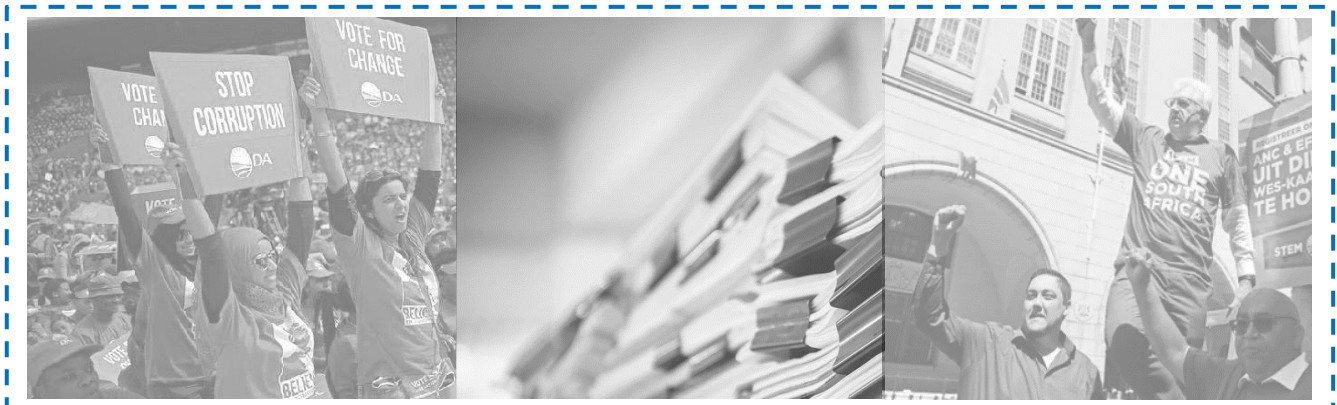




National Health Act, 2003 Regulations relating to the surveillance and the control of Notifiable Medical Conditions: Amendment

Official Submission of the Democratic Alliance



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1. Introduction

On the 15th March 2022, the Minister of Health published draft Regulations in the Government Gazette for the intention to amend the National Health Act 61 of 2003 (“the Act”) and allowed any interest persons to provide substantiated comments of the proposed regulations within 30 days from the date of publication.

In essence, the Regulations relate to the Surveillance and the Control of Notifiable Medical Conditions (“the Regulations”) and are an attempt to continue to regulate the “lockdown levels” and restrictions of the Covid-19 pandemic now that the National State of Disaster, as declared by the Minister of Cooperative Governance and Traditional Affairs under the powers of the Disaster Management Act 57 of 2002, has been terminated. According to the Regulations, the power to put in place further lockdowns and restrictions will now vest in the Minister of Health and will prevent any oversight from Parliament as had been done in the National State of Disaster.

The Regulations intend to include Covid-19 as a Notifiable Medical Conditions (“NMC”) in the set list of NMC’s as contained in Annexure A, Tables 1-3, of the Act which will then allow the Regulations to restrict and limit certain rights as well as force certain practices on those who test positive for Covid-19.

This submission provides a general overview of the potential clauses and how they go against the basic human rights as contained in the Bill of Rights in the Constitution, should they come into effect.

For two years, South Africa has been under a continuous lockdown and if the Regulations come into effect, it will provide the Minister of Health to continue the draconian lockdown levels and restrictions which include *inter alia* the following:

- The forced quarantine, without the option of refusal, in the event of a positive Covid-19 case
- Forced testing and taking of bodily samples, without the option of refusal, in the event of a positive Covid-19 case, or worse, upon the mere suspicion of a positive test.
- Forced treatment or providing of prophylaxis, without the option of refusal, in the event of a positive test. Currently, the only lawful prophylaxis for Covid-19 are the various vaccines as approved by the South African Health Products Regulatory Agency (“SAHPRA”).
- Trivial limitations on gatherings and funerals without the need for scientific based evidence or input which will continue to destroy small businesses and the entertainment and restaurant industry

More worryingly, the Regulations are completely out of touch with reality as certain requirements that need to be followed simply cannot be followed by the majority of ordinary citizens purely because they constantly live in economic hardship. The Minister will, in essence, **be criminalising** the people of South Africa **purely** on the basis that they are poor!

While the Minister of Health has stated that the Regulations are being put in place to provide further regulations to all NMC's, it is clear from the drafting of the Regulations that they are specifically inserting clauses that relate only to Covid-19.

We now provide further and more in-depth submissions on each of the concerns raised.

2. Confirmed Positive Tests

Clause 15A of the Regulations intends to be added to the current regulations of the Act. The clause provides for situations where a person has tested positive for a NMC. Where a person has been confirmed as a clinical or laboratory confirmed case, they may **not** refuse to submit to a medical examination, including the taking of any bodily sample. Further, they cannot refuse to be admitted to a health facility, quarantine or isolation site or submit to mandatory prophylaxis or treatment in order to prevent transmission.

Most notable from this provision is that the clause allows for cases where a positive test confirmation is not necessarily even needed, but the *mere suspicion* of a positive case will be sufficient to be subjected to the above. It also includes those who have come into contact with a person who has been confirmed as a positive case.

This clause thus would allow the Department of Health to subject any person who has tested positive for Covid-19, suspected of being a positive case or has being in close proximity to a positive case to:

- mandatory quarantine; and/or
- mandatory medical facility; and/or
- mandatory taking of bodily samples

These measures go directly against the right to freedom of movement and the right to bodily integrity as set out in the Constitution of South Africa. Additionally, a person **must** submit to mandatory prophylaxis or treatment. The only prophylaxis or treatment, at this stage, for Covid-19 is the vaccination¹.

¹ SAHPRA has only approved the use of various vaccinations in relation to Covid-19; Marc Mendelson, Shabir A Madhi, Jeremy Nel, Glenda Gray, Regina Osih and Francois Venter: The incoherent and illogical new government Covid-19 regulations are the real state of disaster, 22 March 2022

3. Quarantining/Isolation

The Regulations make provision for mandatory quarantining and isolation in the event of a Covid-19 positive case. The quarantine period will be as per the prescribed time period, determined by the Minister from time to time.² However, the time periods of isolation and/or quarantining in certain aspects have already been removed by the current Disaster Management Act Regulations (such as asymptomatic cases). Should a person refuse to be isolated or quarantined, they can be compelled by Court Order.³

It seems that this clause has been drafted with the threat of Covid-19 in mind during the first two waves of the virus where South Africa had not yet achieved any immunity and where the variant of the virus was more deadly than the current Omicron variant. It is illogical to provide for possibly **stricter** measures where the threat of the virus has been reduced substantially over the last quarter of 2021.

4. Requirements for Self-Isolation/ Self-Quarantine

The Regulations allow for persons testing positive to self-isolation or self-quarantine in their own homes⁴. The Regulations set out the minimum requirements which must be complied with if a person is to use their own home. When reviewing the list of requirements, it is apparent that whoever drafted the Regulations was completely out of touch with the reality of how many South African citizens are living day to day.

The following are **strict** requirements as per the Regulations:

- internet and phone that would allow that person to be contacted daily to provide updates on their symptoms; and
- access to a private physician; and
- a separate bedroom and bathroom from the rest of a house; and
- disposable cutlery or cutlery that is washed and kept separately; and
- Lastly, they must have a thermometer in the home to take daily temperatures.⁵

<https://www.dailymaverick.co.za/article/2022-03-22-the-incoherent-and-illogical-new-government-covid-19-regulations-are-the-real-state-of-disaster/>

² Clause 15B(1)(a)-(c)

³ Clause 15B(2)

⁴ Clause 15G(1)

⁵ Clause 15G(1)(2)

Many South Africans do not have access to any of these items. Astonishingly, the Regulations require access to a private physician. This is a luxury that millions of South Africans simply do not have access to, as most South Africans rely on the public healthcare system or a simply do not have any access to a doctor whatsoever due to the location of their home. The Regulations will unfairly **criminalise** South Africans purely because they come from a poor background!

The requirement for a thermometer at every home is also puzzling as current evidence has shown that the taking of temperatures is highly inaccurate and could miss up to 50% of all positive cases⁶ in addition to the fact that not every symptomatic person suffers from a fever from the virus.

The fact that the Regulations require a separate bedroom and bathroom from the remainder of the home is, again, proof of the illogicalness of the Regulations. If one looks at the majority of how South African citizens are living, there are many families who live with multiple family members in a single bedroomed home, perhaps not even with an indoor toilet.

The Regulations only take into account those who are in the middle and upper classes of South Africa and completely neglect those in the lower classes and those living in extreme poverty conditions. It is inconceivable how the Regulations can be put into force and effect given many South African's economic position.

5. Measures to Contain the Spread

The Regulations make provision for contact tracing as well as a national database to enable tracing of persons who are known or reasonably suspected of having come into contact with a person with a NMC.⁷

The database is to ensure the Government records and maintains all necessary information necessary for the purposes of contact tracing.⁸ Laboratories will be required to submit all information to the database where any samples have been tested in relation to a NMC. The clause further requires all accommodation establishments to transmit all information of persons staying at that establishment, with their consent, to the national database.⁹

Within 6 weeks of the National State of Disaster having lapsed or terminated, all information held by the national database shall be de-identified and the information gained shall only be used for research and teaching purposes.¹⁰

⁶ US Food and Drug Administration (FDA): Non-contact Temperature Assessment Devices During the COVID-19 Pandemic <https://www.fda.gov/medical-devices/coronavirus-Covid-19-and-medical-devices/non-contact-temperature-assessment-devices-during-Covid-19-pandemic>

⁷ Clause 15H(2)

⁸ Clause 15H(3)

⁹ Clause 15H(9)(a) & (b)

¹⁰ Clause 15H(11)(a)-(c)

It is uncertain why the provision for contact tracing has been included in the Regulations as it has been proven by scientific evidence that contact tracing is not accurate. As per medical experts, they estimate that only 10% of all cases are successfully traced.¹¹ The remaining 90% go untraced. The National Coronavirus Command Council even did away with contact tracing at one point during the pandemic due to it not having any material impact on the number of active cases. The mandatory providing of personal information by accommodation establishments and laboratories may also be against the provisions of the Protection of Personal Information Act (POPIA). Accordingly, this clause should not be supported as its purpose is not backed up by any scientific evidence and is purely a waste of valuable resources which could be used elsewhere.

6. Travel

For those leaving South Africa, they require a full vaccination certificate or a negative PCR test not older than 72hrs.¹² PCR tests are known to be inaccurate, especially if the person is asymptomatic.¹³ A person can also carry the virus for longer than 72hrs without testing positive. Should a person have an elevated temperature or merely show symptoms consistent with an NMC, they may be subject to medical examinations which may include testing.¹⁴

This is a fruitless provision as it does nothing for the bettering of the healthcare situation in South Africa. If a person tests positive, they are required to go into mandatory isolation. As mentioned above, even today the rules on quarantining have drastically changed and now appear to regress back to the rules of the start of the pandemic. There should be no need for those exiting South Africa to have any requirements from leaving. If they had been positive prior to entering the airport/port, the “damage” would surely have been done and there should be no purpose to keep a person in South Africa for any longer than needed, especially when one has reference to the current weakened strain of Covid-19 which poses a significantly lesser risk than prior variants.

Entering South Africa provides for the same set of criteria as those leaving South Africa. Experts have argued that this clause is also pointless as what material impact would a few positive persons make to an international pandemic where there may already be hundreds or thousands of active cases already within South Africa. The key to protecting oneself would be through vaccination, not preventing people from entering the country.¹⁵

It would only destroy the tourism industry and the economy as we saw in the first three waves of Covid-19. The potential measures that intend to be put in place, again, seem to go back to the time where there was panic over Covid-19, where we did not yet understand the virus,

¹¹ Marc Mendelson *et al, supra*

¹² Clause 16B(2)

¹³ Marc Mendelson *et al, supra*

¹⁴ Clause 16B(3) & (4)

¹⁵ Marc Mendelson *et al, supra*

nor did we have any form of vaccination or immunity. The Regulations seem to cater for a situation where we are exposed to the more deadly first or second variants of Covid-19 where we had no immunity whatsoever, this is simply not the case, scientifically or logically. We cannot force strict regulations on the people of South Africa, or even in future, for an event where we have already learnt so much about the virus, increased immunity and the fact that as of the date of writing, the entire National State of Disaster has been terminated.

The Regulations, comically, provide for the option of mandatory self-quarantining of a person should they chose to do so.¹⁶ This clause is provided for those coming into South Africa who either know or suspect they may test positive for Covid-19. To apply for self-quarantining upon arrival, a written request must be made to the Director General: Health 72 hours before the arrival date.

From experience with the various governmental departments within South Africa, it would be a fairy tale to ever expect a government official or department to be able to respond to a request of this nature within 72hrs of receiving the request. The addition of this clause is simply unrealistic as it would never be able to be met. It would be a complete waste of valuable resources which could be used elsewhere in the fight against Covid-19.

7. Funerals and Gatherings

Funerals and “after tears” events may be restricted to “a number of persons as may be guided by scientific evidence of the risk of transmission. During Covid-19, the attendance at funerals shall be limited to 100 people.”¹⁷

If one takes a strict approach to the interpretation of this clause, it essentially states that Government may restrict the number of people who may attend an event which *may* be guided by scientific evidence. In other words, they *may* take head of scientific evidence, but it is not peremptory. This could lead to potentially arbitrary limitations without any scientific backing as we saw in the early stages of lockdown in 2020.

The limitation on the number of people who may attend a funeral is also illogical and unreasonable. It is a blanket restriction which does not consider any of the surrounding factors such as:

- the risk of the current variant,
- number of daily infections/active cases;
- whether the funeral is held indoors or outside.

¹⁶ Clause 16C(4)

¹⁷ Clause 16I(2)

It is unreasonable in the sense that every other indoor and outdoor event is limited to 1000 and 2000 people, respectively. It does not make sense that funerals are treated or categorized differently.

Gatherings are also unnecessarily limited without sound scientific reasoning. Indoor events are limited to 1000 people whilst outdoor events are limited to 2000 people.¹⁸ This does not make any reasonable nor logical sense as it also gives a blanket limitation without considering other factors such as the size of the venue. The spread of Covid-19 arises from poor ventilation of indoor venues, not necessarily the amount of people. It is the DA's policy that vaccination education should be encouraged as the core focus on protecting oneself from severe sickness or death, this should be the primary focus of Government, not an arbitrary limitation of rights and freedom. Further, our economy cannot continue to be limited by regulations that do not make any material impact to the fight against Covid-19. Restricting the number of people, at the very least in outdoor venues, only hurts small businesses, especially since the requirement of wearing a mask outdoors has already been removed.

The Regulations also state that a mask must be always worn when attending an event.¹⁹ This provision is also irrational as the Government had terminated the National State of Disaster which stipulates that masks do not need to be worn outside, yet these new regulations seem to regress back to more stricter lockdown measures without any scientific evidence to back them up.

8. Conclusion

From reading the above regulations, it is clear that they were drafted without considering:

- the latest scientific evidence;
- the strength of the current variant of Covid-19;
- the fact that the majority of South Africans have developed some form of immunity;
- hospitals and medical institutions are no longer under severe strain or pressure as they once were; and
- the daily infection and death rates are substantially lower when compared to the previous variants of the virus.

The Regulations create undue burdens on employers and various establishments and possibly violate individual rights and freedoms of those persons who test positive for the virus.

¹⁸ Clause 16J(5)

¹⁹ Clause 16J(2)(b)

They create unnecessary red tape and additional administration that will not have any material effect on the reduction in positive Covid-19 cases.

The Regulations are a blatant attempt by Government to continue to keep the people of South Africa in lockdown and to continue to wield their unchecked power, this time under the power of the Minister of Health. Whilst the President has stated that the National State of Disaster has been terminated, it will, in essence, continue in substance through the Regulations.

It is the DA's position that the Regulations should be strongly opposed to protect the rights and livelihoods of South Africans as it is clear since the National State of Disaster has been terminated in all forms, there should be no need whatsoever to return to one through the regulations of another piece of legislation. It is time for the Poverty Cabinet to release their unchecked hunger for power over the ordinary law-abiding people of South Africa and allow South Africa to "open up", and remain that way, once again.

Democratic Alliance

8 April 2022