

MEMORANDUM ON THE OBJECTS OF THE CRIMINAL MATTERS AMENDMENT BILL, 2015

1. BACKGROUND

The level of crime in South Africa relating to essential infrastructure, used to provide or distribute basic services to public, especially involving metal (both ferrous and non-ferrous metal) is unacceptably high. It poses a risk to, among others, public safety, electricity supplies, provision of water, communications and transportation and has a very negative impact on South Africa's economy, society and infrastructure. Essential infrastructure-related offences are becoming increasingly more organised and are often committed by armed and dangerous criminal groups.

2. PURPOSE OF BILL

The amendments intend providing for changes to the law pertaining to infrastructure-related offences by providing stricter provisions for the granting of bail, the sentencing of offenders and creating a new offence to criminalise damage to, tampering with or destruction of essential infrastructure which may interfere with the provision of basic services, to the public.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Preamble

The Criminal Matters Amendment Bill, 2015 (“the Bill”) contains a preamble in order to explain that the Bill seeks to curb damage caused to essential infrastructure and the disruption of basic services and its concomitant negative consequences due to criminal activity.

3.2 Clause 1: Definitions

Clause 1 of the Bill contains three definitions, namely "basic service", "essential infrastructure" and "tamper". The purpose of the first two definitions is to make it clear that the provisions of the Bill are applicable to privately and publicly owned infrastructure, providing or distributing basic services, such as those relating to energy, transport, water and sanitation and communication, to the public. The purpose of the definition of "tamper" is to clarify the ambit of the offence created in clause 3 with regard to unlawfully and intentionally tampering with, damaging or destroying essential infrastructure.

3.3 Clause 2: Bail in respect of essential infrastructure-related offences

Clause 2 of the Bill seeks to amend sections 59 and 59A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA), by removing the discretion of police officials and prosecutors to grant bail to persons charged with any essential infrastructure-related offence. The amendment will ensure that only the courts may deal with bail applications

for these offences in terms of section 60 of the CPA. This aims to send out a message of the seriousness of the crime committed.

3.4 Clause 3: Offence relating to essential infrastructure

Clause 3 of the Bill creates a new offence: It criminalises the unlawful and intentional tampering with or damaging or destroying of essential infrastructure and provides for the possibility of the imposition of a severe penalty, namely imprisonment which may be up to 30 years. The creation of this offence provides an opportunity for the Legislature to emphasise the seriousness of this offence by allowing for the imposition by courts of a harsh sentence and to ensure that legislation is in place to regulate this aspect adequately instead of having to rely on the common law offence of malicious damage to property, which is often regarded as a minor offence.

3.5 Clause 4: Amendment of Schedule 5 to the CPA, 1977

Clause 4 of the Bill seeks to amend Schedule 5 to the CPA by inserting in the Schedule certain essential infrastructure-related offences so that an accused who is charged with these offences may only be released on bail if the accused adduces evidence which satisfies the court that the interests of justice permit his or her release. The offences discussed below are to be inserted.

- (a) Offences under the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (POCA), which relate to racketeering activities (section 2), proceeds of unlawful activities (sections 4, 5 and 6), including money laundering, and criminal

gang activities (section 9). These offences are committed in relation to other offences, such as dealing in drugs, trafficking in persons, infrastructure-related offences and rhino-poaching.

- (b) The offences referred to in section 54(1) of the International Trade Administration Act, 2002 (Act No. 71 of 2002)(the ITA Act), and the offences referred to in section 32(1)(a), (b), (c), (d), (k), in so far as the paragraph relates to section 21(1), (l), (m) or (o) of the Second-Hand Goods Act, 2009 (Act No. 6 of 2009)(the Second-Hand Goods Act), if it is alleged that essential infrastructure is involved. This will ensure that the onus with regard to the interests of justice permitting the release on bail of an accused is also applicable to dealers in second-hand scrap metal and agents responsible for exports.
- (c) Theft of any object committed under certain circumstances is already included in Schedule 5 to the CPA. In order to cover other incidents of theft involving essential infrastructure, it is proposed that the offence of theft involving essential infrastructure be included in Schedule 5, if it is alleged that the offence caused an interference with a basic service rendered to the public or damage to essential infrastructure or if it was committed by persons in positions of trust and for whom it may be easy to tamper with evidence, namely a law enforcement officer, a security officer, an employee or a contract worker or by a group of persons acting with a common purpose. Essential infrastructure-related offences are also committed by individuals, stealing small amounts of metal, for instance petty

thieves or subsistence thieves. These offences are not minor offences as they often have a significant negative social impact on society.

- (d) Contraventions of sections 36 (which deals with the inability of a person to give account of the possession of goods suspected of being stolen) and 37 (which deals with the receipt of stolen property without reasonable cause) of the General Law Amendment Act, 1955 (Act No. 62 of 1955), if it is alleged that essential infrastructure is involved. This inclusion is important because, in many cases, perpetrators can only be charged with contraventions of sections 36 and 37 and not with theft, as it is often not known who has stolen the property, where the property in question was stolen from and who the owner thereof is.

- (e) The offence created in clause 3 of the Bill is also inserted.

3.6 Clause 5: Amendment of section 51 of the Criminal Law Amendment Act, 1997

Clause 5 of the Bill seeks to amend section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), which prescribes the minimum period of imprisonment that must be imposed by the courts for first, second and subsequent offenders convicted of the offences referred to in Schedule 2 to that Act, by providing for the insertion of a new Part V in Schedule 2 which makes provision for prescribed minimum sentences ranging from 3 to 7 years. The offences to be listed in Part V are discussed in paragraph 3.9 below.

3.7 Clause 6: Amendment of Part II of Schedule 2 to the Criminal Law Amendment Act, 1997

Clause 6 provides for the insertion of the offences discussed below in Schedule 2 to the Criminal Law Amendment Act, 1997, so that the minimum sentencing regime of 15, 20 or 25 years, depending on the convicted persons' previous convictions, may be imposed for those offences.

- (a) The offences referred to in section 2, 4, 5 and 6 of the POCA involving essential infrastructure.
- (b) Theft of any object committed under certain circumstances is already included in Schedule 2 to the Criminal Law Amendment Act, 1997. In order to cover other incidents of theft involving essential infrastructure, theft, involving essential infrastructure, causing interference with a basic service or damage to essential infrastructure or which is committed by persons in positions of trust, namely law enforcement officers, security officers, employees and contract workers and by a group of persons (syndicates) are also included in Part II of the Schedule.
- (c) The offence created in clause 3.

The high levels of offences related to critical infrastructure result in the disruption of basic services such as water, electricity and transport, posing not only harmful consequences to the well-being of the public but also causing service-related discontent within affected communities and resulting in losses to the economy. The proposed sentences signify the seriousness of the offences of this nature and the intent to safeguard the interests of society by signalling to the courts that the imposition of harsher sentences must be considered in order to deter other persons from committing similar offences.

3.8 Clause 7: Amendment of Part IV of Schedule 2 to the Criminal Law Amendment Act, 1997

In order to ensure that minimum sentences ranging from 5 to 10 years can be imposed on dealers in second-hand scrap metal and agents, where essential infrastructure-related offences are involved, the offences referred to in section 54(1) of the ITA Act and section 32(1)(a), (b), (c), (d), (k), in so far as the paragraph relates to section 21(1), (l), (m) or (o) of the Second-Hand Goods Act, are inserted in Part IV by clause 7.

3.9 Clause 8: Amendment of Schedule 2 to the Criminal Law Amendment Act, 1997

Clause 8 inserts a new Part V in Schedule 2 in order to provide for the offences referred to in section 36 or 37 of the General Law Amendment Act, 1955, and theft involving essential infrastructure not covered in Part II of that Schedule. The effect of this insertion is that minimum sentences ranging from 3 to 7 years can be imposed for these offences.

3.10 Clause 9: Short title and commencement

Clause 9 provides for the short title of the Bill and a commencement date, which date must be fixed by the President.

4. PARTIES CONSULTED

The drafting of the Bill arises out of a request from the Presidential Infrastructure Co-ordinating Council which was tasked to deal with the issue of infrastructure-related offences. The Bill was not widely consulted upon, but members of the South African Police Service, representatives of the National Prosecution Authority and officials of the International Trade Administration Commission were consulted during the drafting process. The Bill was not finalised and approved in consultation with the JCPS Directors-General Cluster due to the urgency of the Bill.

5. FINANCIAL IMPLICATIONS FOR STATE

The amendments relating to bail and the extension of the minimum sentencing regime to other offences have certain implications: It may take longer to finalise these cases and the case load of the courts will be affected as the courts will have to hear the bail applications and only regional courts and the high court may impose minimum sentences; and the correctional facilities and inmate population will be affected. These implications have financial consequences, for instance an increase in the inmate population in correctional facilities, which is difficult to quantify at this point. The Department of Justice and Constitutional Development and the Department of

Correctional Services will have to fund the additional expenses from their respective budgets.

6. PARLIAMENTARY PROCEDURE

6.1.1 A Bill must be dealt with (tagged) in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996 (the Constitution), if it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies. Section 74 deals with Bills amending the Constitution and does not apply to the Bill under discussion. Section 76 deals with ordinary Bills affecting provinces. In terms of section 76(3) a Bill must be dealt with in accordance with section 76(1) or (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in paragraphs (a) to (f) of section 76(3). In terms of section 76(4) of the Constitution a Bill must be dealt with in accordance with the procedure established by section 76(1) if it provides for legislation envisaged in paragraph (a) or (b) of section 76(4).

6.1.2 Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a) to (f) and second, whether the provisions of the Bill in substantial measure fall within a concurrent provincial legislative competence. Tagging focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect the functional areas listed in Schedule 4 and not whether or not any of its provisions are incidental to its substance.

6.1.3 The Bill seeks to create a new offence in respect of essential infrastructure which is used to provide or distribute a basic service to the public and to amend the legislation dealing with bail and minimum sentences in respect of essential infrastructure-related offences. The provisions of the Bill are discussed in paragraph 3 above. None of the provisions of the Bill provide for legislative matters listed in section 76(3)(a) to (f) and none of the provisions fall within a functional area listed in Schedule 4 to the Constitution. It can therefore not be said that the provisions of the Bill substantially affect the functional areas listed in that Schedule. The provisions of the Bill also do not provide for legislation envisaged in section 76(4)(a) or (b) of the Constitution.

6.1.4 In seeking to curb infrastructure-related offences, which give rise to economic losses and damage to essential infrastructure, and thereby reducing security-related challenges which arise as a result of this type of criminality, the aim of the Bill is to build safer communities and allow for economic growth. The Bill therefore seeks to protect and promote the right to freedom and security of the person and the socio-economic rights of communities as guaranteed in the Bill of Rights contained in Chapter 2 of the Constitution.

6.1.5 The Department of Justice and Constitutional Development and the State Law Advisers are therefore of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.