial services is high-level of nature, as the Board must compile an annual report for submission to the Minister. The Critical Infrastructure Council must also submit an annual report to the Minister for submission in Parliament.
- The Secretariat should submit a report to the Committee on the various Boards/Councils under its responsibility and indicate the resources, including personnel and financial, allocated to the establishment and maintenance of the Councils/Boards.
- The *Ad Hoc* and Standing Committees contemplated in section 12 of the Bill provides that these committees may include persons who are not police officials. Will these persons be remunerated by the SAPS and what conditions apply to such remuneration? The same conditions as contemplated for the remuneration of private sector Council members as stated in section 6 of the Bill should be stipulated.
- The estimated costs associated with the establishment and maintenance of the administration system by the SAPS to implement the Act should be calculated, both in terms of human and financial resources.





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**MEMORANDUM**  
**[Confidential]**

**TO:** Mr. F Beukman, MP  
Chairperson, Portfolio Committee on Police

**DATE:** 31 January 2018

**SUBJECT:** Robert McBride v Minister of Police and Minister of Public Service and Administration [2016] ZACC30

**REF:** L4 /2016; C5.2017

## SUMMARY OF THE LEGAL ISSUES

1. In short the Constitutional Court declared the following provisions invalid to the extent that they authorise the Minister of Police to suspend, take disciplinary steps pursuant to suspension, or remove from office the Executive Director of the Independent Police Investigative Directorate ("IPID"):

1.1. section 6(3)(a) and 6(6) of the Independent Police Investigative Directorate Act, 2011;

1.2. sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act, Proclamation 103 of 1994 ("Public Service Act"); and

1.3. regulation 13 of the Independent Police Investigative Directorate Regulations for the Operation of the IPID<sup>1</sup> ("IPID Regulations").

2. Parliament was directed by Constitutional Court to cure the defects in the legislation within 24 months from the date of the order.

3. Pending the correction of the defects:

3.1. Section 6(6) of the Act is to be read as providing as follows:

*"Subsections 17DA(3) to 17DA(7) of the South African Police Service Act 68 of 1995 apply to the suspension and removal of the Executive Director of IPID, with changes as may be required by the context."*

3.2 Sections 16A(1), 16B, 17(1) and 17(2) of the Public Service Act and regulation 13 of the IPID Regulations is declared inconsistent with section

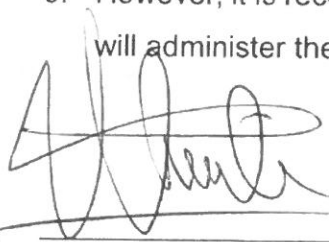
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<sup>1</sup> GN R98 of Government Gazette 35018 of 10 February 2012)



206(6) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and shall not apply to the Executive Director of the IPID.

4. The judgment was delivered on 6 September 2016. The deadline for an amendment Bill that addresses the defects in the IPID Act and to be assented to by the President is **5 September 2018**.
  
5. If the Committee agrees that the IPID Act should be cleaned up, or if the Department is proposing an amendment to the IPID Act and the cleaning up of the IPID Regulations, the Committee may then further address this matter in one of two ways:
  - 5.1. *As part of oversight:* Once the Committee has confirmed with the Department regarding the amendment of the Act and IPID Regulations and agreed on a target date, the Committee will be enabled to monitor progress in respect of the proposed Bill;
  
  - 5.2. *As a Committee Bill:* The Committee could request permission to introduce a Committee Bill that will amend the impugned sections of the IPID Act.
  
6. However, it is recommended that the Committee consult with the Department who will administer the Committee Bill before taking this decision.



**Mr. M. Prince**  
**Legal Adviser**



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**Legislative Process for an  
amendment to the  
Independent Police  
Investigative Directorate Act**



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**1 February 2018**

# First House (1)

## Activity

No	NA Rule	Activity
1.	273(1)	The Committee develops and tables a memorandum for the purpose of obtaining the Assembly's permission
2.	273(2)	Speaker must place the memorandum on the order paper and the Assembly may give or refuse permission
3.	274(1)(a)	The Committee prepares a <b>draft Bill</b> (capacity has been created in the Parliamentary Service to assist the Committee.
4.	274(1)(b)	The committee consult the <b>JTM</b> for advice on classification of the Bill.
5.	276(1)(b) and (c)	<b>Notice</b> of the intention to introduce is given in the <i>Government Gazette</i> , together with a copy of the Bill or an explanatory summary of the Bill
6.	276(4) 275(a) and (b)	<ul style="list-style-type: none"> <li>- If a copy of the Bill is published in the <i>Government Gazette</i>, the notice must contain an <b>invitation</b> for interested persons and institutions to submit written representations on the Bill.</li> <li>- <b>Interested persons</b> must be given at least three weeks after publication to comment.</li> <li>- Relevant <b>Department / Organ of State</b> must be given sufficient opportunity to make submissions to the Committee.</li> </ul>



# First House (2)

No	NA Rule	Activity
7.	274(3)	The Committee must <b>report</b> to the House when it publishes the draft Bill.
8.	s59(1)(a) Constitution	Any written comments received must be considered. It is required that Parliament provides “ <b>meaningful opportunities for public participation</b> in the law-making process.”
9.	275(d)	The Committee may, in view of any comments received, make amendments to the draft Bill before its introduction.
10.	275(c)	The Committee consults the <b>JTM</b> for advice on classification of the Bill in the form that it will be introduced (final Bill).



# First House (3)

No.	NA Rule	Activity
11.	279(4)	The Bill must be <b>certified</b> by the Chief <u>Parliamentary Legal Adviser</u> or a Parliamentary Legal Adviser designated by him or her as being consistent with the Constitution and existing legislation; and properly drafted in the form and style.
12.	279(1)(a) and (c)	The Committee <b>introduces</b> the Bill by submitting a <u>copy thereof</u> and a <u>supporting memorandum</u> to the Speaker.
13.	280(3)	The findings of the JTM as per NA Rule 275(c) is tabled with the Bill when it is introduced.
14.	282(1) 290(2)(b)	The Bill does not have a first reading – in stead it is placed on the order paper for <b>Second Reading</b> . <u>At least three Assembly working days</u> must elapse since the Bill was introduced before the Second Reading.



# Second House

## Activity

The Bill is transmitted to the NCOP and referred to a Committee

Committee deliberations

Report to the second House

Consideration by Second House