Submission on the Critical Infrastructure Protection Bill

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Our interest in the Bill

1. amaBhungane welcomes the extended opportunity to make comment on the Critical Infrastructure Protection Bill, which replaces the National Key Point Act of 1980 and related laws.

2. We concur with the concerns raised in other submissions on the excessive penalities in the Bill. However, for the purposes of this submission, we limit ourselves to comment the omission of express public interest and public domain defence clauses in the Bill, particulary as it relates to cl 26(2) schedule of offences and penalities in the Bill.

3. Our comment is made in view of the potentional the chilling effect these omissions will have for investigative journalists, the media and the wider public, who wish to access or disclose information in the public interest or in the interest of justice, but will be subject to harsh penalities in terms of the Bill.

Qualification of unlawful conduct

4. Cl 26(2) imposes penalties on a range of 'unlawful' actions at critical infrastructure sites. We restate the relevant clauses here:

> 26 (2) Any person who—
> (a) unlawfully hinders, obstructs or disobeys a person in control of a critical infrastructure in taking any steps required or ordered in terms of this Act in relation to the security of any critical infrastructure;
> (b) unlawfully hinders, obstructs or disobeys any person while performing a function or in doing anything required to be done in terms of this Act;
> (c) other than in accordance with the provisions of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), or any other legislation that provides for the lawful disclosure of information, unlawfully furnishes, disseminates or publishes in any manner whatsoever information relating to the security measures applicable at or in respect of a critical infrastructure;
> (d) takes or records, or causes to take or record, an analog or digital photographic image, video or film of a critical infrastructure or critical infrastructure complex with the intent to use or distribute such analog or digital photographic image, video or film for an unlawful purpose;
> (e) takes or records, or causes to take or record, an analog or digital photographic image, video or film of a critical infrastructure or critical infrastructure complex, in contravention of the notice contemplated in section 24(8) or 25(8);
> (f) unlawfully damages, endangers, disrupts a critical infrastructure or threatens the safety or security at a critical infrastructure or part thereof;
> (g) unlawfully threatens to damage critical infrastructure;
> (h) enters or gains access to critical infrastructure, for an unlawful purpose;
> (i) enters or gains access to critical infrastructure, in contravention of the notice contemplated in section 24(8) or 25(8); or
> (j) colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraphs (a) to (i),
> commits an offence and is liable upon conviction to a fine or to imprisonment for a period not exceeding 20 years, or to both a fine and such imprisonment.

5. The absence of a qualification of *unlawfu*l, has the the effect of being in indiscrimnate 'catch-all' provision, subjecting *unknowing*, *unintentional* and or *public interest* breaches of the Bill to the same criminal sanction of bona fide unlawful criminal activity. Concerningly, cl 26 (2)(d) extends this to the *'use or distribut(ion)'* of, among others, photographic images and recordings.

6. The chilling effect of cl 26 (2)(d), and the non-qualifcation of *unlawful* in entirety of cl 26(2) on media freedom and the free flow of information in the public interest cannot be overstated. Important information, images, documentary evidence which may reveal a contravention of the law or misuse of public funds, may be surpressed under the threat of severe criminal sanction.

7. Media reporting on the security upgrades at President Zuma's private Nkandla residence, is case it point. Similar provisions in the National Key Points Act served to obstruct and frustrate media reporting, publication of images and access to information. The clauses in their current form repeat the errors of the NKP Act.

8. Cl 26(1) of the Bill correctly qualifies *'unlawful'* with the intentionalitiy of the act to "*any person who unlawfully and intentionally."* To enable the protection and promotion of the constitutional right to freedom of expression and the free flow of information in a democratic society, a similar qualification should be extended to each instance where unlawful appears cl 26 (2).

Public Interest Defence

9. The constitutional implications of the absense of a public interest safeguard in the Bill are substantial. It is worth remembering that an adequate public interest defence was a key demand in the contentious passage of the Protection of State Information Bill (POSIB) in Parliament. The public interest defence, in this instance, was a method for removing the offences of (simple) receipt, possession and disclosure of classified information where the public interest in disclosure outweighs the harm contemplated.

10. The constitutional imperatives led to the limited public interest exceptions, which are now in s41 of POSIB:

> 41. Any person who unlawfully and intentionally discloses or is in possession of classified state information in contravention of this Act is guilty of an offence and is liable to a fine or imprisonment for a period not exceeding five years, except where such disclosure or possession—
> *(a)* is protected or authorised under the Protected Disclosures Act, 2000 (Act No. 26 of 2000), the Companies Act, 2008 (Act No. 71 of 2008), the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the National Environmental Management Act, 1998 (Act No. 107 of 1998), or the Labour Relations Act, 1995 (Act No. 66 of 1995); 35
> *(b)* is authorised in terms of this Act or any other Act of Parliament; or
> *(c)* reveals criminal activity, including any criminal activity in terms of section 45 of this Act.

11. While the inclusion of this defense has some effect in ameliorating the defects of POSIB, these exceptions do not meet the test for a true public interest defence. A more constitutional defence requires the inclusion of '*imminent public danger'* at the very least. The section 46 public interest defense provision in the Promotion of Access to Information Act (PAIA) 2 of 2000, one of the more progressive pieces of post-apartheid legislation enacted to increase transparency and accountability, makes the inclusion of imminent public danger. We reproduce this provision here:

> 46 Mandatory disclosure in public interest
> Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a)

> or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if(a) the disclosure of the record would reveal evidence of (i) a substantial contravention of, or failure to comply with, the law; or (ii) an imminent and serious public safety or environmental risk; and (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

12. The POSIB amendment process is instructive in demonstrating the importance of inclusion of a public interest defense against the excesses of blanket secrecy. The inclusion of an express public interest defense will ensure that public officials and powerful individuals can be held accountable by members of the media and the wider public, and ensure any corrupt activity and or abuse of the intentions of the Bill are timeously exposed by the media and or the public.

13. We therefore recommend that cl 26(2) (c) should be revised to include an adequate public interest defence, guided by the provisions of PAIA. The same clause should include a public domain defence, which we discuss in the next section of our submission. We make drafting suggestions on both these points at the end of this submission.

Public Domain Defence

14. In South Africa, it is well-established that it is basic to the principle of confidentiality that information cannot be protected once it loses its secrecy. The Constitutional Court in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* has also recognised that the concept of public domain is an important factor in determining whether information should be released to the public. Indeed, the failure to include a public domain defense in the final draft of POSIB, passed by the National Assembly in 2013, continues to be contentious issues, and subject to a possible constitutional challenge by civil society organistions, should POSIB be signed into law.

15. In our own practice of investigative journalism, the absence of a clear public domain defence has led to undue censorship of reporting which would reveal wrong-doing. For example, in 2011, the Mail and Guardian (M&G) and amaBhungane reporters were forcefully censored from publishing an expose by the then presidential spokesperson, following a threat of criminal prosecution under the NPA Act, which makes it an offence to disclose evidence gathered in camera by a s 28 inquiry — providing for a maximum penalty of 15 years. The matter, and excerpts of the record in question had already been partially reported by other media at the time.

16. The M&G and amaBhungane expose would have revealed that Mac Maharaj, the then presidential spokesperson, and his wife Zarina had were knowlingly dishonest during section 28 inquiry by the Scorpions on arms deal related bribery allegations.

17. A six-year battle ensued in the *Maharaj & others vs MandG Centre of Investigative Journalism NPC & others,* and in 2017, the Supreme Court of Appeal confirmed the NPA Act cannot not impose blanket ban on disclosures, but rather decision required "*an appropriate balance between securing the criminal justice system and upholding freedom of expression*." Morever, the judgement confirmed that where classfied information was already in the public domain, further penalities should not apply. It is this appropriate balance which should be present in the Critical Infrastruture Protection Bill, to prevent a repeat such egregious violations of the right of the media to publish.

18. We therefore recommend the clause 26 (2)(c) be revised to include the public interest defence present in PAIA, and a specific public domain defence:

26 (2) (c) other than in accordance with the provisions of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), or any other legislation that provides for the lawful disclosure of information, or where *the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk; and the public interest in the disclosure of the information clearly outweighs the harm contemplated in the provision in question*, unlawfully furnishes, disseminates or publishes in any manner whatsoever information relating to the security measures applicable at or in respect of a critical infrastructure, *except where such information is demonstrated to already be in the public domain*

19. We thank the Committee for the opportunity to make comment on this Bill, and wish to express our availability to engage further on our submission as necessary.

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