

To: The Department of Health
 For attention: Ms Tsakani Furumele
 Per email: tsakani.furumele@health.gov.za

Re: Comments on the Regulations relating to the surveillance and the control of notifiable medical conditions: Amendment

Date: 13 April 2022 (Deadline for comment: Friday, 15 April 2022)

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INTRODUCTION:

Dear Honourable Minister Dr Phaala,

- We refer to your [invitation](#) for written submissions on the amendments (the “Draft Health Regulations”) you are considering making to the 2017 Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions (“the [Existing Regulations](#)”).

2. We note that the [Draft Health Regulations](#) will be made in terms of the National Health Act's¹ provisions empowering the Minister of Health to do so after consultation with the National Health Council or the Office of Health Standards Compliance.²
3. President Ramaphosa addressed the nation on [22 March 2022](#) and [4 April 2022](#). Our understanding from these respective statements is that these [Draft Health Regulations](#) will be the legal instrument used to manage COVID-19, as opposed to the disaster management Regulations used during the National State of Disaster.
4. Government [terminated](#) the National State of Disaster with effect from [midnight](#), 4 April 2022. This marks two years and three weeks since Minister Dlamini-Zuma first declared the COVID-19 pandemic a national disaster on [15 March 2020](#). In Minister Dlamini-Zuma's [notice](#) terminating the State of Disaster, she said that certain regulations ("the Transitional Regulations") (made under the Disaster Management Act), will remain in effect for 30 days after the State of Disaster ends.
5. We note that Deputy Minister Dr Mmaphaka Tau, in his capacity as the Head of Disaster Management Centre, [specifically revoked the classification of the COVID-19 pandemic as a national disaster](#) and rather called upon all sectors of society to work together to reduce the impact of the COVID-19 disease.
6. *FOR SA* assumes throughout our submission, that the [Draft Health Regulations](#) are intended to become operational immediately after the aforementioned Transitional Regulations' expiration on midnight, 4 May 2022.

ABOUT FOR SA, AND OUR INTEREST IN THE BILL:

7. *Freedom of Religion South Africa NPC (FOR SA)* is a legal advocacy organisation working to protect and promote the constitutional right to religious freedom (section 15 of the Constitution) in South Africa.
8. In the matter of COVID-19 and the impact of the Regulations on the religious community of South Africa, *FOR SA* has been mandated by religious leaders and organisations representing between 11 million and 18,5 million people (including 10 million people from the African Indigenous and Spirituality Churches) from a cross-spectrum of churches, denominations and faith groups, to engage with Government and make submissions on their behalf.

¹ Act 61 of 2003.

² Section 90(1)(k).

9. The intention of these Draft Health Regulations are to manage COVID-19 going forward once the Transitional Regulations expire.³ As such, and because the constitutional right to freedom of religion, belief and opinion (hereafter “*the right to religious freedom*” found in section 15) and the rights of religious communities (section 31) have been directly affected by (both the national and provincial) Government’s response to COVID-19, our constituency has a direct interest in this matter.

EXECUTIVE SUMMARY OF SUBMISSIONS:

10. *FOR SA* is mandated by its constituents to make the following submissions on their behalf:
11. These Regulations will be in place long after COVID-19 has become endemic. The provisions therefore need to look ahead to future events because they grant the State substantial power over the individual and their choices to manage their own health. While the Draft Health Regulations may on the face of it seem justifiable when dealing with a pandemic such as COVID-19, the powers that these Regulations grant the State are ripe for abuse by any government official with an ulterior purpose, because no checks and balances have been built into them.
12. *FORSA* is mandated to submit that the [Draft Health Regulations](#) unreasonably and unjustifiably limit *inter alia* the fundamental rights to dignity (section 10 of the Constitution), religious freedom (section 15 of the Constitution), freedom of association (section 18 of the Constitution) and of religious communities to practice their religion together (section 31 of the Constitution). Both religious people and religious organisations are affected.
13. Due to this unreasonable and unjustifiable limitation, the [Draft Health Regulations](#), which qualify as a law of general application,⁴ fail to pass the Constitution’s section 36 test⁵ and are unconstitutional.
14. In light of the above, *FORSA* is mandated to submit that the [Draft Health Regulations](#) require the following changes:
- 14.1. Our understanding of the [Draft Health Regulations](#) is that they are only applicable once something is listed as a notifiable medical condition (“NMC”). However, there are no clear parameters (such as criteria to be met for a disease to be deemed of sufficient “*public*”

³ See paras 2 and 3 above.

⁴ See paras 80 and 81 of this submission.

⁵ See paras 40 through 47 of this submission.

*health importance*⁶ or to pose a sufficient “*public health risk*”⁷ to be listed as a NMC, review or duration of its listing as a NMC etc.) given for what constitutes a NMC. Without these parameters being given the Regulations must be deemed void for vagueness;

14.2. We submit instead that the Regulations need to differentiate between a category 1, 2, 3 or 4 NMC limitation on fundamental rights – i.e. a category 4 NMC cannot limit constitutional rights in the same way and/or to the same degree as a category 1 NMC;

14.3. The Regulations need to make provision for consideration of the evidence of the severity of the disease, before determining the level of limitation of constitutional rights to ensure the limitation is proportional, reasonable and justifiable;

14.4. Regulation 15 should expressly exclude mandatory vaccination;

14.5. Regulation 15 should only impose mandatory medical examination, hospitalisation, quarantine, isolation and treatment, for a **category 1** NMC;

14.6. Regulation 16 should do away with requiring proof of vaccination;

14.7. Regulation 16 should only impose a limitation on gatherings for a **category 1 or 2** NMC; and

14.8. The Regulations should amend Regulation 20 in the [Existing Regulations](#), so that failure to comply with the Regulations is not a crime or subject to a limitless fine, which provision is extremely draconian.

15. **In addition**, FOR SA is mandated to call for the **National Health Act** to be amended as follows:

15.1. The Act needs to provide for the Minister’s listing of a NMC to be subject to public participation and for Parliament to have further public participation should it view the Executive’s consultations to be insufficient;

15.2. The Act needs to require the Minister to give reasons to Parliament for listing a condition as a NMC (i.e. to provide Parliament with the scientific reasons and/or data upon which the Minister is basing this decision);

⁶ Definition as per Regulation 1 of the [Existing Regulations](#).

⁷ Regulation 12(2) of the [Existing Regulations](#).

- 15.3. The Act needs to require the Minister to review the listing of NMCs periodically and to give reasons to Parliament for continuing to list a condition as a NMC (i.e. to provide Parliament with the scientific reasons and/or data upon which the Minister is basing the decision);
- 15.4. The Act needs to make it compulsory for the Minister to consult with the public regarding any proposed changes to the Regulations;
- 15.5. The Act needs to make it compulsory for the Minister to provide Parliament with reasons for any proposed changes to the Regulations, as well as a record of any meetings regarding the drafting of the proposed changes to the Regulations;
- 15.6. The Act needs to define the criteria for the declaration of a pandemic or an epidemic;
- 15.7. The Act needs to define the process for the declaration of pandemic or an endemic; and
- 15.8. The Act must define key concepts such as “*pandemic*”; “*endemic*”; “*ministerial advice*”; “*public health importance*”; “*public place*”; “*treatment*”.

SUBSTANTIVE SUBMISSIONS ON THE DRAFT HEALTH REGULATIONS:

COMMENTS ON SPECIFIC REGULATIONS:

Draft Regulation 15A:

16. This regulation would impose mandatory medical examination,⁸ hospitalisation,⁹ admission to a quarantine site,¹⁰ admission to an isolation site,¹¹ and treatment.¹²
17. The above may occur for merely having been exposed¹³ to someone with a NMC, or for being simply “*suspected of having contracted*”¹⁴ a NMC.
18. Treatment is undefined and could therefore include mandatory vaccination. Many religious people have sincere religious objections to getting certain vaccinations or other medical procedures. This provision is an extremely far-reaching limitation of various rights, specifically

⁸ Draft Regulation 15A(1)(c)(i).

⁹ Draft Regulation 15A(1)(c)(ii).

¹⁰ Draft Regulation 15A(1)(c)(ii).

¹¹ Draft Regulation 15A(1)(c)(ii).

¹² Draft Regulation 15A(1)(c)(iii).

¹³ Draft Regulation 15A(1)(c).

¹⁴ Draft Regulation 15A(1)(b).

the right to religious freedom (should the person have sincere religious objections to getting the treatment) and therefore their right to dignity. As set out later on in this submission, these sincere religious objections are protected by the right to religious freedom, even if the State should view these objections as being “*bizarre, illogical or irrational ... or are incapable of scientific proof*”.¹⁵ It should also be pointed out that this broad provision also limits the right to bodily integrity because it allows the State to prescribe what the best medical treatment and administer such without the permission of the recipient.

19. To date, there is no “law of general application” which makes a vaccination mandatory. In fact, the National Health Act, which is the subsidiary legislation empowering the Minister to make these Regulations, specifically states that a person needs to give informed consent to health care services¹⁶ and that they may not be treated against their will, unless failure to treat will result in a **serious risk to public health**.¹⁷
20. It is submitted that making a vaccination mandatory by using the [Draft Health Regulations](#), without the Executive (in this case the Minister) being required by either the National Health Act or the [Draft Health Regulations](#) themselves, to provide reasons for why a specific NMC is such a serious risk to public health that no other less restrictive means of addressing it are available and that it warrants contravening various entrenched rights - such as the rights to religious freedom,¹⁸ bodily integrity,¹⁹ and just administrative action²⁰ – means that it fails the limitation test set out in section 36.
21. Importantly, no court order is required for the above medical examination, hospitalisation, or treatment.²¹

Draft Regulations 15D and 15G:

22. These Regulations would impose isolation on an asymptomatic person,²² which asymptomatic person would not be able to self-isolate unless they meet the most stringent of requirements²³ that are completely disconnected from reality that most South African households live in –

¹⁵ [Prince v President, Cape Law Society, and Others 2002 \(2\) SA 794 \(CC\)](#) (“Prince 2”) at para 42.

¹⁶ Section 7.

¹⁷ Section 7(1)(d).

¹⁸ Section 15 of the Constitution of the Republic of South Africa, 1996.

¹⁹ Section 12(2) of the Constitution of the Republic of South Africa, 1996.

²⁰ Section 33 of the Constitution of the Republic of South Africa, 1996.

²¹ The need for a court order for a person who has not tested positive for medical examination, hospitalisation, or treatment should be understood as specifically excluded, not merely omitted, by virtue of Draft Regulation 15B(2) expressly requiring a court order should a person refuse to isolate or quarantine, and Draft Regulation 17(3) requiring a court to issue a warrant should a person who has tested positive refuse medical examination, hospitalisation, isolation, quarantine and treatment.

²² Draft Regulation 15D.

²³ Set out in Draft Regulation 15G.

including, but not limited to, separate well-ventilated bedrooms with ensuite bathrooms²⁴ and access to private doctors.²⁵

23. This goes beyond the position under the Disaster Management Act's Regulations,²⁶ which expressly stated that "*Any person who is a confirmed laboratory positive COVID-19 case and is asymptomatic is not required to isolate.*"²⁷
24. This severely limits the exercise of the right to religious freedom as an asymptomatic person will not be able to attend any religious gathering, whether a church service or a small group meeting.

Draft Regulation 16J:

25. This regulation would require proof of vaccination as an entry requirement for a venue to use 50% of its capacity during the COVID pandemic,²⁸ with an upper limitation on the number of unvaccinated people that can attend a gathering of 1000 people indoor and 2000 people outdoor, irrespective of the size of the venue.²⁹ (No provision is made for a negative COVID test.)
26. Religious organisations with large venues will not be able to operate at 50% of venue capacity without requiring their congregants to show proof of vaccination. Individuals who are unable to produce such a vaccination certificate, will not be allowed to set foot in a church.
27. This violates the following rights of an individual believer, including, but not limited to, the individual's right to dignity, religious freedom (as stated above, many people have sincere religious objections to taking a vaccine), and freedom of association (as they will be unable to go to a church of their choice without being vaccinated).
28. Furthermore, this violates of the following rights of a religious institution, including, but not limited to:
 - 28.1. **Religious freedom:** To the extent that this right applies to juristic persons,³⁰ such as religious institutions, this proposed regulation would infringe on their religious freedom as

²⁴ Draft Regulation 15G(2)(a).

²⁵ Draft Regulation 15G(1)(d).

²⁶ Disaster Management Act: Regulations: Adjusted alert level 1 during Coronavirus COVID-19 lockdown: Amendments gazetted on 1 February 2022, in [Government Gazette No. 45855](#).

²⁷ Regulation 7(1) of the Disaster Management Act: Regulations: Adjusted alert level 1 during Coronavirus COVID-19 lockdown: Amendments gazetted on 1 February 2022, in [Government Gazette No. 45855](#).

²⁸ Draft Regulation 16J(4).

²⁹ Draft Regulation 16J(5).

³⁰ Section 8(4) of the Constitution of the Republic of South Africa, 1996.

well, because it will put them in the invidious position of having to decide whether to be true to their faith or else respectful of the law³¹ by *either*.

28.1.1. requiring their congregants to get vaccinated (even if they hold religious objections to such vaccination) and thereby require their congregants to violate their sincerely, deeply held religious convictions and beliefs, *or*

28.1.2. hold “illegal” religious gatherings.

28.2. **Freedom of association:** As set out below,³² freedom of association encompasses religious institution’s right to autonomy and for the State to not become entangled in *inter alia* doctrinal matters. Many religious institutions hold doctrinal beliefs about the centrality of communal worship (i.e. attendance at religious gatherings) and some have sincere doctrinal positions against medical treatment, including being vaccinated. For the State to dictate to these religious institutions that they need to require their congregants to be vaccinated before allowing them to attend church, is for the State to become intimately involved in a doctrinal issue **and something which should be within the sole autonomy of the religious institution to decide.**

Draft Regulation 16M:

29. This regulation would empower Cabinet Ministers to share advice amongst themselves to contain a NMC, including advice regarding *inter alia* religious practices.³³
30. No further description or explanation is given, but it is submitted that this proposed regulation is to be understood as empowering various Cabinet Ministers to either advise the Health Minister regarding the issue of Directions or to themselves issue Directions, similar to those they issued during the National State of Disaster.
31. It is, therefore, reasonable to assume that religious practices may be regulated by such Ministerial “advice” – which would limit the rights to religious freedom and of religious communities to practise their religion together. (Thereby also affect various other rights, such as the rights to dignity and freedom of association).

³¹ [Christian Education SA v Minister of Education 2000 \(4\) SA 757 \(CC\)](#) at para 35 where our Constitutional Court said that the “State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law”

³² See paras 74 through 79.

³³ Draft Regulation 16M(f).

32. It is impossible to determine the purpose of this provision because of the manner in which it is drafted. However, it would be an unprecedented erosion of freedom for any Minister to prescribe to the religious communities regarding how they should worship.

ADDITIONAL CONCERNS:

33. The above limitations on the aforementioned rights seem to be in place indefinitely as long as a disease is listed as a NMC.
34. The Minister has the sole discretion to list something as a NMC in “*Annexure A, Tables 1, 2 or 3*”, of the [Draft Health Regulations](#). Neither the [Draft Health Regulations](#), nor the National Health Act, require that the Minister: consult with the public and/or Parliament, or give reasons for listing a disease as a NMC.
35. Neither the [Draft Health Regulations](#), nor the National Health Act differentiate between a category 1, 2, 3 or 4 NMC, and simply consider the “*risk of transmission*” as opposed to the severity of the disease, for purposes of the limitations on rights.
36. Neither the [Draft Health Regulations](#), nor the National Health Act, define the criteria and process for a disease to be declared a pandemic or an endemic.
37. Neither the [Draft Health Regulations](#), nor the National Health Act, define key concepts (repeatedly used in the [Draft Health Regulations](#)), including, but not limited to:
- 37.1. “*pandemic*”;
 - 37.2. “*endemic*”;
 - 37.3. “*ministerial advice*”;
 - 37.4. “*public health importance*”;
 - 37.5. “*public place*”;
 - 37.6. “*treatment*” etc.
38. The [Draft Health Regulations](#) do not exist in isolation. They are the proposed changes to the [Existing Regulations](#). Importantly, the [Draft Health Regulations](#) do not propose any change to Regulation 20 of the [Existing Regulations](#). Regulation 20 makes it a criminal offence to fail to comply with its provisions, and institutes a sanction of an unspecified fine and/or 10 years’ imprisonment. Should the [Draft Health Regulations](#) be promulgated, failure to abide by them, will, therefore, be a crime with a possible sentence of a decade in jail.

39. The above show how the [Draft Health Regulations](#) limit the entrenched rights to dignity, religious freedom, freedom of association, and the right of religious communities to practise their religion together (without State interference).

SECTION 36 TEST - JUSTIFIABILITY OF INFRINGEMENTS:

40. The [Draft Health Regulations](#), which qualify as a law of general application,³⁴ limit various rights entrenched in the Bill of Rights and, therefore, have to meet the requirements of section 36 of the Constitution.

Section 36 Analysis:

41. The nature of the rights:

41.1. The implicated rights of religious freedom (and therefore, because of its close link with religious freedom, the right to dignity), freedom of association are rights foundational to our democracy.³⁵

41.2. Indeed, dignity and freedom are also values foundational to our democracy.³⁶

41.3. The nature of the rights involved therefore, is that the rights are of utmost importance and go to the very core of our democratic society.

42. The importance of the purpose of the limitation:

42.1. The purpose of the [Draft Health Regulations](#), as per these statements by President Ramaphosa on [22 March 2022](#) and [4 April 2022](#) respectively, is to manage COVID-19 now that South Africa is no longer in a National State of Disaster.

42.2. It is worth pointing out that we will no longer be in a state of disaster, precisely because COVID-19 is no longer seen as requiring such extraordinary measures. As stated by the President in his speech to the nation on 4 April 2022 the context we find ourselves in now is one where although “*the virus continues to circulate, it is not causing the same levels of severe illness that requires hospitalisation or the same number of deaths...these conditions no longer require that we remain in a National State of Disaster*”, and “*in the context of a free and open democratic society, the additional powers that a state of*

³⁴ See paras 80 and 81 of this submission.

³⁵ See for example Prince 1 at para 25 where the Constitutional Court talks specifically about religious freedom being right that is the hallmark of a democratic society and a right that is of fundamental importance. See also [De Lange v The Presiding Bishop of the Methodist Church of Southern Africa 2015 \(1\) SA 106 \(SCA\)](#) at para 31.

³⁶ Section 1(a) of the Constitution of the Republic of South Africa, 1996.

disaster provides are temporary and limited. They should be maintained only as long as they are absolutely necessary”.

42.3. The above is amplified by the fact that Deputy Minister Dr Mmaphaka Tau, in his capacity as the Head of Disaster Management Centre, [specifically revoked the classification of the COVID-19 pandemic as a national disaster](#) and rather called upon all sectors of society to work together to reduce the impact of the COVID-19 disease.

42.4. Internationally other countries are all foregoing similar infringements on citizens’ rights.

42.5. Scientific authorities say South Africa has reached the [convalescent](#) (i.e. recovery) phase from COVID-19, where we have arrived at the tail-end of the epidemic looking at the number of deaths that will transpire from COVID-19 during 2022, [relative to](#) the number of deaths that will transpire from other preventable causes of death.

42.6. In this South African study,³⁷ it was found that antibodies are present in:

42.6.1. 56% of those under 12 years of age (who were all unvaccinated);

42.6.2. 80% of those over 50 (including 70% if unvaccinated and 93% if vaccinated); and

42.6.3. 85% of those living in high-density inner-city areas.

42.7. Scientific experts, such as Prof Shabir Madhi³⁸, [have also said that](#) vaccination status and/or goals are now irrelevant: *“Government’s target of 70% of the population being vaccinated is now irrelevant, as between 80% and 85% of the population have boosted immunity against the virus, either from previous infection, the vaccine, or a combination of both.”*

42.8. The importance of the [Draft Health Regulations’](#) purpose (managing COVID-19) is, therefore, not critical enough to justify a state of disaster (whether national, provincial or local), or a State of Emergency.³⁹

43. [The nature and extent of the limitation:](#)

43.1. As shown in paragraphs 16 through 39 above, the [Draft Health Regulations](#) limit the entrenched rights to dignity, religious freedom, freedom of association, and the right of religious communities to practise their religion together in a [fundamental way](#).

³⁷ See for example, [“Population Immunity and Covid-19 Severity with Omicron Variant in South Africa”](#) by Prof Madhi *et al*, The New England Journal of Medicine, 23 February 2022.

³⁸ Professor of vaccinology at the University of the Witwatersrand.

³⁹ Regulated by section 37 of the Constitution of the Republic of South Africa, 1996.

44. The relation between the limitation and its purpose:

44.1. Limiting these rights in such a fundamental way to manage COVID-19, is extreme and *ipso facto* unreasonable given the current context of the disease.

45. Less restrictive means to achieve the purpose:

45.1. Given that we are no longer in a situation that requires a state of disaster or emergency to be declared, it is submitted that Government should allow individuals to take responsibility for protecting their health and the health of others.

Section 36 Conclusion:

46. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is **reasonable and justifiable** in an open and democratic society based on human dignity, equality and **freedom**.

47. In light of the above cursory analysis of the factors, specifically the nature of the rights involved and the importance of the purpose of the limitation, it is submitted that the [Draft Health Regulations](#)' proposed limitations on the various fundamental rights of both religious people and organisations, are **unjustifiable and unreasonable**, and therefore, **unconstitutional**.

LEGAL FRAMEWORK:

A: INTERNATIONAL LEGAL FRAMEWORK:

48. In terms of section 39(1)(b) of the South African Constitution, a court "**must consider international law**" when interpreting the Bill of Rights.

49. In addition, section 232 of the Constitution states that **customary international law is law** in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

50. Finally, section 233 of the Constitution requires that every court, when interpreting any legislation, "**must prefer**" any reasonable interpretation that is consistent with international law.

51. It would thus be prudent for the Department to be take cognisance of the position on the affected fundamental rights, specifically the right to religious freedom, in international law instruments that are binding on and/or have been agreed to by South Africa. A cursory overview is provided below:

52. South Africa has signed, *inter alia*, the following international and regional treaties and declarations protecting the fundamental right to religious freedom:
- 52.1. The Universal Declaration of Human Rights (UDHR);⁴⁰
 - 52.2. The International Covenant on Civil and Political Rights (ICCPR);⁴¹
 - 52.3. The African Charter on Human and People's Rights (Banjul Charter);⁴²
 - 52.4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief;⁴³
 - 52.5. The International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD");⁴⁴ and
 - 52.6. Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban.⁴⁵
53. All of these treaties and declarations are explicit in their protection of *inter alia* the fundamental right to religious freedom – which includes as an integral part the right to manifest one's religious convictions and beliefs in public through observance and practice.

⁴⁰Although not ratified by South Africa, this can be argued to be binding on the Republic as customary international law (in accordance with s232 of the Constitution), because it is the foundation of international human rights law.

Article 18 states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 20 states that everyone has the right to freedom of association.

⁴¹ [Ratified](#) by South Africa on 10 Dec 1998.

Article 18 of the ICCPR provides that everyone has the right to religious freedom and that this includes the freedom to meet in community with others to manifest such belief in worship, observance, practice and teaching. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Article 22 provides that everyone has the right to freedom of association.

⁴² [Ratified](#) by South Africa on 9 Jun 1996.

Article 8 guarantees that freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Article 10 states that every individual shall have the right to free association provided that he abides by the law.

⁴³See [Christian Education South Africa v Minister of Education 2000 \(4\) SA 757](#) at para 40, where the Constitutional Court considers the Declaration and seems to indicate it considers it binding on South Africa.

Article 1 states that everyone shall have the right to freedom of thought, conscience and religion, and that this right shall include the freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice. Freedom to manifest one's religion or belief may be subject only to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 6 expands on exactly what is meant by religious freedom in article 1, expressly stating that it includes the freedom to worship or assemble in connection with that religion or belief.

⁴⁴ [Ratified](#) by South Africa on 10 Dec 1998.

Article 5 requires the State to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of *inter alia* the right to freedom of thought, conscience and religion and the right to freedom of association.

⁴⁵ Article 8 recognises that religion, spirituality and belief play a central role in the lives of millions of women and men, and in the way they live and treat other persons. Religion, spirituality and belief may and can contribute to the promotion of the inherent dignity and worth of the human person and to the eradication of racism, racial discrimination, xenophobia and related intolerance.

Article 47 urges states to guarantee the rights of persons belonging to national or ethnic, religious and linguistic minorities, individually or in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference, and to participate effectively in the cultural, social, economic and political life of the country in which they live, in order to protect them from any form of racism, racial discrimination, xenophobia and related intolerance that they are or may be subjected to.

B: SOUTH AFRICAN LEGAL FRAMEWORK:

Constitution:

54. **Duties of the State:**

54.1. In terms of section 8(1) of the [Constitution](#), the Bill of Rights applies to all law, and binds the State, including Parliament.

54.2. Section 7(2) requires the State to respect, protect, promote and fulfil (all) the rights in the Bill of Rights.

55. **Limiting a right:**

55.1. Section 7(3) of the Constitution states that a right contained in the Bill of Rights can be limited by section 36, or “*elsewhere in the Bill*”.⁴⁶

55.2. Section 36(2) of the Constitution expressly reiterates the above, stating that except as provided for in section 36(1), no law may limit any right entrenched in the Bill of Rights.

56. **Interpreting a law:** Importantly, in the current situation of drafting Regulations, section 39(2) of the South African Constitution requires that any law - which as set out in paragraphs 45 and 46 below includes Regulations - must be interpreted in a way that promotes “*the spirit, purport and objects of the Bill of Rights*”.

57. **Hierarchy of rights:** The Constitution also knows no hierarchy of rights.⁴⁷ Again, the State has a duty to protect and promote all the rights in the Bill of Rights, without preferring one over another.

Dignity:

58. Dignity is a foundational value of our Republic,⁴⁸ and also a right that is expressly protected in section 10 of the Constitution, including every person’s right to have their dignity respected and protected. This right can only be limited in accordance with section 36 of the Constitution. (To the extent that the [Draft Health Regulations](#) will therefore potentially limit the right guaranteed in section 10, it needs to pass the section 36 limitations test.)

⁴⁶ I.e. by an internal limitation clause, such as for example, in the case of section 16(2), for example.

⁴⁷ See, for example, [Independent Newspapers \(Pty\) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another 2008 \(5\) SA 31 \(CC\)](#) at para 84; [The Citizen 1978 \(Pty\) Ltd and Others v Mcbride \(Johnstone and Others, Amici Curiae\) 2011 \(4\) SA 191 \(CC\)](#) at para 148.

⁴⁸ Section 1(a) of the Constitution of the Republic of South Africa, 1996.

Religious freedom rights:

59. The Constitution expressly protects the right to freedom of conscience, religion, thought, belief and opinion (commonly referred to as “religious freedom”) in section 15 of the Constitution - without any internal limitation (as is the case in section 31). This right applies to both individuals and juristic persons⁴⁹ such as, for example, religious institutions and organisations. This right can only be limited in accordance with section 36 of the Constitution. (To the extent that the [Draft Health Regulations](#) will, therefore, potentially limit the right guaranteed in section 15, it needs to pass the section 36 limitations test.)

Freedom of association:

60. Freedom of association is expressly protected by section 18 of the Constitution. This right can only be limited in accordance with section 36 of the Constitution. (To the extent that the [Draft Health Regulations](#) will, therefore, potentially limit the right guaranteed in section 18, it needs to pass the section 36 limitations test.) This freedom also extends to, and protects, religious associations.

Religious communities:

61. The Constitution also protects the rights of religious communities to collectively practise their religion and to form, join, and maintain religious associations (without State interference) in section 31. This right to “maintain” religious institutions includes the right to exclude non-adherents from (membership, or leadership of) those institutions.⁵⁰ Section 31 is subject to an internal limitation that states that it may not be exercised in a manner that is inconsistent with any provision of the Bill of Rights. (In this sense, section 31 overlaps with section 18 of the Constitution which has similar implications, but which does not any internal limitation).

Case Law:

62. The ambit of aforementioned rights to dignity, religious freedom and freedom of association have been interpreted by our Constitutional Court as follows:

Dignity:

63. The Constitutional Court has expressly stated the close link between the rights to dignity and religious, by saying that “[t]he right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity... For many believers, their relationship with God or creation is central to all their activities”⁵¹ and that

⁴⁹ Section 8(4) of the Constitution of the Republic of South Africa, 1996.

⁵⁰ *Taylor v Kurtstag* 2005 (1) SA 363 (W). See also, by way of analogy, *Wittmann v Deutscher Schülverein*, Pretoria 1998(4) SA 423 (T).

⁵¹ [Christian Education SA v Minister of Education 2000 \(4\) SA 757 \(CC\)](#) at para 36. [Own emphasis.]

the ... “*State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law*”⁵².

64. The Court has also stated that “[r]eligious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality.”⁵³

Religious Freedom:

65. The Constitutional Court has repeatedly given judgments that cover the scope of the right to religious freedom contained in section 15 of the Constitution, including its intimate relationship with other fundamental rights, such as, for example dignity,⁵⁴ and close connection with the institution of democracy itself. A cursory overview of the Court’s most decisive declarations is provided below:

66. This right protects even beliefs which some may find bizarre, illogical or irrational and which are incapable of scientific proof.⁵⁵

67. Amongst others, the Court has held that the right to religious freedom includes not only “*the right to entertain such religious beliefs as a person choose, [but] the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination”⁵⁶ and that “*freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs*”.⁵⁷*

68. Furthermore, on just how closely connected this right is with the institution of democracy and with a free society, the Court has said that “[t]he constitutional right to practise one’s religion ... is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society”⁵⁸.

Freedom of Association – autonomy of religious associations:

69. The freedom of individuals to share and practise the same interests of substance (such as those beliefs which pertains to a religious association) with one another, is important because it forms

⁵² [Christian Education SA v Minister of Education 2000 \(4\) SA 757 \(CC\)](#) at para 35.

⁵³ [MEC for Education, KwaZulu-Natal & others v N Pillay & Others 2008 \(1\) SA 474 \(CC\)](#) at para 62. [Own emphasis].

⁵⁴ See paras 63 and 64 above.

⁵⁵ Prince 2 at para 42.

⁵⁶ [Christian Education SA v Minister of Education 2000 \(4\) SA 757 \(CC\)](#), at para 36 citing [S v Lawrence](#); [S v Negal](#); [S v Solberg 1997 \(4\) SA 1176 \(CC\)](#); [1997 \(10\) BCLR 1348 \(CC\)](#).

⁵⁷ [S v Lawrence](#); [S v Negal](#); [S v Solberg 1997 \(4\) SA 1176 \(CC\)](#); [1997 \(10\) BCLR 1348 \(CC\)](#) at para 92. [Own emphasis].

⁵⁸ [Prince v President, Cape Law Society, and Others 2001 \(2\) SA 388 \(CC\)](#) (“Prince 1”) at para 25.

a foundational part of a democratic and pluralistic society. This freedom implies the right that an individual has to collectively experience and practise their views on “freedom” itself, with other like-minded individuals.

70. As held by the Supreme Court of Appeal (SCA) in [De Lange v The Presiding Bishop of the Methodist Church of Southern Africa](#),⁵⁹ “our Constitution protects an individual’s rights to practise his or her religion as well as the rights of members of a particular religion to practise that religion in association with others and in conformity with the dictates, precepts, ethical standards and moral discipline which that faith exacts.”⁶⁰
71. A religious association is an example of a collectively exercised interest, where the members fulfil and maintain not only their basic right to religious freedom, but also their basic right to human dignity (section 10 of the Constitution), mainly due to their acceptance of, and participation in, the core creeds of such an association. It is such creeds that, in many instances, provide the framework for the believer’s sense of self, which adds to a dignified experience for the believer.⁶¹
72. In the context of religious associations, freedom of association “guarantees an individual the right to choose his or her associates, and a group of individuals their rights to choose their associates. The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform”.⁶²
73. In other words, freedom of association implies institutional autonomy.
74. Indeed, it is trite law that, read together, sections 15, 18 and 31 of the Constitution guarantee religious institutions a certain degree of institutional autonomy - which means that religious institutions have the right to decide “internal matters” (matters of doctrine and governance of the organisation), internally. Protecting this autonomy is deemed vital to a conscience-honouring society. See, for example, [De Lange v The Presiding Bishop of the Methodist Church of Southern Africa](#) where the SCA stated:⁶³

⁵⁹ 2015 (1) SA 106 (SCA).

⁶⁰ [De Lange v The Presiding Bishop of the Methodist Church of Southern Africa 2015 \(1\) SA 106 \(SCA\)](#) at para 40. [Own emphasis].

⁶¹ De Freitas, “Freedom of Association as a Foundational Right”, p 267.

⁶² *Taylor v Kurtstag* at para 37. [Own emphasis].

⁶³ At para 31. [Own emphasis].

“Protecting the autonomy of religious associations is considered a central aspect of protecting religious rights. Indeed such protection has been described as ‘vital to a conscience-honouring social order’.

75. Religious institutions have their own doctrines and faith tenets, based on their holy texts, traditions, customs, etc. According to our Constitution, they have the freedom to operate their association in-line with their doctrines and faith tenets, and the State should not interfere. This is known as the **doctrine of entanglement**.
76. Our courts’ decisions on the **autonomy of religious associations** and the **doctrine of entanglement** make it clear that the State should not involve itself in, and pronounce on, “internal” matters of a religious association:
“As the main dispute in the instant matter concerns the internal rules adopted by the Church, such a dispute, as far as is possible, should be left to the Church to be determined domestically and without interference from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.”⁶⁴
77. Furthermore, from the international law cited above, it is evident that religious freedom is explicitly recognised in international treaties,⁶⁵ and like section 8(4) of the South African Constitution, the treaties further recognise that the right to religious freedom is not limited to individuals but also extends collectively to religious communities and associations. This is so, because religious communities are the necessary means by which individuals effectively exercise their religious freedom rights. The need for churches and religious organisations to operate freely without State intervention is also something that has been repeatedly recognised and protected by foreign courts.⁶⁶

⁶⁴ [De Lange v The Presiding Bishop of the Methodist Church of Southern Africa 2015 \(1\) SA 106 \(SCA\)](#) at para 39. [Own emphasis.]

⁶⁵ See para 52 above.

⁶⁶ See for example: [Hasan and Chaush v Bulgaria](#) Application no 30985/96, judgment on 26 October 2000. § 62; [Metropolitan Church of Bessarabia and Others v Moldova](#) Application no 45701/99, judgment on 13 December 2001. §117; [Holy Synod of the Bulgarian Orthodox Church and Others \(Metropolitan Inoketiy\) v Bulgaria](#) Applications nos 412/03 and 35677/04, judgment on 22 January 2009. §119; [Obst v Germany](#), No 425/03, judgment 23 September 2010, paras 48 to 49; [Sindicatul “Pastorul Cel Bun” v Romania](#) No 2330/09, judgment 9 July 2013; [Nagy v Hungary](#) Application no 56665/09; [Highwood Congregation of Jehovah’s Witnesses \(Judicial Committee\) v Wall](#) 2018 SCC 26; [National Labour Relations Board v Catholic Bishop of Chicago](#) 440 U.S. 490 (1979); [Hosana-Tabor Evangelical Lutheran Church and School v. EEOC](#) 65 U.S. 132 S.Ct. 694 (2012);

78. What the above brief examination of the relevant case law shows, is that religious freedom is inextricably linked with other fundamental rights, including the rights to freedom of association and of religious communities to practise their religion together. Which rights the State is obligated to respect and protect these rights and can only limit them in-line with section 36 of the Constitution.
79. Furthermore, we see that just as individuals can make up their own minds about what they do or do not believe, churches can make up their own minds about their doctrines, teachings and beliefs without State interference. The State's jurisdiction does not extend to the doctrinal and internal affairs of religious institutions and internal church decisions that affect the church's faith and missions are largely immune to government regulation.

REGULATIONS AS A LAW OF GENERAL APPLICATION:

80. The Supreme Court of Appeal (SCA) has expressly held that "*Regulations qualify as a law-making instrument and, by dint of their legislative character, they are a law of general application.*"⁶⁷
81. It is worth pointing out that the SCA held the above when having regard to Regulations made by the COGTA Minister⁶⁸ under the Disaster Management Act⁶⁹ for the same purpose as these Draft Health Regulations – i.e. to manage the COVID-19 pandemic.

FOR SA's RECOMMENDATIONS:

82. In light of the above, *FOR SA* is mandated to submit that amendments are required to both the Draft Health Regulations, and the National Health Act in terms of which⁷⁰ the Draft Health Regulations will be made.
83. In light of the above, *FORSA* is mandated to submit that the Draft Health Regulations require the following changes:
- 83.1. Our understanding of the Draft Health Regulations is that they are only applicable once something is listed as a notifiable medical condition ("NMC"). However, there are no clear parameters (such as criteria to be met for a disease to be deemed of sufficient "*public health importance*"⁷¹ or to pose sufficient "*public health risk*"⁷² to be listed as a NMC,

⁶⁷ Esau at para 119.

⁶⁸ Esau at paras 83 to 84.

⁶⁹ Act 57 of 2002.

⁷⁰ Section 90(1)(k) of the Act.

⁷¹ Definition as per Regulation 1 of the Existing Regulations.

⁷² Regulation 12(2) of the Existing Regulations.

review or duration of its listing as a NMC etc.) given for what constitutes a NMC. Without these parameters being given the Regulations must be deemed void for vagueness;

83.2. We submit instead that the Regulations need to differentiate between a category 1, 2, 3 or 4 NMC limitation on fundamental rights – i.e. a category 4 NMC cannot limit constitutional rights in the same way and/or to the same degree as a category 1 NMC;

83.3. The Regulations need to make provision for consideration of the evidence of the severity of the disease, before determining the level of limitation of constitutional rights to ensure the limitation is proportional, reasonable and justifiable;

83.4. Regulation 15 should expressly exclude mandatory vaccination;

83.5. Regulation 15 should only impose mandatory medical examination, hospitalisation, quarantine, isolation and treatment, for a **category 1** NMC;

83.6. Regulation 16 should do away with requiring proof of vaccination;

83.7. Regulation 16 should only impose a limitation on gatherings for a **category 1 or 2** NMC; and

83.8. The Regulations should amend Regulation 20 in the [Existing Regulations](#), so that failure to comply with the Regulations is not a crime or subject to a limitless fine, which provision is extremely draconian.

84. **In addition**, *FOR SA* is mandated to call for the **National Health Act** to be amended as follows:

84.1. The Act needs to provide for the Minister's listing of a NMC to be subject to public participation and for Parliament to have further public participation should it view the Executive's consultations to be insufficient;

84.2. The Act needs to require the Minister to give reasons to Parliament for listing a condition as a NMC (i.e. to provide Parliament with the scientific reasons and/or data upon which the Minister is basing this decision);

84.3. The Act needs to require the Minister to review the listing of NMCs periodically and to give reasons to Parliament for continuing to list a condition as a NMC (i.e. to provide Parliament with the scientific reasons and/or data upon which the Minister is basing the decision);

- 84.4. The Act needs to make it compulsory for the Minister to consult with the public regarding any proposed changes to the Regulations;
- 84.5. The Act needs to make it compulsory for the Minister to provide Parliament with reasons for any proposed changes to the Regulations, as well as a record of any meetings regarding the drafting of the proposed changes to the Regulations;
- 84.6. The Act needs to define the criteria for the declaration of a pandemic or an epidemic;
- 84.7. The Act needs to define the process for the declaration of pandemic or an endemic; and
- 84.8. The Act must define key concepts such as “*pandemic*”; “*endemic*”; “*ministerial advice*”; “*public health importance*”; “*public place*”; “*treatment*”.

Kind regards,

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END.