



# African Policing Civilian Oversight Forum

## Submission on the Draft Disaster Management Amendment Bill

26 August, 2021

### 1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission to the Portfolio Committee on Cooperative Governance and Traditional Affairs (the Portfolio Committee) in response to the call for public comment on Disaster Management Amendment Bill.

### 2. Desirability

We commend the Portfolio Committee for inviting public comments and inputs in respect of this Amendment Bill, before a vote on the motion of its desirability is made. We note that this gives effect to section 59(1) of the Constitution, which requires the National Assembly to facilitate public involvement in the legislative and other processes of the Assembly and its committees.

We urge the Portfolio Committee, when considering a motion of desirability on the Amendment Bill under rule 286(4)(i) of the 9<sup>th</sup> Edition of the Rules of the National Assembly, to adopt the motion. We submit that it is desirable for the Amendment Bill to progress to the next stages of the legislative process, to introduce reforms and address statutory gaps and shortcomings in the Disaster Management Act 2002 (the Act), including gaps which we highlight in our contribution from paragraph 3 below.

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### 3. Observations regarding the Draft Disaster Management Amendment Bill

We welcome the stated purpose of the Amendment Bill, and its intention to strengthen accountability provisions of the Act. In particular, we welcome provisions that seek to reserve the obligation to extend a national, provincial or local state of disaster for legislative bodies within the three spheres of government, and to allow legislative organs to exercise oversight and accountability functions during a state of disaster. We observe that this will foster inclusive and representative democracy and engagement, strengthen the Constitution's vision of a representative and participatory democracy and give effect to Sections 42(3), 55(2), 92(2)&(3), 114(2)(a)&(b), 133(2)&(3) of the Constitution.

We note that our Constitution establishes and safeguards representative and participatory democracy. In *Doctors for Life International v Speaker of the National Assembly and Others*, our Constitutional Court held that:

*Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.<sup>1</sup>*

We also welcome a further intention of the Bill to amend the provisions of the Act that deal with the lapsing of national, provincial or local state of disaster and the termination of any regulations, directions and by-laws made under it. We emphasize that this is necessary to ensure that the declaration of a state of disaster is time-bound, has a specific duration and only invoked on a temporary basis. We are further encouraged that the Bill seeks to amend the Act and prescribe the involvement of the National Assembly or provincial legislatures or local councils. in assessing and disapproving regulations or directions issued following the declaration.

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<sup>1</sup> *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC, Paragraph 116

While we convey our support for the Bill and its objectives, we believe that the proposed amendment should go further and address other gaps and deficiencies that are contained in the Act. In this regard, we would like to make the following observations and recommendations, which we believe can contribute to strengthening the content of the Act and ensure that the declaration, management and coordination of future states of disasters is comprehensive, effective and consistent with South Africa's human rights obligations. This includes, significantly, legal obligations embodied in the African Charter on Human and Peoples' Rights and the International Covenant on Civil and Political Rights.

#### **4. Observation 1: Shortcomings in the definition of key concepts**

##### **4.1. Section 1: Definition of disaster**

Section 1 of the Act defines and explains the legal meaning of the term "disaster". It states that disaster means any progressive or sudden, widespread or localised, natural or human-caused occurrence which-

- a) Causes or threatens to cause
  - i. Death, injury or disease;
  - ii. Damage to property, infrastructure or the environment; or
  - iii. Disruption of the life of a community; and
  
- b) Is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their resources

We are concerned that this definition is overly broad and accords the Minister, the premier or a council of a municipality, as the case may be, wide and, arguably, unnecessary discretionary powers – with the concomitant possibility of arbitrary and discriminatory application of laws and directives – to declare a state of disaster. In particular, we are concerned that broad nature of the definition makes it susceptible to abuse and may allow officials to invoke any occurrence which causes or threatens to cause damage to, for instance, property or the disruption of the life of a community to declare a state of disaster. A declaration of a state of disaster, concomitantly, prompts the issuance of

directions or regulations or by-law which we argue, in circumstances where it is exercised on the basis of a legal clause that is formulated in broad language, is contrary to the exceptional character of a state of disaster.

Our courts have also expressed concerns about the adoption of laws that afford state actors broad discretion. In *Dawood and Another v Minister of Home Affairs and Others*, the Constitutional Court held that:

*“if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision”<sup>2</sup>*

**Recommendation:** The Bill should amend the definition of the term disaster, as contained in the Act, and limit the circumstances and conditions that justify the declaration of a state of disaster to what is strictly necessary. This can be done by, replacing the word “or” in 1(a)(iii) with “and” making a disaster contingent on all three elements being in place.

#### **4.2. Definition of the phrase ‘other special circumstances’**

Sections 27(1)(b), 41(1)(b) and 55(1)(b) of the Act authorise the declaration of a state of disaster if, inter alia, “other special circumstances” warrant the declaration.

We are concerned that the phrase “other special circumstances” has not been defined in the Act. This lacuna in definition leaves the interpretation of the phrase to the Minister, premier or the Council of a municipality which, again, lends it susceptible to arbitrary interpretation and application. In our constitutional framework, in which the Bill of Rights applies to and binds the three arms of government and all state organs<sup>3</sup>, it is paramount that law makers define with clarity, the nature, scope and intended consequences of legislative instruments. Our courts have given credence to this argument. In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and*, the Constitutional Court held that:

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<sup>2</sup> *Dawood and Another v Minister of Home Affairs and Others* CCT35/99 (2000) ZACC, paragraph 47.

<sup>3</sup> Section 8(1) of the Constitution

*“The legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them”<sup>4</sup>*

**Recommendation:** The Bill should amend the Act and remove the phrase “other special circumstances”, as contained in sections 27(1)(b), 41(1)(b) and 55(1)(b) of the Act.

#### **4.3. Definition of essential services**

The Act does not define, or offer guidance to relevant authorities, in making regulations or issuing directions or by-laws following a declaration of a state of disaster, on how to define key concepts associated with such declarations. This includes, for instance, critical functions, services and programmes that remain essential to the public even after the declaration of a state of disaster. Under the regulations developed to manage the spread of COVID-19, for example, these services are collectively classified and named “essential services”. APCOF is concerned that in the absence of predetermined, clear and coherent determination of what constitutes essential services during a state of disaster, state organs may encounter considerable challenges in, on the one hand, effectively responding to the disaster and, on the other, maintaining a wide ranging, comprehensive and coordinated services that remain essential to the public even during a disaster.

**Recommendation:** The Bill should, for purposes of promoting safe, effective and efficient management of disasters, and at the same time maintaining services and programmes that are critical to the public, amend the Act to define what essential services constitute, and issue clear criteria and process for determining this.

#### **5. Observation 2: Strengthen focus on disaster preparedness and response**

The Act provides that disaster management is a continuous and integrated multisectoral, multidisciplinary process of planning and implementation of measures aimed at, *inter alia*, emergency preparedness and preventing and mitigating the consequences of disasters<sup>5</sup>. The Act also prescribes the preparation of disaster management plans within national,

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<sup>4</sup> Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others (CCT1/00)(2000)ZACC, paragraph 24

<sup>5</sup> Definitional section of the Act

provincial and municipal organs of state. However, APCOF is concerned that, as evidenced by the implementation of measures adopted to manage the spread of COVID-19, in the absence of comprehensive and timely planning and implementation of preventive and containment measures, it may be difficult to effectively prevent and respond to the disaster, and at the same time address concerns, risks and tension that are incidental to the enforcement of preventive measures. Restrictions and limitations of movement, for instance, may, in the absence of pre-planned and effective governmental intervention, enhance the likelihood of interpersonal violence and other social disorders, intensified by limited social and economic activities.

APCOF is further concerned that, while a disaster by definition does not discriminate or differentiate between specific populations, its impact disproportionately affects specific groups. Preventive measures may also disproportionately impact on poor segments of the public and other historically marginalized groups. The announcement and implementation of lockdown, and the accompanying requirement to work from home, for example, disproportionately affect the poor and daily-wage workers who are unable to work from home.

**Recommendation:** To save lives and livelihoods, offer safety and protection, and at the same time also provide solutions to incidental and unintended consequences of the implementation of preventive measures, the Bill should include a provision that requires authorities to, immediately or as soon as practically possible, following the declaration of a state of disaster, conduct a needs assessment with a view to developing a broad policy agenda for action. The development and conduct of this needs assessment should be guided by principles of openness, transparency, inclusivity and non-discrimination, while recognizing different community dynamics. This will allow authorities to identify, in the context of limited abilities and capacities, key areas, emerging concerns and trends and determine appropriate measures and level of attention required to provide effective, inclusive and holistic response mechanism. The outcome of the assessment will, in turn, prepare and enable authorities to deploy targeted and differentiated response, which also encompasses competing rights and interests, in respect of each specific set of circumstances and challenges. Accordingly, the design and delivery of the response plan should be evidence-based and human rights compliant, taking into consideration South Africa's legacy of systemic inequality and social economic marginalization.

## 6. Observation 3: Include a provision on restrictions on human rights

APCOF acknowledges that, both in terms of our constitutional framework and under international human rights law, some human rights may be subjected to limitations during a state of disaster. However, we are concerned that the Act does not embody principles that provide guidance to organs of state on the nature of rights and freedoms that are available for limitations when declaring a state of disaster and those from which no derogation is permitted. We submit that this has resulted in the omission of general principles that govern the limitation of human rights in all circumstances – namely legality, necessity, proportionality and non-discrimination.

As the Portfolio Committee is aware, our Bill of Rights contain a list of non-derogable rights, which safeguard constitutional rights such as, inter alia, the right to be treated with dignity, the right to life and freedom from unfair discrimination on grounds of race, colour, sex, social origin religion or language from restrictions under any circumstances. These core constitutional values listed as non-derogable are also protected from limitation under regional and international human rights instruments.

**Recommendation:** There is need to include a provision that explicitly articulates the basic human rights and freedoms that cannot be limited during a state of disaster, and give effect to constitutional and international legal obligations on state organs to respect and promote human dignity and inalienable human rights. The Bill should expressly delineate and explain general principles of law which cannot be limited in any conditions, with specific reference to the list of non-derogable rights enshrined in the Constitution. In the context of a declaration of a state of emergency under section 37 of the Constitution, for example, the Constitution prohibits any legislation or action taken following the declaration from authorizing:

*any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.<sup>6</sup>*

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<sup>6</sup> Section 37(5)(c) of the Constitution

**7. Observation 4: Include a provision that requires organs of state to ensure access to critical information, and report on the human rights-impact of measures taken to manage a disaster.**

The right to access information is enshrined in section 32 of the Constitution – as reinforced by Promotion of Access to Information Act 2 Of 2000 – and is recognized under regional and international law as a fundamental human right. Under conditions of disaster, APCOF submits that access to timely, accurate and accessible information is of vital importance in making safe choices. In addition, access to information is critical to ensuring transparent and accountable governance, principles which also form part of the values that govern public Administration in South Africa.<sup>7</sup>

At a continental level, the African Commission on Human and Peoples’ Rights, in the light of challenges that emerged in responding to COVID-19, and in recognition of the need for African states to effectively comply with their human rights obligations, has emphasized that:

*in times of public health emergencies, members of the public have the right to receive factual, regular, intelligible and science-based information on the threat COVID-19 poses to their health, the role and impact of the measures adopted for preventing and containing the virus, the precautionary measures that members of the public should take, and on the scale of the spread.*<sup>8</sup>

APCOF further observes that, it is important to foster transparent, accountable and responsive management and coordination of a disaster. To achieve this, there is need to require the government to make regular public reporting on the impact of the enforcement of measures adopted to manage the disaster on the exercise of fundamental human rights and freedoms.

**Recommendation:** To simplify access to critical information, and encourage safe choices during a disaster, the Bill should, by for instance, strengthening section 17 of the Act, place specific positive obligation on the state. This should require it to provide the public, in all

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<sup>7</sup> Section 195(1) (f)&(g) of the Constitution

<sup>8</sup> <https://www.achpr.org/pressrelease/detail?id=483>.



official languages recognized by the Constitution, timely accurate, and accessible information relating to the disaster. The Bill should further include a clause that compels the government to make regular and clear reporting and explanation on the human rights-impact of measures adopted to manage the disaster.

## **8. Conclusion**

The C19 emergency is an unprecedented test of South Africa's Disaster Management capability and legislative framework. As we have sought to demonstrate in this submission, we believe there are several areas where, learning from recent experiences disaster management law can be improved. We believe it is timely that an opportunity is afforded to the country to revisit its Disaster Management Act.