

Briefing

COVID-19 Public Health Response (Vaccinations) Order 2021 for signature

Date due to MO: 28 April 2021 **Action required by:** 28 April 2021

Security level: IN CONFIDENCE **Health Report number:** 20210940

To: Hon Chris Hipkins, Minister for COVID-19 Response

Contact for telephone discussion

Name	Position	Telephone
Dr Ashley Bloomfield	Director-General of Health	s 9(2)(a)
Maree Roberts	Deputy Director-General, System Strategy and Policy	s 9(2)(a)

Minister's office to complete:

- | | | |
|-----------------------------------------------|------------------------------------|----------------------------------------------|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Decline | <input type="checkbox"/> Noted |
| <input type="checkbox"/> Needs change | <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn | |

Comment:

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

COVID-19 Public Health Response (Vaccinations) Order 2021 for signature

Security level: IN CONFIDENCE **Date:** 28 April 2021

To: Hon Chris Hipkins, Minister for COVID-19 Response

Purpose of report

1. This report recommends that you sign the attached COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order). The Order requires that work at certain places be carried out by affected persons who are vaccinated. The Order requires that work undertaken in Managed Isolation and Quarantine Facilities (MIQFs), and by government officials at affected airports and affected ports, be performed only by workers who have been vaccinated.

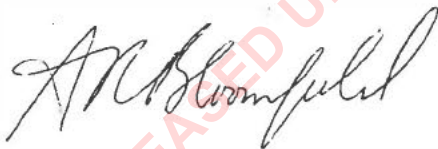
Summary

2. On 20 April 2021, you agreed to make the COVID-19 Public Health Response (Vaccination) Order 2021 (the Order) requiring that work at certain places be carried out by affected persons who are vaccinated. The Order requires that work undertaken in Managed Isolation and Quarantine Facilities (MIQFs), and by government officials at affected airports and affected ports, be performed only by workers who have been vaccinated [Ministry of Business, Innovation and Employment (MBIE) paper 2021-3276 refers].
3. You undertook Ministerial consultation, and this was completed on 27 April 2021, with no amendments requested.
4. The Ministry of Health (the Ministry) considers there is a public health rationale for requiring that specified high-risk roles only be undertaken by vaccinated people, in response to the current pandemic. This is due to the risk that these individuals may be exposed to, and infected by, COVID-19 during their work. Vaccines provide another layer of individual protection and, in doing so, may also be effective in preventing transmission in the community.
5. These measures engage rights protected by the New Zealand Bill of Rights Act (NZBORA). Limits on NZBORA rights can be justified if the measure serves an important and significant objective, and there is a rational and proportionate connection between that objective and the measure. If a court decided the Order, or actions of an employer under the Order, was not justified, then the Order may be successfully challenged in court and found to be ultra vires.
6. We recommend that you sign the attached Order on 28 April 2021 (today) so that it can be gazetted by 5:00pm. This will ensure that the Order enters into force at 11:59pm on 30 April 2021.

Recommendations

We recommend you:

- a) **Note** that officials advise the COVID-19 Public Health Response (Vaccinations) Order 2021 is in line with the purposes of the COVID-19 Public Health Response Act 2020, to prevent, and limit the risk of, the outbreak or spread of COVID-19. **Noted**
- b) **Note** that the Ministry considers there is a public health rationale for requiring specified high-risk roles be performed by vaccinated individuals only, in response to the current pandemic. This is because there is a risk that these individuals may be exposed to, and infected by, COVID-19 during their work. Vaccines provide another layer of individual protection and, in doing so, may also be effective in preventing transmission in the community. **Noted**
- c) **Note** that you must be satisfied that the Order does not limit, or is a justified limit, on the rights and freedoms in the New Zealand Bill of Rights Act 1990, as part of issuing the Order. **Noted**
- d) **Note** that these measures engage rights protected by the New Zealand Bill of Rights Act 1990 (NZBORA). **Noted**
- f) **Note** that further advice will be provided from the Border Executive Board agencies on the recommended approach to requiring high-risk work performed by other workforces at the border that can only be done by a vaccinated worker, including any proposed exemptions and other issues for Ministers to consider. **Noted**
- g) **Note** that following Ministerial consultation, the COVID-19 Public Health Response (Vaccinations) Order 2021 has been finalised for your approval. **Noted**
- h) **Agree** to sign the attached COVID-19 Public Health Response (Vaccinations) Order 2021 on 28 April 2021. **Yes/No**



Dr Ashley Bloomfield
Director-General of Health
Date: 28 April 2021



Hon Chris Hipkins
Minister for COVID-19 Response
Date:

AYESHA VERRILL
ASSOC MIN OF HEALTH
28/4/21

COVID-19 Public Health Response (Vaccinations) Order 2021 for signature

Background

1. On 20 April 2021, you agreed to make the COVID-19 Public Health Response (Vaccination) Order 2021 that requires work at certain places to be carried out by affected persons who are vaccinated. The Order requires that work undertaken in Managed Isolation and Quarantine Facilities (MIQFs), and by government officials at affected airports and affected ports, be performed only by workers who have been vaccinated [MBIE paper 2021-3276 refers].

Contents of the Vaccinations Order

2. The Order makes it mandatory for work at certain places to be carried out by affected persons who are vaccinated. It includes provisions on:
 - a. timings for when border workers are required to be fully vaccinated in order to carry out specified work
 - b. duties of persons conducting a business or undertaking (PCBUs) and employees in relation to vaccinations, including that a breach of any obligations will be an infringement offence
 - c. limited exceptions to the vaccination requirement, including in the case of necessary, unanticipated, time-critical work, and in order to protect a person's life, health or safety in an emergency
 - d. information sharing aimed at supporting effective implementation of the draft Order and the COVID-19 Immunisation Programme, by providing the government and employers/PCBUs a mechanism allowing them to know who has and has not been vaccinated, by:
 - i. requiring the relevant PCBU to request information from the Ministry of Health on the vaccination status of individuals that the PCBU has determined must be vaccinated to perform high risk work at the border
 - ii. requiring the Ministry of Health to provide an individual's relevant COVID-19 vaccination records to PCBUs, as requested
 - iii. requiring individuals who wish to perform work covered by the Order to allow the relevant PCBU to access any records that the Ministry of Health has regarding their COVID-19 vaccination status.

Changes to the draft Order

3. Since Ministerial consultation, there have been amendments made to the draft Order based on further agency consultation. This includes:
 - a. In relation to Clause 11 "Duties regarding vaccination status", clarifying the roles and responsibilities of different stakeholders, including:

- i. that it is the PCBU, not the Ministry of Health, who determines who needs to be vaccinated in order to perform work at an MIQF, affected port, or affected airport
 - ii. that the Ministry of Health is responsible for checking the vaccination status of the individual, and reporting it back to the requesting PCBU
 - iii. adding a requirement that PCBUs must advise the Ministry of Health if an individual is no longer subject to the Order
4. These amendments do not change the substantive policy intent of the Order previously agreed [MBIE paper 2021-3276 refers].

Process for making a section 11 Order

5. Under the COVID-19 Act, an Order may be made if either:
 - a. a state of emergency has been declared (under the Civil Defence Emergency Management Act 2002);
 - b. an Epidemic Notice is in force (under the Epidemic Preparedness Act 2006); or
 - c. it has been authorised by the Prime Minister.
6. There is currently an Epidemic Notice in place, which allows Orders to be made under section 11 of the COVID-19 Act.
7. As the Minister for COVID-19 Response, you may make Orders under section 11 of the COVID-19 Public Health Response Act 2020 (the Act).
8. To make an Order under section 11 you must:
 - a. have received advice from the Director-General about:
 - i. the risks of the outbreak or spread of COVID-19; and
 - ii. the nature and extent of measures that are appropriate to address those risks; and
 - b. be satisfied that the proposed Order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990 (NZBORA); and
 - c. consult with the Prime Minister, the Minister of Justice, Minister of Health, and any other Ministers you think necessary; and
 - d. be satisfied that this Order is appropriate to achieve the purposes of the Act.
9. My advice about the risks of the outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to manage those risks is set out below.

Public health rationale

10. You have previously been provided with detailed public health rationale for the proposed draft Order [MBIE paper 2021-3276 refers].
11. The Ministry advises that there is a public health rationale for requiring specified high-risk roles only be undertaken by vaccinated individuals, in response to the current pandemic. This is due to the risk that these individuals may be exposed to, and infected by, COVID-19 during their work.

12. Evidence of the efficacy of vaccines in preventing person-to-person transmission is still evolving. However, current evidence suggests that the vaccine is likely to be effective in preventing transmission. Real-world evidence suggests that people vaccinated with the Pfizer-BioNTech COVID-19 vaccine who develop COVID-19 have a four-fold lower viral load than unvaccinated people. This observation may indicate reduced transmissibility, as viral load and symptomatic infection has been identified as a key driver of transmission.¹
13. Vaccines offer a high degree of protection for individuals who are vaccinated, alongside a range of other public health measures. A worker who has been vaccinated will have a very high likelihood that they will be protected from serious illness or death and are more likely to be asymptomatic if infected.
14. Therefore, while vaccination does not prevent all possible episodes of transmission, vaccination has a clinically relevant impact on reducing the risk of transmission. The risk of COVID-19 infection in New Zealand is currently highest amongst those in high-risk roles at the border. Ensuring that such workers are vaccinated will therefore substantially protect the wider community.

New Zealand Bill of Rights Act 1990

15. Section 9(ba) of the COVID-19 Public Health Response Act 2020 explicitly requires that orders made under section 11 of the Act be made consistently with the New Zealand Bill of Rights Act (NZBORA). If an order limits a right or freedom affirmed in that Act, all or part of the order may be invalid unless the limitation can be demonstrably justified in a free and democratic society (section 5).
16. The Order raises issues of consistency with the right to refuse medical treatment (s11 of the Bill of Rights Act) and right to be free from discrimination on the grounds of disability, sex (pregnancy) or religious beliefs (s19 of NZBORA).

Finely balanced issue

17. To be satisfied that the limits on these rights are justified, there needs to be a robust public health rationale for requiring that high-risk work be performed only by workers who have been vaccinated. The public health rationale concerns the efficacy of vaccines in preventing transmission. Although evolving, the evidence suggests vaccines are likely to be effective in preventing wider transmission.
18. Ministers must also be satisfied that this public health benefit cannot be realised without introducing this proposal and that introducing the requirement is proportionate to the objective.
19. If a court decided the Order, or actions of an employer under the draft Order, was not justified or proportionate, then the Order may be successfully challenged in court and found to be ultra vires, which has the effect of making the Order null and void.

Crown Law Office

20. Under section 19 of the NZBORA, Crown Law Office considers that if MIQF workers, and government workers at affected airports and affected ports, who cannot or will not receive

¹ <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html>

the vaccination and therefore suffer a material disadvantage, by way of loss of employment, that the Order may amount to discrimination on the grounds of:

- a. sex – based on pregnancy, should the official caution in relation to pregnancy be strengthened;
 - b. disability – if a medical condition has prevented them receiving the vaccination; and/or
 - c. religion – if they decline to be vaccinated as a result of a genuine religious or ethical belief.
21. Furthermore, under s11 of NZBORA, Crown Law Office considers the requirement to receive a vaccination as a condition of employment limits the right to refuse medical treatment.
22. If there is a robust public health rationale, Crown Law Office considers that the Order is a justified restriction on their rights and freedoms affirmed by the NZBORA. Crown Law emphasises that there must be a public health rationale in order to justify the limitation of human rights that coerced vaccination will cause. The fact that vaccination benefits the personal health of those vaccinated is irrelevant for this purpose.
23. A summary of the Crown Law Office's advice is attached as **Appendix 2**.

Equity

24. As discussed above, there is potential for the Order to discriminate against workers on the grounds of sex, disability or religion. We are also aware that many of the affected workers are in low paying jobs and are carried out by ethnic minorities and women, who would potentially be more greatly impacted.
25. However, we also know from historical examples that Māori and Pacific peoples are likely to be disproportionately affected by a widespread epidemic. Therefore, there is also an equity imperative to do everything possible, within the requirement that that Minister must be satisfied that there is no limitations on rights or that any limitation on rights is justified, to minimise the potential risk to the community from COVID-19.
26. Given that the vaccination is available to all groups, we do not consider the equity concerns above to be sufficient to prohibit taking this action.

Implementation

27. The Border Worker Testing Register (BWTR), which became mandatory on 27 April 2021, is the most comprehensive database of the border and MIQF workforce. The Order will allow the Ministry to pre-populate data from the BWTR with the COVID-19 Immunisation Register to proactively identify who should be vaccinated.
28. The Order will also authorise the sharing of the vaccination status of workers (subject to the Order) with their PCUBs/employers. This will provide PCUBs/employers with an accurate record of the vaccination status of their workforce and assist them to manage their obligations under the draft Order in a more efficient way.
29. The implementation of the Order is dependent on PCBU's being able to access information on the COVID-19 vaccination status of their employees, as appropriate. The Ministry is developing an IT solution that will support the automated generation of this information,

on request. We anticipate this being operational from 11 May 2021. In the interim, the Ministry will support the implementation of the Order through a manual process. This means that there is likely to be a transition period, during which some PCBUs will not have immediate access to information on the vaccination status of their affected employees. While this may technically be in breach of the Order, there would need to be evidence of a breach for that to be enforced.

30. We will work with PCBUs to try and manage these requests for information so that information flows can work as effectively as possible in the circumstances. The key difficulty during this time is that we are still transitioning some PCBUs onto the BWTR. Until that is complete, it is not possible to automate the information sharing about vaccination status.
31. While consideration was given to making provision for this transition period in the Order, on the advice of the Ministry's legal team, we have determined that it is more effective to work alongside PCBUs to ensure that they operate in a manner consistent with the intent of the Order, and we support and enable PCBUs to meet their obligations under the Order, as soon as possible, to meet the Government's objectives.
32. MBIE will lead work on the development of the operational guidance to support the Order when it comes into effect. This will include updating guidance on employment.govt.nz; and working with the Public Service Commission and the Border Executive Board Chief Executives to ensure that appropriate guidance is provided to public sector employers.
33. We will update operational guidance (including the immunisation sequencing framework) to ensure that relevant provision is made for people required to be vaccinated under the Order.

Next steps

34. Further advice will be provided from the Border Executive Board agencies on the recommended approach to requiring specified high-risk work performed by other workforces operating at the border that can only be done by a vaccinated worker, including any proposed exemptions and other issues for Ministers to consider, such as the scope of work and workers impacted at affected airports and affected ports.
35. Following this further advice, an Amendment to the Order could be made to bring additional groups into the Order.
36. We recommend that you sign the attached Order on 28 April 2021 (today) so that it can be gazetted by 5:00pm. This will ensure that the Order enters into force at 11:59pm on 30 April 2021.

ENDS

Appendix 2: Summary of Crown Law Office advice – Legally Privileged

1. This is a brief summary of previous Crown Law Office advice on the proposal to make an order under s 11 of the COVID-19 Public Health Response Act 2020 to require that certain work only be undertaken by vaccinated workers (more detailed Crown Law Office advice is attached to briefing 2021-3276).
2. Before making the proposed s 11 order, the Minister must be satisfied that there is a robust and credible public health rationale to justify limiting the rights and freedoms of high-risk workers affirmed by the New Zealand Bill of Rights Act 1990. The fact that vaccination benefits the personal health of those vaccinated is irrelevant for this purpose.
3. We understand the Ministry of Health considers there is a public health rationale for requiring specified high-risk work only be undertaken by vaccinated people in response to the current pandemic. This is because there is a risk that those individuals may be exposed to, and infected by, COVID-19 in the course of their work and may transmit the virus into the community. They consider vaccination of high-risk workers will materially reduce this risk, and other less-intrusive measures have failed to do so. Based on the Ministry of Health's public health advice the Crown Law Office is of the opinion that requiring vaccinated people to fulfil high risk roles is a justified limitation of the right to refuse to undertake medical treatment (s 11) and of discrimination (s 19). Crown Law Office's advice is reliant on public health advice and it is the quality of that public health advice that would likely determine any challenge in a Court.
4. The fact not all potentially high-risk border workers will be covered by the proposed s 11 order does not undermine the public health rationale for the proposed order. We understand for pragmatic and implementation reasons there are other potentially high-risk workers who are not included in the proposed s 11 order. We understand work in this space is ongoing and it is likely further s 11 orders will be made to capture other high-risk workers.