



OFFICE OF THE PRESIDENT
OF THE SOUTH AFRICAN MEDICAL
RESEARCH COUNCIL

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To: Professor Glenda Gray
President and CEO Medical Research Council

From: Professor Ames Dhai
Chair Bioethics Advisory Panel (Medical Research
Council)

ADVISORY: Mandatory COVID-19 Vaccinations for SAMRC Staff.

PROBLEM STATEMENT: On the 11th June 2021, the Employment and Labour Minister gazetted a Direction on COVID-19¹ vaccination in certain work places, in the new consolidated direction on occupational health and safety measures. It stipulates that employers are required to come up with reasonable resolutions so that all parties are accommodated should employees refuse COVID-19 vaccinations on medical and constitutional grounds. The principle espoused by the Direction is that employers and employees should treat each other with mutual respect. Essential considerations are public health imperatives, employees' constitutional rights and efficient business operations.

The Direction in section 3(1)(a)(ii) stipulates that employers must undertake a risk assessment to determine whether or not they intend to "make vaccination mandatory". This should be in accordance with sections 8 and 9 of the Occupational Health and Safety Act⁴ (OHSA) and should take into account the operational requirements of the workplace. Employers are obliged to identify those employees that need to be vaccinated by "virtue of the risk of transmission through their work or their risk for severe COVID-19 disease or death due to their age or comorbidities". Medical grounds for an employee not agreeing to take a vaccine as stated in Annexure 3 of the Directive is "an immediate allergic reaction of any severity to a previous dose or a known (diagnosed) allergy to a component of the covid-19 vaccines". Section 3(4) affirms that the employer must take into account the Constitutional rights of their employees to bodily integrity and the right to freedom of religion, belief and opinion.

The President of SA announced on the 30th of September 2021 that vaccine certificates as proof of full vaccination would be issued by the National Department of Health and the portal for such issue went live on 8th of October 2021. These certificates could be used by employees to access the workplace. Of note, there is currently no shortage of COVID-19 vaccines in South Africa.

Concern was raised that some staff may not be willing to be vaccinated against COVID-19 and hence would not be able to produce the vaccine certificate to access SAMRC premises. Recommendations from the Bioethics Advisory Panel on this matter was requested.

RATIONALE: At the outset it is highlighted that certain workplaces requiring mandatory vaccinations is not a new concept, for example, employers require healthcare workers to be vaccinated with hepatitis B vaccine as a condition of



employment. In terms of the Constitution, everyone is entitled to an environment that is not harmful to their health or well-being (section 24(a)).

(A) The Constitution² affirms:

- the right to bodily and psychological integrity which includes the right to security in and control over their body (section 12(2b)); and
- the right to freedom of conscience, religion, thought, belief and opinion (section 15(1)).

Notwithstanding the above, most rights in the Constitution may be limited, provided the limitation is of general application, and is 'reasonable and justifiable' - which means that it is rational, proportional and the least restrictive means of achieving its objective (section 36(1)). The importance of the purpose of the limitation (public health) needs to outweigh the interests protected by rights infringed (body integrity or religious beliefs) and, if so, the limitation must be the least restrictive means to achieve that purpose.

It is argued that a compulsory requirement that certain people who may be exposed to COVID-19 infection must be vaccinated is 'reasonable and justifiable', because it will ensure their own safety and would also be in the public interest. The purpose of the limitation would be to secure protection against death & severe disease; decrease onward transmission of the virus; reduce the risk of ongoing mutations into variants of concern; relieve the pressures on ICUs; protect health care workers and allow them to attend to the needs of patients with non-COVID-19 medical conditions. In addition, lock-downs are likely to continue and levels increased each time a new wave or variant emerges resulting in a continuing contraction of the economy, unacceptably high unemployment rates, and restrictions on other Constitutional rights and freedoms, such as freedom of association (section 18) and freedom of movement (section 21). Physical distancing, masks and other non-pharmaceutical preventative measures are effective in restraining transmission but have not constituted less restrictive means to end pandemic or limit serious effects of infection in the way that vaccination has.

(B) Relevant sections of the Occupational Health and Safety Act³ are listed as:

- s8(1): every employer is to take reasonable measures to ensure the health and safety of its employees in the workplace
- s9(1): every employer whose workers interface with the public must take reasonable measures to ensure that interface does not endanger the health and safety of the members of the public
- s12(1): employers are to ensure the work environment is not harmful to employees by protecting them from 'hazards emanating from listed work'
- s12(1)(b): employers are to 'as far as reasonably practicable, prevent the exposure of such employees to the hazards concerned, or where prevention is not reasonably practicable, minimize such exposure'
- s14(a): employees are to 'take reasonable care for the health and safety of [themselves] and of other persons who may be affected by [their] acts or omissions'
- s14(c): employees are to 'carry out any lawful order given to [them], and obey health and safety rules and procedures, laid down by [their] employer', or a person authorized by the employer, 'in the interest of health and safety'
- s38(1) (a): it is a criminal offence for an employee not to comply with the rules as set out by the employer.

(C) The Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces¹ focusses at enabling sections 8 and 9 of the OHSA. Relevant aspects include:

- s3(1)(a)(ii): within 21 days of coming into force, every employer must undertake a risk assessment which must stipulate, *inter alia*,

- whether employer intends making Covid-19 vaccination mandatory for its employees
- employers should identify those employees who must be vaccinated due to the risk of transmission through the nature of their work or their risk to contract Covid-19 due to their age or comorbidities.
- Employers must develop plans / amend existing plans which outline the measures to be implemented and take into consideration employees' rights to bodily integrity & freedom of religion, belief and opinion. Mutual respect during these processes is stressed.
- s4(1)(i): employer's must provide workers with information raising awareness on "the nature of vaccines used in the country, the benefits associated with these COVID-19 vaccines, the contra-indications for vaccination and the nature and risk of any serious side effects such as severe allergic reactions."
- s4(1)(k): employers must give administrative support to assist registration on Electronic Vaccine Data System Registration Portal.
- s4(1)(l): employers must provide employees with paid time off to be vaccinated. An employee must provide proof of the vaccination.
- Annexure C (2): considers situations where an employee refuses to vaccinate and states that:
 - The employer should counsel the employee
 - refer them for further medical evaluation should there be a medical contraindication
 - if necessary, take steps to reasonably accommodate the employee in a position that does not require the employee to be vaccinated. This may include adjustment that permits the employee to work from home or in isolation within the workplace.

(D) The Labour Relations Act⁴ permits dismissal for a fair reason related to an employee's conduct or capacity or the employer's operational requirements

(E) Ethical Considerations

- Traditional African values and Ubuntu principles of interrelatedness and interconnectedness⁵ underscore the importance of public health preventative measures to allow for survival of communities. Therefore, achieving public health will trump personal choice.
- COVID-19 vaccine uptake will need to be socially and communally negotiated through discussions, open dialogues, and mutually respectful conversation with all stakeholders at SAMRC. This could assist with staff participation and ownership of decisions, and transparency in the decision-making process.

(F) Production of Vaccine Certificates for entry to SAMRC Premises: see SAMRC Advisory on Vaccine Passports. Certificates/ Passes at <https://www.samrc.ac.za/sites/default/files/attachments/2021-08-04/Advisory%20vaccine%20passports.pdf>

RECOMMENDATIONS:

1. The SAMRC, in responding to the needs of the country's population has the responsibility to ensure its employees are vaccinated and therefore must develop a policy on mandatory vaccinations.
2. The SAMRC must undertake a risk assessment as per the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces.
3. A phased-in approach which includes providing staff with information on the nature of vaccines used in the country, the benefits associated with these COVID-19 vaccines, the contra-indications for vaccination and the nature and risk of any serious side effects such as severe allergic reactions could be instituted. While rights to

bodily integrity, religion and beliefs need to be respected when instituting the phased approach, these rights can be limited in line with section 36 of the Constitution.

4. Only individuals producing proof of vaccinations as per the vaccine certificates issued by the NDoH, or a recently negative SARS-CoV-2 PCR test (within the previous 72 hours) should be allowed to access onto SAMRC premises. This includes service providers and visitors.
5. The SAMRC is urged to consider developing and implementing its policy as a matter of urgency.

Thank you for considering the recommendations in this Advisory.

Sincerely



Professor A Dhai

Chairperson Bioethics Advisory Panel

Approved by SAMRC President & CEO Prof Glenda E Gray



References

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3. Occupational Health and Safety Act 85 of 1993. Accessed on September 7 from <https://www.gov.za/documents/occupational-health-and-safety-act>
4. The Labour Relations Act 66 of 1995. Accessed on September 7 from [Labour Relations Act 66 of 1995 | South African Government \(www.gov.za\)](http://www.gov.za)
5. Africa Centre for Disease Control and Prevention. Framework for Fair, Equitable and Timely Allocation of COVID-19 Vaccines in Africa. Accessed on September 7 from <https://africacdc.org/download/framework-for-fair-equitable-and-timely-allocation-of-covid-19-vaccines-in-africa/>