



HELENSUZMAN FOUNDATION

Submission to the Portfolio Committee on Cooperative Governance and Traditional Affairs on the Disaster Management Amendment Bill

25 August 2021

1. Introduction

The Helen Suzman Foundation (“**HSF**”), as a non-governmental organisation, has been an active participant in a variety of public interest areas in South Africa over many years. Its essential aim is to promote constitutional democracy in South Africa, with a focus on good governance, the rule of law, transparency and accountability.

Given the importance of the Disaster Management Act, as has been demonstrated since early in 2020 with the advent of the COVID-19 outbreak in South Africa, the HSF wishes to submit its comments to Parliament on the text of the Disaster Management Amendment Bill (“**the Bill**”) and the changes to the existing legislation that have been proposed in the Bill.

2. Why it is necessary to amend the Disaster Management Act

The Disaster Management Act is an important piece of legislation, in giving Government the necessary power to act swiftly and effectively when the country, or any part of it, is threatened by a national disaster and the consequences, which can profoundly affect society.

It will be evident that our comments, as set out in this submission, do not try to limit or delay Government’s power in declaring a national state of disaster or its ability to take the necessary measures to deal with such a disaster. It is accepted in this context that action may have to be taken very swiftly, when the country is confronted with a national disaster of any substance. This is particularly so when such a situation arises as a consequence of an unforeseen event and in such circumstances, Government must be able to act as a matter of urgency.

The important issue is, however, that the existing section 27 of the Disaster Management Act allows the Minister to extend the national state of disaster by one month at a time, after an initial period of three months. No limits are set on this power of extension. In terms of

the Disaster Management Act, the Minister is therefore able to extend a national state of disaster indefinitely, without any requirement for Parliament to approve such action.

It can only be assumed that the Disaster Management Act was passed in 2002 on the assumption that a national state of disaster would typically be of relatively short duration and limited to a specific area of the country. We do not believe that it was foreseen that a national state of disaster would last for years and encompass the whole country. It is only on this basis that the absence of any defined Parliamentary role in the executive's management of a national state of disaster can be explained in the Disaster Management Act.

As far as the National Assembly's role in the oversight of executive action is concerned, this is clearly set out in the Constitution.

Section 42(3) of the Constitution provides that

“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and overseeing executive action.”

In addition, Section 55(2) of the Constitution provides that

“The National Assembly must provide for mechanisms –

- (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of –
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state”

If we consider the oversight role played by the National Assembly since the declaration of a national state of disaster arising from COVID-19, the question obviously arises as to whether it has been sufficient. This question is especially pertinent, given the extensive social and economic damage that the COVID-19 pandemic has caused to the country and the fact that there is no real sign of it ending soon. We are aware of occasional briefings by representatives of the executive to specific committees in the National Assembly, but we are of the opinion that such briefings do not amount to effective oversight.

Parliament, and in particular, the National Assembly, cannot afford to take a back seat in such a situation and has to take an active role in fulfilling its constitutional obligations.

Against this background, the HSF is of the opinion that it is necessary to provide defined steps for the National Assembly to monitor and oversee executive action in a national state of disaster.

3. The Disaster Management Amendment Bill

In essence, the Bill addresses the requirement of adequate Parliamentary oversight in a national state of disaster. This applies specifically to the National Assembly ratifying the declaration of a national state of disaster after it has been proclaimed and approving subsequent extensions. The Bill requires a majority vote for the first extension, with a 60%

vote for subsequent extensions (as is also required in the case of a state of emergency in section 37 of the Constitution). However, the HSF is of the opinion that subsequent extensions to a national state of disaster should only require a simple majority.

The Bill also adds the requirement that regulations or directions must be tabled and approved by the National Assembly as soon as possible after their publication, which would require a simple majority.

In addition, the Bill provides for the lapsing of any regulations or directions on termination of the national state of disaster or if they are not approved by the National Assembly. Whilst it may be assumed that regulations or directions would lapse at the same time as the termination of a national state of disaster, this is not explicitly stated in the Disaster Management Act.

Similar changes are proposed in the Bill in the areas of provincial and local government. As in the case of the National Assembly, we submit that a simple majority should be required for extensions to a state of disaster in these levels of government.

4. The HSF's submission

We wish to submit that the principles involved in the Bill will add a very necessary element to the existing legislation - concerning that of Parliamentary oversight (and similar oversight, in the provincial and local government spheres).

It is not acceptable in a constitutional democracy, that the declaration of a national state of disaster, with the very extensive executive powers that it grants government, can be extended indefinitely by way of ministerial discretion without any form of Parliamentary involvement.

In addition, it is not acceptable that the National Assembly, in particular, is under no specific legislative obligation to oversee the executive's actions in a national state of disaster in a clearly defined manner. This refers particularly to regulations and directions that may be issued.

It is important to note that the implementation of these additional provisions to the Disaster Management Act will not impede urgent executive action that may be required in a national state of emergency, but they address what is required in terms of the National Assembly's constitutional oversight obligations. It can be expected that litigation will ensue in due course on the constitutionality of the existing provisions of the Disaster Management Act, if its provisions are not amended to cater for explicit oversight obligations on the part of the National Assembly on national level, and by the relevant bodies on provincial and municipal levels.

For these reasons, the HSF supports the enactment of the Bill, subject to the above comments on changes that should be made to the majorities proposed for approving extensions to a state of disaster.