



SAKELIGA

SELFSTANDIGE SAKEGEMEENSAP

21 April 2022

TO: Department of Health
ATTENTION: Tsakani Furumele
DELIVERED: **By email:** tsakani.furumele@health.gov.za

To whom it may concern,

SUBMISSION: AMENDMENTS TO THE REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF NOTIFIABLE MEDICAL CONDITIONS, 2022

This submission constitutes Sakeliga's comment on the proposed Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions (published for comment on 15 March 2022).

About Sakeliga

Sakeliga is a business group and public benefit organisation with more than 11,000 members in various enterprises across South Africa. Sakeliga promotes a favourable business environment in the public interest.

Submission

Sakeliga finds the proposed regulations to be detrimental to public health, unsound in law, and economically and socially harmful. The regulations constitute an attempt to give the public the impression that the national state of disaster on Covid-19 is being lifted when, in fact, it continues by another name. We maintain that the proposed regulations are so severely flawed – *inter alia* also with regard to process, assumptions, and construction – that they are irreparable and should be abandoned in their entirety.

While the regulations are of more general application than only to Covid-19, government has made it clear that the proposed regulations were crafted specifically for the purposes of giving the Minister of Health the power to continue with heretofore impermissible public health interventions, similar to what was implemented under the national state of disaster on Covid-19. Problematically, the regulations will not be limited in their application to matters relating to Covid-19, but to all matters relating to notifiable medical conditions – a list of conditions that is determined by the Minister by regulation. This creates the grave danger for the public of suffering the harmful effects of permanent Covid-19-type regulations not just for Covid-19 (regardless of Covid-19 constituting a disaster or not), but in their daily walks of life for a multitude and open-ended list of other diseases.

We are concerned that with the adoption of these regulations, the exigent-circumstances-requirement that is associated with states of disaster will be replaced with a default,

entrenched state of health monitoring. This would entail various deleterious consequences for privacy, freedom, social harmony, and commercial flourishing.

We have, as a result, sought advice on the scope of the Minister's powers under the National Health Act (61 of 2003), and have been advised that the draft regulations, if adopted, will most likely be found to be *ultra vires* the empowering provisions of the Act. The Minister does not have the administrative authority to create a new system of law via regulations that will infringe upon the rights and freedoms of the public. We have been advised that the Minister's approach in framing the draft regulations undermines the rule of law, the separation of powers between the executive and the legislature, and is therefore unconstitutional. The Minister has seemingly conferred on himself the authority to regulate matters for which the legislature has failed to provide any authority or guidance on.

With regard to the regulations' merits as public health interventions, Sakeliga has considered the comments of several and diverse public health and medical researchers and scientists. We attach two documents in this regard, in which the authors scathingly reject the proposed regulations. In one, the researchers call the proposed regulations "an ill-conceived and misdirected attempt to continue preventing SARS-CoV-2 infections" and "oblivious to the new realities of Covid-19, two years into a pandemic."¹ In the other, the researchers on similar and other grounds conclude as well that "the Proposed Regulations are not grounded in science, and are unnecessary, illegal and disproportionate to the risks society faces."² We find these analyses comprehensive and significant in that, even while they were done independently and while there are differences between them, both reject the proposed regulations *in toto*, and consider it too flawed for remedy.

Notably, Medelson *et al* remarks that "influenza is not an NMC [notifiable medical condition], and like the "swine flu" (H1N1pdm09) pandemic influenza virus of 2009, the way forward for Covid-19 is to be considered in the same light..." They then proceed to recommend that Covid-19 could simply be added to current influenza community and hospital surveillance programmes. They explicitly reject several remaining compulsory public interventions relating to Covid-19, such as border and travel restrictions, hand hygiene, masking, etc., leaving room only for public health recommendations, rather than instructions. Similarly, Panda concludes that "no new legislation is required. Between the existing health regulations and the Disaster Management Act, government is able to adequately respond to pandemics."

It is common cause that the proposed Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions spring from a desire to replace the supposedly temporary measures under the regulations of the national state of disaster with standing measures under the National Health Act. Were it not for this desire, no new regulations would have been proposed at this time or of this sort. However, since Covid-19 cannot appropriately be considered a notifiable medical condition, none of the proposed regulations are fit for purpose or appropriate to replace existing regulations on notifiable medical conditions.

¹ Mendelson, Madhi, Nel, Gray, Osih, & Venter. 22/03/2022. *The incoherent and illogical new government Covid-19 regulations are the real state of disaster*. Daily Maverick. Available online at <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 Panda Knowledge Factory NPC. March 2022. Panda Comments on the Proposed Regulations relating to the Surveillance and Control of Notifiable Medical Conditions. Available online at <https://www.pandata.org/wp-content/uploads/PANDA-Comments-on-the-Proposed-Amendments-to-the-Health-Act-Regulations.pdf>

Our position is as follows:

1. Covid-19 is not fit for classification as a notifiable medical condition.
2. There is no need to alter the existing regulations to deal with Covid-19, so the proposed regulations, having been developed for that purpose, lack a reasonable basis.
3. The extension of the draconian powers used to deal with Covid-19 to a long list of other conditions on a permanent basis would turn South Africa into a monitored society where freedom, privacy, and commerce would be unduly hindered and deprived.
4. The powers which the Minister affords himself in the regulations (in respect of any current or future notifiable medical conditions) are *ultra vires*, draconian, and unconstitutional.
5. The proposed regulations should be withdrawn.

We insist that the proposed regulations should not be promulgated and have instructed our legal team to prepare for litigation (or to assist others in litigation where appropriate), in the event that a version of the proposed regulations were to be promulgated.

Given the (unlawfully) limited timeframe offered to the public for comments on these proposed regulations, the above comments will have to suffice. We reserved all our rights.