



Australian Government
**Department of Employment
and Workplace Relations**

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

Submission from the Department of
Employment and Workplace Relations to the
Senate Education and Employment
Legislation Committee

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Introduction

The Department of Employment and Workplace Relations (the department) welcomes the opportunity to make a submission to the Senate Standing Committee on Education and Employment's inquiry into the COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 and the Fair Work Amendment (Prohibiting COVID-19 Vaccine Discrimination) Bill 2023.

This submission primarily focuses on the Fair Work Amendment (Prohibiting COVID-19 Vaccine Discrimination) Bill 2023 (referred to throughout this submission as the Fair Work Bill), which proposes amendments to the *Fair Work Act 2009* (Cth) (the FW Act), but also comments on the employment-related aspects of the COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 (the COVID-19 Vaccination Status Bill).

The department

The department has portfolio responsibility for workplace relations issues, including discrimination in the workplace, and work health and safety matters.

Other relevant agencies within the department's portfolio include: the Fair Work Ombudsman (FWO), the national workplace relations regulator; the Fair Work Commission (FWC), the national workplace relations tribunal; Comcare, the Commonwealth authority for work health and safety and workers' compensation; and Safe Work Australia (SWA) the national work health and safety policy body representing the interests of the Commonwealth, states and territories, as well as workers and employers.

Overview of current COVID-19 environment

COVID-19 vaccination rates

Australia's COVID-19 vaccination rates are high, and its vaccination rollout continues. According to the Department of Health and Aged Care's statistics, as of 8 March 2023, 96.2% of Australians aged 16 year or over have been double-vaccinated against COVID-19.¹ This shows that, if a COVID-19 vaccination requirement applies to an Australian workplace, most Australians of working age can satisfy that requirement.

COVID-19 vaccination requirements in the workplace

Most state and territory public health orders in force at the height of the pandemic have now been relaxed or entirely removed.

¹ Australian Government Department of Health and Aged Care, Vaccination Numbers and Statistics (January 13, 2023) <<https://www.health.gov.au/our-work/covid-19-vaccines/vaccination-numbers-and-statistics>>

- New South Wales,² South Australia,³ Western Australia,⁴ the Northern Territory⁵, and Tasmania have removed all public health orders mandating COVID-19 vaccination.
- The Australian Capital Territory,⁶ Victoria,⁷ and Queensland⁸ still require COVID-19 vaccination in some high-risk settings, such as for aged-care workers.

In the absence of public health orders setting COVID-19 vaccine mandates in the workplace, the way in which the risk of COVID-19 in the workplace is managed becomes a matter for each individual workplace to determine, accounting for relevant workplace relations, discrimination, work health and safety, and privacy laws.

This will result in COVID-19 vaccination requirements in the workplace being treated in the same way as other vaccination requirements, such as for the flu or other infectious diseases, which are common requirements for some roles in industries such as aged care, childcare, healthcare, and roles with close contact with animals or animal products.

The department's view is that COVID-19 vaccinations should be treated in the same way as other vaccinations and that the amendments proposed by this Bill are therefore unnecessary.

The Fair Work Act's anti-discrimination framework

Although discrimination is primarily addressed through Commonwealth, state and territory anti-discrimination laws, the FW Act also has its own anti-discrimination framework.

This framework includes a range of protections against discriminatory conduct and applies to the following protected attributes: race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, or social origin.

² NSW Health, *Vaccination Requirements for Workers* (January 12, 2023) NSW Government <<https://www.nsw.gov.au/covid-19/vaccination/requirements-for-workers#toc-vaccination-requirements>>

³ South Australia Department of Health and Wellbeing, *Covid-19 Requirements Under the Public Health Act* (November 29, 2022) SA Health <<https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/conditions/infectious+diseases/covid-19/response/covid-19+requirements+under+the+public+health+act/covid-19+requirements+under+the+public+health+act>>

⁴ WA Health, *Covid 19 Mandatory Vaccination Program Policy* (2022) Government of Western Australia <<https://ww2.health.wa.gov.au/About-us/Policy-frameworks/Public-Health/Mandatory-requirements/Communicable-Disease-Control/Immunisation/COVID-19--Mandatory-Vaccination-and-Vaccination-Program-Policy>>

⁵ Lauren Roberts and Samantha Dick, *Northern Territory Scraps Vaccine Mandate for Workers, Chief Minister Confirms* (June 9, 2022) ABC News <<https://www.abc.net.au/news/2022-06-09/northern-territory-covid-natasha-fyles/101137616>>

⁶ Chief Minister, Treasury and Economic Development, *Information for Employees That Require Vaccination* (October 22, 2021) <<https://www.covid19.act.gov.au/vaccine/information-for-employees-that-require-vaccination>>

⁷ Department of Health, Victoria, *Vaccination for HealthCare Workers* (November 8, 2022) Government of Victoria <<https://www.health.vic.gov.au/immunisation/vaccination-for-healthcare-workers>>

⁸ Queensland Health, *Covid-19 Vaccination for Workers* (February 1, 2023) Queensland Government <<https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/business/vaccination-for-workers>>

Section 351 of the FW Act is the primary protection against discriminatory action and prohibits an employer from taking adverse action against an employee or prospective employee because of a protected attribute. Adverse action in this context can include dismissing a person, injuring a person in their employment, refusing to hire a person, or employing a person on different terms and conditions of employment than others.

This protection is subject to the following exceptions, where the action is:

- not unlawful under an anti-discrimination act in force in the place where the action is taken
- taken because of the inherent requirements of the particular position concerned, or
- taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – in good faith, and to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Other protections in the FW Act include a prohibition on discriminatory terms in modern awards and enterprise agreements (sections 153 and 195 respectively) and a prohibition on the termination of employment for discriminatory reasons (section 772). Under section 578 of the FW Act, the FWC is also required to take into account the need to prevent and eliminate discrimination when performing its functions.

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

Items 2, 3, 4, 6 and 7

Items 2, 3, 4, 6 and 7 of the Fair Work Bill would include COVID-19 vaccination status as a protected attribute under the FW Act's existing non-discrimination provisions.⁹

The department notes, however, that discrimination based on a person's COVID-19 vaccination status is already unlawful under the FW Act in certain circumstances. This includes, for example, where a person is not able to receive a COVID-19 vaccination due to a protected attribute, such as a physical disability. This is the case subject to the exceptions listed above.

The department's view is that the FW Act's existing framework provides sufficient protection from COVID-19 vaccine discrimination and strikes an appropriate balance between protecting the rights of workers who are not vaccinated against COVID-19, protecting public health, and protecting the rights of workers vulnerable to being infected with COVID-19.

The department is also aware that key stakeholders find existing anti-discrimination laws difficult to navigate and the addition of COVID-19 vaccination status as a protected attribute in the FW Act, in circumstances where the normal approach is for the FW Act to reflect existing protections available under other anti-discrimination laws (none of which include COVID-19 vaccination status as a protected attribute) would be likely to increase what is already a complex area of law. In addition, the proposed amendments could cause confusion for employers as to whether they can use COVID-

⁹ *Fair Work Act 2009* (Cth), ss 153(1), 195(1), 351(1), 578(c), 772(1)(f).

19 vaccination mandates as a control measure to manage the risk of COVID-19 in the workplace and meet their duty of care under work health and safety laws.

Item 5

Item 5 of the Fair Work Bill would disapply the current exception that provides that adverse action taken by an employer against an employee (or prospective employee) because of a protected attribute is not discriminatory if it is not unlawful under any other anti-discrimination law in force in the place where the action is taken, but only in respect of action taken because of a person's COVID-19 vaccination status. Such an approach in relation to a person's COVID-19 vaccination status would introduce an inconsistency in the way in which this exemption is usually applied.

The department notes that the Fair Work Bill would allow for some lawful actions to be taken by employers based on COVID-19 vaccination status, such as where action is taken because of the inherent requirements of a particular position. This is consistent with the approach taken under existing anti-discrimination laws.

Item 8

The department notes that item 8 would make a consequential amendment to the heading of section 789HB (to clarify that its extension of anti-discrimination rules only applies to breastfeeding, gender identity and intersex status) as a result of item 9.

Item 9

Item 9 would insert a new extension of anti-discrimination rules provision into Part 6-4E for the proposed amendments relating to COVID-19 vaccination status. This provision purports to rely on the state referrals powers,¹⁰ or in the alternative, the external affairs power¹¹ to support the proposed amendments.

Item 9 also erroneously refers to section 172A as a section to which subsection 789HC(3) applies, but misses section 351.

Item 10

The department notes the commencement provision in item 10 that clarifies that the proposed amendments would only apply to action taken on and after the commencement of the amendment (that is, to prospective enterprise agreements and adverse action).

The COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022

This COVID-19 Vaccination Status Bill would introduce a new Act prohibiting discrimination against a person on the ground of whether they had received a vaccination against COVID-19. The prohibition would apply to Commonwealth, State and Territory governments as well as businesses and voluntary bodies.

¹⁰ *Commonwealth Constitution*, s 51(xxxvii).

¹¹ *Commonwealth Constitution*, s 51(xxix).

The department is only providing comments on the employment-related aspects of the COVID-19 Vaccination Status Bill.

Section 3 – Definitions (Employment)

The department notes that the COVID-19 Vaccination Status Bill would define employment for the purposes of this provision to include ‘work under a contract for services’, which is not a recognised form of employment under the FW Act or the common law.

‘Employment’ is not defined in the FW Act, which means the term takes its ordinary meaning. It would be more appropriate to refer to employment generally, consistent with the FW Act.

Section 10 – Other entities

Section 10 of the proposed Act would apply the prohibition on discrimination against a person on the ground of their COVID-19 vaccination status to businesses and voluntary bodies in the conduct of certain employment-related activities. This would include the employment of persons (subject to exceptions for those involved in frontline health and care work) and the provision of goods and services.

The department is concerned that this section would impose pecuniary penalties for contraventions of this prohibition that are inconsistent with those that apply to breaches of the prohibition on discriminatory adverse action under section 351 of the FW Act.

- A maximum penalty of 100 penalty units (\$27,500) applies to contraventions of proposed subsections 10(1) and 10(4) by an individual, whereas a maximum penalty of 60 penalty units (\$16,500) applies to contraventions of subsection 351(1) by an individual under section 539 of the FW Act.
- Maximum penalties for bodies corporate under the FW Act are 5 times higher than for individuals (\$82,500), which puts them higher than the proposed penalties for employers under proposed subsections 10(1) and 10(4), but lower than the proposed maximum penalty of 1,000 penalty units (\$275,000) for businesses under proposed subsection 10(3).