



RIGHT2KNOW

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23 April 2020

To: THE PRESIDENCY: NATIONAL COMMAND COUNCIL

c/o: Ms Khusela Diko & Mr Mike Louw

Per email: khusela@presidency.gov.za presidentrsa@presidency.gov.za

And To: THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS:

DR NKOSAZANA DLAMINI ZUMA, MP

c/o: Ms Mandisa Mbele & Ms Pamela Salusalu

Per Email: MandisaMB@coqta.gov.za & PamelaS@coqta.gov.za

And To: THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES:

MR RONALD LAMOLA, MP

c/o Ms Zanele Ndlovu and Mr Bruce Sarela

Per Email: ZaneNdlovu@justice.gov.za & BSarela@justice.gov.za

And To: MINISTER OF COMMUNICATIONS AND TELECOMMUNICATIONS

MS STELLA NDABENI-ABRAHAMS

Per Email: ministry@dtps.gov.za & zxabadiya@dtps.gov.za

RE: RECOMMENDATION FOR AMENDMENTS TO COVID19 REGULATIONS AND DIRECTIONS RELATING TO FALSE INFORMATION

This correspondence is sent by the Right to Know Campaign (R2K) on behalf of the C19 People's Coalition (**the Coalition**), regarding the so-called "fake news" provisions of the lockdown regulations that are currently being enforced. These references are currently found as follows:

- a) In regulation 11(5) of the Regulations published by the Minister of Cooperative Governance and Traditional Affairs (**COGTA**) in terms of section 27(2) of the Disaster Management Act 57 of 2002 (**COGTA Regulations**), which criminalises the publication of any statement that intends to deceive another person about COVID-19, the COVID-19 infection status of any person, or any measure taken by the government to address COVID-19.
- b) In item 5.1.3 of the Electronic Communications, Postal and Broadcasting Directions published by the Minister of Communications and Digital Technologies (**Communications Directions**), which provides that electronic communications services licensees, over-the-top services (**OTTs**) and internet service providers (**ISPs**) bear the responsibility to remove fake news related to COVID-19 from their platforms "immediately after identified as such".

R2K recognises the need to address and curb the spread of false information relating to COVID-19 pandemic.

However, R2K, alongside its Coalition partners, remains concerned that the current provisions may unduly and unjustifiably limit the right to freedom of expression, and that they lack the necessary clarity for members of the public and relevant stakeholders to fully understand how they will be implemented.

In particular, R2K has the following key concerns:

- 1) The criminalisation of speech inevitably has a chilling effect on the right to freedom of expression. As such, we propose that instead of a criminal sanction, the COGTA Regulations should rather make provision for an administrative penalty, which also sets out the relevant defences that may apply. The inclusion of an administrative penalty in the regulations is permitted by section 27(4) of the Disaster Management Act;
- 2) The Communications Directions are concerningly vague and potentially subject to abuse, in particular by failing to explain on whose instruction content must be removed. The Coalition submits that this should be streamlined through a centralised process for the removal of content. In this regard, we propose that this responsibility lies with the Minister of Health, as the authority responsible for the centralisation of communications pertaining to COVID-19, or his delegate, in consultation with any other Minister whose area of competence is affected. Such delegate may include a representative of the Minister of Communications and Digital Technologies to serve as the central node of communication;
- 3) The use of the term 'fake news' is inaccurate and misleading, and should be avoided. Instead, we propose alternative wording ("*dissemination of false information with the intention to deceive*") to ensure that the Communications Directions do not perpetuate this problematic narrative; and
- 4) Both the COGTA Regulations and the Communications Directions fail to fully recognise the importance of the right to freedom of expression and the public interest that is served by the safeguarding of this right.

Accordingly, in respect of the COGTA Regulations, R2K proposes the insertion of the following definition:

“the Authority” means “the Independent Communications Authority of South Africa, established in terms of the Independent Communications Authority of South Africa [Act 13 of 2000](#)”.

R2K proposes the substitution of Regulation 11(5) with the following provision:

“Administrative penalties

(1) No person may publish any statement, through any medium, including social media, with the intention to deceive any other person about -

(a) COVID-19;

(b) COVID-19 infection status of any person; or

(c) Any measure taken by the Government to address COVID-19.

(2) Any natural or juristic person who contravenes this provision may be subject to an administrative penalty, to be issued by the Authority, in accordance with the provision set out in section 11(5A).

(3) In determining whether there has been a contravention of this provision, regard shall be had to all relevant considerations, including the importance of the right to freedom of expression, journalistic or artistic activities, fair or protected comment, and the reasonableness of the publication in the full context of such a publication.

11(5A) Inquiry into a complaint

(1) In the event of any person being aggrieved by any statement contemplated in section 11(5)(1), that person may lodge a complaint with the Authority within 48 hours after such publication has occurred and may provide reasons for why such complaint should be dealt with urgently, taking into account the harm that may be caused by the continued publication.

(2) The Authority may conduct an urgent inquiry into such a complaint.

(3) For the purposes of the inquiry, the Authority must notify the person who published the statement of the complaint within 48 hours of receipt thereof.

(4) For the purposes of the inquiry, the Authority may—

(a) through the person presiding at such inquiry, by notice in writing, require from any person such particulars and information as may be reasonably necessary;

(b) by notice in writing in the prescribed form under the hand of a councillor, addressed and delivered by an authorised person or a sheriff to any person, require such person to-

(i) appear in person or by video-conferencing before the Authority at the date, time and place specified in such notice;

(ii) make a statement; and

(iii) submit to it all the documents or objects in the possession or custody or under the control of any such person which may be reasonably necessary; and

(c) through the person presiding at such inquiry and after explaining applicable rights under the Constitution and this section, question any person referred to in paragraph (b) in connection with any matter which may be reasonably necessary.

(5) The Authority must act as expeditiously as possible to resolve the complaint.

(6) In the event that the Authority finds that the statement falls within the ambit of section 11(5), it may issue an administrative penalty, including a fine of up to R10 000.

(7) The decision reached in terms of subsection (4) and (6) is subject to review by a court of law.”

Furthermore, in respect of the Communications Directions, R2K proposes the substitution of item 5.1.3 with a new provision that reads as follows:

“Dissemination of false information with the intention to deceive

(1) For the purpose of this provision, the dissemination of false information pertains specifically to the publication of any statement, through any medium, including social media, with the intention to deceive any other person about -

(a) COVID-19;

(b) COVID-19 infection status of any person; or

(c) Any measure taken by the Government to address COVID-19.

(2) This provision shall be interpreted in accordance with the right to freedom of expression in section 16 of the Constitution of the Republic of South Africa.

(3) For the purpose of this direction, all Electronic Communications Services Licensees, OTTs and ISPs must take all reasonably practicable steps to contain the dissemination of false information on their platforms.

(4) The Minister of Health or his delegate, in consultation with any Minister whose area of competence is affected, may direct any Electronic Communications Services Licensee, OTT or ISP to remove any content that has credibly been found to constitute false information as contemplated in sub-item (1), which direction must be acted on expeditiously.

(5) In accordance with section 78(1) of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), nothing in this provision places any general obligation on the ISPs contemplated in section 78(1) of ECTA to monitor content on their platforms.”

In R2K’s view these amendments would assist in safeguarding the right to freedom of expression, and provide the necessary clarity required in the provisions. Please feel free to contact us should you wish to discuss this further.



GHALIB GALANT, Head of Advocacy, Right2Know



Please direct any correspondence relating to this letter to Ghalib Galant ghalib@r2k.org.za (R2K) with copies to Disha Govender Disha@nu.org.za and Tim Fish Hodgson timothy.hodgson@icj.org.