KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

ADVISORY ON THE PUBLIC HEALTH (PREVENTION, CONTROL AND SUPPRESSION OF COVID-19) RULES, 2020

PRESENTED TO

THE MINISTRY OF HEALTH THROUGH THE OFFICE OF ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

3RD APRIL, 2020

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A. Introduction


2. The KNCHR is the State’s lead agency in promoting and protecting human rights. The National Commission achieves this through investigating and providing redress for human rights violations, researching and monitoring the compliance of human rights norms and standards, advising both private and public sectors on human rights principles and standards, conducting human rights education as well as collaborating with stakeholders. The National Commission under Article 249 of the Constitution has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the Constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories.

3. It is in this regard, that the National Commission issues this advisory on The Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020.

B. General Comments

4. The proposed The Public Health (Prevention, Control and Suppression of Covid-19) Rules, 2020 (“The Rules”) have been formulated in response to the COVID-19 global pandemic currently being experienced across the world. The Rules are made pursuant to section 36(m) of the Public Health Act (Chapter 242, Laws of Kenya) which provision empowers the Minister to make rules ‘whenever any part of Kenya appears to be threatened by any formidable epidemic, endemic or infectious disease,’ aimed at prevention, control or suppression of infectious diseases.

5. The National Commission generally welcomes measures by the Ministry of Health to contain the Covid-19 disease, which has quickly become a grave matter of public health
concern nationally. The KNCHR recognises the need for urgent measures to safeguard the health and life of all persons by containing the spread of the coronavirus and treatment of those suffering from the covid-19 disease.

6. While recognising that these are extraordinary circumstances, and while respecting that the State is under a duty to secure the life and health of all persons in Kenya during this pandemic, the Commission hastens to caution that the rule of law and constitutionalism must not be suspended. As the National Commission has always reiterated, we continue to urge duty bearers to abide by the Constitution, constitutionalism and adopt a human rights based approach in all legislative, policy, administrative and institutional measures directed towards the fight against Covid-19.

7. The Statutory Instruments Act, 2013 (Act No. 23 of 2013) provides a comprehensive regime for the making, scrutiny, publication and operation of statutory instruments. The Act amongst other things requires regulation-making authorities to undertake appropriate consultation before making statutory instruments. It also establishes a mechanism for parliamentary scrutiny of statutory instruments as well as mechanisms to ensure that statutory instruments are periodically reviewed.1 The law requires every Cabinet Secretary responsible for regulation-making (in this case, the Cabinet Secretary in charge of health) to ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before Parliament.2 The House Standing Orders establishes the Committee on delegated legislation and details the nature of scrutiny of statutory instruments.3 If a copy of a statutory instrument is not laid before Parliament as required, the law provides that such statutory instrument ceases to have effect immediately after the last day for it to be so laid.4

Virtual checks

8. The National Commission is alive to the increasing demand to formulate regulations to guide various actions on the response to the Covid-19 crisis. The Commission thereby urges the Office of the Attorney General, in exercise of its constitutional and statutory mandate as the adviser of government and state bodies, to advise government on due process in enacting rules and regulations during this period to ensure that meaningful public participation and Parliamentary oversight is observed to the greatest extent

1Section Statutory Instruments Act, 2013.
2Section 11, Statutory Instruments Act, 2013.
3Standing Order No.210 The National Assembly Standing Orders(4th edition, 2018). Section 13 of Statutory Instruments Act provides the criteria that the Committee is to use in scrutinizing a statutory instrument.
4Section11(4), Statutory Instruments Act, 2013.
possible. Such scrutiny and oversight is of great significance particularly where the proposed legislation governs matters of great public interest and directly and indirectly impacts on individual and/or group rights and liberties.

9. Effective alternatives to the usual manner of doing business need to be explored. For instance, virtual meetings and scrutiny by members of Parliament can and should be encouraged to ensure that the oversight and legislative roles of Parliament are not lost. Notably, skipping this process brings with it the risk of watering down the principle of separation of powers which is at the very heart of our constitutional democracy. In a situation whereby even access to justice in our courts has been limited, every viable available opportunity and alternative, within the law, should be pursued to preserve the existing system of checks and balances in governance. We therefore recommend that Parliament and other oversight bodies explore alternatives to the ordinary way of discharging business that respects the recommended social distancing rule, such as virtual checks.

10. Definition and Protection of Health workers
The medical officers and other frontline workers are at risk of contracting the coronavirus in the course of applying the Rules as stipulated. The safety of the frontline workers is crucial even as they work to save lives. The rights of health workers, volunteers, community health workers and all those on the frontline must be highly safeguarded including personal protective equipment (PPE) and they must be protected from violence by civil unrest. The Rules need to recognise this and provide measures to ensure their PPE as well as their security. Moreover, the Commission proposes the expansion of the definition of health worker to contemplate a situation whereby community health workers would be involved in this process should the crisis escalate to a demand beyond the contemplated professionals.

11. Age, gender, culture and other Diversity perspectives
Our society is diverse with various categories of people; the young, old, mothers and children. The Commission notes a gap in the Rules with regard to recognition of diverse groups. This includes vulnerable groups of persons including infected mothers with infants, pregnant mothers, adolescent girls, elderly and persons with special needs. The Rules need to be sensitive to the unique needs and care particularly when it comes to removal of the ‘carriers’ and the movement to new premises where the suspected cases of covid-19 will be relocated. This includes sanitary, aides and other special needs as the case may be. It also
includes communication that is sensitive to the special interest groups including persons with disability.

12. **Management of gatherings and crowded places**

The Commission takes cognisance of the intensified risk posed in crowded places such as IDP camps, refugee camps and places of detention including police cells and prisons. As such, it is imperative for the Ministry to put in place specific measures that would address challenges of space and make provision for quarantine spaces, access to health care facilities, water and sanitation programmes so as to mitigate the risk of COVID-19 occurrence or exposure in these enclosed spaces.

13. **Safeguarding Privacy and Confidentiality of Covid-19 Patients**

The National Commission notes the significance of safeguarding the privacy and confidentiality of information in the fight against the Covid-19 pandemic. As such, disclosure of information relating to a patient’s health status, treatment or stay in a health facility must not be actively disclosed unless with the express and informed consent of the patients as to the nature of exposure. This is in line with section 11 of the Health Act (No. 21 of 2017) as well as the Access to Information Act. The KNCHR therefore recommends that the proposed Rules be amended to include a separate paragraph that expressly forbids any person, whether a medical health worker or occupier of building from disclosing the status of COVID-positive patients. This will ensure that persons who test positive and their families are safeguarded against stigma and discrimination based on their health status which would claw back on efforts towards containment of spread of the disease. Towards this end, the Commission suggests the borrowing of similar provisions with regard to privacy and disclosure of information contained in the HIV and AIDS Prevention and Control Act (No. 14 of 2006). More sensitisation will however need to be undertaken by the Ministry and other stakeholders at a community level to de-stigmatisate the Covid-19 disease.

14. Overall, the Kenya National Commission on Human Rights emphasizes the need to **underline the principle of human dignity in all its legislation, policies and administrative measures.** The Rules, while seeking to protect the larger public from the spread of Covid-19 must be sensitive to and **recognise the dignity of the carriers of the disease and the need for them to be provided with adequate requisite information, care and support including psychosocial support and counselling.**

A breakdown of the specific comments on the proposed Rules is contained in the table below:
C. Specific Comments

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<thead>
<tr>
<th>Paragraph/section</th>
<th>Proposed Recommendation(s)</th>
<th>Justification</th>
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<tbody>
<tr>
<td>Arrangement of paragraphs</td>
<td>Delete the words appearing alongside paragraph 9 to read ‘Reception by health facilities’ and not ‘Control of public gatherings’.</td>
<td>Accuracy and alignment of the arrangement of paragraphs with the content in the body of Rules.</td>
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<td>Delete the words appearing alongside paragraph 10 to read ‘Escaping from isolation and quarantine’ and not ‘Reception by health facilities’.</td>
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<td>Generally rearrange the arrangement of paragraphs section from Paragraph 9 all through to 13 to align with substantive content.</td>
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<td>Citation of enabling provision: Reads, “IN EXERCISE of the powers conferred by section 36(m) of the Public Health Act, the Cabinet Secretary for Health....”</td>
<td>Include (b), (c), (d) (g) immediately before (m) to read “sections 36(b),(c),(d)(g)(m). Alternatively, delete (m) immediately after 36 to simply read section 36 of the Public Health Act.</td>
<td>The scope of the Regulations goes beyond the general 36(m). For instance, they also touch on confinement, the removal of persons, house visitations and interment. It therefore makes sense to specifically invoke all the other relevant subsections as well or simply the entire section 36.</td>
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<td>Application of Rules</td>
<td>Insert a new paragraph immediately after paragraph 1 on the scope/object of the proposed Rules. This new paragraph should be the new paragraph 2.</td>
<td>Defining the scope of the regulations helps to cap the application of these Rules so as being to be specific and targeted in nature. While the title provides a clue as to the application of the Rules, there is no telling as to the period of application of the Rules. The object is key, so that it is clear once the object is met, the Rules become obsolete.</td>
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<td>2 Responsibility for notification</td>
<td>Delete the last part of the paragraph; ‘or take that person to a medical officer, medical practitioner or health facility for treatment’.</td>
<td>The obligation of the owner, person in charge of, or occupier of premises, and employer should stop at responsibility to notify a medical practitioner and should not extend to giving these individuals power to take the person to hospital. The latter risks infringing on the right to personal integrity of the person suspected to be suffering from COVID-19 unreasonably. In any case, these individuals (owner, person in charge of, or occupier of premises, and employer) are not health professionals and might put themselves at risk when taking the person to hospital against the person’s will (for example, breach of social distancing requirement). The head of household may retain the obligation to take his/her children to hospital in addition to notifying medical practitioners.</td>
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## Proposed Recommendation(s)

### Paragraph 3

Insert a new subparagraph that expressly provides for confidentiality of the information obtained by the health professionals or other person in the course of dealing with Covid-19 patients or suspected cases.

Moreover, a duty to provide full information to the patient in a language that the patient understands regarding his/her treatment should be expressly included in the provision. This should include an obligation to provide information in accessible formats for persons with disabilities.

**Justification**

In line with provisions of the Health Act, 2017.

In line with the provisions of the Access to Information Act (section 5(2)).

### Paragraph 5 Power of Search

Delete the paragraph in totality.

In the alternative, replace the title ‘power of search’ to read ‘power of entry’ or even better ‘home visitations by authorised medical officer’ in the language of section 36(b) which allows the Minister to make rules governing ‘house to house visitation’.

**Justification**

The proposal for deletion is based on two grounds: First, the provisions may be abused or subjected to arbitrariness. There is already a separate paragraph in the Rules that place an obligation on an occupier of building, head of household or owner of premises to report any suspected cases of Covid-19. The additional ‘power of search’ may be excess for the purpose. Should the provision be retained, there is need for identification and such entry must be within a reasonable period during the day.

Secondly, and without prejudice to the foregoing, there is already a provision in the parent Act regarding Power of entry (section 38 of the Act) which authorises the Director of Medical Services and his officers to enter on any premises or vessels for
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<td>the purpose of executing or superintending the execution of any rules made under section 36 of the Act. The provision would therefore be superfluous.</td>
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<td>The change of marginal note (in lieu of deletion) is make it in tandem with the more friendly term used in the Act. Power of search has a more ‘punitive’ connotation to it, as used in criminal processes.</td>
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<td>11(3): The subparagraph reads as follows:</td>
<td>Delete the phrase ‘to be removed’ and substitute therefor the words, ‘cause to be moved’.</td>
<td>A person is not an object to be ‘removed’. Also makes grammatical and drafting sense to say, ‘cause to be moved to a hospital’ rather than ‘or to be removed to a hospital’.</td>
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<td>‘Where a medical officer of health determines that a person is believed or suspected to be a carrier and that the necessary examination and investigations cannot be properly carried out at the house or place of residence of that person, the medical officer of health may direct that person to proceed or to be removed to a hospital or other suitable place for the purpose of examination and investigation and to remain or to be detained in that place for such reasonable period as may be required for that purpose.’</td>
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<td>11(4): The paragraph provides as follows</td>
<td>The Clause should include a proviso that obligates the government to support or provide the necessary for the cleansing any other instructions as may be given to them by the medical officer.</td>
<td>The carriers are victims and depending on the situation including poverty levels, may be in a situation whereby they are unable (not unwilling) to give effect to all the instructions. There should be room to offer the necessary support on a case by case basis.</td>
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<td>(4) Every carrier shall at all times observe and give effect to all reasonable instructions given to him or her by the medical officer of health in regard to the disposal of his or her infectious materials and the cleansing of the articles used by the carrier, and any other precautions for preventing the spread of infection</td>
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SIGNED BY:

Dr. Bernard Mogesa (PHD, CPM)

COMMISSION SECRETARY/CEO