Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

Submission to the Civilian Secretariat for the Police Service

on the

DRAFT CRITICAL INFRASTRUCTURE PROTECTION BILL, 2016

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1. Introduction

The Catholic Parliamentary Liaison Office (CPLO) welcomes the opportunity to comment on the draft Critical Infrastructure Protection Bill.

The CPLO is an office of the Southern African Catholic Bishops' Conference. It is tasked with liaising between the Church and Parliament/Government, commenting on issues of public policy, and making submissions on legislation.

2. The Need for Infrastructure Protection

We understand and appreciate that, as the Preamble to the Bill states, there should be "adequate measures to identify and protect critical infrastructure," and that "public confidence and awareness of critical infrastructure protection" must be enhanced. One of the problems with the National Key Points Act 1980 was precisely that the public was not officially allowed even to know if an item of infrastructure was or was not a key point. This situation led to confusion and uncertainty, rather than the "confidence and awareness" that this Bill purports to seek.

3. Comments on Specific Clauses

3.1. Clauses 4&5: The Critical Infrastructure Council

We note that nine members of the civil service, and five people from the private sector who are knowledgeable in infrastructure protection, all appointed by the Police Minister, will make up the council. There is provision for the *ad hoc* appointment of other persons to assist with specific applications.

We submit that, in the interests of openness and transparency, both Parliament and the public should have an opportunity to comment on the suitability of the people selected by the Minister. This could be done by allowing the Portfolio Committee on Police (or a joint committee covering intelligence, defence and public works) to review the names shortlisted in terms of clause 5(1)(c). The Portfolio Committee could also arrange for public comment on the individuals concerned.

We submit further that the Council must have as a permanent member (not an *ad hoc* appointment) at least one member qualified in constitutional law; or at the very least, that a representative of the

Department of Justice and Constitutional Development be added to the list of officials in clause 4(3)(b). The reason for this is that the declaration of a place or building as critical infrastructure will usually imply a limitation of people's rights of access, or movement, or to information, concerning that infrastructure. Therefore, the Council should have the benefit of expert legal/constitutional advice before it makes decisions on the declaration of critical infrastructure.

We note and support the provision in clause 5(1)(a) that interested persons and members of the public will be able to nominate the five people to be appointed in terms of clause 4(3)(c).

3.2. Clauses 16&17: Declaration as Critical Infrastructure

Clause 16(2) provides that the Minister must take into account the potential negative consequences of the "loss, damage, 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:

"*(d) 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:

"(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."*

3.3. Clause 21: Certificate of Declaration

Clause 21(5) provides that the particulars of a declaration as critical infrastructure, or the termination of such declaration, must be entered into a register. However, there is no provision that this register be published or otherwise made accessible to the public. We submit that it should be. Elsewhere in the Bill (clause 24(8)) it is required that the person in control of a critical infrastructure must erect a notice on the premises informing the public that it has been declared a critical infrastructure. If, then, each item of critical infrastructure is to be advertised in this way, there is no reason why a complete and up-to-date list of such infrastructure, as contained in the register, should not be published. This can only improve the "public confidence and awareness" mentioned in the Preamble. Furthermore, it would give proper effect to the public's right to information in this regard.

3.4. Clause 26: 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.

3.5. Clause 30: Transitional Arrangements

Clause 30(1) provides that all existing national key points (in terms of the National Key Points Act 1980) will be deemed to be critical infrastructure under the new legislation, until such time as their declaration has been reviewed. There is, however, no specific provision for the publication of a list of existing key points/critical infrastructure. We suggest that this is contrary to the spirit of the new legislation, and that such a list should be published as soon as the new legislation (this Bill) comes into effect.

3.6. Clause 31: Indemnity

This clause purports to grant the minister and all officials a blanket indemnity for any damages that arise out of their actions under the Bill, except for "any wilful act or omission on the part of the Minister." It appears that this clause has been imported more or less verbatim from section 7 of the National Key Points Act 1980, and is typical of apartheid-era legislation that sought to oust the courts' jurisdiction in security matters. It is also not clear what is meant by a "wilful act" and whether it is only the minister, or all officials, who can be held liable for such acts.

We suggest that this clause is unconstitutional and that it be scrapped.

4. Conclusion

We welcome the fact that the National Key Points Act is being repealed and replaced by legislation more in tune with our country's constitutional and democratic standards. At the same time, we have noted various concerns with the envisaged legislation, and we hope that these will receive attention.

We look forward to engaging further with the relevant Portfolio Committee(s) when the Bill is tabled in the National Assembly.

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