

EXPLAINER

Mandatory COVID-19 vaccinations and your rights

As the COVID-19 vaccine becomes more available, some employers or service providers are seeking to require their staff or customers to be vaccinated. This resource answers some frequently asked questions about vaccine requirements and Victoria's Equal Opportunity Act or Charter of Human Rights and Responsibilities.

Is it discriminatory for my employer or a service provider to require me to get vaccinated?

The Equal Opportunity Act prohibits discrimination in certain areas of life, including employment and the provision of goods and services, based on protected attributes such as disability or religious belief or activity.

Vaccination status is not a protected attribute under the Equal Opportunity Act. This means that discrimination law doesn't offer protection for everyone who chooses not to get vaccinated, only for people who have one of the other protected attributes in the Equal Opportunity Act.

If an employer makes vaccinations a mandatory condition of employment, or a service provider requires proof of vaccination to access a service, this could be discrimination if you cannot be vaccinated due to a disability or other attribute protected under the Equal Opportunity Act and they do not make an exception for you. The circumstances in which you may or may not have grounds for a discrimination claim are outlined more below.

What if my reasons for not getting vaccinated are connected with a protected attribute under the Act?

If your reasons for not getting vaccinated are connected to a protected attribute under the Equal Opportunity Act, then an employer or service provider requiring you to get vaccinated could be discrimination.

For example, people with certain disabilities or medical conditions may not be able to get the vaccine for medical reasons. The vaccine may not have been tested on people with

their medical condition or the vaccine could be dangerous for people with their medical condition. Requiring people to be vaccinated in these circumstances could amount to indirect discrimination or a failure to make reasonable adjustments. If this is the case, the employer or service provider may seek to rely on health and safety grounds to impose the vaccine (see discussion below).

If a person's reason for not wanting the vaccine is *not* linked to a protected attribute under the Equal Opportunity Act, then this would not be discrimination. For example, if you don't want to be vaccinated due to personal preference or concerns about side effects. You may nonetheless have options under employment law which are outlined briefly below.

Are anti-vaccination views a protected attribute under the Equal Opportunity Act?

There is no protected attribute in the Equal Opportunity Act that directly protects a person from discrimination on the basis of their vaccination status or their opposition to vaccines.

'Political belief or activity' is a protected attribute under the Equal Opportunity Act, which makes it unlawful to discriminate against someone because of that political belief or activity. Many in the community may consider their views on vaccinations to be political views, however it is unlikely that a claim of discrimination regarding mandatory vaccination on the basis of 'political belief or activity' would be successful under the Equal Opportunity Act.

The protected attribute of 'political belief or activity' has been interpreted narrowly in Victoria as a belief or activity that involves the state and bears on government.

The protected attribute of 'political belief or activity' is unlikely to apply to a person who is opposed to vaccines being imposed by a private sector employer or service provider. This is because the requirement is being imposed by an organisation that doesn't represent the government, and it would be difficult to argue that opposition to the private sector employer's or organisation's policy is something which bears on government.

The argument that 'political belief or activity' captures opposition to a vaccine being imposed by a public sector employer or service provider, or by a private sector employer or service provider under a government requirement, is also uncertain but is stronger than the argument regarding a requirement in the private sector. However, there may be other barriers to a successful claim in these circumstances outlined below.

The employer or service provider may seek to rely on exceptions under the Equal Opportunity Act which make discrimination lawful. If the requirement to be vaccinated is authorised by law or a public health order, the employer or service provider can rely on the defence of 'statutory authority'. A vaccination requirement may also be authorised under health and safety laws which require organisations to provide a safe working environment

for staff and a safe environment for customers. The considerations relevant to a health and safety defence are outlined in a bit more detail below.

Am I protected under the Equal Opportunity Act if I can't be vaccinated due to my religious beliefs?

'Religious belief or activity' is a protected attribute under the Equal Opportunity Act, which makes it unlawful to discriminate against someone because of that religious belief or activity.

'Religious belief or activity' is defined as holding or not holding a lawful religious belief or view, or engaging in, not engaging in, or refusing to engage in a lawful religious activity. It has been interpreted broadly and includes atheism. An example of a case where 'religious belief or activity' discrimination has been proven is where fresh Halal meat was not provided to a Muslim prisoner who requested it.

"Religion" has been defined by the High Court of Australia as follows: "[T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief".

It is important to note that 'religious belief or activity' has been distinguished from personal or philosophical beliefs. In one case an applicant argued that her beliefs around non-pharmacological therapies for treatment of people with dementia stemmed from her belief system which was partly sacred and partly secular. The Tribunal found that her philosophical beliefs were neither directly based on religious beliefs or a characteristic of such beliefs and dismissed the claim.

In order for a person to prove that a vaccination requirement constitutes unlawful discrimination on the basis of religious belief or activity it would likely be necessary to prove that they hold a religious belief that prevents them from being vaccinated, that the vaccination requirement disadvantages people with that religious belief, and that the requirement is not reasonable.

The employer or service provider may seek to rely on exceptions under the Equal Opportunity Act which may make discrimination lawful. If the requirement to be vaccinated is authorised by law or a public health order the employer or service provider can rely on the defence of 'statutory authority'. A vaccination requirement may also be authorised under health and safety laws which require organisations to provide a safe working environment for staff and a safe environment for customers. The considerations relevant to a health and safety defence are outlined in a bit more detail below.

Can an employer require employees to be vaccinated on health and safety grounds?

Under the Equal Opportunity Act, discrimination on the basis of disability or physical features is allowed if it is reasonably necessary to protect the health and safety of any person, or the public generally. If an employer wishes to make vaccination a mandatory requirement and this disadvantages some employees because of their protected attribute, the employer must prove how this health and safety exception applies. Health and safety grounds are likely to be relevant to other attributes as well because of the statutory authority defence and the requirements in work, health and safety law to provide a safe environment for staff as far as is reasonably practicable.

A range of things will likely be relevant to whether it is 'reasonably necessary' or 'reasonably practicable' to require vaccination, including:

- the type of workplace and the people in the workplace, and whether there is a heightened risk they will suffer severe symptoms if they contract COVID-19 (for example, aged care settings where there are people over 60 or healthcare settings people where patients have respiratory conditions)
- the physical space of the workplace and associated risk of transmission
- whether alternative measures could have been put in place to protect employees and any members of the public who enter the workplace
- the rate of community transmission at the time
- the availability of the vaccine
- advice from work health and safety bodies such as [WorkSafe Victoria](#) about vaccinations at the time – WorkSafe Victoria currently states that vaccinations are only one control measure available to employers and that other control measures should be considered to slow the spread of COVID-19. WorkSafe Victoria also notes that consultation may be required with individual staff members to consider whether vaccination is an appropriate control measure for.

If your employer is treating you badly because you can't get the vaccine due to your disability or other protected attribute, contact us on **1300 292 153** for more information about your rights and how you can make a complaint.

Is requiring employees to be vaccinated a ‘lawful and reasonable direction’ under employment law?

Under employment law, employers can direct their employees to be vaccinated if the direction is lawful and reasonable. Whether a direction is lawful and reasonable depends on the circumstances.

[The Fair Work Ombudsman has published information](#) on the factors that may be relevant when determining whether requiring employees to be vaccinated is likely to be reasonable.

If your employer directs you to get vaccinated, and your reasons for not getting vaccinated are connected to a protected attribute under the Equal Opportunity Act, then an employer requiring you to get vaccinated could be discrimination and therefore be unlawful.

Can a provider of goods and services require customers or visitors to be vaccinated on health and safety grounds?

Under the Equal Opportunity Act, discrimination is allowed but only on the basis of disability or physical features and if it is reasonably necessary to protect the health and safety of any person, or the public generally. If the provider of goods and services wishes to make vaccination a mandatory requirement, they must prove how this health and safety exception applies. Health and safety grounds are likely to be relevant to other attributes as well because of the statutory authority defence and the requirements in work, health and safety law to provide a safe environment for customers as far as is reasonably practicable.

A range of things will likely be relevant to whether it is ‘reasonably necessary’ or ‘reasonably practicable’ to require customers and visitors to be vaccinated, including:

- the type of goods or service provided and the people that access it, and whether there is a heightened risk they will suffer severe symptoms if they contract COVID-19 (for example, care or support service settings where there are people over 60 or medical goods for people with pre-existing health conditions)
- the physical space of the location (for example, a shop) and associated risk of transmission
- whether alternative measures could have been put in place to protect employees and any members of the public who enter the location
- the rate of community transmission at the time
- the availability of the vaccine

- advice from work health and safety bodies such as [WorkSafe Victoria](#) about vaccinations at the time.

If a provider of goods and services is treating you badly because you can't get the vaccine due to your disability or other protected attribute contact us on **1300 292 153** for more information about your rights and how you can make a complaint.

Is it a breach of human rights for employers or service providers to require staff or customers to be vaccinated?

In Victoria, the Charter of Human Rights and Responsibilities sets out the human rights that people enjoy, as well as the responsibilities on public authorities to protect and promote those rights.

The Charter has continued to apply during the state of emergency in Victoria, imposed by the government to manage the COVID-19 pandemic. This means that public authorities must consider and act compatibly with human rights when making decisions, and that if they fail to do so, they could be taken to court.

If a public authority requires employees to be vaccinated for COVID-19, this may engage certain Charter rights, including:

- the right to life
- the right to freedom of thought, conscience, religion and belief
- the right not to be subjected to medical or scientific treatment without full, free and informed consent
- the right not to have privacy unlawfully or arbitrarily interfered with
- the right to equality and to be protected from discrimination.

How is the Charter relevant to employers and service providers who are public authorities?

Under the Charter, public authorities include government departments and agencies, local councils, Victoria Police and organisations that deliver public services on behalf of the government.

If your employer or service provider is a public authority, the Charter requires them to properly consider and act compatibly with human rights in their decisions and actions, including a decision to make COVID-19 vaccines mandatory for employees and customers.

However, it's important to note that human rights protected by the Charter are not absolute and can be limited in some circumstances. Any limitation on rights must only go as far as necessary to achieve a legitimate purpose and, if limiting a right is necessary, the action taken should be reasonably justified and proportionate, and the least restrictive means available.

Further, it is not possible to take action against public authorities who had to act in the way they did in order to comply with another law. For example, if the public health directions make it a requirement to vaccinate staff in a certain setting then a valid claim under the Charter cannot be brought against the public authority which complies with this requirement by directing staff to be vaccinated.

How do we know if employers and service providers requiring vaccination is a necessary and proportionate limitation of people's rights?

Public authorities may argue that requiring their staff or customers to be vaccinated is a lawful limitation on rights, because it protects the right to life and the health and safety of others.

Determining whether these sorts of limitations on people's rights are necessary and proportionate depends on a range of factors:

- **Necessary:** Is there a justification for making vaccinations mandatory? For example, is requiring employees or customers to be vaccinated necessary to stop the spread of COVID-19 or protect the health of employees or others?
- **Proportionate:** Is the mandatory vaccine requirement proportionate to the purpose it is seeking to achieve? For example, does the risk posed by COVID-19 spreading in the workplace or service outweigh the impact on individuals whose rights are limited? Are there people in the workplace or service who are likely to be at increased risk of severe symptoms if they contract COVID-19? Does the requirement to vaccinate take into account the differing needs of people with disabilities, health conditions or who might otherwise have valid reasons for not wanting to be vaccinated?
- **Availability of other less restrictive means:** Is there another less restrictive option reasonably available? For example, are there measures other than vaccination that would effectively stop the spread of COVID-19 in the workplace or service?

What can I do if I think my rights have been breached?

Human rights	<p>For information about the Charter and your rights:</p> <p>→ Contact us on 1300 292 153 or send us an email</p> <p>To make a complaint about a breach of your rights:</p> <p>→ Contact the Victorian Ombudsman</p>
Discrimination	<p>For more information or to make a complaint about discrimination:</p> <p>→ Contact us on 1300 292 153 or send us an email</p> <p>→ Read more about discrimination</p>
Employment law	<p>For more information about your rights under employment law:</p> <p>→ Contact the Fair Work Ombudsman</p>

What other resources are available?

The Australian Human Rights Commission has also developed guidance for the community on the discrimination and human rights implications of the roll out of the COVID vaccine. Read more: [COVID-19 vaccinations and federal discrimination law](#).

The Fair Work Ombudsman has released guidance materials on vaccinations and workplace issues. Read more: [COVID-19 vaccinations & the workplace](#).