



African Policing Civilian Oversight Forum

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C/O
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Submission on draft regulations relating to the surveillance and the control of notifiable medical conditions

1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission to the Department of Health (the Department) in response to the call for public inputs on draft regulations relating to the surveillance and the control of notifiable medical conditions. We commend the Department for inviting public comments and observations on these proposed regulations.

On 26 August, 2021, APCOF, following a call for public comments on Disaster Management Amendment Bill, made a written submission to the Portfolio Committee on Cooperative Governance and Traditional Affairs. In that submission, we supported some substantive provisions of the proposed Amendment Bill and expressed concerns about others. Our current submission draws on the analysis and information we offered to the Portfolio Committee to

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make the following inputs.

Our submission is divided into two sections: Comments on the proposal to merge temporary regulations aimed at the prevention and management of COVID-19 with a permanent legislative instrument and; inputs into substantive sections of the draft regulations.

2. Comments on the proposal to merge temporary COVID-19 regulations with a permanent legislative instrument

The Proposed regulation seek to merge regulations adopted to manage the spread of COVID-19 and its impact with those developed under National Health Act, 2003. We are concerned that the decision to convert temporary COVID-19 rules into permanent regulations is inconsistent with the exceptional, limited and emergency conditions under which they apply. We are of the view that, due to their exceptional nature and temporary scope, the adoption and implementation of COVID-19 regulation should continue to be governed by the Disaster Management Act 2002 (the Act), as it stands to be amended by the Disaster Management Amendment Bill.

In recognition of the transient nature of states of disaster, a concept which has provided the justification for the development of regulations to manage the spread of COVID-19, the Disaster Management Amendment Bill has set out to amend the provisions of the Act and align them with international trends and standards. Drawing from our observations and experience about the development, issuance and implementation of COVID-19 regulations, and in line with the executive's decision to respond to, and address the, outbreak of Covid-19 under the Disaster Management Act, we observe that the Act represents the appropriate legislative framework to respond to COVID-19 and its impact.

We emphasize that, because of their exceptional character and ability to allow for the exercise of broad executive powers, dovetailed with their adverse impact on the free and full exercise of fundamental human rights and freedoms, legislative, policy and other measures developed to prevent and contain the advancement of COVID-19 should be time-bound and have defined duration. This can be achieved, in our view, by their continued development and adoption under the Disaster Management Act, the amended version of which seeks to, inter alia, provide protections such as sunset clause and review procedures.

3. Comments on substantive provisions of the draft regulations

3.1. Absence of provisions on oversight and accountability

We are concerned that draft regulations do not embody provisions on oversight and accountability over the exercise of specific powers and obligations it creates. We note that section 2 of the Regulations Relating to the Surveillance and the Control of notifiable Medical Conditions 2017 sets out implementation principles, and requires the implementation of the regulations to be subject to the Constitution and human rights values. However, we are concerned that the absence of a clear and specific guidance on who is to exercise oversight and accountability functions over the implementation of the regulations undermines accountability, and the Constitution's vision of accountable governance.

Our emphasise on effective oversight and accountability architecture is reinforced by the acknowledgment that the implementation of the regulations may, inevitably, limit and restrict the exercise of some human rights norms and values. We submit that the draft regulations, because of their potential impact on human rights, should amplify progress made, strengthen and reinforce existing accountability arrangements.

We therefore submit that the adoption and implementation of the regulations should be subjected to periodic and independent oversight and review by the National Assembly. We note that this is important to ensure transparent, accountable and responsive development and enforcement of the regulations. We further note that developing the regulations within the framework of human rights and granting legislative organs oversight powers over the development and application of the regulations will strengthen the Constitution's vision of a representative and participatory democracy, and give effect to Sections 42(3), 55(2), 92(2)&(3) of the Constitution.

3.2. Proposed criteria for self-quarantine and self-isolation

Regulation 15G of the draft regulations articulates and proposes the general requirements with which anyone who elects to self-isolate or self-quarantine must comply. It states that any person who intends to self-isolate or self-quarantine must, inter alia, have access to a private physician whom they can contact should they be in need of medical care or advice and; have access to the internet and a phone that allows the daily reporting of symptoms. It further suggests the criteria that self-quarantine and self-isolation facility should satisfy. This, inter

alia, includes that the facility must be a separate well-ventilated bedroom with a bathroom and toilet, or a residence that is not shared with persons who are not subject to quarantine; have a thermometer and; ensure that meals are served using disposable utensils.

Regulation 15G follows an earlier stipulation, under regulation 15F, which proposes to set the legal basis for the establishment and designation of quarantine facilities, to contain and prevent the spread of notifiable medical condition. Regulation 15F also proposes the services that designated quarantine facilities must offer.

We are concerned that most of the requirements and conditions proposed by regulation 15G are questionable and unrealistic. As the Department is aware, our society is a highly unequal one, characterised by poor access to basic services, and high levels of poverty and inequality. In our view, the structural challenges of deep inequality, exclusion and marginalisation have become more pronounced since the outbreak of COVID-19. We therefore observe that prevailing social-economic realities in the country, coupled with a lack of sustained investment in programmes aimed at fostering conditions in which everyone has equal access to critical services and protection systems, militates against the inclusion of the requirements proposed by regulation 15G.

We further observe that regulation 15G may generate impact that is inconsistent with the state's constitutional and international human rights obligations to ensure full, equitable and non-discriminatory enjoyment of fundamental human rights and freedoms by all, irrespective of their social status.

We emphasise that measures designed to combat and prevent the spread of COVID-19 should be inclusive and equitable, and be broadly and equitably implemented. This includes ensuring that the development and objectives of legislative instruments promote and strengthen inclusivity, and comply with regional and international human rights standards.

3.3. *Proposed establishment of contact tracing database*

Regulation 15H proposes to authorise the department to develop and maintain a national database on notifiable medical conditions contact tracing, which will record and store, inter alia, the names, identity or passport numbers, residential address and cell phone numbers of persons who have been tested for notifiable medical condition.

Regulation 15H(5) intends to prohibit the disclosure of information contained in the database or obtained through the regulations. It also proposes to vest the Director General of Department of Health, or any delegated person, with the power to authorise the disclosure of such information.

While we support the use of technology as part of the broader response and recovery plans, we are concerned that, in the light of the sensitive and personal nature of information to be kept in the proposed database, the draft regulation do not provide for the establishment of adequate oversight over the management of the database.

We are of the view that the collection, use and storage of personal data and information should be adequately and effectively safeguarded from any potential abuse or misuse. This can, in our view, be done through strengthening data and privacy guarantees in the draft regulations, and providing for the establishment of adequate oversight and accountability mechanism over the management of the proposed database.

4. Conclusion

Across the globe, experiences following the outbreak of COVID-19 has called for the development and use of rules and regulations aimed at combatting and preventing the spread of the disease. However, it is key for duty bearers to ensure that laws, policies and strategies designed to respond to public health emergencies include adequate and effective accountability framework, and are informed and guided by domestic and international human rights obligations. We do not believe the proposed regulations meet this criteria. Furthermore, we clearly observed that restrictive and isolation measures and strategies adopted to manage the spread of Covid-9 proved ineffective after a short period of their implementation. Their sustained enforcement engendered incalculable social-economic harm. Should we again experience a similar event, it will be ill-advised to resort to such a blunt and generalised response. Rather, we must plan and be prepared to investigate, analyse and develop specific and targeted measures that are responsive to unique and specific circumstance.

Yours sincerely,

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