



NSWCCL SUBMISSION

EDUCATION AND EMPLOYMENT LEGISLATION COMMITTEE

COVID-19 VACCINATION STATUS (PREVENTION OF DISCRIMINATION) BILL 2022 AND THE FAIR WORK AMENDMENT (PROHIBITING COVID-19 VACCINE DISCRIMINATION) BILL 2023

24 March 2023

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The New South Wales Council for Civil Liberties (**NSWCCL**) is grateful for the opportunity to make a submission to the Committee's Inquiry into the COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 (Cth) (**Discrimination Bill**) and the Fair Work Amendment (Prohibiting COVID-19 Vaccine Discrimination) Bill 2023 (Cth) (**FW Amendment Bill**) (together **Bills**).

About the COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 (Cth)

The COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022 (the bill) prohibits the Commonwealth, States and Territories and other government and non-government entities from discriminating on the basis of whether a person has had a COVID-19 vaccination, in the provision of goods, services and facilities and also in employment, education, accommodation and sport. The bill prevents any interference of free movement between and within States and Territories of the country.

About the Fair Work Amendment (Prohibiting COVID-19 Vaccine Discrimination) Bill 2023 (Cth)

This Bill seeks to amend the Fair Work Act 2009 by adding COVID-19 vaccination status as an attribute protected from discrimination. This Bill explicitly provides that "COVID-19 vaccination status" cannot be used by an employer to take "adverse action" against an employee or prospective employee. This Bill seeks to reinforce workers' rights to refuse a workplace direction where it is not a reasonable and justified requirement of the job. It leaves no doubt for employees and employers that vaccine mandates must not be in place unless it is an inherent requirement of the position they hold and the tasks they undertake in that position.

NSWCCL position on Bills

- 1 NSWCCCL supports the right to decide whether or not to receive a vaccine. We acknowledge that people have valid reasons for choosing to refuse a vaccination (including medical and religious reasons).
- 2 NSWCCCL also supports the objective that the broader community is deserving of the greatest level of health and wellbeing available to them. This includes:
 - (a) employers and businesses - who are legally obliged to provide a safe workplace under state and federal work health and safety laws (**WHS laws**);
 - (b) employees (and other workers) - who have the right to work in a safe environment (and also have legal obligations under WHS laws); and
 - (c) vulnerable and at-risk members of society who are susceptible to the effects of COVID-19 (e.g. the immunocompromised).
- 3 In our view, the Bills unreasonably and disproportionately protects the unvaccinated at the expense of the rights of other members of the community. Based on the generally accepted medical science, the Bills are incompatible with human rights.
- 4 To make workplaces safe, employers and businesses ought to have the right to request information about whether their staff or visitors are vaccinated (with a corresponding duty to adequately protect the privacy of the persons concerned), ask them to be vaccinated, or to be able to make alternative arrangements if they are unwilling to do so. In some situations, this may warrant the exclusion of staff or visitors from workplaces if they are unvaccinated. For example:
 - (a) if immunocompromised people are present in the workplace or other vulnerable individuals such as the elderly or the pregnant;
 - (b) if there is a particularly high incidence of COVID-19 in a certain area; or
 - (c) if a new variant of concern has been identified by the World Health Organisation.

Summary of NSWCCL's submission

- 5 The Bills, in their current form, should be opposed. They do not achieve an adequate balance between the rights of unvaccinated people to live their lives without interference and the rights of businesses, workers and the broader community to protect themselves from the threat of COVID-19.

- 6 In our view, business owners and operators should have the right to choose how they comply with WHS laws, which may include asking about a workers' COVID-19 vaccine status, or requiring certain workers or customers to be vaccinated against COVID-19 to be eligible for employment or to enter their business premises.
- 7 The proposed Bills (particularly section 12 of the Discrimination Bill) are contrary to existing state and federal legislation. The Bills' enactment would have an overriding or contradictory effect to the current anti-discrimination framework.
- 8 In our view, section 351 of the *Fair Work Act 2009* (Cth) (**FW Act**) in its current form adequately affords protection to unvaccinated people (when balancing the right to be unvaccinated against the rights of the broader community), making the proposed FW Amendment Bill redundant.

Obligations under WHS laws

- 9 The Commonwealth (with each Australian State and Territory, save for Victoria) has adopted the Model WHS law. In all jurisdictions, WHS laws are based on the *Work Health and Safety Act 2011* (Cth) (**Model Act**). The Model Act operates similarly to the Victorian scheme. The WHS laws inform how a 'person conducting business or undertaking' (**PCBU**) is to run their business, including compliance with anti-discrimination obligations under the FW Act, federal and state equal opportunity acts.
- 10 The WHS laws include a number of key duties owed by PCBUs.
- 11 A PCBU owes a primary duty to ensure, so far as is reasonably practicable, the health and safety of workers employed or engaged by the person while the workers are on a premises controlled by the business or undertaking.¹ This duty extends to ensuring the safety of 'other persons in the workplace' which can include visitors, contractors, customers and clients.²
- 12 There is also a duty on PCBUs to ensure, so far as is reasonably practicable, that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness of workers arising from the conduct of the business or undertaking.³ To comply with the above duties, PCBU officers must exercise due diligence. Due diligence is prescribed in the Model Act to include, amongst other things, keeping up-to-date knowledge on work health and safety matters. This may include taking into consideration the level of risk of infectious diseases including COVID-19.
- 13 NSWCCCL supports PCBUs having to comply with these obligations. It should be made clear that this is separate to and does not prohibit an individual's right to exercise their freedom of choice not to be vaccinated. Rather, it provides the ability for employers or business owners to choose how to operate their business in a way that is consistent with community expectations.
- 14 Workplace requirements for staff to be vaccinated are not novel. Prior to the COVID-19 pandemic, workers in high-risk settings such as public and private health care were required to be vaccinated against diseases such as influenza, rubella and measles. These protections exist not only for the benefit of patients, but also co-workers. In these instances, any discrimination is permitted under anti-discrimination laws due to the inherent requirements of these roles.

The Bills would operate inconsistently to WHS laws

- 15 NSWCCCL submits that the Bills, in their current form, conflict with existing WHS laws. The Discrimination Bill would prevent businesses from considering an individual's COVID-19 vaccination status when:
- (a) employing or engaging a person to work for or with the business;
 - (b) providing goods or services to the person; or
 - (c) giving the person access to business premises.

¹ Model Act s 19(1).

² Ibid s 19(2).

³ Ibid s 19(3)(g).

- 16 WHS regulators such as SafeWork NSW agree that vaccination is '*a high order risk control measure against disease...[that] should be considered in the context of a broad range of control measures to minimise the risk of COVID-19 in workplaces.*'⁴
- 17 NSWCCCL champions civil liberties. NSWCCCL does not submit that businesses or workplaces should be permitted to treat people differently on the basis of COVID-19 vaccination status in *all* circumstances. In saying that, the Bills conflict with PCBU's obligation to provide for a safe workplace.

Submissions regarding the Discrimination Bill

- 18 The Discrimination Bill aims to override any other law of the Commonwealth, a State or a Territory that requires or permits discrimination on the basis of whether a person has received a COVID-19 vaccination.⁵
- 19 If section 12 of the proposed Discrimination Bill is maintained, its effect on state and territory laws will be indeterminable.
- (a) This may restrict the operation of WHS laws.
- (b) It may also affect the ability to implement future public health orders or directions (noting that the Discrimination Bill defines COVID-19 to include any subsequent variants of that coronavirus). Public health orders and directions can be a necessary means of protecting individuals against the spread of virus. It can be dangerous to apply a blanket provision relating to COVID-19 when we cannot simply determine the veracity or potential danger of future variants.
- 20 Section 4 of the Discrimination Bill defines the meaning of 'discriminates'. We are concerned by the very broad definition of 'discriminate'. Under the proposed definition, a person may be discriminated against by simply being asked about their vaccination status or being asked to produce proof of a vaccine. This sets the bar incredibly low.
- 21 The proposed penalty under the Discrimination Bill is disproportionate. Under the Bill, businesses may be liable to pay up to \$275,000 (1,000 penalty units) per breach where a business discriminates against a person on the basis of whether the person has received a COVID-19 vaccination in relation to providing goods or services or giving the person access to the business premises.⁶ The proposed penalty is disproportionate.
- 22 We consider it is misguided to include statutory obligations in relation to vaccination of children in the Discrimination Bill. This does not appear to be consistent with the purpose of the Bill - which is to minimise or eliminate discrimination on the basis that someone is not vaccinated against COVID-19. There is existing state legislation in relation to the exclusion of unvaccinated children. For example, five Australian states have enacted 'No Jab No Play' policies requiring children to receive certain vaccinations to attend childcare and early education services.⁷ This policy however does not give care providers the right to vaccinate children without the appropriate consent from a parent or guardian.
- 23 The effect of the Discrimination Bill would be to create conflict between Commonwealth, State and Territory laws. For example, by complying with the Discrimination Bill, people may risk breaching WHS laws by creating an unsafe workplace.
- 24 The Discrimination Bill disproportionately prioritises and protects the right to work or to obtain goods and services while unvaccinated against the rights of the broader community. This includes the right to life and right to health, which Australia is obliged to protect under the below treaties.
- (a) ***International Covenant on Civil and Political Rights:*** Article 6.1 which provides that '*Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*'.

⁴ <https://www.safework.nsw.gov.au/resource-library/COVID-19-Coronavirus/covid-19-vaccination#:~:text=SafeWork%20NSW%20considers%20vaccination%20a,of%20COVID%2D19%20in%20workplaces.>

⁵ Discrimination Bill s 12.

⁶ Ibid s 10(3).

⁷ Katie Attwell and Drislane Shevaun, 'Australia's 'No Jab No Play' policies: history, design and rationales' (2022) 46(5) *Australian and New Zealand Journal of Public Health* 549.

Studies show that vaccines can lower the transmission risk of COVID-19 and have a public health benefit beyond individual protection.⁸ Accordingly, vaccines can help prevent transmission of COVID-19, in turn protecting vulnerable people from serious illness or death resulting from infection.

- (b) ***International Covenant on Economic, Social and Cultural Rights***: Article 7(b) which provides that '*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular safe and healthy working conditions*'.

25 The Bill fails to properly consider the position of vulnerable groups in the community. Rather, it imposes a blanket protection that is inconsistent with the above human rights.

Submissions regarding the FW Amendment Bill

- 26 In our submission the proposed amendment to the FW Act is not required and otherwise inappropriate. The legislative framework includes protections against the imposition of mandatory COVID-19 vaccination policies or conditions on staff. The Australian Human Rights Commission's position is that 'the need for vaccination ought to be assessed on a case-by-case basis, taking into account the nature of the workplace and the individual circumstances of each employee.' The NSWCCCL agrees with the Commission's position.
- 27 The FW Amendment Bill seeks to insert 'COVID-19 vaccination status' as an unlawful basis on which an employer must not discriminate against a prospective or current employee when:
- (a) inserting terms of a modern award or enterprise agreement; and
 - (b) taking action, which may be considered adverse action against an employee, such as termination or demotion.
- 28 For the reasons above, NSWCCCL opposes the introduction of COVID-19 vaccination status as a protected attribute. It is not appropriate to include this attribute among the protected attributes which should be afforded liberties in this context such as race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- 29 Unvaccinated individuals may be awarded protection under the existing FW Act if their vaccination status is due to one of the protected attributes (affording some individuals with protection without need for any further amendment to the FW Act). For example, if someone is unable to be vaccinated due to a disability or religious belief, they would be protected under existing provisions of the FW Act.
- (a) Direct discrimination occurs when a person, or a group of people, is treated less favourably than another person or group because of their background or certain personal characteristics listed in paragraph 28.
 - (b) Indirect discrimination occurs when there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular attribute listed in paragraph 28.
- 30 NSWCCCL submits that the current direct and indirect discrimination regimes would include where:
- (a) a person is directly discriminated against in employment or the provision of goods and services where they are unvaccinated due to medical or religious reasons (direct discrimination); and
 - (b) an employer or business seeks to impose a blanket requirement of vaccination which may unfairly affect those unable to receive the COVID-19 vaccine due to medical or religious reasons (indirect discrimination).

⁸ Olha Puhach et al., 'Infectious viral load in unvaccinated and vaccinated individuals infected with ancestral, Delta or Omicron SARS-CoV-2', (2022) 28(1) *Nature* 1491.

- 31 We also submit that, should the FW Amendment Bill be enacted to amend section 351 of the FW Act, the section would be prima facie inconsistent with Australia's international obligations under the international treaties referred to in paragraph 24 of these submissions.
- 32 NSWCCCL also notes the defences available to employers under section 351 of the FW Act may operate to exclude the unvaccinated from holding certain positions whether or not *COVID-19 vaccine status* is inserted as a protected attribute:
- (a) The defence of reasonableness is where an employer can show that the blanket condition to be vaccinated is a reasonable requirement, based on the settings in which its employees are working. This can include where employees are working with vulnerable people in the community.
 - (b) The defence of inherent requirements provides that an employer has assessed it is an essential requirement of the position that an employee is vaccinated and cannot make reasonable adjustments to allow the employee to undertake the fundamental duties and responsibilities of their job without being vaccinated.
- 33 On this basis, we submit that employers are already constrained when dealing with those who choose not to be vaccinated in the way they exclude them from their workplace.
- 34 It is important to maintain these protections of individuals in the workplace against adverse action whilst still permitting business owners to exercise choice and freewill in relation to how they run their business.

Conclusion

- 35 Improving protections for individuals who are discriminated against because of their vaccine status is important and something that NSWCCCL endorses.
- 36 However, the Bills in their current form go much further than this. They allow an imbalance between the important task of protecting the choice to be unvaccinated and protecting the wider community from infections of COVID-19. Where human rights may come into conflict or become restricted, consideration must be given to whether that restriction is reasonable, necessary and proportionate.
- 37 In our view, the importance of the rights of the broader community (ie right to life, right to health) outweigh the individual's rights that the proposed Bills are seeking to protect. A key consideration here being the Bills in the current form may be inconsistent with current state and federal legislative frameworks.
- 38 Accordingly, the Bills must be withdrawn for reconsideration and redrafting, or opposed if pressed unamended.

We hope our submission is of assistance to the committee and would be pleased to assist further, if required.

Yours sincerely,

Sarah Baker
Secretary
NSW Council for Civil Liberties

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