6 October 2021

The Premier Mr Daniel Andrews (Victoria)
Email: daniel.andrews@parliament.vic.gov.au

The Chief Health Officer Professor Brett Sutton (Victoria)
Email: officeofcho@health.vic.gov.au

Dear Mr Andrews and Dr Sutton,

**For Your Urgent Attention: Vaccination of Authorised Workers**

My name is NAME. I am the DIRECTOR/MANAGER/SUPERVISOR/CEO of COMPANY NAME. I have been in this position for X YEARS. There are X NUMBER of employees who work for my company, and who rely on it to make a living.

I write to you in the aftermath of your Media Release dated 1 October 2021 (**the Media Release**), which states that:

On the advice of our public health team, all workers – in Melbourne and regional Victoria – on the Authorised Worker list will require their first Covid-19 vaccine dose by Friday, 15 October in order to continue working onsite. They will need to be fully vaccinated by 26 November.

(**the Vaccination Requirement**)

The purpose of this letter is to give you insight into the position you have put me in. Your Media Release, albeit indirectly, forces me to implement your policy for you. This is not the job of employers in general, particularly in circumstances where the policy you want me to implement is in breach of several other laws, including the Public Health and Wellbeing Act 2008 (Vic) itself (**the PHW Act**).

1. **You are asking me to implement your unlawful policy**

*The State of Emergency*

On 16 March 2020, the Minister for Health declared a state of emergency throughout the state of Victoria under s198(1) of the PHW Act.

S198(7)(c) of the PHW Act notes that a Declaration of a state of emergency “may be extended by another declaration for further periods not exceeding 4 weeks but the total period that the declaration continues in force cannot exceed 6 months or, in the case of the emergency declaration in respect of the COVID-19 pandemic, 21 months”.[[1]](#footnote-1)

Since the initial declaration of a state of emergency on 16 March 2020, the Minister for Health has consistently extended the declaration on a monthly basis, up to and including the most recent extension which took effect on 23 September 2021 and which remains in force until 21 October 2021.[[2]](#footnote-2)

The effect of this is that the current declaration of a state of emergency is due to expire on 21 October 2021. On that date, the Minister for Health could theoretically extend the declaration again, as he has done many times. However, we note that;

* Extending the state of emergency is not a given, nor is it automatic; and
* The Minister cannot extend the state of emergency indefinitely, given that, as quoted above, s198(7)(c) of the PHW Act sets a maximum total period for a state of emergency in the case of Covid-19 of 21 months, being 16 December 2021.

On the same day the Media Release was issued, being 1 October 2021, Professor Benjamin Cowie, Acting Chief Health Officer also issued the *Covid-19 Mandatory Vaccination Directions (No 5)* instrument (**the Mandatory Vaccination Direction**). Like prior directions before it, the Mandatory Vaccination Direction is stated to be issued pursuant to s200(1)(d) of the PHW Act.

The Mandatory Vaccination Direction imposes “obligations upon operators of specified facilities in relation to the vaccination of workers”.[[3]](#footnote-3) Specifically, the Mandatory Vaccination Direction applies to operators of residential aged care facilities, construction sites, healthcare facilities and education facilities.[[4]](#footnote-4) It does not, in conflict with the Media Release, mandate vaccination for all authorised workers. The Mandatory Vaccination Direction commenced at 11.59PM on 1 October 2021 and ends at 11.59PM on 21 October 2021.[[5]](#footnote-5)

*The Media Release is not law and the Mandatory Vaccination Direction denies Procedural Fairness and Natural Justice*

The Media Release asks me to direct my staff to receive a vaccine which many of them do not wish to receive. There is no lawful basis for such a direction. As I said above, there is no public health order or direction made under s200 of the PHW Act which mandates vaccination for authorised workers. So, on what basis am I supposed to implement this? Respectfully, a media release is not law.

Secondly, if there *was* a valid direction made under s200 of the PHW Act for operators of residential aged care facilities, construction sites, healthcare facilities and education facilities, the assertion that authorised workers must receive a first vaccine dose by Friday, 15 October “in order to continue working onsite”, and that “they will need to be fully vaccinated by 26 November” implies an assumption that the state of emergency will be extended beyond 21 October. We do not yet know, and cannot yet know, whether this is the case. The most recent extension itself notes that it was made “on the further advice of the Acting Chief Health Officer and after further consultation with the Minister and the Emergency Management Commissioner under the *Emergency Management Act 2013 (Vic)”.[[6]](#footnote-6)* This must occur again before a further extension is applied. Obviously, the pandemic is ever changing and the response must match that change. In particular, restrictive and mandatory measures should only be implemented as a last resort and when absolutely necessary. So, it is unclear how I can recommend or direct my staff to receive a vaccine in order to continue working for me based on a direction which is;

* seemingly made via a Media Release; and/or
* made under the Mandatory Vaccination Direction that appear unenforceable; and
* which requires them to take actions which are beyond the scope of the current state of emergency anyway.

Finally, even if the state of emergency is extended on 21 October, it could not be extended beyond 16 December absent legislative change, which is obviously a matter for Parliament, but which would, if passed, be dramatic and unprecedented. Although you may say that a vaccine mandate is temporary, several of my staff have pointed out to me that the act of receiving a vaccine is not. Once a vaccine is administered, it can never be removed. This puts my staff as well as myself in an impossible position. Some staff may choose to take leave until December until such a power will be unlawful; others may undergo the vaccination due to a lack of leave or an inability to get by without their job in the meantime. All in all, there is an impression in the community that the Victorian Government has issued this Media Release and the Mandatory Vaccination Direction as a means of coercion: to pressure as many people as possible into getting the vaccine before the impending deadlines of 21 October and 16 December. As an employer, I will not participate in said coercion. I am not an accessory to Government policy, particularly when that policy is improperly made and ill-conceived.

**To be clear; I refuse to terminate staff** **who refuse to undergo vaccination, particularly in circumstances where I lack the lawful authority to do so.**

On this note, there are several other issues with the legality of your approach to vaccination.

1. **You are asking me to breach Work Health and Safety law and enterprise agreements**

As an employer, I cannot make sweeping changes to the workplace, or the requirements my employees are subject to, without notice. Any directions I give must also be lawful and reasonable. It is well known that there is “a legal requirement to consult with employees about significant changes in the workplace” and that these “are set out in legislation, awards and enterprise agreements”.[[7]](#footnote-7)

Specifically, in Victoria, s35 of the *Occupational Health and Safety Act 2004 (Vic)* (**the OHSA**) implements a duty for employers to consult with employees who are likely to be directly affected when doing any of the following (which clearly applies to the introduction of a vaccine mandate):[[8]](#footnote-8)

* making decisions about measures to be taken to control risks to health or safety at a workplace;
* making decisions about resolving health or safety issues at a workplace;
* monitoring the health of employees and the conditions of the workplace; and
* proposing changes that may affect the health or safety of employees.

In addition, the OHSA clearly states the form that this consultation must take, which includes:[[9]](#footnote-9)

* “sharing with employees information about the matter on which the employer is required to consult”;
* “giving the employees a reasonable opportunity to express their views about the matter”; and
* “taking into account those views”.

Your Media Release, the Mandatory Vaccination Direction and the assertion within it that authorised workers must be vaccinated in order to continue their work completely ignores these provisions. I am unable to “share information about the matter” with employees when the matter is a medical procedure I am not qualified to share information about. I am unable to give employees a “reasonable opportunity to express their views”, or to “tak[e] into account those views” in circumstances where you have given employers no notice of the Vaccination Requirement, nor have you consulted with us before implementing it. Importantly, you have also not given us an opportunity to consider the alternative measures which the OHSA and regulations actually authorise (vaccination not being one of them) to reduce workplace risk, which we are statutorily obligated to do at risk of significant penalty.

In other words, you are putting us in between a rock and a hard place. You are asking us to choose between:

* telling our staff they must get vaccinated and breaching Victorian Work Health and Safety law as a result;[[10]](#footnote-10) or
* telling our staff they do not need to be vaccinated despite your confusing Media Release which says otherwise.

It is also unclear whether a direction I make for my staff to be vaccinated could be “lawful and reasonable”. The OHSA and the Occupational Health and Safety Regulations 2017 (**the OHSR**) form a comprehensive and exhaustive statutory framework for workplace law in Victoria. The degree of specificity in the OHSR in particular, which has 560 sections and 20 schedules, indicates that they are clearly intended to cover the field. Those legislative instruments clearly delegate to employers several means of mitigating workplace risk. **None of those means contain a requirement for employees to undergo any kind of medical intervention.** The issue of whether an employer can direct an employee to attend a medical examination has been explored quite extensively, and can provide guidance here despite the requirement to undergo a medical intervention being a much more onerous one. In particular, in *Grant v BHP Coal Pty Ltd*,[[11]](#footnote-11) Dowsett, Barker and Rangiah JJ referred to the ‘principle of legality’, exploring its limits with reference to other authorities. They said (with emphasis added:

87. In Starr v National Coal Board [1977] 1 All ER 243, Scarman LJ at 249 described a person’s right to personal liberty as a fundamental right which would be infringed by requiring the person to undergo a medical examination. It is settled that statutory provisions are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect: see, for example, Coco v The Queen (1994) 179 CLR 427 at 437; X7 v Australian Crime Commission (2013) 248 CLR 92 at [21], [86] and [158]. That principle is known as the principle of legality.

The OHSA and OHSR lack such “clear words or necessary implication”, and, as I noted above, there isn’t even a valid public health order or direction which mandates vaccination in my field of work (DELETE OR AMEND IF NOT ACCURATE).

It is unclear to me why you have taken this approach. It seems reckless and ill-thought out, which is surprising given your position. You must know that asserting yourself into the employer/employee relationship as well as the employee/doctor relationship so hurriedly is inconsistent with the state’s legislative frameworks. The lack of any kind of transitional arrangement or consideration as to the consequences of such a Vaccination Requirement is reckless, at least. You are forcing us as employers to breach the laws we have to comply with without any thought or consideration for that. I believe that I have no choice but to say no. In such circumstances, I have the right not to follow what you’re telling me to do.

1. **The PHW Act is being otherwise misused**

As noted above, the Mandatory Vaccination Direction, and other public health orders in Victoria, have been made pursuant to s200(d) of the PHW Act. This is an over simplification and a misuse of the broader public health legislative framework in Victoria, as well as nationally.

*Inconsistency with the Biosecurity Act*

Section 477 of the *Biosecurity Act 2015* (Cth) (**the BSA**) allows the Federal Health Minister to determine emergency requirements during a human biosecurity emergency period. Australia has at all material times been in such a period pursuant to the BSA.

Section 477(1) of the BSA says:

“(1) During a human biosecurity emergency period, the Health Minister may determine any requirement that he or she is satisfied is necessary:

(a) to prevent or control:

(i) the entry of the declaration listed human disease into Australian territory or part of Australian territory; or

(ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory …”

In addition, Section 8 of the BSA provides that:

(1) This Act does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act (except as referred to in subsection (2)).

(2) Subsection (1) is subject to the following provisions:

(c) subsections … 477(5) and 478(4) (biosecurity emergencies and human biosecurity emergencies).”

So, if the (state) PHW Act is incapable of operating concurrently with the (federal) BSA, then the (federal) BSA excludes or limits the operation of the (state) PHW Act.

Second, even if the PHW Act is capable of operating concurrently with the BSA, Subsection 2(c) notes that, in the case of “human biosecurity emergencies” (which the Covid-19 pandemic is), the BSA limits the operation of the PHA anyway.

Either way it is interpreted, the BSA explicitly seeks to limit and exclude the operation of laws of States and Territories which concern human biosecurity emergencies, for the sake of avoiding inconsistency. This makes sense given the comprehensive and exhaustive nature of the BSA.

We also note Section 477(5) of the BSA, which says that:

(5) A requirement determined under subsection (1) applies despite any provision of any other Australian law.

Significantly, s477(6) also says that:

(6) A determination made under subsection (1) must not require an individual to be subject to a biosecurity measure of a kind set out in Subdivision B of Division 3 of Part 3 of Chapter 2.

Note: Subdivision B of Division 3 of Part 3 of Chapter 2 sets out the biosecurity measures that may be included in a human biosecurity control order.”

Overall, the intention of the comprehensive and exhaustive BSA is clearly to cover the field in relation to the management of human biosecurity emergencies. When (as now) Australia is in a human biosecurity emergency period, due to section s8(2), state laws on that subject, even if they are capable of operating concurrently with the Biosecurity Act, are excluded and inoperative.

It is also important to note that in the BSA, emergency requirements are qualified and restricted by the significant fact that biosecurity measures cannot request an individual to be isolated, detained, tested, vaccinated, medically treated or searched (amongst other actions) in the absence of a biosecurity control order issued to the individual. There are several checks and balances which apply to the issuing of such orders, in recognisance of their seriousness. In the face of such an exhaustive, carefully drafted and overriding federal legislative framework, it is inappropriate for emergency state powers to be used as a bypass to these checks and balances, particularly in circumstances where these powers, issued at the discretion of one Government Minister, seek to breach an individual’s human rights by requiring them to undergo vaccination at short notice in order to continue to make a living.

*The PHW Act itself is being Misused*

Even if you reject the notion that the BSA excludes and limits the operation of state law in this way, and even if we leave the BSA aside entirely, s200 of the PHW Act must be read and understood in the context of the PHW Act as a whole. Concerningly, s200 is being used as if it stands alone as some kind of ultimate discretionary executive super power; immune from the checks and balances the remainder of the PHW Act carefully imposes on it.

This misinterpretation of the applicability of s200(d) likely comes from the words of that section, which says that the emergency powers include to “give any other direction that the authorised officer considers is reasonably necessary to protect public health”. However, this must be read in tandem with the various limitations the rest of the PHW Act places upon this section, and in tandem with the principles of statutory interpretation in general.

The following principles apply (with emphasis added):

* The task of construction must begin with a consideration of the text itself. **The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision**, in particular the mischief it is seeking to remedy;[[12]](#footnote-12) and
* **The context in which the Section is construed includes the context of the wider legislation as a whole**. This also applies to delegated legislation (such as Directions made under s200) which must be read in the context of its enabling legislation, being the PHW Act.[[13]](#footnote-13)

So, s200 must be read in context with the rest of the PHW Act. On this note, it should be said that, on the face of it, it would have been odd for Parliament to draft such a complex legislative framework for the facilitation and regulation of public health in Victoria, with so many checks and balances included, only for the Minister for Health to have the power through s200 to ignore all of that entirely at his or her sole discretion. Indeed, Part 8 implements the following principle which applies “to the management and control of infectious diseases”:

**the spread of an infectious disease should be prevented or minimised with the minimum restriction on the rights of any person[[14]](#footnote-14)**

**(the Principle of Minimum Interference)**

Furthermore, the recent inclusion in the PHW Act of s117 demonstrates the intention of the legislature to mirror the requirement within the federal BSA to issue a biosecurity control order at the state level by authorising the issuance of a public health order to individuals on a similar basis. I extract the entire section 117 below, because it clearly institutes a comprehensive and carefully constructed decision making process for the decision maker, the reason being a recognisance that the restriction of a person’s liberty is something which should only be approached with extreme caution. I particularly draw your attention to 117(2) and 117(3), which institute specific requirements for the making of such orders.

117 Chief Health Officer may make public health order

(1) The Chief Health Officer may, **after having regard to the factors specified in subsection (2)**, make a public health order if the Chief Health Officer believes that—

(a) a person has an infectious disease or has been exposed to an infectious disease in circumstances where a person is likely to contract the disease; and

(b) if a person is infected with that infectious disease, a serious risk to public health is constituted by—

(i) the infectious disease; or

(ii) the combination of the infectious disease and the likely behaviour of that person; and

(c) if infected with that infectious disease, the person needs to take particular action or refrain from taking particular action to prevent, as far as is reasonably possible, that infectious disease constituting a serious risk to public health; and

(d) a reasonable attempt has been made to provide that person with information relating to the effect of the infectious disease on the person's health and the risk posed to public health or it is not practicable to provide this information before making the order; and

(e) it is necessary to make the public health order to eliminate or reduce the risk of the person causing a serious risk to public health.

(2) The factors are—

(a) the nature of the infectious disease, including the ease with which it is transmitted;

(b) the availability and effectiveness of treatment for the infectious disease;

**(c) the possible side-effects and discomfort that may be caused to the person who is or may be infected with the infectious disease if he or she is required to undergo specified pharmacological treatment or prophylaxis for the infectious disease;**

(d) whether urgent action will significantly affect the public health outcome;

(e) the capacity of the person who is or may be infected with the infectious disease to understand the risk to public health constituted by the person having the infectious disease;

(f) any prescribed factors;

(g) any other factors that the Chief Health Officer considers are relevant in the particular circumstances.

**(3) A public health order must—**

**(a) be in writing;**

**(b) identify the person to whom the order applies;**

**(c) specify the purpose of the order;**

**(d) specify the infectious disease which the Chief Health Officer believes the person has or has been exposed to;**

**(e) explain why the Chief Health Officer believes that the person is infected with the infectious disease or has been exposed to the infectious disease in circumstances where a person is likely to contract the infectious disease;**

**(f) subject to subsection (4), specify the period for which the public health order continues to have effect;**

**(g) explain the person's rights and entitlements under this Act and the process for making an application for review to VCAT;**

**(h) contain a statement that the person should seek legal advice;**

**(i) explain that if the person does not comply with the order, the person commits an offence and is liable to a penalty not exceeding 120 penalty units.**

(4) The period for which a public health order continues to have effect must—

(a) not exceed 6 months from the day on which the order is made;

(b) be proportionate with the risk that the person poses to public health.

With specific regard to the requirement for a citizen to undergo vaccination, s117(5) notes that:

(5) A public health order may require the person to whom the public health order applies to comply with any of the following as specified in the order and subject to any specified conditions that the Chief Health Officer considers are appropriate—

(a) participate in counselling, education or other activities provided by a specified person or specified class of person;

(b) undergo an assessment by a specified psychiatrist or specified neurologist;

(c) refrain from carrying out certain activities either absolutely or unless specified conditions are complied with;

(d) refrain from specified forms of behavior either absolutely or unless specified conditions are complied with;

(e) refrain from visiting a specified place or specified class of place;

(f) reside at a specified place of residence at all times or during specified times;

(g) notify the Chief Health Officer or a person nominated by the Chief Health Officer in writing or in another specified form if the person changes his or her name or place of residence within 3 days of doing so;

(h) submit to the supervision of a person nominated by the Chief Health Officer, including—

(i) attending meetings arranged by that person;

(ii) receiving visits from that person;

(iii) providing that person with information relating to any action, occurrence or plan relevant to the health risk posed by the person to whom the order applies;

**(i) receive specified prophylaxis, including a specified vaccination, within the specified period;**

**(j) undergo specified pharmacological treatment for the infectious disease from a registered medical practitioner;**

(k) submit to being detained or isolated or detained and isolated as specified.

Again, such a requirement is therefore subject to the other stringent requirements above. It simply does not make sense for the PHW Act to go to such lengths to protect the rights of an individual against an unfair or unjust requirement to be vaccinated in the context of a public health order in the sense described under s117, but for those same checks and balances not to apply to blanket directions made under s200 of the same Act. This is a misuse of the Act, potentially for the purposes of avoiding said checks and balances. The intention of Parliament in this regard is irrelevant; good intentions do not render actions lawful.

*The Principle of Minimum Interference, and other Safeguards*

But there are other parts of the PHW Act which s200, and directions purported to be made under it, must be consistent with.

I already noted above **the Principle of Minimum Interference**, which notes that “the spread of infectious disease should be prevented or minimised with the minimum restriction on the rights of any person”.[[15]](#footnote-15) In addition to that principle, the PHW Act also includes the following safeguards:

* Decisions made and actions taken in the administration of this Act—

(a) should be proportionate to the public health risk sought to be prevented, minimised or controlled; and

(b) should not be made or taken in an arbitrary manner.[[16]](#footnote-16)

(**the Principle of Proportionality**)

* (1) Persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate

(2) Members of the public should therefore be given—

(a) access to reliable information in appropriate forms to facilitate a good understanding of public health issues; …”[[17]](#footnote-17)

 (**the Principle of Transparency and Accountability**)

Part 2 of the PHW Act is also significant, in that it also specifically defines the intention of Parliament in making the Act; an intention which has been abrogated entirely by the way in which s200 has been used by the Minister for Health thus far. Part 2 notes:

(3) It is the intention of Parliament that in the administration of this Act and in seeking to achieve the objective of this Act, regard should be given to the guiding principles set out in sections 5 to 11A.

**5 Principle of evidence based decision-making**

Decisions as to—

(a) the most effective use of resources to promote and protect public health and wellbeing; and

(b) the most effective and efficient public health and wellbeing interventions—

should be based on evidence available in the circumstances that is relevant and reliable.

**6 Precautionary principle**

If a public health risk poses a serious threat, lack of full scientific certainty should not be used as a reason for postponing measures to prevent or control the public health risk.

**7 Principle of primacy of prevention**

(1) The prevention of disease, illness, injury, disability or premature death is preferable to remedial measures.

(2) For that purpose, capacity building and other health-promotion activities are central to reducing differences in health status and promoting the health and wellbeing of the people of Victoria.

**8 Principle of accountability**

(1) Persons who are engaged in the administration of this Act should as far as is practicable ensure that decisions are transparent, systematic and appropriate.

(2) Members of the public should therefore be given—

(a) access to reliable information in appropriate forms to facilitate a good understanding of public health issues; and

(b) opportunities to participate in policy and program development.

**9 Principle of proportionality**

Decisions made and actions taken in the administration of this Act—

(a) should be proportionate to the public health risk sought to be prevented, minimised or controlled; and

(b) should not be made or taken in an arbitrary manner.

**10 Principle of collaboration**

Public health and wellbeing, in Victoria and at a national and international level, can be enhanced through collaboration between all levels of Government and industry, business, communities and individuals.

So, after all of that, here I am, being asked to implement a Government mandate for my staff to be vaccinated which seems to be based only on a Media Release and/or an ill-thought out Mandatory Vaccination Direction. Even if there was a public health order or direction for my staff to be vaccinated made on the basis of s200 of the PHW Act, such as there is for teachers, aged care workers and construction sites, that direction flies in the face of both;

* The primary piece of federal health legislation (the BSA), which it is inconsistent with; and
* The enabling legislation itself (the PHW Act); the checks, balances and safeguards in which it completely ignores.

In addition to these issues, there are further statutes which you are asking us to breach on your behalf.

1. **You are asking us to breach Privacy, Discrimination and other laws**

If we ask or coerce our staff to get vaccinated against their will, we are very likely to find ourselves in breach of both privacy and discrimination statutes.

*Privacy*

We strongly encourage you to consider the interplay of your Media Release as well as the Mandatory Vaccination Direction with the *Privacy Act 1988* (Cth). Specifically, Australian Privacy Principle 3 allows for the collection of “solicited personal information”, which includes private medical information such as vaccination status, in very limited circumstances. This information must only be collected by lawful means, where it is reasonably necessary for the organisation’s functions or activities.

In this regard, we question whether it is lawful for us to collect our employees’ private medical information (their vaccination status) in circumstances where neither the OHSA or OHSR include vaccination or any other form of medical procedure within their ambit. My business is not a medical body, nor a proxy for Government public health laws (particularly when there hasn’t even been a validly issued government issued mandate for my employees to receive a vaccination) DELETE IF NOT RELEVANT).

With regards to whether it is “reasonably necessary” for me to collect my employees’ vaccination status, my business has fulfilled its duties throughout the pandemic thus far without mandating vaccination. There have been no cases of Covid-19 within my workplace during this pandemic (DELETE OR CHANGE IF NOT RELEVANT). It is therefore difficult to argue that enforcing vaccination is “reasonably necessary” for my business to continue the job it has been doing successfully for almost two years, particularly given that, on the account of both the data and Government messaging, the worst of the pandemic (attributed mostly to an initial lack of familiarity and predictability with an increasingly better understood virus) has passed.

*Bullying and Harassment*

We are also deeply concerned that a mandatory direction issued by us to our employees that they receive a vaccination by a certain date could be construed as bullying or harassment, particularly if an employee is continually reminded, or pressured, to receive such vaccination.

If employees who have not been vaccinated are subject to separation, mistreatment or ostracisation this is also likely to amount to causes of action for affected employees.

*Discrimination*

Your Media Release as well as the Mandatory Vaccination Direction potentiate liability for us in actions of discrimination and victimisation.

We note that both the Equal Opportunity Act 2010 (Vic) (**the EOA**) as well as the Federal discrimination statutes, including the Age Discrimination Act 2004 and the Disability Discrimination Act 1992, are intentionally broad in their ambit, particularly with regards to both ‘indirect discrimination’ and ‘victimisation’. It is very possible that employees who are unwilling to receive a Covid-19 vaccination, and are treated differently to vaccinated staff as a result, could fall within these definitions. As you may know, the Victorian Equal Opportunity and Human Rights Commission and the Australian Human Rights Commission each offer no-cost forums for the resolution of complaints of discrimination. We are likely to be inundated with such complaints by employees if we are to mandate vaccination.

To illustrate this issue, we draw your attention to the definition of “disability” within the EOA:

disability means—

…

**(b) the presence in the body of organisms that may cause disease;**

….

**and includes a disability that may exist in the future** (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability;

So, if an employee is treated differently because they are not vaccinated, and therefore because of the idea that as a result of this, there exists “the presence in the body of organisms that may cause disease”, or even that they *may in future* have such organisms in their body, they have a valid claim of disability discrimination under the Victorian discrimination statute. The federal discrimination statute has an equivalent definition.[[18]](#footnote-18)

We also direct your attention to s76 of the OHSA, which specifically prohibits discrimination by employers against employees. “Discrimination” under this section includes dismissing or terminating the worker, or treating them less favourably because, among other reasons, they:[[19]](#footnote-19)

(d) raises or has raised an issue or concern about health or safety to the employer, an inspector, the Authority, an authorised representative of a registered employee organisation, a health and safety representative, a member of a health and safety committee or an employee of the employer.

So, as a result of this section, an employee who seeks to raise an issue or concern about the safety implications of receiving a vaccine which their employer has made mandatory, and is treated differently to other employees as a result, is a victim of “discriminatory conduct” under this division. We also encourage you to review Division 3 of the same Act which prohibits coercion other forms of duress against employees. It is quite clear that a direction to receive a medical procedure at risk of termination is a form of economic duress, and so, we’re at risk of breaching the OHSA prohibitions on discrimination also.

1. **Conclusion**

As we said at the outset of this letter, our purpose here is to give you some insight into our position. We are confused and frustrated. The Media Release, along with the Mandatory Vaccination Direction, which seems to have no basis in law, puts us in the inappropriate position of both Government proxy and medical advisor, neither of which we are qualified nor willing to embody.

Our employees are confused and frustrated, too. It is they who have brought to our attention many of the potential liabilities we have expressed in this letter. In short, if we are to comply with your Media Release and the Mandatory Vaccination Direction, which are themselves inconsistent with both the BSA and the PHW Act, we are likely to ourselves be in breach of workplace law, discrimination law, privacy law as well as the general principle of natural justice.

We refuse to be placed in such a position.

We implore you to withdraw your Media Release and Mandatory Vaccination Direction immediately. Clarify that it does not constitute law. Remove from employers and their staff the misleading and unlawful pressure to undergo vaccination in circumstances where such pressure will only lead to legal and economic chaos.

Instead of using force, which implies a lack of trust in the people of Victoria, place your faith in the people of this state, that they may make the decision which they, as free citizens in a free democracy, deem prudent; without the strong hand of the Premier hanging over them.

Yours Sincerely,

NAME
POSITION

1. *Public Health and Wellbeing Act 2008 (Vic)*, s198(7)(c). [↑](#footnote-ref-1)
2. *Public Health and Wellbeing Act 2008 EXTENSION OF DECLARATION OF A STATE OF EMERGENCY (Section 198(7)(c)) at* [*https://www.dhhs.vic.gov.au/sites/default/files/documents/202109/state-of-emergency-extension-23-september-2021.pdf*](https://www.dhhs.vic.gov.au/sites/default/files/documents/202109/state-of-emergency-extension-23-september-2021.pdf) [↑](#footnote-ref-2)
3. *Covid-19 Mandatory Vaccination Directions (No 5)*, s1(1). [↑](#footnote-ref-3)
4. *Covid-19 Mandatory Vaccination Directions (No 5)*, s1(2)-(3). [↑](#footnote-ref-4)
5. *Covid-19 Mandatory Vaccination Directions (No 5)*, s3(1). [↑](#footnote-ref-5)
6. *Public Health and Wellbeing Act 2008 EXTENSION OF DECLARATION OF A STATE OF EMERGENCY (Section 198(7)(c)) at* [*https://www.dhhs.vic.gov.au/sites/default/files/documents/202109/state-of-emergency-extension-23-september-2021.pdf*](https://www.dhhs.vic.gov.au/sites/default/files/documents/202109/state-of-emergency-extension-23-september-2021.pdf) [↑](#footnote-ref-6)
7. *Consultation and Cooperation in the Workplace,* Fair Work Australia, <https://www.fairwork.gov.au/tools-and-resources/best-practice-guides/consultation-and-cooperation-in-the-workplace> [↑](#footnote-ref-7)
8. *Occupational Health and Safety Act 2004 (Vic)* s35(1). [↑](#footnote-ref-8)
9. *Occupational Health and Safety Act 2004 (Vic)* s35(3). [↑](#footnote-ref-9)
10. Breaching the duty to consult in s35 attracts a penalty of 900 penalty units, being $163,566 [↑](#footnote-ref-10)
11. [2017] FCAFC 42 at 87- 88. [↑](#footnote-ref-11)
12. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR [47] (Hayne, Heydon, Crennan and Kiefel JJ). [↑](#footnote-ref-12)
13. *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 [19] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefell JJ). [↑](#footnote-ref-13)
14. *Public Health and Wellbeing Act 2008.* [↑](#footnote-ref-14)
15. *Public Health and Wellbeing Act 2008 (Vic) s111* [↑](#footnote-ref-15)
16. *Public Health and Wellbeing Act 2008* (Vic), s9 [↑](#footnote-ref-16)
17. *Public Health and Wellbeing Act 2008* (Vic), s8 [↑](#footnote-ref-17)
18. *Disability Discrimination Act 1992* (Cth), s4 [↑](#footnote-ref-18)
19. Occupational Health and Safety Act 2004 (Vic) s76 [↑](#footnote-ref-19)