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# Mandatory Vaccinations in the Workplace: Lessons for the Next Pandemic

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# Mandatory Vaccinations in the Workplace: Lessons for the Next Pandemic

*by*

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Submitted in partial fulfilment of the requirements for the degree of
Master of Laws by Coursework and Research Report
at the University of the Witwatersrand, Johannesburg

Date: 31 May 2025

## DECLARATION

I, **Heleen Mostert**, declare that this report is my own, unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws in the field of **Labour Law** at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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In the words of Snoop Dogg, ‘I wanna thank me for believing in me. I wanna thank me for doing all this hard work. I wanna thank me for having no days off. I wanna thank me for, for never quitting.’ Above all else, I want to thank myself for meeting adversity with resilience and diplomacy; for greeting failure with the same grace with which I receive success; and, most importantly, for accepting setbacks with a sense of humour – because nothing in this life should ever be taken too seriously, except perhaps death and taxes.

## ABSTRACT

The World Health Organization ('WHO') declared the SARS-CoV-2 ('COVID-19') outbreak a pandemic on 11 March 2020. The South African government took heed of the WHO's response principles and declared, per section 27(5)(*c*) of the Disaster Management Act 57 of 2002 ('DMA'), a National State of Disaster ('NSD') on 15 March 2020. Various countries responded to the COVID-19 pandemic ('the pandemic') by mandating the vaccination of their workforce in designated labour industries. Inversely, the South African government opted for an intermediate approach by neither mandating nor prohibiting the mandating of COVID-19 vaccination. Instead, the government gave employers the statutory regulated discretion, in accordance with the Consolidated Direction on Occupational Health and Safety Measures in Certain Workplaces in GN 499 *GG* 44700 of 11 June 2021 ('the Direction'), on whether to mandate employee vaccination.

The pandemic underscored vaccine hesitancy and reshaped vaccine policies, resulting in occupational and socioeconomic implications for unvaccinated employees. I analyse these implications, vaccine hesitancy, and the regulation of occupational vaccine mandates. Legal development – premised on lessons drawn from the pandemic – can be observed globally. South Africa would be well-placed to keep up with global legal developments when deliberating on prospective occupational vaccine policies. I, therefore, consider international law, South African law, and the foreign laws of Australia, New Zealand ('NZ'), and the United States of America ('U.S.') to draw lessons from the pandemic and inform vaccine policies in preparation for the next pandemic. I assess to what extent these legal developments have balanced public health with labour stakeholders' competing interests, rights, and duties ('the balance').



**Keywords:** COVID-19 Pandemic, Public Health, Occupational Vaccine Mandates, Vaccine Hesitancy, Pandemic Preparedness

**TABLE OF CONTENTS**


I INTRODUCTION ..... 7

II SCIENTIFIC AND ANTHROPOLOGICAL VARIABLES UNDERLYING VACCINE HESITANCY AND INFORMING VACCINE MANDATES ..... 9

*(a) Vaccine hesitancy and mandates* ..... 9

*(b) Scientific and anthropological variables* ..... 10

*i. Religion* ..... 11

*ii. Medical science* ..... 11

*iii. Health and government authorities* ..... 13

III OVERVIEW OF INTERNATIONAL LAW ON VACCINE MANDATES ..... 16

IV OVERVIEW OF SOUTH AFRICAN LAW ON VACCINE MANDATES ..... 17

*(a) Pre-COVID-19 pandemic* ..... 17

*i. National regulation* ..... 17

*ii. Labour regulation* ..... 18

*(b) The COVID-19 pandemic* ..... 19

*i. National regulation* ..... 19

*ii. Labour regulation* ..... 20

V OVERVIEW OF FOREIGN LAW ON VACCINE MANDATES ..... 23

*(a) Australia* ..... 23

*(b) New Zealand* ..... 25

*(c) United States of America* ..... 29

VI LESSONS FOR THE NEXT PANDEMIC ..... 31

*(a) Scientific and anthropological considerations* ..... 31

*i. South Africa* ..... 31

*ii. Foreign jurisdictions* ..... 32

*iii. Lessons* ..... 34

*(b) Regulation of vaccine mandates* ..... 35

*i. South Africa* ..... 35

*ii. Foreign jurisdictions* ..... 36

*iii. Lessons* ..... 37

*(c) Balancing public health with labour interests, rights, and duties* ..... 39
*i. South Africa* ..... 39
*ii. Foreign jurisdictions* ..... 40
*iii. Lessons* ..... 41
VII CONCLUSION ..... 41
VIII BIBLIOGRAPHY ..... 43
***(a) Australia*** ..... 43
***(b) International sources*** ..... 44
***(c) New Zealand*** ..... 46
***(d) Other foreign sources*** ..... 47
***(e) South Africa*** ..... 49
***(f) United States of America*** ..... 52

# I INTRODUCTION

'The World Health Assembly… recognized the progress made… by Member States to develop a pandemic agreement and strengthen the International Health Regulations… Governments… are in talks to advance these two efforts, which aim to boost the world's ability to… respond to… future pandemics.'[1]

Recognising a pandemic's adverse consequences, the WHO has been cooperating with its Member States to prepare for the next pandemic.[2] The WHO and the Coalition for Epidemic Preparedness Innovations encourage preparation through global research.[3]

During the pandemic, the South African government followed the guidance of the WHO by declaring a NSD.[4] The proliferation of COVID-19 infections incited global debate on whether vaccination should be mandated in light of its scientific efficacy and the economic, social, health, and legal consequences of the pandemic and mandatory vaccination.[5]

The World Bank considers COVID-19 to have caused 'the largest global economic crisis in more than a century'.[6] This crisis exacerbated inequality and placed emerging economies at a further disadvantage.[7] A survey conducted by the University of Johannesburg's Centre for Competition, Regulation and Economic Development demonstrates the economic impact of the pandemic lockdown in South Africa.[8] The survey indicates that 42.7% of

1 WHO 'WHO member states agree way forward to conclude pandemic agreement' at *https://www.who.int/news/item/28-05-2024-who-member-states-agree-way-forward-to-conclude-pandemic-agreement*, accessed 2 July 2024.

2 WHO 'Preparing for pandemics' at *https://www.who.int/westernpacific/activities/preparing-for-pandemics*, accessed 2 July 2024.

3 WHO 'CEPI and WHO urge broader research strategy for countries to prepare for the next pandemic' at *https://www.who.int/news/item/01-08-2024-cepi-and-who-urge-broader-research-strategy-for-countries-to-prepare-for-the-next-pandemic*, accessed 7 August 2024.

4 M Modisenyane, L Madikezela, S Mngemane, O P Ramadan, M Matlala, K McCarthy, N Govender, T Nemungadi, & S P Silal 'COVID-19 response in South African communities: Screening, testing, tracing and movement modelling' (2022) 112 *SAMJ* 366; Declaration of a National State of Disaster in GN 313 *GG* 43096 of 15 March 2020.

5 Jeremy Phillips, Amogelang Makuwa, & Shamima Gaibie 'COVID-19 mandatory vaccinations in the workplace: A developing jurisprudence' (2022) 43 *ILJ* 2163-2165; Kevin Bardosh, Alex de Figueiredo, Rachel Gur-Arie, Euzebiusz Jamrozik, James Doidge, Trudo Lemmens, Salmaan Keshavjee, Janice E Graham, & Stefan Baral 'The unintended consequences of COVID-19 vaccine policy: Why mandates, passports and restrictions may cause more harm than good' (2022) 7 *BMJ Global Health* 1-11.

6 World Bank Group 'Chapter 1. The economic impacts of the COVID-19 crisis' at *https://www.worldbank.org/en/publication/wdr2022/brief/chapter-1-introduction-the-economic-impacts-of-the-covid-19-crisis*, accessed 19 January 2025.

7 Ibid.

8 Grace Nsomba, Ntombi Tshabalala, & Thando Vilakazi 'Analysis of the impact of COVID-19 on micro, small and medium-sized enterprises in South Africa' at *https://www.compcom.co.za/wp-content/uploads/2021/11/SMEs-COVID-19-in-South-Africa_Final-Report_CCRED-20210510-003.pdf*, accessed 19 January 2025.

businesses ceased operating by November 2020, 60% of full-time employees lost their jobs, and 76.8% of part-time employees lost theirs.[9] Arguably, these statistics emphasise the appeal of mandatory vaccination as a potential solution to a pandemic bearing socioeconomic implications. Contrary to South Africa, various countries mandated the COVID-19 vaccination of designated employees.[10]

It will become clear from my discussion on case law throughout this research report that COVID-19 vaccine mandates were not well-received by vaccine-hesitant employees. Studies indicate that vaccine hesitancy is attributable to various anthropological and scientific variables.[11]

Employment and human rights remain affected by the pandemic.[12] The WHO stressed 'science and political resolve' as relevant to mitigating prospective pandemics.[13] Foreign jurisdictions have already used the pandemic as a benchmark for legal development.[14] I assert that South Africa should follow suit, starting with the contentious measure of occupational vaccine mandates.

Considering the WHO's envisaged science and political resolve, I first analyse common catalysts for vaccine hesitancy as aspects informing prospective vaccine policies. Second, I discuss international human rights laws on vaccine mandates. Third, I provide an overview of South Africa's regulation of vaccine mandates before and during the pandemic. Fourth, I provide an overview of the regulation of COVID-19 vaccine mandates in terms of the laws of Australia, the U.S., and NZ. Lastly, to draw lessons from the pandemic, I analyse South African law in relation to foreign and international law to strike a balance between public health and competing labour interests, rights, and duties.

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9 Ibid.

10 Jessica U. Damian & Takalani G. Tshitangano 'Mapping the global adoption of mandatory vaccination against COVID-19: A scoping review' (2023) 3 *J. Respir*. 156-157 and 160; BusinessTech 'Deputy president gives update on mandatory COVID vaccines in South Africa' at *https://businesstech.co.za/news/government/573256/deputy-president-gives-update-on-mandatory-covid-vaccines-in-south-africa/*, accessed 1 May 2024.

11 Bent Steenberg, Andile Sokani, Nellie Myburgh, Portia Mutevedzi, & Shabir A. Madhi 'COVID-19 vaccination rollout: Aspects of hesitancy in South Africa' (2023) 11 *Vaccines* 1-3 and 11-12; Michelle Engelbrecht, Christo Heunis, & Gladys Kigozi 'COVID-19 vaccine hesitancy in South Africa: Lessons for future pandemics' (2022) 19 *Int. J. Environ. Res. Public Health* 6 and 9-10.

12 Rachael Johnson 'Preparing for the next pandemic' at *https://www.ibanet.org/Preparing-for-the-next-pandemic*, accessed 2 July 2024.

13 Op cit note 3.

14 Op cit note 12.

## II SCIENTIFIC AND ANTHROPOLOGICAL VARIABLES UNDERLYING VACCINE HESITANCY AND INFORMING VACCINE MANDATES

Bardosh *et al* assert that the pandemic reshaped vaccine policies.[15] This has led to 'ethical, scientific, practical, legal and political' controversy from which lessons can be inferred.[16] It is implied by Steenberg *et al* that vaccine hesitancy should not be viewed through a keyhole where solely the clinical aspects of vaccines are examined.[17] Instead, the anthropological variables central to vaccine hesitancy should be explored to draw lessons for future pandemics and negated to encourage immunisation.[18] In this section, I analyse scientific and anthropological factors for and against vaccination to give equal consideration to public health and polarising interests and rights.

### *(a) Vaccine hesitancy and mandates*

The WHO regards vaccine hesitancy as a public health impediment due to it impeding vaccine advancements.[19] Steenberg *et al* summarise vaccine hesitancy as the product of conspiracy theories and uncorroborated allegations.[20] These theories question the integrity of governments and health institutions and the efficacy and safety of vaccinations.[21] Engelbrecht *et al* identify the latter variable as being the most prevalent globally.[22] Similarly, Phillips *et al* contend that the 'disregard of science' is one of the catalysts for COVID-19 vaccine opposition in South Africa.[23] Former Chief Justice, Mogoeng Mogoeng ('Mogoeng'), denounced COVID-19 vaccines, tying them to the devil.[24]

White *et al* ostensibly insinuate that the opinions shared by public figures on COVID-19 vaccines amount to disinformation and misinformation if they assume an anti-vaccination

15 Bardosh *et al* op cit note 5 at 1.
16 Ibid.
17 Steenberg *et al* op cit note 11 at 2-3 and 11-12.
18 Ibid.
19 WHO 'Ten threats to global health in 2019' at *https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019*, accessed 27 April 2024.
20 Steenberg *et al* op cit note 11 at 2.
21 Ibid at 1-3 and 11-12; Engelbrecht *et al* op cit note 11 at 6 and 9-10.
22 Engelbrecht *et al* op cit note 11 at 9.
23 Phillips *et al* op cit note 5 at 2165.
24 Boitumelo B. Senokoane 'The devil, 666 and the COVID-19 vaccine' (2021) 77 *HTS Theological Studies* 1.

stance.[25] Davis J in the case of *COVID Care Alliance NPC v President of the Republic of South Africa*[26] (‘*Alliance’*) refers to the allegation that those who oppose COVID-19 vaccines, without adequate evidence, are potentially biased ‘anti-vaxxers’.[27] To inform vaccine policies, I contend that policymakers should explore to what extent, if any, these conspiracy theories hold true in retrospect. I discuss *Alliance* in more detail below.

Lazarus *et al* acknowledge the potential ease with which vaccine compliance among employees can be enforced, but caution that it risks upholding employers’ interests at the expense of their employees’ voluntary choice.[28] Bardosh *et al* caution that coercive vaccine policies could exacerbate vaccine hesitancy and the socioeconomic implications of occupational exclusion.[29] Bardosh *et al* describe coercive policies as fixating on ‘policing’ instead of maintaining public health.[30] Inversely*,* Savulescu admits that mandating vaccination could be justifiable, owing to the public health severity of COVID-19 at the time and vaccines potentially being a less restrictive measure.[31]

*(b) Scientific and anthropological variables*

Here, I reflect on the observations of Phillips *et al* and Steenberg *et al*, respectively, that vaccine hesitancy resembles scientific ignorance and that most studies thereon are devoid of anthropology.[32] Therefore, I examine common catalysts for vaccine hesitancy, as identified below.

25 Brianna M. White, Chad Melton, Parya Zareie, Robert L. Davis, Robert A. Bednarczyk, & Arash Shaban-Nejad ‘Exploring celebrity influence on public attitude towards the COVID-19 pandemic: Social media shared sentiment analysis’ (2023) 30 *BMJ Health & Care Informatics* 1-7.

26 *COVID Care Alliance NPC v President of The Republic of South Africa* (000149/2023) [2024] ZAGPPHC 171 (29 February 2024).

27 Ibid para 97.

28 Jeffrey V. Lazarus, Scott C. Ratzan, Adam Palayew, Lawrence O. Gostin, Heidi J. Larson, Kenneth Rabin, Spencer Kimball, & Ayman El-Mohandes ‘A global survey of potential acceptance of a COVID-19 vaccine’ (2021) 27 *Nature Medicine* 226.

29 Bardosh *et al* op cit note 5 at 1-11.

30 Ibid at 10.

31 Julian Savulescu ‘Good reasons to vaccinate: Mandatory or payment for risk?’ (2021) 47 *J Med Ethics* at 78-82.

32 Phillips *et al* op cit note 5 at 2165; Steenberg *et al* op cit note 11 at 2.

*i. Religion*

Netshapapame states that the conflict between religion and science exacerbates vaccine hesitancy.[33] Senokoane alludes to people's susceptibility to erroneously construe religious texts to discredit scientific reasoning.[34] It has been alleged that the COVID-19 vaccines carry 'foetal tissues or microchips'.[35] Senokoane is instead concerned with the allegation of Mogoeng, regarding chapter 13:11-18 of the Book of Revelation mentioning the devil's branding of Christians.[36] I support Senokoane's argument that Mogoeng can be perceived as deliberately discrediting COVID-19 vaccination on religious grounds.[37] The employee in the case of *Bessick v Baroque Medical (Pty) Ltd*[38] ('*Bessick CCMA*') opposed COVID-19 vaccination on religious grounds by referring to Mogoeng's allegation.[39] However, the employee's lack of credible evidence did not support her objection.[40] I discuss *Bessick CCMA* further in subsequent sections.

Senokoane summarises Mogoeng's allegation as asserting that science and religion are two distinct ideologies, where the former values 'rational perception' and the latter values 'faith and revelation'.[41] I support the view that both ideologies are important,[42] especially when drafting vaccine policies, which should balance public health with religious beliefs.

*ii. Medical science*

The U.S. health agency, Centers for Disease Control and Prevention ('CDC'), continues to attest to the efficacy of COVID-19 vaccination in mitigating new strains.[43] The CDC claims the vaccines have been administered according to the most vigorous 'vaccine safety monitoring in [U.S.] history'.[44] The U.S. federal agency, Food and Drug Administration ('FDA'), reassured

33 Tshifhiwa S. Netshapapame 'COVID-19 vaccination hesitancy in South Africa: Biblical discourse' (2023) 79 *HTS Theological Studies* at 1-2.
34 Op cit note 24 at 1-7.
35 Ibid at 1.
36 Ibid at 1-2 and 6.
37 Ibid at 2 and 6.
38 *Bessick v Baroque Medical (Pty) Ltd* (CCMA) unreported case no WECT 13083/21 (9 May 2022).
39 Ibid para 38.
40 Ibid paras 72 and 77-79.
41 Op cit note 24 at 6.
42 Ibid.
43 CDC 'CDC recommends updated 2024-2025 COVID-19 and flu vaccines for fall/winter virus season' at *https://www.cdc.gov/media/releases/2024/s-t0627-vaccine-recommendations.html*, accessed 20 June 2024.
44 Ibid.

that COVID-19 mutations and the vaccines' safety and efficacy will undergo continuous oversight.[45] My discussion below shows that mistrust of COVID-19 vaccination persisted despite health authorities' reassurances. Similar to Engelbrecht *et al*, I explore the reason for this in this section, as it may guide authorities in earning the public's trust and securing immunisation.[46] I submit that policymakers can similarly be guided and foster trust by incorporating the reasonable grounds on which people commonly oppose vaccination as exemptions into their policies.

*Alliance* illustrates where the applicants cast doubt on the COVID-19 vaccines.[47] The applicants unsuccessfully sought an order to interdict the South African government from administering the vaccines.[48] The applicants challenged the vaccines on the basis that the vaccines impaired the health of patients who allegedly had their blood cell structures altered.[49] Notably, Davis J questioned the credibility of the applicants' expert witnesses and research methodology.[50] Davis J argued that the witnesses relied on were not specialised in the relevant areas of medical science and were alleged to hold biased anti-vaccination notions.[51]

Furthermore, *Bessick CCMA* illustrates where the applicant unsuccessfully alleged the health implications of COVID-19 vaccination to challenge her employer's vaccine mandate.[52] The employee asserted that vaccination may elicit an adverse health response in her, as she had a blood disorder, and her medical practitioner advised against her vaccination.[53] She further questioned the safety of vaccination based on the vaccines' hasty production and unknown composition.[54] I argue that *Bessick CCMA* and *Alliance* are important because these cases illustrate the judiciary's unwillingness to accept vaccination objections that are not scientifically and medically substantiated.[55]

Phillips *et al* assert that anti-vaccination allegations, including the alleged lack of medical protocol adhered to in the COVID-19 vaccines' efficient production, are conspiracy theories.[56] Phillips *et al* propose that these allegations do not deserve acknowledgement in

45 U.S. Food & Drug Administration 'Updated COVID-19 vaccines for use in the United States beginning in fall 2024' at *https://www.fda.gov/vaccines-blood-biologics/updated-covid-19-vaccines-use-united-states-beginning-fall-2024*, accessed 20 June 2024.
46 Engelbrecht *et al* op cit note 11 at 2 and 9-10.
47 Supra note 26 paras 5 and 8-9.
48 Ibid paras 1, 5, 97, and 107.
49 Ibid paras 8-9.
50 Ibid paras 94-98.
51 Ibid.
52 Supra note 38 para 68.
53 Ibid para 35.
54 Ibid paras 37 and 69-70.
55 Ibid paras 35-38 and 68-72; supra note 26 paras 94-98.
56 Phillips *et al* op cit note 5 at 2174-2175.

court, even where opposing medical evidence is intended to be adduced.[57] Whether or not time reveals that scientific truth is to be found in these averments, I argue that the actualisation of this proposal risks compromising the balance. This balance was required by the Direction,[58] which I discuss under an overview of South African law.

*iii. Health and government authorities*

Studies conducted during the pandemic reveal Americans' mistrust of their health organisations, including the CDC and FDA.[59] Bass, a medical postgraduate student, questions the integrity of the CDC, WHO, and FDA.[60] Bass believes these health institutions have been untruthful in the evidence adduced in support of the COVID-19 vaccines.[61] Florida Governor, Ron DeSantis, accuses vaccine producers of lacking transparency on the adverse effects of the COVID-19 vaccines, which are alleged to be causing myocarditis.[62] On my analysis, these are the same American organisations cited by the South African government and employers in support of employee vaccination. This is evident from my discussion below on *Alliance*, *Tshatshu v Baroque Medical (Pty) Ltd*[63] ('*Tshatshu*'), and *Bessick CCMA*.

In *Alliance*, it was disclosed that the South African Health Products Regulatory Authority ('SAHPRA') relied on evidence produced by the WHO and FDA to support its approval of COVID-19 vaccination.[64] SAHPRA and Davis J denounced the applicants' lack of substantiated arguments against the reliability of the foreign health institutions and SAHPRA's vaccine approval.[65] *Tshatshu* illustrates the employer's reliance on the FDA to support

57 Ibid.
58 Guideline 4 of Annexure C to the Direction.
59 Harvard University 'Nearly half of Americans don't trust CDC and FDA – that's a problem' at *https://content.sph.harvard.edu/wwwhsph/sites/94/2021/05/thehill.com-Nearly-half-of-Americans-dont-trust-CDC-and-FDA-thats-a-problem.pdf*, accessed 10 July 2024; Robert Wood Johnson Foundation 'The public's perspective on the United States public health system' at *https://www.rwjf.org/en/insights/our-research/2021/05/the-publics-perspective-on-the-united-states-public-health-system.html*, accessed 31 March 2025; Michael S. Pollard & Lois M. Davis 'Decline in trust in the Centers for Disease Control and Prevention during the COVID-19 pandemic' at *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9242572/*, accessed 10 July 2024.
60 Kevin Bass 'It's time for the scientific community to admit we were wrong about COVID and it cost lives' at *https://www.newsweek.com/its-time-scientific-community-admit-we-were-wrong-about-coivd-it-cost-lives-opinion-1776630*, 20 June 2024.
61 Ibid.
62 Daniel Chaitin 'DeSantis calls for grand jury on COVID vaccines' at *https://www.dailywire.com/news/desantis-calls-for-grand-jury-on-covid-vaccines*, accessed 20 June 2024.
63 *Tshatshu v Baroque Medical (Pty) Ltd* (2022) 43 *ILJ* 2151 (CCMA).
64 Supra note 26 paras 32-33 and 37-38.
65 Ibid paras 38 and 97.

employee vaccination.[66] The commissioner nevertheless challenged the rationale of the employer's vaccine mandate and, subsequently, the employee's dismissal for non-compliance.[67] I discuss *Tshatshu* further in subsequent sections.

The employer in *Bessick CCMA* predicated its mandate on the 'rational and scientific basis' for vaccination to safeguard labour stakeholders from COVID-19.[68] The employer compiled a risk assessment, which took heed of WHO and CDC resources.[69] The presiding commissioner similarly trusted the foreign authorities that approved the vaccines.[70] The commissioner declared the employee's dismissal substantively and procedurally fair on the grounds of operational requirements.[71] On my analysis, South Africa's faith in health authorities was also evident from the Direction. The Direction defined 'COVID-19 vaccines' as being 'scientifically evaluated and recommended by the WHO and approved by the [SAHPRA] to be effective'.[72]

Lötter questions the extent to which the global pharmaceutical industry's ('Big Pharma') profit-driven agenda and governments aiding in that agenda have influenced the vaccine enforcement narrative.[73] Financial collusion between Big Pharma and SAHPRA has been alleged by a retired molecular biologist, attesting on behalf of the applicants in *Alliance*.[74] My evaluation indicates that Lötter's above inquiry contradicts South Africa's faith in foreign health authorities and the apparent contempt of Phillips *et al* for alleged conspiracy theories, as discussed earlier. Lötter argues that Big Pharma's ulterior motive is divulged by its inclination to resist a scientific inquiry into and disclosure of not only the advantages, but also the disadvantages of COVID-19 vaccination.[75] Lötter advocates for social sciences in the formation of crucial public health viewpoints.[76] Conventional medical science is, therefore, not the be-all and end-all solution to a pandemic.[77]

66 Supra note 63 para 22.
67 Ibid paras 22-24 and 47-61.
68 Supra note 38 para 15.
69 Ibid para 25.
70 Ibid para 71.
71 Ibid para 78.
72 Section 1 of the Direction.
73 Casper Lötter 'The constitutional case against the mandatory vaccine policy – An interdisciplinary South African perspective' (2024) 27 *PER/PELJ* 5, 12-13, and 22-23.
74 Supra note 26 para 22.
75 Op cit note 73 at 20.
76 Ibid.
77 Ibid.

MacAulay *et al* explain that politicians have often recited 'follow the science' during the pandemic.[78] Leaders have utilised it to defend their public health policies against claims that they reflect political and public opinion.[79] The employers in *Bessick CCMA*, as already mentioned, and *Solidarity obo Members v Ernest Lowe, a Division of Hugado Trading (Pty) Ltd*[80] ('*Ernest*') also adopted the science rhetoric to justify employee vaccination.[81] *Ernest* is relevant because it illustrates where an employer required COVID-19 vaccination based on the 'scientifically proven' efficacy of vaccines in safeguarding the community and economy.[82] The employer simultaneously dismissed objections 'not well-founded in science'.[83]

MacAulay *et al* condemn the science rhetoric as a 'blame-avoidance' mechanism employed by politicians to vindicate their 'ineffective or unpopular policies'.[84] This practice tarnishes science's credibility and counters governmental health initiatives.[85] I submit that it risks compromising the interests and rights of employees who are duty-bound to receive a vaccine that is not necessarily as effective and safe as policymakers claim. This is especially disconcerting if political and commercial interests are conflated with science, which emphasise the need to protect employees' human rights.

Vaccine hesitancy may be fuelled when people discover evidence that refutes the scientific evidence relied on by decision-makers known for eluding and diverting blame.[86] I accentuate the peer-reviewed scientific studies that have recently emerged.[87] These studies reveal the concerning effects (including cerebral thrombotic syndrome and excess cardiopulmonary arrest) of COVID-19 vaccination.[88] Arguably, these studies contradict the claims that COVID-19 vaccination was undisputedly safe and effective. I argue that these studies question how the administration of a new vaccine, of which little is known about its long-term effects, ought to be regulated.

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78 Margaret MacAulay, Patrick Fafard, Adèle Cassola, & Michèle Palkovits 'Analysing the 'follow the science' rhetoric of government responses to COVID-19' (2023) 51 *Policy & Politics* at 466-467.
79 Ibid.
80 *Solidarity obo Members v Ernest Lowe, a Division of Hugado Trading (Pty) Ltd* (2022) 43 *ILJ* 1125 (LC).
81 Ibid para 5; supra note 38 para 15.
82 Supra note 80 para 5.
83 Ibid.
84 Op cit note 78 at 476.
85 Ibid.
86 Ibid.
87 See Claire Rogers, James A. Thorp, Kirstin Cosgrove, & Peter A. McCullough 'COVID-19 vaccines: A risk factor for cerebral thrombotic syndromes' (2024) 9 *IJIRMS* 621-627; see Nicolas Hulscher, Michael J. Cook, Raphael B. Stricker, & Peter A. McCullough 'Excess cardiopulmonary arrest and mortality after COVID-19 vaccination in King County, Washington' (2024) 2 *J Emerg Med OA* 1-11.
88 Ibid.

Johnson asserts that the effects exerted on human rights and employment during the pandemic prevail.[89] Opponents of vaccine mandates have predicated their arguments on human rights.[90] King *et al* dismiss these arguments for not being well-founded from an international law perspective.[91] Here, I consider the viewpoint of King *et al* by discussing international human rights laws to later conclude lessons on how occupational vaccine policies can avoid human rights violations.[92] Van Aardt identifies relevant human rights laws, including:[93]

(a) The International Covenant on Civil and Political Rights ('ICCPR'), as ratified by South Africa, Australia, NZ, and the U.S., is a legally binding instrument.[94] Article 7 of the ICCPR proscribes the 'medical or scientific experimentation' of a person who has not voluntarily consented thereto.

(b) Principle one of the Nuremberg Code (1947) ('Nuremberg') regards a person's voluntary and informed consent to 'medical experiments' as fundamental.

(c) The Universal Declaration on Bioethics and Human Rights ('UDBHR') is a guide in matters concerning 'medicine, life sciences and associated technologies' of which humans form the subject.[95] The UDBHR protects:

- prior, informed, and voluntary consent to 'preventive, diagnostic and therapeutic medical intervention';
- the patient's acquisition of 'adequate information' before consenting;
- the bias-free revocation of consent for whatever reason;
- individual interests and health over scientific and societal interests; and
- freedom and human rights.[96]

89 Op cit note 12.
90 Jeff King, Octávio Luiz Motta Ferraz, & Andrew Jones 'Mandatory COVID-19 vaccination and human rights' (2022) 399 *The Lancet* 220; Bardosh *et al* op cit note 5 at 1 and 8.
91 King *et al* op cit note 90 at 220.
92 Section 39(1)(*b*) of the Constitution of the Republic of South Africa, 1996 ('Constitution').
93 Willem van Aardt 'Can government mandate the COVID-19 vaccine against your will? A discussion on international human rights law' at *https://www.derebus.org.za/can-government-mandate-the-covid-19-vaccine-against-your-will-a-discussion-on-international-human-rights-law/*, accessed 19 January 2025.
94 OHCHR 'Ratification of 18 international human rights treaties' at *https://indicators.ohchr.org/*, accessed 24 January 2025.
95 Articles 1-2 of the UDBHR.
96 Ibid articles 3 and 6.

(d) Paragraph 25 of The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights confirms that rights are not exempt from limitation when public health warrants it.[97]

Evidently, international law upholds prior, informed, and voluntary consent to scientific experimentation or medical intervention.[98] I submit that these consent elements should be incorporated into vaccine policies to ensure that public health is balanced with individual rights.

## IV OVERVIEW OF SOUTH AFRICAN LAW ON VACCINE MANDATES

In this section, I outline the regulation of mandatory vaccination pre-, mid-, and post-pandemic. I aim to gauge the extent to which the interest and rights balance have been achieved.

### *(a) Pre-COVID-19 pandemic*

#### *i. National regulation*

Here, I discuss the history of vaccine mandates, as delineated by Phillips *et al*.[99] During this discussion, I emphasise the primary statute that mandated vaccination.[100]

The Spanish influenza epidemic prompted the legislature to implement a criminal vaccine mandate by means of the Public Health Act 36 of 1919 ('PHA').[101] The PHA resembles the legislature's first endeavour to mandate vaccination.[102] The PHA provided for numerous diseases, one of which was smallpox.[103] The PHA mandated that 'unvaccinated adult[s]' or 'the parent or guardian of every unvaccinated child', or the child itself, be vaccinated against smallpox.[104]

97 UNCHR 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' at *https://www.refworld.org/legal/resolution/unchr/1984/en/57200*, accessed 31 March 2025.
98 Article 7 of the ICCPR; principle 1 of the Nuremberg; article 6 of the UDBHR.
99 Phillips *et al* op cit note 5 at 2165-2167.
100 Ibid.
101 Ibid at 2166.
102 Ibid.
103 Ibid.
104 Section 96 of the PHA.

The legality of and medical justification for mandatory vaccination against smallpox was confirmed in *R v Noqobo*[105] ('*Noqobo*').[106] *Noqobo* is relevant because the presiding court reasoned that refusing vaccination could compromise public health without valid medical grounds.[107] The appellant's interest in not vaccinating had to yield to public health.[108] The appellant was, consequently, held criminally liable in terms of the PHA.[109]

Vaccine mandates have not been repealed with the PHA.[110] The Draft Admission Policy for Ordinary Public Schools proposes mandatory vaccination for public school pupils.[111] This mandate is established by the National Education Policy Act 27 of 1996 ('NEPA') and the South African Schools Act 84 of 1996 ('SASA').[112] If a pupil fails to vaccinate against various 'communicable diseases', he/she may legally be excluded from admission to a public educational institute.[113] Immunisation or exclusion is predicated on what the policymakers regard as being in the 'best interest' of public education learners.[114] It is, therefore, evident that individual interests may yield to public health.

*ii. Labour regulation*

Mandatory vaccination equates to 'compulsory medical treatment'.[115] Mufamadi and Letsiri identify mandatory vaccination as predominantly unexplored in South African labour statutes.[116] Notwithstanding, the Occupational Health and Safety Act 85 of 1993 ('OHSA') sets out the common law duty of employers and employees to foster workplace health and safety.[117] The OHSA obliges an employer to secure a work environment conducive to its employees' health and safety, and that of third parties, to an extent 'reasonably practicable'.[118]

105 *R v Noqobo* 1955 (4) SA 105 (E).
106 Ibid at 105D-107D.
107 Ibid at 105H-106H.
108 Ibid at 106G-107D.
109 Ibid 107A-D.
110 Phillips *et al* op cit note 5 at 2166.
111 Item 16 of the National Education Policy Act, 1996 (Act No. 27 of 1996) in GN 38 *GG* 44139 of 10 February 2021 ('Education Policy').
112 Section 3(4)(*i*) of the NEPA; section 12(3)(*a*)(*i*) of the SASA; Education Policy.
113 Item 16 of the Education Policy.
114 Ibid.
115 Kgomotso Mufamadi & Katleho Letsiri 'Mandatory vaccination against COVID-19 – Implications for the South African workplace' in Murdoch Watney (eds) *The impact of COVID-19 on the future of law and related disciplines* (2022) 200.
116 Ibid.
117 See Monray Marsellus Botha 'Mandatory vaccinations in the workplace: Lessons from COVID-19' (2021) 42 *ILJ* 2066.
118 Sections 8(1) and 9(1) of the OHSA.

This obligation ties in with the constitutional right to a healthy environment.[119] Employees may be locked out of the workplace if they pose a risk to other employees or persons in contact with the employer's workforce.[120] Employees are similarly obliged to adhere to the lawful instructions and protocols of their employer or other relevant authority to maintain occupational health and safety.[121]

The lawfulness of an employer's vaccine mandate and the consequences of non-compliance have been uncertain.[122] This is because common law and labour legislation do not expressly mandate vaccination.[123] Nevertheless, Phillips *et al* believe the uncertainty can be resolved by consulting common law and the OHSA.[124] My discussion below illustrates that this resolution is not limited to the common law and OHSA.

Arguably, employee vaccination was not as prevalent and contentious as it has been since the pandemic. I submit that the pandemic has emphasised the need for legal certainty and express vaccine regulations. I elaborate on this submission in the sections that follow.

### *(b) The COVID-19 pandemic*

#### *i. National regulation*

The former Deputy President, David Mabuza ('Mabuza'), confirmed the government's intention not to mandate COVID-19 vaccination for South African citizens.[125] Instead, Mabuza expressed the government's intention to encourage vaccination through incentives.[126] Existing laws, including the Constitution and the National Health Act 61 of 2003 ('NHA'), were already in place to regulate COVID-19 vaccination. Section 7(1) of the NHA would require a person's 'informed consent' to vaccination. However, if medical treatment is warranted to avoid 'a

119 Section 24(*a*) of the Constitution; Simon Dippenaar & Associates 'To jab or not to jab?' at *https://www.sdlaw.co.za/articles/mandatory-vaccination-consititutional/*, accessed 1 April 2025.
120 Nivaani Moodley 'Mandatory vaccination in the workplace: Considerations for employers' at *https://www.webberwentzel.com/News/Pages/mandatory-vaccination-in-the-workplace-considerations-for-employers.aspx#:~:text=On%20the%20basis%20of%20an,legal%20right%20to%20entry%20exists*, accessed 24 January 2025.
121 Sections 14(*a*)-14(*c*) of the OHSA.
122 Phillips *et al* op cit note 5 at 2171-2172; op cit note 115 at 218-219.
123 Phillips *et al* op cit note 5 at 2170.
124 Ibid.
125 BusinessTech op cit note 10.
126 Ibid.

serious risk to public health', consent may lawfully be dispensed with.[127] The Constitution is discussed below in conjunction with the Direction.

*ii. Labour regulation*

The COVID-19 vaccination of employees in the basic education sector, for instance, was not mandated.[128] Instead, vaccination was encouraged to achieve immunisation and normalise schooling.[129] Despite the government's intention not to mandate national vaccination, the Minister of Employment and Labour ('MEL') introduced the Direction.[130]

The Direction arose from section 27(2) of the DMA.[131] The Direction's purpose was to curtail COVID-19 in the workplace.[132] The Direction offered employers leeway to mandate the vaccination of their workforce, provided the Direction's procedures were honoured.[133]

President Cyril Ramaphosa stressed the importance of balancing the rights and interests of different labour stakeholders and those of the public when enforcing vaccine policies.[134] The Direction expressed 'mutual respect' as forming the basis of the balance between public health, employees' constitutional rights, and employers' business interests.[135] Therefore, an employer that sought to mandate vaccination was required to compile a risk assessment.[136] The employer, consequently, had to weigh up its workplace circumstances, operational requirements, and its employees' medical vulnerabilities, transmission risks, contraindications, and constitutional rights.[137]

Importantly, section 12(2) of the Constitution affords a person the right to bodily integrity, while section 15 safeguards a person's 'right to freedom of… religion… belief and opinion'. The Direction obliged employers to take account of these constitutional rights and to

127 Section 7(1)(*d*) of the NHA.
128 Department: Basic Education Republic of South Africa 'COVID-19 vaccination roll-out in the basic education sector' at *https://www.education.gov.za/BEVaccination.aspx*, accessed 23 January 2025.
129 Ibid.
130 Op cit note 117 at 2066.
131 Preamble of the Direction.
132 Ibid.
133 Sections 3-4 of and Annexure C to the Direction.
134 Khulekani Magubane 'Employees can refuse vaccination, but rights have limits – Ramaphosa' at *https://www.news24.com/fin24/economy/employees-can-refuse-vaccination-but-rights-have-limits-ramaphosa-20210904*, accessed 5 May 2024.
135 Guideline 4 of Annexure C to the Direction.
136 Ibid section 3 and guideline 5 of Annexure C.
137 Ibid sections 3(1)(*a*) and 3(4) and guideline 5(*a*)(*ii*) of Annexure C.

inform their employees of vaccination exemptions on constitutional and medical grounds.[138] Notwithstanding, individual rights are subject to the Constitution's limitation clause.[139]

Employers were further required to be transparent with their employees about the advantages and adverse effects of COVID-19 vaccination.[140] Employers had to, where necessary, 'reasonably accommodate' employees with a medical or constitutional reason for opposing vaccination.[141]

*Bessick v Baroque Medical (Pty) Ltd*[142] ('*Bessick LC*') illustrates where an employer's non-adherence to the Direction compromised the fairness of its employee's dismissal.[143] *Bessick LC* is important because it overturned *Bessick CCMA* on the ground that the employee's dismissal was substantively unfair.[144] Mokhoaetsi AJ determined that the dismissal was unfair in light of the employer's operational requirements and section 189 of the Labour Relations Act 66 of 1995 ('LRA').[145] Mokhoaetsi AJ held that the employer failed to consider alternatives to the unvaccinated employee's dismissal per section 189 and the Direction.[146]

To negate his employer's mandate, the employee in *Dreyden v Duncan Korabie Attorneys*[147] ('*Dreyden*') referred to the lack of parliamentary statutes enabling mandatory vaccination and dismissal for non-compliance.[148] The presiding commissioners acknowledged that employees were not duty-bound (according to statutes, directions, or regulations) to submit to COVID-19 vaccination.[149] The employee dismissed the Direction, erroneously asserting that it did not amount to a legally binding instrument.[150] I elaborate on this point when concluding lessons. The employee's dismissal was declared procedurally unfair due to the employer's failure to observe the Direction's procedures.[151] These procedures included informing its employees of the constitutional grounds on which vaccination may have been declined.[152] Similarly, the *Tshatshu* commissioner concluded that the employer neglected to honour the

138 Ibid section 3(4) and guideline 5(*a*)(*ii*) of Annexure C; the Direction incorrectly refers to section 13 instead of section 15 of the Constitution.
139 Section 36 of the Constitution considers, amongst others, the 'nature of the right' limited, the limitation's 'purpose', and 'less restrictive' alternatives.
140 Section 4(1)(*i*) of the Direction.
141 Ibid guideline 5(2)(*c*) of Annexure C.
142 *Bessick v Baroque Medical (Pty) Ltd* (LC) unreported case no C285/2022 (4 November 2024).
143 Ibid paras 34-42.
144 Ibid para 49.
145 Ibid paras 34-42 and 49.
146 Ibid paras 34-42.
147 *Dreyden v Duncan Korabie Attorneys* (2022) 43 *ILJ* 1405 (CCMA).
148 Ibid para 49.
149 Ibid para 68.
150 Ibid paras 49 and 62-68.
151 Ibid paras 84-88.
152 Ibid.

Direction's procedures (including considering employees' medical objections) and section 189 of the LRA.[153]

*Tshatshu* dealt with an inquiry into the substantive fairness of retrenching an employee who rejected her employer's vaccine policy on medical grounds.[154] The employee was retrenched in terms of her employer's operational requirements and duty to ensure a healthy work environment.[155] The commissioner declared the employee's dismissal unconstitutional and substantively unfair after considering section 36 of the Constitution and the procedures stipulated in section 189 of the LRA.[156]

*Kok v Ndaka Security Services*[157] ('*Kok*') presents another instance where an employee challenged his employer's COVID-19 vaccination policy and his consequent exclusion from the workplace.[158] The employee argued that vaccine mandates violate the Constitution and the NHA.[159] The commissioner rebutted this argument, relying on section 36 of the Constitution and mentioning the NHA's listed exceptions.[160] The commissioner did not, however, apply the NHA's provisions. The commissioner verified that compulsory vaccination amounts to a 'reasonable practical' measure advanced by the employer in terms of its statutory obligations, business interests, and the essentiality of its service.[161] Moreover, in *Mulderij v Goldrush Group*[162] ('*Mulderij*'), the employee's dismissal due to incapacity was declared substantively fair, despite her constitutional objections.[163] I continue discussing the last-mentioned cases when concluding lessons.

The NSD ceased in 2022 and, consequently, rendered the Direction redundant.[164] I submit that mandatory vaccination will likely arise with the next pandemic. As such, it is essential to establish the best practicable way of regulating employee vaccinations.

153 Supra note 63 paras 52-55 and 58.
154 Ibid paras 3, 8, and 17.
155 Ibid paras 3-8, 14, and 22.
156 Ibid paras 35-59.
157 *Kok v Ndaka Security & Services* (2022) 43 *ILJ* 958 (CCMA).
158 Ibid paras 13.1 and 13.14.
159 Ibid.
160 Ibid paras 36-37.
161 Ibid paras 52-57.
162 *Mulderij v Goldrush Group* (GAJB24054-21) [2022] ZACCMA 1 (18 January 2022).
163 Ibid paras 2, 22.1, 19-20, 22-24, 27, and 29.1.
164 Op cit note 115 at 211; Termination of the National State of Disaster (COVID-19) Disaster Management Act, 2002: (Act No. 57 of 2002) in GN 1988 *GG* 46197 of 4 April 2022.

## V OVERVIEW OF FOREIGN LAW ON VACCINE MANDATES

On my below analysis, Australia, NZ, and the U.S. decisively mandated COVID-19 vaccination for designated employees. As will become apparent, this resulted in unfavourable consequences for unvaccinated employees, giving rise to various lawsuits and legal developments, which I examine in this section.

### *(a) Australia*

Kevat *et al* explicate that the Commonwealth of Australia Constitution Act of 1977 permits Australia's federal parliament to promulgate laws on specifically defined matters.[165] However, the promulgation of public health legislation is left to each independent state and territory.[166] The permissibility of vaccine mandates across Australia may, therefore, differ.[167] For brevity, I limit my discussion to New South Wales ('NSW') and Queensland. Below, I discuss NSW for its adoption of numerous vaccine mandates, all of which were challenged in the Supreme Court case of *Kassam v Hazzard; Henry v Hazzard*[168] ('*Kassam*').[169] I further discuss Queensland for the direct consequences it laid down for non-vaccinated employees.

Australia's Work Health and Safety Act of 2011 ('WHSA') prescribes 'nationally consistent' occupational safety and health regulations.[170] The WHSA is not legally binding in isolation and serves as a benchmark.[171] On my evaluation, the WHSA does not regulate employee vaccination. Nevertheless, Australia's National Cabinet welcomed the compulsory COVID-19 vaccination of aged-care workers.[172] The Australian government accentuated that occupational safety and health regulations differed, depending on each territory and state government, each reserving the discretion to mandate vaccination.[173]

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165 Dev AS. Kevat, Danielle CA. Panaccio, Sam C. Pang, Jessica M. Dean, Caitlin C. Farmer, & Patrick D. Mahar 'Medico-legal considerations of mandatory COVID-19 vaccination for high risk workers' (2021) 215 *MJA* 22.

166 Ibid.

167 Ibid.

168 *Kassam v Hazzard; Henry v Hazzard* [2021] NSWSC 1320.

169 Ibid paras 1-8.

170 Part 1, division 2 of the WHSA.

171 Ibid part 1, divisions 2 and 4.

172 Sally Hall Dykgraaf, Jane Desborough, Anne Parkinson, Elizabeth A. Sturgiss, Paul Kelly, & Michael Kidd 'Implementing mandatory COVID-19 vaccination for Australian aged care workers' (2022) 217 *MJA* at 570.

173 Australian Government Department of Health and Aged Care 'COVID-19 vaccination for residential aged care workers' at *https://www.health.gov.au/our-work/covid-19-vaccines/information-for-aged-care-providers-workers-and-residents-about-covid-19-vaccines/residential-aged-care-workers*, accessed 24 January 2025.

The governing entity of each state and territory is vested with authority – derived from their public health statutes – to proclaim a public health emergency.[174] This empowers these entities to mandate vaccination for designated workers.[175] The court in *Kassam* confirmed this authority, referring to NSW's Public Health Act of 2010 ('NSWPHA').[176] The NSWPHA's purpose is to preserve public health.[177]

*Kassam* addressed the legality and reasonableness of various vaccine mandates of the Minister for Health and Medical Research ('the Minister').[178] These mandates included the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No. 2) 2021 ('Restrictions Order'); the Public Health (COVID-19 Aged Care Facilities) Order 2021 ('Aged Order'); and the Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 ('Education Order').[179] The common thread of these orders was safeguarding public health, taking into account the transmissibility of COVID-19, the adverse implications of infection, and the necessity of vaccination.[180] The Education Order disallowed unvaccinated 'education and care workers' from working.[181] An exemption was allowed for 'a medical contraindication' or if the Minister granted an exemption.[182] The Aged Order similarly afforded exemption for 'a medical contraindication' or with the Minister's approval.[183]

In *Kassam*, the plaintiffs opposed the mandates based on the unreasonable implications they harboured for designated employees' 'fundamental rights and freedoms'.[184] The mandates were also opposed because the Minister neglected to weigh up 'relevant considerations' (including vaccine safety, efficacy, and alternatives) before mandating vaccination.[185] The court rejected the plaintiffs' contentions, arguing that the mandates were neither unreasonable nor unlawful.[186] The court concluded this decision given the Minister's authority in terms of the NSWPHA, the efficacy of vaccination in mitigating public health risks, and the absence of

174 Katherine Jefferies 'Can employers mandate their employees receive the COVID-19 vaccine?' (2022) 47 *Alternative Law Journal* 113.
175 Ibid.
176 Supra note 168 paras 245-246.
177 Section 3 of the NSWPHA.
178 Supra note 168 paras 1-8.
179 Ibid.
180 Clause 1.8 of the Restrictions Order; clause 4 of the Aged Order; clause 3 of the Education Order.
181 Clause 4 of the Education Order.
182 Ibid clauses 4(1)(*b*) and 6.
183 Clause 8 of the Aged Order.
184 Supra note 168 paras 3-5 and 8.
185 Ibid paras 5 and 227.
186 Ibid paras 227-230, 240-241, 245-246, 250-254, and 294.

an inquiry prescribed by the NSWPHA into international human rights laws, vaccine safety and efficacy, and medical alternatives.[187]

In Queensland, the COVID-19 Testing and Vaccination Requirements (Contact by Health Workers with Cases) Direction (No. 2) ('CTVRD') was promulgated under Queensland's Public Health Act of 2005.[188] The CTVRD's purpose was to safeguard the health of the public and healthcare workers.[189] Employees and contractors within Queensland's health industry were, consequently, singled out for vaccination.[190] They faced criminal sanction and unfavourable employment consequences for disobedience.[191] These consequences were avoidable, provided the designated workers had a 'medical reason', 'reasonable excuse', or an immediate emergency necessitated their healthcare services.[192] The CTVRD allowed unvaccinated workers alternative and temporary employment where possible.[193]

*(b) New Zealand*

Ellis J in *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health*[194] ('*Nga*') cited NZ's Medicines Act of 1981 ('NZMA') as regulating the national approval of medicine.[195] Section 23(1) of the NZMA authorises NZ's Minister of Health ('the Minister') to 'provisional[ly] consent to… new medicine', which before the NZMA's amendment had to be restrictively administered to treat 'a limited number of patients'.[196] Consequently, Pfizer's COVID-19 vaccine was provisionally authorised.[197] *Nga* challenged the legality of this authorisation, the importance of patients' informed consent, and the vaccine's safety and efficacy.[198]

187 Ibid.
188 Queensland Government 'Revoked - COVID-19 Testing and Vaccination Requirements (Contact by Health Workers with Cases) Direction (No. 2)' at *https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/testing-and-vaccination-requirements-contact-by-health-workers-with-cases-2*, accessed 3 December 2024.
189 Preamble of the CTVRD.
190 Ibid clauses 5-7.
191 Ibid clauses 6-8 and part 7.
192 Ibid clauses 8 and 10 and part 7.
193 Ibid clauses 10-12.
194 *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107 [18 May 2021].
195 Ibid paras 10 and 24.
196 Parliamentary Counsel Office 'Medicines Act 1981 as at 29 September 2020' at *https://www.legislation.govt.nz/act/public/1981/0118/latest/versions.aspx?av=True*, accessed 2 February 2025.
197 Supra note 194 para 1.
198 Ibid paras 1, 4, and 7.

Ellis J advanced on the premise that 'lawfully approved' vaccines hold 'a public health benefit' and that COVID-19 vaccination would not have been enforced on the whole of NZ.[199] Ellis J explained that section 23 of the NZMA may solely have been invoked if 'a clear and immediate' necessity for approval existed.[200] This implies that full consent would have been impractical, given the inadequate information on the new vaccine's safety and efficacy.[201]

Ellis J explained that if vaccination had been restricted to frontline workers, as initially deliberated, section 23 of the NZMA would have been satisfied.[202] Ellis J referred to the benefit-risk assessment in section 22(1)(*b*) of the NZMA.[203] This assessment would examine, 'as far as practicable', the transmissibility of a virus, exposure risks, vulnerable individuals, and the vaccine's safety and efficacy.[204] The benefit-risk assessment, read with the former section 23 of the NZMA, would have concluded that the COVID-19 vaccine should have been administered to frontline workers only and not the general public.[205] This is due to frontline workers' elevated exposure risk.[206] However, section 23 was not adequately complied with in *Nga*, as provisional consent was not restricted to a limited class of patients.[207]

Despite the Minister's likely overreached authority, in terms of section 23 of the NZMA, Ellis J refused to grant interim orders to halt COVID-19 vaccination in NZ.[208] Ellis J emphasised the detrimental health consequences that could have ensued from granting such orders.[209] Ellis J cited Dr Bloomfield, who pointed to the erosion of the public's trust in vaccination and subsisting pandemic restrictions should the interim orders have been granted.[210] Considering the above, I submit that *Nga* illustrates the premium placed on public health.

Sections 9, 11, and 12 of the COVID-19 Public Health Response Act of 2020 ('CPHRA') enabled the Minister for COVID-19 Response ('the Minister') to implement 'a COVID-19 order' for 'different classes of persons'.[211] These sections, applied to a COVID-19

199 Ibid para 8.
200 Ibid paras 34-38 and 58-60.
201 Ibid.
202 Ibid paras 34, 36-37, 60-61, and 64-67.
203 Ibid paras 35, 38, 59, and 64.
204 Ibid.
205 Ibid paras 64-65.
206 Ibid.
207 Ibid paras 64-67 and 75.
208 Ibid paras 4 and 75-76.
209 Ibid paras 71 and 75.
210 Ibid.
211 Parliamentary Counsel Office 'COVID-19 Public Health Response Act 2020 as at 08 December 2020' at *https://www.legislation.govt.nz/act/public/2020/0012/latest/versions.aspx?av=True*, accessed 3 March 2025.

vaccination order, required the Minister to first weigh the risks of COVID-19 transmission, the 'nature and extent' of vaccination, and the applicability of vaccination according to the CPHRA's purpose.[212] The CPHRA's purpose was to curtail the public health implications of COVID-19 in an 'economically sustainable' manner.[213] The Minister may have considered 'social, economic, or other factors', but was not required to.[214] The Minister had to deliberate 'on the rights and freedoms' that would be limited.[215] Any limitation had to be justifiable and compliant with the NZ Bill of Rights Act of 1990 ('NZBRA').[216]

Section 10 of the NZBRA protects the right against coerced 'medical or scientific experimentation', and section 11 guarantees the right to decline 'medical treatment'. Sections 4 and 5 of the NZBRA permit the justifiable limitation of persons' 'rights and freedoms'. The cases of *Four Aviation Security Service Employees v Minister of COVID-19 Response*[217] ('*Aviation*') and *Yardley v Minister for Workplace Relations and Safety*[218] ('*Yardley*') examined the impugned vaccine mandates' limitation on employees' rights.[219]

*Yardley* illustrates the rebuttal of the COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021 ('Specified Order'), promulgated in terms of the CPHRA and in relation to designated police and defence force employees.[220] These employees faced employment termination for non-compliance.[221] Cooke J cited the now-repealed clause 3 of Schedule 3A of the amended Employment Relations Act of 2000 ('NZERA').[222] It authorised the dismissal of employees who failed to vaccinate against COVID-19, either in terms of a CPHRA order or their employer's instruction.[223] The NZERA instructed employers to first consider 'reasonable alternatives' to a dismissal.[224] The Specified Order allowed vaccination exemption, predominantly on the grounds of employees' medically evidenced health or the necessity of honouring the CPHRA's purpose and preventing the disruption of essential

212 Section 9(1) of the CPHRA.
213 Ibid section 4.
214 Ibid section 9(1)(*b*).
215 Ibid section 9(1)(*ba*).
216 Ibid.
217 *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 [8 November 2021].
218 *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 [25 February 2022].
219 Supra note 217 paras 1-2, 26-31, and 39; ibid para 17.
220 Supra note 218 paras 1-2 and 17.
221 Ibid para 2.
222 Ibid para 9; Parliamentary Counsel Office 'Employment Relations Act 2000 as at 30 June 2024' at *https://www.legislation.govt.nz/act/public/2000/0024/latest/versions.aspx*, accessed 18 February 2025.
223 Clause 3 of Schedule 3A of the NZERA.
224 Ibid clause 3(4) of Schedule 3A.

services.[225] The public health risk underlying the specified work and whether a vaccinated employee could instead undertake the work were also relevant.[226]

The applicants in *Yardley* argued that the Specified Order dishonoured the CPHRA's purpose.[227] This purpose was to curtail the negative implications of COVID-19, secure the continuity of essential services, and preserve the public's trust in these services.[228] The applicants further contested that the Specified Order unjustifiably and unlawfully limited section 11 of the NZBRA.[229] Similarly, in *Aviation*, sections 10 and 11 of the NZBRA were alleged to have been unjustifiably limited by the COVID-19 Public Health Response (Vaccinations) Order 2021 ('Vaccinations Order') in relation to aviation security workers who were dismissed for non-vaccination.[230] The Vaccinations Order was unsuccessfully challenged for being 'irrational', as it was alleged to have been enacted without taking 'mandatory relevant considerations' into account in terms of a benefit-risk assessment and the NZBRA.[231] Cooke J solely found the right against coerced medical and scientific experimentation relevant.[232]

In *Yardley*, the court concluded against the lawfulness and reasonableness of the Specified Order, as its limitation on the applicants' rights was unjustified.[233] Cooke J explained that the mandate's purpose was not directed at combatting COVID-19 transmission; the mandate did not materially advance the continuity of the public services; health advice confirmed the redundancy of vaccination; neither the vaccinated nor unvaccinated were immune to the new strains; and the mandate ineffectively prohibited transmission.[234] Inversely, the court in *Aviation* utilised the proportionality assessment employed in *Hansen v R*[235] and contemplated the scientific and statutory rationale behind and against the Vaccinations Order.[236] The court, subsequently, upheld the mandate based on its statutory purpose and scientific efficacy in curtailing COVID-19 transmission among border workers.[237]

225 Clauses 10-11 of the Specified Order.
226 Ibid clause 11(5).
227 Supra note 218 para 17.
228 Clause 3 of the Specified Order.
229 Supra note 218 para 17.
230 Supra note 217 paras 1-2, 26-31, and 39.
231 Ibid paras 39 and 133-143.
232 Ibid para 31.
233 Supra note 218 paras 104-108.
234 Ibid.
235 See proportionality test in paras 103-104 of *Hansen v R* SC 58/2005 [20 February 2007]; *Aviation* cited this case as '*R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1'.
236 Supra note 217 paras 90-127 and 143-144.
237 Ibid.

The case of *GF v Minister of COVID-19 Response*[238] ('*GF*') concerns the relationship between public health legislation and private employment interests.[239] *GF* dealt with the dismissal of an employee who failed to adhere to the Vaccinations Order.[240] Significantly, the court dismissed the allegation of COVID-19 vaccination amounting to a 'medical experimentation'.[241] The court based its decision on the provisional consent given to COVID-19 vaccination, as discussed with reference to *Nga*, and the FDA's full approval. [242]

Importantly, in *NZTSOS Inc v Minister for COVID-19 Response*[243] ('*NZTSOS*'), Gilbert J confirmed that the Vaccinations Order solely afforded employees a vaccination exemption for possible health risks and not for religion or culture.[244] I further discuss these cases when concluding lessons.

### *(c) United States of America*

The summary judgment of *Pub. Health & Med. Professionals for Transparency v. Food & Drug Admin*[245] ('*FDA*') explains the U.S. vaccine approval process. I contend that *FDA* is relevant to the transparency in medical science and the integrity of health authorities. The plaintiff in *FDA* requested access to the FDA's data on the Pfizer-BioNTech COVID-19 Vaccine.[246]

*FDA* explains that vaccines are regulated by the Public Health Service Act of 1944 and the Federal Food, Drug, and Cosmetic Act of 1938.[247] Before the FDA approves a vaccine, it undergoes the 'Biologics License Applications'.[248] This application reviews the vaccine's manufacturing methods and clinical and non-clinical aspects.[249] Before approval, the FDA should be satisfied with the vaccine's safety, purity, and efficacy.[250] However, the Project BioShield Act of 2004 allows the FDA to authorise a vaccine, in response to a public health

238 *GF v Minister of COVID-19 Response* [2021] NZHC 2526 [24 September 2021].
239 Ibid paras 1-5.
240 Ibid.
241 Ibid paras 46-47.
242 Ibid; see supra note 194 paras 33-36, 38, 58-60, and 64-67.
243 *NZTSOS Inc v Minister for COVID-19 Response* [2024] NZCA 74 [26 March 2024].
244 Ibid para 98.
245 *Pub. Health & Med. Professionals for Transparency v. Food & Drug Admin*., 4:21-cv-01058-P (N.D. Tex. Dec. 6, 2024).
246 Ibid on pages 1-2.
247 Ibid on page 2.
248 Ibid on pages 2-3.
249 Ibid.
250 Ibid on page 3.

emergency, without complying with the conventional approval procedures.[251] The implication is that a vaccine's safety and efficacy are merely supported and not proven by data, as the approval standards are lower and reviews rushed.[252]

Pittman J cited Zukerman, president of the National Center for Health Research.[253] Zuckerman claimed that there were instances where COVID-19 products were not reviewed for safety and efficacy in terms of emergency authorisation standards, which she noted differed significantly from the conventional FDA standards.[254] Pittman J clarified that a summary judgment is applicable where the material facts are uncontested and a matter of law vindicates the plaintiff's judgment.[255] The judge ordered, per the Freedom of Information Act 5 U.S.C. § 552, the release of the 'Emergency Use Authorization' file on Pfizer's vaccine.[256]

The U.S. Secretary of Labor, through the Occupational Safety and Health Administration ('the Administration'), mandated the vaccination of U.S. employees in terms of 'emergency temporary standards'.[257] This mandate was negated in *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration & Ohio v. Department of Labor, Occupational Safety and Health Administration*[258] ('*Federation*').[259] *Federation* is significant because it contemplates the Administration's authority, in accordance with the Occupational Safety and Health Act of 1970 ('OSHA'), to set 'workplace safety standards', as opposed to 'public health measures'.[260]

The court clarified that the OSHA does not aim to preserve public health generally, as this exceeds the Administration's expertise.[261] Due to COVID-19 transmission outreaching the workplace, the court refused to accept COVID-19 as an occupational hazard and the Administration's indiscriminate mandate.[262] Instead, the court accepted the Administration's regulation – using targeted standards, as opposed to 'broad public health measures' – of 'occupation-specific risks' unique to COVID-19.[263] This requires the Administration to

251 Ibid on pages 3-4.
252 Ibid.
253 Ibid; Diana M. Zuckerman 'Emergency use authorizations (EUAs) versus FDA approval: Implications for COVID-19 and public health' (2021) 111 *AJPH* 1065-1066.
254 Zukerman op cit note 253 at 1066.
255 Supra note 245 on page 4.
256 Ibid on pages 1 and 5-9.
257 *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration & Ohio v. Department of Labor, Occupational Safety and Health Administration* 595 U. S. ____ (2022) IIA.
258 Ibid.
259 Ibid IA-IIB.
260 Ibid IIA.
261 Ibid.
262 Ibid.
263 Ibid.

consider risks in relation to a specific workplace and an employee's specific occupation.[264] I submit that *Federation* questions how a pandemic should be regulated in relation to employees and the public.

Furthermore, Texas prohibits, through section 81B.003. of the Texas Health and Safety Code ('THSC'), the mandating of COVID-19 vaccination by 'a governmental entity'.[265] Additionally, chapter 81D of the THSC disallows 'a private employer from' subjecting employees, contractors, and job applicants to mandatory COVID-19 vaccination and 'adverse action' for being unvaccinated.[266]

Australia, NZ, and the U.S. evidently embraced decisive COVID-19 vaccination regulations and consequences for non-compliance. I draw lessons from these decisive measures in the next section.

## VI LESSONS FOR THE NEXT PANDEMIC

It is relevant to explore how different countries regulated COVID-19 vaccine mandates to determine how to achieve balance during prospective pandemics. In this section, I offer lessons to inform occupational vaccine policies for the next pandemic.

### *(a) Scientific and anthropological considerations*

#### *i. South Africa*

Lötter questions Big Pharma's 'aggressive pricing policy', agenda to push vaccine mandates, and uncompromising approach to reviewing the disadvantages of COVID-19 vaccination.[267] Lötter alleges governments' cooperation with business-oriented elites in the drafting of public policies.[268] Governments' ability to address public health risks and enforce public policies

264 Ibid.
265 Texas State Law Library 'Section 81B.003 of the Texas Health & Safety Code' at *https://statutes.capitol.texas.gov/Docs/HS/htm/HS.81B.htm#81B.003*, accessed 2 July 2024.
266 Texas State Law Library 'Senate Bill 7' at *https://capitol.texas.gov/tlodocs/883/billtext/pdf/SB00007F.pdf*, accessed 2 July 2024.
267 Op cit note 73 at 5, 12-13, and 20.
268 Ibid at 20 and 22-23.

relies on the public's trust.[269] On my evaluation, trust was placed by employers and the South African government in medical science and health institutions.[270]

I argue, with reference to *Bessick CCMA* and *Alliance*, that the judiciary rightfully rejected medically, scientifically, and religiously unsubstantiated objections to vaccination.[271] However, medical science might in time reveal the correlation between COVID-19 vaccination and the adverse health effects alleged. I argue that this would make a compelling case, not against vaccination in general, but against mandating a new vaccine of which little is known about its long-term effects. I do not, however, agree that the government cooperated with elite corporations to push vaccination in South Africa. Instead, the government adopted a liberal approach compared to foreign jurisdictions by neither mandating nor prohibiting the mandating of COVID-19 vaccination.[272]

### *ii. Foreign jurisdictions*

After examining court judgments, of which *Aviation* is one, Lötter accuses NZ's judiciary of furthering its government's efforts to embrace the mainstream science rhetoric.[273] The court in *Aviation* defended the Vaccinations Order for its statutory and scientific purpose in effectively curtailing COVID-19 among vulnerable workers.[274] The court in *NZTSOS* acknowledged the lack of long-term safety data on the adverse effects of COVID-19 vaccination.[275] This was, however, not sufficiently material to challenge the mandate.[276] Notwithstanding, peer-reviewed scientific studies have emerged that reveal the significant adverse effects of COVID-19 vaccination.[277]

Lötter equates COVID-19 vaccination to an experiment and refers to the Nuremberg, which upholds voluntary and informed consent to medical experimentation.[278] Similarly, the

269 Sarah D. Kowitt, Allison M. Schmidt, Anika Hannan, & Adam O. Goldstein 'Awareness and trust of the FDA and CDC: Results from a national sample of US adults and adolescents' (2017) 12 *PLoS ONE* 1-2 and 11.
270 Supra note 26 paras 32-33 and 37-38; supra note 63 para 22; supra note 38 paras 15 and 25; supra note 80 para 5.
271 Supra note 38 paras 35-38, 68-72, and 77-79; supra note 26 paras 93-98.
272 Op cit note 172 at 570-571; Damian & Tshitangano op cit note 10 at 156-157; section 3 of and Annexure C to the Direction.
273 Op cit note 73 at 17-18.
274 Supra note 217 paras 12, 15, 19, 62, 68-69, 90-123, and 143-144.
275 Supra note 243 para 95.
276 Ibid.
277 Rogers *et al* op cit note 87 at 621-627; Hulscher *et al* op cit note 87 at 1-11.
278 Op cit note 73 at 22 and 24-26; principle 1 of the Nuremburg.

ICCPR prohibits coerced 'medical or scientific experimentation'.[279] The alleged experimental nature of COVID-19 vaccination was rejected by Churchman J in *GF* on, which I assert to be the weak premise that the vaccine had been provisionally approved.[280] Churchman J, citing *Nga*, held that 'approval was granted on… the provision of information of similar comprehensiveness to that required for full approval'.[281] This argument is weak on the basis of Ellis J's confirmation in *Nga* that full consent would be impractical, given the inadequate information on the new vaccine's safety and efficacy, hence the need for provisional approval.[282] Contrary to Churchman J, I argue that this confirmation and the lack of known long-term effects, as acknowledged in *NZTSOS*, confirm the experimental nature of COVID-19 vaccination.[283] Moreover, the UDBHR requires a person's informed and voluntary consent to 'therapeutic medical intervention'.[284] COVID-19 vaccination was confirmed by the court in *Nga* to be a therapeutic medicine.[285] Lötter criticises the courts in *Nga* and *GF* for disregarding consent and validating its disregard in subordinate legislation.[286] For the above reasons, I concur with Lötter that COVID-19 was experimental and that informed consent could not have been acquired.[287]

I previously accentuated the relevance of *FDA*. *FDA* reveals that the emergency approval of a new vaccine implies that its safety and efficacy are supported and not proven by data, as the approval standards are lower and reviews rushed.[288] I argue that the FDA's compromised approval standards and the previously cited peer-reviewed scientific studies render anti-vaxxers' concerns worth valuing by policymakers when deciding whether to mandate a new vaccine of which the long-term health implications are not yet adequately known.

279 Article 7 of the ICCPR.
280 Supra note 238 paras 46-47.
281 Ibid.
282 Supra note 194 paras 33-36, 38, and 58-60.
283 Ibid; supra note 243 para 95.
284 Article 6 of the UDBHR.
285 Supra note 194 para 11.
286 Op cit note 73 at 18.
287 Ibid at 18, 22, 24-26, and 28.
288 Supra note 245 on pages 3-4.

*iii. Lessons*

Steenberg *et al* argue that the clinical and anthropological variables underlying vaccine hesitancy should be identified and negated to encourage immunisation.[289] Lesson 1: Although I acknowledge the importance of immunisation, I submit that policymakers should weigh scientific and anthropological variables against and for vaccine hesitancy to ensure that public health balances with individual interests, rights, and duties. However, I argue for a cautious approach to vaccine objections. Religious text, for example, may erroneously be interpreted to rebut scientific reasoning.[290] I submit that this renders reliance on section 15 of the Constitution, to negate mandatory vaccination on religious grounds, uncorroborated.

Lesson 2: I concur with MacAulay *et al* that public health policies should be science-based.[291] However, I contend that policymakers should be cautious not to blindly conform to an exclusive scientific narrative that potentially represents health institutions' commercial interests and policymakers' political interests. I emphasise this in view of South African employers' discretion whether to enforce COVID-19 vaccination.[292] Therefore, to ensure that concerns and interests are not disregarded and mistrust fostered, policymakers should refrain from pledging their uncompromising allegiance to health authorities and an exclusive scientific narrative. I further submit that research into the history and commercial dealings of authorities pushing for and profiting from vaccine rollouts is necessary to safeguard human rights.

Lesson 3: I submit that international human rights laws on consent, scientific experimentation, and medical intervention should be incorporated into vaccine policies. The NSWPHA did not mandate an inquiry into international law, vaccine safety and efficacy, and vaccine alternatives before a vaccine mandate may have been enforced.[293] I argue that policymakers should avoid the NSWPHA's shortcoming to ensure the equitable balancing of competing rights. The UDBHR is a useful starting point, as it aims to guide the drafting of legislation and policies on bioethics.[294]

289 Steenberg *et al* op cit note 11 at 2-3 and 11-12.
290 Op cit note 24 at 1-7.
291 Op cit note 78 at 468.
292 Section 3 of and Annexure C to the Direction.
293 Supra note 168 paras 227-230, 240-241, and 250-254.
294 Articles 1-2 of the UDBHR.

*(b) Regulation of vaccine mandates*

*i. South Africa*

The government neither mandated nor proscribed the mandating of COVID-19 vaccination.[295] This approach echoes the strategy suggested by Lazarus *et al,* which value voluntarism instead of coercion,[296] the latter of which could exacerbate vaccine hesitancy, occupational exclusion and, therefore, socioeconomic inequalities.[297] As for workplaces, the Direction enabled the voluntary implementation of vaccination.[298] However, case law indicates that employers felt coerced to mandate vaccination to preserve their business interests and clients' trust.[299]

The government's indifferent stance resulted in employers having no discernible direction as to whether they were legally authorised to force vaccination.[300] The Direction lacked guidance on the specific employees eligible for mandatory vaccination, the extent of such mandate, the circumstances rendering mandatory vaccination lawful, and whether dismissal for non-vaccination was justifiable.[301]

The employee in *Dreyden* erroneously disregarded the legal bindingness of the Direction.[302] The commissioners confirmed that mandatory vaccination and dismissal for non-compliance are not expressly authorised by legislation.[303] Notwithstanding, the judiciary has referred to the OHSA and LRA to resolve disputes on mandatory vaccination and subsequent dismissals.[304] The judiciary in *Dreyden* and *Ernest* confirmed the binding nature of the Direction, which qualified as subordinate legislation.[305]

It was acknowledged in *Dreyden* that the Direction did not expressly warrant dismissal, but that this was not required to be expressly stipulated.[306] Employers were required to honour the Direction's requirements (including respecting employees' constitutional rights and affording unvaccinated employees reasonable accommodation) before resorting to a

295 Section 3 of and Annexure C to the Direction; BusinessTech op cit note 10.
296 Op cit note 28 at 226.
297 Bardosh *et al* op cit note 5 at 1-11.
298 Sections 3-4 and Annexure C to the Direction.
299 Supra note 157 paras 14.7 and 57; supra note 38 paras 24 and 54-55; supra note 63 para 21.
300 Phillips *et al* op cit note 5 at 2165.
301 Ibid at 2171-2172; op cit note 115 at 218-219.
302 Supra note 147 paras 49, 62-63, and 66-68.
303 Ibid paras 64 and 68.
304 Ibid paras 64-65; supra note 142 paras 28 and 40; supra note 63 paras 16, 20, and 53.
305 Supra note 147 paras 66-68; supra note 80 paras 56-57.
306 Supra note 147 paras 73-76.

dismissal.[307] If reasonable accommodation was impractical, dismissal or suspension was a logical consequence to preserve the employer's business interests, adhere to the OHSA, and ensure public health.[308]

Furthermore, a blanket mandate was not warranted by the Direction, since employers had to compile a risk assessment.[309] Employers had to discriminate in identifying employees for vaccination according to criteria, such as 'operational requirements' and 'comorbidities'.[310]

### *ii. Foreign jurisdictions*

As discussed, foreign jurisdictions took a decisive approach to COVID-19 vaccination and a less tolerant approach to vaccine hesitancy. In Queensland, the right of designated employees to work in the relevant health service was contingent on their compliance with the CTVRD.[311] A designated employee had to receive a specified COVID-19 vaccine dose by a specified date and from a manufacturer specifically prescribed.[312] The CTVRD was not as specific about vaccination exemptions, as it merely referred to 'reasonable excuse' and 'medical reason'.[313] Inversely, non-compliance with the CTVRD was clear, which permitted imprisonment.[314]

The Aged Order and the Education Order identified employees within specified labour industries as vulnerable to COVID-19.[315] These employees were eligible for vaccination to ensure public health.[316] These orders allowed vaccination exemption for medical contraindications or with the relevant minister's instruction.[317] Decisive measures can further be found in the formerly amended NZERA, which permitted the dismissal of unvaccinated employees.[318]

307 Ibid.
308 Ibid paras 74-83; supra note 157 paras 48-59.
309 Section 3 of the Direction; supra note 63 para 45.
310 Ibid.
311 Clauses 6-7 of the CTVRD.
312 Ibid.
313 Ibid clauses 8 and 10 and part 7.
314 Ibid part 7.
315 Clauses 4-5 of the Aged Order; clauses 3-4 of the Education Order.
316 Clause 4 of the Aged Order; clause 3 of the Education Order.
317 Clause 8 of the Aged Order; clauses 4(1)(*b*) and 6 of the Education Order.
318 Clause 3 of Schedule 3A of the NZERA.

*iii. Lessons*

On my analysis, foreign vaccine mandates were more decisive than South Africa's Direction in that they:

- specified employees eligible for vaccination according to occupational and public health considerations instead of leaving this to the employer;
- outright mandated vaccination in terms of public health laws instead of affording employers the discretion; and
- stipulated clear consequences for non-compliance.

I argue that Australia and NZ's mandates left little room for ambiguity. However, the Direction was more specific and lenient in that it permitted vaccination exemptions on medical and specific constitutional grounds.[319] The Direction's exemptions were not restricted to medical contraindications or a minister's discretion, as with NSW, nor were they as non-specific as Queensland's mandate.[320]

Lesson 4: While decisive and unambiguous mandates appear ideal during a pandemic plagued with health and socioeconomic implications, I argue that vaccine mandates undermine the balance if employees are denied vaccine exemption on medical and constitutional grounds. Therefore, policymakers should afford employees medical and constitutional grounds on which to oppose vaccination.

Lesson 5: Mandatory vaccination risks upholding employers' interests at the expense of employees' voluntary choice.[321] I argue that employers should not similarly be denied the voluntary choice to implement vaccine policies tailored to their individual workplace circumstances. I further argue that banning mandates, as Texas has undertaken,[322] undermines public health and employers' business interests. In this instance, little weight should be attached to the UDBHR's guidance, as it values individual interests and health over scientific and societal interests.[323] I argue for employers' statutory regulated discretion to require

319 Guideline 5(*a*)(*ii*) of Annexure C to the Direction.
320 Clauses 4(1)(*b*) and 6 of the Education Order; clause 8 of the Aged Order; clauses 8 and 10 and part 7 of the CTVRD.
321 Op cit note 28 at 226.
322 Op cit note 265; op cit note 266.
323 Article 3 of the UDBHR.

vaccination, but not without affording employees legitimate grounds for refusing vaccination without justified prejudice.

Lötter refers to *Aviation* in which Cooke J alluded to regulating vaccination through primary legislation instead of subordinate legislation.[324] This was accentuated given the ambiguities surrounding the efficacy of COVID-19 vaccination and the limitation of fundamental rights.[325] Lesson 6: I submit that primary legislation should regulate occupational vaccine mandates. This will ensure legal certainty on the consequences of non-vaccination and labour stakeholders' rights and duties. I propose this in consideration that the NSD's termination rendered the Direction (amounting to subordinate legislation drafted for COVID-19 vaccination only)[326] redundant and that mandatory vaccination remains unregulated in South African labour statutes.[327]

I argue that it is important to enquire whether the Direction should have followed NZ's mandates by specifying vulnerable employees from designated industries eligible for COVID-19 vaccination.[328] *Federation* questions whether general public health measures or discriminatory policies should address a pandemic virus not limited to the workplace.[329] Lesson 7: Following the court's reasoning in *Federation*, I argue that a pandemic virus should be regulated through discriminatory vaccine policies, which take heed of occupation-specific risks unique to a virus and employees.[330] I submit that a blanket vaccine mandate indiscriminately enforced by the MEL would not give employers the discretion to draft policies tailored to their specific workplace circumstances. The Direction prevailed in this regard.

Lesson 8: I argue that policymakers should draw from section 23 of the NZMA (before its amendment), which restricted the administration of a new vaccine to a limited number of persons, such as frontline workers only.[331] Following the court's reasoning in *Nga*, I submit this as a viable compromise where there is not adequate information on a new vaccine, but where there is an immediate need to approve a vaccine to protect vulnerable workers.[332]

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324 Op cit note 73 at 18; supra note 217 paras 40, 55, and 129.
325 Ibid.
326 Supra note 147 paras 66-68; supra note 80 at paras 56-57; preamble of the Direction.
327 Op cit note 115 at 200 and 211.
328 Clause 3 and Schedule 2 of the Specified Order; clause 3 and Schedule 2 of the Vaccinations Order.
329 Supra note 258 IA-IIB.
330 Ibid IIA.
331 Section 23 of the NZMA.
332 Supra note 194 paras 34-38 and 58-60.

### *(c) Balancing public health with labour interests, rights, and duties*

#### *i. South Africa*

The commissioner in *Kok* contested that the limitation of the applicant's constitutional rights was justifiable.[333] This contention was based on the efficacy of vaccination, the limited adverse vaccine effects, public health interests, the alternative accommodation offered to the applicant, and the applicant's uncorroborated anti-vaccination objections.[334] The commissioner acknowledged the essential nature of the employer's business, the commercial rationale underlying the mandate and, therefore, the employee's justifiable suspension for non-compliance.[335] The *Bessick CCMA* commissioner contemplated the employee's poorly substantiated medical, personal, and religious objections.[336] The commissioner regarded the employee's dismissal for non-vaccination as procedurally and substantively fair in view of the employer's operational requirements.[337] In *Mulderij*, the commissioner considered the nature of the employee's occupation.[338] The commissioner emphasised the employee's obligation to ensure a healthy and safe work environment by vaccinating, failing which renders her permanently incapable of performing her occupational duties.[339]

The Direction did not leave employees without recourse, as is evident from its application in *Bessick LC*, *Dreyden*, and *Tshatshu* where the employers' non-adherence to the Direction compromised the fairness of the dismissals.[340] To summarise, *Bessick LC* overturned *Bessick CCMA* because the employee's dismissal was substantively unfair.[341] The employer failed to consider alternatives to the unvaccinated employee's dismissal per section 189 of the LRA and the Direction.[342] In *Dreyden*, the employee's dismissal was procedurally unfair, as the employer failed to inform its employees of their constitutional rights to refuse vaccination.[343] In *Tshatshu*, the employer neglected to consider its employees' medical objections to vaccination.[344]

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333 Supra note 157 paras 36-45.
334 Ibid.
335 Ibid paras 56-59.
336 Supra note 38 paras 67-72.
337 Ibid paras 67-74 and 78.
338 Supra note 162 paras 2, 19-20, 24, and 27.
339 Ibid paras 27-29.1.
340 Supra note 142 paras 32-42; supra note 147 paras 84-88; supra note 63 paras 52-55 and 57-58.
341 Supra note 142 paras 32-42.
342 Ibid.
343 Supra note 147 paras 84-88.
344 Supra note 63 paras 52-55 and 57-58.

Annexure C to the Direction was framed in general terms.[345] Workplace circumstances may, consequently, have rendered deviation from the Direction permissible.[346] Employers had to consider various factors, including operational requirements, before enforcing vaccination.[347] I argue that the Direction balanced different labour interests, rights, and duties with public health. However, Botha notes that obscurity surrounded the Direction's meaning of 'operational requirements' in the context of vaccine mandates.[348] This may have resulted in the *Tshatshu* commissioner conflating misconduct with the employer's operational requirements.[349]

Evidently, employers had to ensure balance when contemplating mandatory vaccination. I submit that this may have presented a conflict of interest, as employers may likely uphold their own interests. A collective agreement could potentially have remedied this setback, as collective agreements took precedence.[350] The commissioner in *Tshatshu* argued that the responsibility rests with the government and not the employer to declare vaccination mandatory in terms of law of general application.[351]

### *ii. Foreign jurisdictions*

The vaccine mandates enforced in NSW focused on preserving public health and occupational health and safety.[352] In Queensland, the CTVRD had a similar purpose.[353] Designated employees faced criminal sanctions and unfavourable employment consequences for non-compliance.[354] The NZ Appeal Court confirmed that the Vaccinations Order solely permitted vaccination exemption for 'potential health risk[s]', not for religion or culture.[355] Gilbert J referred to the narrow exemption criteria and the harsh practical implications it harboured for a few defiant employees, such as dismissal.[356] These implications were relevant to the court's proportionality inquiry.[357] Notwithstanding, NZ's NZERA instructed employers to consider all

345 Guideline 2 of Annexure C to the Direction.
346 Ibid.
347 Ibid sections 3(1)(*a*) and 3(4) and guideline 5(*a*)(*ii*) of Annexure C.
348 Op cit note 117 at 2068.
349 William Manga Mokofe & Stefan van Eck 'COVID-19 at the workplace: What lessons are to be gained from early case law?' (2022) 55 *De Jure Law Journal* 168.
350 Guideline 3 of Annexure C to the Direction.
351 Supra note 63 paras 56-57.
352 Clause 1.8 of the Restrictions Order; clauses 4-5 of the Aged Order; clauses 3-4 of the Education Order.
353 See preamble of the CTVRD.
354 Ibid clauses 5-8 and part 7.
355 Supra note 243 para 98.
356 Ibid.
357 Ibid.

reasonable alternatives to dismissing their unvaccinated employees.[358] Gilbert J concluded by adverting to the balancing of constitutional rights with the public good being a matter of ongoing public interest.[359]

### *iii. Lessons*

Lesson 9: Considering the court's analysis of the Vaccinations Order in *NZTSOS*,[360] I argue that policymakers should avoid narrow vaccine exemption criteria with harsh practical implications for non-vaccinated employees, as these implications may compromise the balance. The Direction avoided narrow vaccine exemption criteria, as the Direction allowed exemption on medical and constitutional grounds, including religion.[361] Lesson 10: Policymakers should be clear on the consequences for non-vaccination, as in the case of the CTVRD and NZERA.[362] Lesson 11: To avoid uncertainty, I submit that policymakers should clarify the meaning of 'operational requirements', 'misconduct', and 'incapacity' in the context of mandatory employee vaccination.

## VII CONCLUSION

The WHO's Director-General asserts that 'the next pandemic is a matter of when, not if'.[363] Therefore, pandemic preparedness through science and political resolve is essential.[364] To prepare, vaccine hesitancy should be understood through the lens of medical science and anthropology,[365] to ensure that competing interests and rights are upheld alongside public health.

While I acknowledge the appeal of blanket vaccine mandates mitigating a pandemic's health and socioeconomic implications, I conclude that these mandates risk overlooking the interests and rights of vaccine-hesitant employees. Blanket vaccine mandates, indiscriminately enforced by the MEL, would not give employers leeway to draft policies tailored to their workplace circumstances.

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358 Clause 3(4) of Schedule 3A of the NZERA.
359 Supra note 243 para 102.
360 Ibid para 98.
361 Guideline 5(*a*)(*ii*) of Annexure C to the Direction.
362 Clauses 5-8 and part 7 of the CTVRD; clause 3 of Schedule 3A of the NZERA.
363 Op cit note 3.
364 Ibid.
365 Steenberg *et al* op cit note 11 at 2-3 and 11-12.

I conclude that employers should have the statutory regulated discretion to voluntarily require vaccination, but not without affording employees exemptions without justified prejudice. Therefore, the goal during a pandemic should be to embrace the best practicable way of balancing human rights, public health, and economic considerations.

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