

Russell Kennedy webinar: To Mandate or Not Mandate COVID-19 Vaccinations, that is the Question

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Disclaimer

The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

Overview

- The legalities around vaccination requirements
- Implementing requirements in the workplace
- Dealing appropriately with unvaccinated staff
- Contracting and governance considerations

**When is it legal to mandate
vaccinations for workers?**



When is a vaccination requirement lawful?

- > You can lawfully implement a vaccination requirement if:
 - > there is a legal requirement that workers in your sector be vaccinated; or
 - > it is lawful and reasonable for you to direct staff to be vaccinated



Legal requirements - NSW

- > Public health orders mandate vaccinations for:
 - > Anyone leaving an area of concern for work (6 September)
 - > Disability support workers living or working in areas of concern (6 September)
 - > Residential aged care (17 September)
 - > Health care workers (30 September)
- > Exemption – medical contraindication

Legal requirements – WA, Tasmania

- > WA: health care workers and health support staff to have had first dose by:
 - > Tier 1 facilities – 1 October
 - > Tier 2 facilities – 1 November
 - > Tier 3 facilities – 1 December
- > Tasmania: health care workers to have had first dose by 31 October

Flu vaccination case law

Kimber v Sapphire Coast Community Aged Care [2021]
FWC 1818

- Public health orders required vaccination of all aged care facility staff (exemption - medical contraindication)
- Employer introduced a mandatory vaccination policy
- Receptionist refused
- FWC held that employer could give a lawful and reasonable direction to be vaccinated
- FWC held that receptionist could not perform inherent requirements of the role

Legal requirements – everywhere else

- > No specific requirements (today) for vaccination of workers
- > WHS – is requiring vaccination reasonably practicable?
- > SafeWork Australia indicated no... in April
- > Conduct your own assessment
 - > Likelihood of risk depends on location
 - > Significant risk to health
 - > Particularly vulnerable clients
 - > What alternative measures are there?
 - > Are alternative measures effective?

When is a direction lawful?

- > “Lawful” means “not unlawful”
- > Does not need to be a legal requirement imposed by the government
- > What about section 51(xxiiiA) of the Constitution?
- > What about the Nuremberg Code?
- > What about the Charter?

When is a direction reasonable?

- > “Reasonable” requires a consideration of all of the circumstances
 - > Safety considerations
 - > Nature of role
 - > Location
 - > Alternative measures
 - > Consistent with contracts, policies, enterprise agreements



Fair Work Ombudsman guidance material

“Tier 2 work, where employees are required to have close contact with people who are particularly vulnerable to the health impacts of coronavirus (for example, employees working in health care or aged care)....

“The coronavirus pandemic doesn’t automatically make it reasonable for employers to direct employees to be vaccinated against the virus.

An employer’s direction to employees performing Tier 1 or Tier 2 work is more likely to be reasonable, given the increased risk of employees being infected with coronavirus, or giving coronavirus to a person who is particularly vulnerable to the health impacts of coronavirus.”

Flu vaccination case law

Glover v Ozcare [2021] FWC 2989

- > Health directions required vaccination for residential aged care staff
 - > Exemption – medical contraindication
- > Ozcare imposed a vaccination requirement which covered home care staff
- > Glover refused, citing allergy
- > No solid medical evidence of contraindication

Glover v Ozcare continued

- > FWC determined that the direction was lawful and reasonable – even though it did not contain any exemptions
- > Given time to reconsider
- > Allowed to use paid leave
- > Vulnerability of clients
- > Potential super-spreader

More flu vaccination case law

Barber v Goodstart

- No relevant health directions in place
- Employer introduced a policy
- Barber refused vaccination – sensitive immune system – no medical evidence
- Goodstart argued that she could not perform inherent requirements – rejected by FWC
- However, direction was lawful and reasonable

Implementing a mandatory vaccination requirement



Implementation

- > Consider any enterprise agreement requirements
- > Consultation
 - > Not consent
 - > Survey?
- > Communicate the benefits (and counter disinformation)
- > Equip staff with the information they need to get vaccinated



Policy

- > Who is covered by the requirement
- > Exemptions
 - > What happens to the exempt?
- > Remove economic obstacles
 - > Paid time off to attend appointments
 - > Recovering from side effects
- > Encourage independent medical advice

Evidence of vaccination (and privacy)

- > Request to provide evidence is reasonable
- > Direction must comply with privacy laws to be lawful
- > Vaccination status is sensitive information
- > Can only collect sensitive information if:
 - > authorised by law; or
 - > collection is reasonably necessary for one or more of the organisation's functions, AND the worker consents
- > Privacy policy, collection statement

Unvaccinated staff



Workers with legal exemptions

- Seek information about exemption
- Allow the worker to continue working
- Consider additional safety measures
- Consider redeployment if relevant

Workers without legal exemptions

- Find out why
- Keep on communicating
- Alternative roles or duties
- Suspension (with or without pay)
- Paid or unpaid leave
- Dismissal



Risks

- Unfair dismissal
- Discrimination
- Workers' compensation
- Negligence



Volunteers

- Not your employees
- No obligation to allow a volunteer to attend
- Should not be any obstacle to vaccination requirements



Contracting and governance

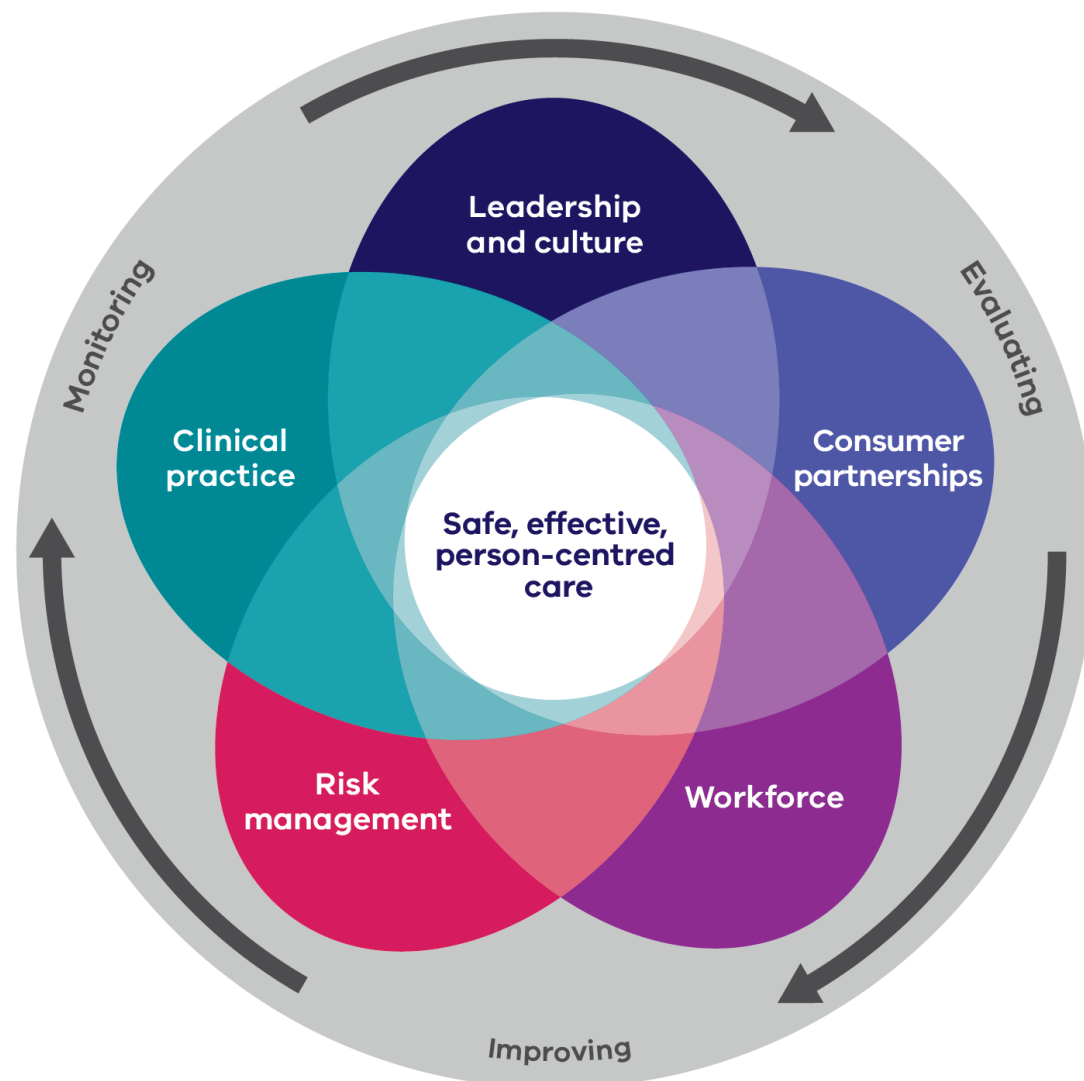


Contracting considerations

- > Contracts with organisations: eg labour hire, commissioning service providers, brokerage agreements
- > **New contracts**
 - > commercial decision whether customer/provider require mandatory vaccinations
 - > See earlier slides eg discrimination
- > **Existing contracts**
 - > review existing provisions: Flu/other vaccinations?
 - > OHS requirements? Qualifications? Reasonable directions?
Customer security policies?

Clinical governance considerations

- > Safer Care Victoria clinical governance framework / Targeting Zero (Duckett Report)
- > Central vision is “safe, effective, person-centred care”
- > Infection control now emphasised and critical – vaccine mandates contribute to this



Clinical governance considerations

- > What elements guide decisions to mandate vaccines?
- > **Leadership and culture** – what culture and ethos should we set about care for our clients? Engaged clinicians. Engaged clients.
- > **Workforce** – systems to support and protect the workforce. Providing a physically and psychologically safe workplace. Credentialing, systems for checking/tracking vaccination status (eg future boosters).
- > **Risk management** – Minimising and safeguarding against clinical risk. Risk identification and treatment (eg receptionist outside COVID ward catching COVID).

Corporate governance considerations

- > **Director fiduciary obligations:** What is in the best interests of your organisation?
- > Weighing broad range of stakeholders (eg staff, clients, public safety)
- > Weighing monetary and non-monetary factors (cost v benefit? net benefit?)
- > What's your client/staff profile? What vaccines are available to them?
- > **Benefits:** Culture, leadership, risk management, engage clients and their confidences, workplace productivity, support government policy
- > **Risks:** first-mover adverse publicity, attacks from unions/media/social media, vexatious complainants, unreasonable conduct, misinformation

Questions



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