

Proposed amendments to the International Health Regulations

Legal opinion

Introduction

1. When announcing, on 20 September 2023, Australia’s commitment to provide additional voluntary funding of \$100m over 5 years for the World Health Organisation, the Minister for Foreign Affairs, Penny Wong, declared: “We need a strong global health system to help keep Australia, our region, and the world safe. This means a strong, capable WHO with the authority to respond quickly and decisively to complex health emergencies.”
2. Proposed amendments to the International Health Regulations (**IHR amendments**) would give the WHO that “authority”.¹
3. The Australian government is involved in negotiations on the IHR amendments. Between 7 August and 24 September 2023, in collaboration with the Department of Foreign Affairs and Trade, the Department of Health and Aged Care conducted a public consultation entitled “Strengthening global health and international pandemic response”². The stated purpose of the consultation was “to inform our negotiating positions for the new pandemic instrument and IHR changes [and to] ensure they align with Australia’s priorities.”
4. A report summarising themes arising from the 4,521 submissions that were made, and the government’s response, noted that “Many responses raised concerns that the pandemic instrument and changes to the IHR would result in countries ceding authority to WHO,

¹ https://apps.who.int/gb/wgihp/pdf_files/wgihp1/WGIHR_Compilation-en.pdf; see further paragraph 12 below.

² <https://www.health.gov.au/our-work/strengthening-global-health-and-international-pandemic-response>

and could affect Australia’s ability to make decisions on national pandemic response measures, including on lockdowns and vaccine mandates.”³

5. The Government Response on this point was:

WHO plays an important role coordinating international action by managing responses to health emergencies and pandemics (such as COVID-19), developing technical standards and guidance, and providing advice and country level support to improve local health systems. Australia supports strengthening WHO’s ability to respond to disease outbreaks, including through rapid access to outbreak sites, deployment of WHO-led teams (on request), and timely provision of information to the international community.

WHO is a Member State-led organisation made up of 194 countries, including Australia. Australia participates in WHO decision-making processes as a member of both the WHO Executive Board and the World Health Assembly (WHA). WHO reports to, and is accountable to, all its Member States through the WHA. All WHA documentation is publicly available on the [WHO’s website](#).

Under international law, WHO Member States, including Australia, retain their sovereignty regarding their national public health policies. The pandemic instrument or changes to the IHR will not provide powers to WHO to mandate health measures or control the movement of persons. The pandemic treaty and IHR will not operate to prevail over Australian law. Australia will retain the right to make and implement public health decisions in the best interests of Australians.⁴

6. This opinion addresses the following questions:

- What recommendations would the WHO be able to make?
- Would WHO recommendations be binding on Australia?

³ Department of Health and Aged Care, *Preparing for, and responding to, future pandemics and other international health emergencies – Summary of public consultation submissions* (Report, December 2024) available at <https://www.health.gov.au/resources/publications/preparing-for-and-responding-to-future-pandemics-and-other-international-health-emergencies-summary-of-public-consultation-submissions>. The government has not published the submissions.

⁴ Ibid page 2.

- Will parliament vote on the IHR amendments?
- Do the IHR amendments involve Australia ceding sovereignty to the WHO?
- Do the IHR amendments involve Australia deferring to the WHO in all its decision-making in relation to public health during a pandemic?

At the heart of these questions is a fundamental concern about Australia allowing the WHO to dictate our public health policy. The government's assurances that Australia would not be ceding sovereignty and that will still be making our own health decisions may be technically correct, but they fail to address the fundamental concern – *why* would we want to commit to following the WHO's recommendations?

The purpose of this opinion is to advance understanding of the implications of the proposed amendments to the IHR, and the Australian government's apparent support of them. It is not intended as legal advice and should not be taken as such.

The scope of this opinion is limited to the proposed amendments to the IHR. It does not address matters arising from the proposed new pandemic treaty.⁵

⁵ Information about the proposed new international instrument on pandemic prevention, preparedness and response (variously known as the "pandemic treaty" or "pandemic agreement") can be accessed at <https://www.health.gov.au/our-work/strengthening-global-health-and-international-pandemic-response>.

Summary

What recommendations would the WHO be able to make?

The WHO can make any recommendation that it deems appropriate, including but not limited to isolation, detention, treatment and vaccination.

Would WHO recommendations be binding on Australia?

Yes, WHO recommendations would be binding on Australia *if we choose to make them so*. If legislation is not passed in Australia mandating compliance with the WHO recommendations, they would be binding under international law, but not enforceable (and therefore not really binding in a practical sense) in Australia.

Will parliament vote on the IHR amendments?

No, parliament will not vote on whether the IHR amendments come into force in Australia. The Australian Constitution gives this power to the federal government.

Will parliament need to pass legislation for WHO's recommendations to become binding in Australia?

We already have legislation *enabling* us to follow the WHO's recommendations. Under our current legislation, if the IHR amendments come into force, we would be expected by the international community to comply with them, but could choose not to. We would be in breach of our obligations under international law, but not in breach of any domestic laws, if we chose not to comply. If we did choose to comply, the governments in Australia could claim that we are legally bound to follow the WHO's recommendations without having to debate any legislation to mandate this in domestic law.

The government in one or more jurisdictions in Australia may decide to introduce legislation *requiring* compliance with WHO recommendations. This would make WHO recommendations binding under domestic law and would be consistent with our obligations under the IHR. However, this scenario would require parliaments to legislate to commit us to following WHO recommendations. Given Australian governments appear to be of one mind - that we should follow WHO recommendations - it is conceivable that to avoid controversy, governments may decide not to legislate to mandate compliance with WHO recommendations.

Do the IHR amendments involve Australia ceding sovereignty to the WHO?

No. The IHR amendments would see Australia *effectively* handing decision-making in relation to public health measures to the WHO. But *technically, legally*, Australia would retain its sovereignty because we would still be making the decisions - it's just that we would be committing to always deciding in line with WHO recommendations.

Do the IHR amendments involve Australia deferring to the WHO in all its decision-making in relation to public health during a pandemic?

Yes. The Government's assurance that "*Australia will retain the right to make and implement public health decisions in the best interests of Australians.*"⁶ is technically correct. But in practice, by supporting the IHR amendments which would strengthen the WHO's authority, Australia is committing to following the WHO's recommendations whether they are technically binding or not. The policy rationale for this is unclear.

⁶ See footnote 4 above.

Detailed analysis

What recommendations would the W.H.O. be able to make?

7. Under existing Article 18 (1) of the IHR (to which no amendments are proposed)⁷, recommendations issued by WHO to States Parties with respect to persons may include the following advice:
- review proof of medical examination and any laboratory analysis;
 - require medical examinations;
 - review proof of vaccination or other prophylaxis;
 - require vaccination or other prophylaxis;
 - place suspect persons under public health observation;
 - implement quarantine or other health measures for suspect persons;
 - implement isolation and treatment where necessary of affected persons;
 - implement tracing of contacts of suspect or affected persons;
 - refuse entry of suspect and affected persons;
 - refuse entry of unaffected persons to affected areas; and
 - implement exit screening and/or restrictions on persons from affected areas.
8. For example, the WHO could recommend mandatory vaccination (4th bullet point) or mandatory treatment (7th bullet point).
9. The above list is not exhaustive. The WHO has broad discretion in determining what recommendations to make.

Would W.H.O. recommendations be binding on Australia?

10. The WHO's recommendations will only be binding on Australia if we choose to make them binding.

⁷ https://apps.who.int/gb/wgihhr/pdf_files/wgihhr1/WGIHR_Compilation-en.pdf

11. Recommendations made by the WHO are currently advisory only⁸. Member States are at liberty to follow them or not, as they see fit.
12. The intention is that the WHO's recommendations would no longer be advisory – they would become binding. Recommendations would be rendered binding by the proposed amendments as follows:
- a. Article 1 – the words “non-binding” are to be removed from the definition of *standing recommendation* and from the definition of *temporary recommendation*.
 - b. Article 13A provides that countries will “undertake to follow WHO’s recommendations”.
 - c. Article 42 requires that health measures stipulated by the WHO “shall be initiated and completed without delay” by all countries.
 - d. Article 43 provides: “Recommendations made pursuant to paragraph 4 of this Article shall be implemented by the State Party concerned within two weeks from the date of recommendation. State Party concerned may approach WHO, within 7 days from the date of recommendations made under paragraph 4 of this Article, to reconsider such recommendations. Emergency Committee shall dispose the request for reconsideration within 7 days and the decision made on the request for reconsideration shall be final. The State Party concerned shall report to the implementation committee established under Article 53A on the implementation of the decision.”
 - e. New Annex 10 is headed “Obligations of duty to cooperate” and states “It shall be the obligation of the WHO and States Parties, to whom such requests are addressed to respond to such request, promptly and to provide collaboration and

⁸ Article 1 of the [current IHR](#) defines “standing recommendations” and “temporary recommendations” as being “...non-binding advice issued by the WHO...”.

assistance as requested. Any inability to provide such collaboration and assistance shall be communicated to the requesting States and WHO along with reasons.”

13. However, obligations under a treaty are only binding in practice if they are implemented into domestic law. Treaty-making has two stages: entering into the treaty, and then implementing it into domestic law.⁹
14. The Federal government has power under s61 of the Constitution to enter into treaties and has indicated its support for the proposed IHR amendments.¹⁰
15. For the purpose of this opinion, it is assumed that the Federal government will continue to support the proposed IHR amendments, and accordingly will not reserve Australia’s position on them; as a result, the amendments would come into force for Australia in May 2025.¹¹ Australia will have entered into the treaty.
16. Australia will then be expected (and legally obliged under international law) to incorporate our obligations under the amended IHR into our domestic legislation.¹² It is assumed for the purpose of this opinion that the Federal government, being in support of the proposed amendments, intends to follow through with any necessary changes to our domestic legislation.
17. The federal government has not yet published its National Interest Analysis in relation to the proposed IHR amendments. That analysis can be expected to include a description of

⁹ See Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Report, November 1995), Chapter 6, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/pre1996/treaty/report/index

¹⁰ *Australian Constitution* s61. See also Chapter 4 of the Report cited in footnote 5 above, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/pre1996/treaty/report/c04.

¹¹ *International Health Regulations 2005*, Article 59, as amended in May 2022. See further Explanatory Statement 5 of 2023 Amendments, adopted by the 75th World Health Assembly, to the International Health Regulations (2005) (Geneva, 28 May 2022), available [here](#).

¹² *International Health Regulations 2005*, Article 44(1)(d): “States Parties shall undertake to collaborate with each other...in .. the formulation of proposed laws and other legal and administrative provisions for the implementation of the Regulations.”

regulatory implications, but may or may not include a list of Commonwealth, State and Territory legislation which would or may need to be amended in order to fully implement the IHR amendments.

18. It is beyond the scope of this opinion to identify which statutes may need to be amended, but some observations can be made.

19. At the federal level:

- a. The *Biosecurity Act 2015* (Cth) (**Biosecurity Act**) already enables the Federal Health Minister to issue directions in order to follow WHO recommendations.¹³ The Explanatory Memorandum¹⁴ for the *Biosecurity Act* clearly stated that the intention was to enable Australia to comply with our international legal obligations including the International Health Regulations:

“Meeting Australia’s international obligations

The Bill allows for the management of biosecurity risks in a manner that is consistent with Australia’s international obligations.

This includes obligations under the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures 1994 (SPS Agreement), the World Health Organization International Health Regulations 2005 (International Health Regulations), and the Convention on Biological Diversity 1992 (Biodiversity Convention).”

- b. However, the *Biosecurity Act* does not currently *require* the Health Minister to follow WHO Guidelines.

¹³ *Biosecurity Act 2015* (Cth) sections [477](#) and [478](#).

¹⁴ https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5379_ems_97aa862c-089c-4fc2-abe5-ce1204f1bfc6/upload_pdf/399357-b.pdf%3BfileType=application/pdf

- c. Australia may amend the *Biosecurity Act* to *require* Australian decision-makers to follow the WHO recommendations, but no legislative change is needed in order to *enable* Australia to do so, at least at the Commonwealth level.

20. At the State and Territory level:

- a. If Australia is to be fully compliant with the amended IHR, our legislation would need to *require* the Chief Health Officers of the States and Territories to follow WHO recommendations in their respective jurisdictions, when issuing their emergency directions.
- b. It may be that existing legislation at least in some States is adequate to enable enforcement by domestic authorities of the WHO’s “recommendations”.
- c. For example, under s158 of the *Public Health Act 2016* in Western Australia, a person can be restrained to enable them to be vaccinated.
- d. Similarly, the Victorian *Public Health and Wellbeing Act 2008* already enables a person who does not comply with emergency directions to be detained.¹⁵

21. Given legislation in Australia already *enables* us to follow WHO recommendations, and given the apparent desire of governments in all jurisdictions to follow WHO recommendations, the governments in each of the jurisdictions may not consider it necessary to pass legislation *requiring* the WHO’s recommendations to be followed.

22. To the extent that is the case, no legislative change would be necessary to implement the IHR amendments. Accordingly, there may not be any opportunity for parliamentary debate over proposed legislation to implement the treaty by rendering it binding in domestic law – because no changes to domestic law may be deemed necessary.

23. It should also be noted that the federal government, or a State or Territory government could – if it wanted to - pass or amend legislation:

¹⁵ Part 10, Division 3.

- a. to declare the WHO recommendations to be *non-binding* (regardless of what the IHR amendments require) - this would mean that WHO recommendations could be taken into account but weighed against other relevant considerations in the national interest), or,
- b. going further, to prohibit taking any notice of WHO recommendations¹⁶, and/or to remove the power to make emergency directions at all.

24. Such legislation at the State or Territory level would be at odds with Australia's obligations under the IHR amendments. This may (or may not) give rise to political consequences, but there would be no legal consequences for Australia because treaty obligations are not enforceable.

25. Throughout the period of the COVID-19 pandemic, there were some differences in the specific measures taken by the States and Territories at different times. However, all governments appeared to be in broad agreement that we should follow the general approach recommended by the WHO – for example lockdowns and vaccination were adopted as the primary strategies for dealing with the pandemic in all of Australia's jurisdictions, and early treatments were not encouraged or were even prohibited. If this mentality continues, and with the continued support of the Health Ministers Meeting¹⁷ and the so called "National Cabinet"¹⁸ as coordinating mechanisms, it seems likely that the States and Territories will either:

- a. make legislative changes (if any are necessary) to *enable* us to follow the WHO's recommendations - in which case the WHO's recommendations would be binding under international law, but would not be binding under domestic law; or

¹⁶ This has occurred in Louisiana - see <https://merylnass.substack.com/p/louisianas-senate-just-unanimously?r=1cmbrn&triedRedirect=true>

¹⁷ <https://www.health.gov.au/committees-and-groups/health-ministers-meeting-hmm>

¹⁸ <https://federation.gov.au/national-cabinet/terms-of-reference>

- b. make legislative changes to *oblige* us to follow the WHO's recommendations – in which case the WHO's recommendations *would* be binding under both international and domestic law.

26. In conclusion, under the IHR amendments, the WHO's recommendations would be legally binding under international law. However, there is no mechanism for enforcing binding obligations under international law, and so they will only be binding if Australian jurisdictions pass legislation requiring us to follow the WHO's recommendations. Only then would the WHO's recommendations be binding in a practical and legal sense, because once the requirement is incorporated into domestic legislation, it can be enforced by local authorities (courts, police etc).

27. An unofficial version of the IHR amendments¹⁹ appears to wind back on the recommendations being binding. This is welcome news. However, the question remains as to why Australian governments would want to commit us to following WHO recommendations, regardless of whether or not they are legally bound to do so.

28. Australia already has the legal and administrative structures in place to enable us to comply with WHO directives if we choose to do so. This was evident throughout the time of COVID.²⁰ Once an emergency has been declared by the Governor General at the request of the federal government, the Health Minister has unlimited scope to issue any emergency directions he or she sees fit *despite any other Australian law*,²¹ undermining legal protections such as informed consent.

¹⁹ <https://jamesroguski.substack.com/p/these-amendments-are-unacceptable>

²⁰ Examples of existing legislative provisions in Australia are given at paragraph 19 above. For an overview of emergency powers used by Victorian and Commonwealth governments during the time of COVID, see Department of Parliamentary Services, Parliament of Victoria, *Emergency Powers, Public Health and COVID-19*, (Research Paper No.2, August 2020), available at <https://apo.org.au/node/307587>

²¹ *Biosecurity Act 2015* (Cth) Sections 477(5) and s478(4).

29. Regardless of whether WHO recommendations become binding under international law, governments in all Australian jurisdictions seem not only committed to following the WHO's recommendations, but also willing and able, both legally and politically, to do so.
30. Whatever the outcome of the negotiations on the IHR amendments, Australian decision-makers will be able to point to our (legal and/or political) obligations to follow WHO recommendations. Australians will continue to be the decision-makers, but will likely defer to the WHO for the substance of what those decisions should be.
31. In conclusion, the WHO recommendations will be binding in Australian law only if parliaments in Australia amend legislation to *require* us to follow WHO recommendations. It remains to be seen which if any Australian governments would introduce the necessarily legislative changes. Given the legislative framework already enables us to follow recommendations, and given that the changes would likely be controversial, it seems unlikely that any such legislation would be introduced. In that case, the WHO's recommendations would not be binding under Australian law, but for all practical purposes would likely be acted upon *as if they were binding*.

Will parliament vote on the IHR amendments?

32. No, the Australian parliament does not have to vote on the IHR amendments for them to be binding on Australia under international law.
33. The IHR is an existing international agreement. Under the procedural rules set out in the IHR, amendments take effect unless a member nation opts out by sending notification to the World Health Organisation "rejecting" (or making "reservations" to) the amendments, as set out in Article 55 of the IHR:

"Article 55 Amendments

1. Amendments to these Regulations may be proposed by any State Party or by the Director- General. Such proposals for amendments shall be submitted to the Health Assembly for its consideration.

2. The text of any proposed amendment shall be communicated to all States Parties by the Director-General at least four months before the Health Assembly at which it is proposed for consideration.

3. Amendments to these Regulations adopted by the Health Assembly pursuant to this Article shall come into force for all States Parties on the same terms, and subject to the same rights and obligations, as provided for in Article 22 of the Constitution of WHO and Articles 59 to 64 of these Regulations.”

34. Article 22 of the Constitution of WHO is the provision which means that the amendments will come into force automatically unless a member nation rejects or expresses reservations within the required deadline:

“Regulations adopted pursuant to Article 21 shall come into force for all Members after due notice has been given of their adoption by the Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period state in the notice.”

35. Therefore, no decision is required – and at any rate, it is the executive arm of government and not the parliament, which has the power under the Australian constitution, to enter into binding international agreements.²²

²² See paragraph 14 above.

36. The Joint Parliamentary Standing Committee on Treaties (JSCOT) will have an opportunity to scrutinise the proposed amendments, but JSCOT does not have any decision-making power. JSCOT's role is to consult and then issue a report with recommendations for the Federal Government.²³ Given that JSCOT's terms of reference²⁴ stipulate that a majority of the members of JSCOT are government ministers, the report is unlikely to recommend against the IHR amendments.

Do the IHR amendments involve Australia ceding sovereignty to the WHO?

37. No, Australia would not cede sovereignty under the IHR amendments.

38. The IHR amendments would see Australia effectively handing decision-making in relation to public health measures to the WHO. But technically, legally, Australia would retain its sovereignty because we would still be making the decisions - it's just that we would be committing to always deciding in line with WHO recommendations.²⁵

39. Brexit provides an analogy. The British people handed decision-making over many matters to the European Union. But they did not cede sovereignty: as a nation, Britain retained the capability to make its own decision to exit the European Union. Similarly, Australia could decide to withdraw from the IHR, exit the WHO entirely, or simply not comply. We would be in breach of our obligations under the IHR, but can still make that decision without legal consequences.

²³ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee. See also Capling, A., & Nossal, K. R. (2003). Parliament and the Democratization of Foreign Policy: The Case of Australia's Joint Standing Committee on Treaties. *Canadian Journal of Political Science / Revue Canadienne de Science Politique*, 36(4), 835–855. <http://www.jstor.org/stable/3233213>.

²⁴ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee

²⁵ There may be an argument that agreeing under a treaty to be legally bound to follow the WHO's recommendations may be an unlawful fettering of the relevant decision-making power, but that question is beyond the scope of this opinion.

Do the IHR amendments involve Australia deferring to the WHO in all its decision-making in relation to public health during a pandemic?

Yes. The Government's assurance that "*Australia will retain the right to make and implement public health decisions in the best interests of Australians.*"²⁶ is technically correct. But in practice, by supporting the IHR amendments which would strengthen the WHO's authority, Australia is committing to following the WHO's recommendations whether they are technically binding or not. The policy rationale for this is unclear.

Conclusion

The questions canvassed in this opinion are based on a fundamental concern about whether Australia's decision-making in relation to public health will be autonomous, or tied in some way whether binding or not, to the World Health Organisation.

The government's reassurances as set out in the Introduction (and oft-repeated for example by Senator Gallagher²⁷) about not ceding sovereignty, and about Australia retaining the right to make and implement public health decisions in the best interests of Australians, do little to assuage concerns that Australia will nonetheless once again blindly and willingly do what she is told by the WHO, next time there is a pandemic or other public health emergency of international concern.

Elizabeth (Libby) Klein

Australian legal practitioner

28 March 2024

²⁶ See footnote 4 above.

²⁷ See further here <https://libbyklein.substack.com/p/a-helping-hand-for-australian-parliamentarians>