



South Australia Directive Summary

Introduction

This document has been prepared for South Australian practitioners in relation to the **Emergency Management (Healthcare Settings Workers Vaccination No 3) (COVID-19) Direction 2021 (Directions)**.¹

Included in this document are some extracts from the advice provided by PGC Legal, with the input and review by Mark Douglas, barrister, on the 26 November 2022. These extracts serve to provide a further understanding of the Directions only.

Please note the CDC are not continuing to work with PGC Legal and are currently sourcing an alternative legal counsel.

Further to this, included is some useful COVID-19 safe procedures that practitioners should implement in clinical settings in South Australia.

PGC Legal 26 November 2022

'Health Care Setting'

- (9) The Direction focusses on the place that services are provided in person (and the people located there), rather than the person providing them.
- (10) While the Direction does not expressly provide for it, the language used appears to permit practitioners who are able to provide their services remotely, e.g. by telehealth, can continue offering services this way.
- (11) Practitioners would need to consider whether they are able to provide these services consistently with any other professional obligations they held (e.g. codes of ethics), as well as whether Medicare and other rebates are impacted.

¹ <https://www.covid-19.sa.gov.au/emergency-declarations/healthcare-setting-workers-vaccination>

'Title Used'

- (17) If a practitioner is subject to a Phase 2 or Phase 3 Healthcare Setting Direction, it has been suggested to us that they may be able to continue practicing by utilizing a different job title that is not subject to the Direction (e.g. “wellness practitioner”, “counsellor”, “natural therapist”).
- (18) While this seems, on its face, to be a method through which practitioners may continue working, we make the following observations:
 - o 18.1. Each field of health practice is heavily regulated by relevant Boards, AHPRA, etc, including by way of codes of ethics;
 - o 18.2. Each practitioner would need to consider whether practicing under a different title would be consistent with the obligations they owe pursuant to relevant regulatory instruments, and if they were satisfied that they were not breaching any of their ethical or other obligations, that any work performed under this new title did not usurp the scope of work permitted to be performed under that title;
 - o 18.3. Each practitioner would also need to be aware that they would likely not be able to access the same Medicare rebates if they decide to work under a different title;
 - o 18.4. There would also be ramifications on each practitioner’s insurance, but we anticipate this may be somewhat able to be remedied by amending the scope of their insurance.

Onus

- (19) The Direction places the onus on the employee, rather than the employer. That is, relevant employers do not have a duty to ensure their employees are vaccinated in the workplace (although they may request proof of vaccination).
- (20) Accordingly, depending on the wording of each individual’s contract, should an employee be dismissed for non-compliance with the Direction, there may be an argument that such dismissal is unlawful.
- (21.4) Under the Emergency Management Act, an authorised offer has an express power enabling her or him to request vaccine information from an individual.

Authorised Officer

- (22) For the avoidance of doubt, we confirm that an “authorised officer” under the Emergency Management Act (and for the purpose of the Direction) includes a Police Officer, as well as any person or class of persons the State Coordinator appoints.
- (23) Importantly, an authorised officer must furnish their certificate of authority or identity card upon the request of the person to whom the authorised officer intends to exercise any powers.

Exemptions Under the Directions

- (26) At the outset, we acknowledge that the wording of this passage of the Direction is imperfect and possibly leaves open an avenue of challenge.
- (27) However, upon reading all of the subsections of 4(3)(a) as a whole and in context, sections 4(3)(a)(v)-(vii) do not make sense if only applied to the exemption set out at 4(3)(a)(iv).
- (28) We consider it more likely that a Court interpreting this section would consider that the requirements set out at 4(3)(a)(v)-(vii) would apply to each of the exemptions set out at 4(3)(a)(i)-(iv). This is in line with the Court's more recent approach to statutory interpretation; that being, the primary consideration ought be the intention of the legislature.
- (33) Practically, it would seem that the CHO or her delegate must endorse any exemption for it to be applicable pursuant to this section of the Direction. As you have flagged there is no specific channel through which this can occur, we suggest sending an email with all of the relevant information (including the name and practice of the supporting medical practitioner) to Health. NJNPExemptions@sa.gov.au.
- (34) Until the exemption is endorsed, technically it is not an applicable endorsement pursuant to the Direction permitting the individual to continue working compliantly with the Direction,
- (35) However, should an individual have a medical practitioner sign off on an exemption that has not been endorsed by the CHO, there may be an argument that should they not comply with the Direction, that they ought be excused from a section 28 offences due to having a "reasonable excuse" for their non-compliance (*insert- however, this would need to be considered on a case-by-case basis*).
- (36) Again, the individual circumstance of an affected practitioner would influence the strength of them relying on this argument, and we are happy to provide advice upon your instructions and receipt of further information pertaining to an individual's factual circumstances.

Non Compliance with the Directions

- (41) The Direction has been made pursuant to power provided under the Emergency Management Act 2004 (SA) (Act), which provides, amongst other things, that:
 - o 41.1. The State Coordinator (who is defined as being the SA Police Commissioner) may declare a major emergency;
 - o 41.2. During a major emergency, the State Coordinator can make certain declarations;
 - o 41.3. A person must not fail to comply with the State Coordinator's directions or declarations during a major emergency without reasonable excuse. The maximum

penalties for non-compliance are:

- 41.3.1. \$75,000 for a body corporate;
 - 41.3.2. \$20,000 or imprisonment for 2 years for an individual.
 - o 41.4. We observe that the obligations contained within the Direction are largely placed on individuals.
- (46) There may be some grounds to argue that an individual who has not complied with the Direction due to a legitimate medical concern (e.g. they have consulted with a doctor or specialist who has advised against taking a vaccine required by the Direction), whose medical condition does not satisfy the ATAGI requirements may have a “reasonable excuse”, however, this would need to be considered on a case-by-case basis.

Implementation COVID-19 Safe Procedures in Clinical Settings

No matter the circumstances of practice, practitioners should implement clear COVID-19 safe measures.

In South Australia COVID-19 safe procedures should include:

- a) The implementation of a COVID-19 Safe Plan that includes;
 - a. A detailed plan of action to help prevent the risk of infection of COVID-19 in the workplace;
 - b. The appropriate PPE and face mask for the workplace; and
 - c. How the workplace should prepare for and respond to the possibility of a COVID-19 infection.
- b) Ensuring density quotients and social distancing measures are maintained in the workplace; and
- c) Accurate record-keeping. For example, ensuring the workplace is registered for a QR code and checking that individuals, including employees, are signing in and out when entering and leaving the premises.
- d) A template to guide the implementation of, and adherence to, these measures can be found here <https://www.covid-19.sa.gov.au/business-and-events/create-a-covid-safe-plan>

Rapid Antigen Testing

South Australia has current restrictions that apply to Rapid Antigen Testing: Emergency Management (Prohibition of Certain Point of Care Tests No 2) (COVID-19) Direction 2020.²

² <https://www.covid-19.sa.gov.au/emergency-declarations/prohibition-of-point-of-care-serology-tests>

The purpose of this Direction is to prohibit a person from using a point of care serological (blood) test or a point of care antigen based or nucleic acid based (upper or lower respiratory tract or oropharyngeal specimen) test (including an assay or device) as an acute illness diagnostic tool for COVID-19, as their use may adversely affect the prevention, control and abatement of the serious public health risk present by COVID-19.

The situation in South Australia may change in time.

In other states across Australia, RAT testing is currently used alongside or as an alternative to COVID-19 vaccination in various industries in Victoria and New South Wales, including government, agencies, schools, construction. For example, RAT has been approved for use in the emergency department of the Royal Melbourne hospital. These industries have included guidance on use.³

³NSW Ministry of Health, *Framework for the Provision of Rapid Antigen Screening for COVID-19 in Clinical and Non-Clinical Settings*, August 2021 <https://www.nsw.gov.au/sites/default/files/2021-08/209659_RAS%20Framework%20and%20Standard%20Operating%20Procedure%20Aug21%20v5.pdf>.