



Online Networking Event for Managers and Coordinators of Volunteers

Date: Thursday 9 December 2021

Time: 10am – 11:30am

Hosted by: Jean Giese (CEO), Cath Cook (Sector Development Manager)
Guest presenters – Alison Baker (Partner, Hall & Wilcox)
- Iona Goodwin (Special Counsel, Hall & Wilcox)

Session Notes:

Introduction/CEO Welcome

- VolunteeringACT has put together this session to assist organisations and members in our network with answers to some of the questions they have been raising over the past few months relating to COVID-19, vaccination mandates and what the rights and responsibilities of both volunteers and the organisations they are involved with are in this context.
- Our guest presenters/speakers today are from Hall and Wilcox Law Firm.
- VolunteeringACT has gathered questions covered today from conversations with a range of organisations and by inviting attendees to submit questions in advance upon registration.
- Today's session will be recorded, to enable organisations to share this information with colleagues along with the Presentation slides.

Hall and Wilcox Presentation

- There is increasing demand for Employment Law advice around this topic, which is likely to continue as the impacts of COVID-19 and new variants continue.
- Organisations need to be mindful of the terminology used around 'Employees', 'Workers' and 'Volunteers' within legislation and their own internal policies and procedures.

Requiring employees/workers to be vaccinated against COVID-19, Vaccine Policies, and Implementation

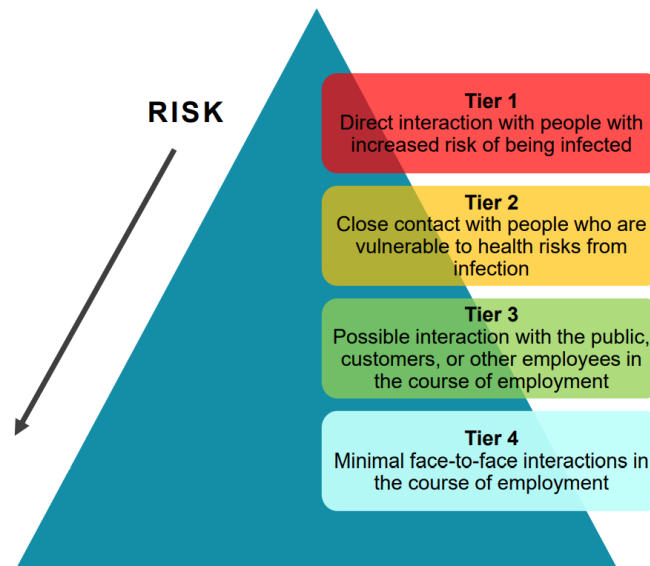
- The decision organisations take on this must focus on what is **lawful** and **reasonable**, what the current Public Health advice is, if there are any Government/legally mandated vaccination requirements for certain roles or settings and compliance with existing Work Health and Safety (WHS) legislation.
- Even if there is currently no mandate in place for your specific workforce, organisations still must consider what they need to do within their settings. Model WHS laws that apply across the country will apply in the ACT. Organisations must consider if mandating vaccinations meets your obligations around minimizing WHS risks as per your industrial agreements, what sort of existing internal processes/documents you have in place etc. and finally consider whether it is worth developing and implementing a specific policy.



- Very few organisations would probably have an existing policy around vaccinations in general – except perhaps in an Aged Care setting around Flu vaccination etc. This area of employment policy is fast evolving and likely to become more important in the future.
- Reminder that ‘workers’ is a broad definition but will cover your volunteers, work experience placements, internships, contractors etc. – these roles are all included in that definition within WHS laws.
- However, even outside your duty to workers, you also have a duty to members of the public who may come onto your work sites. Organisations must also weigh things like the likelihood of infection and risk of spread i.e. is there a current outbreak near to your site, or within a particular cohort you serve that may increase exposure risks?
- Ultimately, these decisions are about the degree of harm and the responsibility organisations have, to minimise risk of transmission and protect the health and wellbeing of their staff and the people they serve.

What is Lawful and Reasonable to Implement?

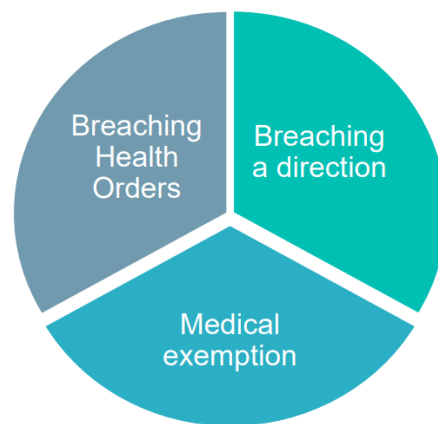
- There may be factors around availability & suitability of vaccine measures – availability is no longer a main issue, but organisations should consider what else they can put in place to protect people – ensuring hand sanitiser is easily available at all sites, encouraging or mandating mask wearing, applying social distancing across workstations and site layouts, allowing more working from home arrangements (where possible/appropriate). These measures may be sufficient for some of your service/activities delivery to keep everyone as safe as is possible, without the need to mandate vaccines.
- Appreciate that there can be costs – hidden or otherwise for organisations to implement this type of policy – especially the admin around keeping records and ensuring compliance etc.
- This is where you must consider what is lawful and what is reasonable within your setting. E.g. who are the people you have contact with? Are you working with vulnerable people who may have an increased level of compromised immunity? Answers to these questions may increase your risks and what you need to manage.
- In the current situation regarding COVID-19 and the implications for its spread, the severity of how it can affect people, and the emergence of new variants it **is lawful** for organisations to be drawing up defined policies around vaccination and mandating them for their workers if they choose to.
- However, when it comes to the practical application and implementation of those directions/policies, you must also consider **what is reasonable**. E.g. what are other/alternative workplace arrangements you can put in place to workers and the public? Are there people to consider who are immunocompromised? Some workers with existing health complications might not be able to be vaccinated if it poses a danger to them, but if other workers can, mandating it for the rest of your workforce is one of the ways you can protect those workers with additional needs etc.
- It is useful to refer to the Fair Work Ombudsman Tier system, introduced a couple of months ago:



- Tier 1 – examples are settings like airports, border control points, direct contact situations where its unavoidable - reasonable.
- Tier 2 – with vulnerable people this is where there would clearly be a higher risk of infection and severe impact on their health due to the virus, settings like aged care, childcare, services for people with disabilities, paramedics etc. – again, reasonable.
- Tier 3 – settings where you may have interactions with members of the public as part of your operations so having everyone vaccinated may be appropriate, but this is where the actual environment you're operating in comes into play more. Where/how are you having contact with people? Is it possible to reduce/eliminate that and still provide your service/activity? What are the changing circumstances you need to consider if COVID-19 is not a direct risk at your site, but if it has been circulating all around them? – less clear cut.
- Tier 4 – as this is very minimal contact, is it reasonable to request people be vaccinated in this type of setting? – it may not be.
- Important to note that when the Tier system was introduced, Australia's borders were closed with the approach of virus suppression. Now borders are opening again, we know the virus will transmit more across the country – that is what changes the risk factors relating to Tier 3 so you must be mindful of this.
- Organisations should regularly review what the advice is and keep track of what is changing, especially directions relating to particular workforces etc.

Managing Vaccines Refusals and appropriate action

- There are 3 main reasons in this context:



- Main thing to consider is if not being vaccinated leads to an inability of the employee to meet the obligations of their role – this may well include volunteer roles.
- It is best practice to consider some alternative arrangements for that worker such as working from home, a temporary or even permanent change of role, perhaps even a change of schedule, if that minimises risk for them etc.
- A worker will be committing an offence if they are in breach of a Public Health Order (PHO) and are doing so willingly and knowingly. In these circumstances, **the offence is on the person, but is also on the organisation too.** In those cases, if no alternative arrangements for that worker exist, and this means they can't fulfil their function and won't follow PHOs they can be considered for suspension, standing aside temporarily, or termination.
- If a worker breaches an organisational vaccine policy where vaccines are not mandated by a PHO, this is where the **lawful** and **reasonable** definitions come in. Before organisations move to terminating that role you should ask what other accommodations can be put in place first?
- A volunteer won't have the same contractual rights as an employee and around unfair dismissal etc. However, if a claim is brought, even with no grounds this will take up resources from your organisation to respond/defend
- Best practice is to consult properly on any policy or organisational direction before it is even developed, then implement your policies and procedures around vaccines and worker expectations as fairly and transparently as possible. Ensure workers with concerns have a genuine opportunity to raise and discuss these confidentially, that everything is documented, and that you have checked and confirmed understanding at regular intervals.

Medical Exemptions

- The situation regarding medical exemptions is more complex. This will impact on whether a direction is lawful and reasonable and is where there is an overlay of discrimination law as well. These situations are where it is critical for organisations to confirm there is a genuine medical condition requiring exemption and where you must show consideration of workplace alternatives or adjustments.



- The digital certificate will show if they are an exempted person. If the exemption is NOT legitimate – refer to the previous advice. If they are genuinely medically exempt – you must consider mitigation strategies, including things like the balance of risk regarding the rest of your workforce, the role the person is doing, who they have contact with etc.
- In some work settings where there may be high risk exposure it may not be possible to accommodate adjustments or alternative roles/duties – in those circumstances you should seek legal advice on an individual case basis.

Discrimination Considerations

- This is very important as in the ACT the definition of ‘employment’ does include paid and unpaid workers, and this does cover volunteers – they do have access to the provisions of the ACT Discrimination Act.
- Be aware of indirect as well as direct discrimination. There are protected attributes drawn from the ACT legislation etc. The decisions you take around vaccines may be discriminatory as it has an unfair impact, but they may not be **unlawful**. In those circumstances, an employer would need to show that the rule/policy to get vaccinated was **reasonable**.
- Any proposed policies/decisions to be made around vaccination must fulfil employer obligations under relevant WHS laws. Some protected attributes such as age, religion, pregnancy, disability etc. may impact on an employee’s ability to receive a vaccine, but some might not be relevant in the context of COVID-19.
- There is minimal case law relating to these employment issues and we have not yet seen any case law relating to terminating employment due to refusal of COVID-19 vaccination. There is case law on situations where employers did not consult properly with employees/workers before mandating a vaccine policy etc.
- In NSW there have been some court challenges e.g., recent cases involving childcare employers mandating flu vaccines where employees have refused. These cases have considered the actions of the employer lawful/reasonable, and indications so far are that in certain industries where there are higher risks, employers are in a good position regarding challenges to vaccine mandates.
- Sometimes an organisation’s policies may set a ‘higher bar’ than the actual PHO directions – this can still be found as lawful and appropriate. The Fair Work Commission can factor things in like the likelihood of infection controls, whether those employees would be super spreaders etc.
- The policy you put in place for your organisation should:
 - Reflect your workplace risk assessment and what is reasonable for your work setting
 - Identify the source of the requirement to mandate vaccines e.g., employer’s decision to implement or an actual PHO – this is important to frame
 - Who is required to get the jab (show you’ve taken into account people’s roles and whether it is actually necessary for all positions or just some etc.)
 - Cover medical exemptions and what other arrangements may need to be in place regarding this



- Address the timeframes required, including the gap needed between vaccine shots and boosters and any timeframes that can often apply when mandates for different workforces are introduced one after the other etc.
 - Align with other organisational policies/procedures and not leave any gaps
 - Outline what information to prove vaccination status/exemptions will be collected and how this will be protected
 - Specify what the consequences are for breaching the rules
- An alternative approach to mandating vaccines and having a specific policy is to strongly encourage and promote the benefits of vaccination. Organisations can make your own decisions about hygiene, PPE, alternative/adjusted working arrangements such as rotating shifts, working from home etc. and if you want to offer ½ a day paid leave to go and get vaccinated.

Vaccine Information and Privacy/Storage

- The evidence you gather and store on employees' vaccination status and any medical exemptions should be balanced with privacy rules.
- The Privacy Act 1988 is a Commonwealth Act and sets out 13 Australian Privacy Principles (APPs) – a breach of an APP can result in regulatory action/fines. This Act usually applies to organisations over \$3m turnover but there are exceptions to this. For example, a small organisation with turnover under \$3m providing a health service and holding health information will NOT be exempt from the Act regardless of the threshold.
- Even if your organisation is not covered by the Privacy Act, we recommend that you consider these factors. The Act applies to personal information collected and used by organisations – vaccination status and medical information is a special category where extra care is required because the information is sensitive.
- Office of Australian Info Commission states best practice is that employers should respect the information of their employees.
- Organisations should only collect information that is genuinely needed and then this information should be locked down so that only those who need to see it can. IT firewalls, virus protection, password protected files, or measures such as multi-authentication access are helpful if you have those options.

Cross Border Considerations

- If organisations are also operating outside of the ACT across other jurisdictions – the relevant State/Territory Public Health Orders (PHOs) are the first place to get your information from regarding the most up to date advice on mandated vaccines for difference workforces etc.



Other Issues - Vaccine Policy Considerations and Implementation/Compliance

- Regarding vaccine policies and procedures, the situation with boosters and where these fit in is a little fluid in terms of timeframes for vaccinations and boosters depending on where you are in the country and what demographic or cohort people fall into.
- Recommendation is that vaccination policies contain general clauses to cover this- e.g., *the organisation reserves the right to require a person to have further COVID-1 vaccinations such as booster shots in line with Public Health advice and Government orders.*
- If a volunteer has been asked to provide proof of vaccination status where the organisation has mandated vaccines and refuses, there are grounds to end their volunteering arrangement with you. Note – volunteers are not covered by the Fair Work Act. However, as outlined in the above sections, best practice would be to try to work with that volunteer to explore alternative options for them, if they wish to remain with your organisation before considering termination.
- If a volunteer refuses to be vaccinated on medical grounds, refer to advice above around discrimination and potential adjustments, but note that **organisations only have to do what is 'reasonable' – rights to implement adjustments are not absolute.**
- There is no need to check a person's vaccination certificate at the start of every shift. Just review occasionally to ensure it's up to date and remains in line with any changing requirements around appropriate proof etc.
- In Australia, vaccine certificates don't currently have expiry dates. However, this may change with the arrival of more widespread booster shots, so for the time being it's a 'watch this space' issue. In parts of Europe, some countries are introducing expiry dates so there may be learnings from overseas implementation first before this is brought in for Australia.

At what age do employers need to ask for permission from a guardian to request vaccination status?

- If you have anyone working for you under 18, whether they can give their permission is more about maturity, capacity, and decision-making ability of that individual, and if they are giving proper consent.
- Alternatively, as a rule, you can assume that anyone over the age of 15 can give their permission. If there is anyone aged between 15-18 you are honestly not sure about, in those circumstances best practice would be to approach their parent/guardian.

If a volunteer chooses not to get vaccinated against COVID-19, are they required to sign a disclaimer form so that an organisation is not held responsible for any potential litigation?

- No – you cannot do this.

Are we legally required to know the medical history of a volunteer prior to commencing in the role?

- No – you are not legally required to know this.



Is the Human Rights ACT 2004 (ACT) applicable to the question of mandatory vaccination and volunteers?

- The Human Right Act applies to public authorities. There are very limited circumstances for private and voluntary organisations, but best practice is to keep the following core principles in mind when developing and implementing vaccine policies and procedures:
 - Is it necessary?
 - Is it proportionate?
 - Is it transparent?
 - Does the restriction being imposed protect the human worth and dignity of the communities most at risk?
 - How will you communicate effectively with workers on an ongoing basis?

Other Questions Outside of COVID-19 and Vaccination Issues

Working With Vulnerable People information – what information can we ask for/keep?

- This is an ACT specific process but if your volunteers are required to have those checks for their role, you are allowed to keep that info and maintain it, i.e. check for when their registrations expire etc.

Termination of volunteers? What are their rights around terminating agreements and investigating misconduct?

- There are a couple of initial questions you should go through when considering termination of a volunteer:
 - Are they clearly defined as a volunteer and can't be interpreted as a different type of employee within your organisation who may be entitled to different provisions/protections?
 - Has the relationship with the person and their volunteer changed over time - do they see themselves as an employee with stronger rights etc?
 - The above situations can often arise when a volunteer has been involved with an organisation for a long period of time, they may have been recruited by a person who is no longer at the organisation, if paperwork is patchy or missing, you need to be careful in checking what the person's actual role is, and what agreements may be in place between your organisation and them.
- If they are a true volunteer, check the language of the document that sets out what has been agreed with them. Some organisations use the term 'Volunteering Agreement', but it is better to use the language of an 'Arrangement' as this language is less likely to blur boundaries regarding the different types of workers an organisation has.
- In theory, you should be able to end a volunteer arrangement if someone has engaged in misconduct. Most organisations usually request a volunteer to sign up to a Code of Conduct before commencing their role and if the volunteer breaches any of that code, you can hold them



accountable to it. You should properly document the process and ensure transparent communication with the volunteer throughout.

- If in doubt and you feel the situation is complex, seek legal advice.

Further Resources

[Slide deck accompanying this session](#)

[Coronavirus and Australian workplace laws - Fair Work Ombudsman](#)

[COVID-19 vaccinations and the workplace - Fair Work Ombudsman](#)

[COVID-19 and human rights: information and resources - ACT Human Rights Commission](#)

[The Privacy Act - Home \(oaic.gov.au\)](#)

[National Volunteer Guide \(Part 2\) \(nfplaw.org.au\)](#)

Guidance on difference between Employee, Contractor or Volunteer.