



Mandatory childhood immunisation in South Africa: What are the legal options?

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In recent years there have been outbreaks of vaccine-preventable childhood illnesses across the globe, and in various parts of South Africa (SA). This has raised the debate about mandatory vaccination as a means to improving immunisation coverage, and to address the need for an improved prevention strategy to minimise the risk of such outbreaks. This article explores the legal avenues available within the SA context by which mandatory vaccination could be applied, with a particular focus on the options for legislative amendments, as well as an exploration of foreign court decisions in which parties were compelled to immunise children.

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A number of countries across the world are experiencing a resurgence of previously eliminated diseases owing to suboptimal immunisation coverage.^[1] This, along with a growing global vaccine hesitancy movement, has prompted a number of countries to consider, adopt or strengthen mandatory childhood immunisation legislation, in an effort to promote high coverage rates.^[2]

Despite the significant achievements of the South African (SA) Expanded Programme on Immunisation (EPI) introduced in 1995, there are historical challenges regarding suboptimal immunisation coverage, which have resulted in SA struggling in recent years with outbreaks of vaccine-preventable diseases such as measles and diphtheria.^[4,5]

Immunisation coverage data are routinely used to measure a country's immunisation system performance. In SA, the administrative fully immunised under 1-year-old coverage (FIC) is persistently lower than the global target of 90%.^[6] The 2016 SA Demographic and Health Survey (SADHS) found that only 52.7% of children aged 12 - 23 months had received all age-appropriate vaccinations. In 2017/2018, the District Health Information System (DHIS) reported that the FIC was 77%, which is 10 points lower than the required national target set for the same period.^[7] This underlines the persistence of suboptimal immunisation coverage for young children in SA.

Frequently cited reasons for suboptimal immunisation coverage include vaccine availability and supply issues, health worker-related factors (such as insufficient knowledge of vaccines and EPI practices), facility-level factors (such as availability of the service and missed opportunities),^[8] lack of access to health services in hard-to-reach communities, and parental resistance and misinformation about immunisation.^[9] Despite the lack of definitive data, three recent measles outbreaks in SA have highlighted concerns about the extent of the local impact of vaccine hesitancy. Vaccine hesitancy refers to delays in the acceptance of, or the refusal of, vaccines despite the

availability of vaccination services.^[2] These 2017/2018 outbreaks resulted in a 12-fold increase in measles cases compared with the previous year, with most cases occurring in individuals who had received fewer than the two recommended vaccine doses.^[4,5]

Vaccine hesitancy is underexplored in the SA context, and there is therefore no certainty with regards to the scale of the issue, the underlying reasons for parental refusal and effective strategies to address these. This growing global sentiment and the unchanging local immunisation landscape have sparked a debate about whether SA should consider making childhood immunisation compulsory. This article explores the available options within which to frame possible mandatory immunisation laws in the SA context.

Exploring the legal framework

We start by looking at specific constitutional rights that immunisation invokes, in particular, the child's right to basic healthcare services (s 28(1)(c)),^[10] to parental care (s 28(1)(b)),^[10] to protection from maltreatment, abuse, neglect and degradation (s 28(1)(d))^[10] and the principle of the best interests of the child (s 28(2)).^[10] In addition to the relevant provisions in section 28, section 27 of the Constitution grants everyone, including children, the right of access to healthcare services.^[10]

The right to basic healthcare services guaranteed to children includes the provision of primary healthcare services such as immunisation. Given the age at which immunisation becomes necessary and available to children, parents and caregivers have to agree to and present the child for immunisation at healthcare facilities. Health provisions in both the National Health Act No. 61 of 2003^[11] and the Children's Act No. 38 of 2005^[12] thus require parental consent to be obtained for young children to access healthcare services. However, the need for parental consent can pose a problem when parents object to immunisation unreasonably,

creating a conflict of interest between the parent and the child. In health matters outside of immunisation parent-child conflicts have been managed and resolved through legislation and case law that impose limits on parents' ability to refuse their child access to healthcare services when such a refusal would be detrimental to the child.

According to section 129(10) of the Children's Act, parents cannot refuse a healthcare service for a child purely on religious grounds, unless they can prove that there is a medically accepted alternative measure. In addition, when parents unreasonably refuse a child's treatment, provision is made in section 129(7)(9) to obtain ministerial or court-ordered consent.^[12] In the case of *Hay v B and Others*,^[13] the parents' right to withhold consent for medical treatment on religious grounds was balanced against their child's right to life, and the court upheld the rights of the child in this case.

Children also have the constitutional right to parental care, and the Children's Act gives expression to this right through its parental responsibilities and rights provisions. The duty of care as defined in section 1 of the Children's Act, includes the duty to promote and safeguard the child's wellbeing, and to protect the child from harm.^[12] Therefore, parental care must be exercised in a way that does not harm the child.^[12] Given that immunisation is a proven, cost-effective tool for controlling and eliminating life-threatening infectious diseases,^[14] it can be argued that if parents withhold children's access to vaccinations (where services are readily available) for personal reasons, then such conduct conflicts with the child's right to parental care and to be protected from harm. A failure to perform the duty of care and provide for the health (i.e. immunisation) needs of the child may also constitute neglect on the part of the caregiver, and that too would conflict with the child's right to be protected against any form of neglect.

As noted above, section 28(2) of the Constitution demands that the best interests of the child must be of paramount consideration in all matters affecting the child.^[10] The question hence arises whether immunisation serves the best interests of the child. To answer this, we will consider foreign case law (as allowed by section 39 of the Constitution),^[10] as there are no relevant reported SA cases.

In the UK, in the case of *Re SL (Permission to vaccinate)*,^[16] the local authority wanted a 7-month-old child who was placed in its care to receive certain vaccinations. However, the child's mother objected based on reported instances of her other children suffering adverse reactions to the vaccines. In this case, the court held that immunisation was in the child's best interests and that the benefits of immunisation outweighed the risks claimed. The court held that it would not be intruding into parents' autonomy by exercising its obligations as the upper guardian of all children.^[16] Another example from UK case law is *F v F*, where there was a dispute between separated parents regarding whether or not their children should be immunised. The court held that it was in the best interests of the children concerned to be immunised, despite an objection from the mother.^[17]

Having considered the benefits of immunisation, some foreign precedents and the ability of immunisation to serve the constitutional rights of children, the state could use legislative or other measures to promote mandatory immunisations. The question is, what would be the best way of doing so?

Legal strategies to advance mandatory immunisations in South Africa

Amending the law

To start with, the Children's Act could create a provision that all children <12 years old must be immunised. Exemptions, though mainly on medical grounds, could be allowed, as is the case in Australia^[18] and Slovenia.^[19] Such a provision would remove the discretion of parents not to immunise the child. Transgressions could be made less punitive by reports being made to the Department of Social Development (rather than the police), and counselling provided to parents by healthcare providers to address the underlying reasons for vaccine refusal. However, one risk of such an approach may be that parents simply ignore the law if it is not enforced.

Alternatively, immunisation could be made compulsory for the enrolment of children into schools. National school admission regulations dictate that parents must present proof that their child has been fully immunised when they apply for public school admission.^[20] However, this law does not expressly indicate that a child will be refused entry into a school for incomplete or lack of immunisation.

If the parent cannot show proof of immunisation, then the school principal should advise the parent to have the child immunised.^[20] However, what happens if the parent still fails to provide proof of immunisation after the principal advises the parent? The national regulations are not clear on this. As a result, different provinces have created different rules. In Gauteng Province schools, a child will be conditionally admitted while the parent is given an opportunity to obtain the necessary documents, including proof of immunisation. If this is not done after some time, then the conditional admission will lapse.^[21] On the other hand, according to Western Cape education policy (WCEP), if a parent does not want a child to be immunised, they must make an application to the Head of the Education Department (HOD), and the learner cannot be admitted to that school pending the decision from the HOD.^[22] National regulations that follow either the WCEP or the Gauteng schools' approach could create a benchmark to be followed across the country.

The problem with making immunisation a requirement for admissions would be that such an approach could limit children's right to access to education. It can be argued that the right is not completely abrogated, and that the limitation is justifiable in the interests of all children attending a particular school. In the case of *The Teddy Bear Clinic For Abused Children and Another v Minister of Justice and Constitutional Development and Another*,^[23] the Constitutional Court found that the best-interest principle creates a 'standard against which to test provisions or conduct which affects children in general'. Therefore, if the objective of mandatory immunisation legislation is to protect the health and other interests of not only individual children but also children in general, it could meet the best-interest standards of section 28(2).

Litigation as an option

Another available option would be to initiate litigation in a case with facts similar to ones tested in the foreign courts. However, waiting for a specific case has definitive weaknesses, as there is

no telling when such a matter would reach the courts. In addition, courts usually make orders that are directed to a particular child. The UK case^[16] noted above said expressly that its decision was child-specific, and it was not pronouncing on the merits of the immunisation debate. An SA court could make similar findings in an immunisation case.

The best way of using litigation to change the law would be to ask a court to declare current law (for example the Children's Act) unconstitutional for failing to make immunisation compulsory despite it being in the best interests of children. Such an argument could be made in a case where a parent has refused to immunise a child, and the unvaccinated child contracts a vaccine-preventable disease and exposes/infects others, which results in more infections, or worse. However, for a litigation strategy to have significant impact, it would require a Constitutional Court judgment, with a likely outcome being an order to amend the defects in the existing law so as to craft provisions to strengthen existing national immunisation efforts.

Conclusion

Suboptimal immunisation coverage, outbreaks of vaccine-preventable diseases and the fact that vaccine hesitancy is now considered a priority global health threat, have resulted in a number of countries adopting mandatory immunisation policies.^[24] The aim of this article was to consider available options on how mandatory immunisation could be effected in SA, with a particular focus on such laws within a child rights framework.

However, the effectiveness of mandatory immunisation laws is not guaranteed. It is unclear among countries that have adopted such legislation whether there has been any significant improvement in immunisation coverage.^[25] There is also no standard approach with regard to which vaccines are made compulsory, to which age groups this applies and conditions for opting out, among other specifics. The World Health Organization does not have an official policy on mandatory immunisations, and states that it is preferable that high public demand and acceptance should drive improvements in immunisation coverage, rather than compulsory immunisation laws.^[19]

Given the underlying reasons for suboptimal immunisation coverage, and the lack of information on vaccine hesitancy in our context, it is unclear whether legislating mandatory child immunisation would have significant impact on immunisation coverage in SA. Therefore, this debate should be part of a broader discussion and further exploration of alternative strategies to improve immunisation coverage and uptake among children. This should include a review of social and behaviour change communication initiatives, strategies that address vaccine delivery and supply challenges, and specific interventions aimed at strengthening the knowledge, skills and competence of healthcare workers to not only deliver vaccines, but also to effectively counsel parents/caregivers on their concerns about or refusal of immunisation.

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1. World Health Organization. Strategic advisory group of experts on immunization: 2018 assessment report of the global vaccine action plan. Geneva: WHO, 2018.
2. World Health Organization. Ten threats to global health in 2019. Geneva: WHO, 2019. <https://www.who.int/emergencies/ten-threats-to-global-health-in-2019> (accessed 6 November 2019).
3. Aung Y-Y, Dlamini NR. Immunisation. In: Massyn N, Padarath A, Peer N, Day C (eds). District Health Barometer (2016/2017). Durban: Health Systems Trust, 2017.
4. National Institute for Communicable Diseases. Diphtheria alert: KwaZulu-Natal Province, South Africa. <http://www.nicd.ac.za/index.php/diphtheria-alert-kwazulu-natal-province-south-africa/> (accessed 8 August 2019).
5. Hong H, Makhathini L, Mashele M, et al. Annual measles and rubella surveillance review, South Africa, 2017. <http://www.nicd.ac.za/wp-content/uploads/2018/09/Annual-measles-and-rubella-surveillance-review-South-Africa-2017.pdf> (accessed 6 November 2019).
6. Burnett RJ, Dlamini NR, Meyer JC, et al. Progress towards obtaining valid vaccination coverage data in South Africa. *S Afr J Sci* 2019;115(5/6):1-4. <https://doi.org/10.17159/sajs.2019/6060>
7. Dlamini NR. Immunisation. In: Massyn N, Pillay Y, Padarath A, eds. District Health Barometer 2017/18. Durban: Health Systems Trust, January 2019.
8. World Health Organization. Missed Opportunities for Vaccination (MOV) Strategy. Geneva: WHO, 2019. https://www.who.int/immunization/programmes_systems/policies_strategies/MOV/en/ (Accessed 8 August 2019).
9. Wiysonge C, Ngcobo N, Jeena P, et al. Advances in childhood immunisation in South Africa: Where to now? Programme managers' views and evidence from systematic reviews. *BMC Public Health* 2012;12:578. <https://doi.org/10.1186/1471-2458-12-578>
10. Constitution of the Republic of South Africa. 1996.
11. South Africa. National Health Act No. 61 of 2003.
12. South Africa. Children's Act No. 38 of 2005.
13. *Hay v B and Others* 2003 (3) SA 492 (W).
14. *C and Others v Department of Health and Social Development, Gauteng, and Others* 2012 (2) SA 208 (CC) para 116.
15. Andre FE, Booy R, Bock HL, et al. Vaccination greatly reduces disease, disability, death and inequity worldwide. *Bull World Health Organ* 2008;86(2):140-146.
16. *Re SL (Permission to vaccinate)* 2017. Paras 38, 41, 43, 48-51. https://www.familylaw.co.uk/news_and_comment/re-sl-permission-to-vaccinate-2017-ewhc-125-fam (accessed 3 April 2019).
17. *F v F* 2013 EWHC 2683 (Fam) para 22.
18. Australia. Social Services Legislation Amendment (No Jab, No Pay) Act No. 158 of 2015.
19. Walkinshaw E. Mandatory vaccinations: The international landscape. *Can Med Ass J* 2011;183(16):E1168. <http://www.cmaj.ca/content/183/16> (accessed 6 November 2019).
20. National Department of Education, South Africa. National Education Policy Act, 1996 (Act No. 27 of 1996). Admission policy for ordinary public schools. Government Gazette No. 19377:2432. 1998.
21. Gauteng Department of Education. Regulations Relating to the Admission of Learners at Public Schools 2001 (as amended in 2012). Regulation 6(2)(4).
22. Western Cape Education Department. WCED Policy for the management of admission and registration of learners at ordinary public schools. https://wcedonline.westerncape.gov.za/circulars/circulars10/e26_10.pdf (accessed 8 August 2019).
23. *Teddy Bear Clinic For Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (1) SACR 327 (CC) para 69.
24. Bozzola E, Spina G, Russo R, et al. Mandatory vaccinations in European countries, undocumented information, false news and the impact on vaccination uptake: The position of the Italian Pediatric Society. *Ital J Pediatr* 2018;44(1):67. <https://doi.org/10.1186/s13052-018-0504-y>
25. Bromberger N. Vaccine-preventable diseases: Compensating victims and deterring non-vaccinators? *Altern Law J* 2017;42(3):211-215. <https://doi.org/10.1177%2F1037969X17730200>

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