

FREE



FAIR

**A REPORT TO THE ELECTORAL COMMISSION OF SOUTH AFRICA IN
TERMS OF SECTION 14(4) READ WITH SECTION 5(2)(a) OF THE
ELECTORAL COMMISSION ACT**

Introduction

[1] On 21 April 2021, the President of the Republic announced that the 2021 general local government elections will be held on 27 October 2021. On the following day, 22 April 2021, the Electoral Commission of South Africa (Commission) held a pre-arranged meeting with the leaders of political parties represented in the National Political Party Liaison Committee (the Liaison Committee), when some leaders expressed concern that the elections may not be free and fair, emphasising the lockdown restrictions forbidding electoral political activity. Other leaders thought that, with appropriate precautions, elections are likely to be free and fair.¹

[2] On 20 May 2021, the Commission appointed me to enquire into, make findings, report on, and make recommendations concerning the likelihood that the Commission will be able to ensure that the forthcoming 2021 general local government elections will be free and fair in view of the Covid-19 pandemic and the measures promulgated by the Government to curb the continued spread of the virus (Inquiry). The Commission went on to stipulate that the report of the Inquiry may indicate additional measures that the Commission may have to implement to realise free and fair elections within the Covid-19 context.

[3] The Inquiry was required to call for and receive submissions from registered political parties; key stakeholders in the electoral process, including the Chief Electoral Officer; relevant health authorities in the Republic, particularly in respect of matters related to the expected future trajectory of the pandemic as well as efforts to manage and mitigate the spread of Covid-19, and reach community immunity through vaccination endeavours; relevant disaster management authorities; and other

¹ The Liaison Committee is a body established in line with section 5(1) of the Electoral Commission Act, 1996 (Electoral Commission Act), through which the Commission maintains liaison and co-operation with political parties.

stakeholders and experts both here and elsewhere whose submissions would assist me in the execution of the assignment.

[4] The assignment envisaged a written report to the Commission (Report) bearing findings and recommendations. The Commission will consider the Report and take such steps as it may consider necessary. Thus, the Report is plainly not directive but rather advisory.

[5] In the conduct of the assignment: I was entitled to appoint one or more knowledgeable or experienced people to assist in the performance of the task of the Inquiry, to determine the procedure for calling and receiving written and oral submissions and, in appropriate cases, to receive sworn or affirmed statements.

[6] Given the nearness of the date for the elections announced by the President,² being 27 October 2021, there was considerable urgency attached to this assignment. The agreed timelines for the execution of the task were stringent and hurried. It follows that this Report, although well considered, was perforce, prepared in great haste. This assignment is without precedent since the enactment of the Electoral Commission Act in 1996, as are the circumstances that have necessitated the conduct of this task. I trust that this Report will assist the Commission in the execution of its constitutional mandate to conduct and ensure free and fair elections.

² The President's announcement was made on 21 April 2021, available at: <http://www.thepresidency.gov.za/newsletters/president-announces-27-october-2021-date-local-government-elections>.

Legal basis for the appointment

[7] The Commission is a constitutional institution established in terms of section 181,³ read with section 190,⁴ of the Constitution of the Republic of South Africa (Constitution). Section 190(1) requires the Commission to manage elections of national, provincial, and municipal legislative bodies as prescribed by national legislation, to ensure that those elections are free and fair, and to declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

³ Section 181 of the Constitution reads as follows:

- “(1) The following state institutions strengthen constitutional democracy in the Republic:
- (a) The Public Protector.
 - (b) The South African Human Rights Commission.
 - (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
 - (d) The Commission for Gender Equality.
 - (e) The Auditor-General.
 - (f) The Electoral Commission.
- (2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.
- (3) Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.
- (4) No person or organ of state may interfere with the functioning of these institutions.
- (5) These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.”

⁴ Section 190 of the Constitution provides as follows:

- “(1) The Electoral Commission must–
- (a) manage elections of national, provincial and municipal legislative bodies in accordance with national legislation;
 - (b) ensure that those elections are free and fair; and
 - (c) declare the results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.
- (2) The Electoral Commission has the additional powers and functions prescribed by national legislation.”

[8] So, the very existential object of the Commission is to conduct and ensure free and fair elections. In the execution of this task, which is so vital to our democracy, national legislation authorises the Commission to publish a report on the likelihood or otherwise that a pending election will be free and fair. The empowering provision is section 14(4) of the Electoral Commission Act.⁵ Section 5(2)(a) of the same Act provides that the Commission may for purposes of the achievement of its objects acquire capacity by way of employment, secondment, appointment on contract or otherwise.⁶

[9] The establishment of the Inquiry and its terms of reference are reasonably necessary and justified in pursuit of the constitutional obligation and legal mandate of the Commission. More so, my appointment is envisaged and authorised by the Electoral Commission Act.⁷

Setting up the Inquiry

[10] Shortly after my appointment on 20 May 2021, with the aid of the Commission, the Inquiry set up an office on the first floor of Tugela House, Riverside Office Park, Centurion, from which the personnel of the Inquiry would do their work.

[11] From 24 May 2021, the Inquiry appointed Mr Success Hlase and Ms Lily Mahlakoane who were seconded by the Commission to provide executive support and administrative assistance. In quick succession, I appointed a team of four law

⁵ Section 14(4) of the Electoral Commission Act states that “[t]he Commission may, if it deems it necessary, publish a report on the likelihood or otherwise that it will be able to ensure that any pending election will be free and fair.”

⁶ Section 5(2)(a) of the Electoral Commission Act provides, amongst other things, that “[t]he Commission shall, for the purposes of the achievement of its objects and the performance of its functions –

(a) acquire the necessary staff, whether by employment, secondment, appointment on contract or otherwise.”

⁷ Section 5(2)(a).

researchers for the duration of the Inquiry from the ranks of duly qualified advocates and attorneys. They are Ms Molebogeng Kekana, Ms Catherine Kruyer, Ms Faathima Mahomed and Mr Thabang Mabina. Their contribution to the work of the Inquiry has been most professional and invaluable.

[12] From the week of 24 May 2021, the staff held a series of meetings with the Commission, and together set up a proper office with workstations, the required digital communications and other support systems including a live website.⁸

[13] On 27 May 2021, the Inquiry held a meeting with the Liaison Committee. I apprised the political parties about the process that the Inquiry would adopt. The representatives of the political parties in turn pledged their support for the Inquiry. The Inquiry issued a press statement detailing the salient features of the Inquiry's terms of reference and providing a schedule of the key milestones and the dates earmarked for each of the activities. The following day, the Inquiry issued letters inviting written submissions from the Chief Electoral Officer of the Commission, the Minister of Health, and the Minister of Cooperative Governance and Traditional Affairs (Minister), and the Director-Generals of the relevant departments.

[14] On 1 June 2021, the Inquiry invited other key stakeholders to make written submissions on specified issues and any issue connected with the proper conduct of local government elections. Stakeholders were also invited to express a view on whether they wished to make oral submissions to the Inquiry. The key stakeholders broadly fell into the following categories: independent medical experts; international and regional electoral monitoring bodies; domestic electoral monitoring bodies; civil

⁸ The Inquiry's website is available at: <https://www.elections.org.za/freeandfair/>.

society organisations; political parties registered with the Commission at national and local government levels;⁹ and individual members of the public.

[15] From the beginning of June 2021, the Inquiry began receiving numerous emails from the public expressing their views on whether the local government elections should proceed or not. Over a period of several weeks, the Inquiry received around 3 000 submissions from the public by email and WhatsApp text messages and voice notes.

[16] On 4 June 2021, the Commission filed its written submissions with the Inquiry. On 8 June 2021, the Inquiry's website went online. The website provided details for the public to make submissions to the Inquiry. On 15 June 2021, medical experts and electoral monitoring bodies made written submissions to the Inquiry. On 18 June 2021, political parties and civil society organisations made written submissions to the Inquiry, followed by the Minister on 20 June 2021. During the week of 21 June 2021, the Inquiry considered the written submissions. On 22 June 2021, the Inquiry issued a press statement informing the public about the upcoming week of oral hearings and providing details about how the hearings could be accessed via online platforms. On 23 June 2021, the Inquiry invited key stakeholders, who had so requested, to make oral submissions. As important stakeholders, the political parties on the Liaison Committee were also invited to make oral submissions.

[17] For a weeklong from 28 June 2021, the Inquiry heard oral submissions from a range of interested parties. The hearings were in person or on digital platforms and extensively televised, reported on, and available for viewing on online streaming platforms. This opportunity to livestream the oral submissions was valuable considering the prevailing lockdown restrictions which prevented the public and other

⁹ The Inquiry despatched 460 invitations.

interested parties from physically attending the hearings. From 5 July 2021, the Inquiry started its internal deliberations ahead of writing this Report. On Friday 9 July 2021, the Inquiry heard further oral submissions from the South African Covid-19 Modelling Consortium (Modelling Consortium) on two specified issues related to medical science.

[18] In pursuit of transparency, the Inquiry has placed all written submissions and transcriptions of oral submissions on its website for unhindered access by all stakeholders and the public. Tracking statistics on the website show significant visitations and interest.

Scheme of the Report

[19] Before this Inquiry there are matters that were keenly contested and others that were not. The prime divergence amongst most stakeholders – including political parties, representatives of organised business and labour and civil society, civil society organisations, individual members of the broader society, and government authorities – is whether the local government elections scheduled for 27 October 2021 should be proceeded with or deferred to a later date within the context of the Covid-19 pandemic.

[20] Even so, there are several other matters that are indeed common cause to, or uncontested by, the stakeholders. At the outset, the Report proposes to set out the common cause facts or background. This is important for two reasons. First, the decision on whether elections are likely to be free and fair depends on the context, and on the objective circumstances which are likely to obtain at the time of the envisaged election. Second, in this way, we hope to clear the overgrowth in the path of a later critical analysis of the core conundrum of this Inquiry. That intractable question bears repetition and it is whether the Commission is likely to conduct free and fair local

government elections in October 2021 given the potential threat to life, bodily and psychological integrity and access to health care posed by the Covid-19 pandemic.

[21] This Report hopes to traverse, albeit briefly:

- (a) the factual background;
- (b) the Covid-19 pandemic and the measures adopted by Government to curb the spread of Covid-19, and the likely impact on elections;
- (c) the law on local government elections;
- (d) the legal standard of free and fair elections;
- (e) the rights to life, bodily and psychological integrity, and access to health care;
- (f) submissions from the following stakeholders:
 - The Commission;
 - Political parties;
 - Civil society organisations and organised media;
 - Organised business, labour and civil society;
 - General public;
- (g) a public survey by the University of Johannesburg Human Sciences Research Council (Research Council);
- (h) submissions from electoral monitoring bodies;

- (i) electoral practice in our country, the rest of our African continent and elsewhere in the world in the wake of the pandemic;
- (j) submissions from civil society organisations focused on health care;
- (k) submissions from Ministerial Advisory Committee on Covid-19 (Advisory Committee);
- (l) submissions from the Director-General of the Department of Health;
- (m) submissions from medical experts;
- (n) submissions from the Minister; and
- (o) findings, conclusion, and recommendations.

Background

[22] Most of the uncontested facts have been garnered from the material furnished by the Commission in its terms of reference or written and oral submissions, or from other research or other official documents.

[23] Since the last general local government elections were conducted on 3 August 2016, the current term of all municipal councils in the Republic will terminate by effluxion of time on 3 August 2021, and general local government elections will have to be held by 1 November 2021 to elect new municipal councils. To this high-level legal proposition, we return later.

[24] The position of the Commission is that it must prepare for the local government elections in accordance with its constitutional mandate and the requirements that elections occur regularly and within the prescribed time limits. However, the Commission accepts that elections must be free and fair, and has undertaken to approach the Constitutional Court to seek a short postponement of the elections if it is not possible to hold free and fair elections in October of this year, considering the trajectory of the pandemic.

[25] The forthcoming local government elections will, in effect, involve 4 725 separate elections; electing proportional representation members of 8 metropolitan councils, 205 local councils and 44 district councils as well as 4 468 ward councillors.

[26] The Commission has assured the Inquiry that it has made proper arrangements to conduct free and fair local government elections in October this year. In preparation for the conduct of the local government elections, the Commission asserts that it:

- (a) is ensuring a conducive legislative environment for the holding of the elections;
- (b) has completed the ward and voting district delimitation process in preparation for the election;
- (c) is preparing for the holding of a voter registration weekend to enable eligible voters to register to vote and registered voters to check and update their registration details;
- (d) is procuring 23 151 voting stations across the country for the voter registration weekend and election day;

- (e) is procuring and preparing for the distribution of electoral materials for the voter registration weekend and voting day;
- (f) is recruiting and training electoral staff to administer voter registration, voting, vote counting and the collation of the election results;
- (g) is procuring 40 000 new voter management devices to be deployed on voter registration weekend and election day;
- (h) is registering political parties as part of an on-going process; and
- (i) is performing voter outreach and education, including communicating with voters about the Covid-19 health protocols that will be in place for the voter registration weekend and election day.¹⁰

[27] The Commission has assured the Inquiry that all preparatory steps are on track to be completed on schedule and will be in place for the voter registration weekend and for the conduct of the local government elections in October this year.

[28] However, the procurement cost of personal protective equipment for the voter registration weekend, and for election day, is currently unfunded.¹¹ The Commission is in engagements with National Treasury regarding additional funding.

¹⁰ The Commission is intending to release a video on “Voting in Covid Times” on social media platforms at the end of July, among other short videos to promote voter education. The Commission has already launched a community radio programme in some provinces and had organised 195 radio slots across all provinces as at 1 June 2021. The Commission held the launch for the local government elections 2021 on 9 June 2021, as part of its communication strategy.

¹¹ The total expenditure estimated for personal protective equipment procurement costs is R129 350 364.

[29] On 7 July 2021, the Commission announced that the voter registration weekend planned for 17 and 18 July 2021 would be postponed to 31 July and 1 August 2021 because of the third wave spreading across the country.¹² The two-week postponement necessitated changes to the Commission's timetable for the holding of the local government elections, including delaying the proclamation of the elections by the Minister from 2 August 2021 to 6 August 2021, and reducing the election timetable from 86 days to 82 days. The Commission remains confident that "successful elections can be held within [the] reduced election timetable".¹³

[30] The Commission launched online voter registration in mid-July 2021.¹⁴ While it is hoped that online voter registration will boost registration, this can hardly be the only way in which eligible voters may place themselves on the voters roll. In-person registration is vital to avoid disenfranchising eligible voters who do not have access to online platforms.

[31] The importance of the voter registration cannot be overstated. There are 40 263 709 citizens eligible to vote according to the national population register. Of those eligible to vote, only 25 789 566 are currently registered to vote. In other words, 36 per cent of eligible voters are not yet registered to vote. Young people are disproportionately underrepresented among registered voters.

[32] It is important to grasp that only a voter who applied for registration prior to the proclamation of an election date may vote in the election concerned.¹⁵ This means the elections will only be formally called after the registration weekend which, for now, is

¹² Electoral Commission, Press Release, 7 July 2021, available at: <https://www.elections.org.za/pw/News-And-Media/News-List/News/News-Article>.

¹³ Id.

¹⁴ Online self-registration is available at: <https://registertovote.elections.org.za/Welcome>.

¹⁵ Section 6(1A) of the Local Government: Municipal Electoral Act, 2000 (Municipal Electoral Act).

set for 31 July and 1 August 2021. Given the steps that must be taken prior to voting day, the elections must be proclaimed by not later than 6 August 2021.

[33] The Commission's submissions also covered the measures put in place to reduce the risk of transmission of the virus on election day. The Covid-19 protocols adopted by the Commission are as follows:

- (a) All voting stations will be defogged and sanitised before voting commences;
- (b) Voting officers will be provided with personal protective equipment for use at voting stations and at home visits;
- (c) Voters will be encouraged to bring their own pens and pens provided by the Commission will be sanitised between uses;
- (d) Queue walkers will enforce physical distancing of 1.5 metres while voters queue outside voting stations and will ensure that all voters in the queue are wearing face masks;
- (e) Door controllers will ensure that voters entering the voting station are wearing face masks, will sanitise voters' hands upon entrance and exit, and control access to the voting station to prevent congestion;
- (f) Inkers will check the identity documents of voters and mark voters' fingernails with disposable buds, which will be discarded in disposable bags;
- (g) Officials must ensure that physical distancing of 1.5 metres is maintained inside voting stations at all times; and

- (h) During counting procedures, electoral officials must use rubber gloves, sanitise hands at various stages, sanitise all surfaces before and after use, and always maintain physical distancing.

[34] The Commission has affirmed that political party agents, electoral observers and the media will be able to observe the voting and counting process, with adherence to all Covid-19 protocols, including physical distancing. Each party or candidate may have two agents per voting station and one agent per home visit. If the venue cannot accommodate these numbers, an alternative arrangement will be reached in consultation with the political parties and independent candidates.

[35] The Commission has submitted that the Covid-19 protocols adopted by it are reasonable measures to ensure that the elections are held in a manner that safeguards the health of voters, electoral staff and others who will attend voting stations during the voter registration weekend and on voting day. The Commission has indicated that it does not currently have the budget to implement any additional risk reduction measures that have cost implications.

[36] From the time the President announced the declaration of a national state of disaster on 15 March 2020, the Commission has approached the Electoral Court (Court) on eight occasions, to seek an order postponing the by-elections. We return to the postponement of by-elections later.¹⁶

[37] Nonetheless, the Commission repeatedly reassured the Inquiry that it was ready to discharge its constitutional and legislative obligations to conduct the general local government elections by 1 November 2021, and that it was at an advanced stage of preparation. To this end, from a technical point of the view, the Commission is

¹⁶ See paragraphs 124-5 below.

confident that the arrangements to conduct the national local government elections will be fully in place.

The Covid-19 pandemic and its likely impact on elections

[38] On 11 March 2020, the World Health Organisation (WHO) publicly characterised Covid-19 as a pandemic, which means a global outbreak of disease. The Covid-19 outbreak has since been declared a national emergency by many countries. Since then, the pandemic has grown exponentially and, as of 18 July 2021, internationally there have been 189 743 723 confirmed cases of Covid-19, including 4 084 990 deaths, reported to WHO.¹⁷ In South Africa, as at 18 July 2021, 2 295 095 persons have tested positive for the virus and 1 510 385 persons have recovered from the disease, representing a recovery rate of 89 per cent, and 66 859 persons have succumbed to the disease.¹⁸

[39] On 15 March 2020, the President announced that Cabinet had resolved to declare a national state of disaster, as part of Government's measures to combat the global outbreak of the Covid-19 pandemic. The national state of disaster was formally declared by the Minister on the same day.¹⁹

[40] The Minister also promulgated the Disaster Management Regulations to contain the spread of Covid-19.²⁰ The Regulations make provision for an alert level system to

¹⁷ See <https://covid19.who.int/>.

¹⁸ See <https://sacoronavirus.co.za/2021/07/18/update-on-covid-19-sunday-18-july-2021/>.

¹⁹ In her capacity as the designated authority in terms of section 27(1) of the Disaster Management Act, 2002 (Disaster Management Act) by publication in the *Gazette* on the same day, GN 313, GG 43096, 15 March 2020.

²⁰ Section 27 of the Disaster Management Act empowers the Minister, during a national state of disaster, to make regulations, issue directions and authorise the issuing of directions concerning the disaster, after consultations with other members of Cabinet. The regulations promulgated by the Minister remain in force until the state of disaster lapses or the regulations are repealed.

manage the response to Covid-19. The applicable alert level is determined by the Minister in consultation with the Minister responsible for health and Cabinet.²¹ The determination of the alert level considers the prevalence and incidence of the virus, the availability of resources to treat those with severe illness and other factors relevant to the containment of the virus.²²

[41] The Regulations impose non-pharmaceutical interventions that apply generally, regardless of the alert level in application, such as the mandatory wearing of masks while in public,²³ physical distancing,²⁴ and sanitisation.²⁵ In addition, the Regulations require persons who are infected with the virus, or who have been in contact with someone who is infected with the virus, to isolate or quarantine.²⁶

[42] The Regulations also place restrictions on the movement of persons and gatherings of varying levels of severity, depending on the applicable alert level. There are a

²¹ Regulation 3(1) of the Regulations relating to Covid-19 GN R480, GG 43258, 29 April 2020 (Disaster Management Regulations). The alert level applicable may differ at a national, provincial, metropolitan or district level or in a hotspot.

²² Regulation 3(4).

²³ Regulation 1 defines a “face mask” as “a cloth face mask or a homemade item that covers the nose and mouth, or another appropriate item to cover the nose and mouth”. Regulation 5, which contains general measures to contain the spread of Covid-19, makes the wearing of a mask mandatory when in public places, and prohibits any person from entering a building used by the public or being in any public open space without a mask.

²⁴ Regulations 36(1)(c), 53(1)(c) and 72(1)(c), which apply under Alert Levels 3, 2 and 1, require that every person who attends a gathering “must maintain a distance of at least one and a half meters from each other”. Regulation 5(4)(c), which applies generally, requires every business premises to “take steps to ensure that persons queuing inside or outside the premises are able to maintain a distance of one and a half metres from each other”. Notwithstanding that regulation 5(4)(c) only refers to business premises, in practice, this regulation is observed at all public places.

²⁵ Regulation 5(4)(d), which applies generally, provides that every business premises must “provide hand sanitisers for use by the public”. As is the case with regulation 5(4)(c), in practice, regulation 5(4)(d) is observed at all public places.

²⁶ Regulations 6 and 7, which apply generally, require any person who has or is suspected of having contracted Covid-19, or who has been in contact with a person who has Covid-19, to isolate or quarantine. Regulation 1 defines “isolation” as “separating a sick individual with a contagious disease from healthy individuals that are not infected with such disease in a manner that aims to prevent the spreading of infection or contamination” and defines “quarantine” as “the restriction of activities or separation of a person, who was or may potentially have been exposed, to Covid-19 and who could potentially spread the disease to other non-exposed persons, to prevent the possible spread of infection or contamination to healthy individuals”.

number of offences created in terms of the Regulations that criminalise political gatherings and other political activity. The penalty, on conviction, is a fine, a period of imprisonment not exceeding 6 months, or both a fine and a period of imprisonment.

[43] Alert Level 5 would involve the most severe restrictions on movement of persons and gatherings, much like the restrictions in place when South Africa was in a hard lockdown from 26 March to 30 April 2020. The Regulations do not at present prescribe the restrictions that will be in place under Alert Level 5.

[44] Adjusted Alert Level 4, which was determined to apply nationally on 27 June 2021,²⁷ places significant restrictions on the movement of persons and gatherings. Although work outside the home is permitted, every person who can work from home must do so.²⁸ There are restrictions placed on interprovincial travel.²⁹ A curfew is imposed from 21h00 until 04h00, during which time every person is confined to their place of residence, with narrow exceptions.³⁰ In addition, it is a criminal offence to break curfew.³¹

[45] Under Adjusted Alert Level 4, all gatherings are prohibited, with very few listed exceptions.³² The ban on gatherings expressly includes gatherings at political events.³³ Moreover, it is a criminal offence to convene³⁴ or attend³⁵ a gathering, including a

²⁷ GN R564, GG 44772, 27 June 2021.

²⁸ Table 1 of the Disaster Management Regulations.

²⁹ Regulation 17(4).

³⁰ Regulation 17(1).

³¹ Regulation 17(2).

³² Regulation 21(1).

³³ Regulation 21(4).

³⁴ Regulation 21(22).

³⁵ Regulation 21(23) provides that any person who attends a gathering and who knows or ought reasonably to have known or suspected that it is prohibited, commits a criminal offence.

political gathering, under Adjusted Alert Level 4. On 11 July 2021, Adjusted Alert Level 4, with some amendments, was extended for two weeks, until 25 July 2021, and may be extended again.

[46] Alert Levels 3, 2 and 1 impose less severe restrictions on the movement of persons and gatherings. Curfews are imposed under Alert Levels 3, 2 and 1, beginning at 22h00, 23h00 and 00h00, respectively, and ending at 04h00.³⁶ In addition, breaking curfew is a criminal offence under all these alert levels.³⁷ There are no restrictions on interprovincial travel under Alert Levels 3, 2 and 1.

[47] Gatherings, including political gatherings, are permitted under Alert Levels 3, 2 and 1 subject to restrictions, such as the wearing of masks, physical distancing and adherence to Covid-19 health protocols.³⁸ There are also limits imposed on the number of people who may attend a gathering, depending upon whether the gathering is to take place at an indoor or outdoor venue and the capacity of the venue to accommodate physical distancing.

[48] Under Alert Level 3, the maximum number of people who may attend a gathering is 50 at an indoor venue and 100 at an outdoor venue.³⁹ Under Alert Level 2, the maximum number of people who may attend a gathering is 100 at an indoor venue and 250 at an outdoor venue.⁴⁰ Under Alert Level 1, the maximum number of people who may attend a gathering is 250 at an indoor venue and 500 at an outdoor venue.⁴¹ If a

³⁶ Regulations 33(1), 50(1) and 68(1).

³⁷ Regulations 33(2), 50(2) and 68(2).

³⁸ Regulations 36(1), 53(1) and 72(1).

³⁹ Regulation 36(3).

⁴⁰ Regulation 53(3).

⁴¹ Regulation 72(3).

venue cannot accommodate the numbers permitted with the requisite physical distancing, then more than 50 per cent of the capacity of the venue may not be used.⁴²

[49] Under Alert Levels 4, 3, 2 and 1, any gathering that contravenes the Regulations must be dispersed by an enforcement officer.⁴³ If any person refuses to disperse, the enforcement officer must take appropriate action, which may include the arrest and detention of any person at the gathering.⁴⁴ It is also a criminal offence, for the duration of the national state of disaster, to hinder, interfere with or obstruct enforcement officers in the exercise of their powers or performance of their duties.⁴⁵

[50] In addition, the Regulations have recently been amended to make it an offence for any person to incite, instigate, command, or procure any other person to commit any offence in terms of the Regulations.⁴⁶ This may include convening a gathering that contravenes the Regulations under Alert Levels 3, 2 and 1.

[51] The Commission documented with considerable detail the potential impact of the pandemic as well as measures introduced to combat the spread of Covid-19 on the conduct of free and fair elections. The Commission's posture is that elections cannot be free and fair whilst restrictions imposed under Alert Levels 2, 3, 4 and 5 are in force. We did not understand any of the stakeholders to challenge this stance of the Commission. It notes that people can contract Covid-19 from others who have the virus, even if the infected person is asymptomatic. According to the WHO, the virus

⁴² Regulations 36(3), 53(3) and 72(3).

⁴³ Regulations 21(21), 36(7), 53(7) and 72(7). Section 1 of the Regulations defines an "enforcement officer" as including "a member of the South African Police Service, the South African National Defence Force, metro police, traffic officers, immigration inspectors; and a peace officer as defined in section 1 of the Criminal Procedure Act".

⁴⁴ Regulations 21(21), 36(7), 53(7) and 72(7).

⁴⁵ Regulations 31(1)(c), 47(1), 64(1) and 83(1).

⁴⁶ Regulation 14(9), as amended by the Disaster Management Act: Regulations relating to Covid-19: Amendment, GN R565, GG 44772, 27 June 2021.

can spread from person to person through respiratory droplet transmission, which occurs when a person is in close contact (within 1 metre) with an infected person who has respiratory symptoms or who is talking or singing. Respiratory droplets containing the virus can reach the mouth, nose or eyes of a susceptible person and can result in infection.

[52] The holding of a general election involves probably the single largest mobilisation of citizens in the Republic on a particular day. The Commission, as indicated, has taken steps to ensure that scheduled elections can proceed within the constraints of Alert Level 1. However, it is not able to predict with any certainty the trajectory of the virus and recognises that this uncertainty also poses challenges to the potential climate within which elections will take place.

[53] Prior to the calling of a general local government election, the Commission interacts with a generous number of people during its targeted communication and registration activities.

[54] A key feature of these activities is the voter registration weekend, during which the Commission will open all approximately 23 200 voting stations across the Republic to allow eligible citizens to register as voters, to check their registration details, and to update the same, as well as to obtain the addresses of voters whose names appear on the voters' roll without addresses.

[55] The second feature involves the Commission employing fieldworkers to undertake a door-to-door registration campaign in identified areas to ensure that affected voters can register as voters or re-register in the correct voting district, as well as to obtain the addresses of voters whose names appear on the voters' roll without addresses.

[56] The Commission records that, as of 6 May 2021, there were about 25.7 million registered voters who would be eligible to participate in the forthcoming general local government elections. The Commission expects this number to rise because of additional registrations between now and the proclamation of the elections.

[57] The impact of the pandemic and the regulatory measures which have been adopted to curb its spread are a vital consideration in assessing whether the pending local government elections are likely to be free and fair. To this matter we return later in the analysis and findings.

The Constitution, municipal election law and term of office

[58] Before sketching the views of stakeholders, it is now apposite to set out briefly the governing law on electoral postponements about which there is no significant difference amongst the stakeholders. The debate seems to be about how the Commission could regularise local government elections that might be delayed beyond the time limit that is constitutionally prescribed.

[59] As a starting point, the Constitution, provides that South Africa is one, sovereign, democratic State founded on certain values, which include “[u]niversal adult suffrage, a national common voter’s roll, regular elections and a multi-party system of democratic government to ensure accountability, responsiveness and openness”.⁴⁷

[60] The Constitution then expands on the values set out in the founding provisions, and details the political rights which every citizen is entitled to, including “the right to free, fair and regular elections for any legislative body established in terms of the Constitution”, the right to vote in elections for any legislative body established in terms

⁴⁷ Section 1(d) of the Constitution.

of the Constitution, and to do so in secret, as well as the right to stand for public office and, if elected, to hold office.⁴⁸

[61] Chapter 7 of the Constitution focuses on the local sphere of government, which is made up of various municipalities across the country.⁴⁹ Each municipality’s executive and legislative authority is vested in its municipal council.⁵⁰ Considering contentions of some of the stakeholders, it is salutary to emphasise that two of the key constitutional objects of local government are “to provide democratic and accountable government for local communities” and “to ensure the provision of services to communities in a sustainable manner”.⁵¹

[62] Importantly for present purposes, the Constitution prescribes the terms of municipal councils, clearly stating that “[t]he term of a Municipal Council may be no more than five years, as determined by national legislation”.⁵² The Constitution then

⁴⁸ Section 19 of the Constitution, which reads as follows:

- “(1) Every citizen is free to make political choices, which includes the right –
 - (a) to form a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; and
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
- (3) Every adult citizen has the right –
 - (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
 - (b) to stand for public office and, if elected, to hold office.”

⁴⁹ Section 151(1) of the Constitution. Section 155(1) provides for the following three categories of municipalities (which are defined in further details in the Local Government: Municipal Structures Act, 1998):

- (a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.
- (b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.
- (c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.

⁵⁰ Section 151(2) of the Constitution.

⁵¹ Section 152(1)(a) and (b) of the Constitution.

⁵² Section 159(1). Section 159 of the Constitution reads as follows in full:

states that “[i]f a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired”.⁵³ A municipal council remains competent to function from the time that it is dissolved, or its term expires, until the newly elected council has been declared elected⁵⁴ (unless the municipal council was dissolved pursuant to an intervention by the relevant provincial executive).⁵⁵

[63] Besides the Constitution, the postponement of local government elections is also regulated by a cluster of legislative provisions.⁵⁶ The Municipal Structures Act⁵⁷ echoes that the term of municipal councils is “five years, calculated from the day following the date set for the previous election of all municipal councils”.⁵⁸ Whenever it is necessary, the Minister, after consulting the Commission, must, by notice in the Government Gazette, call and set a date for an election of all municipal councils, “which must be held within 90 days of the date of the expiry of the term of municipal

“(1) The term of a Municipal Council may be no more than five years, as determined by national legislation.

(2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.

(3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected.”

⁵³ Section 159(2).

⁵⁴ Section 159(3) of the Constitution.

⁵⁵ Section 139(1)(c) of the Constitution provides that when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including, in exceptional circumstances, dissolving the municipal council and appointing an administrator until a newly elected municipal council has been declared elected.

⁵⁶ The Local Government: Municipal Structures Act, 1998 (Municipal Structures Act), and the Municipal Electoral Act.

⁵⁷ Municipal Structures Act.

⁵⁸ Section 24(1) of the Municipal Structures Act.

councils”.⁵⁹ The legislation further provides that a person is elected as a member of a municipal council for a period ending when the next council is declared elected.⁶⁰

[64] Once the Minister has received a request from the Commission for the general postponement of elections,⁶¹ she, by notice in the Government Gazette, “must postpone the voting day for the election to a day determined in the notice, but that day must fall within a period of 90 days of the applicable date mentioned in . . . the Municipal Structures Act”.⁶² The applicable date mentioned in the Municipal Structures Act means the date of the expiry of the term of the incumbent municipal councils. In other words, in the event of a general postponement of municipal elections, the revised voting date

⁵⁹ Section 24(2) of the Municipal Structures Act.

⁶⁰ Section 26(1)(a) of the Municipal Structures Act.

⁶¹ Section 8(1) of the Municipal Electoral Act allows for a request for the postponement of elections as follows:

“The Commission may request the Minister or, in the case of a by-election, the [Member of the Executive Council of a province responsible for local government in the province (the MEC)], to postpone the voting day determined for an election if the Commission is satisfied that it is not reasonably possible to conduct a free and fair election on that day.”

⁶² Section 8(2) of the Municipal Electoral Act. Section 24 of the Municipal Structures Act provides as follows:

“(1) The term of municipal councils is five years, calculated from the day following the date set for the previous election of all municipal councils in terms of subsection (2).

(2) Whenever necessary, the Minister, after consulting the Electoral Commission, must, by notice in the Government Gazette, call and set a date for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils. The notice may be published either before or after the term of municipal councils expires in terms of subsection (1).”

Section 25(3) of the Municipal Structures Act deals with by-elections, and requires the municipal manager of the municipality concerned, after consulting the Commission, to call and set a date for a by-election, which must be held within 90 days of the date –

- (a) of the voting day of the previous election, if the Commission does not declare the result of the election of a municipal council, or in a district management area, or in a ward, within seven days after such elections (section 25(1)(a), read with section 5(1)(n) of the Electoral Commission Act);
- (b) on which the election was set aside by the court, if a court has set aside the election of a council, or in a district management area, or in a ward (section 25(1)(b));
- (c) on which the council was dissolved, if a council is dissolved (section 25(1)(c)); or
- (d) on which the vacancy occurred, if a vacancy in a ward occurs (section 25(1)(d)).

must fall within the 90-day period following the expiry of the five-year term of the current municipal councils.⁶³

[65] Similarly, the Municipal Electoral Act allows for the postponement of voting at a particular voting station, if the Commission “is satisfied that it is not reasonably possible to conduct a free and fair election at a voting station on the voting day”.⁶⁴ In the circumstances, the Commission must postpone the election prior to the commencement of voting at that voting station, and the election must be postponed to a date determined by the Commission and, as in the case of a general postponement, “that day must fall within a period of 90 days of the applicable date mentioned in . . . the Municipal Structures Act” (i.e. within 90 days of the date of expiry of the term of the current municipal councils).

[66] For completeness, it should be noted that the Electoral Act contains similar provisions regarding the general postponement of a voting day,⁶⁵ and the postponement of voting at a particular voting station.⁶⁶ In both instances, the Electoral Act provides

⁶³ In terms of the relevant provisions of the Municipal Electoral Act and the Municipal Structures Act.

⁶⁴ Section 9(1) of the Municipal Electoral Act.

⁶⁵ Section 21(1) of the Electoral Act provides that the Commission may request the person who called an election (i.e. the Minister) to postpone the voting day for that election, provided the Commission is satisfied that –

- “(a) the postponement is necessary for ensuring a free and fair election; and
- (b) the voting day for the election will still fall within the period as required by the Constitution or national or provincial legislation thereunder.”

Section 21(2) states that if the Minister accedes to the request for a general postponement, she, by proclamation or notice in the Government Gazette, must postpone the voting day for the election to a day determined by her, but that day must fall within the period referred to in section 21(1)(b), i.e. the period stipulated in the Constitution or the applicable national or provincial legislation.

⁶⁶ Section 22(1) of the Electoral Act provides that if it is not reasonably possible to conduct a free and fair election at a voting station on the proclaimed voting day, the Commission may, at any time before the voting at a voting station has commenced, postpone voting at that voting station. This type of postponement must be–

- (a) effected in the prescribed manner;
- (b) to a day that would still fall within the period referred to in section 21(1)(b); and
- (c) publicised in the media, in order to ensure wide publicity of the postponement of the voting day at that voting station.

that the postponement must be necessary for ensuring a free and fair election, and the revised voting day must still fall “within the period as required by the Constitution or national or provincial legislation thereunder”. This is the period stipulated in the Constitution, which is “within 90 days of the date that Council was dissolved, or its term expired”, or, similarly, in terms of the Municipal Structures Act, “within 90 days of the date of the expiry of the term of municipal councils”.⁶⁷

[67] According to the Constitution, when the term of a municipal council expires, an election must be held within 90 days of the date on which that council’s term expired.⁶⁸ In terms of the Municipal Structures Act, whenever necessary, the Minister, after consulting the Commission, must, by notice in the Government Gazette, call and set a date for an election of all municipal councils, which must be held within 90 days of the date of the expiry of the term of municipal councils.⁶⁹

[68] Our legislative scheme allows for the postponement of elections, both generally and at a particular voting station. In the case of a general postponement of a voting day, it is the Minister who has the power to postpone the election. In the case of a postponement at a particular voting station, it is the Commission that decides to postpone voting. Nonetheless, in both scenarios (i) the Commission must be satisfied that it is not reasonably possible to conduct free and fair elections on that day, and (ii) the adjourned voting day, must fall within the 90-day period following the expiry of the five-year term of the incumbent municipal councils. This aligns with the Constitution, which states that an election must be held within 90 days of the date on which a municipal council was dissolved, or its term expired.⁷⁰

⁶⁷ Section 24(2) of the Municipal Structures Act.

⁶⁸ Section 159(2) of the Constitution.

⁶⁹ Section 24(2) of the Municipal Structures Act.

⁷⁰ Section 159(2) of the Constitution.

Free and fair elections

[69] The litmus test on whether elections should be postponed is whether, if they were held, the elections will be free and fair. The requirement of free and fair elections is the golden standard of our electoral project. Indeed, without free and fair elections there can be no democracy.⁷¹ A government that does not receive its mandate from the people, through the expression of their will in free and fair elections, will not have legitimacy. But what is more, the outcome of such elections would be invalid to the extent that they are unlawful and inconsistent with the Constitution and other law.

[70] International⁷² and regional law,⁷³ similarly, require that the authority of government be based on the will of the people and that elections must be held which reflect the will of the people. While there is no internationally accepted definition of “free and fair elections”, the meaning given to free and fair elections in South African law is informed by international and regional law.⁷⁴

⁷¹ *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17; 2018 (5) SA 380 (CC) (*My Vote Counts II*) at para 32; *Richter v The Minister for Home Affairs and Others* [2009] ZACC 3; 2009 (3) SA 615 (CC) at para 53; and *New National Party v Government of the Republic of South Africa and Others* [1999] ZACC 5; 1999 (3) SA 191 (CC) at para 11.

⁷² Article 21(1) and (3) of the Universal Declaration of Human Rights, 10 December 1948; and Article 25(a) and (b) of the International Covenant on Civil and Political Rights, 16 December 1966. See also *Kham and Others v Electoral Commission and Another* [2015] ZACC 37; 2016 (2) SA 338 (CC) at footnote 25.

⁷³ Article 13 of the African Charter on Human and Peoples' Rights, 27 June 1981; Articles 3.4 and 17 of the African Charter on Democracy, Elections and Governance, 30 January 2007; Part II Article 4(a) of the African Union, Declaration on the Principles Governing Democratic Elections, 8 July 2002; SADC Principles and Guidelines Governing Democratic Elections, 20 July 2015; and Article 3 of the Additional Protocol to the European Convention on Human Rights, 4 November 1950. For an explanation of the elements essential to free and fair elections in Europe, see the European Commission for Democracy through Law, Code of Good Practice in Electoral Matters, 18-19 October 2002.

⁷⁴The Constitutional Court outlined the elements fundamental to free and fair election in a unanimous judgment, by Wallis AJ, in *Kham* at para 34. These elements were “distilled” from international and regional law.

[71] In South African law, whether an election is free and fair must be assessed in context and involves a value judgement.⁷⁵ There are a number of elements that are fundamental to the conduct of free and fair elections.⁷⁶ These elements include:

- (a) Universal suffrage: Every adult citizen must have the right to vote.⁷⁷
- (b) Secret suffrage: Every person who is entitled to vote must be able to vote in secret.⁷⁸
- (c) Equal suffrage: Each person's vote counts equally or is of equal value.⁷⁹
- (d) Free suffrage: Every person who is entitled to vote must have the opportunity to do so. This requires that every person who is entitled to vote "should, if possible, be registered to do so".⁸⁰ It further requires that there are no unreasonable restrictions or burdens placed on eligible voters who wish to exercise the right to vote.⁸¹

⁷⁵ *Kham* at para 34.

⁷⁶ *Id.*

⁷⁷ Section 1(d) of the Constitution enshrines universal suffrage as a founding value. Section 19(3) of the Constitution confers the right to vote on every "adult citizen".

⁷⁸ Section 19(3) of the Constitution enshrines the right to vote in secret.

⁷⁹ Section 1(c) of the Constitution enshrines human dignity and equality as founding values of our constitutional democracy. Treating people with human dignity and with respect for their equal worth, requires giving all eligible voters an equal say in who will represent them. This was expressed by the Constitutional Court in *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC) at para 17:

"The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts."

⁸⁰ *Kham* at para 34.

⁸¹ *Richter* at para 57; and *New National Party* at paras 21 and 23.

(e) Freedom to contest elections: Every adult citizen must be able to freely contest elections whether through membership of a political party or as an independent candidate.⁸²

(f) Equality of opportunity: Political parties and candidates must have the ability to compete with one another on relatively equal terms.⁸³ This requires that all political parties and candidates are able to compete without “any undue hindrance or obstacle” in the way that the elections are prepared for and conducted.⁸⁴

[72] The likelihood of the forthcoming local government elections being free and fair must be assessed in light of the impact of the Covid-19 pandemic and the measures promulgated by the Government to curb the continued spread of the pandemic on the elections.

The rights to life, bodily and psychological integrity, and access to health care services

[73] The right to life is as old as humanity. Sadly, life is not always adequately protected. Our Constitution rightly proclaims that everyone has the right to life.⁸⁵ This right has on numerous occasions been adjudged – albeit alongside the right to dignity – as the

⁸² *New Nation Movement* at para 120. In *Kham*, the Constitutional Court highlighted, at para 91, the link between free and fair elections and the right to stand for and, if elected, hold office. The Constitutional Court said that the constitutional commitment to free and fair elections provides a safeguard of the right to stand for public office.

⁸³ *Kham* at para 86.

⁸⁴ *Kham* at para 87.

⁸⁵ See section 1 of the Constitution.

most important of all basic human rights. The right to life is “the most fundamental of all rights”.⁸⁶

[74] As important as it is, it may still be susceptible to a limitation in terms of the Constitution. Academics have stated that “the justification for a limitation [to the right to life] would have to be exceptionally compelling”.⁸⁷ Undoubtedly, this is due to the nature and importance of this right. So important is the right to life that its limitation negates other constitutional rights, including the right to dignity.⁸⁸ To this end, the right to life not only imposes negative duties upon the State but translates into a positive duty as well. This means the State is not only precluded from taking someone’s life, it is also required to act positively in fulfilment of its duty to protect the lives.⁸⁹

[75] The Constitution also entitles everyone to the right to bodily and psychological integrity.⁹⁰ The right to bodily and psychological integrity refers primarily to the right to autonomy and self-determination over ones’ own body.⁹¹ It seeks to uphold

⁸⁶ *S v Makwanyane and Another* [1995] ZACC 3;1995 (3) SA 391 (CC) at para 217. In this context, the words of O’Regan J at paras 326-7 bear relevance:

“The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence – it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity.”

⁸⁷ Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta, Cape Town) at 260; See also *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC) at para 28.

⁸⁸ Currie and De Waal at 260.

⁸⁹ Currie and De Waal at 262.

⁹⁰ Section 12(2) of the Constitution.

⁹¹ See the Child Rights International Network Library available at: <https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html>.

everyone's right to be free from acts against their body which they did not consent to.⁹² In other words, it is a right to make decisions concerning one's body without undue interference. Everyone has the right to both security in and control over their body.⁹³ To this end, absent consent, any physical intrusion is a human rights violation.⁹⁴ One's right to control over their body would thus be frustrated if one were to be coerced or unduly influenced into taking a decision regarding their body or is denied the option of making the decision at all.⁹⁵

[76] Like the right to life, the right to bodily and psychological integrity may be limited provided such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁹⁶ To this end, any significant limitations of the rights to life, dignity and bodily and psychological integrity would, for its justification demand a very compelling countervailing public interest".⁹⁷

[77] In addition, the Constitution provides that everyone has the right to have access to health care services, including reproductive health care,⁹⁸ and that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.⁹⁹ The Constitutional Court affirmed that "the right to have access to health care services includes the right of access to medicines, although

⁹² See the Child Rights International Network Library available at: <https://home.crin.org/issues/bodily-integrity>.

⁹³ Section 12(2)(b) of the Constitution.

⁹⁴ See the Child Rights International Network Library available at: <https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html>.

⁹⁵ Nienaber and Bailey "The Right to Physical Integrity and Informed Refusal: Just How Far does a Patient's Right to Refuse Medical Treatment Go?" 2016 *SAJBL* 9 at 74.

⁹⁶ See section 36 of the Constitution.

⁹⁷ *Ex Parte Minister of Safety and Security and Others* at para 28.

⁹⁸ Section 27(1) of the Constitution.

⁹⁹ Section 27(2) of the Constitution.

this right is not without limitations”.¹⁰⁰ The corollary negative obligation on the State is to desist from preventing or impairing the right of access to health care services.¹⁰¹

Submissions from political parties

[78] Political parties are vital stakeholders in any election, be it national, provincial or local elections. In recognition of that, the Inquiry invited written and oral submissions from political parties across the length and breadth of South Africa. Of these political parties, some are members of the National Assembly and the Liaison Committee.¹⁰² Other political parties, although not represented in the National Assembly or on the Liaison Committee, are participants and stakeholders in local government elections.¹⁰³ We do not distinguish between political parties at national government and those who are exclusively registered at local government level. It is thus unnecessary, for the purposes of this Inquiry, to set out the individual submissions of each political party.

¹⁰⁰ *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* 2005 (3) SA 238 (SCA) at para 42.

¹⁰¹ *New Clicks* at para 43. In *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 39 the Constitutional Court stated as follows regarding the positive and negative obligations arising from section 27:

“[S]ection 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Section 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to respect, protect, promote and fulfil such rights.”

¹⁰² These political parties include: African Christian Democratic Party; African Independent Congress; Al Jama-ah; African National Congress (ANC); African Transformation Movement; Congress of the People; Democratic Alliance (DA); Economic Freedom Fighters (EFF); GOOD; Inkatha Freedom Party; National Freedom Party; United Democratic Movement; Action SA; and the Freedom Front Plus.

¹⁰³ These political parties include: Abantu Integrity Movement; Active United Front; African Content Movement; African Covenant; African People First; African People’s Convention; African Transformation Movement; Arusha Economic Coalition; Black and White Party; Black First Land First; Compatriots of South Africa; Fighting for Unemployment; Khoisan Revolution Party; Land Party; Moqhaka Community Forum; Northern Alliance; One South Africa Movement; Pan Africanist Congress of Azania; Party of Action; Patriotic Alliance; People’s Democratic Movement; Plaaslike Besorgde Inwoners; Randfontein Peoples Party; Shosholozza Progressive Party; Thabazimbi Forum 4 Service Delivery; United Residents Front; and Us The People.

Should Elections be Postponed?

[79] Whether the 2021 local government elections ought to be postponed, and then the extent of such postponement, if any, remain highly contested issues among political parties. While several political parties have argued that the 2021 local government elections should be deferred, on the converse, numerous political parties have argued that the elections ought to proceed as scheduled, that is, on 27 October 2021.

[80] Political parties calling for a postponement raised varied concerns associated with proceeding with the elections in October. These concerns include the need to ensure free and fair elections, and the need to prevent further infections of Covid-19 and to protect lives and limbs. These proponents submit that the current circumstances are not conducive to having free and fair elections. This is so because the prevailing lockdown regulations restrict political parties from campaigning, and therefore deny the electorate the opportunity to make informed political choices. Furthermore, proceeding will prejudice relatively “smaller parties” as they do not have access to the media and other platforms through which they may relay their manifestos to the electorate. The fairness of the elections will thus be vitiated. Also, due to the fear of infection, there is a possibility of a low voter turnout which may, in turn, undermine the credibility and integrity of the electoral process. Because of this fear, there would also be voter apathy among the electorate. They submit that ensuring free and fair elections is more than “mere preparedness of [the Commission]”, it also envisage voters being free – without fear of infection and possible loss of life – to cast their votes.

[81] On the need to protect lives and limbs, these political parties submit that though the Constitution makes provision for both the right to vote and the right to life, the latter supersedes the former. To this end, these political parties noted, at the time of making submissions, that in South Africa, over 1.8 million people have been infected with the

virus and over 58 000 people had lost their lives. They argue that proceeding with the elections will expose not only the electorate to the risk of infection, but also political party agents and independent electoral monitoring officials. The fact that South Africa is now in a third wave of the virus, and infections are rising across the country, make it clear that both voter registration activities and the voting day may be massive “super spreader” events. This, viewed in light of the overburdened South African health care system, and the slow pace of the vaccine rollout, points to the need to postpone elections in order to save lives. In this regard, it is argued that “[e]lections come and go, a life lost cannot be regained”. Therefore, they contend that the forthcoming elections must be postponed.

[82] It is worth noting that, although these political parties agree that elections should be postponed, there are differences among these political parties on the extent of postponement. Some submit that a postponement to early 2022 will do, others submit that March, April or May 2022 will be most suitable. Additionally, some have suggested a postponement until such a time that community immunity is reached.

[83] Political parties advocating for the elections to proceed submit that the right to elect new government every five years is a fundamental principle of our Constitution. To this end, the Commission is seized with a duty to ensure that democratic rights are protected and advanced, and that the electorate can exercise these rights as guaranteed by the Constitution. Proceeding with elections will thus seek to acknowledge and endorse the founding value of “regular elections”, as enshrined in the Constitution. Also, they submit that South Africa’s democracy depends largely on regular elections. A postponement would therefore be extreme and undemocratic. For these reasons, a postponement of elections may lead to instability for reasons of “stolen voting rights”. Furthermore, these political parties submit that the state of local government clearly calls for the election of a new local government. This is particularly because since the 2016 elections, the state of local government has deteriorated and collapsed entirely,

leaving many communities, and the country at large, without satisfactory service delivery. In this regard, these political parties contend that the one way to cure the high levels of corruption, mismanagement and lack of service delivery within municipalities, is through the exercise of the constitutional right to vote.

[84] These political parties submit that the measures suggested by the Commission are adequate to hold free and fair elections as evidenced by the by-elections held in the pandemic, which were not declared super spreaders; the social nature of elections has always been of social distancing, therefore, social distancing should not be a problem for holding elections; queuing during elections does not present a greater risk of infection than other daily activities, as citizens already queue for numerous basic services on a daily basis. As such, elections will not necessarily present a greater risk of infection. In addition, there is no suggestion that a third wave will still be in place, or uncontrollable, in October, as it will be the middle of the spring season. They further argue that the virus is unpredictable, and as such, a postponement would be premature, and may well lead the country to a more severe period of infections. In conclusion, these political parties submit that there is still sufficient time to prepare for the elections, therefore, the elections ought to proceed as scheduled.

Submissions on the postponement of elections

[85] On this question as well, the Inquiry has received submissions from numerous political parties. Some take the view that postponing the elections is within the prescripts of the law. For instance, one political party submitted during oral argument that as much as terms of municipal councils may be terminated pre-emptively under certain circumstances, the Constitution should be read permissively to allow for the extension of councilors' terms under the current circumstances. Some take the view that the Constitution does not permit a postponement of elections, and that postponing

elections will require a constitutional amendment. The argue further that an amendment is not desirable because of the temporary nature of the pandemic. These political parties submit that even if that option was to be considered, it will constitute a limitation of the founding value of “regular elections”. In this regard, it is argued that the right to vote is a fundamental right and cannot be curtailed. Furthermore, these political parties contend that any extension of a term of office beyond the five-year and 90-day period is inherently undemocratic, and that a postponement is therefore not legally permissible.

[86] Moreover, these political parties submit that, if the term of office expires and the incumbent councilors are permitted to continue occupying positions, it may give justification to an unelected autocratic system of public office bearers. They submit that the power given by the electorate may not be indefinitely or unilaterally extended.

Civil Society Organisations

[87] The Inquiry has received submissions from various civil societies.¹⁰⁴ Some submitted that “nothing is as important as preserving the lives of South Africans” and thus, elections should be postponed. Some of these societies argue that regular elections for local government are a foundational value of our constitutional order and should not lightly be departed from. The argument continues that the right to vote has a direct impact on the enjoyment of other democratic rights, particularly socio-economic rights. The prevalent poor governance, lack of service delivery, unemployment, and ongoing maladministration and corruption, in the local government calls for the elections to be held as scheduled. These proponents submit that postponement of elections is a measure of last resort to be invoked in circumstances of extreme exceptionality. In any

¹⁰⁴ The World Economic Forum defines a “civil society” as a “wide array of organisations: community groups, non-governmental organisations [NGOs], labour unions, indigenous groups, charitable organisations, faith-based organisations, professional associations, and foundations” available at: <https://www.weforum.org/agenda/2018/04/what-is-civil-society/>.

event, they contend, any postponement at this stage is premature and will not cure the situation. This is so because the virus is unpredictable and may prevail for some time. That, viewed in light of the fact that the country is far from community immunity, it cannot be stated with certainty where at the country will be in October 2021. To this end, additional measures such as: introducing health guidelines; online voting; provision of voter education; extending voting days; encouraging more special votes; gazetting regulations specific to local government elections; provision of internet access at zero rates; discouraging disinformation during the election period; and the provision of mobile voting stations may be employed. With these measures, local government elections should proceed.

[88] During oral submissions, some of these civil society organisations submitted that there simply should not be any cause for concern around the contention that lockdown restrictions robbed political parties of an opportunity to campaign. This is so because political campaigns, by their nature, begin immediately after the previous elections, and political parties cannot cry foul at this stage.

[89] In addition, some of the proponents said that although the risk of infection cannot be excluded in an absolute manner, participating in elections does not carry a greater risk of infection than each person's normal daily activity. These include shopping, drawing money, public transport, queuing for social grants and many other activities.

[90] Proponents of a postponement argued that proceeding with elections under the current circumstances of a worldwide pandemic, will stifle, rather than promote democracy. Proceeding with elections under the current restrictions will deny not only political parties of an opportunity to campaign, but will also be "unfair for the voters not to have [a] fair opportunity to confront the candidates". They said that if scientific and medical grounds exist for local government elections to be held without placing lives at risk or threatening the health of the nation, then elections should proceed.

However, if scientific and medical experts take the view that holding local government elections in October 2021 threatens lives and may spark a devastating fourth wave, then the elections must be postponed. In conclusion, they argued that at the core of this Inquiry is the right to life, therefore the Inquiry should be guided by medical science and health experts rather than political preferences of politicians.

Blind SA

[91] On 13 July 2021, while in the process of drafting this Report, the Inquiry received written submissions from Blind SA¹⁰⁵ on the possible impact of the upcoming local government elections on blind and partially sighted people due to the Covid-19 pandemic. In their submissions, Blind SA put forward certain measures which could be taken by the Commission to ensure that blind and partially sighted people are able to cast their votes safely and in secret in the local government elections, scheduled to take place during the pandemic.

[92] Blind SA states that the following measures are required to ensure free and fair elections during Covid-19. These measures suggested by Blind SA, and which we embrace, entail the following:

- (a) All blind and partially sighted people must be fully vaccinated with the Covid-19 vaccine;
- (b) All the applicable Covid-19 regulations, policies, directions and protocols regarding health and security must be observed during elections; and

¹⁰⁵ Blind SA is a National Disable People's Organisation, established in 1946 to empower, advocate, promote and protect the human rights of blind and partially sighted people and to access equitable, affordable, safe and secure educational, social, cultural, economic and civic participation and services. Blind SA is made up of 30 member organisations and over 1 200 members throughout the country.

- (c) Blind and partially sighted people must have access to the following materials and facilities:
- i. Access to voter education programmes;
 - ii. Physical access to the built environment, namely, voter education venues and voting stations, including ablution facilities;
 - iii. Access to information, including voter education materials and election information leaflets, in accessible formats such as braille daisy audio, large print, and electronically;
 - iv. Access to information and communications technology, which includes ensuring that the Commission's website, online platforms, and interactive communication systems are accessible, and that videos, social media and digital media have audio descriptions; and
 - v. Adequate access to the Universal Ballot Template,¹⁰⁶ and ensuring that it is sanitised after every use.

National Economic Development and Labour Council

[93] The National Economic Development and Labour Council (Nedlac) is the statutory vehicle by which Government, labour, business, and community organisations seek to cooperate, through problem-solving and negotiation, on economic, labour and development issues and related challenges facing the country.¹⁰⁷ Thus, Nedlac is a vital stakeholder in our democratic project.

¹⁰⁶ The Universal Ballot Template is a voting aid, which was developed by the Commission and the South African National Council for the Blind, to assist blind and partially sighted people and people with special needs to have an independent and secret vote during elections.

¹⁰⁷ National Economic, Development and Labour Council Act, 1994.

[94] On 9 June 2021, the Inquiry held a meeting with the Covid-19 Nedlac Rapid Response Task Team.¹⁰⁸ The Nedlac delegation consisted of key stakeholders from organised business, civil society, and organised labour.

[95] Organised business considered it important that local government elections be held as scheduled but cautioned that exercising the right to vote must be done subject to appropriate protective measures. Organised business suggested that the Commission should be flexible and responsive to what the situation may require in October 2021. Organised business was of the view that the elections may proceed in October, subject to safety protocols being adhered to. The representatives for organised business spoke to the need to balance the electoral process, to curb the transmission of Covid-19 and ensuring stability in the economy. Organised business noted that while capacity to rollout vaccines might exist, the vaccination programme is largely dependent on the supply of vaccines. The supply of vaccines needed particular attention to ensure the protection of all citizens. It was encouraging to learn that organised business was part of the collaboration between public and private sectors to ensure the delivery of vaccines.

[96] In the effort to curb the spread of infection, organised business suggested that the preferred approach was to vaccinate as many people as possible and, at the same time, to limit the number of people who may gather. Organised business supported restrictions on gatherings especially electioneering events preceding voting day. It was suggested that indoor gatherings should be limited to a maximum of 50 people and outdoor gatherings to 100 people. Concern was expressed that the public was not consistently adhering to non-pharmaceutical interventions, for example: there was disregard for the limitations on social gatherings, and masks were not being worn, either at all, or correctly to cover the mouth and nose.

¹⁰⁸ The meeting was held virtually on the Zoom platform.

[97] The community constituency of Nedlac consists of several community-based sectors. The community constituency questioned the freeness and fairness of the upcoming elections if political parties were unable to campaign for votes. This constituency preferred a postponement of the elections for a period set with reference to expert scientific information and knowledge about the extent of the infections in coming months. The same standard of limitations, they emphasised, should apply to the politicians. In other words, if the population is to limit its social gatherings and attendance at funerals, politicians should not be given greater latitude to hold political gatherings.

[98] The community constituency was receptive to the possibility of new ways of conducting elections and supported the idea of the elections being staggered over a few days, to prevent congestion and long queues at voting stations. They cautioned that the postponement of the elections may result in municipalities being in limbo as there would have been no plans for the municipal officials to continue in office for the period of the postponement as the municipalities' integrated development plans would not have factored in any postponement of elections. The postponement of elections would have a negative impact by increasing service delivery problems in circumstances where many communities have already been expressing their dissatisfaction over the failure of municipalities to deliver basic services. Overall, the community constituency remains open to the elections being postponed.

[99] Organised labour expressed itself at the meeting, and in its written submissions. Organised labour also expressed itself on the feasibility of proceeding with the forthcoming local government elections in October 2021. They raised the need to abide by the Constitution, to hold local government accountable, and to hold elections timeously whilst at the same time saving lives and livelihoods. To this end, organised labour submitted that no principle can be more important than protecting and preserving

lives. Organised labour further submitted that the traditional approach of campaigning is not possible under the current disaster management restrictions. Therefore, there can be no free and fair elections because some political parties, particularly those with known influence and availability of resources, will have an advantage over those who do not necessarily have such influence and resources. This will be unfair to many stakeholders, including the electorate itself, as it will not be able to interact with candidates in a meaningful manner. In its view, proceeding under the current circumstances will “stifle rather than promote democracy”.

General public

[100] The assignment of the Inquiry has sparked a great amount of public interest. The Inquiry has received about 3 000 written comments and voice notes from the public expressing their views on the local government elections earmarked to take place in October this year.¹⁰⁹

[101] Whether the local government elections ought to proceed in October or to be postponed until a later date is a highly contested issue, with strong views expressed by the public on both sides. It should be noted that the period for public comment closed on Friday, 18 June 2021, prior to the country being moved to Adjusted Alert Level 4.

[102] Members of the public advocating for postponement of the local government elections raise concerns about the risk of increased transmission of the virus in the run up to, and during the holding of elections, and the risk that this poses to lives and livelihoods.

¹⁰⁹ The majority of the general public who made comments, 63.3 per cent, supported proceeding with the local government elections in October 2021, while 27.8 per cent supported postponement and 8.9 per cent were unsure. A breakdown of the comments received through Dear South Africa is available at: <https://cdn.dearsouthafrica.co.za/wp-content/uploads/2021/06/20170714/IECllocal2021-web.pdf>.

[103] In addition, they raise concerns about whether elections held during a pandemic and with Covid-19 restrictions in place would be free and fair. The concern is expressed that many South Africans would be unable to vote because they are in hospital, isolation or quarantine or would be deterred from voting because of the fear of infection. There is also concern that this would lead to low voter turnout, which may, in turn, delegitimise the elections. In addition, the concern is expressed that the restrictions on political gatherings and other political activities will diminish the freeness and fairness of the elections and will advantage larger and better-resourced political parties.

[104] Members of the public advocating for postponement suggest that the local government elections should be postponed until they may be held safely, and many suggest postponing elections until South Africa has reached community immunity.

[105] Members of the public advocating for the local government election to proceed in October highlight the importance of elections occurring regularly in line with the constitutionally prescribed time-limits. They raise a concern that postponing elections undermines the ability of the electorate to hold their public representatives to account, and thus undermines accountable and responsive governance. These concerns are often raised in the context of, or in relation to, corruption, maladministration, and poor service delivery at the local government level.

[106] These members of the public point to the by-elections held in South Africa, and the numerous elections held around the world, as an indication that the Commission will be able to hold free, fair, and safe elections in October 2021. They consider the Covid-19 health protocols with which we are all familiar as being adequate to reduce the risk of transmission posed by the holding of elections. They also suggest additional risk reduction measures to reduce congestion at voting stations, including extending

voting days, extending voting hours, staggering the vote, and expanding the eligibility criteria for special votes.

[107] Those who advocate for the local government elections to proceed raise the concern that if the elections are postponed, they may have to be postponed multiple times or indefinitely, since it is unclear when the pandemic is likely to be behind us. Postponement is, thus, seen as a serious threat to our democratic project.

Public opinion survey

[108] The University of Johannesburg Human Sciences Research Council (the Research Council) conducted a Covid-19 Democracy Survey on the public's views on the postponement of the 2021 local government elections.¹¹⁰ Those being surveyed were throughout asked a particular question: Given the Covid-19 pandemic, would you support or oppose a postponement of the 2021 local government elections (currently announced to take place on 27 October 2021) to a later date. The responses were captured using a five-point scale, ranging from strongly support to strongly oppose postponement.¹¹¹ A report on this survey was shared with the Inquiry on 8 July 2021 by the Director for Centre for Social Change University of Johannesburg, Prof Carin Runciman, on behalf of UJ's Human Sciences Research Council. The Inquiry has, for two reasons, adopted a cautious approach towards the survey, and its subsequent report. First is that the report on the survey was not shared with us timeously.¹¹² Second is that other stakeholders did not have an opportunity to comment

¹¹⁰ See the University of Johannesburg Human Sciences Research Council Covid-19 Democracy Survey, available at: <https://www.research.net/r/TBVDFRW>.

¹¹¹ See the University of Johannesburg Human Sciences Research Council Covid-19 Democracy Survey Report on the Publics' Views on the Postponement of the 2021 Local Government Elections available at: <http://www.hsrc.ac.za/en/media-briefs/dces/survey-2021-local-government-elections>

¹¹² Timeously in the sense that it was submitted after the date scheduled for submissions.

on the survey. Nonetheless, we appreciate the submission and the report may be accessed on the Inquiry's website.

[109] The online survey was conducted using the #datafree Moya Messenger App which is operated by Datafree. The app has 5 million monthly users, 800 000 of whom use the app every day. The survey was made available in six official languages: English, Afrikaans, isiZulu, isiXhosa, Setswana and Sesotho. Of the 4,728 participants who fully completed the survey, English was the common language used. It appears further that of those who participated, most used a smartphone. To bridge the gap between who has, and who does not have, access to smartphones, particularly between older and younger people, the Research Council weighted up quantitative findings to match statistical data of Statistics South Africa on race, education and age, as such, the survey can be regarded as broadly representative of the adult population at large.

[110] The survey reveals that nearly 61 per cent of South Africans favour a postponement with 52 per cent strongly supporting postponement. It further reveals that the consensus for postponement is largely consistent across a range of socio-demographic variables such as gender, age, race, education level, employment status and subjective poverty status.

[111] The survey indicates that notwithstanding political support, postponement is the most preferred option. This is evidenced by the highest support for postponement amongst ANC supporters. Though the EFF and DA's support for postponement was lower, it still represents just over half, 53 per cent, of supporters of other parties.

[112] In conclusion, the Research Council states that personal characteristics have virtually no statistically significant effect on views on electoral postponement. Instead, the basis of varying support for postponement appears to be influenced more by attitudes relating to political trust and performance, Covid-19 risk perceptions, and

beliefs about acting in the collective interest of the health of all South Africans. In sum, the broad consensus is one that favours postponement.

Electoral Monitoring Bodies

[113] In its effort to achieve this task of constitutional significance, the Inquiry also invited submissions from electoral monitoring bodies. Two electoral monitoring bodies – the Electoral Institute for Sustainable Democracy in Africa (EISA) and the Institute of Election Management Services in Africa (EIMSA) – made written and oral submissions. Their expertise and experience in the electoral field is well acknowledged and this Inquiry is grateful for their participation.

[114] EISA submitted that, while experiences of holding elections during the pandemic have varied from one country to another, available data broadly indicates that, with sufficient precautions and mitigation measures in place, elections can take place without unduly and negatively impacting on either the health or democratic rights of citizens. From all available results in varied countries, no “post-campaign or post-election ‘surges’ or spikes in infection rates” were reported.

[115] EISA contended that under the Municipal Structures Act, the term of municipal councils is no more than five years, and elections must be held within 90 days of the date of expiry of the five-year period. Therefore, from a legal standpoint, and in compliance with the Constitution and existing legislation, the local government elections must be held in October 2021, as scheduled. This is so not only because that is what the law requires, but also because elections are a cornerstone of democracy, their postponement would set a bad precedent, and would result in an illegitimate government.

[116] EISA argued that while proceeding with elections clearly carries some risks from a health perspective, postponements to elections should be avoided wherever possible. It added that a decision to delay elections will be in hope as there is no valid method for accurately predicting future conditions of the virus. Of particular concern is that once the decision to delay an election is made on the basis of health and safety considerations, it becomes challenging later to justify that conditions have improved to the extent that elections may then be held. This, according to EISA, introduces its own set of risks, and leaves any decision to postpone elections even less credible. Additionally, as there exists no mechanism – particularly a constitutional mechanism – that allows for the postponement of an election, any decision to postpone would trigger legal proceedings. Consequently, such may cause misinformation, voter apathy, and in the extreme, lead to protests and violence. The decision to postpone elections should therefore be taken only if all other reasonable alternatives have been exhausted.

[117] Though EISA expresses its appreciation of potential health risks should the elections proceed as scheduled, it has also sought to outline numerous benefits that come with proceeding with the elections. These benefits include testing the Commission’s recently introduced voter identification device and its updated voter register to include addresses, thwarting the ongoing perception that local government elections are less important, promoting accountability of political representatives, and reaffirming nationhood, common purpose and a sense of nation building.

[118] EISA recommends that, by invoking the doctrine of necessity, the elections could be postponed by six to eight months, provided an agreement is reached between the Commission and Parliament setting out the rationale, the period for the transitional mechanism, the time limits and a potential date for the elections.

[119] EISA recommends the deployment of Covid-19 ambassadors; temperature checks outside voter registration centres; mandatory mask wearing for voters, personal

protective equipment kits for electoral monitoring staff and officials, use of alcoholic sanitiser hand wash, queue management outside centres, and fixed maximum numbers permitted inside registration and voting stations, clear and transparent communication about the procedures through the media and on posters around registration and voting stations.

[120] EIMSA, on the other hand, argued that the postponement of an election is not an act outside the confines of the law as it is anticipated by the Municipal Electoral Act. So, it argued, the law permits a postponement of elections under certain circumstances. It argued that the Commission has an obligation to ensure free and fair elections, and if the current circumstances do not allow for free and fair elections, a postponement is called for. EIMSA notes that the Commission has postponed by-elections before and should clearly do it now as it has indicated that the circumstances are not conducive for holding free and fair elections.

[121] Unlike EISA, EIMSA submits that elections should be postponed to early 2022. This – according to EIMSA – will allow sufficient opportunity for political parties to hold their campaigns and reach out to the electorate and enable the Commission sufficient time to carry out the election processes, including the training of electoral staff.

[122] EIMSA recommends that the Commission should halt the implementation of the draft election timetable. In its view, failure to do so, will render the recommendations of this Inquiry meaningless and irrelevant. Furthermore, EIMSA recommends that the Commission should (i) approach the Independent Communications Authority of South Africa to review the regulations on party elections broadcasts and political advertisement, and to ensure the equitable treatment of political parties by broadcasting licensees; and (ii) introduce support measures for community-based radio stations. In

sum, EIMSA contends that the period between March and May 2022 appears to be the most appropriate for holding local government elections.

Comparative electoral practice at home, on our continent and elsewhere

[123] Electoral monitoring bodies and other stakeholders have drawn our attention to elections that were held or postponed on our continent and in other countries around the world during the Covid-19 pandemic. The electoral experience during the pandemic is put up to bolster the standpoint that others have gone to the polls during the pandemic, and we should do so too, or that others have postponed their elections during the pandemic, and we should do so too. The Report briefly looks at the domestic experience first, and the comparison, thereafter, expands to other countries in Africa and in key electoral destinations.

Domestic by-elections

[124] From March 2020 until June 2021, the Commission approached the Electoral Court on eight occasions, to seek orders postponing the holding of by-elections. The Court granted the orders on each occasion.¹¹³ The Commission's first application was brought two days after the President announced that a national state of disaster was being proclaimed to deal with the Covid-19 pandemic. The remaining seven applications were brought when the country was placed under Alert Levels 2 to 5.¹¹⁴

¹¹³ Case number 001/2020, court order granted on 19 March 2020; Case number 002/2020, court order granted on 4 May 2020; Case number 003/2020, court order granted on 19 June 2020; Case number 004/2020, court order granted on 17 July 2020; Case number 005/2020, court order granted on 23 September 2020; Case number 001/2021, court order granted on 21 January 2021; Case number 002/2021, court order granted on 4 February 2021; and Case number 003/2021, court order granted on 30 June 2021.

¹¹⁴ Case numbers 002/2020 and 003/2020 were brought under Alert Level 5; Case number 003/2021 was brought under Alert Level 4; Case numbers 004/2020, 001/2021 and 002/2021 were brought under, Alert Level 3; and Case number 005/2020 was brought under Alert Level 2.

[125] The Commission advanced four broad bases for seeking a postponement of by-elections under Alert Levels 2 to 5. First, the Commission was hindered from preparing for, and conducting by-elections in a free and fair manner. Second, the risk of infections spreading through the holding of election activities did not make it possible for the by-elections to be held safely. If the Commission proceeded to hold the elections, this would undermine Government's efforts to curb the spread of the infections. Third, Alert Levels 2 to 5 impose restrictions on gatherings and political activities. In addition, people are confined to their places of residence from specified hours of night until the early hours of the morning. These limitations adversely impact on the ability of political parties and candidates to campaign for votes. This would render the by-elections not free and fair. Fourth, as the population was more aware about the risk of infections, coupled with the existence of highly transmissible new variants of the virus, there was a real possibility that voters would stay away from the polls. This would have resulted in low levels of voter turnout and participation, which would undermine the credibility of the outcomes and the legitimacy of those who were elected to lead.

[126] The Commission proceeded with by-elections when the country was placed under Alert Level 1.¹¹⁵ When the alert level was subsequently changed to Alert Level 3, the Commission sought postponements of the by-elections that were scheduled to take place during January, February and March 2021, and again later when the country was placed on Adjusted Alert Level 4.

[127] What comes through clearly is that the Commission has successfully conducted by-elections during lockdown Alert Level 1, and there were no known indications that the by-elections turned out to be "super spreaders" of Covid-19 infections. However,

¹¹⁵ By-elections were held on 11 November 2020 and 9 December 2020.

each time the Government placed the country under lockdown restrictions between Alert Levels 2 to 5, the Commission has taken the view that the elections were likely not to be free and fair and has sought court orders that allowed it to postpone the by-elections concerned.

Global overview of elections held or postponed during Covid-19

[128] In the period from 21 February 2020 to 21 June 2021, at least 78 countries postponed elections due to Covid-19.¹¹⁶ At least 41 of these countries postponed national elections and referendums. However, at least 55 of the countries that initially postponed elections have now held elections. In the same period, at least 125 countries held elections notwithstanding Covid-19 concerns.¹¹⁷ At least 104 of these countries held national elections and referendums.

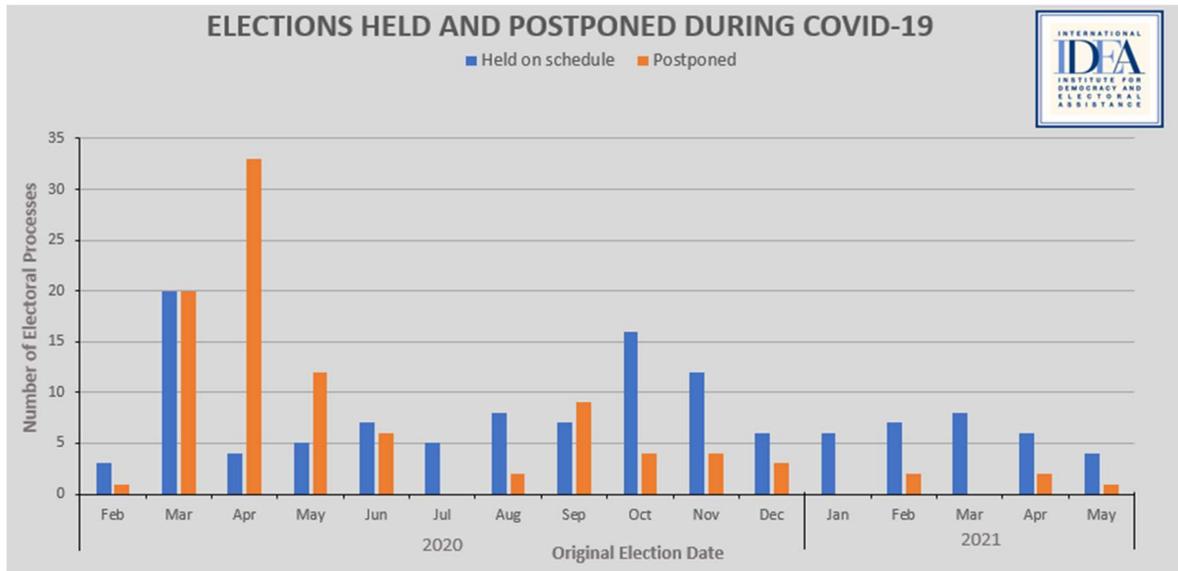
[129] Most elections postponed during Covid-19 were postponed in the first few months of the pandemic.¹¹⁸ While many countries experienced a decline in voter turnout, in many cases the decline was small, and some countries even experienced increases in voter turnout.¹¹⁹

¹¹⁶ The International Institute for Democracy and Electoral Assistance (IDEA) is a nongovernmental organisation based in Sweden whose objective is to facilitate democratic elections. IDEA has produced a Global Overview of the Covid-19 Impact on Elections, which provides information about countries that have postponed elections since the outbreak of Covid-19 and those that proceeded with elections despite concerns related to Covid-19. The data on the global overview of elections held or postponed during Covid-19 was retrieved from the website of the of IDEA, available at: <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.

¹¹⁷ Id.

¹¹⁸ Id.

¹¹⁹ Id.



Elections held or postponed in Africa during Covid-19

[130] Since the outbreak of Covid-19, in the period from 21 February 2020 to 21 June 2021, at least 14 countries and territories on the African continent have decided to postpone national and subnational elections due to Covid-19, and at least 28 countries decided to proceed with elections despite the Covid-19 pandemic – some of which had originally postponed elections due to the pandemic.¹²⁰

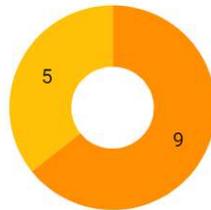
[131] Of the 14 countries and territories in Africa that decided to postpone elections, nine of them postponed national elections and referendums, including Zimbabwe, Kenya, Ethiopia, Somalia, Chad, Nigeria, Gabon, Liberia, and Somalia. While five countries, including South Africa, Botswana, Uganda, Libya, and Tunisia, postponed subnational elections.

¹²⁰ The data on the elections which were held and postponed in Africa from 21 February 2020 was retrieved from the website of IDEA, available at: <https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections>.



National and Subnational Elections Postponed

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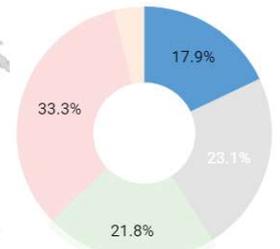


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Elections Postponed in
14
Countries and Territories



● Africa(inclu... ● Americas ● Asia Pacific
● Europe ● Middle East

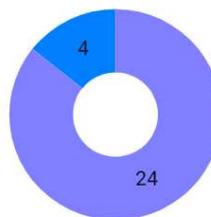


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[132] As stated above, at least 28 countries and territories decided to hold national or subnational elections amid the Covid-19 pandemic. These countries and territories include South Africa, Cameroon, Guinea, Mali, Benin, Burundi, Nigeria, Malawi, Tunisia, Egypt, Uganda, Seychelles, Cape Verde, Tanzania, Côte d'Ivoire, Algeria, The Gambia, Burkina Faso, Namibia, Ghana, Liberia, Niger, Kenya, Central African Republic, Republic of the Congo, Somaliland, Algeria, and Ethiopia.

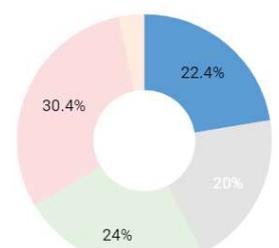
National and Subnational Elections Held

● Africa(inclu... ● Americas ● Asia Pacific
● Europe ● Middle East



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Elections held in
125
Countries and Territories



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[133] Of the countries and territories that held elections during Covid-19, at least 21 held national elections or referendums: Guinea, Mali, Benin, Burundi, Malawi, Egypt,

Uganda, Seychelles, Tanzania, Côte d'Ivoire, Algeria, Egypt, Burkina Faso, Ghana, Liberia, Niger, Central African Republic, Republic of the Congo, Cape Verde, Somaliland, and Ethiopia. At least 11 held subnational elections: South Africa, Cameroon, Nigeria, Tunisia, Cape Verde, Uganda, Egypt, The Gambia, Namibia, Niger, and Kenya.

[134] Information on whether the elections that occurred in specific countries and territories in Africa led to a spike in Covid-19 infections could not always be readily ascertained. This made it difficult to discern with any level of certainty whether the elections held on the continent could be categorised as “super spreader” events. The difficulty was compounded by the paucity of Covid-19 testing in certain countries, for example, Central African Republic, which meant that the real extent of the pandemic following the elections in those countries was only partially determined, if at all.

[135] Nonetheless, it can be gleaned from the available data that in countries such as South Africa,¹²¹ Egypt,¹²² and Ghana,¹²³ where mandatory Covid-19 protocols were put

¹²¹ In its preparations for the by-elections on 11 November 2020 (referred to as “Super Wednesday”), and 9 December 2020, the Commission, in consultation with the Liaison Committee, compiled Covid-19 voting protocols to ensure that the by-elections were not only free and fair, but also safe. The protocol, titled “Voting in the time of COVID-19: Voting Procedures to Minimise Contagion at the Voting Stations”, sets out a comprehensive list of measures and precautions to limit the risk of the spread of Covid-19 during the election process. The protocol provides as follows:

- a. Registered voters would be allowed to cast their votes.
- b. The queue walker voting officer would ensure that voters stand in the queue at a distance of at least 1.5 metres apart. Adhesive tape or any other voting station specific measure should be used to aid and enforce the distance to be observed by voters in the queue.
- c. Before entering the voting station door, the door controller should spray alcohol-based liquid hand sanitiser on both hands of each voter and explain to the voter the value and importance of the step.
- d. No voter may enter a voting station if the voter is not wearing a face mask or similar face cover.
- e. The barcode of the identity document or card of the voter is scanned by the voters’ roll officer to determine if the person is registered to vote at that voting station and their sequence number on the voters’ roll.
- f. The voting official should wear disposable latex gloves when handling identity documents or cards.
- g. The voter should adjust the face mask to enable the official to determine whether the voter is the person described in that identity document, while maintaining the requisite physical distancing.
- h. The name of the registered voter is marked off the voters’ roll, the ballot paper is stamped on the back and handed to the voter.
- i. The voter’s fingernail is marked by the inker voting official (who is wearing disposable rubber gloves) with indelible ink. The voter is asked to wait for at least five seconds at the inker table after applying ink to the nail. This is important to ensure that the bonding properties of the ink are not vitiated by the necessary use of hand sanitiser.
- j. The voter marks the ballots in secret at the voting booth, folds the ballots and deposits the marked ballots in the ballot boxes before exiting the voting station. The ballot box controller wipes each pen (voters may be encouraged to bring own pens) with disposable wipes after each voter has voted.
- k. Before exiting the voting station, the ballot box controller again sprays hand sanitiser on both hands of the voter. This is intended to assuage the concerns and risks emanating from touching surfaces in the voting station.
- l. Accredited political party agents, observers and the media are able to observe the voting process. This is an important part of ensuring the transparency of the voting process. Protocols on social distancing and sanitising of hands to apply to all party agents and observers that enter voting station. These categories of persons must provide their own personal protective equipment.
- m. All voting officials should be seated or standing at least 1.5 metres apart and must ensure that all voters inside of the voting station always maintain 1.5 metres.

¹²² The Covid-19 mitigation measures adopted by Egypt include the following:

- a. Voting was held over a two-day period to ensure proper social distancing;
- b. It was mandatory for all polling stations to provide voters with free masks, to be worn while voting, and disinfectants;

in place, and properly enforced, there were no reports of a spike in Covid-19 infections because of the elections. Whereas in countries where there were no Covid-19 measures, or where they were not adequately implemented, for example in Burundi and Malawi, there appears to have been an increase in Covid-19 infections after the elections.

[136] Below is a brief survey of the approach of countries outside Africa to elections during Covid-19 and whose experiences might be instructive.

Elections held or postponed in countries outside Africa during Covid-19

[137] First, I consider countries that initially postponed elections due to the Covid-19 pandemic, but which later held elections after the period of postponement.

France

[138] Municipal elections were scheduled to take place in France in March 2020. France's electoral system makes provision for two rounds of voting – a second round of voting is held if there is no absolute majority after the first round. The first round of voting was scheduled for 15 March and the second for 22 March. France decided to proceed

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- c. Poll workers were required to take voters' temperatures before they entered the voting stations; and
 - d. Polling stations had to be fitted with sterilisation gates at their entrances to ensure proper sanitising.

¹²³ The Covid-19 mitigation measures in Ghana included:

- a. During campaigning, Ghana did not place a limit on the number of people permitted to gather at a venue, however, political parties adapted from large-scale mass events to several smaller outdoor events.
- b. During registration, a district nurse was stationed at each registration centre to advise and respond to emergencies (for example, high temperature checks). Voters with high temperatures were immediately referred to the nearest clinic or hospital and they could arrange to register later.
- c. Special voting accounted for 109 577 votes prior to voting day.
- d. The following health precautions were put in place at polling stations: sanitising; washing hands with soap and water; mask wearing; social distancing; temperature checks.
- e. "Covid ambassadors" were deployed to monitor and enforce compliance at voting stations on election day.

with the first round of voting as scheduled, at the very beginning of the pandemic. It did so trusting scientific advice that it was possible to hold elections, notwithstanding Covid-19, with modifications to voting procedures.¹²⁴

[139] At the time of the first round of voting there were over 5 000 cases and 127 deaths reported in France. There were some reports that the election facilitated transmission of the virus that causes Covid-19. However, a medical study suggests that the election did not accelerate the spread of the virus.¹²⁵

[140] There was, however, significantly reduced voter turnout in the 2020 municipal elections in France, which led to complaints about the legitimacy of the elections. Voter turnout in the first round was 44.66 per cent of registered voters, as compared to 63 per cent in the first round of the 2014 municipal elections.¹²⁶ Voter turnout was particularly low among groups more vulnerable to Covid-19. A study found that Covid-19 “depressed turnout by a substantial amount”.¹²⁷ The study, however, notes that the elections took place at the start of the outbreak in France and at a time when there was limited reliable information on the virus.

[141] Most municipalities (30 000) achieved an absolute majority after the first round of voting. However, 5 000 municipalities required a second round of voting. On 16 March 2020, France introduced new restrictions confining people to their homes. The Government decided, with the agreement of all political parties in Parliament, to

¹²⁴ Rambud “Holding or Postponing Elections During a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France” International Institute for Democracy and Electoral Assistance (15 June 2020), available at: <https://www.idea.int/sites/default/files/publications/holding-or-postponing-elections-during-a-covid-19-outbreak-v2.pdf>.

¹²⁵ Zeitoun et al “Reciprocal association between participation to a national election and the epidemic spread of COVID-19 in France: nationwide observational and dynamic modelling study” (2020) *medRxiv*.

¹²⁶ Noury et al “How does COVID-19 affect electoral participation? Evidence from the French municipal elections” (2021) 16 *PLoS ONE* 2 at 2.

¹²⁷ *Id.*

postpone the second round of voting because of exceptional circumstances.¹²⁸ However, the law in France was silent on the postponement of elections.

[142] On 23 March 2020, France passed new legislation creating a state of health emergency and permitting the postponement of the second round of voting for a short period.¹²⁹ The second round of voting was held on 28 June 2020. Voter turnout remained low in the second round of voting with 41.67 per cent of registered voters voting.¹³⁰ The number of daily new confirmed cases in June, when the second round of voting was held, appears to have been low.¹³¹

England

[143] England was scheduled to hold local government elections in the first week of May 2020. Considering the Covid-19 pandemic, the Government postponed the elections for a year to May 2021. English law was silent on the postponement of elections. The Government, therefore, introduced emergency legislation,¹³² to provide a legal basis to postpone the local government elections.¹³³

[144] The May 2021 local government elections were held under special conditions and with altered voting procedures to mitigate the risk of virus transmission.¹³⁴ The number

¹²⁸ Rambud above.

¹²⁹ Article 19 of the Emergency Response to the COVID-19 Epidemic Act, 2020.

¹³⁰ Noury above.

¹³¹ See World Health Organisation “Country situation: France” available at: <https://covid19.who.int/region/euro/country/fr>.

¹³² The Coronavirus Act 2020.

¹³³ Johnston “Coronavirus Act: Elections” House of Commons Briefing Paper No. 08856 (14 April 2021), available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-8856/>.

¹³⁴ The measures adopted by England included:

- a. Encouraging the use of postal and proxy votes;

of daily new confirmed cases in the United Kingdom was low and declining in May 2021, when the local government elections were held in England.¹³⁵

Brazil

[145] Brazil was set to hold local government elections on 4 October 2020, but decided to postpone the elections for a short period. The length of time between local government elections is prescribed in the Constitution of Brazil. Brazil, thus, passed a constitutional amendment to postpone the local government elections.¹³⁶ After a short postponement, Brazil held local government elections on 15 and 29 November 2020. Brazil has a system of compulsory voting.

[146] Brazil has adopted less restrictive measures in response to the pandemic than other countries. Nonetheless, Brazil did adopt some measures to reduce the risk of transmission of the virus during the election.¹³⁷

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- b. The use of an emergency proxy if a voter is ill or self-isolating. The strict criteria for emergency proxies were temporarily relaxed;
 - c. Special safeguards at voting stations, including social distancing, the use of protective equipment and the wearing of face masks;
 - d. The Electoral Commission provided detailed guidance to election officers on how to conduct the elections, including on postal and proxy voting, voting stations and vote counting; and
 - e. England provided separate guidance on what was allowed during campaigning. The guidance allowed for two months of outdoor campaigning in the run up to elections. Door-to-door campaigning was permitted, but campaigners were not permitted to enter homes. Campaigners had to follow the existing guidance on how to prevent the spread (distancing, face masks, etc) and the relevant rules on gatherings.

¹³⁵ World Health Organisation “Country situation: United Kingdom” available at: <https://covid19.who.int/region/euro/country/gb>.

¹³⁶ Tarouco “Covid-19 and the Brazilian 2020 Municipal Elections Case Study” International Institute for Democracy and Electoral Assistance (19 February 2021) available at: <https://www.idea.int/sites/default/files/covid-19-and-the-brazilian-2020-municipal-elections.pdf>.

¹³⁷ The measures adopted by Brazil include:

- a. Online voter registration;
- b. Suspension of biometric identification;

[147] The voter turnout in Brazil was less than in previous years. In the first round of voting, 77 per cent of registered voters voted – 6 percentage points lower than the previous local government elections. A post-election poll found that 40 per cent of absent voters reported failing to vote because of their fear of infection.¹³⁸ However, voter turnout had been in decline in Brazil before the pandemic so the drop may not be fully attributable to the pandemic.

[148] There was a large increase in new confirmed Covid-19 cases following the campaigning period.¹³⁹ This is largely blamed on widespread in-person campaigning in defiance of Covid-19 restrictions.

[149] We now turn to look at countries that did not postpone their elections. To keep this Report within reasonable limits we have chosen only two, but instructive, electoral experiences in the United States of America and India.

United States of America Presidential elections

[150] There was no unified response to the Covid-19 pandemic among states for the United States Presidential elections because the power to make laws and rules for

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- c. Adoption of a health safety plan setting out rules to be followed in voting stations, including opening voting stations to the elderly an hour early, regular sanitising of hands and disinfecting of surfaces, social distancing, wearing face masks and encouraging voters to bring own pens; and
 - d. Encouraging voters with Covid-19 to stay home and waiving their absence fine.

¹³⁸ DataSenado, Instituto de Pesquisa [Research Institute], ‘Pesquisa DataSenado: Eleições municipais e coronavírus’ [DataSenado research: municipal elections and coronavirus], Senado Federal, Brasil, 2020, available at: <https://www12.senado.leg.br/institucional/datasenado/%20publicacaodatasenado?id=apesar-da-pandemia-oito-em-cada-dez-brasileiros-votaram-%20em-eleicoes-municipais>.

¹³⁹ Borges and Souza “Governo de SP diz que campanhas eleitorais para prefeito e vereador ajudaram a disseminar o coronavírus” [SP Government says election campaigns for mayor and councillor helped spread coronavirus], G1 São Paulo (26 November 2020) available at: <https://g1.globo.com/sp/sao-paulo/noticia/2020/11/26/governo-de-sp-diz-que-campanhas-eleitorais-para-prefeito-e-vereador-ajudaram-a-disseminar-o-coronavirus.ghtml>.

elections is dispersed across all levels of government.¹⁴⁰ The Presidential elections in the United States took place on 3 November 2020. In the period between the outbreak of the coronavirus and the end of October 2020, the United States reported 9 105 230 cases and 229 932 deaths. The United States experienced a peak in October 2020 with a continued rise to the end of that month.¹⁴¹

[151] The United States President's term of office is set out in the United States Constitution. There is no mechanism in the Constitution for changing the date of expiry of the presidential term,¹⁴² and the United States did not postpone the Presidential election. Various states modified voting procedures to ensure safe elections.¹⁴³ These measures were frequently challenged in legal proceedings¹⁴⁴ and fed into complaints about the legitimacy of the elections.

[152] There was a record high voter turnout for the 2020 Presidential elections, with nearly two-thirds of eligible voters voting.¹⁴⁵ Covid-19 cases and deaths surged in the run up to the presidential elections.¹⁴⁶ The United States set a new record for daily new

¹⁴⁰ Sullivan "Impact of COVID-19 on the 2020 US presidential election Case Study" International Institute for Democracy and Electoral Assistance (20 November 2020), available at: <https://www.idea.int/sites/default/files/impact-of-covid-19-on-the-2020-us-presidential-election.pdf>.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ The measures adopted by some states in the United States include:

- a. Online voter registration;
- b. Increased use of early in-person voting and postal voting to reduce numbers at voting stations, and expanded days and times of early voting; and
- c. Use of personal protective equipment, social distancing, sanitising, requiring or encouraging mask wearing and encouraging voter to bring their own pens.

¹⁴⁴ See Stanford-MIT's COVID-related election litigation tracker, which contains 628 cases and appeals, available at: <https://healthyelections-case-tracker.stanford.edu/>.

¹⁴⁵ Desilver "Turnout soared in 2020 as nearly two-thirds of eligible U.S. voters cast ballots for president" (28 January 2021) available at: <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/>.

¹⁴⁶ Chiwaya and Siemaszko "Covid-19 cases, deaths rising rapidly ahead of Election Day" (2 November 2020) available at: <https://www.nbcnews.com/news/us-news/covid-19-cases-deaths-rising-rapid-rate-ahead-election-day->

confirmed Covid-19 cases the day after the election was held, with 91 000 new cases.¹⁴⁷ The spike in cases has been linked to large outdoor rallies held by the Republican Party. A study has confirmed that 18 rallies resulted in 30 000 confirmed Covid-19 cases and likely led to more than 700 deaths.¹⁴⁸ In addition, in-person voting at voting stations has been linked to increased numbers of Covid 19 cases following the Presidential election in certain states.¹⁴⁹

India

[153] India has held several elections since the outbreak of the Covid-19 pandemic.¹⁵⁰ On 6 April 2021, India held State Assembly elections in four states and one union territory. These were one of the largest elections held during the pandemic, with 185 million eligible voters.

[154] There was increased voter turnout in the April 2021 elections compared to previous elections. Voter turnout was 57.05 per cent of registered voters, as compared to 56.66 per cent in the State Assembly elections held in 2015.

n1245780. See also World Health Organisation “Country situation: U.S.”, available at: <https://covid19.who.int/region/amro/country/us>.

¹⁴⁷ Levin “Coronavirus: US sets record for daily new cases average one day after election” *The Guardian* (5 November 2020), available at: <https://www.theguardian.com/us-news/2020/nov/04/coronavirus-us-record-daily-new-cases-one-day-after-election>.

¹⁴⁸ Bernheim et al “The Effects of Large Group Meetings on the Spread of COVID-19: the Case of Trump Rallies” Stanford Institute for Economic Policy Research (SIEPR) Working Paper 20-043 (30 October 2020), available at: https://sebotero.github.io/papers/COVIDrallies_10_30_2000.pdf.

¹⁴⁹ “In-person voting really did accelerate covid-19’s spread in America” *The Economist* (10 July 2021), available at: <https://www.economist.com/graphic-detail/2021/07/10/in-person-voting-really-did-accelerate-covid-19s-spread-in-america>.

¹⁵⁰ Tamang “Assam, West Bengal, Kerala, Tamil Nadu, Puducherry: Indian State Assembly Elections keep the Flame of Democracy Burning” International Institute for Democracy and Electoral Assistance (12 April 2021), available at: <https://www.idea.int/news-media/news/assam-west-bengal-kerala-tamil-nadu-puducherry-indian-state-assembly-elections>. See also Thakur “Conducting Elections during COVID-19: New Policy Guidelines Issued by the Election Commission of India” (2020) 1 HAPSC Policy Briefs Series 94.

[155] India adopted certain measures to reduce the risk of virus transmission.¹⁵¹ However, on 26 April 2021, India reported the highest daily tally of new confirmed infections recorded in the world up to that date, 360 960 infections.¹⁵² The surge in Covid-19 cases is attributed to eased restrictions, lack of compliance with Covid-19 measures such as mask wearing and social distancing, political campaigning and mass rallies for the State Assembly elections and religious gatherings.¹⁵³ This includes a religious gathering, the Kumbh Mela, where hundreds of thousands of Hindus gather at the Ganges River.

[156] India was criticised by experts for its response to Covid-19 and its handling of its second wave which coincided with the elections,¹⁵⁴ and for allowing large gatherings, including hundreds of mass political rallies and roadshows.¹⁵⁵ The Electoral Commission in India eventually banned roadshows and limited political rallies to a maximum of 500 attendees. However, these restrictions were perceived to be weak and too late.

¹⁵¹ The measures adopted by India included:

- a. All voting station workers were vaccinated;
- b. Postal voting eligibility was extended to people over 80 years of age, differently abled, Covid-19 patients and those in quarantine or self-isolation;
- c. Restrictions on political campaigning; and
- d. Safeguards and precautions at voting stations; including social distancing, thermal scanning, sanitising, the wearing of face masks.

¹⁵² Thiagarajan “Why is India having a covid-19 surge?” (2021) *BMJ* 373. See also World Health Organisation “Country situation: India”, available at: <https://covid19.who.int/region/searo/country/in>.

¹⁵³ *Id.*

¹⁵⁴ Bhuyan “Experts criticise India’s complacency over COVID-19” (2021) 397 *The Lancet* 1611.

¹⁵⁵ *Id.*

Civil Society Organisations focused on health care

[157] We received written submissions from three health care non-governmental organisations, namely, Right to Care, and a joint written and oral submission by the Health Justice Initiative and the People’s Health Movement South Africa.

[158] Right to Care presented modelling data to inform a possible long-term projection towards October 2021. Their projection is that as the provinces enter the third wave at different times from week 3 in May 2021 to week 3 in July 2021, and the infections thereafter move into an expected three month high, by week 4 of October 2021, there is a “potential for cases to be low in the October period, assuming the onset of the third wave in each province within the next month”. It is only in week 4 of October 2021 that no high cases are predicted in all provinces.

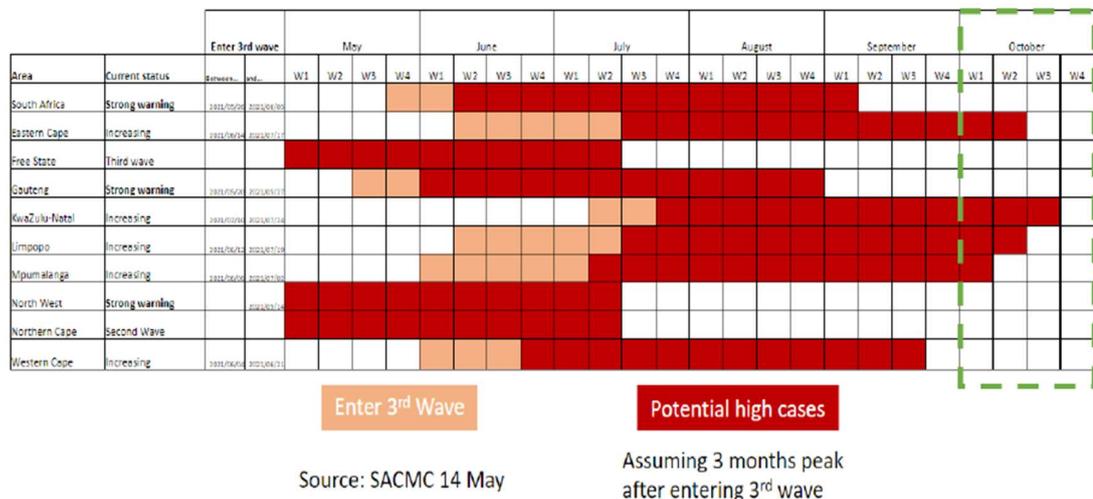


Figure 5: Potential timeline for high COVID-19 cases

[159] Health Justice Initiative and People’s Health Movement South Africa expressly point out that their submissions should not be construed as motivation for or against holding the local government elections in October 2021.

[160] Using the timeline of the first and second waves, Health Justice Initiative and People’s Health Movement South Africa maintain that the third wave is likely to peak in the next 3 to 5 weeks (that is weeks 1 and 2 of July 2021). The 25-week gap between the peak of the first wave and the second wave is likely to be replicated between the second and third waves.

[161] As at 18 June 2021, South Africa had administered 1.8 million vaccine doses. The rate of vaccination at that stage was approximately 80 000 doses per day from Mondays to Fridays. About 1.3 million of the doses are Pfizer vaccines which require two doses to be administered. The two doses are usually administered 41 days apart. Eligible voters may not be fully vaccinated by the end of October 2021.

[162] South Africa’s vaccine roll-out has been hindered by limited supplies of vaccines available to the country. Health Justice Initiative and People’s Health Movement South Africa refer to this as “so-called vaccine apartheid”. Most high-income countries are blocking the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights waiver and are not making knowledge and funds available to increase the manufacturing of vaccines. The supply that is available is being made available first to certain age groups (those over 60 years) and professional cohorts (for example health care workers). It may take months before everyone who is eligible may be vaccinated. Accordingly South Africa is unlikely to significantly increase its vaccination programme.

[163] South Africa’s vaccination programme is slow as it is affected by global supply chains and there are global and regulatory issues as well. Even if the South African government increases the rate of vaccinations, it could be well into 2022 for South Africa to achieve community immunity from Covid-19 through vaccination.

Viewed from a continental perspective, as at 25 June 2021, Africa ranked the lowest in number of Covid-19 vaccinations.

[164] Health Justice Initiative and People’s Health Movement South Africa point to two types of threats in relation to the holding of upcoming local government elections: the increased risk of transmission of the virus due to electioneering activities and the increased risk of transmission of the virus due to the election itself.

[165] There has been poor risk communication throughout the pandemic. This is exacerbated by serious allegations of the misuse of funds. One of the effects of poor risk communication is that the public do not wear masks properly – masks are often worn on chins and below noses. There is also misdirected emphasis on use of sanitisers rather than on ventilation. Political parties have also been responsible for spreading misinformation about Covid-19 treatments and vaccines.

[166] While lockdown regulations impose limitations on outdoor activities – for example, limitations on the number of people at gatherings, and the need for physical distancing and wearing of masks – there remains a real risk that political parties and voters may ignore these non-pharmaceutical interventions. Electioneering, by its nature, also contains aspects of close interaction in door-to-door visits and operating “campaigning and voter registration tables”. Health Justice Initiative and People’s Health Movement South Africa caution that if there is no political will to enforce restrictions on gatherings, the gatherings could become “super spreader” events.

[167] Voters face increased risk of transmission of the virus during the act of voting itself. Health Justice Initiative and People’s Health Movement South Africa are mindful that the Commission “goes some way” to address these risks, they highlight that the Commission’s submissions remain silent on the critical issue of ventilation. The risk here is that the act of placing voters, the Commission’s staff and officials, and agents

of political parties and independent candidates, indoors in a venue that is poorly ventilated exposes them to increased risk of transmission, even if physical distancing measures are followed. They also highlight that the Commission’s guidelines are silent as to the steps to be taken if it becomes known that voters, officials or party agents were exposed to Covid-19 at a voting station. The two civil society organisations made several useful recommendations.¹⁵⁶

The Ministerial Advisory Committee on Covid-19

State of the pandemic in October 2021

[168] The Ministerial Advisory Committee on Covid-19 was established in March 2020 by the Minister of Health. The Advisory Committee, a non-statutory advisory body, consists of 21 experts with different skills and expertise. The Advisory Committee receives questions from the Minister of Health, and its members formulate “an advisory”. Thereafter, the advisory is shared with various bodies, including the National Coronavirus Command Council. The Advisory Committee relies on data provided by the South African Covid-19 Modelling Consortium. The Advisory

¹⁵⁶ Health Justice Initiative and People’s Health Movement South Africa propose the following recommendations:

- a. Consulting with the Africa Centres for Disease Control and Prevention and WHO considering the potential risk for the region and to have regard to best practices used in other jurisdictions;
- b. Preparation for the upcoming local government elections “should include specific risk communication campaigns aimed at encouraging ‘good health’ measures to reduce” the risk of infections;
- c. Specific measures must be put in place to ensure that political parties comply with measures aimed to reduce the risk of infections and these measures must include steps to ensure that parties refrain from spreading misinformation about the virus and vaccines; and
- d. The Commission’s guidelines must address the need for good ventilation in all voting stations and there must be specific procedures in place to guide procedures that are to be followed if there is exposure to the virus. In this regard, the Health Justice Initiative and People’s Health Movement South Africa point to the existing occupation and health guidelines developed by the National Institute of Occupational Health as a useful marker.

Committee’s oral submissions were presented by Dr Jacqui Miot and Prof Sheetal Silal, with the assistance of an extensive slide presentation.

[169] The health scientists stated at the outset that, although the Advisory Committee has “modelers who work incredibly hard days, nights and weekends, it is not possible to predict what the pandemic will look like in October in South Africa, let alone the provinces and districts”. The waves of infection differ from one province to another. Within provinces and districts the waves happen at different times. The projection is made more uncertain because the population is displaying signs of “Covid-19 fatigue” and thus not adhering to non-pharmaceutical interventions. More so, the Advisory Committee does not have accurate data about the level of natural immunity of the population because it is unclear how many people were previously infected.

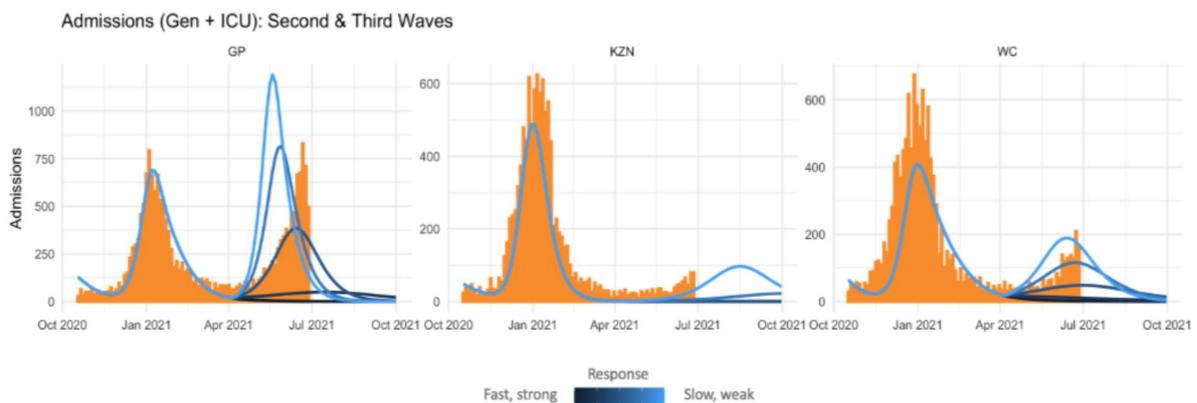
Impact of lockdown restrictions on the rate of infections

[170] Lockdown restrictions seek to curb transmission of the virus. The impact of lockdown restrictions can only be assessed in a few weeks after the lockdown restrictions have been implemented. The two-week period, or more accurately the 10-day period, is to cater for “the lag”, which comes about after infection. It takes 4 to 6 days for the virus to incubate and for symptoms to develop and, thereafter, a few days for the symptoms to be severe enough for the patient to seek hospital care. It will not be possible to see a decrease in all provinces across the country at the same time after a lockdown is imposed – the levels of infection will fluctuate.

[171] The Modelling Consortium generated a projection for the third wave on 29 April 2021. This projection shows a light blue line for slow or weak compliance by the population with non-pharmaceutical interventions or displays “Covid-19 fatigue”, coupled with increased contacts within the community. This is tracked against the

yellow bars which depict hospital admissions. The light blue line from April to June 2021 rises quite sharply to show slow or weak adherence to the non-pharmaceutical interventions. This is immediately followed, in July 2021, by a rise in hospital admissions. This points to an interpretation that the third wave possibly started in April or May 2021 because of increased contacts within the community and the new delta variant or some other factor came into play to push the pattern of hospitalisations out of the projected pattern. Significantly, the projection prepared by the Modelling Consortium on 29 April 2021 did not consider the new delta variant.

Tracking projections for the third wave



- While admissions tracked the 2nd (WC) and medium (GP) scenario until May, admissions rapidly exceeded the scenarios in June 2021

SACMC: COVID-19 modelling update: Considerations for a potential third wave” (2021-04-29)

Vaccination programme

[172] By October 2021, those who are 50 years and older, and some who are 40 years and older, may be vaccinated. Some parts of the population will remain unvaccinated by October 2021. The age group 35 to 59 are a very “characteristic population” for two reasons: first, they constitute the largest number of admissions in hospitals in Covid-19

cases, and, second, this age group is a big portion of the voter population. It is this age group that will likely attend group rallies and other electioneering activities that are precursors to voting day, and are also likely to participate in high contact activities.

[173] The two scientists, Prof Silal and Dr Miot provided the Inquiry with evidence about the efficacy of two vaccines (Astra Zeneca and Pfizer) in the United Kingdom against the delta variant. The study reflects the efficacy of the vaccines against all symptomatic disease and against hospitalisation. In relation to all symptomatic disease, and with two doses, Astra Zeneca is 60 per cent effective, and Pfizer is 88 per cent effective. With one dose, Astra Zeneca and Pfizer are 33 per cent effective. In relation to hospitalisation, and with two doses, Astra Zeneca is 92 per cent effective and Pfizer is 96 per cent. With one dose, Astra Zeneca is 71 per cent effective and Pfizer is 94 per cent effective. Viewed holistically, these results demonstrate that these vaccines provide a high level of protection against all symptomatic disease and against hospitalisation.

Delta variant Vaccine Effectiveness

UK data – all symptomatic disease

Vaccine	Vaccine effectiveness single dose		Vaccine effectiveness two doses	
	Alpha	Delta	Alpha	Delta
Astra Zeneca	51% (47-55)	33% (19-44)	66% (54-75)	60% (29-77)
Pfizer	49% (43-55)	33% (8-51)	93% (90-96)	88% (78-93)

Compared to Alpha, there was a modest reduction in effectiveness against symptomatic disease after a single dose, but very little difference after two doses

UK data – hospitalisation

Vaccine	Vaccine effectiveness single dose		Vaccine effectiveness two doses	
	Alpha	Delta	Alpha	Delta
Astra Zeneca	76% (61-85)	71% (51-83)	86% (53-96)	92% (75-97)
Pfizer	83% (62-93)	94% (46-99)	95% (78-99)	96% (86-99)

These findings suggest high levels of protection (>70%) against hospitalisation with the Delta variant with one or two doses of either vaccine – levels of protection similar to the Alpha variant

T. de Oliveira et al. Update on Delta and other variants in South Africa

Community immunity

[174] Although the vaccination programme has been slow to start up, it is picking up now. As of 30 June 2021, around 3.5 million people have been vaccinated, which amounts to about 8 per cent of the population. However, even with the “best will in the world” and even if the country caught up to what the plans are for the vaccination programme, enough people would not have been vaccinated by October 2021 for the country to achieve community immunity.

[175] To achieve community immunity, 67 per cent of the population must be vaccinated. Dr Miot stated that “it is very unlikely that by the first of March [2022], we would have vaccinated 67 per cent of the population. I think we would have fallen short of that”. Dr Miot indicated that this was not based on any projection and was purely her personal view and speculation. She said that, considering the current pace of vaccinations, she does not think we will achieve community immunity by the end of February 2022. Prof Silal was unable to predict accurately the time by which 67 per cent of the population will have been vaccinated. Prof Silal added that the projection as to when community immunity may be achieved is dependent on the supply of vaccines, however, the supply keeps changing, as well as the agreements between different providers and the existence of new variants, all of which may have a cumulative effect.

Will the risk to life be less in March 2022 than in October 2021?

[176] Prof Silal responded that since the outbreak of the pandemic in South Africa, there has not been a period of no infection at all. Even during the periods between waves, statistics show a few thousand infections a day reported in different parts of the country. She stated that if the third wave is likely to be over by the end of August or September

2021, there may be a period of about two to three months where there will be a low number of infections.

[177] Prof Silal elaborated that by the time we enter March 2022, the fourth wave may be over. In that sense, she states that the country may be in the same position in March 2022 as it would be in October 2021. However, she went on to say that we may be in a better position in March 2022, because more people would have been vaccinated and “even one more vaccine is . . . a wonderful bit of extra protection . . . and having gone through a third, and most likely a fourth wave by then, we will have had a greater build-up of natural immunity”.

[178] Dr Miot emphasised that people do not always comply with Covid-19 protocols, and that it is difficult to manage big groups of people and to monitor their compliance. She suggests that whatever it takes to reduce the number of people who are gathering, so that the incidence of transmission is reduced, then those steps must be taken until we reach a point where there is sufficient community immunity.

[179] Dr Miot offered the following concluding remarks in her personal capacity, and not as that of the Advisory Committee: In March 2022, the country will be better protected because more people would have been vaccinated and, “even if there is another variant that potentially does escape from the vaccine, and the vaccines are not as effective”, we will still have some people in the population with some protection.

[180] In a quest to receive the best available update on the applicable projections of figures on the viral infections, hospitalisations, and mortality, we invited Prof Silal to present to the Inquiry before the writing of this Report started. She was joined by Dr Harry Moultrie, who is based at the National Institute for Communicable Diseases. Both presented oral submissions, with the aid of slides, on the updated delta projections and further information on the age profile of hospitalisations and mortality.

Further Submissions – Friday 9 July 2021

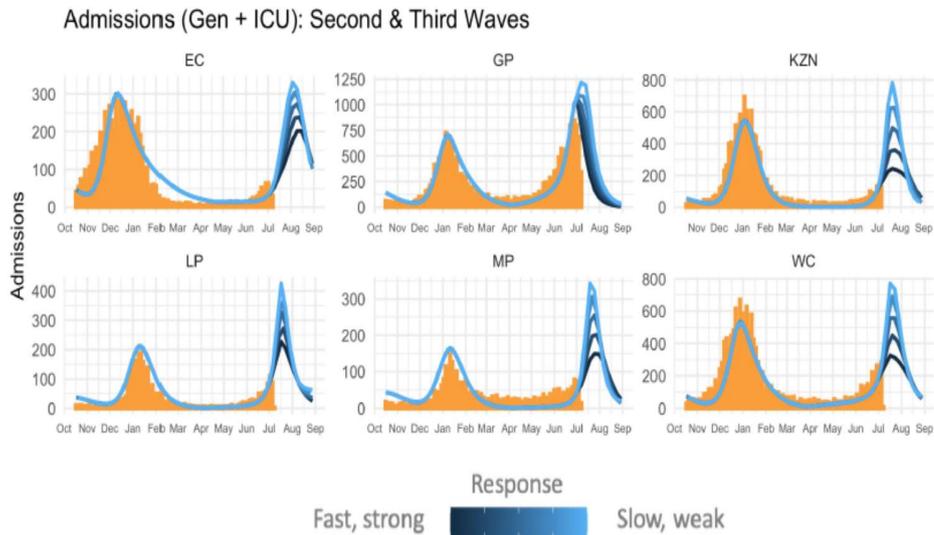
[181] In modelling the third wave, the Modelling Consortium notes that there has been a sparse rate of sampling from Mpumalanga, the North West, Northern Cape and Free State provinces. While sampling has not been done as extensively for these provinces, it does not follow that there are no transmissions. It is more accurate to proceed on the basis that it is likely that transmissions are taking place, but that the official records are not showing the complete information as it is not officially recorded yet.

[182] In simulating the projection for the third wave, the model considers the interplay between the variants to date, namely the original “wild” variant, the beta variant, and the delta variant. The model also considers the way in which the Covid-19 infection has been manifesting itself, for example, asymptomatic, mild or severe infection. Importantly, the model also considers vaccinations to date.

[183] Except for the Free State, Northern Cape and North West provinces,¹⁵⁷ the third wave projection shows that the rate of infections is expected to decrease in August and September 2021. As the projection stands, from August to beginning of September 2021, the rate of infections decreases to the extent that it is close to the base of the trough. Between waves, the pattern shows that a few thousand new infections will arise. It must be remembered that the rate of infections fluctuates interprovincially and within districts.

¹⁵⁷ There is insufficient sampling at this stage to make a projection for these provinces.

The Third Wave: Projected Admissions (Province)



- Gauteng projected to reach its peak in the next two weeks.
- All scenarios for Limpopo and Mpumalanga project a similar or higher peak in the third wave.
- EC, KZN and WC are projected to experience waves at similar levels compared to the second wave, though some scenarios project third waves substantially higher than the second wave.

[184] In projecting the impact of the third wave, the numbers include excess deaths. Depending on the population’s compliance with non-pharmaceutical interventions, the hospital admissions, deaths in hospital, and all deaths are projected. If the population has a slow or weak compliance with the required non-pharmaceutical interventions, hospital admissions may be 150 000, hospital deaths may be a little above 50 000 and all deaths may be a little beyond 100 000. Dr Moultrie confirmed that excess deaths will have a high correlation with reported deaths.

[185] The projection concludes that by September 2021, new infections and hospital admissions are expected to reduce to low levels. The projection shows that the peak of the third wave will be like that of the second wave in most provinces. The impact of vaccinations has been “appreciable” and, as stated earlier, the vaccination estimates have been factored into the model.

[186] Prof Silal and Dr Moultrie were unable to say whether we are likely to be in a fourth wave in October 2021. Prof Silal is of the view that, on any scenario, the country will be better off, and there will be less infections, hospitalisations and lower mortality around March 2022 than in October 2021, because more people of voting age would have been vaccinated. Put otherwise, more lives are likely to be saved in March 2022 than in October 2021.

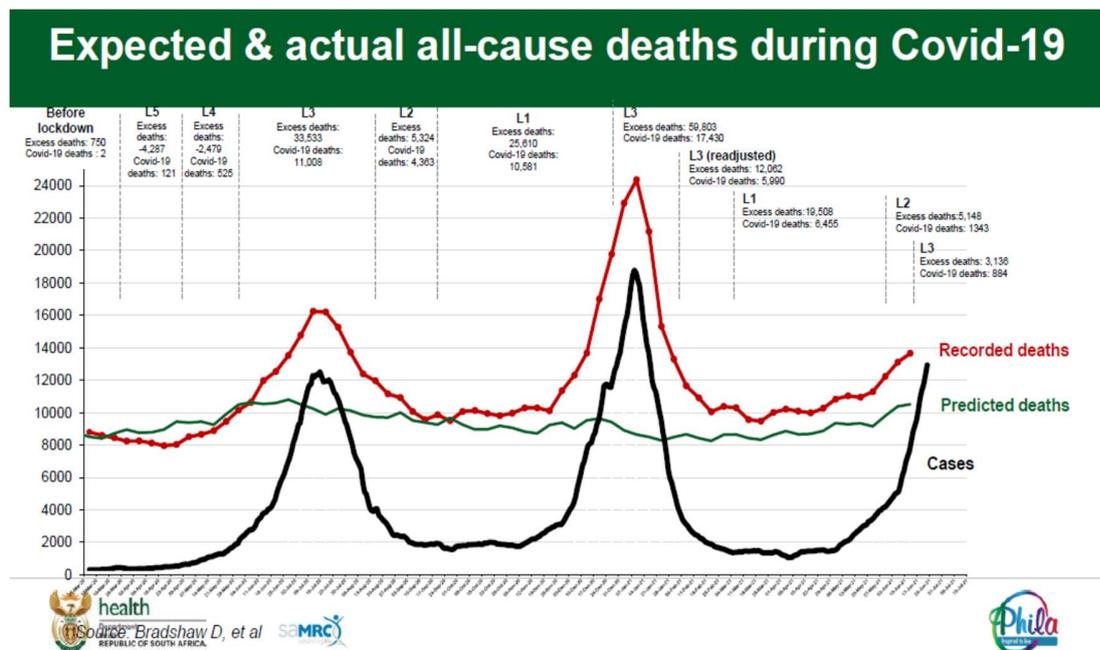
Director-General of the Department of Health

[187] In addition to the medical science experts who serve on the Advisory Committee, the Inquiry received written and oral submissions from the Department of Health (Health Department) through its Director-General, Dr Sandile Buthelezi.

Rising infections and mortality rate

[188] Dr Buthelezi informed the Inquiry that as at 30 June 2021 – the day before his appearance at the Inquiry – South Africa recorded 19 506 new infections in a 24-hour period, 11 000 of which occurred in Gauteng, which make up 57 per cent of the new infections. South Africa’s cumulative figure of infections was 1.9 million and there were then 165 000 active cases in the country. Less than a month ago, South Africa had less than 20 000 active cases. Hospital admissions were at 20 893 and “these are accumulative mortality at 60 000” and, on 30 June 2021, South Africa reported 383 deaths. Tracking the progress of infections over June 2021, it is evident that new infections are on a steady increase throughout the country. By way of example, Dr Buthelezi noted that the recorded new cases per 1 000 per day showed that, on 7 June 2021, Gauteng had 17.4 new cases per 1 000 and, on 28 June 2021, it had 65.1 cases per 1 000.

[189] He continued that the recorded statistics demonstrate that, as the number of Covid-19 infections increased, the mortality rate increased, above and beyond the predicted death rate. Of particular concern, as voiced by Dr Buthelezi, is that the recorded deaths have continued to remain higher than the predicted deaths. Dr Buthelezi also confirmed that the excess deaths (namely deaths higher than the predicted deaths) have been linked to Covid-19 infections.¹⁵⁸ Dr Buthelezi confirmed that the “excess deaths”, “[have] been linked to above predicted deaths as more related to Covid-19”.



¹⁵⁸ By way of explanation, Dr Buthelezi referred to a slide titled “Expected and actual all-cause deaths during Covid-19”. The green line on the graph depicts the predicted deaths based on past trends. The predicted deaths refer to general, all-cause mortality. The red line depicts recorded deaths. Just before the first wave around mid-June 2020, as the number of Covid-19 infections increased, the recorded number of deaths “shot up above the green line. And we have literally stayed above this green line, even between the first and second wave . . . and it has never been below that [the green line showing the predicted deaths], which is a problem we can see it is on the increase. That is a worrying factor”.

The pandemic waves

[190] Using figures from the third week of June 2021, the Modelling Consortium prepared graphs that detail the provincial resurgence analysis. The graphs show that about a minimum of six provinces are in the third wave. In the next seven to 10 days, all provinces are expected to be in the third wave.

[191] The second wave was dominated by the beta variant of the virus in December 2020, January and February 2021. Around April 2021, the delta variant was detected in South Africa. The delta variant was first discovered in India in October 2020. The statistics show that from around 26 April to 7 June 2021, the delta variant has slowly increased its presence and has now displaced the beta variant. As of 7 June 2021, the delta variant is the dominant variant and the driver behind South Africa's third wave.

[192] Dr Buthelezi highlighted two significant factors about the delta variant. First, the delta variant is at least twice as infectious as the beta variant, and it is highly transmissible. This accounts for the rapid increase in infections in Gauteng. Second, the delta variant demonstrates that even those previously infected with the beta variant, may still be infected with the delta variant. In this way, the delta variant displays what is referred to as "immune escape".

Vaccination programme

[193] South Africa's vaccination programme has not progressed as fast as the Health Department had anticipated. This is attributable to constraints on vaccine supply. As at 30 June 2021, the Health Department had administered 3 026 636 vaccines nationally. As at 1 July 2021, the Health Department was administering a minimum of 100 000 vaccines a day. Vaccination supply has since improved and, by

the end of October 2021, the Health Department expects to vaccinate more than 16.6 million people. The vaccination programme started with health care workers, followed by those over 60. As at 1 July 2021, the Health Department started registering those from 50 to 59 years old. About 1000 educators were already vaccinated by 5 July 2021, and the Health Department envisaged rolling out the vaccine programme to the police. Within two weeks – that is by mid-July 2021 – the Health Department planned to be vaccinating 200 000 per day at different vaccination sites throughout the country. There are currently more than 600 vaccination sites in the country, and this number was expected to increase to almost 1 000 by the first week of July 2021.

[194] By the beginning of October 2021, the Health Department expects to have vaccinated 16 million people. The Health Department is, nevertheless, aiming to increase vaccinations to about 300 000 per day, with the assistance of senior medical students and senior nursing students. If that is achieved, at least 1.5 million people will be vaccinated daily. As at 1 July 2021, the Health Department was of the view that the supply of vaccines had improved and the situation was “starting to get comfortable”.

Community immunity

[195] Based on guidance by the Advisory Committee, the Health Department is of the view that, for South Africa to achieve community immunity, 40 million people must be vaccinated. The Health Department expects this target to be reached by February 2022. Dr Buthelezi agreed that community immunity will not necessarily stop infections, but it will drop the mortality rate. Dr Buthelezi confirmed that the highest risk in achieving this target and timeline is the risk in the vaccine supply line.

[196] Currently South Africa is using only two vaccines. The Health Department is hopeful that the South African Health Products Regulatory Authority will license one

or two more new vaccines. The diversification of the “menu” will ensure that there is more stability in the supply, and that the country is not dependent on one supplier.

[197] In addition to immunity arising from vaccinations, the population will also develop natural immunity through infections and recovery. However, there is a possibility of reinfections, in which case natural immunity may no longer be a relevant factor. For example, the delta variant has been shown to reinfect people who have already been infected with the beta variant.

What will the state of the pandemic be in October 2021?

[198] Dr Buthelezi stated that it is difficult to predict the likely state of the pandemic in October 2021 for at least the following reasons: there are variants with different characteristics; the time lag for past infections shows that the fourth wave will be dependent on “community units”; it is difficult to predict when a province may come out of a wave; and new information comes up almost daily. The Modelling Consortium have advised the Health Department that, at the end of August 2021 and the beginning of September 2021, the country may still be in the third wave. If that comes to pass, it is reasonable to expect that the country may be placed under an alert level with severe restrictions, at the end of August and beginning of September 2021.

[199] The Health Department’s view is that the holding of elections in October 2021 will place the public at risk of contracting the virus during election activities such as “physical voter registration, the voting process itself when large numbers of people will gather at polling stations and will queue to complete their ballot, [and] large political gatherings”. The Health Department emphasised that the rollout of the vaccine programme will not have reached a sufficient proportion of people to reach community

immunity. If elections were held in October 2021, there would be a high likelihood of a high number of delta infections, hospitalisation and deaths.

Medical Science

[200] As we have seen, the question whether the scheduled local government elections of October 2021 should be held or deferred is fiercely contested within and amongst election stakeholders of varied kinds. Some stakeholders have urged us to find and follow medical science and others have scoffed at reliance on science. We chose to heed the science, and, to that end, solicited the assistance of no less than 9 leading medical and public health experts in South Africa. They are Dr Aslam Dasoo, Dr Fareed Abdullah, Prof Shabir Madhi, Dr Sandile Buthelezi, the Director-General of the Health Department, Prof Salim Abdool Karim, Dr Jacqui Miot, Prof Sheetal Silal, from the Advisory Committee (Health Department), Dr Harry Moultrie, from the National Institute for Communicable Diseases, and Prof Susan Goldstein.¹⁵⁹

[201] We are grateful for their appearance before the Inquiry and for their meticulous and instructive presentations on the medical science related to the Covid-19 pandemic. Their respective slide presentations and the transcripts of their oral presentations are well preserved on our website.

[202] The material presented by the scientists displayed substantial convergence. The differences amongst them are limited, in the main, to the likely trajectory of the virus and the resultant infections, hospitalisation and deaths in October 2021 compared to February-March 2022. We set out briefly the convergence, and later individualise the divergences, on their predictions.

¹⁵⁹ The Inquiry also received a joint written submission from Prof Elmién du Plessis, Ms Petronell Kruger and Ms Safura Abdool Karim.

Convergence – rising infections and the impact on hospitalisation and mortality

[203] The experts are at one that available data shows that the country is amid a third wave of Covid-19 infections. By the time the oral hearings were held,¹⁶⁰ the delta variant was the dominant strain of the virus in South Africa, and in the world. Hospital admissions and deaths tend to follow the rise in infections. However, it is difficult to predict the trajectory of the pandemic with any certainty for many reasons. The virus is constantly evolving, its variants are unpredictable, and they are not going away anytime soon. There are variable geographic areas of high infections as the infections spread. The uncertainty is also worsened by the population’s “Covid-19 fatigue”. That means that the population is not consistently adhering to the recommended non-pharmaceutical interventions. Whilst the rate of vaccination of different groups, including high-risk groups, could result in a reduction in hospitalisation and death, it may not prevent a resurgence of infections. And lastly, although all vaccines used in South Africa are shown to likely have “a high protection against severe disease and death, they are likely to vary significantly in protecting against infection and mild disease”. The virus is not well understood. There is insufficient knowledge, even at this stage, about the transmission trends, the ability of the virus to cause an infection, and the changing nature of the virus.

[204] The experts started by drawing attention to rising infections and the impact on hospitalisation and mortality. The delta variant can spread much faster, and large numbers of people need hospitalisation and medical care. Similarly, during the second wave of the pandemic, hospitalisations rose rapidly. Prof Abdool Karim stated that

¹⁶⁰ From Monday, 28 June 2021, to Friday, 2 July 2021.

“anything that exacerbates the spread of these variants just makes matters so much worse”.

[205] Prof Abdool Karim compared the infection waves, observing that the seven-day moving average of cases per 100 000 population in the first wave was just over 20 cases per 100 000 population; the second wave, at its peak, was 32 cases; and the third wave, as it is still rising, was already at 27 cases per 100 000 population. In Gauteng, he added, the situation was dire because of a confluence of three factors: (a) the third wave that is driven by the delta variant, with an increasingly high rate of cases per day; (b) Charlotte Maxeke Hospital, which is the biggest and most important hospital in the province, with the highest number of ICU beds, is “out of action”;¹⁶¹ and (c) there is no Covid-19 field hospital as the Nasrec facility is not operational.¹⁶²

[206] Prof Madhi made identical observations of a rising third wave. Around 7 June 2021, 5 of the 9 provinces were experiencing the third wave. In provinces where the third wave was yet to start, namely the Eastern Cape, Western Cape and KwaZulu-Natal, it may happen that the infection rates may be lower because over the course of the first two waves, the population in these provinces could possibly have developed natural immunity. However, natural immunity may not be relevant if there are further variations of the virus that makes it resistant to immunity from past infections.

Capacity of the health system and excess mortality

[207] In dealing with the rising third wave, Dr Abdullah reflects on the ability of the health services to respond to Covid-19. He measures the responses of the health services

¹⁶¹ The Charlotte Maxeke Hospital was closed because of damage caused by a fire which broke out in April 2021.

¹⁶² The Nasrec field facility was commissioned by the Gauteng Department of Health to be used for isolation and quarantine of Covid-19 positive patients. The Nasrec field hospital was closed down in January 2021.

during the first, second and third waves and, using this information, considers the capacity of health services to deal with the fourth and future waves.

[208] Gauteng, Western Cape and KwaZulu-Natal may be able to meet the minimum capacity required for a “substantial health system response” (especially having regard to the private sector health care facilities) but other provinces do not have the benefit of a similar response. This mainly accounts for the high mortality rate in the Eastern Cape during the second wave.

[209] Dr Abdullah agrees with Dr Dasoo that there is significant undercounting of Covid-19 deaths. Underreporting is extensive. Deaths are underreported because hospitals are often remarkably busy, or they are not very well organised. The hospitals do not report daily, and people may not make it to a hospital and the hospital reports will not account for these patients. A more accurate database for excess death reporting is that of the South African Medical Research Council (the Medical Research Council). In our country, a burial cannot take place without a death notification. The data collected from the death notifications is downloaded and provided to the Medical Research Council on a weekly basis and they produce a report on excess death reporting. The excess death reports produced by the Medical Research Council provide a good lens through which one can observe the trends of the pandemic through the mortality rates. The effect of the underreporting of excess deaths, is that the threat to life and limb is much larger than the official number of Covid-19 deaths suggests.

[210] The country’s health care system has not been able to create special capacity to manage the third wave and it is unlikely that it will be able to do so in a fourth wave. The national response reveals “deep dysfunction in governance”, and “poor state capacity” in “what should be regarded as a public health emergency”.

[211] Dr Dasoo prefers the excess mortality rates compiled by the Medical Research Council. Their data takes into account fatalities recorded by health facilities and mortuaries, and in police reports, and it therefore presents a more accurate reflection of the number of excess deaths in our country. The official mortality rate from Covid-19 is reported as 58 000. The excess mortality rate from the Medical Research Council, however, records the figure as 180 000. On this account of excess mortality, it seems that the actual figures of Covid-19 mortality are about three times higher than the official reports of deaths. Dr Dasoo added that it was “common cause” amongst the scientific community. Comparable excess mortality figures were presented to the Inquiry by Prof Silal and Dr Moultrie of the Modelling Consortium.

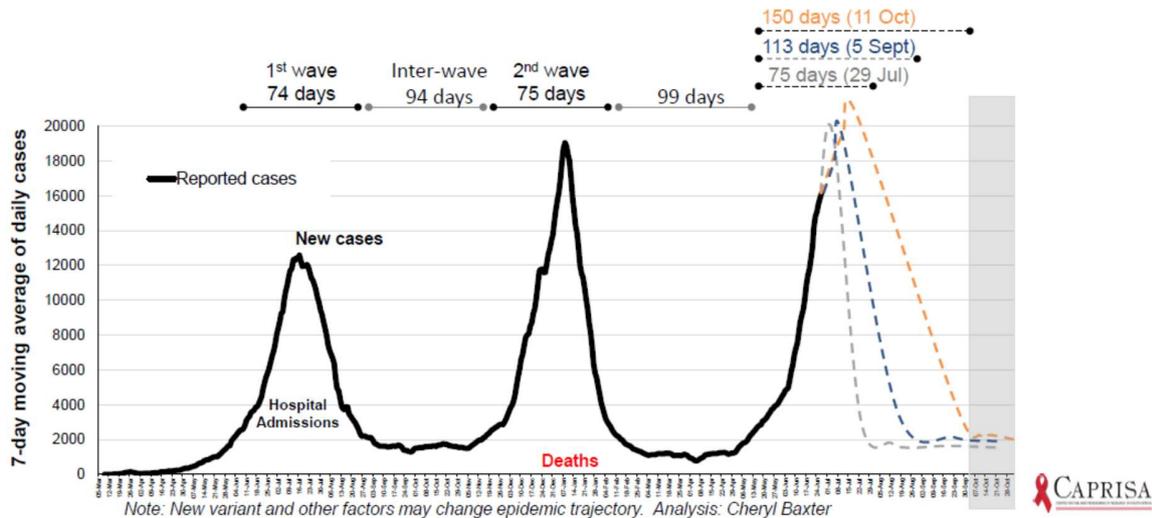
Convergence: similar trajectory of waves of infection

[212] Another constant common position of the experts, is that patterns or subsequent waves of infection will be similar, and follow a similar trajectory, to that of infections in the first and second waves in South Africa. In the effort to project the trajectory of the virus, the modelling data presented by the experts is based on some assumptions. The primary assumption is that there will be no new variant that would arise in the projected period. On the assumption that no new variant will emerge from now until then, October 2021 will be a period of low infections. This means the present delta-driven third wave is predicted to peak and thereafter decline during August and September 2021, depending on when a particular province would reach its peak.

[213] Prof Abdool Karim relied on similar trajectories to inform the projection of what the state of the pandemic is likely to be in October 2021. He relied on the patterns and figures of the past waves. The duration of the first wave was 74 days and the gap between the first and second waves was 94 days. The second wave lasted 75 days and

the interval between the second and third wave was 99 days”. If this pattern holds, October will be a period of low transmission.

Cases numbers in October? Estimations of end of 3rd wave, based on duration of 1st and 2nd waves in SA



Convergence: vaccination and community immunity

[214] Vaccines are better at protecting against severe disease and death than at protecting against mild symptomatic illness. If one makes one important assumption, that the virus does not change, then it will be worthwhile to try to get some level of community immunity, which will substantially reduce the risk of hospitalisation and death.

[215] However, as Dr Dasoo points out, currently South Africa has one of the lowest vaccination rates in the world and the highest rates of Covid-19 fatalities. With varying emphasis, the experts agree that it is necessary to strive for community immunity and that, given the vaccination rate, it will not be possible for South Africa to achieve community immunity by October 2021.

[216] Dr Abdullah made the point that natural immunity and vaccination coverage will contribute to the size and shape of the future spread of the virus. However, these factors have not been particularly useful for understanding the way in which the third wave manifested itself. Importantly, he said that “the ability of variants of concern (VOC) to partially escape both natural and vaccine-induced immunity is difficult to estimate and weakens the predictive value of prior Covid-19 infection and vaccination status”.

[217] All experts agreed with Prof Madhi that there is a level of natural immunity derived from previous infections with the beta and delta variants, and this will play a role in what happens going forward. The Pfizer and Johnson and Johnson vaccines are both good vaccines and have protection against severe disease and death. The United Kingdom is having another surge in infections, but the death rate is flat. South Africa must get to that stage. South Africa must reach a stage where there is a decline in deaths and this can be achieved by vaccinating the most “at risk” population, namely those who have comorbidities and are above a certain age. South Africa should aim to administer 300 000 doses of vaccines daily.

[218] In response to the Health Department’s estimate of vaccinating 40 million people by February 2022, Prof Abdool Karim says that the Health Department’s calculations are based on the chosen target of vaccinating 67 per cent of the population to reach community immunity. While he agrees that 67 per cent was the benchmark a few months ago, at this stage, his view is that there is a need for a higher proportion than 67 per cent to be vaccinated to achieve community immunity. He puts up two reasons for his view: first, countries like Seychelles and Israel who have vaccinated two thirds of their population are still experiencing “outbreaks”. Second, the efficacy of the vaccines currently being used, is much lower than the vaccines that Government intended to use when it settled on 67 per cent as being the required percentage. In Prof Abdool Karim’s view, Government’s goal of vaccinating 67 per cent of the

population by February 2022 is “probably on target” but he is not convinced that this will lead to community immunity.

[219] South Africa is behind the global rate of vaccination. Although there will be an increase in vaccination rates in the next 2 to 3 months as more vaccines become available, it is unlikely that there will be coverage outside high-risk groups. The target of vaccinating 40 million people by March 2021 set by the Health Department already shows slippages.

Risks associated with elections

[220] The experts are agreed that large gatherings are super spreader events. This is particularly true in closed spaces of low ventilation. They are agreed that such events are likely to be ‘seeding events’ and ‘wave triggers’ that are dangerous. This threat to life and limb cannot be emphasised enough. Prof Madhi notes that gatherings cannot be allowed during the run up to elections and on voting day – this is non-negotiable. He urged strongly that no gatherings should be allowed. Elections are likely to cause a resurgence of infections, and any resurgence will be difficult to manage. As a mitigatory measure, when elections do proceed, he suggests that voting stations should be located outdoors as the preferred option.

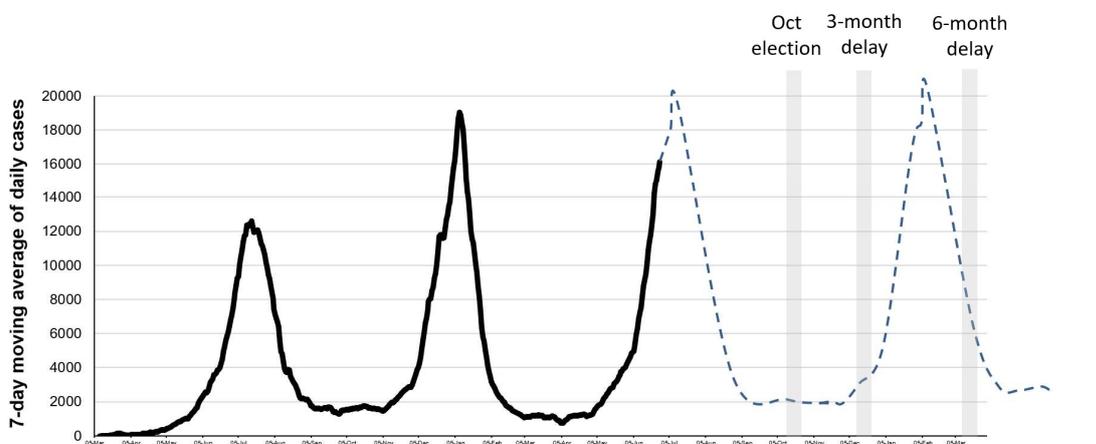
[221] Prof Abdool Karim speaks to five risks of transmission that arise with election activities: occupational exposure for the Commission’s staff and campaign staff; door-to-door visits; small group meetings; large group rallies and marches; and voting day queues and polling booth risks. There are three principal risks associated with these activities, namely: gatherings, especially those indoors; movement of people; and the level of adherence to non-pharmaceutical interventions. Large group rallies and marches are super spreader events.

[222] Dr Abdullah is aware that the limitation on gatherings translates to restrictions on electioneering. He cautions that if the scale tilts in favour of electioneering activities, when the transmission rates of the delta variant are high, the events will become seeding events, and will lead to cluster outbreaks and in turn trigger another wave. Ordinarily, gatherings have been shown to be super spreader events.

Divergence: October 2021 vs February-March 2022

[223] There is divergence amongst the experts on the likely state of the pandemic and levels of infections during October 2021, and later around February-March 2022. This difference has implications on the question whether the state of the pandemic will be more conducive to holding elections during October 2021, or say 3 to 4 months later. Prof Abdool Karim presented that if the elections were delayed by three months, South Africa will be in low transmission, but will be in the “very early stages” of a fourth wave. Relying on a useful graph, he displayed projections of likely virus infections during October 2021, then during a three-month delay and a six-month delay. Based on the projections, Prof Abdool Karim maintains that the best time to hold local government elections “is now”, meaning October 2021, rather than 3 months later.

Estimated case numbers if elections delayed by 3 or 6 months (assuming 3rd wave is 1.5 x as long as 1st and 2nd waves)



Note: New variant and other factors may change epidemic trajectory. Analysis: Cheryl Baxter



[224] Prof Abdool Karim is of the view that “we are likely to see several new variants” by March 2022. He believes that at some stage there is going to be a variant that escapes immunity and once that variant arrives, everyone who has been vaccinated will be back to “square one”. Prof Abdool Karim said he had no firm view about whether elections should be held in October 2021 or at another time. He only presents the data and says that support can be found in the data for either of the two options.

[225] Prof Madhi pointed out that it is difficult to predict the trajectory of the virus, particularly for October 2021. He said the major risk lies in the period leading to election day. Electioneering, especially large outdoor gatherings, and any indoor gatherings of more than 20 people will have a major impact on the resurgence of infections. Based on past patterns with waves 1 and 2, it may be that October is a period of relative calm, with a resurgence in December 2021 onwards.

[226] Dr Abdullah is of the view that continuing with current plans to hold elections in October 2021 puts thousands of lives at risk. The country or parts of it will remain at different stages of a wave for the foreseeable future. He recommends that elections be postponed until the mortality rate declines. The country must reach a stage where there is a flattening of the hospitalisation and mortality curve. Conducting elections in February-March 2022 will certainly save more lives than in October 2021, because of the higher levels of vaccination and related immunity.

[227] It will be remembered that in their submissions, Prof Silal, Dr Miot and Dr Moultrie expressed their personal opinions – not representing the Advisory Committee or Modelling Consortium – that the more people who are vaccinated at the time of holding elections, the more lives will be saved. In that sense, they said, February-March 2022 will always be better and safer than October 2021. This will be true even if February-March 2022 might be a period of the fourth wave, if any.

The Minister of Cooperative Governance and Traditional Affairs

[228] On 20 June 2021, the Minister provided the Inquiry with written submissions containing the regulatory interventions imposed to curb the spread of Covid-19, an assessment of the impact of the Covid-19 pandemic and the regulatory interventions on the holding of free and fair elections, and proposed measures to be put in place to ensure free and fair elections.

[229] The Minister is the convenor of the Inter-Ministerial Committee on Municipal Elections, established by Cabinet to oversee the arrangements for the 2021 local government elections.¹⁶³ The Minister has informed the Inquiry that the Inter-Ministerial Committee is meeting regularly and that the Ministry of Health will be added to the Committee to ensure that the impact of Covid-19 on the holding of the local government elections is effectively monitored.

[230] The Minister has promulgated the Disaster Management Regulations,¹⁶⁴ which impose several non-pharmaceutical interventions, including the mandatory wearing of masks when in public, physical distancing, sanitisation, curfews and limitations on gatherings. The Regulations also require those infected with Covid-19, or exposed to someone infected with Covid-19, to isolate or quarantine. The Minister submits that these non-pharmaceutical interventions are likely to remain in place in the run up to, and at the time earmarked for, the holding of the local government elections.

¹⁶³ The Inter-Ministerial Committee consists of the Ministry of Cooperative Governance and Traditional Affairs, Ministry of Home Affairs, Ministry of Justice and Correctional Services, Ministry of Finance, Ministry of Police, Ministry of State Security, Ministry of Communications, the Chairperson of the Commission, the President of the South African Local Government Association and the Chairperson of the Municipal Demarcation Board.

¹⁶⁴ The Regulations have been amended numerous times since first promulgated.

[231] While many non-pharmaceutical interventions are generally applicable, the severity of some restrictions may be relaxed or intensified depending on the alert level in application at the time. The Minister said that it is unable to predict the alert level that will be in application in the run up to, and at the time earmarked for, the holding of local government elections since “unpredictable and unknown factors” may emerge in the period. However, the Minister submits that it would be possible to hold free and fair elections under Alert Level 2, the alert level that was in application at the time of its written submission.

[232] The Minister is concerned that the restrictions imposed under the Regulations may impact on the ability of voters to register, to vote, and to exercise their right to vote. The Minister also notes that some more vulnerable voters may be deterred from visiting voting stations because of fear of exposure to the virus.

[233] The Minister proposes a number of measures to ensure free and fair elections to be considered by the National Coronavirus Command Council.¹⁶⁵

[234] In addition, the Minister proposes amendments to the Regulations to assist with the conduct of free and fair elections, including excluding queuing at voting stations from the definition of a “gathering” and amending the curfew to align with the operational hours of voting stations and to allow for travelling time to and from voting stations.

¹⁶⁵ These proposals include:

- a. increasing registration measures to allow for more people to register to vote, including the use of online self-registration;
- b. expanding special votes to more people and extending the period for application for special votes;
- c. extending the vote over more than one day, extending the operation hours of voting stations and staggering the vote in order to reduce the numbers of voters at voting stations at one time;
- d. creating special accommodations and priorities in queues for at-risk voters; and
- e. providing any voter who arrives at a voting station without a mask with a mask instead of turning them away.

[235] The Minister notes that the contravention of certain provisions in the Regulations is a criminal offence and that the presence of members of the South African Police Service at voting stations may deter voters from attending voting stations. The Minister submits that the police must enforce Covid-19 restrictions at voting stations, where necessary, but must ensure that “there is no chilling effect on the right to vote”. However, no suggestions are made as to how to avoid a chilling effect.

[236] In addition to these proposals, the Minister also outlines the measures that will be put in place by the Department of Cooperative Governance and Traditional Affairs to ensure free and fair elections during Covid-19. These measures include the development and implementation of the 2021 Local Government Elections Disaster Management Contingency Plan, and ensuring “well-coordinated and integrated planning with clear roles and responsibilities by all organs of state”.

[237] These events have been bypassed by the present context. As we have seen the trajectory of the virus, and so too of the infections, hospitalisation and death is difficult to predict. The measures issued by the Minister have placed the entire country under Adjusted Alert Level 4. These submissions were made with Alert Level 2 in mind. It would have been helpful to know what the Minister’s submissions would have been under the more adverse restrictions that now prevail, or that may prevail in the run up to and at the time of elections.

Findings, recommendations and conclusion

Introduction

[238] It will be remembered that this Report has been commissioned by the Commission in terms of section 14(4), read together with section 5(2)(a), of the Electoral Commission Act. These provisions authorise the Commission to publish a report on

the likelihood or otherwise that a pending election will be free and fair. The need for the Report was triggered by the onset of the Covid-19 pandemic.

[239] The outcome of the Report is not binding on the Commission which retains its constitutional and legislative mandate and, indeed, duty to decide on the conduct of elections in our country. It is appropriate to acknowledge that this Report was prepared with the diligent and professional support of Ms Molebogeng Kekana, Ms Catherine Kruyer, Ms Faathima Mahomed and Mr Thabang Mabina.

[240] The Report was prepared in haste in part because of the tight electoral timetable of the Commission. Even so, the current Report runs through 120 pages and traverses considerable material on the contextual background, applicable law on local government elections, the Covid-19 pandemic, its likely impact on free and fair elections, and the rights to life, bodily and psychological integrity, and the right of access to health care, which are self-evidently threatened by the ominous rate of infections, hospitalisation and deaths associated with the different and recurrent waves of the Covid-19 pandemic.

[241] The Report carefully records and examines the submissions of the Commission and stakeholders, including: political parties; the public; civil society organisations and organised media; organised business, labour, and civil societies under the purview of the National Economic Development Labour Council; and a public opinion survey. The Inquiry went on to receive and hear submissions from independent electoral monitoring bodies whose submissions, amongst others, prompted the Inquiry to study and compare electoral practice in our country, the rest of our African continent and elsewhere in the world in the wake of the Covid-19 pandemic.

[242] The Inquiry went on to receive written and oral submissions from organisations focused on health care, independent medical experts, and from government

functionaries that included the Director-General of the Health Department, medical experts and scientists related to or serving within a Ministerial Advisory Committee on Covid-19 established by the Minister of Health, and from the Minister of Cooperative Governance and Traditional Affairs.

[243] The central issue that this Inquiry was tasked to report on is whether the local government elections that are scheduled for October 2021 are likely to be held in a free and fair manner. The political parties and civil society organisations that made submissions to the Inquiry are fiercely divided on whether the elections, if held, are likely to be free and fair. In this Report we represent these divergent views and have preserved the submissions in their original form on our website.

[244] Whilst submissions by political parties, civil society and members of the public are instructive and important, this Report does not make any factual findings on or assess cogency of the positions advanced by these stakeholders. This is so because the respective political views are not susceptible to a fact-finding process. They are often driven and animated by their partisan and subjective world views, or even by self-interest. To that extent, the Inquiry heeded and respected all views and deemed each to carry equal force whatever the size or pedigree of the political party concerned.

[245] The Inquiry sought to find an objective and dependable standard that is suited to measure whether the pending elections are likely to be free and fair in the face of the threat to life and limb and access to health care posed by infections, hospitalisation and deaths spawned by the pandemic on our country and its population.

[246] The outcome the Inquiry has reached is not, and must not be, driven by positions and preferences of political actors or entities of civil society, important as all these views are and must be. Public opinion too is divided. We have rather turned to our Constitution and other electoral law. First, we have looked at the electoral response to

the pandemic in our own country, and thereafter in the rest of the African continent, and in other significant electoral destinations abroad.

[247] Thereafter we have sought to be guided by the science related to the Covid-19 pandemic. That explains why we have heard submissions and presentations from no less than 9 medical experts and scientists, including State functionaries tasked with curbing the impact of the pandemic. This Report carefully records the core presentations of these experts and delineates their convergences and divergences on the research data, projections and expert opinions they have tendered.

May local government elections be postponed?

[248] The first question to probe is whether local government elections may ever be postponed. The starting point must be our Constitution. It tells us that ours is a democratic state founded on universal adult suffrage and regular elections. What is telling is that regularity of elections, like our democratic form of governance, is a founding value so highly cherished that it may not be amended except by a super majority of 75 per cent of members of the National Assembly and the supporting vote of at least six provinces.¹⁶⁶

[249] In plain language, our Constitution commands that a term of a municipal council may be no more than five years and, when its term expires, an election must be held within 90 days of the date of expiry. As we have earlier recorded in this Report, electoral legislation accords with this constitutional stricture on the term of a municipal council. Local government elections may be postponed if they are likely not to be free and fair but to a date within the mandatory term of five years and 90 days.

¹⁶⁶ Section 74(1)(a) and (b) of the Constitution.

[250] However, in sharp contrast, the Constitution and other law do not provide for an extension of the term of a municipal council. This is consistent with the tenor of our Constitution which tends to hold public office bearers to fixed terms of office.

[251] The first order answer to the initial question is that local government elections must be held within 90 days of the expiry of the fixed term of five years and the Constitution does not contemplate a deferment.

[252] Well, we also know that in our democratic order, elections must not only be regular, but they must also be free and fair.¹⁶⁷ The Constitution does not create an optional binary that says elections must be regular but need not be free and fair or that they must be free and fair even if they are not regular. Elections that are not free and fair, even if held regularly, are not democratic elections at all. They are a nullity. The two requirements must co-exist and be co-present at every election held under our jurisdiction.

[253] It seems to us there are two ways to approach the fixed term set by the Constitution and other law for a municipal council. The first option that suggests itself, is to seek to amend the Constitution and the applicable legislation. The provisions concerned are section 1(d), which is especially entrenched as a founding value, and section 159(2) of the Constitution. It seems plain that an amendment of section 159(2), which seeks to remove the regularity of elections, in effect, undermines section 1(d) and may not be done without a super majority of 75 per cent. It may also be said that it is an undesirable democratic practice to amend the Constitution on an ad hoc basis or to solve a short-term challenge.

¹⁶⁷ Section 19(2) of the Constitution.

[254] Then the question must follow: May a court of competent jurisdiction grant or permit the extension or relaxation of a fixed term deliberately set by the Constitution? Happily, our current assignment does not require us to answer that difficult question which we respectfully leave for the courts to decide. It may be argued that a court of competent jurisdiction may want to assume jurisdiction to extend the limited term of office of a municipal council to a finite date if it is shown that exceptional and compelling circumstances warrant the extension. Such circumstances could include elections that are likely to be a nullity because they were not free and fair, or dire circumstances like a pandemic that massively threaten life or limb, or other considerations of necessity that render compliance with the constitutional dictate impossible or exceptionally hazardous.

Would local government elections in October 2021 be free and fair?

[255] What our current assignment requires us to answer is whether the local government elections set for October 2021 are likely to be free and fair.

[256] Having considered all the submissions of stakeholders, applicable law, research on electoral practices during the Covid-19 pandemic, and the related science, we conclude that it is not reasonably possible or likely that the local government elections scheduled for the month of October 2021 will be held in a free and fair manner, as required by the peremptory provisions of the Constitution and related legislation. And we go further to find that the scheduled elections are likely to be free and fair if they were to be held not later than the end of the month of February 2022.

Grounds for the decision

[257] The decision and recommendations we have arrived at are supported by grounds which are all foreshadowed in the Report. The decisive and dominant reasons are

drawn from agreed scientific data and prognosis tendered by medical experts and scientists.

The election timetable of the Commission

[258] When an election has been called, the Commission must prepare a timetable for the election.¹⁶⁸ Any act required to be performed in terms of the Municipal Electoral Act must then be performed by no later than the time stated in the election timetable.¹⁶⁹ The Commission is entitled to amend the timetable, if it considers it necessary for a free and fair election.¹⁷⁰ On the current draft timetable the voter registration is now scheduled for 31 July and 1 August 2021 and only thereafter may “elections be called”. It is planned that the Minister will call the elections not later than 6 August 2021. The scheduled voter registration weekend is 6 days from the end of the current Adjusted Alert Level 4 restrictions, whose currency may be extended beyond that date (being 25 July 2021). This Report describes in some detail the nature and extent of the restrictions on movement, gatherings and activities of political parties and other hopeful independent candidates.

[259] We conclude that, if the elections were to proceed as scheduled, most of the acts required to be performed in accordance with the draft timetable will not be reasonably possible, starting with the face-to-face registration of voters who do not have access to electronic registration, the provisional and final certification of the voters’ roll, and the finalisation of the nomination processes for registered parties and independent candidates. This is so because the subsisting lockdown restrictions will stand in the

¹⁶⁸ In terms of section 11 of the Municipal Electoral Act and Schedule 3 thereto.

¹⁶⁹ Section 11(3) of the Municipal Electoral Act. Clause 1 of Schedule 3 specifies that an act required in terms of the Municipal Electoral Act and the Municipal Electoral Regulations, 2000, must be performed by no later than 17:00 on the date stated in the election timetable.

¹⁷⁰ Section 11(2) of the Municipal Electoral Act.

way of parties and independent candidates of accomplishing acts prescribed by the timetable and electoral laws.

Electoral conduct of the Commission during the pandemic and lockdown restrictions

[260] This ground for concluding that scheduled elections cannot possibly be conducted in a free and fair manner relates to the previous one. Our study of the electoral conduct of the Commission, since the onset of the pandemic, is that it has conducted by-elections but only when the country was placed under Alert Level 1.

[261] From March 2020 until June 2021, the Commission approached the Electoral Court on eight occasions, to seek orders postponing the holding of by-elections. The Court granted the orders on each occasion. The Commission's first application was brought two days after the President announced that a national state of disaster was being proclaimed to deal with the Covid-19 pandemic. The remaining seven applications were brought when the country was placed under Alert Levels 2 to 5.

[262] The Commission advanced four broad bases for seeking postponements of by-elections under Alert Levels 2 to 5. First, the Commission was hindered from preparing for, and conducting, the by-elections in a free and fair manner. Second, the risk of infections spreading through the holding of election activities did not make it possible for the by-elections to be held safely. If the Commission proceeded to hold the by-elections, this would undermine Government's efforts to curb the spread of the infections. Third, Alert Levels 2 to 5 impose restrictions on gatherings and political activities. In addition, people are confined to their places of residence from specified hours in the night to the early hours of the morning. These limitations, the Commission stated, adversely impact on the ability of political parties and independent candidates to campaign for votes. This would render the by-elections not free and fair. Fourth, as the population was more aware about the risk of infections, coupled with the existence

of highly transmissible new variants of the virus, there was a real possibility that voters would have stayed away from the polls. This may have resulted in low levels of voter turnout and participation, which would have undermined the credibility of the outcomes and the legitimacy of those who were elected to lead.

[263] The Commission proceeded with by-elections when the country was placed under Alert Level 1. When the Alert Level was subsequently changed to Alert Level 3, the Commission sought postponements of the by-elections that were scheduled to take place during January, February, and March 2021, and again later when the country moved to Adjusted Alert Level 4.

[264] This Report finds no fault in the attitude of the Commission. Much as the Commission has often proclaimed that it is technically ready to conduct elections, historically it has also made the correct call that the measures promulgated by the Government to curb the continued spread of the pandemic had an adverse impact on the likelihood of the by-elections being free and fair.

[265] The concern of the Commission is justified that under a state of national disaster, and with restrictions in place on the movement of persons and gatherings, political parties and independent candidates will not be able to freely participate in the forthcoming local government elections and voters will not have the opportunity to exercise rights that are essential to the conduct of free and fair elections. The concern is heightened if South Africa is placed under an alert level that imposes more severe restrictions during the run up to, and at the time earmarked for, the local government elections.

[266] Freedom to participate in elections is an element fundamental to the conduct of free and fair elections. This includes the “freedom to canvass; to advertise; and to engage

in the activities normal for a person seeking election”.¹⁷¹ While the Constitution and the law are not prescriptive as to the manner in which parties should campaign and advertise, the activities “normal for a person seeking election” in South Africa include the holding of large political rallies, the holding of smaller political gatherings, and door-to-door campaigns. However, the freeness and fairness of the local government elections must be evaluated in context, which includes the “new normal” imposed upon all of us by the Covid-19 pandemic.

[267] What is important is that political parties and independent candidates must be able to participate in elections “fully and effectively”.¹⁷² This means that they must be able to get their political message to their chosen electorate. If political parties and independent candidates are restricted in the ability to convey their messages to voters, this limits their rights to contest elections,¹⁷³ to campaign,¹⁷⁴ and to freedom of expression,¹⁷⁵ and diminishes the freeness and fairness of the election.

[268] Although the restrictions on movement of persons and gatherings under the Disaster Management Regulations apply to all political parties and candidates, there is likely to be a disproportionate impact of the Covid-19 restrictions on smaller less-resourced political parties and independent candidates. Larger well-resourced political parties will more easily be able to advertise widely and shift to digital platforms to engage with voters. In addition, incumbents are advantaged in terms of broadcasting opportunities to share their political messaging under the principle of proportionality applied by the Independent Communications Authority of South Africa.

¹⁷¹ *Kham* at para 86.

¹⁷² *Kham* at para 85.

¹⁷³ Section 19(3) of the Constitution.

¹⁷⁴ Section 19(1)(c) of the Constitution enshrines a right to campaign for a political party or cause.

¹⁷⁵ Section 16 of the Constitution. *Kham* at para 103. See also *Democratic Alliance v African National Congress and Another* [2015] ZACC 1; 2015 (2) SA 232 (CC) at para 135.

[269] The restrictions on the ability of political parties and independent candidates to campaign, in turn, diminishes the rights of the electorate, including the right to vote. It has long been established that the effective exercise of the right to vote requires access to information.¹⁷⁶ If voters are unable to receive political messaging from political parties and independent candidates, they will be hindered in their ability to make political choices and to vote. In addition, the rights of the electorate to participate in political activities,¹⁷⁷ and to freedom of assembly,¹⁷⁸ are limited by Covid-19 restrictions. This diminishes the freeness and fairness of the election, since free and fair elections require that every person can exercise their fundamental rights.

[270] A legitimate question may be asked: What if the lockdown restrictions higher than Alert Level 1 were removed? The ready answer is that, on all medical expert predictions, during October 2021 infections, hospitalisation and mortality will remain a significant threat to physical wellbeing and life until a substantial number of our population has been vaccinated.

Medical expert data and predictions

[271] We now turn to deal with the submissions on expert data and predictions.

[272] As we have seen, the question whether the scheduled local government elections of October 2021 should be held or deferred is fiercely contested within and amongst election stakeholders of varied kinds. Some stakeholders have urged us to find and follow medical science and others have scoffed at reliance on science. We chose to

¹⁷⁶ *My Vote Counts II* at para 35, quoting with approval Ngcobo CJ in *President of the Republic of South Africa v M & G Media Limited* [2011] ZACC 32; 2012 (2) SA 50 (CC) at para 10.

¹⁷⁷ Section 19(1)(b) enshrines a right to participate in the activities of a political party.

¹⁷⁸ Section 17 of the Constitution.

heed the science, and, to that end, solicited the assistance of no less than 9 leading medical and public health experts in South Africa.

[273] They are Dr Aslam Dasoo, Dr Fareed Abdullah, Prof Shabir Madhi, Dr Sandile Buthelezi, the Director-General of the Health Department, Prof Salim Abdool Karim, Dr Jacqui Miot, Prof Sheetal Silal, from the Advisory Committee (Health Department), Dr Harry Moultrie, from the National Institute for Communicable Diseases, and Prof Susan Goldstein.¹⁷⁹

[274] The material presented by the scientists displayed substantial convergence. The differences amongst them are limited, in the main, to the likely trajectory of the virus and the resultant infections, hospitalisation and deaths in October 2021 compared to February-March 2022. We set out briefly the convergence, and later individualise the divergences, on the predictions.

[275] The experts are at one that available data shows that the country is amid a third wave of Covid-19 infections. By the time the oral hearings were held,¹⁸⁰ the delta variant was the dominant strain of the virus in South Africa and in the world. Hospital admissions and deaths follow the rise in infections. It is difficult to predict the trajectory of the pandemic with any certainty for many reasons. The virus is constantly evolving, its variants are unpredictable, and they are not going away anytime soon. There are variable geographic areas of high infections as infections spread. The uncertainty is also worsened by the population's "Covid 19 fatigue". That means that the population is not consistently adhering to the recommended non-pharmaceutical interventions. Whilst the rate of vaccination of different groups, including high-risk groups, could result in a reduction in hospitalisation and death, it may not prevent a resurgence of

¹⁷⁹ The Inquiry also received a joint written submission from Prof Elmien du Plessis, Ms Petronell Kruger and Ms Safura Abdool Karim.

¹⁸⁰ From 28 June 2021 to 2 July 2021.

infections. And lastly, although all vaccines used in South Africa are shown to likely have a high protection against severe disease and death, they are likely to vary significantly in protecting against infection and mild disease. The virus is not well understood. There is insufficient knowledge, even at this stage, about the transmission trends, the ability of the virus to cause infections, and the changing nature of the virus.

[276] The experts drew attention to rising infections and the impact on hospitalisation and mortality. The delta variant can spread much faster, and large numbers of people need hospitalisation and medical care. Similarly, during the second wave of the pandemic, the hospitalisations rose rapidly. Prof Abdool Karim stated that “anything that exacerbates the spread of these variants just makes matters so much worse”.

[277] Prof Madhi made identical observations of a rising third wave. Around 7 June 2021, 5 of the 9 provinces were experiencing the third wave. In provinces where the third wave was yet to start, namely the Eastern Cape, Western Cape and KwaZulu-Natal, it may happen that the infection rates may be lower because over the course of the first two waves, the population in these provinces could possibly have developed natural immunity. However, natural immunity may not be relevant if there are further variations of the virus that makes it resistant to immunity from past infections.

Capacity of the health system and excess mortality

[278] In dealing with the rising third wave, Dr Abdullah reflected on the ability of the health services to respond to Covid-19. He measured the responses of the health services during the first, second and third waves and, using this information, considered the capacity of health services to deal with the fourth and future waves. Gauteng, the Western Cape and KwaZulu-Natal may be able to meet the minimum capacity required for a “substantial health system response” (especially having regard to the private sector health care facilities), but the other provinces do not have the benefit of a similar

response. This mainly accounts for the high mortality rate in the Eastern Cape during the second wave.

[279] Dr Abdullah agrees with Dr Dasoo that there is significant undercounting of Covid-19 deaths. Underreporting is extensive. Deaths are underreported because hospitals are often remarkably busy, or they are not very well organised. The excess death reports produced by the Medical Research Council provide a good lens through which one can observe the trends of the pandemic through the mortality rates. The effect of the under-reporting of excess deaths, is that the threat to life and limb is much higher than the official number of Covid-19 deaths suggest. The official mortality rate from Covid-19 is reported as 58 000. The excess mortality rate from the Medical Research Council, however, records the figure as 180 000. On this account of excess mortality, it seems that the actual figures of Covid-19 mortality are about three times higher than the official reports of deaths. Dr Dasoo added that it was “common cause” amongst the scientific community. Comparable excess mortality figures were presented to the Inquiry by Prof Silal and Dr Moultrie of the Modelling Consortium.

[280] Dr Dasoo added that the country’s health care system has not been able to create special capacity to manage the third wave and it is unlikely that it will be able to do so in a fourth wave. The national response reveals “deep dysfunction in governance”, and “poor state capacity” in “what should be regarded as a public health emergency”.

Similar trajectory of waves of infection

[281] Another common position of the experts is that patterns or subsequent waves of infection will be similar, and follow a similar trajectory, to that of infections in the first and second waves in South Africa. In the effort to project the trajectory of the virus, the modelling data presented by the experts is based on certain assumptions. The primary assumption is that there will be no new variant that would arise in the projected

period. On the assumption that no new variant will emerge from now until then, October 2021 will be a period of low infections. This means the present delta-driven third wave is predicted to peak and thereafter decline during August and September 2021, depending on varied trajectories of the different provinces. If this pattern holds, October 2021 will be a period of low transmission.

Community immunity and vaccines

[282] Vaccines are better at protecting against severe disease and death than at protecting against mild symptomatic illness. If one makes one important assumption, that the virus does not change, then it will be worthwhile to try to get some level of community immunity, which will substantially reduce the risk of hospitalisation and death. Currently South Africa has one of the lowest vaccination rates in the world and the highest rates of Covid-19 fatalities. With varying emphasis, the experts agree that it is necessary to strive for community immunity and that, given the vaccination rate, it will not be possible for South Africa to achieve community immunity by October 2021.

[283] All experts agreed with Prof Madhi that there is an extent of natural immunity derived from previous infections with the beta and delta variants, and this will play a role in what happens going forward. The Pfizer and Johnson and Johnson vaccines are both good vaccines and have protection against severe disease and death. The United Kingdom is having another surge of infections, but the death rate is flat. South Africa must get to that stage. South Africa is behind the global rate of vaccination. South Africa must reach a stage where there is a decline in deaths and this can be achieved by vaccinating the most “at risk” population, namely those who have comorbidities and are above a certain age. South Africa should aim to administer 300 000 doses of vaccines daily. The target of vaccinating 40 million people by March 2021 set by the Health Department already shows slippages.

Risks associated with elections

[284] All experts expressed themselves on the risks associated with elections and are agreed. Large gatherings are super spreader events. This cannot be emphasised enough. Prof Madhi notes that gatherings cannot be allowed during the run up to elections and on voting day – in his words, “this is non-negotiable”. He urged strongly that no gatherings should be allowed. Elections are likely to cause a resurgence of infections, and any resurgence will be difficult to manage. As a mitigatory measure, when elections do proceed, he suggests that voting stations should be located outdoors as the preferred option.

[285] Prof Abdool Karim speaks to five risks of transmission that arise with election activities: occupational exposure for the Commission’s staff and campaign staff; door-to-door visits; small group meetings; large group rallies and marches; and voting day queues and polling booth risks. There are three principal risks associated with these activities, namely: gatherings, especially those indoors; movement of people; and the level of adherence to non-pharmaceutical interventions. Large group rallies and marches are super spreader events.

[286] Dr Abdullah is aware that the limitation on gatherings translates to restrictions on electioneering. He cautions that if the scale tilts in favour of electioneering activities, when the transmission rates of the delta variant are high, the events will become seeding events, and will lead to cluster outbreaks and, in turn, trigger another wave. Ordinarily, gatherings have been shown to be super spreader events.

October 2021 vs February-March 2022

[287] There is difference of opinion among the experts on when it would be less risky, and safer, to hold elections between October 2021, and later around February-March

2022. Prof Abdool Karim presented that if the elections were delayed by three months, South Africa will be in low transmission, but will be in the “very early stages” of a fourth wave. Relying on a useful graph, he displayed projections of likely virus infections during October 2021, then during a three-month delay and a six-month delay. Based on the projections, Prof Abdool Karim maintained that the best time to hold local government elections “is now”, meaning October 2021, rather than three months later.

[288] Prof Abdool Karim is of the view that “we are likely to see several new variants” by March 2022. He believes that at some stage there is going to be a variant that escapes immunity and, once that variant arrives, everyone who has been vaccinated will be back to “square one”. Prof Abdool Karim said he had no firm view about whether elections should be held in October 2021 or at another time. He only presents the data and says that support can be found in the data for either of the options.

[289] Prof Madhi pointed out that it is difficult to predict the trajectory of the virus, particularly for October 2021. He said the major risk lies in the period leading to voting day. Electioneering, especially large outdoor gatherings, and any indoor gatherings of more than 20 people will have a major impact on the resurgence of infections. Based on past patterns with waves 1 and 2, it may be that October 2021 is a period of relative calm, with a resurgence in December 2021 onwards.

[290] Dr Abdullah is of the view that continuing with current plans to hold elections in October 2021 puts thousands of lives at risk. The country or parts of it will remain at different stages of a wave for the foreseeable future. He recommends that the elections be postponed until the mortality rate declines. The country must reach a stage where there is a flattening of the hospitalisation and mortality curve. Conducting elections in February-March 2022 will certainly save more lives than in October 2021, because of the higher levels of vaccination and related immunity.

[291] It will be remembered that in their submissions, Prof Silal, Dr Miot and Dr Moultrie expressed their personal opinions – not representing the Advisory Committee or the Modelling Consortium – that the more people that are vaccinated at the time of holding elections the more lives will be saved. They took the view that there will be many more people vaccinated in February-March 2022, and expected less hospitalisation and mortality. This expert view, it will be remembered, accords with that of Dr Buthelezi of the Health Department who warned against election gatherings and campaigning during October 2021, and that community immunity through vaccination will have been reached by February 2022 when approximately 40 million of the population would have been vaccinated.

[292] The foregoing paragraphs are a fair summation of the science that ought to guide us. Whilst the delta variant may have subsided somewhat during October 2021, the risk to our population of infection, serious illness and the consequential hospitalisation and death will remain remarkably high. Our public health care system is inadequate for the health demands spawned by the pandemic. Our death or mortality rate appears to be nearly three times more than the official statistics of death. That means the threat to life posed by the pandemic is much higher than meets the eye. All experts tell us that by holding elections in October 2021 or in February-March 2022 there is a potential risk of infection or of even a fourth wave. The real difference will be made by community immunity through vaccination. Even if community immunity, at 67 per cent of our population, is not reached in February-March 2022, there will be far less risk of hospitalisation and death than there will be in October 2021.

[293] Before we turn to our recommendation on when, if deferred, elections should be held, we draw attention to the section on the electoral experience in other countries on our continent and in other significant electoral destinations. We commend our research recordal in this Report to sticklers for detail. What is plain is that many countries around the world have postponed their presidential, national, and subnational elections

due to the pandemic and others have held elections despite the pandemic. It is indeed difficult to make helpful comparisons from country to country because of the diversity of the context within which the decision to defer or to go ahead with the elections was made. Let it suffice to draw attention to the studies on the Presidential elections in the United States of America, State Assembly elections in India, and local government elections in Brazil during the pandemic. The recorded estimates of deaths associated with each of these elections run into staggering numbers – something we should not wish for ourselves.

Why February 2022?

Prevent the slippery slope

[294] We have readily conceded that deferring elections might be an unwelcome dent to our nation's democratic resolve and psyche. And yet we hope we have shown that we are in exceptional circumstances that pose a real, direct and collective threat to our lives, bodily and psychological well-being and, might we add, to our livelihoods.

[295] Some have argued that deferment may encourage or initiate a slippery slope that might undermine the democratic project. We think that this argument has considerable force. Only the most compelling of reasons should justify the deferment of a term of elections set in the supreme and other law of the country. For that reason, our recommendation is that the elections be deferred only once, and to the earliest possible date, to be determined as the safest and shortest time within which local government elections may be held without excessive loss of life.

Reset municipal governance speedily

[296] Key constitutional objects of local government are to provide democratic and accountable government for local communities and the provision of services in a

sustainable manner. It is so, that it will be extremely hard to find a governance injunction more compelling than the one which our Constitution imposes on local government. First, local governments wield authority only because they are so authorised by the people who vote them into power. Second, once they assume office, their term of office is not only finite for five years, but they must ensure accountable government and the provision of services in a sustainable manner.

[297] Many stakeholders in their submissions drew attention to the governance devastation to be found within the ranks of most municipalities in our country. They rightly pressed that the current municipal councillors should be given not one day more in office if citizens are to be spared more bouts of unaccountable government, inept and dishonest financial accounting, and downright failure to observe the law that governs municipalities. The consequence of this has been repeated service delivery protests in the face of dysfunctional and totally inept municipal councils.

[298] On 30 June 2021, the Auditor-General, Ms Tsakane Maluleke, released her annual report on the audit outcomes of 257 municipalities for the financial year 2019-2020. She records that the decline in the affairs of local government has been consistently reported by the Auditor-General over the past four years of the current administration. The Auditor-General bemoans the fact that there has been little evidence that the messages of the Auditor-General have been taken to heart. It is saddening that the Auditor-General finds that most municipalities are in a worse position than at the beginning of this administration's term in 2016-2017. The Auditor-General's report concludes with a clarion call for ethical and accountable leadership to drive the desired changes to bring about an improved local government.

[299] These are powerful considerations that ordinarily should militate against deferment of elections. At a local government level, South Africa is due for a reset and, ordinarily, local government elections would be that reset button. We acknowledge that elections

should be held soon. But it cannot be at any cost. On all expert medical evidence, many, many lives are likely to be lost unless we reach a certain level of community immunity. The nearest point of safety will be February 2022, when there is likely to be a high level of community immunity. The postponement should be no longer than is strictly and reasonably necessary to save lives and limbs.

[300] Lastly, the additional benefit to keeping the deferment as short as four months, to February 2022, is that it will allow the newly elected municipal councils to approve the annual budget for the new financial year. Although the annual budgetary cycle will commence before elections are held in February 2022, the benefit of a short postponement is that the newly elected municipal councils will be in place to consider the annual budget to be tabled in April 2022, and to approve the annual budget before the start of the new financial year on 1 July 2022. The incumbent municipal councils will need to commence the budgetary process and should do so in accordance with the Integrated Development Plans of their municipalities.¹⁸¹

Recommendations for holding free, fair and safe elections during Covid-19

Introduction

[301] The assignment with which we have been tasked includes indicating additional measures that the Commission may have to implement to realise free and fair elections

¹⁸¹ The position is set out in the Municipal Finance Management Act, 2003 (MFMA), the Municipal Budget and Reporting Regulations, GN 393, GG 32141, 17 April 2009, and various Treasury Municipal Budget Circulars. Municipal councils are required to approve an annual budget for each financial year for the municipality in which they serve. The integrated development plan is integral to this, since it forms the “policy framework and general basis” on which the annual budget of the municipality must be based. The municipal council must approve the annual budget before the start of the municipal financial year, which is 1 July. The mayor of a municipality must table, in the municipal council, a time schedule with key deadlines for the preparation, tabling and approval of the annual budget at least 10 months before the start of the new financial year. The relevant legislation requires that the annual budget must be tabled before the municipal council by the mayor at least 90 days (that is in April 2022), and considered by the municipal council for approval at least 30 days (that is in June 2022), before the start of the municipal financial year.

within the Covid-19 context. The measures we suggest are in line with our recommendation that local government elections be deferred to February 2022. We have drawn upon international best practices¹⁸² and adapted them, where necessary, to the South African context in developing recommendations regarding measures to mitigate the health risks that may be posed by the local government elections. These measures are in addition to those already adopted by the Commission.

Electoral campaigning

[302] In order to safeguard lives, restrictions ought to be placed on campaigning in the run up to the local government elections. People that may attend in-person political gatherings must adhere to Covid-19 health protocols.

[303] In addition, political parties and independent candidates must ensure adherence with Covid-19 health protocols at all political campaign activities, including physical distancing, sanitisation and the mandatory wearing of masks.

[304] The Electoral Code of Conduct,¹⁸³ which forms part of the Electoral Act and applies to political parties and independent candidates, should be amended to include issues relevant to Covid-19. Compliance with the Electoral Code of Conduct, and in particular

¹⁸² The African Commission on Human and Peoples' Rights has published a statement on Elections in Africa during the COVID-19 Pandemic, 22 July 2020, which draws upon best practices adopted in the continent and provides valuable guidance on the measures that should be taken to ensure free, fair and safe elections. In addition, a number of international organisations, including the Election Management Network, the International Institute for Democracy and Electoral Assistance and the International Foundation for Electoral Systems, have published advisories on how to conduct elections safely during the Covid-19 pandemic. In particular, Buril et al "IFES COVID-19 Briefing Series: Safeguarding Health and Elections" available at: <https://www.ifes.org/publications/ifes-covid-19-briefing-series-safeguarding-health-and-elections>.

¹⁸³ Contained in Schedule 2 of the Electoral Act.

provisions intended to curb the spread of Covid-19, should be monitored and any non-compliance therewith sanctioned in terms of the Electoral Act.¹⁸⁴

[305] Measures should be put in place to ensure equal opportunities for political parties and independent candidates to contest the local government elections in light of the restrictions that may be in place on traditional methods of campaigning. These measures should include coordination between Independent Communications Authority of South Africa and public and private broadcasters to provide all political parties and candidates with increased and equitable access to broadcasting opportunities to disseminate their political messaging to the electorate.

Electoral planning

[306] All electoral staff who will be present at voting stations or conducting home visits should be vaccinated prior to the elections in order to reduce the occupational risk faced by electoral staff.

[307] Special focus should be given to procuring voting stations that allow for physical distancing and natural ventilation; and

[308] Masks should be procured to be provided to voters who arrive at voting stations without masks.

¹⁸⁴ Contravention of the Electoral Code of Conduct is an offence in terms of section 94, read with section 97, of the Electoral Act. Any person convicted of the offence of contravening the Electoral Code of Conduct is liable to a fine or a period of imprisonment not exceeding 10 years.

Voter registration

[309] Although voter registration poses less risk of spreading Covid-19 than voting, measures should be adopted to reduce congestion at voting stations during voter registration:

- (a) First, the period for voter registration should be extended to avoid congestion at voting stations during voter registration. The Commission should give consideration to holding two voter registration weekends.
- (b) Second, eligible voters should be encouraged to register, and registered voters should be encouraged to check and confirm their registration details and to update their details where necessary, using online platforms, instead of attending a voting station in person.

[310] In addition, the same Covid-19 protocols adopted by the Commission for voting stations on voting day must be applied to voter registration.

Voting

[311] Measures should be adopted to reduce congestion at voting stations on voting day, including:

- (a) extending the operational hours for voting stations;
- (b) staggering voting times by dividing the electorate by surname initials; and

- (c) creating special accommodations and priorities in queues for more vulnerable voters to reduce the length of time that they spend in queues as well as their exposure to the risk of virus transmission.

Special votes

[312] Special voting should be expanded and extended to ensure that no one is disenfranchised.¹⁸⁵

- (a) eligibility for a special vote should be expanded to include those who are ill, in isolation or quarantine and those who are at-risk of more severe illness from Covid-19;
- (b) alternatively, if some of these groups of voters are already eligible for a special vote, use of special voting by these groups should be encouraged;
- (c) the period for application for special votes should be extended to allow for more people to apply and emergency applications should be introduced for those who fall ill or are in isolation or quarantine at the time earmarked for the holding of elections; and
- (d) voters applying for a special vote should be encouraged to submit their applications on online platforms or by SMS rather than by hand.

¹⁸⁵ Section 55 of the Municipal Electoral Act makes provision for special votes and special votes are regulated under the Municipal Electoral Regulations, 2000 published under GN R848 in GG 21498, 22 August 2000.

Voter Education

[313] Information about the Covid-19 protocols that will be in place at voting stations must be widely disseminated and easily accessible in all South African languages.

[314] The spreading of disinformation related to Covid-19 with the intention of influencing the conduct or outcome of the local government elections should be carefully monitored and sanctioned in terms of the Electoral Act¹⁸⁶ or the Disaster Management Regulations.¹⁸⁷

Election observation and agents for political parties and candidates

[315] In order to ensure transparency, election observers and agents for political parties and candidates must be allowed to observe activities at voting stations with proper adherence to all Covid-19 protocols, including physical distancing, sanitisation and mandatory wearing of masks.

[316] In addition, consideration should be given to virtual election observation through broadcasting or livestreaming of activities at voting stations, including counting, to enhance the transparency of elections conducted under Covid-19 conditions.

After voting

[317] If the number of days for special voting is extended, then additional measures may be required to ensure the security of the ballots and legitimacy of the elections.

¹⁸⁶ Section 89(2), read with section 97, of the Electoral Act.

¹⁸⁷ Regulation 14(2) of the Disaster Management Regulations.

Modernisation project – introducing alternative methods of voting

[318] Since the Covid-19 pandemic is likely to be with us for a long time, consideration should be given to the introduction of alternative methods of voting that do not require voters to visit voting stations in person, such as electronic voting.

[319] The electoral legislative scheme does not currently make provision for electronic voting. The voting procedure for local government elections is set out in the Municipal Electoral Act,¹⁸⁸ and requires voters to vote at voting stations.¹⁸⁹

[320] It is therefore recommended that a legislative process be undertaken to introduce electronic voting. However, a change to the voting method requires a substantial legal change in the electoral framework and should not be introduced within six months of a scheduled election. Less than six months is insufficient time for the public to gain familiarity with and develop trust in a new voting method. Rapid introduction of new voting methods may impact upon the *perceived* legitimacy of the elections.

Conclusion

[321] Having considered all the submissions of stakeholders, applicable law, research on electoral practices during the Covid-19 pandemic, and the related science, we conclude that it is not reasonably possible or likely that the local government elections scheduled for the month of October 2021 will be held in a free and fair manner, as required by the peremptory provisions of the Constitution and related legislation. We find that the scheduled elections are likely to be free and fair if they were to be held not later than

¹⁸⁸ Section 47 of the Municipal Electoral Act.

¹⁸⁹ Section 47(1)(a) of the Municipal Electoral Act.

the end of February 2022. We have also made recommendations on how free, fair and safe elections may be held in February 2022.

[322] Should the Commission accept and seek to implement the outcome of this Inquiry it is self-evident that it must approach, with deliberate speed, a court of competent jurisdiction to seek a just and equitable order to defer the local government elections to not later than the month of February 2022 and on such terms the court may grant.