

Medicolegal Considerations of Mandatory COVID-19 Vaccination in High-Risk Workers

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Is a policy of mandatory vaccination for healthcare workers permissible under Australian law?

Introduction

A multi-pronged strategy of education, financial and social incentives have contributed to Australia's historically widespread uptake of vaccines. Mandatory vaccination, however, constitutes a greater degree of government direction than customary policies and is worthy of discussion in the context of the advent of effective vaccines against SARS-CoV-2 (COVID-19), a disease of substantial morbidity and mortality.

COVID-19 infection of high risk workers constitutes a transmission risk to other staff, consumers and the community at large. This article provides a legal analysis of mandatory vaccination for high-risk workers, focusing on those working in healthcare as a pertinent example. Where vaccination is considered an inherent requirement of an employee's role, an interesting question arises as to whether mandatory vaccination is legally permissible.

Relevant State, Territory and Commonwealth Legislation

The Federal Parliament can only make laws on certain matters as defined by the Australian Constitution. As such, in Australia, public health legislation is primarily the responsibility of States and Territories, who legislate independently and as such there is variation at a State and Territory level with respect to whether vaccinations can be mandated by public health legislation.

State & Territory Legislation

Relevant public health legislation of each of the States and Territories is summarised in Table 1.

In Victoria, section 117 *Health Services Act 1988* (Vic) states that the Chief Health Officer can issue a public health order requiring a person to receive specified prophylaxis (including vaccination), inclusive of individuals exposed to or likely to contract an infectious disease. The *Health Services Amendment Act 2020* (Vic) section 8 inserted a provision into the *Health Services Act 1988* (VIC) directing health services to require persons employed or engaged by them to be vaccinated against or prove immunity to specified diseases. If COVID-19 is included by amendment as a 'specified disease', the Act precludes a discrimination claim.¹

The *Public Health Act 2016* (WA) section 184 states that for emergency management purposes, an emergency officer may direct a person, or class of persons, to undergo medical treatment or be vaccinated.²

Public health legislation in other jurisdictions is less prescriptive, with mandatory vaccination of health practitioners largely determined by policy directives of individual State and Territory health authorities.

Federal Legislation

The Biosecurity Act 2015 (Cth) section 51 allows for Health Ministerial determinations specifying a number of biosecurity measures to be taken by specified classes of persons, including requiring certain behaviours or practices. The biosecurity measure must be appropriate and adapted to prevent, or reduce the risk of, the disease entering, emerging, establishing itself or spreading in, an Australian territory. Whether 'requiring certain behaviours or practice' could be extended to mandatory vaccination is unclear, and potentially subject to challenge.³

Under section 91, an individual may be required by a human biosecurity control order to receive a specified vaccination. Such an order requires that the individual is symptomatic of a listed disease, has been exposed to a listed disease, or has failed to comply with specific entry requirements into Australia. Whilst the *Biosecurity Act* can potentially mandate vaccination, it is restricted in that it cannot be arbitrarily applied to asymptomatic or non-exposed individuals.

Possible New Legislation

The Australian Health Primary Protection Committee does not currently recommend mandating COVID-19 vaccination for the aged care workforce due to insufficient evidence about effectiveness and absence of clear dates of vaccine availability.⁴ That said, the COVID-19 Vaccination Policy has indicated that governments may introduce border entry or re-entry requirements conditional on proof of vaccination.⁵

New South Wales is considering a bill requiring a relevant body to pay compensation to a worker suffering injury, loss or damage secondary to a vaccine where vaccination has been made a condition of employment, with liability extending for the life of the worker even if the worker is no longer rendering services.⁶

Exemptions to Vaccination

Medical exemptions

Valid medical exemptions to childhood vaccinations allowing continued access to Family Tax Benefit(s) can only be assessed by certain medical practitioners, including paediatricians and infectious diseases physicians.⁷ Similarly, medical exemptions to COVID-19 vaccination will likely require individual assessment by authorised medical practitioners.

A history of anaphylaxis to a vaccine component or previous dose is a contraindication to vaccination per the Australian Immunisation Handbook.⁸ Individuals with such a history relevant to the COVID-19 vaccine will be likely to receive a medical exemption to vaccination.

Immunocompromised individuals are at increased risk of harm from COVID-19, however there is limited safety and efficacy data currently available about COVID-19 vaccination in this cohort.⁹

Pregnant women are at potentially increased risk of complications from COVID-19. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG) has recommended against routine vaccination, acknowledging the low prevalence of COVID-19 in Australia and limited safety and efficacy data in this cohort. RANZCOG has recommended that pregnant workers at risk of COVID-19 exposure should be allocated to low-risk duties, with vaccination offered where unfeasible.¹⁰

Personal, religious or political beliefs

Whilst some countries have strong explicit defences for religious and political beliefs which would conflict with mandatory vaccination policies, legal protections in Australia are much more limited. Section 116 of the Australian Constitution states that the Commonwealth shall not make any law prohibiting the free exercise of any religion.¹¹ The High Court of Australia (HCA) has consistently interpreted the wording of this provision narrowly.¹² In *Krygger v Williams* it was held that a person could not legally exempt themselves from compulsory military training for service on religious grounds. In *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth*, the HCA noted that without the protection of society, liberty would be “meaningless and ineffective” and that Courts should determine whether a law “protect[s] the existence of the community.” The HCA noted that freedom of religion could be subject to restrictions necessary for the preservation of the community in *Kruger v The Commonwealth*. More recently, a majority of HCA judges in *Kruger v The Commonwealth* emphasised a law would only be invalidated by section 116 of the Australian Constitution if its ‘purpose’ was to prevent the free exercise of religion; if the adverse effect on religious freedom was an ancillary effect, the legislation would remain valid.

The High Court recognises an implied right to freedom of political communication.¹³ Whilst this may protect expression of anti-vaccination views, it is unlikely to invalidate regulations enacting compulsory vaccination.

Victoria, Queensland and the Australian Capital Territory have legislated human rights instruments which are listed in Table 2. These contain provisions regarding freedom of conscience, religion and belief as well as the ‘right to liberty and security of person’. However, most instruments also contain clauses and mechanisms whereby such freedoms may be limited or overridden if the relevant legislative assembly intends to achieve another objective, such as the protection of public health (via the least restrictive method). For example, although freedom of belief may be undermined by a policy of compulsory vaccination of healthcare workers, it could be argued that the policy is the least restrictive method of achieving a public health outcome, and thus compatible with the human rights instrument. A nighttime curfew in Victoria was found by the Supreme Court of Victoria to not contravene the Human Rights Charter.¹⁴

Employee / Employer Consequences of Non-Vaccination

Where employees are not vaccinated (for example due to allergy), employers are required to minimise the risks to employees as much as is reasonably practicable. In determining what is reasonably practicable, the employer is likely to take into account all relevant matters including the likelihood of COVID-19 infection, the degree of harm that might result from infection, and the availability, suitability and cost of ways of minimising risk from COVID-19. There have been a number of recent Fair Work Commission (FWC) matters that have considered and supported in their discussions that dismissal for refusing vaccination is unlikely to be found to be unfair, unless vaccination refusal is for a medical reason.¹⁵ In briefly considering *Arnold v Goodstart Early Learning*, (which didn't proceed to consideration on its merits due to the lateness of the application) the Commissioner commented that a mandatory vaccination policy was *prime facie* necessary to satisfy a childcare centre's duty of care with respect to children in its care. The applicant had religious reasons for refusing vaccination. Deputy President Asbury commented that it was ‘arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction...’.

Conclusion

Australian employers of high-risk workers (such as healthcare workers) could mandate vaccination for COVID-19. Such a direction may well be lawful and reasonable, excepting for those with relevant medical exemptions, for whom low-risk roles must be sought if possible. The Federal Government has limited but available powers to enact compulsory vaccination for high-risk workers under the Biosecurity Act, and while there is variation amongst States and Territories, compulsory vaccination is allowed for in Victoria and Western Australia and could be enabled via passage of specific legislation elsewhere. State-level human rights instruments and Commonwealth constitutional provisions are unlikely to invalidate a policy or regulation mandating compulsory vaccination for high-risk workers. Where employee vaccination is mandated, organisations may become liable for any adverse outcomes of vaccination.

References

1. *Health Services Act 1988* (Vic); *Health Services Amendment Act 2020* (Vic).
2. *Public Health Act 2016* (WA).
3. *Biosecurity Act 2015* (Cth).
4. Australian Health Protection Principal Committee. Statement on COVID-19 and influenza vaccination requirements for aged care workers. Australian Government Department of Health. Updated January 2021. <https://www.health.gov.au/news/australian-health-protection-principal-committee-ahppc-statement-on-covid-19-and-influenza-vaccination-requirements-for-aged-care-workers> (accessed April 2021).
5. Australian Government Department of Health. Australian COVID-19 vaccination policy. Australian Government Department of Health. Updated February 2021. <https://www.health.gov.au/sites/default/files/documents/2020/12/covid-19-vaccination-australian-covid-19-vaccination-policy.pdf> (accessed April 2021).
6. *Public Health Amendment (Vaccination Compensation) Bill 2021* (NSW), to amend the *Public Health Act 2010* (NSW).
7. s 6(3)(a) *A New Tax System (Family Assistance) Act 1999* (Cth).
8. Australian Technical Advisory Group on Immunisation (ATAGI). Australian Immunisation Handbook. Australian Government Department of Health. Updated September 2019. <https://immunisationhandbook.health.gov.au/vaccination-procedures/preparing-for-vaccination#contraindications-to-vaccination> (accessed 10th April 2021).
9. Sonani B, Aslam F, Goyal A, et al. COVID-19 vaccination in immunocompromised patients. *Clin Rheumatol* 2021;40:797-798. DOI: [10.1007/s10067-020-05547-w](https://doi.org/10.1007/s10067-020-05547-w) (Accessed 11 April 2021)
10. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists. COVID-19 Vaccination in Pregnant and Breastfeeding Women. Royal Australian and New Zealand College of Obstetricians and Gynaecologists. Updated March 2021. <https://ranzcoq.edu.au/statements-guidelines/covid-19-statement/covid-19-vaccination-information> (accessed April 2021).
11. *Commonwealth of Australia Constitution Act 1900* (Imp.).
12. *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116; *Kruger v The Commonwealth* (1997) 190 CLR 1.
13. *Australian Capital Television v Commonwealth* (1992) 177 CLR 10
14. *Loiello v Giles* [2020] VSC 722.
15. *Glover v Ozcare* [2021] FWC 231; *Arnold v Goodstart Early Learning* [2020] FWC 6083; *Knight v One Key Resources* [2020] FWC 6083.

Table 1: Public Health Legislation by State and Territory jurisdiction

State/Territory	Relevant Public Health Legislation
Victoria	<i>Public Health and Wellbeing Act 2008 (Vic); Health Services Amendment (Mandatory Vaccination of Healthcare Workers) Act 2020 (Vic)</i>
New South Wales	<i>Public Health Act 2010 (NSW)</i>
Queensland	<i>Public Health Act 2005 (Qld)</i>
Western Australia	<i>Public Health Act 2016 (WA)</i>
South Australia	<i>South Australian Public Health Act 2011 (SA)</i>
Tasmania	<i>Public Health Act 1997 (Tas)</i>
Northern Territory	<i>Public and Environmental Health Act 2011 (NT)</i>
Australian Capital Territory	<i>Public Health Act 1997 (ACT)</i>

Table 2: Human Rights Legislation by State and Territory jurisdiction

State/Territory	Relevant Human Rights Legislation
Victoria	<i>Charter of Human Rights & Responsibilities 2006 (Vic)</i>
Queensland	<i>Queensland Human Rights Act 2019 (Qld)</i>
Australian Capital Territory	<i>Human Rights Act 2004 (ACT)</i>