Children's Health Defense AUSTRALIA CHAPTER

24 March 2023

The Committee Secretary
Education and Employment Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email only: seniorclerk.committees.sen@aph.gov.au

Dear Secretary,

COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 and the Fair Work Amendment (Prohibiting COVID-19 Vaccine Discrimination) Bill 2023: Submission

Children's Health Defence Australia

1. This submission is made by Children's Health Defense Australia, a not for profit organisation with the following objectives:
    a. To restore and protect the health of children by eliminating exposures to environmental toxins, holding responsible parties accountable, and establishing safeguards to prevent future harm to children's health.
    b. To make available to Members and the public information resources, presentations, scientific and educational materials on adverse impacts upon childhood health.
    c. To make available to Members and the public information resources, presentations, scientific and educational materials for the guidance and promotion of childhood health.
    d. To work with private and public bodies for promoting childhood health free of preventable adverse impacts.
    e. To provide and coordinate meetings with, and information, submissions, and presentations to private and public bodies responsible for

campaigns, policies, laws, programs, educational materials, or forums involving childhood health.

f. To advocate on behalf of Members, children and families everywhere for the protection of childhood health.

g. To undertake representative legal actions on behalf of Members, children and families everywhere against any measures, actions, programs, policies, bodies, agencies, decisions, or laws, adversely impacting or capable of adversely impacting childhood health.

2. Children's Health Defense Australia is the Australian chapter of Children's Health Defense, an American not for profit organisation founded in 2011.

3. The Board of the Australian Chapter is comprised of the following Directors:

   a. Professor Robyn Cosford, Chair Person, MBBS (Hons), Dip Nutr, Dip Hom, FACNEM, FASLM, (Professor of Nutritional and Environmental Medicine, Lifestyle and Wellness Coach);
   b. Brett Camm, Secretary;
   c. Karen McDonough;
   d. Cloi Geddes;
   e. Julian Gillespie, LLB, BJuris;
   f. Dr Astrid Lefringhausen (Virologist, Biologist); and
   g. Peter Fam, LLB (Human Rights Lawyer).

4. With its combined expertise in medicine, science and law, Children's Health Defense Australia is in a unique position to provide feedback on the proposed Bills.

Covid-19 Vaccination Status (Prevention of Discrimination) Bill 2022

Executive Summary

5. In general, Children's Health Defense Australia strongly supports and endorses the *Covid-19 Vaccination Status (Prevention of Discrimination) Bill 2022* (**the Discrimination Bill**).

6. Statutorily enshrined protection against discrimination on the basis of Covid-19 vaccination status is sorely needed in Australia, as is legal certainty on the issue of vaccination of children under 18, to the extent that it is not already available (discussed below). As alluded to within Section 13 of Discrimination Bill, such protections would assist in rendering our domestic laws consistent with Australia's international human rights obligations under international law.

7. However, a prohibition on discrimination on the basis of vaccination should be drafted in a manner which is consistent with the discrimination laws already operating in Australia in the states and territories, as well as federally. As such, we recommend that the focus and language of the Bill be broadened to include discrimination on the basis of medical record, medical status, or vaccination status, so as to increase the utility of the Bill, as well as its consistency with other laws.

Vaccination of Children Under 18

The Issue

8. Section 11 of the Discrimination Bill reads as follows:

> 11 Vaccination of children under 18
>
> (1) This section applies where a COVID-19 vaccination is to be administered to a child who is under 18.
> (2) A COVID-19 vaccination must not be administered to a child without the consent of:
>
> (a) a parent of the child; or
> (b) a guardian of the child; or
> (c) a person who, under a parenting order, has responsibility for the child's long-term or day-to-day care, welfare and development.
>
> Penalty: 1,000 penalty units.

(**Section 11**)

9. Section 11 is an example of sorely needed law, for the clarification it will provide. Although the situation has calmed, in the past two years, the following practices were reported to us:
    a. teachers were talking to their students about, and encouraging them to receive, medical procedures that they did not understand;
    b. pop up clinics were being set up in schools, without parental consent, for the administering of medical procedures;
    c. children were being encouraged to attend these clinics and to undergo these procedures irrespective of their parents' wishes; and
    d. 'vaccination buses' were being driven to schools, particularly in regional areas, where children were ushered onto these buses and vaccinated before being returned to school.

10. Those practices were not only greatly concerning, but unlawful. To illustrate the extent of the problem, we provide two de-identified case studies below. The first account has been provided directly by the mother of a child with Autism, who was horrified to learn that he had been vaccinated without her consent. The second account has been provided by the father of a boy who suffered from pericarditis as a result of receiving a Covid-19 vaccination.

Case Studies

Joan and Mitchell

Joan is the mother of Mitchell. Mitchell is 12 years old and suffers from severe Autism.

As a result of his disability, Mitchell has been graded as having the intellectual capacity of a 6 year old.

Joan did not want Mitchell to undergo vaccination for Covid-19. Although her reasons are her own, they consist of a lack of data going towards long term adverse reactions, the lack of testing around how vaccination might interact with both her son's disability as well as the medication he takes for it, as well as the lack of danger Covid-19 presents to him vis-à-vis the risks of vaccination.

One day, Mitchell came home from school crying. Eventually, Joan realised that Mitchell had a band aid on his shoulder. Shocked, she called his school, who confirmed that a pop up clinic had been set up that day for children to attend. The school said they had taken a position of allowing children to choose whether or not to attend the clinic, and that they had encouraged it. Joan had not been contacted at all about this.

Horrified, Joan said to the school; "Mitchell is only 12, and as you know, only has the capacity of a 6 year old. How could you allow him to attend the clinic without asking me first?"

The school did not provide a meaningful response and has since refused to engage with Joan on this topic.

Thomas and Steven

Thomas is Steven's father. Steven is in Year 9; 15 years old.

One day, Steven's teacher asked everyone in the class who had not been vaccinated to put up their hand. Steven, the only child in his class who hasn't been vaccinated, put up his hand. The other kids laughed at him, and the teacher asked him to stay back after class.

That afternoon, Steven's teacher asked him why he hadn't been vaccinated. Steven told his teacher he had spoken to his parents about it and they had decided to wait for a while longer before taking the vaccine. Steven's teacher said, "the pop up clinic is next week. We've all been vaccinated. It's ok, we are all ok. Do what you want to do".

The next day, Steven's teacher said to him, "if you don't get the vaccine, you won't be able to come on excursions, and you probably won't be able to come to school".

Worried about being bullied and excluded from school, Steven went to the pop up clinic and received the vaccine. The staff at the clinic did not ask Steven whether his parents consented to the procedure, nor did they contact Steven's parents.

Steven has been suffering from pericarditis since having received the vaccine. He has been advised not to exert himself or to do any exercise for 3 months. He is missing a significant amount of school due to this vaccine injury.

What does the current law say?

11. At law, consent is a requisite for any intervention. Even touching somebody requires their consent, whether express or implied, to avoid common law liability in battery and/or assault.

12. In the field of medicine, any kind of intervention, including taking a history or performing a physical examination, requires clear patient consent. Except in an emergency or very unusual circumstances, health professionals cannot treat any individual without informed consent for fear of liability in battery or negligence

13. With respect to children, consent is much more important. Obviously, there is a point in life where the ability to consent to anything, including medical procedures, passes from parent to offspring. Until that time, a parent acts as their child's guardian; making the decision that they deem best in all the circumstances. The age and capacity of minors to give consent is therefore a critical issue at law, and one which is relevant here.

14. The age at which a person becomes an 'adult' in Australia, and at which time they can give valid consent for medical treatment, is 18 years. Consent for people under the age of 18 is therefore to be provided by the child's parents. Although there are circumstances in which a child less than 18 can give valid consent, these circumstances are extremely limited. We elaborate on this below.

Current Legislation

15. Three states in Australia, New South Wales, Victoria and South Australia, have legislation going towards the ability of children to consent to medical procedures.

New South Wales

16. In New South Wales, the *Minors (Property and Contracts) Act 1970* (**the MPC Act**), at Section 49, provides a defence in actions for assault and battery against minors aged less than sixteen years "where medical treatment…is carried out with the prior consent of the parent or guardian". The MPC Act does not provide said defence in circumstances where a parent has **not** provided their consent, even if their child has.

17. Section 49 (2) also states that a medical practitioner who provides treatment with the consent of a child 14 years or over will have a defence to any action for assault or battery. In saying that, the MPC Act does not assist a medical practitioner in a situation where there is a conflict between a child and their parent, and a parent can still generally override a child's consent to treatment. It is also worth noting that "consent" is not defined in the MPC Act, and the ability of a child aged 14 years and above to give *valid and informed* consent will depend on the application of the common law principles explained below to the individual circumstances of that child's case.

Victoria

18. In Victoria, the *Medical Treatment Planning and Decisions Act 2016* (**the MTPD Act**), at Section 4, defines "Decision-making capacity" as follows:

> **4 Decision-making capacity**
>
> (1) A person has decision-making capacity to make a decision to which this Act applies if the person is able to do the following—
>
> (a) understand the information relevant to the decision and the effect of the decision;
>
> (b) retain that information to the extent necessary to make the decision;
>
> (c) use or weigh that information as part of the process of making the decision;

(d) communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.

19. The definition, modelled on the common law principles elaborated on later in these submissions, applies to children also.

South Australia

20. In South Australia, the *Consent to Medical Treatment and Palliative Care Act 1995* (**the CMTPC Act**) states, at Part 2, Division 1, Section 6 that a person over the age of 16 years can "make decisions about his or her own treatment as validly and effectively as an adult". South Australia, therefore, is the only state in Australia where it is clear that a child aged between 16 and 18 could lawfully consent to vaccination in the absence of parental consent. In saying that, even here, consent must still be *informed* (see Section 3) and valid; a child must have capacity to give consent, like any adult, in order to be capable of giving it. So, therefore, the common law principles still have some application even here.

21. Additionally, in regards to children who are under the age of 16, Section 12 of the CMTPC Act states the following:

> Division 4—Medical treatment of children
>
> 12—Administration of medical treatment to a child
>
> A medical practitioner may administer medical treatment to a child if—
>
> (a) the parent or guardian consents; or
>
> (b) the child consents and—
>
> (i) the medical practitioner who is to administer the treatment is of the opinion that the child is capable of understanding the nature, consequences and risks of the treatment and that the treatment is in the best interest of the child's health and well-being; and

(ii) that opinion is supported by the written opinion of at least one other medical practitioner who personally examines the child before the treatment is commenced.

22. In the context of the Bills under consideration it should be noted 'medical treatment' under Section 12 includes 'the provision of such therapy for the purposes of preventing disease' (see Section 4), a definition sufficiently broad to include vaccination. It is also important to note the checks and balances this section provides, such as seeking the written opinion of another medical practitioner.

The Current Common Law

23. The common law is the primary guide in Australia as to the limited circumstances in which a child has capacity to give consent to medical intervention in the absence of parental consent of same. Even in NSW, Victoria and South Australia, where there is some legislation on this issue, the common law is required to clarify its application. In the other 3 states and 2 territories, we are completely reliant on the common law to determine the issue in its totality, as there is no applicable legislation on this point.

The Concept of a 'Mature Minor', or 'Gillick Competency'

24. The case often referred to in regards to a child's ability to give consent to a medical procedure or treatment is *Gillick v West Norfolk and Wisbech Area Health Authority* (**Gillick**).[1]

25. First, it must be noted that Gillick was a case in which it was debated whether a 15 year old could consent, without parental knowledge, to a prescription for the contraceptive pill. So, the circumstances are quite different to consent for an invasive medical procedure such as vaccination.

[1] [1986] 1 AC 112.

26. Nonetheless, in Gillick, Lords Scarman and Fraser agreed that in most cases it is in the child's best interests for parental consent to be obtained. They said, however, that "exceptional" and "special" circumstances could exist where minors could consent to medical treatment on their own, provided certain conditions were met. Lords Scarman and Fraser provided their own versions of these conditions.

27. Problematically, this decision is often over-simplified to suggest that as long as a minor has a "sufficient understanding and intelligence to enable him or her to fully understand what is proposed"[2] that a child will be capable of giving lawful consent. This is often referred to as 'Gillick Competence'.

28. What is often ignored is the complexity inherent within the test Lord Scarman proposes. As Lord Scarman himself notes, to be deemed competent to make a decision without parental consent or knowledge, a minor must fully understand the moral, emotional and familial, long, and short term implications of the decision they are purporting to make.[3] Put another way, it is very difficult to determine the time at which, and the circumstances where, a child will be capable of "fully understanding" a medical procedure for the purpose of providing fully informed consent.

29. This is particularly true in the case of vaccination against Covid-19, which, to be frank, no child (nor adult) could "fully understand" due to the lack of long term safety data available. This is further exacerbated by unique circumstances where despite clear evidence of unprecedented and historically unequalled reports to the Therapeutic Goods Administration [4] of injuries and deaths after Covid-19 vaccination, there has been a continued failure of Federal, State, and Territory authorities, including medical practitioners, to share and make positively known such critically important information for the purpose of information needed for being fully informed for providing informed consent. This begs the question – how could a child under 18 easily apprise themselves of such information, when most Australian adults and even medical practitioners remain unaware of this adverse event data following receipt of Covid-19 medical treatments/vaccinations? We do not wish to digress on this issue too far, but these are the types of directly relevant considerations affecting the ability of Australian children to provide true consent,

[2] *Gilick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, Lord Scarman at [189].
[3] Ibid.
[4] As of 12 March summarised HERE as drawn from the TGA's DAEN system HERE.

amidst a health and medical environmental that does not provide the information needed for true consent. Nearly all responsible adults have not been sharing this adverse event information in relation to the Covid-19 drugs properly or adequately amongst their peers, let alone minors; nor have they attempted to present such information in a form such that minors can emphatically appreciate, without any ambivalence towards their appreciation of the decision making consequences arising from an understanding of such data.

30. Though we will elaborate below, our own High Court has noted that the test for Gillick Competence is a "very high threshold"; described as the ability to exercise a "wise choice",[5] and one that medical doctors have expressed as "higher than they would expect from some competent adults".[6] Another implication of Lord Scarman's test is that competency will differ from child to child, pursuant to their own capacity and circumstances, as indeed will the ability to judge competency vary from doctor to doctor. Quite a forensic assessment of that child would need to occur in order for the threshold of Lord Scarman's test to be reliably met. Finally, and again oft ignored, was the requirement Lord Scarman proposed for the doctor to first try to persuade the child to include their parents in the decision-making process.[7]

31. Lord Fraser gave his own version of the conditions which must be met for 'Gillick Competence', or for a 'mature minor', to be capable of consenting to medical treatment absent his/her parents. His Lordship described the following steps a health professional should follow to determine whether to give treatment to a minor without parental consent. Again, this judgment was made specifically in the context of contraceptive treatment, so the steps are relevant to that scenario:[8]

> [The practitioner must be satisfied of the following matters]:
>
> (1) that the [child] will understand his advice;

[5] Patrick Parkinson, "Children's Rights and Doctors' Immunities: The Implications of the High Court's decision in *Re Marion*" (1992) 6 AJFL at 111.
[6] Diana Brahams, "The Gillick Case: A Pragmatic Compromise" (1986) 136 NLJ 75 at 76; New South Wales Law Reform Commission Report 199: Young People and Consent to Health Care (Sydney, 2008) at 82.
[7] *Gilick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at [189].
[8] *Gilick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at [174].

> (2) that he cannot persuade [the child] to inform her parents or to allow him to inform the parents that [the child] is seeking contraceptive advice;
>
> (3) that [the child] is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment;
>
> (4) that unless [the child] receives contraceptive advice or treatment [their] physical or mental health or both are likely to suffer; and
>
> (5) that [the child's] best interests require him to give [the child] contraceptive advice, treatment or both without the parental consent.

32. So, this test makes clear too the high threshold that must be met. To be 'satisfied of understanding' is no simple thing when it comes to a child, and further, the role of the parent is not negated completely given the requirement to attempt to persuade the child to seek their parents' consent. In addition, and importantly, there are requirements around the detriment to be suffered if the child does *not* receive the treatment, as well as the child's best interests. Both of these matters are clear in the case of Covid-19 vaccination. The evidence is clear that there is a very low risk to children of severe or long term illness from the virus,[9] and clear with respect to the vaccines currently available, that the risk-benefit analysis favours non-vaccination in light of the excess risk of suffering a serious adverse event including death;[10] in circumstances where the chances of children 18 years or less surviving Covid illness are 99.9997%.[11] Indeed the real risk for minors in such circumstances would appear to be doctors and/or authorities who do not share these facts, as has proven to be the case during the national Covid-19 vaccination program in Australia.

9 See How Common is Long Covid in Children and Adolescents? The Paediatric Infectious Disease Journal, Zimmermann, Petra MD, PHD, and Ors, available at https://journals.lww.com/pidj/Fulltext/2021/12000/How_Common_is_Long_COVID_in_Children_and.20.aspx

10 Fraiman et al 2022: Serious adverse events of special interest following mRNA COVID-19 vaccination in randomized trials in adults.

11 Pezzullo et al 2022: Age-stratified infection fatality rate of COVID-19 in the non-elderly informed from pre-vaccination national seroprevalence studies; Axfors & Ioannidis 2022: Infection fatality rate of COVID-19 in community-dwelling elderly populations

Marion's Case

33. In Australia, *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (**Marion's Case**)*[12] examined "whether a child, intellectually disabled or not, is capable, in law or in fact, of consenting to medical treatment on his or her behalf".[13]

34. In determining this question, Marion's Case laid the following foundations:
    - First, Section 63F(1) of the *Family Law Act 1975* (Cth) recognises and empowers parents as guardians and custodians of children until they attain the age of 18 years;[14]
    - Second, that "the responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child…they extend to every aspect of the child's life";[15] and
    - Third, "A fortiori, if the child is incompetent to give consent, whether by reason of age, illness, accident or intellectual disability, the parents have the responsibility and power to authorize the administration of therapeutic medical treatment".[16]

35. Importantly, the High Court emphasised the extreme care that must be taken if parental consent is to be set aside, quoting an established precedent as follows:[17]

> "In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded. **There must be some clear justification for a court's intervention to set aside the primary parental responsibility for attending to the welfare of the child."**

36. And, Brennan J even cast doubt on whether Gillick, in laying out the test for competency, placed enough emphasis on the parents' view, stating that "I would

[12] (1992) 175 CLR 218, 6 May 1992.
[13] *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [7].
[14] *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [27]
[15] *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [28]
[16] *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [28]
[17] *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [31]

respectfully doubt whether the primacy of parental responsibility was sufficiently recognised in the leading English case of Gillick".[18]

37. So, in summary, the current Australian legal position can be distilled into the following principles:
    - Parental consent is generally essential to any medical procedure for somebody under the age of 18;
    - There are exceptional circumstances where somebody under the age of 18 can give consent absent their parents, subject to strict conditions which will rarely be met;
    - Such conditions would need to be met on a case by case basis; and
    - If such conditions aren't met, medical treatment provided absent parental consent is likely to constitute liability for battery and/or negligence.

Would Section 11 in the Discrimination Bill complement and clarify and bolster existing law, or detract from it?

38. At present, Australia is faced with an inconsistent set of laws relevant to Section 11 of the Discrimination Act, that is, relevant to the circumstances in which vaccines can be administered to children under the age of 18.

39. In general, however, the intent of the Courts in both England and Australia has been to enshrine and emphasise the importance of parental consent, only allowing its abdication in extremely strict and limited circumstances.

40. The Covid-19 'vaccines' are based on a new technology, and are only provisionally approved. The full short, medium and long term consequences of these products are still largely unknown. It is appropriate, and indeed necessary, that the law with respect to those products be clarified, by way of statute, so that no child under the age of 18 can consent to their administration absent the consent of their parent or legal guardian. Section 11 of the Discrimination Act achieves this.

[18] *Secretary, Department of Health and Community Services v J.W.B. and S.M.B (Marion's Case)* at [31]

41. However, the issue of ensuring that minors are giving valid and fully informed consent, via their parents and guardians, is not one isolated to the Covid-19 vaccines. Minors are the most valuable and vulnerable of every population. Therefore we believe the Bill should not stop short at just Covid-19 vaccination – why should it? To this end consideration should be given to broadening the scope of Sections 11 and 12 to insert the following after "Covid-19 vaccination" appearing in those sections:

> .. Covid-19 vaccination **or any other medical treatment**

42. For clarity, and despite the general preference of Federal Law over State Law to the extent of any inconsistency,[19] we recommend that Section 12 of the Discrimination Bill be broadened in scope so that it doesn't apply only to laws that "require or permit discrimination on the basis of whether a person has received a COVID-19 vaccination", but also to any law which allows a minor to consent to Covid-19 vaccination absent parental or guardian consent. By way of example we believe Section 12 should be broadened with the following additional wording (or wording to the same effect) so to read:

> This Part has effect despite any other law of the Commonwealth, a State or a Territory (whether passed or made before or after the commencement of this section) that:
>
> (a) requires or permits discrimination on the basis of whether a person has received a COVID-19 vaccination; and
>
> **(b) permits or allows a child under 18 years to consent to a Covid-19 vaccination absent a consent provided under Section 11.**

Recommendations:

1. **Section 11 is an important and very much needed Section in Australian law;**
2. **Consideration should be given to broadening the scope of Sections 11 and 12 to include "or any other medical treatment"; and**
3. **Section 12 should be broadened in scope so that it applies to Section 11 also.**

[19] Australian Constitution, Section 109.

Discrimination

43. The stated purpose of the Discrimination Bill is to "prevent discrimination in relation to COVID-19 vaccination status, and for related purposes". It seeks to ensure that the Commonwealth (Section 7), States (Section 8) and Territories (Section 9) do not discriminate on that basis.

What do Current Discrimination Laws Prohibit?

44. Whether unvaccinated Australians have been subjected to discrimination, in a legal sense, over the past two years has been a hot topic. Discrimination law is complex, and there are few experts in the field. As a result, much of the advice in this area has been erroneous and/or oversimplified.

45. For the purpose of this submission, it is necessary to consider whether the current law already protects against discrimination on the basis of vaccination status, so that the utility of the proposed Bill can be properly determined by the Committee.

The 'Protected Attributes'

46. Each state and territory has its own discrimination statute which seeks to protect citizens from discrimination on the basis of several 'protected attributes'. There are also concurrent federal statutes which seek to protect citizens on the basis of those same attributes.[20] None of those attributes explicitly include vaccination status, or more generally, medical status or medical record. As a result, the most basic advice on this issue has been that:

> Discrimination on the basis of one's medical status/record is simply not, by current Australian legal standards, discrimination.

[20] *Age Discrimination Act 2004; Disability Discrimination Act 1992; Racial Discrimination Act 1975; Sex Discrimination Act 1984*, as well as the various state Acts (such as the *Anti-Discrimination Act 1977* in NSW, and equivalents)

47. There have been some suggestions that discrimination on the basis of medical status/record could fit under the definition of 'disability discrimination', which is one of the protected attributes. In brief, this is due to the definition of 'disability' in these statutes. In the Federal Act (the *Disability Discrimination Act 1992 Cth,* Section 4), for example, Disability is defined as follows: (extracted as relevant):

> ***disability***, in relation to a person, means:
>
> …
>
> (c) the presence in the body of organisms causing disease or illness; or
>
> (d) the presence in the body of organisms capable of causing disease or illness; or
>
> …
>
> and includes a disability that:
>
> …
>
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
>
> (k) is imputed to a person.

48. The argument is unvaccinated people are treated differently on the basis that they are assumed to have an illness ('*imputed*'), or to be more vulnerable to an illness ('*may exist in the future*'), that they meet the above definition and have a 'disability' for the purpose of the Act.

49. But the argument is a bit awkward. Firstly, it is simply not true that unvaccinated people are more vulnerable to illness than the vaccinated, where NSW Health data throughout 2022 into 2023 clearly evidenced Covid-19 vaccinated persons out numbering unvaccinated for hospitalisations, ICU admissions, and Covid-19 deaths[21]. Secondly, there are several sections in the *Disability Discrimination Act* which allow disability discrimination to occur in certain circumstances, such as where the discrimination is aimed at curbing an infectious disease, or where it is occurring pursuant to another law (such as a state public health directive or order). It was on the basis of these exceptions that this 'disability discrimination' argument was dismissed by the NSW Supreme Court in *Kassam v Hazzard*.[22] However that case was not a discrimination case, and the NSW Supreme Court is

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[21] Madry 2022: *A Pandemic of Confounded Variables*
[22] See *Kassam v Hazzard; Henry v Hazzard [2021] NSWSC 1320* at [200] – [206].

not a discrimination forum, meaning the disability discrimination argument put forward in that case remains open to some extent; nonetheless there is sufficient doubt to say that such an argument has uncertain prospects of success for protecting unvaccinated persons, and it should not give confidence to unvaccinated people that they can rely on it to avoid being discriminated against. Consequently it is more important for the purpose of these submission to establish whether vaccination status should be considered a grounds of discrimination in and of itself, which is what the Discrimination Bill seeks to establish.

50. So, the most well-known discrimination statutes (with the exception of the AHRC Act, discussed below) **do not explicitly prohibit discrimination on the basis of vaccination status**. This is a point in favour of the Discrimination Bill.

51. However, there is another (often ignored) statute which does include 'medical record' within its definition of 'discrimination'. The Australian Human Rights Commission website implies that the lawful authority for discrimination on the grounds of medical record is actually the *Australian Human Rights Commission Act* (**the AHRC Act**), which is the enabling legislation for the AHRC itself. Their website says[23];

> **Under the Australian Human Rights Commission Act,** individuals can also lodge complaints with the Commission concerning discrimination in employment because of their religion, political opinion, national extraction, nationality, social origin, **medical record**, criminal record or trade union activity. Complaints will be reported to Parliament where the Commission finds a breach of the Act.

52. It is important to note that there are two different definitions of "discrimination" in the AHRC Act.

53. Critically, the definition[24] of "discrimination" in the AHRC Act is broader than in the general state and federal discrimination laws, where the oft referred to 'protected attributes' apparently come from.

[23] See quick guide page entitled *Discrimination,* accessed 12 March 2023, HERE.
[24] See Section 3.

"discrimination", except in Part IIB[25], means:

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

(c) in respect of a particular job based on the inherent requirements of the job; or

(d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

54. As noted above, the Australian Human Rights Commission Regulations (**the AHRC Regs**) include at Regulation 6:

6 Other distinctions, exclusions or preferences that constitute discrimination

[25] See below for relevance.

For the purposes of subparagraph (b)(ii) of the definition of ***discrimination*** in subsection 3(1) of the Act any distinction, exclusion or preference made:

(a) on the ground of:

(i) age; or

(ii) medical record; or

(iii) criminal record; or

(iv) impairment; or

(v) marital or relationship status; or

(vi) mental, intellectual or psychiatric disability; or

(vii) nationality; or

(viii) physical disability; or

(ix) sexual orientation; or

(x) trade union activity; or

(xi) one or more of the grounds specified in subparagraphs (iii) to (x) (inclusive) which existed but which has ceased to exist; or

(c) any distinction, exclusion or preference made **on the basis of the imputation to a person of any ground specified in paragraph (a) or (b).**

55. However, as per the highlighting above, the AHRC Act seeks to exclude this definition of discrimination from Part IIB of the Act.

56. Part IIB, Section 49P of the Act, is the Part which facilitates and enables a complaint to the AHRC. In this Part, there is a **different** definition of discrimination, being "unlawful discrimination", which must be met in order for a complaint to be brought. Returning to Section 3 of the Act and we find "unlawful discrimination" defined as:

> ***unlawful discrimination*** means any acts, omissions or practices that are unlawful under:
>
> (aa) Part 4 of the *Age Discrimination Act 2004*; or
>
> (a) Part 2 of the *Disability Discrimination Act 1992*; or
>
> (b) Part II or IIA of the *Racial Discrimination Act 1975*; or
>
> (c) Part II of the *Sex Discrimination Act 1984*;
>
> and includes any conduct that is an offence under:
>
> (ca) Division 2 of Part 5 of the *Age Discrimination Act 2004* (other than section 52); or
>
> (d) Division 4 of Part 2 of the *Disability Discrimination Act 1992*; or
>
> (e) subsection 27(2) of the *Racial Discrimination Act 1975*.

57. So, in sum, there are two different definitions for discrimination in the AHRC Act; "discrimination" and "unlawful discrimination". It is only "unlawful discrimination" for which a complaint may be made to the AHRC under Part IIB of the Act, which is the usual way complaints are made, but, nonetheless, the AHRC Act does define discrimination on the basis of medical status as discrimination ***in a more general sense***.

58. Given that the AHRC Act only excludes the more general definition of discrimination from Part IIB, it is prudent to look at the remainder of the Act where the broader definition is used to see if a complaint, or other action, can still be brought by other means.

59. In summary, the only means by which somebody who has been discriminated against on the basis of their medical record can bring a complaint to the AHRC is via Sections 31 and 32 of the AHRC Act.

60. Section 31 of the AHRC Act confers on the AHRC the function of: "inquir[ing] into any act or practice (including any systemic practice) that may constitute discrimination" in the context of equal opportunity in employment; and if the Commission considers it appropriate to do so—endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry". "Practice" under Section 30 is defined to mean:

> ***"practice"*** includes a practice engaged in:
>
> (a) by or on behalf of a State or an authority of a State;
>
> (b) under a law of a State;
>
> (c) wholly within a State; or
>
> (d) partly within a State to the extent to which the practice was or is engaged in within a State.
>
> (1A) In this Division, a reference to an act or practice that constitutes discrimination includes a reference to an act that is an offence under subsection 26(2).
>
> (2) This Division binds the Crown in right of a State.

61. It is Section 32 which allows an individual to lodge a complaint alleging discrimination in a general sense (including on the basis of medical status):

> **Performance of functions relating to equal opportunity**
>
> (1) Subject to subsections (2) and (3), the Commission shall perform the functions referred to in paragraph 31(b) when:
>
> (a) the Commission is requested to do so by the Minister; or
>
> **(b) a complaint is made in writing to the Commission, by or on behalf of one or more persons aggrieved by an act or**

> **practice, alleging that the act or practice constitutes discrimination;**[26] **or**
>
> (c) it appears to the Commission to be desirable to do so.

62. So, there is a general statutory duty for the AHRC to at least "inquire into any act or practice that may constitute discrimination", including on the basis of medical status, if such a complaint is made with the AHRC.

63. The rest of Section 32 is important, however, as it imparts several reasons why the Commission ***shall or may not*** conduct such inquiry:

> (2) The Commission **shall not inquire into an act or practice**, or, if the Commission has commenced to inquire into an act or practice, shall not continue to inquire into the act or practice, if the Commission is satisfied that the subject matter of the complaint is dealt with under a prescribed enactment or a prescribed State enactment.
>
> (3) The Commission **may decide not to inquire into an act or practice**, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice, if:
>
> (a) the Commission is satisfied that the act or practice does not constitute discrimination;[27] or
>
> (b) the Commission is satisfied that the person aggrieved by the act or practice does not want the Commission to inquire, or to continue to inquire, into the act or practice; or
>
> (ba) the Commission is satisfied, having regard to all the circumstances, that an inquiry, or the continuation of an inquiry, into the act or practice is not warranted; or

[26] Note that the term used here is "discrimination" (including medical status), not "unlawful discrimination" (which doesn't).
[27] Again, as above, the term used here is "discrimination", which in the Regulations explicitly includes on the basis of medical status.

(c) in a case where a complaint has been made to the Commission in relation to the act or practice:

(i) the complaint was made more than 12 months after the act was done or after the last occasion when an act was done pursuant to the practice; or

(ii) the Commission is of the opinion that the complaint is frivolous, vexatious, misconceived or lacking in substance; or

(iib) the Commission is satisfied that there is no reasonable prospect of the matter being settled by conciliation; or

(iii) where some other remedy has been sought in relation to the subject matter of the complaint—the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with; or

(iv) the Commission is of the opinion that some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to the complainant; or

(v) where the subject matter of the complaint has already been dealt with by the Commission or by another statutory authority—the Commission is of the opinion that the subject matter of the complaint has been adequately dealt with; or

(vi) the Commission is of the opinion that the subject matter of the complaint could be more effectively or conveniently dealt with by another statutory authority; or

(vii) the Commission is satisfied that the complaint has been settled or resolved.

64. In our view, none of the above exclusions apply, and the Commission would be generally obligated to deal with a Complaint made on the basis of discrimination on the basis of a medical record relating to employment.

65. It is also worth noting Section 34, which says:

> **Nature of settlements**
>
> The Commission shall, in endeavouring to effect a settlement of a matter that gave rise to an inquiry, have regard to the need to ensure that any settlement of the matter reflects **a recognition of the right of every person to equality of opportunity and treatment in respect of employment and occupation and the need to protect that right**.

66. So, in summary, under Sections 31 and 32 of the AHRC Act, there is a statutory pathway to lodge a complaint for discrimination on the basis of medical status to the AHRC for one or a group of employees. This is not the traditional means by which these complaints are lodged (being that under Part IIB), but still applies and is valid, nonetheless.

67. However, there is no direct pathway to Court (such as the Federal Court, for example), and the sections only apply to discrimination in the specific context of equal opportunity and employment. Additionally, these sections only really assist an individual on a case by case basis, meaning where industry wide discrimination may be occurring affecting many persons, each person would be required to lodge a separate complaint, with each complaint if actioned properly by the AHRC, requiring a separate investigation. When faced with the possibility of thousands of employees lodging thousands of complaints, it foreseeable the resource of the AHRC would quickly become overwhelmed, with most complaints never receiving attention, let the alone the relief sought. The AHRC system of redress would soon break down and not serve persons being affected by discrimination.

Would Part 2 in the Discrimination Bill clarify and bolster existing law or detract from it?

68. All in all, this leaves us in the following position;

    a. There is no general statutory prohibition of discrimination on the basis of medical status in Australia;

    b. The 'protected attributes' *may* be defined in such a way so as to cover this form of discrimination, but the Courts have rejected this approach once already, and it is not straightforward; and

    c. The AHRC Act includes discrimination on the basis of medical record within its definition of 'discrimination', but only provides the opportunity to make a complaint to the AHRC in the context of equal opportunity and employment, and nothing further. Problematically, complaints to the AHRC lead to 'opt in' conciliations which potential defendants can merely choose to abstain from without penalty.

    d. The AHRC Act does not contemplate dealing on behalf of potentially thousands of persons all individually complaining of the same discrimination. Such 'class action' inquires on behalf of multiple complainants were not properly envisaged when the Act was created and evidences an Achilles Heel in the AHRC Act.

69. In brief, therefore, the past two years have exposed a gaping hole in Australian law; citizens who are discriminated against on the basis of their private medical choices have very little recourse, except in the specific context of employment, but even then their options are limited, and enforceability is in issue.

70. Part 2 of the Discrimination Bill solves this problem at least with respect to Covid-19 vaccination, which is appropriate given the new technology and exponentially higher adverse event and death reports attributed to those products. It is appropriate that the Bill explicitly bars the Commonwealth, States and Territories from such discrimination, and that it explicitly seeks to override other laws

(Section 12), given the different and overlapping discrimination statutes that otherwise operate in those jurisdictions.

71. The definition of "discriminates" given in section 4 is generally consistent with discrimination law, and the clarification in 4(3) with respect to discrimination on multiple bases is, again, consistent with the way discrimination law generally operates in this country.

72. In general, the Committee should consider recommending that the Bill be broadened in scope so that it refers to discrimination on the basis of medical status/medical record generally. This would still serve the important purpose the Bill seeks to address, while ensuring Australia's domestic law is consistent with its international human rights obligations (see below section), and the language of already existing domestic law (such as the AHRC Act). Broadening the scope would 'future proof' the legislation so as to encompass discrimination based on as yet unknown, yet probable, other medical treatments promoted to persons for some new and purported threat to their health. Broadening the scope would not alter the object and effect of the Bill in relation to the current discrimination that has arisen in respect of Covid-19 vaccination. To achieve this increase in the scope for the future benefit and protection it would afford all Australians only requires the following wording to be inserted in Section 4 wherever "Covid-19 vaccination" occurs:

.. a Covid-19 vaccination **or any other medical treatment**

73. If the recommendation contained in 71 above to broaden the scope is adopted, the same (or similar) wording "or any other medical treatment" will also need to be inserted in Sections 7, 8, 9, 10, 11, and 12.

Recommendations:

4. **Part 2 is an important and very much needed Section in Australian law;**
5. **Consider broadening the Bill in scope so that it prohibits discrimination on the basis of medical record/medical status generally, with the inclusion of "or any other medical treatment".**

International Human Rights Law

74. Part 3 of the Discrimination Bill, at Section 13, notes as follows:

> **Constitutional basis of this Act**
>
> (1) This Act gives effect to Australia's international obligations, particularly under:
>
> (a) the International Covenant on Economic, Social and Cultural Rights, particularly article 12; and
>
> (b) the International Covenant on Civil and Political Rights, particularly articles 7, 17 and 26.
>
> (2) In this Act:
>
> International Covenant on Civil and Political Rights means the International Covenant on Civil and Political Rights, done at New York on 16 December 1966, as in force for Australia from time to time.
>
> Note: The Covenant is in Australian Treaty Series 1980 No. 23 ([1980] ATS 15 23) and could in 2022 be viewed in the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au).
>
> International Covenant on Economic, Social and Cultural Rights 18 means the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966, as in force for Australia from time to time.
>
> Note: The Covenant is in Australian Treaty Series 1976 No. 5 ([1976] ATS 22 5) and could in 2022 be viewed in the Australian Treaties Library on 23 the AustLII website (http://www.austlii.edu.au).

75. This is an appropriate addition to the Bill; Australia's treaty obligations have basically been ignored over the past three years. Australia's primary human rights body, the Australian Human Rights Commission, has been slow and weak to

defend the human rights of Australia's citizens, despite their defence being one of their primary statutory functions. In most cases this was rationalised by the alleged emergency presented by Covid-19, but many of the treaty obligations which were breached are not subject to any 'pandemic' exceptions within the treaties and covenants from which they are derived. For example, article 7 of the International Covenant on Civil and Political Rights (**ICCPR**), which the Bill references, states as follows:

> 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.

76. There are no exceptions to this article.

What other articles does the Bill address?

77. For completeness, it is worth noting that the Bill actually gives effect to several more of Australia's treaty and covenant obligations. For example, with respect to the ICCPR in particular:

    a. Part 1, Article 1 of the ICCPR notes that:

    > "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

    The right to self-determination is a cardinal principle in human rights law. Individually, it refers to a person's ability to make choices and manage their own life. Telling people they cannot work in their industry of training or choice, or that they cannot engage freely in society, on the basis of either their medical status or political opinion (ie; their self-determination), is a clear abrogation of the "right [to] freely pursue their economic, social and cultural development";

    b. Part III, Article 12 of the ICCPR concerns liberty of movement. In particular, it states that "everyone lawfully within the territory of a State shall within

that territory, have the right to liberty of movement and freedom to choose his residence"; that "everyone shall be free to leave any country"; and that "no one shall be arbitrarily deprived of the right to enter his own country";

c. Article 14 of the ICCPR protects the right to equality before courts and tribunals (relevant to unvaccinated people not being allowed to attend courts in person in the past three years);

d. Article 17 of the ICCPR protects the right to privacy (including private medical information);

e. Article 18 of the ICCPR protects freedom of thought;

f. Article 19 of the ICCPR protects the right to freedom of expression and to hold opinions without interference.

78. It is also important to acknowledge that Section 11 of the Bill gives effect to several of Australia's obligations under the *Convention on the Rights of the Child* (**CRC**). For example:

a. Article 2(2) states that "State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members";

b. Article 3(1) states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration";

c. Article 5 states that "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction

and guidance in the exercise by the child of the rights recognized in the present Convention";

d. Article 6(1) states that "State parties recognise that every child has the inherent right to life"; and

e. Perhaps most relevantly for these submissions, Article 14(2) states that:

> "State Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child".

79. Finally, the *Universal Declaration on Bioethics and Human Rights* states as follows:

a. Article 3(2) notes that:

> "the interests and welfare of the individual should have priority over the sole interest of science or society"; and

b. Articles 5 and 6 deserve extraction in full, as follows:

> **Article 5 – Autonomy and individual responsibility**
>
> The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected. For persons who are not capable of exercising autonomy, special measures are to be taken to protect their rights and interests.
>
> **Article 6 – Consent**
>
> 1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the

person concerned at any time and for any reason without disadvantage or prejudice.

2. Scientific research should only be carried out with the prior, free, express and informed consent of the person concerned. The information should be adequate, provided in a comprehensible form and should include modalities for withdrawal of consent. Consent may be withdrawn by the person concerned at any time and for any reason without any disadvantage or prejudice. Exceptions to this principle should be made only in accordance with ethical and legal standards adopted by States, consistent with the principles and provisions set out in this Declaration, in particular in Article 27, and international human rights law.

3. In appropriate cases of research carried out on a group of persons or a community, additional agreement of the legal representatives of the group or community concerned may be sought. In no case should a collective community agreement or the consent of a community leader or other authority substitute for an individual's informed consent.

c. Article 11 states that:

"**No individual or group should be discriminated against or stigmatized on any grounds, in violation of human dignity, human rights and fundamental freedoms**".

Fair Work Amendment (Prohibiting Covid-19 Vaccine Discrimination) Bill 2023

1. The *Fair Work Amendment (Prohibiting Covid-19 Vaccine Discrimination) Bill 2023* (**the Fair Work Amendment Bill**) seeks to explicitly include "Covid-19 vaccination status" within the Fair Work Act 2009 as one of the grounds upon which, broadly, a person cannot be discriminated against.
2. Although we support this notion, the language within the Bill should be broadened to include not just vaccination against Covid-19, but "medical record" or "medical status" generally. This will be a more appropriate fit given the language and function of the *Fair Work Act 2009,* and it will broaden the utility of the Fair Work Amendment Bill beyond the scope of only Covid-19.

Sincerely yours,
CHD Australia

24 March 2023

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