

**24 April 2022**

**TO: DIRECTOR-GENERAL  
DEPARTMENT OF HEALTH**  
c/o Ms Tsakani Furumele  
by email: tsakani.furumele@health.gov.za

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**JOINT COMMENT BY  
ALT ADVISORY AND PROFESSOR JONATHAN KLAAREN**

**DRAFT REGULATIONS RELATING TO THE SURVEILLANCE AND THE CONTROL OF  
NOTIFIABLE MEDICAL CONDITIONS**

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## INTRODUCTION

1. This joint comment pertains to the Draft Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions ('the draft regulations').
2. Our comment has the following structure
  - 2.1. **Part One** gives an overview of the context for the draft regulations, and our comments;
  - 2.2. **Part Two** gives a background of data collection regulations pertaining to COVID-19 during South Africa's state of disaster, which is relevant to the draft regulations;
  - 2.3. **Part Three** addresses the end of the state of disaster and its implications for data collection related to the pandemic, and gives some initial assessment of COVID-19 data collection policies which are relevant to the draft regulations;
  - 2.4. **Part Four** gives general comment on the draft regulations;
  - 2.5. **Part Five** gives specific comment on the draft regulations;

## PART ONE: OVERVIEW

3. To begin with, we set out our interest and expertise in making the comments we do here:
  - 3.1. Murray Hunter is a specialist on digital rights, advocacy and communications at **Advisory** ("ALT"), a public interest advisory and research firm, based in South Africa. More information is available at: <https://altadvisory.africa>;
  - 3.2. Jonathan Klaaren is a professor of Law & Society at the University of the Witwatersrand. More information about Jonathan is available at: <https://www.wits.ac.za/staff/academic-a-z-listing/k/jonathanklaarenwitsacza/>
4. We state at the outset that our focus in this submission is to address data protection and related implications of the draft policy, and while we are interested in the intersection between data protection and public health, we do not consider ourselves experts in public health. We also emphasise that, as our earlier work indicates, we acknowledge the value of contact tracing and other targeted purposes for data processing in certain public health interventions.
5. The declaration of the end of South Africa's state of disaster on 4 April 2022, after more than two years, resulted in nearly all emergency measures adopted since March 2020 falling away with immediate effect. Only a few still remain: for example, that face masks are still required in certain public spaces; that there are still crowd limits for major gatherings, and that certain protocols apply for international travel. Importantly, the R350 COVID-19 relief grant will still be issued.

6. Two significant lingering aspects which demand further attention in relation to the draft regulations are in our view deeply entangled:
  - 6.1. First, what *did* happen in practice during the evolving data collection regime that South Africa's health authorities pursued to combat the pandemic (and what can we learn from that experience); and
  - 6.2. Second, what *will* happen to that self-same regime under the draft regulation.
7. This comment on the current set of draft health regulations addresses primarily the second of these two questions, though to do so it engages in a detailed assessment of the first question.
8. On 15 March 2022, the Minister of Health published a draft set of amendments to the Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions. The Minister also called for public comment in a period of 30 days from 15 March 2022 (e.g. to 14 April 2022), and later extended this period to 24 April 2022.<sup>1</sup>
9. The publication for comment of these proposed changes is in line with the general duty in South African law to seek comment on draft regulations, a duty confirmed by the Supreme Court of Appeal in 2021.<sup>2</sup> The National Health Act does not specify any particular period for comment on draft regulations.<sup>3</sup> The notice for comment indicates that the process of consultation (mandated by the Act in s 90(1)) with the National Health Council has taken place.
10. The set of regulations which are proposed to be formally amended are set firmly within the health sector dealing with notifiable diseases and were first promulgated on 15 December 2017 "after many years of development."<sup>4</sup>
11. While operative within the health sector, the draft Regulations must also be read against the background of the COVID-19 state of disaster regulations. These vital regulations responded to the COVID-19 pandemic and were comprehensive. For instance, in their consolidated state as of 17 December 2021, the COVID regulations ran to 8 chapters, 102 distinct regulations, and – adding the tables, annexures, and forms – 63 pages. In terms of academic commentary, the regulations gained both criticism and praise, exposing and revealing some of the strengths and weaknesses of the existing legal system.<sup>5</sup>

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<sup>1</sup> In light of the complicated data protection issues raised in the draft regulations, and the changing policy environment occasioned by the termination of the state of disaster, this extension is welcomed.

<sup>2</sup> *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others (611/2020) [2021] ZASCA 9 (28 January 2021)*.

<sup>3</sup> National Health Act, section 90(1)

<sup>4</sup> Sasha Stevenson (ed), *National Health Act Guide 2019* (3rd edn, SiberInk 2019) 58 <<http://section27.org.za/wp-content/uploads/2019/07/Stevenson-National-Health-Act-Guide-2019-1.pdf>>.

<sup>5</sup> Geo Quinot, 'Justification, Integration, and Expertise: South Africa's Regulatory Response to COVID-19' 16; Julian Brown, 'Lawfare under Lockdown: Challenges to South Africa's COVID- Regulations, March to August 2020' (2021) 37 (2) South African Journal on Human Rights 302-312.

12. The proposed amended health regulations released for comment contain three new sets of regulations, regulations addition to the existing Regulation 15, regulations additional to the existing Regulation 16, and an amendment of Regulation 17 adding additional text.
13. This Comment intends only to focus on draft Regulation 15H, which is entitled contact tracing. This is covered from page 5 to page 8 of the draft regulations.
14. Draft Regulation 15H should itself be read against the background of the above 2020 national state of disaster regulations. Regulation 8 of that now-repealed set of regulations provided legal authority and some degree of accountability for the establishment and operation of the COVID-19 Tracing Database and the COVID-19 Database. We cover this aspect further below in Part Two, the second of five Parts to this Comment.
15. We also include a table, Table One in Part Four, that shows the policy evolution of the COVID-19 databases, including the current moment as well as the potential future successor database proposed in the current draft set of regulations.

## **PART TWO: OVERVIEW ON COVID-19 DATA COLLECTION DURING THE STATE OF DISASTER**

16. As one will recall, the onset of the pandemic brought extensive global debates about data protection and public health technology, as governments and industry players across the world experimented with all manner of digital technologies and data tracking to try slow the spread of the virus.
17. South Africa initially experimented with collecting mobile location data in the hopes of using it for contact tracing and surveillance in an attempt to counter the pandemic.<sup>6</sup> This policy was enabled by regulations under the Disaster Management Act, issued on 2 April 2020, which provided for a range of data collection for the purposes of contact tracing, including access to locational information held by telecommunications and internet service providers about any user known or suspected to have contracted or been exposed to COVID-19.<sup>7</sup>
18. However, this ‘phone-tracking’ approach was shelved very soon afterward, as it became clear that the data was both sensitive enough to raise substantial privacy concerns yet not practically useful for contact tracing.<sup>8</sup> As put into law, however, the phone-tracking approach had included several notable safeguards to try to mitigate concerns about privacy and data protection. These included the appointment of a judge, entitled the COVID-19

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<sup>6</sup> J Klaaren and others, ‘South Africa’s COVID-19 Tracing Database: Risks and Rewards of Which Doctors Should Be Aware’ (2020) 110 SAMJ: South African Medical Journal 1.

<sup>7</sup> Section 11H, Government Gazette no 43199, 2 April 2020.

<sup>8</sup> Murray Hunter, ‘Track and Trace, Trial and Error: Assessing South Africa’s Approaches to Privacy in COVID-19 Digital Contact Tracing’ (2020) <[https://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/track-and-trace-digital\\_contact-tracing-in-sa-nov-2020.pdf](https://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/track-and-trace-digital_contact-tracing-in-sa-nov-2020.pdf)> accessed 14 January 2021; Jonathan Klaaren and Brian Ray, ‘South Africa’s Technologies Enhancing Contact Tracing for COVID-19: A Comparative and Human Rights Assessment’ (2022) \_\_ South African Journal on Human Rights \_\_ (available at <https://www.tandfonline.com/doi/full/10.1080/02587203.2022.2054467>).

designated judge, to oversee the use of the policy and as well as legal provisions that clearly restricted any data collection to legitimate public-health purposes.

19. This soon-to-be-abandoned policy approach provided for the development of a database (the first of at least two versions), called the COVID-19 Tracing Database. We understand this database to have been housed at the Council for Scientific and Industrial Research (CSIR), operated by a multi-institutional team, and was governed by the Department of Health. Intended as a key part of the government's initial response to the pandemic, it operated only for a period of two to three months, and had specific regulatory authority from 2 April 2020 to 25 June 2020.
20. The regulatory framework was adjusted by amendment regulations issued on 26 June 2020. Under the adjusted policy approach, the 'COVID-19 Tracing Database' was renamed the 'COVID-19 Database'. This database enjoyed specific authority in terms of the disaster regulations from 26 June 2020 to 4 April 2022.
21. The 'COVID-19 Database' was permitted to include the names, identity numbers, addresses and contact details of anyone who took a COVID-19 test, as well as the details of anyone suspected of having been exposed to someone with a COVID-19 infection. While it is understood that this adjusted policy approach was intended to move away from the collection of mobile phone data for contact tracing, as this was the explicit recommendation of the designated judge, in fact the amended regulations still provided for collection of a person's cellular location data "when necessary for the purposes of addressing, preventing or combatting the spread of COVID-19 through the contact tracing process or geospatial hotspot mapping."
22. The amended regulations also underscored the Department of Health's shift to alternative technological approaches to contact tracing and related interventions. These included:
  - 22.1. CovidConnect, the Department of Health's messaging suite which combines bulk SMS and WhatsApp exchanges, through a range of service providers, to send out public health messaging, give people access to general information about COVID-19, and allow a range of personalised enquiries such as accessing test results or nominating people for contact tracing in the case of a positive result; and
  - 22.2. The COVID Alert South Africa app, which uses Bluetooth proximity monitoring to do anonymised exposure notifications. While apps of this nature and their underlying technology sidestepped the major privacy debates of the time, in the South African case there have been significant questions about its efficacy, and little public data if any of its role in slowing chains of transmission.
23. Section 8(24) of the amended regulations provided, among other things, that any service providers involved in the building or running of such platforms would be governed by the same data protection provisions that applied to the Department of Health and other public bodies, and that such service providers would be subject to a range of undertakings and reporting requirements, such as:

- 23.1. Having all employees with access to the system sign a declaration that they understand the COVID-19 data collection regulations and will comply with its safeguards; and
- 23.2. Providing a fortnightly report to the Department of Health detailing a log of which employees have accessed any personal data collected, the date of access, and the reason for access.

### **PART THREE: WHAT IS TO BE DONE AFTER THE STATE OF DISASTER**

24. It is particularly relevant at this moment when the state of disaster has been ended, to note that the COVID-19 regulations relating to data collection practices included a sunset policy, written into several specific clauses. We submit that the force and authority of these sunset clauses are now triggered.
25. Our first specific comment in this respect is to note that the current set of draft regulations do not implement any of the sunset actions required to be done.
  - 25.1. See in this respect Draft Regulations 15H (10) and (11). These regulations are discussed in Part Five below. They appear to be capable of an interpretation that the sunset clauses triggered by the end of the state of disaster are not yet in effect. They also seem completely outdated and bypassed by events.
26. In a distinct concern, the ending of the state of disaster, barring the extension of only a very few regulations, and the drafting of the current set of draft Regulations may have lost sight that the authority for the COVID-19 tracing database ended with the termination of the end of the state of disaster on 4 April 2022.
  - 26.1. There is, for instance, no explicit recognition in the draft Regulations of the current hiatus period where there is no explicit regulatory authority for a database of any name. (See Table One, below.)
27. We do not suggest that the current set of health regulations is necessarily the best place to implement those sunset actions. But we do make a comment to ask where and how those sunset clauses are being implemented?
28. It reasonably appears that these health regulations are the successor in policy to the COVID-19 regulations on the COVID-19 database; and they are at best silent on the operation of the sunset provisions.
29. The sunset clauses of COVID Regulation 8 included that the COVID-19 data collection processes would end with the declared state of disaster itself, and within six weeks any personal data collected in terms of this policy should either be destroyed or strictly de-identified if needed for further public-health research. The designated judge has the power to set out standards for how this data can be acceptably de-identified or destroyed. The director-general of health is obliged to table reports to the designated judge and to Parliament on steps taken to shutter the data collection system. The director-general of

health is also required, within six weeks, to notify any person whose communications data was accessed in terms of the regulation.

29.1. The relevant sunset clauses are Regulation 8 (16), 8 (17), 8 (18), and 8 (19).

30. Unfortunately, the draft regulations seek to develop and adapt aspects of South Africa's COVID-19 data collection practices, at a time where there is an obligation, and a vital need for assessment and public debate of how these policies have actually worked. As we briefly outlined in Part Three, above, since April 2020 there has been an ambitious, iterative set of policies seeking to use data collection and technology to aid South Africa's response to the COVID-19 pandemic and uphold public health. However, both in winding up the sunset policies of the old regulation, and in designing in future regulation, there is a need for reflection and assessment of what these policies have achieved.
31. There are also of course many questions of accountability and learning from experience that are not specifically linked to the sunset clauses.
  - 31.1. From a data protection perspective, there is limited public information on how the data collection processes spelt out in the regulations actually functioned, and whether any data protection risks were effectively mitigated.
  - 31.2. From a public health perspective, there is limited public information on the accuracy and quality of such personal data, and whether it played a meaningful role in ensuring effective public health responses to the pandemic.
  - 31.3. From a governance and administration perspective, there is limited public information on whether the regulations aided or hindered the relevant institutions in fulfilling their mandates – in other words, aside from any rights-based implications, whether the regulations made for *good policy*.
32. To date, we are aware of hardly any Parliamentary or Provincial legislative hearings where COVID-19 data collection has been seriously discussed on the basis of adequate information regarding its operation. There appears to be no public information on the effectiveness and uptake of interventions such as CovidConnect or the COVID-19 Alert app.
33. We submit that these discussions should take place through public processes, possibly convened through Parliament, with input and reporting from the Information Regulator, the Designated Judge, the Department of Health, and any other stakeholders. We believe it is premature to develop or extend aspects of the policy, as the draft regulation appears to do, until these processes have played out meaningfully.

#### **PART FOUR: GENERAL COMMENTS ON THE DRAFT REGULATIONS**

34. As the President has noted, going forward this pandemic at least will be managed in terms of the National Health Act. As we describe further below, the draft health regulations open for comment seemingly propose to absorb aspects of the COVID-19 public health policies into existing regulations governing surveillance of other serious diseases and public health

risks. These diseases are known as ‘notifiable medical conditions,’ which require that certain information about confirmed cases must be shared with relevant authorities as a matter of public health.

35. In our reading, the draft regulations extend aspects of COVID-19 data collection to these broader health policies and the dozens of other illnesses which they govern – without adequate engagement with how COVID-19 data collection policies have played out in practice.
36. The risk here is that, before our society has had any chance for reflection, assessment, and public engagement into the successes or failures of our attempt to balance privacy and public health in South Africa’s COVID-19 regulations, we adopt the end-state version of this attempt in perpetuity. With echoes to the apartheid era, there is an aspect here of the permanence of the temporary.<sup>9</sup>
37. Specifically, section 15H of the draft regulations plans to create a ‘notifiable conditions contact tracing database’, for which the Department of Health must collect a wide range of personal information of any person who contracts (or even tests for) one of about 50 illnesses listed as notifiable medical conditions in the regulation; the database should also include the details of anyone known or suspected to have been exposed to them, for contact tracing purposes.
38. There seems to be little consideration of the data protection implications, if any, of applying COVID-style data collection indiscriminately to this large number of other illnesses, serious as they may be. As an example, the list of applicable diseases includes gonorrhoea, a sexually transmitted infection: the proposal to do COVID-style contact tracing carries vast implications for a patient’s privacy and dignity. As noted in Part Five, while the creation of an oversight mechanism, in the form of a Designated Judge, seems to acknowledge that the policy may require safeguards to ensure protection for privacy, there seems to be a lack of enforcement provisions and other measures which would make these safeguards meaningful.
39. As detailed in Part Five, the draft regulations also do not appear to distinguish between notifiable medical conditions where contact tracing is may be a valuable public health intervention (for example, because of high risk of transmissibility from one person to another) and those where it is not.
40. As noted above, there seems to be no explicit recognition in the draft Regulations of the current hiatus period, following the declared end of the state of disaster, where there is no explicit regulatory authority for a database of any name. See Table One, below.

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<sup>9</sup> AS Mathews and RC Albino, ‘The Permanence of the Temporary - An Examination of the 90- and 180-Day Detention Laws’ (1966) 83 South African Law Journal 16.

**Table One: Evolution of COVID-19 Databases**

<b>DATABASE</b>	<b>REGULATORY LIFESPAN</b>	<b>PURPOSE</b>
“COVID-19 Tracing Database”	2 April 2020 - 25 June 2020.	<i>“...to enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19.”<sup>10</sup></i>
“COVID-19 Database”	26 June 2020 – 4 April 2022.	<i>“...to guide appropriate responses in addressing, preventing or combatting the spread of COVID-19, including contact tracing and geospatial hotspot mapping.”<sup>11</sup></i>
None	5 April 2022 – present.	The termination of a national state of disaster leaves no explicit provision for COVID-19 contact tracing or a COVID-19-related database.
“Notifiable Medical Conditions Contact Tracing Database”	Upon gazette of amended regulations relating notifiable medical conditions.	<i>“To enable the tracing of persons who are known or reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted a notifiable medical condition listed in Annexure A, Table 1, 2 or 3.”<sup>12</sup></i>

**PART FIVE: SPECIFIC COMMENTS ON DRAFT REGULATION 15H**

41. As explained above, contrary to the most natural reading of Draft Regulation 15H1(a) and 15H2, the institution of the “Notifiable Medical Conditions Contact Tracing Database” (NMCCTD) is not a matter of “establishment” and “development” but rather of transition from (or arguably “resuscitation of”) the COVID-19 Database.

41.1. We thus propose that the regulations be changed to authorise and govern a transition from the COVID-19 database to the NMCCTD.

42. The COVID-19 tracing database would effectively be expanded in terms of coverage to include a large number of notifiable diseases in Tables 1, 2, and 3 of the 2017 regulations on notifiable medical conditions.

42.1. To put things plainly, there are a lot of diseases listed here. To our admittedly laypersons’ eyes, the database may be overinclusive.

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<sup>10</sup> Regulation 11(H)c, per Government Gazette no 43199, issued 4 April 2020.

<sup>11</sup> Regulation 8(11)b, per Government Gazette no 43476, issued 26 June 2020.

<sup>12</sup> Draft Regulation 15(H), per Government Gazette no 46048, issued 15 March 2022.

- 42.2. Related to this point, Draft Regulation 15H appears to cover Table 1, Table 2, and Table 3 diseases. Yet it does not distinguish among them for purposes of this section. This approach seems to lose sight of the optimal precision of rules.<sup>13</sup>
43. In terms of providing accountability, Draft Regulation 15H adopts the data governance framework of a designated judge as developed in the crucible of the COVID-19 regulatory framework.
- 43.1. The direct translation of the COVID-19 governance framework to this NDCCTD is inappropriate. And it is further inappropriate without an examination of the successes and/or failures of the COVID-19 Tracing Database and the COVID-19 Database.
44. Even on its own terms, there appear to be some drafting issues with this framework.<sup>14</sup>
- 44.1. Draft Regulation 15H1(b) is a very indirect and apparently tenuous way of providing authority and a mandate for appointing a NMC Designated Judge, with no specific powers granted to the NMC Designated Judge.
- 44.2. There is a clearly out of place and outdated reference to lockdown in Draft Regulation 15H (9).
45. In respect of the national state of disaster, Draft Regulation 15H (10) and (11) are now clearly outdated and must be revised. At worst, they may be taken to indicate a lack of authority for the sunset clauses of Regulation 8. See the above discussion in Parts One and Three.

## CONCLUSION

46. We thank the Department for its consideration of the above comments.
47. We wish to restate that the end of the state of disaster – and this current juncture in our pandemic response – is an important opportunity for reflection, assessment and accountability for the policies pursued in combatting the pandemic over the past two years. We believe this assessment is vital to determining how best to protect public health and other human rights in the current pandemic, and in any public health crises in the future.
48. We believe that it would be wisest to understand in some depth the successes and failures of our data collection practices in the pandemic before we formulate any regulations to expand or extend these practices. While we are not in a position to comment on the broader draft regulations, we therefore submit that the current draft regulations relating to contact tracing and collection of personal information (draft regulation 15H) should not be passed in their current form. We further submit that new draft regulations to this effect should only be developed following full assessment, public reporting and consideration of the

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<sup>13</sup> Colin S Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 Yale Law Journal 65.

<sup>14</sup> There is also a typo in Reg 15H (5), an extra paren.

implementation and impact of data collection processes under South Africa's state of disaster from March 2020 to April 2022.

49. We would welcome any further opportunity to engage on this matter.

**24 April 2022**

**Prepared by:  
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## Bibliography

Brown J, 'Lawfare under Lockdown: Challenges to South Africa's COVID-19 Regulations, March to August 2020' (2021) 37(2) South African Journal on Human Rights 302-312

Diver CS, 'The Optimal Precision of Administrative Rules' (1983) 93 Yale Law Journal 65

Hunter M, 'Track and Trace, Trial and Error: Assessing South Africa's Approaches to Privacy in COVID-19 Digital Contact Tracing' (2020) (available at [https://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/track-and-trace-digital\\_contact-tracing-in-sa-nov-2020.pdf](https://www.mediaanddemocracy.com/uploads/1/6/5/7/16577624/track-and-trace-digital_contact-tracing-in-sa-nov-2020.pdf))

Klaaren J and others, 'South Africa's COVID-19 Tracing Database: Risks and Rewards of Which Doctors Should Be Aware' (2020) 110 SAMJ: South African Medical Journal 1

Klaaren J and Ray B, 'South Africa's Technologies Enhancing Contact Tracing for COVID-19: A Comparative and Human Rights Assessment' (2022). South African Journal on Human Rights (available at <https://www.tandfonline.com/doi/full/10.1080/02587203.2022.2054467>)

Mathews AS and Albino RC, 'The Permanence of the Temporary - An Examination of the 90- and 180-Day Detention Laws' (1966) 83 South African Law Journal 16

Quinot G, 'Justification, Integration, and Expertise: South Africa's Regulatory Response to COVID-19' 16 (available at [https://administrativelawreview.org/wp-content/uploads/sites/2/2021/03/11.-ALR-73.1\\_Quinot-South-Africa\\_FINAL.pdf](https://administrativelawreview.org/wp-content/uploads/sites/2/2021/03/11.-ALR-73.1_Quinot-South-Africa_FINAL.pdf))

Stevenson S (ed), *National Health Act Guide 2019* (3rd edn, SiberInk 2019) (available at <http://section27.org.za/wp-content/uploads/2019/07/Stevenson-National-Health-Act-Guide-2019-1.pdf>)

*Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* (611/2020) [2021] ZASCA 9 (28 January 2021)