

Medico-legal considerations of mandatory COVID-19 vaccination for high risk workers

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

A multipronged strategy of education, and financial and social incentives has contributed to Australia's historically widespread uptake of vaccines. Mandatory vaccination, however, constitutes a greater degree of government direction than customary policies. It is therefore worthy of discussion in the context of the advent of effective vaccines against severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which causes coronavirus disease 2019 (COVID-19), a disease of substantial morbidity and mortality.

SARS-CoV-2 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 health care 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 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, which legislate independently. Consequently, there is variation at a state and territory level with respect to whether vaccinations can be mandated by public health legislation.

State and territory legislation

The relevant public health legislation in each state and territory is summarised in [Box 1](#).

In Victoria, section 117 of the *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 (Mandatory Vaccination of Healthcare Workers) Act 2020* (Vic) inserted a provision into the *Health Services Act* directing health services to require people employed or engaged by them to be vaccinated against or prove immunity to specified diseases. If COVID-19 were to be included by amendment as a "specified disease", the Act would preclude a discrimination claim.¹

In Western Australia, section 184 of the *Public Health Act 2016* (WA) 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

Section 51 of the *Biosecurity Act 2015* (Cth) allows for Health Ministerial determinations specifying a number of biosecurity measures to be taken by specified classes of people, 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 practices could be extended to mandatory vaccination is unclear and potentially subject to challenge.³

Under section 91 of the *Biosecurity Act*, 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. While 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 Protection Principal 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 Australian 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 reasons

Valid medical exemptions to childhood vaccinations allowing continued access to family tax benefits 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.

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1 Key public health legislation by jurisdiction

Jurisdiction	Key public health legislation
Victoria	<i>Public Health and Wellbeing Act 2008</i> <i>Health Services Amendment (Mandatory Vaccination of Healthcare Workers) Act 2020</i>
New South Wales	<i>Public Health Act 2010</i>
Queensland	<i>Public Health Act 2005</i>
Western Australia	<i>Public Health Act 2016</i>
South Australia	<i>South Australian Public Health Act 2011</i>
Tasmania	<i>Public Health Act 1997</i>
Northern Territory	<i>Public and Environmental Health Act 2011</i>
Australian Capital Territory	<i>Public Health Act 1997</i>

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 SARS-CoV-2 infection; however, there is limited safety and efficacy data currently available about vaccination in this cohort.⁹

Pregnant women are at potentially increased risk of complications from SARS-CoV-2 infection. The Royal Australian and New Zealand College of Obstetricians and Gynaecologists has recommended against routine vaccination, acknowledging the low prevalence of COVID-19 in Australia and limited safety and efficacy data in this cohort. It has recommended that pregnant workers at risk of SARS-CoV-2 exposure should be allocated to low risk duties, with vaccination offered where this is unfeasible.¹⁰

Personal, religious or political beliefs

While 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 has consistently interpreted the wording of this provision narrowly. In *Krygger v Williams*, it was held that a person could not legally exempt themselves from compulsory military training for service on religious grounds.¹² In *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth*, the High Court 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".¹³ It noted that freedom of religion could be subject to restrictions necessary for the preservation of the community in *Kruger v*

The Commonwealth.¹⁴ In *Kruger v The Commonwealth*, a majority of High Court judges emphasised that 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.¹⁵ While this may protect expression of antivaccination 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 [Box 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 health care workers, it could be argued that the policy is the least restrictive method of achieving a public health outcome, and is thus compatible with the human rights instrument. A night-time curfew in Victoria was found by the Supreme Court not to contravene the Human Rights Charter.¹⁶

Consequences of non-vaccination for employees and employers

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 SARS-CoV-2 infection, the degree of harm that might result from infection, and the availability, suitability and cost of ways of minimising risk of infection. There have been a number of recent Fair Work Commission 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 valid medical reason.¹⁷⁻¹⁹ In *Arnold v Goodstart Early Learning*, the Commission commented that a mandatory influenza vaccination policy was prime facie necessary to satisfy a childcare centre's duty of care with respect to children in its care. The applicant

2 Human rights legislation by jurisdiction

Jurisdiction	Relevant human rights legislation
Victoria	Charter of Human Rights and Responsibilities 2006
Queensland	<i>Queensland Human Rights Act 2019</i>
Australian Capital Territory	<i>Human Rights Act 2004</i>

had religious reasons for refusing vaccination. The Commission commented that it was “arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction”.¹⁸ In *Barber v Goodstart Early Learning*, an employee’s termination for refusing influenza vaccination because of a purportedly “sensitive immune system” was not substantiated, and the dismissal was found to be lawful.²⁰

Conclusion

Australian employers of high risk workers (such as health care workers) could mandate COVID-19 vaccination. 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 among states and territories, compulsory vaccination is allowed for in Victoria and WA 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.

Acknowledgements: We thank Alexandra Stewart (Department of Infectious Diseases, Western Health, Melbourne) for assistance with the review of this article.

Competing interests: No relevant disclosures.

Provenance: Not commissioned; externally peer reviewed. ■

The unedited version of this article was published as a preprint on mja.com.au on 22 April 2021.

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- 14 *Kruger v Commonwealth* [1997] HCA 27.
- 15 *Australian Capital Television v Commonwealth* [1992] HCA 45.
- 16 *Loiello v Giles* [2020] VSC 722.
- 17 *Glover v Ozcare* [2021] FWC 231
- 18 *Arnold v Goodstart Early Learning* [2020] FWC 6083
- 19 *Knight v One Key Resources* [2020] FWC 3324.
- 20 *Barber v Goodstart Early Learning* [2021] FWC 2156. ■