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To: Ms MM Wenger
Chairperson of Ad Hoc Committee on COVID-19 (WCPP)
Per e-mail: lhcloete@wcpp.gov.za

And to: Per e-mail: zadams@wcpp.gov.za

Re: **Comments on COVID-19: Your experience and Government's response**

From: **Advocate N L Badenhorst**
Legal Counsel, *Freedom of Religion South Africa (FOR SA)*
Per e-mail: legal@forsa.org.za

Date: Tuesday, 11 August 2020 (Deadline: 12 August 2020)

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Dear Ms Wenger,

1. We refer to the [call](#) by the Western Cape's Provincial Parliament's Ad Hoc Committee on COVID-19 (the "*Committee*"), for the public to share their experiences and thoughts on Government's response to COVID-19 ("*Government's response*").
2. We would appreciate the opportunity to make verbal submissions to address any questions the Committee may have, should such opportunity present itself.

ABOUT FOR SA & OUR INTEREST IN GOVERNMENT'S RESPONSE TO COVID-19:

3. *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 and related rights in South Africa.
4. On this particular issue, *FOR SA* represents religious leaders and organisations representing 18.5 million people in South Africa (including over 10 million from African Indigenous and Spiritual Churches) from a cross-spectrum of denominations, churches and faith groups.
5. As such, and because the constitutional right to freedom of religion, belief and opinion (s 15) and the rights of religious communities (s 31) have been directly affected by (both the national and provincial) Government's response to COVID-19, our constituency has a direct interest in this matter.
6. *FOR SA's* submission will focus on how the religious community has been impacted by the Lockdown Regulations and Directions. However, we wish to state at the outset that *FOR SA*, has not, and is not specifically advocating for the religious community to be allowed to "re-open" at 100% capacity at this point. We are, however, explicit in our position that the religious community's constitutional rights to religious freedom must be fully restored at the earliest opportunity this pandemic allows.
7. ***FOR SA's* concern is that Government's response has been unequal, unreasonable and unfairly discriminatory against the religious sector. Furthermore, despite frequent requests for clarity, Government's Regulations and Directions as they pertain to, and affect, the religious sector, remained opaque.**

COMMENTS RELATING TO THE SUBSTANCE OF GOVERNMENT'S RESPONSE:

8. From the outset, we should be clear about the fact that the stated and sole purpose of the lockdown and its Regulations, Directions etc is to reduce the rate of COVID-19 infections – to "flatten the curve". No other reason exists for the promulgation of the current Regulations and Directions that patently interfere with various constitutional rights guaranteed by our Constitution's Bill of Rights.
9. No matter how compelling the reason for the interference with fundamental rights, each of these infringements must nonetheless comply with the requirements of s 36 in the Constitution ("the limitations clause"), including that it must be rational and proportional.

Unfairly discriminatory:

10. In light of the aforementioned, when Government takes steps to systematically re-open our society, it must ensure that it treats all sectors of society fairly. As the saying goes, what is good for the goose is good for the gander. It is constitutionally imperative that the Regulations and Directions to limit the spread of COVID-

19, must treat (and be seen to be treating) the religious community equitably when compared to its treatment of the other sectors of our society and the economy.

11. This is especially so, given that the religious community has certain specific constitutional rights and freedoms (e.g. those contained in s 15 and s 31) expressly granted to it in the Bill of Rights, whereas other sectors of the economy do not have this level of constitutional protection.

12. The perception that the religious community is not as important to Government as other sectors of the society is unfortunately exacerbated by the inequitable and irrational treatment of the religious community which its members see happening around them – in the communities in which they daily live, work and serve.

13. This has contributed to a growing sense of frustration amongst the religious community across South Africa, including in the Western Cape, that the religious sector is being **unfairly discriminated against** by the State, and being treated inequitably and unreasonably in comparison to other sectors of society.

14. To give a few examples:

14.1. Despite the President's express identification of religious leaders as "*essential frontline workers*" for purposes of spiritual counselling (during his nationwide address on 28 May 2020), no amendment has been made to Table A: Alert Level 4 to reflect this, even though other sectors are expressly mentioned in the Table. Should South Africa and/or a province and/or be a "hot spot" that moves back to Level 4 and/or 5, religious leaders are not expressly allowed to provide the essential services, such as grief counselling, which they need to provide to their congregations.

14.2. Religious gatherings are restricted to a maximum of 50 people (inclusive of adults and children) irrespective of the size of the floor space of the religious premises. By contrast, casinos are allowed to operate at 50% of floor space, provided that there is a 1.5-meter distance between gamblers. Similarly, while religious gatherings have been limited to 50 people, no numerical limitation has been placed on restaurants or other commercial enterprises. This clearly can have no other effect on the religious community than to leave the unmistakable impression that casinos are more important to Government than churches, temples, mosques or synagogues.

14.3. Hotels or conference centers can host meetings in different halls and spaces under the same roof, all happening at the same time. By contrast, religious gatherings are restricted to 50 people per "premises", irrespective of how many separate halls or venues may exist on a given property and can (on its own) comfortably accommodate 50 people.

14.4. Religious gatherings are strictly regulated with onerous administrative, and hygiene / sanitisation, rules being imposed upon faith-based organisations. No equivalent onerous requirements are being imposed on, for example, shopping malls.

14.5. The Minister of the Department of Cooperative Governance and Tradition Affairs (the “Minister”) has indicated that faith-based organisations are not allowed to have “drive-in” services where cars are parked 2 metres apart from each other with people listening to the service via the car radio and with the windows closed in the organisations’ parking lots. By contrast, shopping centres’ car parks are full, with hundreds of people visiting the shops and their ablution facilities. This restriction makes absolutely no scientific or rational sense, given that listening to a sermon on your car radio with the windows closed, is indisputably significantly safer than attending a meeting inside a building. In this regard further, we note that from this month [drive-in cinemas are taking place both in Durban, KwaZulu/Natal](#) and at [Loftus Park, Pretoria](#). There is no rational reason why this should be allowed for the entertainment sector, but not for the religious sector.

Unreasonable:

15. In FOR SA’s various engagements with Government (covered below), we have repeatedly pointed out that although the Risk Adjusted Framework now caters for the religious sector at Alert Level 3, to date the Framework has not been adjusted to give the religious sector any indication as to what it could look like for them at Levels 2 or 1 – or what the benchmarks and timelines are to move to those Levels.

16. While FOR SA is well aware of the many demands being made on the Cooperative Governance and Traditional Affairs Department (the “Department”), this state of affairs, unfortunately, does not inspire the religious community with any confidence that Government (either provincial or national) is taking their constitutional rights seriously. Neither does it cause them to believe that there will shortly be any relaxing of the current restrictions on places of worship or that Government is showing any willingness to treat the religious community fairly.

17. We wish to clearly state and clarify that the religious community (in spite of being a sector of society that holds specific constitutional rights), is not asking for special privileges. What the religious leaders are asking for, however, is that *equal* rights and equal treatment be extended to the religious community. It should be borne in mind that the religious community has, from the outset of this pandemic, endeavoured to assist Government in serving and caring for South Africa’s people by making sure that food, masks and other necessities reach the most vulnerable in our society. This community also wishes to continue serving their members and communities (it should be noted at great cost to themselves), with love and care during this difficult time in our nation.

18. FOR SA would further point out that it is in no way suggesting that the religious community *should* re-open its corporate services and gatherings. It is evident that, despite the Regulations permitting gatherings of less than 50 people to take place in a place of worship, many denominations, faiths and independent churches have chosen to remain closed. This is their right and their exclusive prerogative. We are simply arguing that where other sectors of society are being treated differently, the same parameters should logically and fairly be applied to the religious community.

COMMENTS RELATING TO PROCEDURAL ASPECTS:

19. The process followed by the Government when promulgating Regulations and Directions is essential, because it is the means by which the State arrives at conclusions. Should the Government not have done enough to engage with the religious community and its leaders, the outcomes arrived at will likely not be consensual and therefore unacceptable to the people the Regulations and Directives affect.

Difficulty in engaging with Government

20. First, it should be noted that when the lockdown was first announced on 15 March 2020, the religious community did not insist on their rights to meet and corporately exercise their religion and belief. Instead, the religious community agreed that it was reasonable for everyone to agree to a temporary curtailment of their rights, in order to allow Government to increase the capacity of South Africa's health care system so that it could cope with the anticipated influx of COVID-19 patients.

21. Furthermore, even when the initial Regulations (which failed to acknowledge the important role that religious leaders have traditionally played in crises such as these) were published, the recognised faith structures in our country did not litigate to enforce these rights, but instead sought to **constructively** engage with Government through the **democratic** process. Religious leaders did this by *inter alia*:

21.1. Commenting on the draft Schedule of Services: Framework for Sectors. (It should be noted here that the Department only opened the schedule for comments from Saturday 25 April 2020 until 12h00 on Monday, 27 April 2020); and

21.2. Thereafter, commenting on the Level 4 Regulations and, amongst other things, submitting proposals for what a staggered opening up of the religious sector across Levels 5 to 1 could reasonably look like. Here it must be stated that the Level 4 Regulations, which were promulgated on 29 April 2020, did not mention or accommodate South Africa's very large religious community in any way.

22. *FOR SA* has actively been attempting to engage with multiple Government structures, on behalf of our constituency, to request that our legitimate questions, concerns and issues regarding Government's apparent inconsistencies and ambiguities in the Regulations and/or Directions be properly addressed.

23. This engagement has taken the form of:

23.1. Sending questions to Parliament, the COGTA Department and the "Nerve Centre" asking for clarification on various matters on 25 April, 27 April and 13 May 2020 respectively.

23.2. Sending submission to Parliament, the COGTA Department and the President on 5 and 7 May 2020 respectively.

23.3. Petitioning the Speaker of Parliament on 20 May 2020.

- 23.4. Sending various correspondence (with the aim of obtaining clarity and pointing out aspects of inequality regarding the directions that dictate to norms and standards for religious gatherings) to the President, the COGTA Minister, the Deputy Ministers, the Director-General and the Nerve Centre from May through to July.
 - 23.5. Meeting with the COGTA Parliamentary Portfolio Committee, the COGTA Deputy Ministers, the Head of the National Disaster Management Centre and representatives of the CRL Rights Commission on 24 June 2020. At that meeting, *FOR SA* was given the assurance that we would henceforth be included in any further discussions with Government and that the issues we raised would be given urgent and immediate attention. A letter, dated 29 June, was received from the COGTA Minister via email on 2 July 2020, but various issues remained unsolved.
 - 23.6. Meeting with the COGTA Minister, the Deputy Ministers, the Director-General of Traditional Affairs, the Director-General of Cooperative Governance, and representatives of the CRL Rights Commission on 4 August 2020.
24. Despite all of the above, *FOR SA* has still not received a definitive response regarding all the issues raised with the Minister – which included, amongst others, particularly the issues set out in paragraphs 8 through 17 above.
25. From a procedural point of view, *FOR SA* would be remiss if we did not point out that the lack of responsiveness from the Government in addressing the various issues, such as instances of inequality that have been raised, has left sections of the religious community with a sense that their voice, and their concerns, are not nearly as important to Government as other sectors of the society.

FOR SA's RECOMMENDATIONS:

26. In view of the foregoing, we recommend that the Western Cape Provincial Parliament:
- 26.1. Conduct an evaluation of the various restrictions the national Government has placed across sectors to ensure that some sectors are not getting preferential treatment over other sectors (or to put it differently, that some sectors are not being unfairly discriminated against), when there is no rational basis for doing so;
 - 26.2. Bring to the national Government's attention any instances of irrationality, ambiguity and/or unfair discrimination and recommend immediate steps to rectify this; and
 - 26.3. Consider easing restrictions on the religious community in the Western Cape Province to reflect the less onerous restrictions placed on other economic sectors, for example, by expressly allowing drive-in religious gatherings.

27. We trust you will find this submission useful and look forward to engaging with you at any opportunity that arises to further discuss these pressing issues. (We would also be happy to provide you with a copy of any of the submissions and/or correspondence addressed to national Government and Parliament, as indicated in paragraph 23 above, to the extent necessary).

Kind regards,

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THE END.