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To: The Minister of Cooperative Governance and Traditional Affairs

Dr Nkosazana Dlamini-Zuma

Per mail: ministry@cogta.gov.za

Cc: The Deputy Minister of Cooperative Governance and Traditional Affairs

Mr Mpho Parks Tau

Per e-mail: parkst@cogta.gov.za

Cc: The President

Mr Cyril Ramaphosa

Per e-mail: presidentrsa@presidency.gov.za

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1 June 2020

URGENT, AND HIGH PRIORITY

Dear Dr Dlamini-Zuma,

RE: CLARITY SOUGHT WITH REGARDS TO THE DIRECTIONS RELATING TO NORMS AND STANDARDS FOR RELIGIOUS GATHERINGS NO. 609, GOVERNMENT GAZETTE NO. 43365 OF 28 MAY 2020

1. We refer to the above Directions issued by yourself in terms of Regulation 37(1)(a) of the Regulations issued in terms of the Disaster Management Act, 2002 ('the Act'), and published in the *Government Gazette* on 28 May 2020.
2. In terms of clause 9 thereof, the Directions come into operation today (1st June 2020).

3. We address this letter, in the first place, to thank Government for rightly considering the submissions and proposals made by the religious community, including *Freedom of Religion South Africa* (FOR SA) on behalf of religious leaders and organisations representing approximately 15,5 million people from a broad cross-spectrum of denominations, churches and religious organisations (including African Spirituality and Indigenous Churches)¹, for the phased opening up of the religious sector (alongside the economic sector).
4. In this regard and in particular, we welcomed the announcement by the President (on Thursday 28th May 2020) that, as part of the regulations for Alert Level 3:
 - 4.1. Religious leaders will be recognised as “*essential religious frontline workers*” for purposes of spiritual counselling;
 - 4.2. Religious buildings have been permitted to open, thereby allowing the administration offices of churches and religious organisations to reopen and to start functioning again, subject to work from home arrangements, strict social distancing, and other health and sanitization protocols; and
 - 4.3. Churches, synagogues, mosques, temples and other recognised places of worship are able to resume services limited to 50 people or less depending on the space available, and subject to strict health and sanitization protocols (as set out in the above Directions subsequently issued by yourself).
5. Government’s ultimate recognition and endorsement of the importance of the role of the religious community was timely, and will enable this vital sector of our society to be further empowered to help meet the physical, psychological and spiritual needs of our nation in this time of crisis – as the religious leaders and organizations we represent in this matter, remain committed to do.

¹ Letter from FOR SA to the President and COGTA Minister dated 29 May 2020.

CLARITY URGENTLY SOUGHT WITH REGARDS TO CERTAIN CLAUSES

6. Following the issuing of the Directions (which are in operation as of today), FOR SA has received a number of queries from various religious leaders and organizations, with regards to certain Clauses of the Directions, that are not clear and unambiguous. As such, these Clauses are open to varying interpretations and from reports in the media, are indeed being interpreted differently.
7. **It is the express position of FOR SA and all the religious leaders, churches and religious organisations represented by it, to obey the laws of the land including all the Regulations and Directions issued. This will be exceptionally difficult as a result of the ambiguity and lack of clarity of some of the Clauses.**
8. **This ambiguity and lack of clarity potentially has far-reaching consequences, because if one of our constituent religious leaders or organisations misunderstands the guidelines, they may be arrested or even prosecuted.**
9. **As such, we believe it is of the utmost importance that these Clauses be clarified as a matter of extreme urgency, so that any legal uncertainty can be removed and any (unintentional, or perceived) non-compliance with the law as a result, can be avoided.**
10. In this regard, and in particular, we mention the following:

10.1. Religious leaders' status as "essential workers":

- 10.1.1. As mentioned above, in the President's speech on 28th May 2020 he indicated that religious leaders would be recognised as "essential workers" for purposes of spiritual counselling. This was also confirmed by you in your media statement dated 29 May 2020, as follows: *"government is now in a position to categorise religious counselling as an essential service. This will enable the millions who have been affected by the virus, to receive this much needed service, since the majority cannot afford professional attention of this nature"*.

- 10.1.2. We note however that, neither the Level 3 Regulations nor the Directions issued by yourself on 28 May 2020, explicitly recognise religious leaders as “essential workers”.
- 10.1.3. As a result, should any area move back to Alert Level 4 or 5 (as contemplated in Clause 3 of the Level 3 Regulations), the religious workers in that particular area may no longer be able to fulfil their tasks and functions amongst their members and/or the communities they serve, as “essential workers”.
- 10.1.4. This is presumably not what was intended, as spiritual counselling is no less necessary nor “essential” – and is arguably even more necessary and “essential” – as the infection rate amongst its members and communities increases, and so too the sickness / death rate. Many South Africans will grieve, and have to come to terms with, the death of loved ones – and it is then that religious leaders are most needed and valued.

10.1.5. *Recommendation:*

- 10.1.5.1. That Part P.4 of “Table 1: Alert Level 4” of the Regulations of 29 April 2020 be amended as follows (with our proposed amendment underlined):

“All social work, counselling including by religious leaders, services to the grieving, bereaved, victims of the pandemic including supporting victims of gender based violence, care and relief activities, are permitted”.

10.2. Clause 1 of the Directions – definition of “places of worship”

- 10.2.1. The above Clause defines “*places of worship*” as meaning “*any place or premises usually used for religious purposes; including churches, synagogues, mosques, temples and other recognized places of worship*”.

10.2.2. Various religious leaders and organisations are interpreting this Clause as including individual homes – presumably because many churches, in the ordinary course (and therefore “usually”), run church and worship meetings in the form of home church / cell groups in members’ homes during the week - and are advising their congregations / members accordingly that it falls within the definition.

10.2.3. *Recommendation:*

10.2.3.1. If the intention of the Directions was for religious meetings to take place in homes at Alert Level 3 already, as is the practice by millions and as is interpreted by some, we recommend that this Clause be amended as follows (with our proposed amendment underlined):

*“**places of worship**’ means any place or premises usually used for religious purposes; including churches, synagogues, mosques, temples and other recognized places of worship, and homes usually used for religious purposes”.*

10.2.3.2. If, however, the intention of the Directions was not for religious meetings to take place in homes at Alert Level 3 already (but presumably, to be allowed when family / social visits are allowed), we recommend that this Clause be amended as follows (with our proposed amendment underlined):

*“**places of worship**’ means any place or premises usually used for religious purposes; including churches, synagogues, mosques, temples and other recognized places of worship, but excluding (at Alert Levels 5, 4 and 3) individual homes”.*

10.2.4. The above regulation cannot be left unamended, because there is a high degree of legal uncertainty, i.e. a religious leader may legitimately select one interpretation of the regulation while a law enforcement official may

select another legitimate interpretation of the regulation, ending in a needless arrest.

10.3. Clause 1 of the Definitions – definition of ‘religious gathering’

10.3.1. The same Clause defines “religious gathering” as meaning “*a gathering at a place of worship for religious purposes*”.

10.3.2. The question has been asked whether this definition includes ‘drive-in’ religious gatherings (as have been permitted in the USA and elsewhere, and which indeed present much lower risk of any infection than physically meeting together in a confined space, as people remain in their cars except for the use of ablution facilities which can be sanitized).

10.3.3. These ‘drive-in’ religious gatherings would, of course, be subject to the same Directions (including appropriate social distancing between vehicles) where applicable, as well as any other Regulations / Directions (including relating to the number of passengers allowed in a vehicle as well as that the passengers be from the same household) and by-laws (relating to open-air broadcasting / radio transmission, etc) that may apply.

10.3.4. As matters stand, this is a significant omission in the Directions and if not clarified immediately, would likely result in unnecessary misunderstanding between the religious sector and law enforcement, which is easily avoidable.

10.3.5. *Recommendation:*

10.3.5.1. If the intention is to include ‘drive-in’ religious gatherings, it is recommended that:

10.3.5.1.1. the definition of ‘religious gathering’ be amended as follows (with our proposed amendments underlined):

*“**religious gathering**’ means a gathering at a place of worship for religious purposes, and shall include a drive-in gathering at the place of worship with congregants remaining in their cars”; and*

- 10.3.5.1.2. Clause 3(1) be amended accordingly, as follows (with our proposed amendment underlined):

“Religious gatherings of not more than 50 persons (or in the case of drive-in gatherings, such number of vehicles as may be accommodated in the designated parking lot of the relevant place of worship, allowing 2 metres apart on each side), are allowed subject to the conditions outlined in these Directions.”

- 10.3.5.1.3. Clause 4(1)(c) be amended accordingly as follows (with our proposed amendment underlined):

“All religious leaders or persons in charge of places of worship must –

...

(c) develop and maintain protocols on how they will ensure that there are no more than 50 persons within the place of worship at a time, or no more than the allowed number of vehicles in the case of a drive-in gathering, at a time.”

10.4. Clause 3(1) of the Directions – limitation of 50 persons

- 10.4.1. The above Clause provides that *“religious gatherings of not more than 50 persons are allowed subject to the conditions outlined in these Directions”*.
- 10.4.2. In this regard, we firstly mention that various religious leaders and organisations are of the opinion that the limitation of 50 persons is

somewhat arbitrary given that different buildings have different capacity, and that it may be more appropriate to fix the limit as a percentage (e.g. 30%) of the normal seating capacity. (For example, an auditorium that normally seats 3,000 people, could easily accommodate more people while observing appropriate social distancing). We note that this is the approach the Regulations has taken with motor vehicles.

10.4.3. The above notwithstanding, and for present purposes, the enquiry is whether the limitation of 50 people is per site or per building. The reason is that many of the bigger religious organisations have various buildings / auditoriums, each of which can comfortably accommodate 50 people with appropriate physical distancing, on the same site / premises. Many different religious organisations meet in different rented venues such as on University campuses, in hotels and conference venues, etc. The Directions could certainly not mean only one group on a large campus with multiple large halls spread over a large area?

10.4.4. *Recommendation:*

10.4.5. If the intention was to accommodate a maximum of 50 people per building, we recommend that the Clause be amended as follows (with our proposed amendment underlined):

“3(1). Religious gatherings of not more than 50 people per building are allowed subject to the conditions outlined in these Directions”.

10.5. ‘Children’s church’:

10.5.1. Finally, we wish to raise the issue of ‘children’s church’ (and similar activities for children in other faith groups) with you.

10.5.2. Section 76 of the Children’s Act of 2005 provides that “*partial care is provided when a person, whether for or without reward, takes care of more than six children on behalf of their parents or caregivers during specific*

hours of the day or night, or for a temporary period, by agreement between the parents or caregivers and the provider of the service.” “Partial care” typically includes play schools, creches and day care centres, but because of the broad definition, it may also include ‘children’s church’ (and similar activities for children in other faith groups).

10.5.3. As you may be aware, in terms of an announcement by the Department of Social Development (as recently again as 30th May 2020), all early childhood development centres (ECDCs) and partial-care facilities are to remain shut until further notice.

10.5.4. The (presumably unintended) effect is that ‘children’s church’ (and similar activities for children in other faith groups), being religious and worship activities of children while their parents are involved in worship services, may be interpreted to not be allowed to open and operate, at the same time and in the same way as the ‘normal’ services for church and other recognised places of worship.

10.5.5. *Recommendation:*

10.5.5.1. That Clause 3(1) of the Directions be amended as follows (with our proposed amendment underlined):

“Religious gatherings of not more than 50 persons (including children) are allowed subject to the conditions outlined in these Directions.”; and

10.5.5.2. That a Clause 3(4) be added as follows:

“Partial care of small children during religious gatherings is allowed subject to the same conditions as outlined in these Directions.”

11. We trust that our letter will receive your urgent consideration, particularly in circumstances where the Directions are already in operation and many religious organisations are

commencing, or preparing to this weekend commence, religious gatherings subject to the Directions.

12. In view of the foregoing, we look forward to receiving your written reply by no later than **5pm on Wednesday, 3 June 2020** so that we can allow our constituents accordingly.

Yours faithfully,

Adv Nadene L. Badenhorst

Legal Counsel, FOR SA