

South African Institute of Race Relations NPO

Submission to the National Coronavirus Command Council,

Supporting the Proposal to Repeal

National Health Act Regulations

on the Critical Control Measures to contain the spread of COVID-19, 2022,

Johannesburg,

21st June 2022

1 Introduction

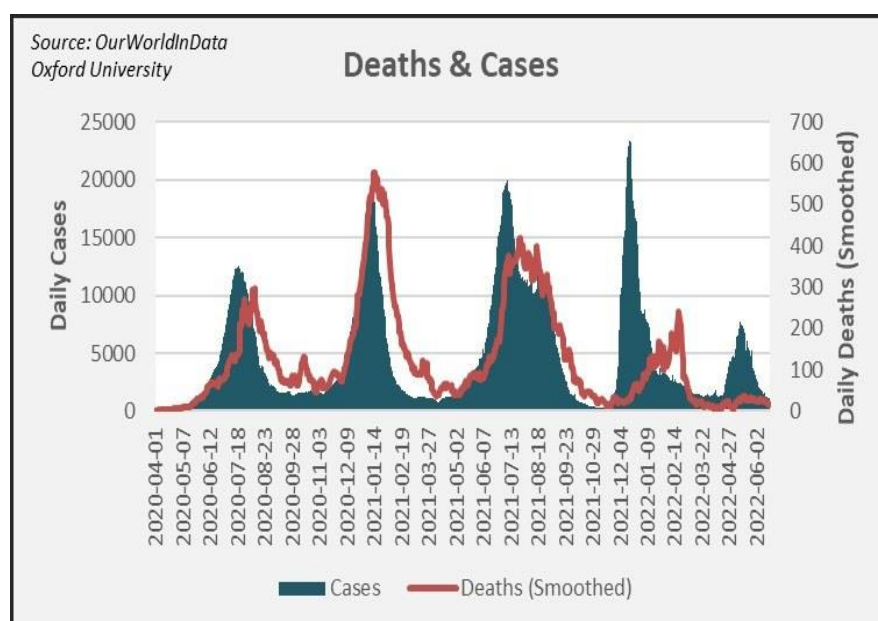
The Minister of the Department of Health (DoH), Dr MJ Phaahla, has proposed that the National Coronavirus Command Council should repeal current Regulations under the National Health Act (the Act) described as “Critical Control Measures to contain the spread of Covid-19”¹ (the Regulations).

This submission supporting the repeal of the Regulations Covid-19 is made by the Institute of Race Relations (IRR), a non-profit organization formed in 1929 to oppose racial discrimination and promote racial goodwill. The IRR’s current objectives are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

Over 15,000 South Africans signed onto an IRR campaign opposing the Regulations and thereby reinforce the Minister’s proposal to **end the lockdown now**.

Covid-19 Status

As of the beginning of April 5, 2022, South Africa was no longer in a Covid-19 “State of Disaster”. This reflects an official recognition that Covid-19 radically transformed from being a “critical threat to society” to “an ordinary dangerous illness” here. The quoted phrases are borrowed from the Danish government as it lifted restrictions². Covid-19 has long been “an ordinary dangerous illness” in South Africa too.



¹ <https://twitter.com/ShabirMadh/status/1538982283058749441/photo/1>

² <https://www.npr.org/2021/09/10/1036136246/covid-denmark-eu-restrictions>

As predicted, there was a divorce between Covid-19 deaths and cases in the South African summer of 2021/22 and then a further flatlining of deaths through the autumn of 2022.

Since less than a third of the population is fully vaccinated how did this “miracle” happen?

A serological study revealed that roughly 80% of residents of Gauteng above 50 years old had already been infected with Covid-19 before the Omicron variant entered circulation in 2021³.

In a more recent blood-bank study 98% of subjects showed signs of boosted immune protection against Covid-19, almost 80% of them from previous infection alone⁴.

There is wide scientific agreement that convalescent protection from recovery is riskier to acquire but as effective as, or more effective and lasting than, protection from vaccination. For example the US CDC summarized a review of the scientific literature as follows:

“A systematic review and meta-analysis including data from three vaccine efficacy trials and four observational studies from the US, Israel, and the United Kingdom, found no significant difference in the overall level of protection provided by infection as compared with protection provided by vaccination; this included studies from both prior to and during the period in which Delta was the predominant variant⁵.”

A more recent study sensitive to multiple strains of Omicron in Qatar shows that previous infection beats two doses of Pfizer on almost every measure, and on the exceptional measures they are equivalently effective⁶.

This means in practical terms Gauteng passed the equivalent of the DoH 66-75% vaccination target in 2021 already through prior infection, and that this target for immune boosting has been far exceeded nationwide since then.

South Africa may well have had the highest, fastest national infection rate in the world as no other large country has equivalent evidence of reaching such widespread infection rates. This reflects poorly on the government’s ability to manage the pandemic.

Nevertheless, the key two key points to draw on the virological situation:

- 1) “A combination of high levels of immunity and the reduced severity of the Omicron variant has rendered **Covid-19 less lethal than influenza** for the vast majority of people in England, according to a Financial Times analysis of official data”⁷ [emphasis added].
- 2) Professor Shabir Madhi said “We’ve made **similar sorts of estimates for South Africa**. It doesn’t mean the virus has disappeared - the virus is still among our midst and will be among our midst for the rest of our lives”⁸ [emphasis added].

³<https://www.nejm.org/doi/full/10.1056/NEJMoa2119658>

⁴<https://assets.researchsquare.com/files/rs-1687679/v2/330599aa-61c0-4196-b825-0644e1d5cd53.pdf?c=1653578592>

⁵<https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/vaccine-induced-immunity.html>

⁶<https://www.nejm.org/doi/full/10.1056/NEJMoa2203965>

⁷<https://www.ft.com/content/e26c93a0-90e7-4dec-a796-3e25e94bc59b>

⁸<https://www.news24.com/health24/medical/infectious-diseases/coronavirus/covid-19-now-less-deadly-than-flu-in-the-uk-analysis-shows-20220314>

Any regulations that strangle liberty to combat an ordinary dangerous illness that will be in our midst for the rest of our lives, meaning the Regulations, are eo ipso permanent limitation of rights.

The Urgent Need to Get South Africans back to work

South Africa's unemployment rate is 34.5% on the narrow definition and 45,5% on the expanded definition, according to the latest data from Stats SA⁹. In a list of over 150 countries the World Bank ranks South Africa as having the world's worst unemployment rate, on the narrow definition¹⁰. This means South Africa is in a worst-case position and its government must focus on growing jobs now.

India, Turkey, Argentina, Brazil, Mexico, Kenya, and Egypt are just a few of the countries that lost jobs during the pandemic and subsequently regained all the lost jobs, and in many cases grew even more opportunities to work than were available pre-pandemic. By contrast South Africa has **lost 1.5 million jobs** that have not come back. This means South Africa is underperforming in reopening its economy.

Mandates on masks and vaccines send signals to consumers, both domestic and international, that *free economic consumption is unwelcome*. This harms producers by chasing away potential customers. Direct limits on business capacity also harms production. Harming production means harming job prospects. The government should help, not harm job prospects.

Relevant Provisions of the Constitution

Section 12(1) prohibits the state from depriving people of freedom "arbitrarily or without just cause" and states that persons shall "not to be treated or punished in a cruel, inhuman or degrading way", while Section 12(2) guarantees the right to "bodily...integrity" which includes the right to "security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent."

Section 14 states that the Right to Privacy includes "the right not to have their person...searched".

Section 21 (1) states that "Everyone has the right to freedom of movement" and Section 21 (3) states "Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic."

Section 36 (1) states that these rights may only be limited to the extent that the limitation is, inter alia, "reasonable and justifiable in an open and democratic society".

The list of countries that have lifted Covid-19 indoor restrictions except in health facilities includes, but is not limited to: Denmark, Namibia, Bulgaria, Kenya, Czech Republic, France, Estonia, Finland, Hungary, Iceland, the Netherlands, the Republic of Ireland, UK, USA, Lithuania, Sweden, Norway, Dominican Republic, Switzerland, Iceland, Maldives, Poland, Latvia, Croatia, Dominican Republic, Brazil, Paraguay, Uruguay, Belgium, and Jamaica.

Since as many as 98% of South Africans show signs of immune enhancement against Covid-19 this country cannot be said to be in a worse position, virologically, than any of the countries where citizens and residents enjoy freedom of movement, privacy, bodily integrity, and freedom to gather.

Mask Mandate

Responding specifically to Mask Mandate in South Africa six medical experts co-signed the following observation: "[E]xperience with the highly transmissible and infectious Omicron variant indicates

⁹ <https://www.statssa.gov.za/publications/P0211/P02111stQuarter2022.pdf>

¹⁰ https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?most_recent_value_desc=true

that **the type of cloth mask most worn by the public** (which rarely provides a good seal around the nose and mouth) provides little-to-no protection against being infected and **does not meaningfully reduce transmission** [emphasis added]¹¹.”

Moreover, a peer-reviewed study of 35 European countries found masks at a macro level to be ineffective or even harmful. Specifically, it found "that countries with high levels of mask compliance did not perform better than those with low mask usage". Moreover, "the moderate positive correlation between mask usage and deaths in Western Europe also suggests that the universal use of masks may have had harmful unintended consequences"¹².

Since the measure “does not meaningfully reduce transmission” in the relevant context according to these experts the Mask Mandate cannot be reasonably imposed for the purpose of reducing transmission.

In the absence of an enforcement mechanism that covers the nation robustly the Mask Mandate is bound to be arbitrarily enforced, which is prohibited by Section 12(1).

Section 12(2) guarantees one’s “control over their body” which includes those external objects that make direct contact with one’s body. While that control can be limited by the state, this can only be done in a manner that is “reasonable and justifiable in an open and democratic society”. No open and democratic society aims to force people to wear masks when entering all public premises as long as Covid-19 is in circulation, definitive evidence that this measure is neither reasonable nor just.

Vaccine Passes

The Regulations require “a valid vaccine certificate” be produced before persons may enter “indoor and outdoor gatherings”.

The National Health Act, however, does not empower the Minister, either explicitly or implicitly, to introduce the novel measure of forced or induced vaccination. The current Regulations are therefore *ultra vires* the Act.

The DoH’s intension to induce people to be vaccinated by denying them freedom of movement and imposing *de facto* searches of their person must be so significant an imposition that even if it were to introduce such impositions by statute there would be challenges based on Section 14 of the Constitution, guaranteeing the right to privacy, and Section 21, guaranteeing freedom of movement, which are unlikely to be met. But as it stands the Regulations attempt to introduce a form of vaccine mandate that is not envisaged or permitted by the Act, which is silent on forcing medical treatments of this kind at this scope, and is therefore *ultra vires* the Act.

Business Restrictions

The Regulations limit outdoor venue capacity to 50%.

However, six experts stated, regarding the Regulation’s 50% capacity limits that: “Physical distancing at work and in queues is also detailed in the regulations. But this ignores the fact of aerosol spread of infectious virus particles, which can comfortably exceed distances of the recommended one metre. The notion of physical distancing to reduce risk of infecting others is firmly rooted in an era

¹¹ <https://www.dailymaverick.co.za/article/2022-03-22-the-incoherent-and-illogical-new-government-covid-19-regulations-are-the-real-state-of-disaster/>

¹² <https://www.cureus.com/articles/93826-correlation-between-mask-compliance-and-covid-19-outcomes-in-europe>

prior to realising that spread of SARS-CoV-2 is mainly via the airborne route, and most efficient in poorly ventilated indoor spaces irrespective of distancing between people.”

The limits on business restrictions are dire, and unjustified, especially in the context of joblessness being the country’s priority problem.

The Way Forward

The DoH proposal to repeal all Covid-19 “critical control measures” enforced by Regulation under the National Health Act must be executed. Support Minister Phaahla’s call to lift the burden of red tape that takes the form of ineffective and/or illegal mask mandates, vaccine passes and capacity limits. **End the Lockdown.**

Priorities should be made to allow the economy to grow while the DoH does what it can to manage the increased excess mortality that has occurred outside of Covid-19 waves, which is most likely due to the increases in joblessness and poverty caused partly by reckless government limitations on constitutional rights.