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Is it fair discrimination to exclude unvaccinated people?



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By **HILDA GROBLER**

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27 Sep 2021

The [Bill of Rights](#) provides that everyone is equal before the law and that this equality includes the full and equal enjoyment of all rights and freedoms.

The Minister of Health, Joe Phaahla, announced on 2 September 2021 that the government hoped to put into place a plan in the next two weeks in terms of which everyone who has been vaccinated would be in possession of a vaccination card as proof thereof. The unvaccinated would not have access to public sporting events, entertainment and “many other social activities”, the Minister said.

This raises the question: Does the vaccination proof-requirement amount to unfair discrimination against people who have elected not to be vaccinated? The answer to this question is simply ‘NO’.

A quick look at the Bill of Rights shows that there are limitations to the rights everyone enjoys in terms of [the Constitution](#).

Section 36 of the Bill of Rights provides that individual rights are limited when these go against the public interest.

Section 18 provides that South Africans have a right known as the freedom of association. This means that they are free to organise, and to form and participate in groups, either formally or informally. That, in turn, means that they can refuse to mix with people who, for a variety of reasons, have elected not been vaccinated.

When individual rights provided by the Constitution are limited because they impact negatively on the rights of the general public, it is no longer a matter of ‘unfair discrimination’ – the discrimination in question becomes ‘fair discrimination’.

Deliberately excluding the unvaccinated from public, private or workplace premises might not, however, be sufficient to protect the broader society from people who elect not to be vaccinated. This is where the Regulations issued in terms of the [Disaster Management Act](#) come in.

In instances where contact with the unvaccinated is unavoidable, the Regulations require everyone to keep a safe social distance and to wear a mask in a public space.

It is not commonly known that as from 1 February 2021 it is now a criminal offence to appear in public without a mask. If charged and convicted, the transgressor could be given a fine, or handed a sentence of six months in jail, or both.

Regulation 34(3) provides some guidance as to what is meant by a public space. It states that no one may be on public transport, enter any premises “used by the public to obtain goods or services”, or “be in any public open space”.

The phrase “used by the public to obtain goods or services” is far-reaching. It was originally intended to ensure that any employer, manager or owner of a building used by the public to obtain goods or services would be held liable if someone entered or remained on the premises without wearing a mask.

Given the government’s plans to impose proof of vaccination before accessing public spaces, this phrase could potentially mean that, for example, shops could deny access to customers who cannot prove that they have been vaccinated.

The requirement to provide proof of vaccination in unrelated instances, has been accepted and has remained unchallenged for decades. If one, for example, wished to travel to certain countries, there was a requirement to obtain a yellow fever vaccination. It was a simple choice between being vaccinated or forgoing the trip.

Based on the principle that one should not expose others to the danger of infecting them with this deadly virus, the requirement relating to a ‘vaccination passport’ or ‘card’ is gaining momentum internationally. At present a number of countries have introduced a so-called ‘vaccine passport’. The EU has, for example, introduced it across all 27 member nations.

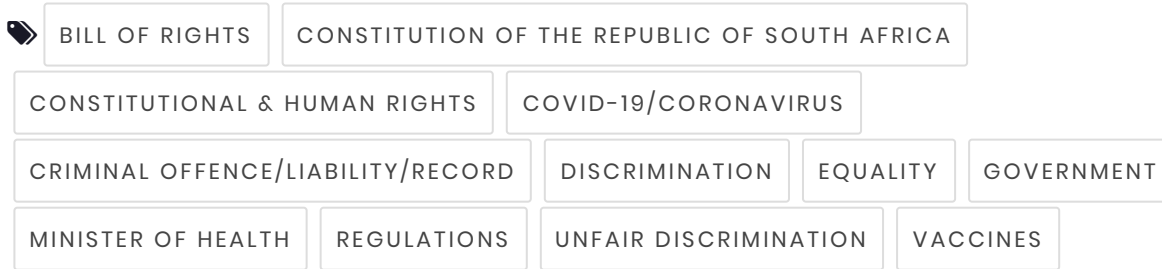
Is the South African government overreacting? Not according to Professor Debbie Bradshaw, a senior scientist working for the SA Medical Research Council’s Burden of Disease Research Unit, who told News 24 on 2 September 2021 that it seems that **‘Covid-19 will become the single leading cause of death’** in 2021.

See also:

- [Disaster Management Act Regulations have been amended](#)
- [Malaria, vaccines and the riddle of steel](#)
- [The current implementation of vaccine roll out is probably unlawful & unconstitutional](#)
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Hilda Grobler has over 30 years' experience in conducting arbitrations, mediations and workplace facilitations, as well as in the chairing of disciplinary enquiries and appeal hearings. She presided in the... [Read more about Hilda Grobler](#)

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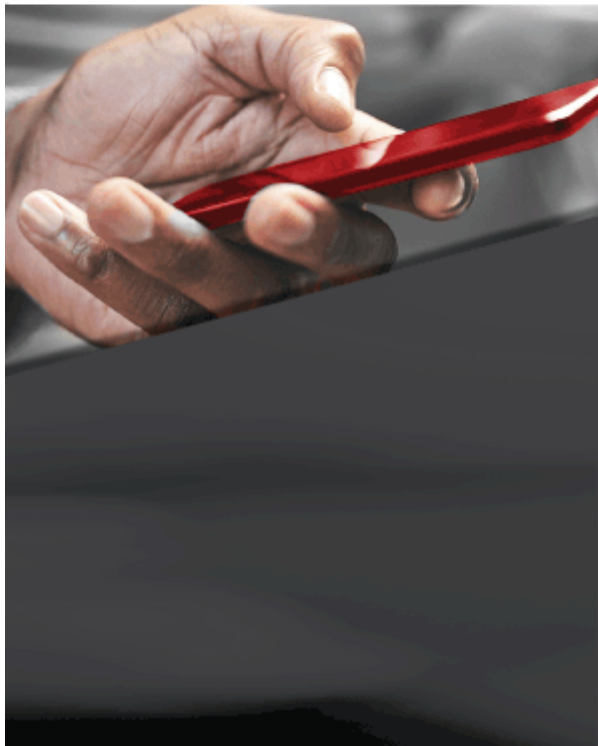


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