

Volunteering ACT

Mandatory COVID-19 vaccinations

Alison Baker and Iona Goodwin

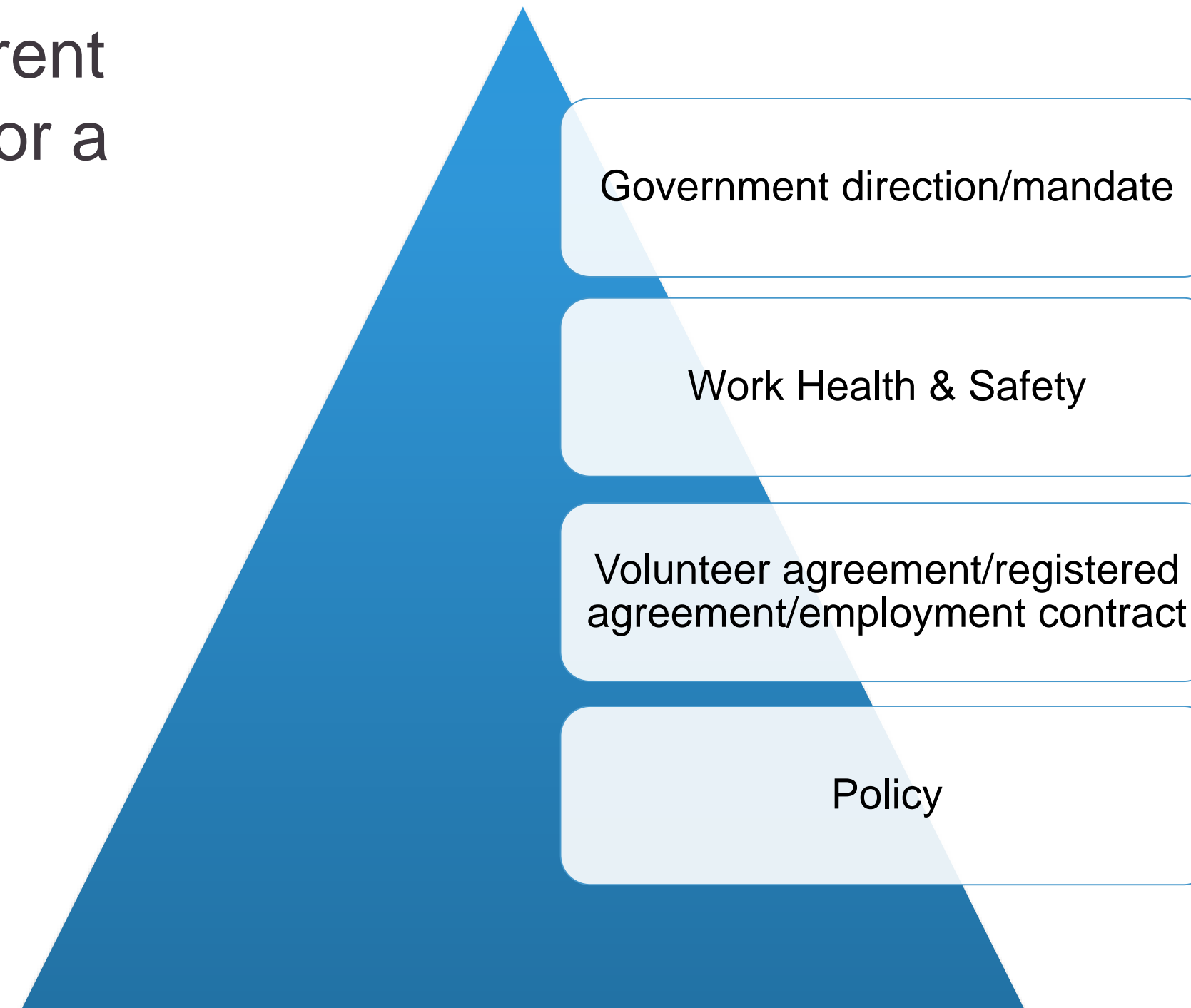
December 2021



Requiring an employee to be vaccinated

Q: Can I require my workers/employees to be vaccinated against COVID-19 in order to work?

A: Is vaccination an inherent requirement of their role or a lawful & reasonable direction?



Work Health & Safety

All WHS / OHS laws contain a duty to workers:

to eliminate, or if this is not possible, minimise the risks of exposure to COVID-19 so far as is reasonably practicable

Factors pertaining to whether an act is *Reasonably Practicable*:

- a) the likelihood;
- b) the degree of harm;
- c) what the employer knows (or ought reasonably to know) about the risk, and how to reduce it;
- d) the availability and suitability of measures; and
- e) the cost associated, including whether the cost is grossly disproportionate to the risk.

Lawful and reasonable directions

Environmental Factors

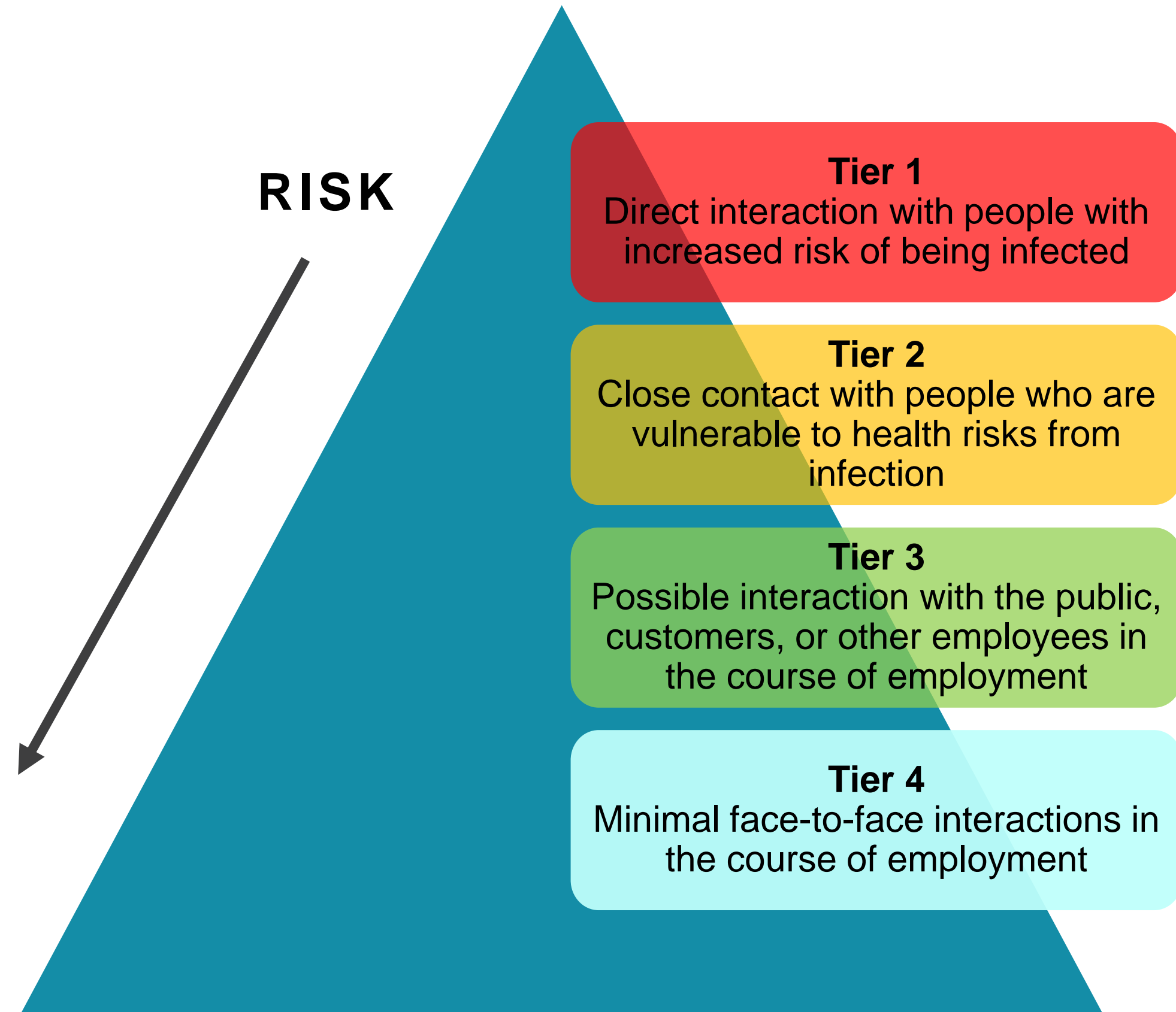
- Government mandates and recommendations
- Health and safety of workers and those attending the workplace
- Nature of the workplace – interaction with the public and interaction with vulnerable individuals (eg children or the elderly)
- Extent of community transmission of COVID-19 and risk of transmission among workers, third parties (including customers, clients, contractors) and the community
- Use of, and ability to implement, other control measures and their effectiveness including:
 - Social distancing
 - Masks, sanitisation
 - Testing (regular testing, rapid and non-rapid testing)
 - Contact tracing
- Vaccine availability and effectiveness



Worker Factors

- Each worker's particular circumstances, including duties and risks associated with their work
- If a worker has a particular vulnerability to serious harm or injury from COVID-19 exposure
- Whether a worker has a legitimate reason for not being vaccinated (eg medical reason)

Fair Work Ombudsman: Guidance from the Tiers



Mandatory vaccinations in the ACT

Australian Capital Territory

residential aged care facility workers

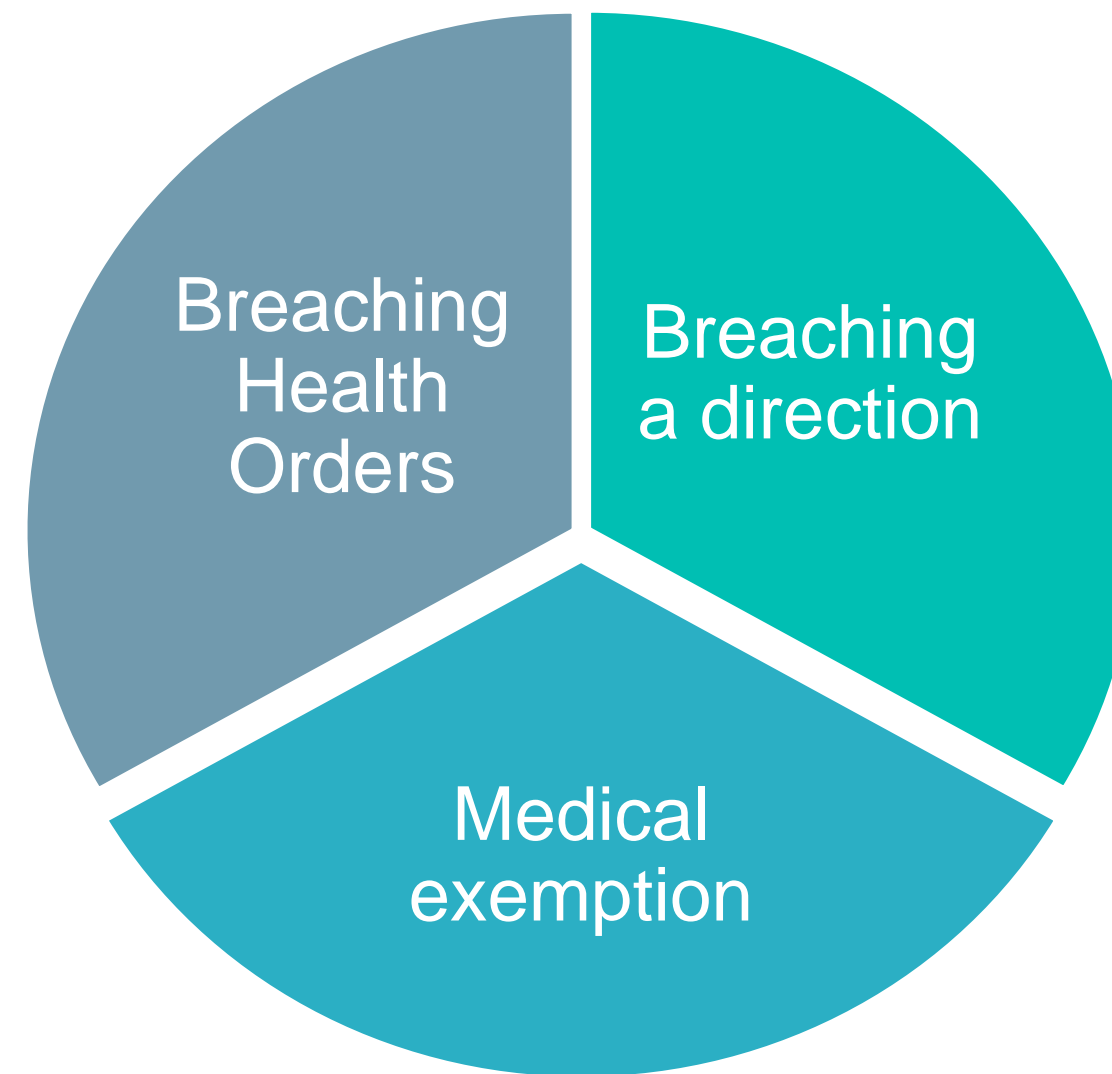
health care facility workers

workers in school or early childhood education and care facilities

disability workers

in-home and community aged care workers

Managing refusals to be vaccinated



Discrimination considerations

Indirect discrimination occurs when there is an unreasonable rule or policy that is the same for everyone else but has an unfair effect on people who share a particular attribute

Factors

- a) the **nature** of the **proposed policies** or **decisions** made as a result of an employee's vaccination status;
- b) the employer's **obligations** under relevant **WHS laws**;
- c) the **risk presented** by **COVID-19** in the locations where the employer operates;
- d) the **existence** of any **alternative methods** of achieving the purpose of the rule or policy which **avoids discrimination**; and
- e) whether the employee is able to perform the **inherent duties of their role** without complying with the rule or policy.

Protected Attributes:

- Accommodation status
- **Age**
- Breastfeeding
- **Disability**
- Employment status
- Gender identify
- Genetic information
- Immigration status
- Industrial activity
- Irrelevant criminal record
- Parent, family, carer or kinship responsibilities
- Physical features
- Political conviction
- **Pregnancy**
- Profession, trade, occupation or calling
- Race
- Record of a person's sex having been altered under the *Births, Deaths and Marriages Registrations Act 1997*
- Relationship status
- **Religious conviction**
- Sex
- Sex characteristics
- Sexuality
- Subject to domestic or family violence

Fair Work Commission – Flu Vaccination guidance

Case name	Key factors:	The Commission's decision:
<i>Barber v Goodstart Early Learning</i> [2021] FWC 2156 (20 April 2021)	<ul style="list-style-type: none"> • Goodstart operated in the childcare industry. • Ms Barber stated that she had a medical condition which made her exempt and had a prior adverse reaction to the vaccine. Goodstart argued medical evidence didn't support the contraindication. • Ms Barber's employment was terminated on the basis that she was unable to fulfil the inherent requirements of her role. 	<ul style="list-style-type: none"> • Vaccination did not constitute an inherent requirement of Barber's role. • Goodstart's policy was lawful and reasonable and Barber was required to comply with that policy.
<i>Kimber v Sapphire Coast Community Aged Care Ltd</i> [2021] FWC 1818 (29 April 2021)	<ul style="list-style-type: none"> • Sapphire operated in the aged care industry. • Ms Kimber claimed that she had a prior allergic reaction to the vaccination. • Sapphire rejected this contraindication on medical evidence and the advice regarding contraindications set out by the Chief Medical Officer. • Sapphire also claimed she failed to comply with lawful & reasonable direction to be vaccinated. • Ms Kimber was stood down and later dismissed. 	<ul style="list-style-type: none"> • The Commission found that Ms Kimber's dismissal was not harsh, unjust or unreasonable. Ms Kimber was not able to meet the inherent requirements of her role. • Commission found that no lawful & reasonable direction was actually given. However, had Sapphire given a direction it would have been lawful & reasonable.
<i>Glover v Ozcare</i> [2021] FWC 2989 (26 May 2021)	<ul style="list-style-type: none"> • Ozcare operated in the aged care/home care industry. • Ms Glover worked in home care – not aged care. • Ms Glover refused to get the vaccination on the basis of an anaphylactic reaction to the vaccination she experienced as a child. • Ms Glover was unable to accept further shifts with Ozcare and commenced proceedings with the Commission. 	<ul style="list-style-type: none"> • Public health direction did not apply to Glover's role (as it applied only to aged care). • Ozcare's mandatory vaccination policy was more onerous than public health directions, but it was a lawful and reasonable direction to require client-facing employees to be vaccinated.

Introducing a vaccination policy

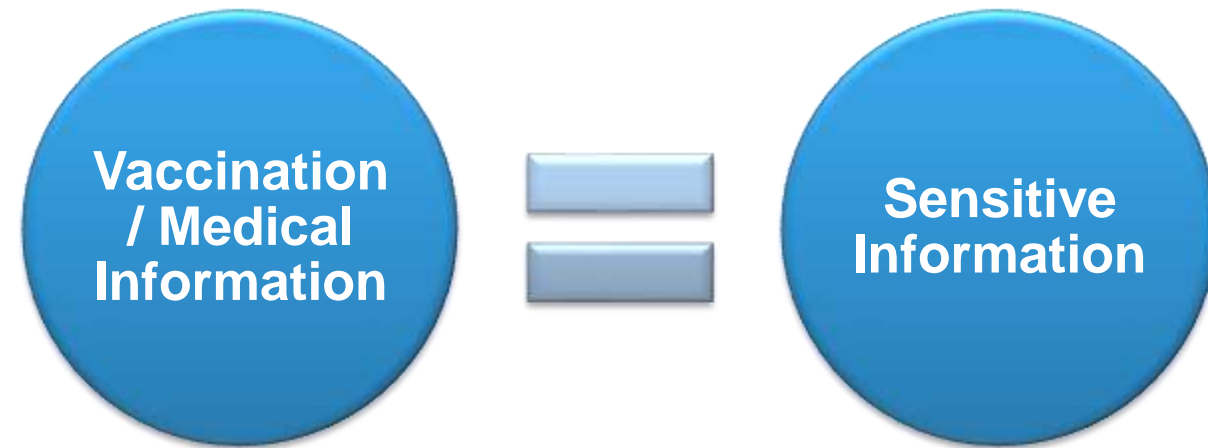
Workplace Risk Assessment – Mandatory vaccination or not?

Mandatory Vaccination Policy	General Vaccination Policy
Source of requirement (public health order or rationale)	Strong recommendation to be vaccinated (clear preferred position of the organisation)
Who is required to be vaccinated (whole organisation vs segments)	Additional control measures (PPE; distancing; sanitation)
Timeframes for first and second doses	Imposing testing requirements
Evidence of vaccination & privacy considerations	Altered working arrangements (eg internal redeployments; working from home arrangements)
Exemptions from vaccination (including evidence requirements)	Offering paid vaccination leave
Accommodation of vaccinations during work time, including leave allowances	Encouraging vaccination through incentives, in line with <i>Therapeutic Goods Administration</i>
Consistency with other organisational policies	
Consequences for policy breach, disciplinary processes	

Consult with employees and their representatives

Privacy considerations

Privacy Act 1988 (Cth) and Sensitive Information



Vaccination and medical status is **Sensitive Information**, which must be dealt with carefully.

Obligation	APP
Transparency and openness; privacy policies	APP 1
Obtain full, informed consent	APP 3
Notify of certain matters	APP 5
Use for primary purpose	APP 6
Take reasonable steps to ensure security	APP 11



Australian Government
Office of the Australian
Information Commissioner

Who is covered?

- Annual turnover of + \$3 million
- Australian government entities
- Certain small businesses (eg private sector health, information brokers, employee associations)
- Entities that have opted-in

Employee records exception:

- Section 7B(3)
- Applies once information has entered organisation
- **Excludes collection**
- Applies to current and former employees → not contractors!
- Must relate to employment: *'absolute, exact or precise connection'*

Questions

1. Can organisations mandate vaccines for staff even if there is no official requirement (ie public health order) to do so?
2. What do organisations have to consider when working across borders? What legal requirements should we consider in different jurisdictions?
3. Once a volunteer's vaccination certificate has been sighted by the volunteer manager and recorded as valid, does the volunteer need to produce the certificate again on every shift?
4. Does the vaccination certificate have an expiry date?
5. At what age do employers need to ask permission from a guardian to request vaccination status?

Questions

1. Do vaccine policies and procedures need to be explicit about boosters?
2. If a volunteer has been asked to provide proof of vaccination status and they refuse, is it legal to terminate their volunteering role with you?
3. What rights do volunteers have if they want to remain with their volunteer organisation, but do not want to be vaccinated? Can they request to move to a different role?
4. What is the right balance between collecting information about people's vaccination status and privacy laws?
 - a) What data are we allowed to capture about people in one-off volunteering circumstances (ie staffing a BBQ)?
 - b) Are groups allowed to ask informal volunteers these questions?

Questions

1. Is the *Human Rights Act 2004* (ACT) applicable to the question of mandatory vaccination and volunteers?
2. If a volunteer chooses not to get vaccinated against COVID-19, are they required to sign a disclaimer form so that an organization is not held responsible for any potential litigation?
3. Are we legally required to know the medical history of a volunteer prior to commencing in the role?

Further questions?





Alison Baker, Partner
Phone +61 3 9603 3568
alison.baker@hallandwilcox.com.au



Iona Goodwin, Special Counsel
Phone +61 3 9603 3576
iona.goodwin@hallandwilcox.com.au

Thank you!