22 November 2021 (change)

The Premier Mr Mark McGowan (Western Australia)
Email: wa-government@dpc.wa.gov.au

The Chief Health Officer Dr Andy Robertson (Western Australia)
Email: cho@health.wa.gov.au

Dear Mr McGowan and Dr Robertson,

**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 the Covid-19 mandatory vaccination requirements the Western Australian (WA) Government has introduced for certain workers.

The requirements apply to:

* quarantine centre workers
* residential aged care facility workers
* health care facility workers
* primary health care workers
* certain port workers in WA who board or work with exposed vessels
* transport, freight, and logistics drivers entering WA
* mission critical area workers (including members of WA police force, ambulance and health care workers entering mission critical areas)
* resources industry workers entering a rural or remote resources industry site or a remote operating centre (from 1 December 2021)
* rig or platform crew members entering a rural or remote airport or a State Port to travel to or from a rig or platform (from 1 December 2021)
* community care services workers (from 1 December 2021)
* leavers event workers entering certain premises between the period 22 November 2021 and 26 November 2021
* meat industry workers (from 1 December 2021).

The purpose of this letter is to give you insight into the position you have put me in. The Vaccination Direction forces me to implement your policy for you and puts me at risk of significant legal liability.

This is not the job of employers in general, particularly in circumstances where the direction you want me to implement is in breach of several other laws, including the Public Health Act 2016 (WA) itself (**the PH Act**).

1. **Implementing your direction puts me at significant risk of liability**

*The State of Emergency*

On 15 March 2020, Hon Francis Logan, Minister for Emergency Services, declared a State of Emergency in Western Australia with effect from 12am, 16 March 2020, due to the pandemic caused by COVID-19. The declaration was enabled through section 56 of the Emergency Management Act 2005 (WA). [[1]](#footnote-1)

On 16 March 2020, Hon Roger Cook, Minister for Health, declared a Public Health State of Emergency, effective 12am 17 March 2020. The declaration was made under section 167 of the Public Health Act 2016. [[2]](#footnote-2)

s51 and s52 of the EM Act notes that an emergency declaration comes into operation from the time that it is made, or later if so, specified in the declaration; and only remains in force for three days unless revoked within those three days, or extended by the State Emergency Coordinator.

The State Emergency Coordinator may, in writing, extend or further extend the declaration of an ‘emergency’. A declaration of extension must include the time and date on which it is made, and the period of the extension; and remains in force for the period of extension unless revoked earlier.

Any extension by the State Emergency Coordinator may be in respect of all powers in which case the extension must not be for more than seven days; or only for s69, ‘Powers of officer to control or use property’, or s72, ‘Exchange of information’ (see s52) – in which case the extension may be for such period as the State Emergency Coordinator considers necessary. [[3]](#footnote-3)

Since the initial declaration of a state of emergency on 15 March 2020, the Minister for Emergency Services has extended the declaration on a need-by-need basis, up to and including the most recent extension which took effect on 19 November 2021, and which remains in force until 3 December 2021.[[4]](#footnote-4)

The effect of this is that the current declaration of a state of emergency is due to expire on 3 December 2021. On that date, the Minister for Emergency Services could theoretically extend the declaration again, as he has done previously. However, we note that;

* Extending the state of emergency is not a given, nor is it automatic

On or around September 2021 and the months proceeded, several Mandatory Vaccination Directions came into effect. Like prior directions before it, the Mandatory Vaccination Directions is stated to be issued pursuant to the Public Health Act 2016 (WA) Sections 157(1)(e), 157(1)(k), 180 and 190(1)(p) and the Emergency Management Act 2005 (WA) Sections 67, 70 and 72A

The Mandatory Vaccination Directions imposes “obligations upon employers in relation to the vaccination of workers”.[[5]](#footnote-5)

***The Mandatory Vaccination Direction denies Procedural Fairness and Natural Justice***

The Mandatory Vaccination Direction asks me to direct my staff to receive a vaccine which many of them do not wish to receive. The worker must produce for inspection and recording, evidence in the form approved by the Chief Health Officer of their vaccination status, if: (a) directed to do so by an emergency officer; or (b) required to do so by their employer or by the owner, occupier or person apparently in charge.

The employer, owner, occupier or person apparently in charge must; (a) take all reasonable and lawful steps to collect and maintain a record of the vaccination status of each worker; and (b) on request, provide any record of the kind referred to in paragraph (a) that the owner, occupier or person apparently in charge has collected and maintained to an emergency officer as soon as practicable after the request is made. The employer is not only playing the role of the owner/occupier or person in charge but also to act in the capacity of a GP by requesting to see and collect private and personal information regarding the health of their worker.

Furthermore, the assertion that workers featured in the direction must receive a first vaccine dose, or book in to receive a vaccine, by a certain date, and that they will need to be fully vaccinated by a certain date in order to work implies an assumption that the state of emergency will be extended beyond 3 December 21. We do not yet know, and cannot yet know, whether this is the case.

Obviously, the pandemic is ever changing, and the response must match that change. 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 to continue working for me based on a direction which requires them to take actions which are beyond the scope of the current state of emergency.

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 indefinitely until such a power will be unlawful or runs out; 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 Western Australian Government has issued Media Publications and Mandatory Vaccination Directions as a means of coercion: to pressure as many people as possible into getting the vaccine before the impending deadlines made out by the Public Health Orders.

Many workers in WA have received or will receive a direction[[6]](#footnote-6) from their employer to be vaccinated by a certain date, telling them that they must have a booking for a vaccination by a particular day or they would not be able to work. This is a frankly unreasonable and negates informed consent through the threat and loss of employment if the vaccination direction is not complied with.

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 laws and enterprise agreements**

As an employer, I cannot make sweeping changes to the workplace, or enforce vaccination requirements directed to employees without due notice and informed consent. Any directions I give must also be lawful and reasonable. It is well known that there is a legal requirement to consult with employees directly affected by a matter relating to work health or safety as set out in the legislation[[7]](#footnote-7), awards and enterprise agreements.[[8]](#footnote-8)

The *Occupational Health and Safety Act* (**OHSA**), for example, sets out several duties for consultation, such as at s35 and indeed s19, which creates a duty for employers to consult with employees regarding occupational safety and health at the workplace. It is also worth noting that one of the objects of the OHSA is cooperation and consultation of employers and employees (s5).

Under the new legislation, s47 of the *Work Health and Safety Act 2020 (WA)* (**WHS Act**) [[9]](#footnote-9) implements a duty for employers to consult with employees who are likely to be directly affected by a matter relating to work health or safety (which clearly applies to the introduction of a vaccine mandate) and must not be inconsistent with s48 of the *Work Health and Safety Act 2020 (WA)* (**WHS Act**) [[10]](#footnote-10) consultation under the Division requires the following:

* that relevant information about the matter is shared with workers
* that workers be given a reasonable opportunity to express their views and to raise work health or safety issues in relation to the matter
* to contribute to the decision-making process relating to the matter that the views of workers are taken into account by the person conducting the business or undertaking
* that the workers consulted are advised of the outcome of the consultation in a timely manner

If the workers are represented by a health and safety representative

* the consultation must involve the health and safety representative so far as is reasonably practicable
* without limiting paragraph (the above), the person conducting the business or undertaking must make all reasonable efforts to carry out the consultation at times and places, or otherwise in ways, that are convenient for both the workers and the health and safety representative.

In addition, the WHS Act clearly states *when* consultation is required under s49 of the *Work Health and Safety Act 2020 (WA)* (**WHS Act**) in relation to following health and safety matters;

* when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking
* when making decisions about ways to eliminate or minimise those risks
* when making decisions about the adequacy of facilities for the welfare of workers
* when proposing changes that may affect the health or safety of workers

When making decisions about the procedures for

* consulting with workers
* resolving work health or safety issues at the workplace
* monitoring the health of workers
* monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking; or (v) providing information and training for workers

Or when carrying out any other activity prescribed by the regulations for the purposes of this section.[[11]](#footnote-11)

The Mandatory Vaccination Directions 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 give employees a “reasonable opportunity to express their views”, or to “take[e] into account those views” in circumstances where you have given employers insufficient notice of the Vaccination Direction, 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 WHS Act 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.

Penalty for this subsection:

(a) for an individual, a fine of $25 000;

(b) for a body corporate, a fine of $115 000[[12]](#footnote-12)

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 Work Health and Safety laws as a result;[[13]](#footnote-13) 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 WHS Act 2020, the OHSA and the Occupational Safety and Health Regulations 1996 (**the OSH regulations**) form a comprehensive and exhaustive statutory framework for workplace law in Western Australia. The degree of specificity in the WHS Act 2020 in particular, which has 425 sections and 2 schedules, which 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*,[[14]](#footnote-14) 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 WHS Act, OSH Act and OSH Regulations lack such “clear words or necessary implication”.

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 Emergency Management Act and the Public Health Act is being otherwise misused**

Mandatory Vaccination Directions, and other public health orders in Western Australia, have been made pursuant to the Public Health Act 2016 (WA) Sections 157(1)(e), 157(l)(k), 180 and 190(l)(p) and Emergency Management Act 2005 (WA) Sections 67, 70 and 72A. This is an oversimplification and a misuse of the broader public health legislative framework in Western Australia, 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) PH Act and the EM Act is incapable of operating concurrently with the (federal) BSA, then the (federal) BSA excludes or limits the operation of the (state) PH Act and EM Act.

Second, even if the PH Act and EM Act is capable of operating concurrently with the BSA, s8 (2)(c) notes that, in the case of “human biosecurity emergencies” (which the Covid-19 pandemic is), the BSA limits the operation of the EM Act anyway. [[15]](#footnote-15)

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 to continue to make a living.

*The EM Act and the PH 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, Sections 157(1)(e), 157(1)(k), 180 and 190(1)(p) of the PH Act and Sections 67, 70 and 72A of the EM Act, must be read and understood in the context of the PH Act and the EM Act as a whole. Concerningly, the above sections are being used as if they stand alone as ultimate discretionary executive superpowers; immune from the checks and balances the remainder of the PH Act and EM Act carefully imposes on it.

This misinterpretation of the applicability of sections 190(1)(p) of the PH Act likely comes from the words of that section, which says that the emergency powers are to “without limiting any other emergency power, exercise any serious public health incident power.” However, this must be read in tandem with the various limitations the rest of the PH 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;[[16]](#footnote-16) 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 Sections 157(1)(e), 157(1)(k), 180 and 190(1)(p) of the PH Act and Sections 67, 70 and 72A of the EM Act, which must be read in the context of its enabling legislation.[[17]](#footnote-17)

In particular, s157(1)(k) of the PH Act must be read in context with the rest of the PH 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 Western Australia, with so many checks and balances included, only for the Minister to have the power through limited sections of the PH Act and the EM Act to ignore all of it entirely at his or her sole discretion.

Furthermore, Division 5 of the PH Act, 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 of 116, 117 and 118 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.

**116. Chief Health Officer may make public health orders**

(1) The Chief Health Officer may make a public health order in respect of a person if the Chief Health Officer reasonably believes that

(a) the person

(i) has a notifiable infectious disease; or

(ii) has been exposed to a notifiable infectious disease, and may develop that disease; and

(b) the person is behaving, or may behave, in a way that (if the person has or develops the disease) will transmit, or is likely to transmit, the disease to another person; and

(c) there is a material public health risk; and

(d) any of the following applies

(i) the person has been given counselling;

(ii) reasonable attempts have been made to give the person counselling;

(iii) it is not practicable to give the person counselling before making the order; and

(e) making a public health order is necessary to prevent or minimise the material public health risk posed by the person.

(2) A public health order must —

(a) be in writing in the approved form; and

(b) name the person to whom it applies; and

(c) name the notifiable infectious disease the person is believed to have or to which the person is believed to have been exposed, as the case requires; and

(d) set out the details of what the order requires the person to whom it applies to do or refrain from doing; and

(e) give details of the circumstances that the Chief Health Officer considers justify making the order; and

(f) set out the following information —

(i) an explanation of the person’s obligations under section 88(2) to (4);

(ii) an explanation of the person’s rights under section 88(5);

(iii) a statement that the person has the right under section 127 to apply to the State Administrative Tribunal for a review of the decision to make the order;

(iv) a statement that the person has the right to obtain legal advice and to communicate with a lawyer; and

(g) state that force may be used to enforce the order; and

(h) contain a warning that failure to comply with the order is an offence; and

(i) include any matters prescribed by the regulations.

(3) When making a public health order, the Chief Health Officer must take into account the principle that any requirement of the order restricting the liberty of the person to whom the order applies should be imposed only if it is the only effective way to ensure that public health is not endangered or likely to be endangered.

(4) A public health order may include ancillary or incidental directions and may be made subject to any reasonable conditions that the Chief Health Officer considers appropriate and specifies in the order.

(5) The Chief Health Officer may, by further order under this section, vary or revoke a public health order.

**117. Effect of public health orders**

(1) A public health order may require the person to whom it applies to do one or more of these

(a) to refrain from specified conduct, either absolutely or unless specified conditions are satisfied;

(b) to refrain from carrying out specified activities (for example, without limitation, employment, use of public transport or participation in certain events), either absolutely or unless specified conditions are satisfied;

(c) to undergo counselling by a specified person or one or more persons within a specified class of persons;

(d) to refrain from visiting a specified place, or a place within a specified class of places, either absolutely or unless specified conditions are satisfied;

(e) to refrain from associating with specified persons or specified classes of persons, either absolutely or unless specified conditions are satisfied;

(f) to submit to specified supervision;

(g) to undergo a specified medical examination, or specified medical treatment, at a specified time and place;

(h) to take specified action to prevent or minimise the public health risk posed by the person; (i) to reside at a specified place and, if considered to be appropriate by the Chief Health Officer, to remain isolated at that place;

(j) to submit to being detained at a specified place for the purpose of undergoing a medical examination or medical treatment;

(k) to submit to being detained or isolated, or detained and isolated, at a specified place.

(2) A public health order that requires a person to undergo a medical examination authorises

(a) the carrying out of that medical examination in accordance with the order; and

(b) the testing of any sample obtained or taken in connection with that medical examination.

(3) A public health order that requires a person to undergo medical treatment authorises

(a) the giving of medical treatment to that person in accordance with the order; and

(b) the testing of any sample obtained or taken in connection with that medical treatment.

(4) Subsections (2) and (3) do not limit what a person can do for the purposes of, or in connection with, the enforcement or administration of a public health order.

**118. Personal service of orders required**

(1) A public health order, and any variation to or revocation of a public health order, must be served personally on the person to whom it applies.

(2) However, if the person to whom the public health order applies is a protected person, the public health order, and any variation to or revocation of the order, must be served personally on a responsible person.

 (3) A public health order, or a variation to or revocation of a public health order, does not take effect until it is served personally in accordance with subsection (1) or (2), as the case requires.

Again, such a requirement to be vaccinated is therefore subject to the other stringent requirements above. It simply does not make sense for the PH 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 under Sections 157(l)(e), 157(1)(k), 180 and 190(l)(p) of the PH Act but for those same checks and balances not to apply to blanket directions made under 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.

There are other parts of the PH Act which Sections 157(l)(e), 157(1)(k), 180 and 190(l)(p), and directions purported to be made under it, must be consistent with.

Principles applying in relation to this part which notes that “the spread of notifiable infectious diseases should be prevented or limited without unnecessarily restricting personal liberty or privacy, and in the application of this principle, particular regard should be required to the principle of proportionality set out in section 3(2).”

The PH Act listed principles also include

(2) A person who is at risk of contracting a notifiable infectious disease must take all reasonable precautions to avoid contracting the disease.

3) A person who suspects that he or she may have a notifiable infectious disease must ascertain (a) whether or not he or she has the disease; and

(b) what precautions should be taken to prevent others from contracting the disease.

(4) A person who has a notifiable infectious disease must take all reasonable precautions to ensure that others are not unknowingly placed at risk of contracting the disease.

(5) To the extent to which the exercise of those rights does not infringe on the wellbeing of others, a person who is at risk of contracting, who suspects that he or she may have, or who has a notifiable infectious disease or a notifiable infectious disease-related condition has these rights.

Part 1 of the PH 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 s157(l)(e), 157(1)(k), 180 and 190(l)(p) has been used as it states; In the pursuit of the objects of this Act, regard must be had to the principles set out in the table below[[18]](#footnote-18)

**1. Sustainability principle**

(1) Sound public health practices and procedures should be adopted as a basis for sustainability for the benefit of all people and the community today, while consideration is given to the public health, social, economic and environmental needs of future generations. [[19]](#footnote-19)

(2) Public health, social, economic and environmental factors should be considered in decision-making, with the objective of improving community wellbeing and the benefit to future generations.

(3) Public health practices and procedures should be cost effective and in proportion to the significance of the public health risks and consequences being addressed.

**2. Precautionary principle**

(1) If there is a public health risk, lack of scientific certainty should not be used as a reason for postponing measures to prevent, control or abate that risk.

(2) In the application of the precautionary principle, decision-making should be guided by — (a) a careful evaluation to avoid, where practicable, harm to public health; and (b) an assessment of the risk-weighted consequences of the options.

 **3. Principle of proportionality**

(1) Decisions made and actions taken in the administration of this Act to prevent, control or abate a public health risk should be proportionate to the public health risk sought to be prevented, controlled or abated.

(2) In the application of the principle of proportionality, decision-making and action should be guided by the aim that, where measures that adversely impact on an individual’s or business’s activities or a community’s functioning are necessary, measures that have the least adverse impact are taken before measures with a greater adverse impact.

**4. Principle of intergenerational equity**

The present generation should ensure that public health is maintained or enhanced for the benefit of future generations.

**5. Principle relating to local government**

The functions of local governments in relation to public health should be acknowledged and respected.

(3) Persons involved in the administration of this Act must perform their functions with due regard to the objects and principles of this Act.

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 s157(l)(e), 157(1)(k), 180 and 190(l)(p) of the PH Act, such as there is for quarantine centre workers, residential aged care facility workers, health care facility workers, primary health care workers (from 1 November 2021), certain port workers in WA who board or work with exposed vessels, certain transport, freight and logistics workers entering WA mission critical area workers (including members of WA police force, ambulance and health care workers entering mission critical areas) 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 ignoring the doctrine of informed consent**

Any healthcare treatment, procedure or other intervention undertaken without consent is unlawful unless legislation in a state or territory, or case law, permits the treatment, procedure or other intervention without consent

The Australian Human Rights Commission Act 1986 (Cth), which among several international human rights covenants and treaties which it attaches via schedules, attaches article 7 of the ICCPR, being:

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Therapeutic Goods Administration notes that the currently approved vaccines for Covid-19 in Australia are in Phase IV trials. The vaccines are in experimental phase IV trials.

Trials are incomplete and approvals were given without complete safety and efficacy data being available. The TGA says the following about the vaccines’ current “provisional approval”; [[20]](#footnote-20)

*“With rolling submissions, collaboration with international regulators, and proactively working with sponsors, it is expected the evaluation of COVID-19 vaccines will be significantly expedited without compromising on our strict standards of safety, quality and efficacy. However, the timeframe for the evaluation of each vaccine will ultimately depend on when the complete data package is provided by sponsors. We have not yet received a full data package from any company.”*

It is very difficult for us to implement your Mandatory Vaccination Direction in circumstances where our employees rightly tell us that they are concerned about the rushed approval and long-term safety implications of the vaccines, and when we ourselves do not have the expertise or training to reassure them. This is particularly problematic when we are only indemnified for adverse reactions or deaths if we facilitate vaccination in the workplace itself (which we elaborate on below).

Nonetheless, the vaccines remain a novel technology, and we are uncomfortable directing our employees to receive it at short notice at the expense of their informed consent.

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.

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*

The Mandatory Vaccination Direction potentiates liability for us in actions of discrimination and victimisation, particularly given that it does not give us appropriate time to consider medical exemptions, nor employees time to attain them.

We note that both the Equal Opportunity Act 1984 (WA) (**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 Western Australian Equal Opportunity 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 Discrimination Act 1992[[21]](#footnote-21)

disability means—

…

(c)  the presence in the body of organisms causing disease or illness; or

 ….

 and includes a disability that:

 (h)  presently exists; or

 (i)  previously existed but no longer exists; or

 (j)  may exist in the future (including because of a genetic predisposition to that disability); or

**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 Disability Discrimination Act. [[22]](#footnote-22)

We also direct your attention to s56 of the OSH Act, which specifically prohibits discrimination by employers against employees.[[23]](#footnote-23)

**56. Discrimination**

(1) If an employer or prospective employer in any way treats an employee or prospective employee less favourably than would otherwise be the case for the dominant or substantial reason that the employee or prospective employee

(c) gives or has given assistance or information to an inspector, safety and health representative or any member of a safety and health committee; or

(d) makes or has made a complaint in relation to safety or health to;

(i) the Commissioner; or

(ii) an inspector; or

(iii) a person who is or was his or her employer or fellow employee; or

(iv) a safety and health representative; or

(v) a member of a safety and health committee

**the employer or prospective employer commits an offence.**

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.

On a broader level, it is also concerning that the Mandatory Vaccination Direction applies to some workers, but not others. There has been a carve out of certain groups, such as the judiciary, on constitutional grounds, but you have not specified the grounds on which that carve out has been made. The idea that judges can avoid such a direction, but that many ordinary citizens can’t, is unfair and troublesome.

*Workers Compensation*

Whilst you, the Western Australian Government, is forcing our hand as employers to regulate this Public Health Order mandating the vaccines, you are not directly providing us with an indemnity should the vaccine result in any injury and/or death to one of our employees. This means that we are completely exposed to direct liability from our employees should they become harmed through this process, including mental harm. Furthermore, Workers’ Compensation through WorkSafe WA will not cover any liability for injury or death unless the employer has:

* recommended or organised the vaccination onsite or at another location; or
* subsidized the vaccination.

Given the insufficient time you have given us before our staff must be vaccinated, it is not possible for us to subsidize or facilitate vaccination. Most employers are simply directing their staff to undergo vaccination under the false assumption that they will not be held liable for adverse events. But the Government is not indemnifying employers directly, and neither is WorkSafe WA. As a result, there is no insurance, and as employers we are at significant risk of catastrophic liability.

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 Mandatory Vaccination Direction puts us in the inappropriate position of both Government proxy and medical advisor, neither of which we are qualified nor willing to embody.

If we are to comply with your Mandatory Vaccination Direction, which are themselves inconsistent with both the BSA, PH Act and the EM 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 are also likely to be liable for any injury or adverse reaction that our employees suffer as a result of the vaccines.

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.

We refuse to be placed in such a position.

We implore you to withdraw your Mandatory Vaccination Direction immediately. 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 WA, 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. *Emergency Management Act 2005 (WA)*, s56. [↑](#footnote-ref-1)
2. *Public Health Act 2016 (WA), s167.* [↑](#footnote-ref-2)
3. *Emergency Management Act 2005 (WA)*, s51, s52. [↑](#footnote-ref-3)
4. Notice of extension of State of Emergency declaration made by the Minister for Emergency Services under section 58 of the Emergency Management Act 2005 [20211117-Extension-of-State-of-Emergency-Declaration\_0.pdf (www.wa.gov.au)](https://www.wa.gov.au/sites/default/files/2021-11/20211117-Extension-of-State-of-Emergency-Declaration_0.pdf) [↑](#footnote-ref-4)
5. [COVID-19 coronavirus: State of Emergency Declarations (www.wa.gov.au)](https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-state-of-emergency-declarations) [↑](#footnote-ref-5)
6. Mandate-summary-Final-Oct-2021.pdf (www.wa.gov.au) [↑](#footnote-ref-6)
7. Division 2 — Consultation with workers 47. Duty to consult workers pg. 52 [Work Health and Safety Act 2020 - [00-00-02].pdf (legislation.wa.gov.au)](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_43434.pdf/%24FILE/Work%20Health%20and%20Safety%20Act%202020%20-%20%5B00-00-02%5D.pdf?OpenElement)

8 *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. [↑](#footnote-ref-8)
9. *Work Health and Safety Act 2020(WA)* s47 (1). [↑](#footnote-ref-9)
10. *Work Health and Safety Act 2020(WA)* s48(1)(2) [↑](#footnote-ref-10)
11. *Work Health and Safety Act 2020(WA)* s49 (a-f) [↑](#footnote-ref-11)
12. *Work Health and Safety Act 2020(WA)* s47(1) [↑](#footnote-ref-12)
13. [Work Health and Safety Act 2020 - [00-00-02].pdf (legislation.wa.gov.au)](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_43434.pdf/%24FILE/Work%20Health%20and%20Safety%20Act%202020%20-%20%5B00-00-02%5D.pdf?OpenElement) [↑](#footnote-ref-13)
14. [2017] FCAFC 42 at 87- 88. [↑](#footnote-ref-14)
15. Concurrent operation of State and Territory laws <https://www.legislation.gov.au/Details/C2017C00303> [↑](#footnote-ref-15)
16. *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR [47] (Hayne, Heydon, Crennan and Kiefel JJ). [↑](#footnote-ref-16)
17. *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 [19] (Gummow ACJ, Kirby, Hayne, Crennan and Kiefell JJ). [↑](#footnote-ref-17)
18. *Public Health Act 2016 (WA), Part 1, s3 Objects and Principles* [↑](#footnote-ref-18)
19. *Public Health Act 2016 (WA), Part 1, s3 Objects and Principles* [↑](#footnote-ref-19)
20. <https://www.tga.gov.au/covid-19-vaccines-undergoing-evaluation> [↑](#footnote-ref-20)
21. *Disability Discrimination Act 1992* (Cth) [↑](#footnote-ref-21)
22. *Disability Discrimination Act 1992* (Cth) [↑](#footnote-ref-22)
23. [Occupational Safety And Health Act 1984 - [07-k0-00].pdf (legislation.wa.gov.au)](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_43441.pdf/%24FILE/Occupational%20Safety%20And%20Health%20Act%201984%20-%20%5B07-k0-00%5D.pdf?OpenElement) [↑](#footnote-ref-23)