



Clinical Health Emergency Coordination Centre
Via email: CHECC@act.gov.au

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Mandatory COVID-19 vaccination for workers in health care settings

Thank you for the opportunity to provide feedback on the proposed terms of measures to introduce mandatory requirements for health care workers to be fully vaccinated against COVID-19 in order to be permitted to attend work. We understand that – similar to the mandatory vaccination requirements that were recently introduced for aged care workers – these requirements will be implemented by way of a public health direction issued by the Chief Health Officer (CHO). The Commission has several concerns with this approach, as well as with the proposed terms of the mandate, which are set out below.

Human rights implications

The Commission accepts that health care settings are particularly vulnerable to COVID-19 outbreaks and that vaccination of health care workers can reduce the risk of onward transmission of COVID-19 to patients, other workers in health care settings and the wider community. Having regard to those facts, we acknowledge that the proposed measures are undoubtedly aimed at legitimate objectives.

We note that the proposals do not mandate vaccination in the sense of authorising vaccination to be forcibly administered on health care workers or by making it an offence for health care workers to be unvaccinated, however, their mandatory effect arises because by making proof of vaccination (subject to limited exceptions) a condition of employment, many health care workers would effectively have no choice but to get vaccinated.

By their nature, vaccination mandates are likely to involve restrictions on a range of rights which are guaranteed in the *Human Rights Act 2004* (HR Act), including the right to equality and non-discrimination (s 8), the right not to be subjected to medical treatment without free consent (s 10(2)), the right to privacy and personal autonomy (s 12), the right to freedom of thought, conscience, religion and belief (s 14), and the right to work and rights in work (s 27B). Like all interferences with human rights, vaccination mandates must therefore conform to the strict test of reasonableness, necessity and proportionality in accordance with the requirements of s 28 of the HR Act, which requires limits to be:

- (a) set by laws, and
- (b) demonstrably justified in a free and democratic society.

In this respect, a recent decision of the European Court of Human Rights in *Vavříčka v Czech Republic* (Applications nos. 47621/13 and 5 others, Judgment of 8 April 2021) may be relevant. The court found that mandatory vaccination in a childcare setting was a reasonable limitation on human rights, but in the context of several safeguards that may not be present under existing ACT law. The court's assessment took account of various factors, including:

- the vaccination requirement had a specific basis in primary legislation (applied in conjunction with secondary legislation);

- the existence of a pressing social need and relevant and sufficient reasons necessitating the interference (noting that states have a positive obligation to take appropriate measures to protect the life and health of those within their jurisdiction); and
- the proportionality of the interference with the legitimate aim pursued, including:
 - the existence of exemptions for reasons of medical contraindications or conscience,
 - the availability of compensation for health injuries resulting from vaccination,
 - the severity of sanctions imposed on those who refuse vaccination, and
 - the availability of administrative appeals and judicial remedies for those who wish to contest sanctions.

While *Vavříčka* concerned the ‘standard and routine vaccination of *children* against diseases that are *well known to medical science*’ (para 158, emphasis added), we consider that the court’s analysis provides useful guidance for assessing the compatibility of COVID-19 vaccination mandates with human rights.

(a) “Set by laws”

The requirement for limitations on rights to be “set by laws” means that the relevant law must (i) be sufficiently precise and foreseeable, (ii) protect against arbitrariness, consistent with the rule of law, and (iii) provide a reasonable indication of the scope of any discretion, having regard to its legitimate aims.

While s 120 of the *Public Health Act 1997* provides the CHO with broad powers to make directions that the CHO considers to be “necessary or desirable to alleviate the emergency”, we are concerned that s 120 does not confer clear statutory authority for directing a class of persons to be vaccinated. In our view, these words are too vague to empower the CHO to impose a vaccination condition on employees by means of a public health direction. Vaccination mandates are a form of involuntary medical treatment, and s 120 amounts to an imprecise source of power for their imposition, not only because vaccination mandates (or medical treatment) are not explicitly mentioned, but also because the provision allows for a broad margin of administrative discretion at the point of implementation.

We consider that, in order to comply with the HR Act, measures involving rights limitations of such a significant nature must be based on clear and explicit powers set out in primary legislation to ensure that they are subject to proper scrutiny and accompanied by robust safeguards.

(b) “Demonstrably justified in a free and democratic society”

The HR Act permits rights to be limited where the limitation is reasonable, necessary and proportionate to the objective being sought (s 28). In short, to meet the requirements of s 28 of the HR Act, a limitation must be (i) necessary to achieve a legitimate objective, and (ii) be reasonably and proportionately connected to that objective.

(i) Necessity

As stated above, the Commission accepts that the proposed vaccination mandate for health care workers is aimed at legitimate public health objectives. However, we consider that further information is required with respect to the necessity of such a mandate, noting that up to 98% of Canberrans over 12 years old have already received their first dose as of 11 October 2021, with 70% being fully vaccinated.

Ideally, prior to considering any vaccination mandates, a minimum target for vaccination to be reached in the community for COVID-19 should be identified and such a target should be attempted to be reached through voluntary immunisation. Whether a vaccination mandate for health care workers satisfies the criteria of necessity may depend on whether voluntary uptake has been attempted and not achieved its

purpose. The requirement should also be subject to regular and transparent review based on new evidence as it emerges.

(ii) Proportionality

Of importance to an assessment of the proportionality of a rights limitation is whether there are safeguards against overreach, including whether there are procedures for monitoring the operation and impact of the measures, and avenues by which a person may seek review of an adverse impact. A proportionate approach to a vaccination mandate for health care workers would, in our view, require:

- Appropriate legislative exemptions: We consider that exemptions should be provided not just for individuals who are unable for medical reasons to be vaccinated, or for whom a COVID-19 vaccination is not reasonably available, but should also be made available, where possible, for other legitimate reasons, such as religion or other conscientious objection grounds. Individuals who have a conscientious objection to COVID-19 vaccines should not be automatically excluded in the first instance but only as a measure of last resort after steps have been taken to ensure improved access and education (including, for example, by requiring a person who objects to vaccination to sign an “informed declination form”). Exemptions for conscientious objection reasons should only be denied if the voluntary vaccination uptake has fallen short of the coverage rates being sought, and/or where other risk mitigation measures are insufficient to manage the risks to public health.
- Right of review: We consider that express provision should be made for a person to seek independent merits review of exemption decisions.
- Operational guidance/policies: We consider that health care facilities should be required to develop and publish comprehensive guidance on how they will deal with unvaccinated staff, including ensuring that any process followed is non-discriminatory and whether reasonable adjustments have been considered for employees with a disability.

Conclusion

Given the significant rights implications of these proposals, we consider that it will be imperative for the public health direction introducing these measures to be accompanied by a detailed statement of compatibility addressing its consistency with human rights. The human rights statement should address the following matters:

- Whether and how the legality requirement in s 28 of the HR Act has been met;
- Whether the vaccination mandate is supported by evidence and an ongoing monitoring process to assess the correctness of the assumption that the measure will contribute to achieving its goal; and
- Whether the limitations on rights are accompanied by adequate human rights safeguards (including whether compensation is available for vaccination-related injuries, noting that there is no right to seek compensation under the *Public Health Act 1997* for COVID-19 related damages); and a reasoned (and evidence-supported) explanation of why a less restrictive alternative would not be available.

We note that the government bears the onus of demonstrating that a restriction on human rights is justifiable. We have consistently emphasised that mere assertions that restrictions imposed by public health directions are rational, reasonable and proportionate, without further explanation or support, will generally be insufficient to discharge that onus. We note that in many cases it will be necessary for government to provide empirical or other evidence to justify a conclusion that a limitation of a right is permissible.

We would welcome the opportunity to discuss these matters further with you.

Yours sincerely,



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