

To: Ms Faith Muthambi
Chairperson
**Parliamentary Portfolio Committee on Cooperative Governance and
Traditional Affairs**

For **Ms Shereen Cassiem**
attention:

Committee Secretary

Per e-mail: scassiem@parliament.gov.za

Re: **Disaster Management Amendment Bill [B2-2021] – FOR SA submission**

Date: 26 August 2021 (**Deadline for comment: 26 August 2021**)

CONTENTS:	PAGE NUMBER:
Introduction	1
Executive summary of <i>FOR SA</i> 's submissions	2
About <i>FOR SA</i> , and our interest in the Bill	2
Substantive Proposals	3
RECOMMENDATIONS	4

INTRODUCTION:

Dear Honourable Muthambi MP,

1. We refer to the [invitation](#) by the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs (“the Committee”) for comments on the [Disaster Management Amendment Bill \[B2-2021\]](#) (“the Bill”).
2. In principle, we support the Bill. We do, however, have some recommendations regarding the current wording thereof, which we set out hereinbelow.

EXECUTIVE SUMMARY OF FOR SA'S SUBMISSIONS:

3. In a nutshell, *FOR SA* supports the Bill, but submits that it could be strengthened in the following respects:
 - 3.1. Making it compulsory for the Executive (i.e. Minister, Premier or Municipal Council) to consult with the public (for example, by publishing the proposed regulations for public comment); and
 - 3.2. To allow for the Legislature (i.e. National Assembly, Provincial Parliament) to have further public participation should it view the Executive's consultations to be insufficient; and
 - 3.3. Making it compulsory for the Executive to provide the Legislature with the scientific reasons and/or data upon which it is basing its proposed regulations, as well as a record of any meetings regarding the drafting of the proposed regulations; and
 - 3.4. Making it compulsory for the Legislature, as part of the required debate, to debate whether:
 - (a) The proposed regulations are rationally connected to the science and/or data; and
 - (b) If the proposed regulations limit any of the fundamental rights protected in the Bill of Rights. (Part of this enquiry, would be whether the proposed regulations unfairly discriminate against a particular sector.); and
 - (c) Should any of the fundamental rights be limited, whether such limitation is reasonable and justifiable in accordance with section 36 of the Constitution.
4. We request an opportunity to make verbal submissions in this regard during any (further) consultations that may be held in relation to the Bill.

ABOUT FOR SA, AND OUR INTEREST IN THE BILL:

5. *Freedom of Religion SA NPC (2014/099286/08) (FOR SA)* is a legal advocacy organisation, working to protect and promote the constitutional right to religious freedom in South Africa.

6. The Disaster Management Act, 2002¹ (“the principal Act” or “DMA”) has come into the foreground for its use to declare COVID-19 a national disaster and pass regulations and directives curbing many fundamental freedoms.
7. In this aforementioned matter, *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.
8. Furthermore, as this Committee is well aware, *FOR SA* has previously (on at least two occasions already) had to petition this Committee, following the Executive’s failure to engage with *FOR SA* and/or the religious sector we represent. (See *FOR SA*’s submission to this Committee on the impact of the DMA Regulations on the religious sector (dated 22 April 2021), attached as “**annexure A**”.)
9. *FOR SA*’s interest in the Bill lies therein that the principal Act has been used to directly limit various constitutional rights and freedoms, including the right to freedom of religion, belief and opinion (section 15) and the rights of religious communities (section 31), without any proper public consultation and/or provision for proper Parliamentary oversight. Our constituency, therefore, has a direct interest in the amendment of the principal Act.

SUBSTANTIVE PROPOSALS:

10. The Bill comes at the time when section 27 of the principal Act (in terms of which a State of National Disaster may be declared), is the subject of a constitutional challenge. In a majority judgment the North Gauteng High Court: Pretoria held in March 2021 that section 27 is constitutional.² A dissenting minority judgment, however, held section 27 to be unconstitutional. At the time of writing, the matter had been appealed to the Constitutional Court,³ but is still awaiting directions from the Court on how it will proceed with the matter.⁴

¹ Act 57 of 2002.

² [Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and Others](#) [2021] ZAGPPHC 168.

³ Under case number CCT123/21.

⁴ Confirmed via telephonic conversation with the Court on 26 August 2021.

11. *FOR SA* views the Bill's aim as laudable – namely, to increase Parliamentary oversight in a situation where the principal Act has been used since 15 March 2020 to limit fundamental rights and freedoms, and where both Parliament and the public have struggled to effectively engage with and/or be considered by the Executive.
12. The Bill's provision of checks and balances in the exercise of Executive power, is crucial. The current situation has led to numerous court cases challenging the constitutionality of the Executive's (unilateral) exercise of power.
13. It is imperative that the principal Act be amended to allow for proper checks and balances, as well as public consultation, for as long as the current state of national disaster continues and/or another state of (national / provincial / local) disaster were to arise in future.
14. *FOR SA*, therefore, supports the Bill, but believes it can be strengthened by amending the clauses as set out below.

RECOMMENDATIONS:

15. **Clause 1(b) of the Bill** (amending section 27 of the principal Act) be amended to read as follows (additions are underlined):

(6) The Minister may terminate a national state of disaster by notice in the Gazette before it lapses as contemplated in section 27(5)(b).

(7)(a) The National Assembly may extend a national state of disaster for no more than three (3) months at a time and only subject to public consultation.

(b) The first extension of the national state of disaster must be by a resolution adopted with a supporting vote of a majority of the members of the National Assembly.

(c) Any subsequent extension must be by a resolution adopted with a supporting vote of at least sixty (60) per cent of the members of the National Assembly.

(d) The National Assembly may only adopt a resolution in terms of this subsection following a public debate in the National Assembly.

(e) In holding the public debate in terms of section 27(7)(d), it is compulsory for the National Assembly to debate whether -

- (i) The regulations or directions issued in terms of section 27(2) are rationally connected to the science and/or data; and*

- (ii) The regulations or directions issued in terms of section 27(2) limit any of the fundamental rights protected in the Bill of Rights, including the right not to be unfairly discriminated against; and
- (iii) Should any of the fundamental rights be limited, whether such limitation is reasonable and justifiable in accordance with section 36 of the Constitution.

(8) The Minister must table the following in the National Assembly as soon as possible after the publication of any notice declaring a national state of disaster -

- (a) a copy of the notice declaring a national state of disaster; and
- (b) a copy of any regulation made or direction issued in terms of section 27(2); and
- (c) a record containing the scientific reasons and/or data upon which the Minister is basing the notice declaring a national state of disaster, regulations, or directions; and
- (d) a record containing the minutes of the Minister's meetings where the notice declaring a national state of disaster, regulations, or directions was discussed.

(9) The National Assembly may —

- (a) disapprove of any such regulation or direction, or of any provision thereof; or
- (b) make any recommendation to the Minister in connection with any such notice, regulation or direction, or any provision thereof.

16. **Clause 3(b) of the Bill** (amending section 41 of the principal Act) be amended to read as follows (additions are underlined):

(6) The Premier may terminate a provincial state of disaster by notice in the provincial Gazette before it lapses as contemplated in section 41(5)(b).

(7)(a) The provincial legislature may extend a declaration of a provincial state of disaster for no more than three (3) months at a time and only subject to public consultation.

(b) The first extension of the provincial state of disaster must be by a resolution adopted with a supporting vote of a majority of the members of the provincial legislature.

(c) Any subsequent extension must be by a resolution adopted with a supporting vote of at least sixty (60) per cent of the members of the provincial legislature.

(d) A provincial legislature may only adopt a resolution in terms of this subsection following a public debate in that legislature.

(e) In holding the public debate in terms of section 41(7)(d), it is compulsory for the provincial legislature to debate whether -

- (i) The regulations or directions issued in terms of section 41(2) are rationally connected to the science and/or data; and
 - (ii) If the regulations or directions issued in terms of section 41(2) limit any of the fundamental rights protected in the Bill of Rights, including the right not to be unfairly discriminated against; and
 - (iii) Should any of the fundamental rights be limited, whether such limitation is reasonable and justifiable in accordance with section 36 of the Constitution.
- (8) The Premier must table the following in the provincial legislature as soon as possible after the publication of any notice declaring a provincial state of disaster -
- (a) a copy of the notice declaring a provincial state of disaster; and
 - (b) a copy of any regulation made or direction issued in terms of section 41(2); and
 - (c) a record containing the scientific reasons and/or data upon which the Premier is basing the notice declaring a provincial state of disaster, regulations, directions; and
 - (d) a record containing the minutes of the Premier's meetings where the notice declaring a provincial state of disaster, or regulations, or directions was discussed.
- (9) The provincial legislature may —
- (a) disapprove of any such regulation or direction, or of any provision thereof; or
 - (b) make any recommendation to the Premier in connection with any such notice, regulation or direction, or of any provision thereof.

17. **Clause 5(b) of the Bill** (amending section 55 of the principal Act) be amended to read as follows (additions are underlined):

- (6) The council may terminate a local state of disaster by notice in the provincial Gazette before it lapses as contemplated in section 55(5)(b).
- (7)(a) The council may extend a declaration of a local state of disaster for no more than three (3) months at a time and only subject to public consultation.
- (b) The first extension of the local state of disaster must be by a resolution adopted with a supporting vote of a majority of the members of the council.
- (c) Any subsequent extension must be by a resolution adopted with a supporting vote of at least sixty (60) per cent of the members of the council.
- (d) The council may only adopt a resolution in terms of this subsection following a public debate in that council.

(e) In holding the public debate in terms of section 55(7)(d), it is compulsory for the council to debate whether -

- (iv) The bylaws made, or directions issued, in terms of section 55(2) are rationally connected to the science and/or data; and
- (v) If the bylaws made, or directions issued, in terms of section 55(2) limit any of the fundamental rights protected in the Bill of Rights, including the right not to be unfairly discriminated against; and
- (vi) Should any of the fundamental rights be limited, whether such limitation is reasonable and justifiable in accordance with section 36 of the Constitution.

(8) The Mayor must table the following in the council as soon as possible after the publication of any notice declaring a local state of disaster -

- (a) a copy of the notice declaring a local state of disaster; and
- (b) a copy of any bylaws made or direction issued in terms of section 55(2); and
- (c) a record containing the scientific reasons and/or data upon which the Mayor is basing the notice declaring a local state of disaster, bylaws, or directions; and
- (d) a record containing the minutes of the Mayor's meetings where the notice declaring a local state of disaster, or bylaws, or directions was discussed.

(9) The council may —

- (a) disapprove of any such bylaws or direction, or of any provision thereof; or
- (b) make any recommendation to the Mayor in connection with any such notice, bylaws or direction, or of any provision thereof.

18. FOR SA further submits that the amendment of the following sections in the principal Act is necessary:

18.1. Section 27(1) of the principal Act:

- (1) In the event of a national disaster, the Minister, after public consultation, may, by notice in the Gazette, declare a national state of disaster if –
 - (a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or
 - (b) other special circumstances warrant the declaration of a national state of disaster.

18.2. Section 41(1) of the principal Act:

(1) In the event of a provincial disaster, the Premier of a province, after consultation with the other MECs and the public, may, by notice in the Provincial Gazette, declare a provincial state of disaster if –

- (a) existing legislation and contingency arrangements do not adequately provide for the provincial executive to deal effectively with the disaster; or*
- (b) other special circumstances warrant the declaration of a provincial state of disaster.*

18.3. Section 55(1) of the principal Act:

(1) In the event of a local disaster the Mayor of a municipality having primary responsibility for the coordination and management of the disaster, after public consultation, may, by notice in the Provincial Gazette, declare a local state of disaster if –

- (a) existing legislation and contingency arrangements do not adequately provide for that municipality to deal effectively with the disaster; or*
- (b) other special circumstances warrant the declaration of a local state of disaster.*

Kind regards,

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