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Policy on "No Jab, No Play" provisions in Victoria

Introduction

1. This document sets out the policy position of Liberty Victoria on the "No Jab, No Play" provisions in Victoria. The provisions are found in the *Public Health and Wellbeing Amendment (No Jab, No Play) Act 2015* (the **Act**) and will take effect on 1 January 2016. They will exclude preschool children from childcare or Kindergarten facilities unless they are up to date with the Commonwealth's prescribed vaccination schedule. Exemption on medical grounds is allowed but not exemption on the basis of conscientious objection.

2. The subject matter is approached from a human rights and ethical point of view. However, as is clear from the analysis below, in order to engage the question of necessity and proportionality of the relevant provisions, we must rely on the views of medical professionals and public health experts. We do so with the acknowledgment that we are not medical professionals or public health experts and that, within the vaccination debate, there may not be consensus among experts within the field on the matters addressed by this paper.

3. The "no jab, no play" policy in Victoria is to be contrasted with the position in New South Wales (NSW), which has been called a "no form, no play" policy. The NSW provisions provide for the exclusion of children from childcare facilities if they are not up to date with their vaccinations but allow for exemptions on medical grounds or refusals based on conscientious objection.

4. Underlying the views expressed below are three basic assumptions. The first is that childhood vaccinations are generally safe and that the health benefits of vaccinating children greatly outweighs the risks. Therefore, it is worthwhile to vaccinate children.[1] The second assumption is that governments have an obligation to protect the public's health and welfare and that vaccination is not only an important means of protecting individuals but also the community. The reason for this is that the full benefits of a vaccination program will exceed the benefits for participating individuals due to the effect of herd immunity. Therefore, it might be said that collective vaccination programs serve the public interest. An ideal level of childhood vaccination would be about 95%. The third assumption is that individual human beings are not just "members of the public," but first and foremost are persons whose rights should be respected by both government and public health professionals. In the context of the relationship between parents and young children, this translates into an assumption that the autonomy of parents to make decisions regarding their young children's health should be respected, unless such decisions represent an immediate and serious threat to the wellbeing of the child. Clearly, assumptions two and three run into conflict within the vaccination debate.[2]

5. This paper proposes a solution to the conflict from a human rights and civil liberties perspective. Liberty Victoria concludes that the "no form, no play" policy of NSW is preferable to the "no jab, no play" policy in Victoria. There are two main reasons for adopting this position. First, in accordance with accepted principles in human rights law, the Victorian policy cannot be justified as a necessary and proportionate limitation on a child's right to education. Second, the policy cannot be justified from an ethical point of view. Although an adult's decision not to vaccinate a child under their care may be unethical, such a decision does not justify a policy that sacrifices the interests of the child.

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[1] Evidence of Prof Del Mar before the Health and Community Services Committee of the Queensland Government, Public Hearing – Inquiry into the Public Health (Exclusion of Unvaccinated Children from Child Care) Amendment Bill 2013, 19 August 2013, 11.

[2] Marcel Verwij and Angus Dawon 'Ethical principles for collective immunisation programmes' *Vaccine* 22 (2004) 3122-3126. Available online at www.sceincedirect.com.au.

The Victorian legislation

6. The Act will amend the *Public Health and Wellbeing Act 2008*. These amendments will come into effect on 1 January 2016. In summary, the "No Jab, No Play" provisions are as follows:

   6.1 Section 143B(1) provides that a person in charge of an early childhood service (which includes childcare and Kindergarten services during school hours) must ensure that the enrolment of a child is not confirmed unless the child's parent provides an immunisation status certificate. The document or documents constituting the immunisation status certificate must show (as of a date not more than two months before the date the child first attends the service) that the child is age-appropriately immunised or that immunisation of the child would be medically contraindicated under the specifications set out in the Australian Immunisation Handbook.

   6.2 A child will be age appropriately immunised if the child is immunised in accordance with the vaccination schedule (or the catch-up vaccination schedule) prescribed under the Commonwealth, *A New Tax (Family Assistance) Act 1999*.

   6.3 Section 143C provides an exemption from the requirements in section 143B for certain disadvantaged and vulnerable children. The categories of disadvantaged and vulnerable children to whom the exemption applies are listed in paragraphs (a) to (g) of section 143C(1). The nature of the exemption is that the person in charge of the early childhood service is not required to exclude a child if the case falls within one or more of the specified categories of disadvantaged and vulnerable children. However, the person in charge of the early childhood service must take reasonable steps within 16 weeks after the child first attends the service to ensure that an immunisation certificate is provided. Such steps may include referring the parent to a recognised immunisation provider.

7. Putting aside the limited accommodation that is made for certain categories of disadvantaged and vulnerable children, the only exception to exclusion from the early childhood service will require certification by a medical practitioner that the child

should not be immunised. Such certification will have to comply with the specifications set out in the Australian Immunisation Handbook. The Australian Immunisation Handbook has been developed by the Australian Technical Advisory Group on Immunisation, which provides advice to the Federal Minister of Heath on immunisation matters.

The New South Wales legislation

8. The relevant provisions in NSW are contained in the *Public Health Act 2010*. Section 87 provides that the principal of a child care facility must not permit a child to enrol at the facility unless the parent of the child has provided either a vaccination certificate showing that the child has received age-appropriate vaccinations in accordance with the NSW Immunisation Schedule or a certificate under s. 87(a) or (b). Under s. 87(a), a parent may provide a certificate by an authorised practitioner certifying that the child should have an exemption for one or more vaccines due to a medical contraindication to vaccination. Under s. 87(b), a parent may provide a certificate in an approved form in which:

   i. the parent certifies that he or she has a personal, philosophical, religious or medical belief involving a conviction that vaccination should not take place; and

   ii. an authorised practitioner certifies that the practitioner has explained the benefits and risks associated with immunisation to the parent and has informed the parent of the potential danger if a child is not immunised.

A historical perspective from the UK

9. Recently, opposition to childhood vaccinations is often blamed on the British doctor Andrew Wakefield, who published an article in 1998 linking the MMR vaccination with causing autism. Such a link has now been discredited and Dr Wakefield has been removed from the medical register in the UK for publishing misleading information.

The publication by Dr Wakefield caused a significant reduction in numbers of children being vaccinated in the United Kingdom.[3]

10. Resistance to vaccinations, however, especially forced vaccinations, has a history in the UK going back more than 150 years (when the government made smallpox vaccination compulsory, initially without non-medical exemptions). After a report in 1850 by the Epidemiology Society, the Vaccination Act of 1853 made smallpox vaccinations compulsory throughout England and Wales. The law galvanised the anti-vaccination movement, which was joined by libertarians. In 1865, 20,000 demonstrators took to the streets of Leicester for an anti-vaccine demonstration. In 1889, the Royal Commission on Vaccination was charged with making an inquiry and preparing a report on issues such as the usefulness of vaccination in controlling smallpox; what means, other than vaccination, could be used for controlling smallpox; the safety of smallpox vaccination; what would be done to improve the safety of smallpox vaccination; and whether changes should be made to compulsory vaccination laws. Over the course of seven years, the Commission met 136 times and questioned 187 witnesses. In its final report (published in 1896), the Commission recognised the decrease in smallpox incidence was at least partly attributable to vaccination, but did not dismiss the contribution made by improvements in sanitation. The Commission also recommended the introduction of a non-medical (conscientious) exemption for people who were "honestly opposed" to vaccination. [4]

11. In 2004, the British Medical Association revisited the issue of compulsory vaccination due to decreases in vaccination coverage following the publication by Dr Wakefield referred to above. The British Medical Association concluded that compulsory vaccination was not appropriate for the UK. It referred to a 2003 Scottish Executive Report concluding that a policy of compulsory vaccination is not consistent with key

[3] Evidence of Prof Del Mar before the Health and Community Services Committee of the Queensland Government, Public Hearing – Inquiry into the Public Health (Exclusion of Unvaccinated Children from Child Care) Amendment Bill 2013, 19 August 2013, 11.

[4] Daniel A. Salmon et al., 'Compulsory vaccination and conscientious or philosophical exemptions: past, present and future' *Lancet* 2006, vol 367: 436-442, 436-437; Daniel A Salmon, C Raina MacIntyre and Saad B Omer, 'Making mandatory vaccination truly compulsory: well intentioned but ill conceived' *Lancet*, 2015 vol 15: 872-873.

elements of the framework or principles for immunisation policy. The 2003 report further noted: "On a practical level, it is not self-evident that it would lead to higher levels of immunisation. More substantively, it runs counter to the…core principle that vaccines should be administered on a voluntary basis."[5]

A child's right to education

12. A right to education is recognised in international human rights law. Australia is a signatory to the UN Convention on the Rights of the Child (**CROC**). Article 28 provides: "States Parties recognize the right of the child to education…"

13. The UN Committee on the Rights of the Child has outlined the reasons why early childhood is a critical period for the realisation of children's rights. It is a time when:

(a) Young children experience the most rapid period of growth and change during the human lifespan, in terms of their maturing bodies and nervous systems, increasing mobility, communication skills and intellectual capacities, and rapid shifts in their interests and abilities;

(b) Young children form strong emotional attachments to their parents or other caregivers, from whom they seek and require nurturance, care, guidance and protection, in ways that are respectful of their individuality and growing capacities;

(c) Young children establish their own important relationships with children of the same age, as well as with younger and older children. Through these relationships they learn to negotiate and coordinate shared activities, resolve conflicts, keep agreements, and accept responsibility for others;

(d) Young children actively make sense of the physical, social and cultural dimensions of the world they inhabit, learning progressively from their activities and their interactions with others, children as well as adults;

(e) Young children's earliest years are the foundation for their physical and mental health, emotional security, cultural and personal identity, and developing competencies;

(f) Young children's experiences of growth and development vary according to their individual nature, as well as their gender, living conditions, family organization, care arrangements and education systems;

[5] Daniel A. Salmon et al, 'Compulsory vaccination and conscientious or philosophical exemptions: past, present and future' *Lancet* 2006, vol 367: 436-442, 438.

(g) Young children's experiences of growth and development are powerfully shaped by cultural beliefs about their needs and proper treatment, and about their active role in family and community.

Respecting the distinctive interests, experiences and challenges facing every young child is the starting point for realizing their rights during this crucial phase of their lives.[6]

14. Furthermore, young children should be protected against the consequences of discrimination:

Young children may also suffer the consequences of discrimination against their parents, for example if children have been born out of wedlock or in other circumstances that deviate from traditional values, or if their parents are refugees or asylum-seekers. States parties have a responsibility to monitor and combat discrimination in whatever form it takes and wherever it occurs—within families, communities, schools or other institutions. Potential discrimination in access to quality services for young children is a particular concern, especially where health, education, welfare and other services are not universally available and are provided through a combination of State, private and charitable organizations.[7]

15. There is a consensus in Australia that young children benefit from an early childhood education and social inclusion. On its website, the Council of Australian Governments states with respect to early childhood education:

Early childhood development is of central importance to the wellbeing of Australia's children and to the future wellbeing and productivity of the nation. There are significant benefits to ensuring all children experience a positive early childhood, from before birth through the first eight years of life. Research shows that quality maternal, child and family health, early childhood education and care and family support programs make a significant difference to improving outcomes for children. There are particular benefits for children from disadvantaged backgrounds.[8]

16. Article 2(2) of the CROC provides:

States Parties shall take all appropriate measures to ensure that the child is protected

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[6] Committee on the Rights of the Child, *General Comment No. 7 – Implementing Child Rights in Early Childhood,* UN Doc CRC/C/GC/7 (2006), 3.

[7] Ibid, 6.

[8] At https://www.coag.gov.au/early_childhood. (viewed on 3 November 2015); See also Associate Professor Julie Leask's Submission to Health and Ambulance Services Committee on the inquiry into the Public Health (Childcare Vaccination) and Other Legislation Amendment Bill 2015 (Submission 37) 1-2.

against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

17. The CROC does not contain a limitation clause. It is assumed, however, for the purpose of this paper that the right of a child to education is not an absolute right and may be subject to limitations if such limitations are necessary and proportionate. The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights endorsed by the United Nations Economic and Social Council states at [25]:

Public health may be invoked as a ground for limiting certain rights in order to allow the State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.[9]

18. Applying these principles to vaccination programs in acute humanitarian emergencies, it has been argued by Moodley et al.[10] that vaccination should be voluntary unless it becomes critical to prevent a concrete and serious harm. Moodley et al. further state:

If the risk to health is extremely high, individuals should not be allowed to compromise group protection and communal rights. When personal liberty is restricted to protect public health, the measures applied must be effective, the least restrictive (i.e. least liberty-infringing), proportional to the risk, equitable and non-discriminatory, minimally burdensome and in line with due process. Those whose liberty is violated should, when appropriate, be compensated, particularly if they experience vaccine-associated side-effects. In addition, individual rights should be restricted only with utmost respect for the dignity of persons.[11]

19. The quoted passage is consistent with the Siracusa Principles and the proportionality

[9] United Nations Commission on Human Rights, *The Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights.* Geneva: UNCHR; 1984. Available from refworld.org (viewed on 3 November 2015).

[10] Moodley et al., 'Ethical considerations for vaccination programs in acute humanitarian emergencies' *Bulletin of the World Health Organization*, 2013; 91:290-297. Available at http://dx.doi.org/10.2471/BLT.12.113480. (viewed on 3 November 2015)

[11] Ibid, 293.

tests set out in the Canadian case *R v Oakes*[12], which case had been cited with approval by Courts in Victoria. [13]

20. For the reasons set out below, the provisions in the Act that give effect to the "no jab, no play" policy is not a justifiable limitation on a child's right to education.

21. First, the provisions are not necessary. Excluding children from childcare facilities is a form of indirect compulsion. Australia has achieved high and stable rates of childhood immunisation without the need for compulsion. The Australian Childhood Immunisation Register (ACIR) contains immunisation records for nearly all Australian children and is a reliable source of information on childhood immunisation rates.[14] ACIR data shows the following immunisation rates in Australia, as of 30 September 2015:[15]

Immunisation coverage rates for children aged 12 to 15 months (cohort 1)

State	Number of children in state	% Fully immunised
ACT	1,378	94.2
NSW	24,740	92.8
VIC	18,904	93.1
QLD	15,851	93.0
SA	4,948	93.4
WA	8,731	92.6
TAS	1,438	94.3
NT	981	93.2
AUS	76,971	93.0

Immunisation coverage rates for children aged 24 to 27 months (cohort 2)

State	Number of children in state	% Fully immunised
ACT	1,398	91.2

[12] [1986] 1 SCR 103.

[13] *Kracke v Mental Health Review Board* [2009] VCAT 646 [145] and in *R v Momcilovic* [2010] VSCA 50.

[14] Dr Hal Willaby & Associate Professor Julie Leask, Submission to the Health and Community Services Committee of the Queensland Parliament: Re The Public Health Amendment Bill 2013 (Exclusion of Unvaccinated Children from Child Care) (Submission 57), 15 July 2013, 2.

[15] Australian Childhood Immunisation Register statistics available at humanservices.gov.au (viewed on 5 November 2015).

NSW	24,684	90.4
VIC	18,954	90.9
QLD	15,872	90.9
SA	4,940	89.6
WA	8,506	89.2
TAS	1,477	90.3
NT	947	86.7
AUS	76,778	90.4

Immunisation coverage rates for children aged 60 to 63 months (cohort 3)

State	Number of children in state	% Fully immunised
ACT	1,370	94.4
NSW	25,448	93.3
VIC	18,969	93.2
QLD	16,571	92.1
SA	5,066	92.0
WA	8,621	90.6
TAS	1,502	93.1
NT	871	92.2
AUS	78,418	92.6

22. These rates are not only high, but they have been stable over the last decade.[16] According to evidence presented by Professor Del Mar[17] before the Health and Community Services Committee of the Queensland Government, the level of vaccination needed to achieve herd immunity varies for each disease "but it is around 90 per cent or 80 per cent of the population".[18] Moreover, of the approximately 7% of children who are not fully vaccinated, only a small percentage have parents who are conscientious objectors. According to Associate Professor Kristine Macartney,[19] the parents of more than half of the 7% of children who are not fully vaccinated are not conscientious objectors but instead face practical, economic, social, or geographic

[16] Dr Hal Willaby & Associate Professor Julie Leask, Submission to the Health and Community Services Committee of the Queensland Parliament: Re The Public Health Amendment Bill 2013 (Exclusion of Unvaccinated Children from Child Care) (Submission 57), 15 July 2013, 2.

[17] Professor of public health at the Bond University, Queensland.

[18] Evidence of Prof Del Mar before the Health and Community Services Committee of the Queensland Government, Public Hearing – Inquiry into the Public Health (Exclusion of Unvaccinated Children from Child Care) Amendment Bill 2013, 19 August 2013, 12.

[19] Associate Professor, Discipline of Paediatrics and Child Health, University of Sydney.

impediments to full and timely vaccination. Individuals within this group are more likely to experience poverty or social exclusion. A smaller proportion, estimated at 2-3% of the general population, have beliefs, attitudes, and concerns that cause them to reject or delay some or all vaccines.[20] Immunisation rates of above 95% are therefore possible without removing the right to conscientious objection. According to Associate Professor Macartney, strategies that increase the opportunity to vaccinate are most effective at increasing vaccination rates among children. Coverage rates could potentially be boosted by as much as 3-4% by improving access, awareness, and affordability. Moreover, having vaccine-hesitant parents engage with well-qualified health professionals can help them wade through misinformation regarding the perceived risks associated with vaccinations.[21]

23. The immunisation rates set out in paragraph 20 above show that in the ACT, immunisation rates approximating 95% have been achieved for cohorts 1 and 3. This has been done without direct or indirect compulsion.[22]

24. Second, the provisions are unlikely to be effective. History has shown that attempts by governments to force people to take part in vaccination programs are unlikely to work. There is skepticism among public health experts that removing conscientious objection will persuade truly committed vaccine objectors to vaccinate their children.

[20] Kristine Macartney, 'Forget 'no jab, no pay' schemes, there are better ways to boost vaccination', *The Conversation*, 27 February 2015; Prof Paul Ward, Submission to the Senate Standing Committees on Community Affairs, re Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Submission 326), 12 October 2015.

[21] Kristine Macartney, 'Forget 'no jab, no pay' schemes, there are better ways to boost vaccination', *The Conversation*, 27 February 2015.

[22] ACT Immunisation Requirement for entry into school preschool and childcare 2016 (Parent Guide) available at health.act.gov.au. (viewed on 5 November 2015)

Moreover, there is a concern that coercion may backfire and lead hesitant parents to accept anti-vaccination arguments.[23]

25. From statements attributed to the Victorian Minister for Health, Jill Hennessy, it appears that concerns about an increase in whooping cough cases in Victoria are behind the introduction of the "no jab, no play" policy.[24] However, according to submissions made by Julie Leask[25] and Kerrie Wiley[26] in response to inquiries by the Queensland and Federal Governments, more than 50% of infants hospitalised due to whooping cough caught it from a parent, not from an unvaccinated child. This is because most adults have immunity that has waned. Therefore, children are at risk from catching whooping cough from others within the community such as older siblings, parents, or childcare workers. Under the circumstances, it may be false to assume that excluding unvaccinated children from childcare will lower the risk as substantially as one may hope.[27]

26. Third, there is an effective alternative policy available that is less intrusive upon a child's right to education. The policy in NSW requires parents to provide documentation of a child's vaccination status before they are allowed to enroll in childcare services. A child's vaccination status may include any of the following: a certificate of full immunization, a medical exemption form, or a signed conscientious objection form. As noted in paragraph 7 above, a parent is allowed to provide a conscientious objection form only after a medical practitioner has explained the

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[23] Associate Professor Julie Leask, Submission to Health and Ambulance Services Committee on the inquiry into the Public Health (Childcare Vaccination) and Other Legislation Amendment Bill 2015 (Submission 37), 2 ; Kristine Macartney, 'Forget 'no jab, no pay' schemes, there are better ways to boost vaccination', *The Conversation*, 27 February 2015; Daniel A Salmon, C Raina MacIntyre and Saad B Omer, 'Making mandatory vaccination truly compulsory: well intentioned but ill conceived' *Lancet*, 2015 vol 15: 872-873; Evidence of Prof Del Mar before the Health and Community Services Committee of the Queensland Government Public Hearing – Inquiry into the Public Health (Exclusion of Unvaccinated Children from Child Care) Amendment Bill 2013, 19 August 2013, p 12.

[24] ABC news *New 'no jab, no play' vaccination laws to be introduced in Victoria* posted 16 August 2015. Available at abc.net.au (viewed on 6 November 2015)

[25] Associate Professor at the School of Public Health, University of Sydney.

[26] Phd, MScMed (Clinical Epidemiology) BSc (Biomedical) School of Public Health, University of Sydney.

[27] Julie Leask, Submission to Health and Ambulance Services Committee on the inquiry into the Public Health (Childcare Vaccination) and Other Legislation Amendment Bill 2015 (Submission 37) 2; Julie Leask & Kerrie Wiley Submission to the Senate Standing Committees on Community Affairs, re Social Services Legislation Amendment (No Jab, No Pay) Bill 2015 (Submission 327.)

benefits and risks associated with immunisation to the parent and has informed the parent of the potential dangers if a child is not immunised. This has been called a "no form, no play" policy. According to Dr Hall Willaby[28] and Associate Professor Julie Leask, such a policy has several advantages over a policy that does not allow for conscientious objections:

Firstly, mandating registration of vaccination status – regardless of whether the child is immunised, medically exempt, or the parents have refused vaccination – will serve as a useful reminder to parents who haven't yet vaccinated their children because of busy lives or lack of awareness.

Secondly, mandatory registration will allow a ready mechanism to exclude unvaccinated children from childcare centres *should an outbreak occur*. As a result, unvaccinated children are not permanently disadvantaged by exclusion from an educational facility because of their parents' decision.[29]

27. According to Associate Professor Leask, the effectiveness of such a policy can be further enhanced by:

    27.1 Providing for yearly registration of an objector exemption with a health care provider instead of a once-off registration.

    27.2 Implementing a parent peer advocate program in communities with higher rates of refusal to reduce the social influence of vaccine refusers.

    27.3 Teaching health professionals counseling techniques to help vaccine-hesitant parents so they don't become vaccine-refusing parents.

    27.4 Encouraging midwifery and antenatal educator curricula to have a strong component of vaccine education.[30]

28. Fourth, to socially exclude children and deny them the benefits of an early childhood education because of the decisions of their parents is manifestly unfair towards the

[28] Research Fellow in the School of Public Health at the University of Sydney and at the National Centre for Immunisation Research and Surveillance.

[29] Dr Hal Willaby and Associate Professor Julie Leask, Submission to the Health and Community Services Committee of the Queensland Parliament: Re The Public Health Amendment Bill 2013 (Exclusion of Unvaccinated Children from Child Care) (Submission 57), 15 July 2013, 4.

[30] Julie Leask, Submission to Health and Ambulance Services Committee on the inquiry into the Public Health (Childcare Vaccination) and Other Legislation Amendment Bill 2015 (Submission 37), 5.

child. Article 3 of the CROC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

29. Under the Victorian Charter of Human Rights and Responsibilities, every person:

[I]s equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.[31]

30. The link between human dignity, equality, and the harm caused by unfair treatment has been articulated in the Canadian case of *Law v Canada (Minister of Employment and Immigration.*[32] Justice Frank Iacobucci delivered the unanimous judgement of the Federal Court of Appeal, asserting that:

Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

31. Respect for the dignity and inherent worth of individual children militates against accepting the "no jab, no play" policy as consistent with their human rights. The policy smacks of giving effect to collective punishment. Moreover, if one takes into account the circumstances under which the policy excludes children from the benefits of childcare and Kindergarten services and the additional adverse effects such exclusions may have on the wellbeing of a child's immediate family, it becomes clear that a strong case for a critical or immediate threat to the health of the population or

[31] Section 8(3).

[32] [1999] 1 SCR 497 at [53].

to individual members of that population will have to be made before one can regard such exclusions as fair or justifiable from a human rights point of view. In light of the matters set out above, it is unlikely that such a case can be formulated. Accordingly, the policy is not a justifiable limitation on a child's right to education and equality.

Ethical dilemmas presented by conscientious objection

32. In this section, we consider some ethical questions around the "no jab, no play" policy and conscientious objection to childhood vaccination. The ethical considerations in this area of public health policy are complex and deserve a more thorough analysis than are offered here. Our treatment will rely heavily on a chapter titled "Vaccination Ethics" by Angus Dawson in a publication titled "*Public Health Ethics*."[33]

33. In liberalism, a distinction is traditionally made between actions likely to cause harm only to self and actions likely to cause harm to others. This distinction makes a vital difference to the legitimacy of interfering in someone's freedom of action. It is more difficult to justify interference on harm-to-self grounds than it is to justify interference on harm-to-others grounds.

34. Let us accept that, consistent with the first assumption set out in paragraph 3 above, childhood vaccination is in the best interest of the child. Let us further assume that in Australia, the risk to a child of suffering serious harm by contracting a childhood disease for which a vaccine is available is not of such an immediate and serious nature as to provide a legitimate basis for overruling parental authority and forcing all parents to have their children fully vaccinated (for instance though a court order).[34]

[33] *Public Health Ethics*, ed. Angus Dawson. Published by Cambridge University Press. @ Cambridge University Press 2011.

[34] As to the legal limits of parental responsibility in Australian law see Thomas Humphrey, 'Children, medical treatment and religion: defining the limits of parental *responsibility' Australian Journal of Human Rights*, vol 14(1) 2008, 141.

35. Given these assumptions, one may then construct an ethical argument about the need to participate in a public immunisation program on the basis of a duty to prevent harm to others:

1. Contagious diseases that might result in harm can be passed on to others through non-intentional action.
2. This could be prevented through vaccination of any potential source individual in advance.
3. We have a moral obligation not to cause harm to others through our own actions or inactions.
4. Given 1 and 2, an individual can reduce the risk of causing harm to others through vaccination.

36. This leads to the conclusion that given 3 and 4, we are morally obliged to have vaccinations for serious contagious diseases. Therefore, where there are serious public health issues at stake, it is legitimate to argue that parents are under a moral obligation to ensure that their children are fully vaccinated on the grounds of potential harm to third parties.[35] This argument represents an utilitarian approach to the ethical question. The vaccination decisions of parents should be judged by their consequences, and in particular by the effect of such decisions on the total sum of individual wellbeing.[36]

37. Does this argument mean, therefore, that the "no jab, no play" policy is ethically justified? It should be noted that the issue of legal compulsion, whether direct or indirect, is different from the existence of a moral obligation. An argument for compulsion requires an additional step to move from our moral condemnation of a parent to justifying legislation that excludes preschool children from childcare.[37] We

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[35] *Public Health Ethics*, ed. Angus Dawson. Published by Cambridge University Press. @ Cambridge University Press 2011, 145.

[36] Carlo Petrini and Sabina Gianotti, 'A personalist approach to public-health ethics' *Bulletin of the World Health Organization*, 2008; 86: 624-629, 625. Available at http://www.who.int/bulletin/volumes/86/8/08-051193.pdf.

[37] *Public Health Ethics*, ed. Angus Dawson. Published by Cambridge University Press. @ Cambridge University Press 2011, 145.

would argue that the further step of exclusion is not ethically justified for two reasons. First, notwithstanding the utilitarian merits of a policy that seeks to support herd immunity, it is wrong to sacrifice the interests of a child who happens to have parents who are conscientious objectors in order to promote the interests of the group. This argument relies on the Kantian approach to ethics, which provides that human beings ought to be treated with respect as ends in themselves and not as mere means to the ends of another individual or the group.[38] Second, as is clear from the analysis above, exclusion is unnecessary, as it is possible to achieve effective herd immunity even when conscientious objections are allowed. If exclusion is unnecessary, then it is difficult to rationalise as ethically justified the potential harms that may be caused by the "no jab, no play" provisions.

38. Therefore, although one can argue that parents who choose not to vaccinate their children are making an unethical decision and that one may legitimately pass moral judgement upon such a choice, this does not justify excluding the children of these parents from childcare services. Moreover, the effect of the "no jab, no play" policy is to sacrifice the interests of young children for the sake of public health policy. Under the circumstances, we would argue that exclusion from childcare is a step too far and is not ethically justified.

Conclusion

39. Liberty Victoria does not support the "No Jab, No Play" provisions as set out in the Act. Liberty prefers the "no form, no play" policy adopted in NSW. Such a policy requires registration of a child's vaccination status before enrolment at childcare or Kindergarten facilities while still allowing for conscientious objections. The NSW provisions strike a better balance between the opposing values of promoting the public's interests and respecting individual autonomy. Moreover, the NSW policy:

[38] Carlo Petrini and Sabina Gianotti, 'A personalist approach to public-health ethics' *Bulletin of the World Health Organization*, 2008; 86: 624-629, 626. Available at http://www.who.int/bulletin/volumes/86/8/08-051193.pdf.

39.1 Allows for achievement of high rates of childhood vaccination sufficient to achieve herd immunity.

39.2 Weeds out those parents who have not vaccinated their children because they are forgetful or have been too busy.

39.3 Places an emphasis on education and dialogue between GP's and vaccination-hesitant parents. This is the best way to avoid vaccination-hesitant parents becoming anti-vaccination parents. It also recognises that with education, people's views on childhood vaccination may change.

39.4 Accepts that for a small minority of parents, their anti-vaccination views are entrenched. Such parents are unlikely to be persuaded by exclusion from childcare services.

39.5 Allows for additional measures (as set out in paragraph 27 above) that can be taken to further enhance vaccination rates within a "no form, no play" policy.

40. In conclusion, we simply note that there is something deeply unpalatable in using compulsion, whether direct or indirect, to force parents to subject their children to preventative medical interventions when they believe such interventions may be harmful to their children. It is certainly not an approach favoured by medical ethics[39] and, in our submission, is an approach that should not be favoured by civil libertarians. Even more objectionable is the fact that the "no jab, no play" provisions in Victoria may have the effect of visiting additional deleterious consequences on young children due to parental decisions not to vaccinate.

[39] The Australian Medical Association's code of ethics provides at principle 1.1(k): "Respect your patient's right to choose their doctor freely, to accept or reject advice and to make their own decisions about treatment or procedures." Available at https://ama.com.au/position-statement/ama-code-ethics-2004-editorially-revised-2006. (Viewed on 7 November 2015).