

Health Report

Routine Mandatory COVID-19 Testing of Border Workers: Progressing Phase 3 of the Required Testing Order

Date due to MO: 6 November 2020 **Action required by:** 9 November 2020

Security level: IN CONFIDENCE **Health Report number:** 20201893

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

Contact for telephone discussion

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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 Withdrawn | |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:

Routine Mandatory COVID-19 Testing of Border Workers: Progressing Phase 3 of the Required Testing Order

Security level: IN CONFIDENCE **Date:** 6 November 2020

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

Purpose of report

This report provides you with advice to inform decisions on the third phase of the COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020.

Summary

- Phases 1 and 2 of the mandatory routine testing of border workers through the COVID-19 Public Health Response (Required Testing) Order 2020 (the Order) have now been rolled out. Implementation of Phase 3 has been delayed pending decisions on some of the elements to be included in the amended Order.
- It is proposed that Phase 3 will extend the testing requirements to new groups of workers, increase testing frequency for some higher-risk workers, and introduce new duties on workers and Persons Conducting a Business or Undertaking (PCBUs).
- We have been working with relevant agencies to discuss the proposals to be included in Phase 3 of the Order. Agencies were generally supportive of proposed duties to be progressed as part of phase 3, and noted many PCBUs were already fulfilling these roles.
- You asked that high risk port workers have the frequency of their routine testing requirements increased to weekly [HR20201904 refers]. Officials have identified maritime pilots and any airport and port workers that are in an enclosed space on board an aircraft or boat for more than 15 minutes at a time with arriving crew/passengers (where physical distancing is not practicable) as higher-risk groups where testing frequency could be increased to once every 7 days.
- The attached draft Order includes the new duties on workers and PCBUs that are reasonable, practical, and within the scope of what a section 11 Order may require. Duties on PCBUs involve keeping records of compliance, notifications of the requirements, and a prohibition on PCBUs from preventing or prohibiting the workers they employ or engage from undergoing testing during working hours, when testing is available during working hours. A new duty on workers requires them to provide the PCBU that employs or engages them with the information that will enable PCBUs to meet their obligations.
- You also requested advice on the creation of additional enforcement functions, such as authorising an enforcement officer, to support the routine mandatory testing requirements. WorkSafe inspectors are currently authorised under the COVID-19 Act to

carry out the functions and powers of an enforcement officer, and could act in this capacity to respond to non-compliance with the Order on an interim basis.

- There will also be a specific review of WorkSafe's role in regulating COVID-19 measures in workplaces due in February 2021. This offers an opportunity to consider the scope of the enforcement function and who holds responsibility for it.
- If the Phase 3 Order is signed on Wednesday 11 November, it can come into force from Monday 16 November. This would give the sector five days of lead-in time to implement the new requirements.

Recommendations

We recommend you:

- a) **Note** that phase 3 of the mandatory testing regime will introduce new duties on workers and their PCBUs, extend the testing requirements to new groups of workers, and increase the testing frequency for some higher-risk port workers **Yes/No**
- b) **Note** that testing frequency must be proportionate to the worker's risk level **Yes/No**
- c) **Agree** to extend the testing requirements to the following groups of workers (fortnightly testing): **Yes/No**
- a) all other airside workers (other than excluded airport persons)
 - b) all landside workers at international airports (other than excluded airport persons) who routinely interact with international arrivals
 - c) all other port workers (other than excluded port workers) who interact with persons required to be in isolation or quarantine under COVID-19 order
- d) **Agree** to increase testing frequency to weekly for all maritime pilots **Yes/No**
- e) **Agree** to increase testing frequency to weekly for all airport and port workers who spend more than 15 minutes in an enclosed space on board an aircraft or affected ship with a member of crew or passenger who has arrived from overseas and where physical distancing is not practicable **Yes/No**
- f) **Agree** to include a duty on affected workers to provide information to the PCBU that employs or engages them **Yes/No**
- g) **Agree** to include a duty on PCBUs to keep records of the affected workers they employ or engage, and make these available to an enforcement officer **Yes/No**
- h) **Agree** to include a duty on PCBUs to notify the affected workers they employ or engage of the applicable testing requirements **Yes/No**
- i) **Agree** to include a prohibition on PCBUs from preventing or prohibiting the workers they employ or engage from undergoing testing during working hours, when testing is available during working hours **Yes/No**

- j) **Note** that the Border Worker Testing Register will support PCBU's to fulfil the proposed Phase 3 duties **Yes/No**
- k) **Note** that WorkSafe inspectors are currently authorised under section 18 of the COVID-19 Public Health Response Act 2020 to carry out the functions and powers of an enforcement officer **Yes/No**
- l) **Note** that WorkSafe could act in their capacity as an authorised enforcement officer under section 18 of the COVID-19 Act to respond to specific patterns of non-compliance with the Order **Yes/No**
- m) **Note** that the February 2021 review of WorkSafe's role in regulating COVID-19 measures in workplaces offers an opportunity to consider the scope of the enforcement function and who holds responsibility for it **Yes/No**
- n) **Consult on** the attached draft COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020 with relevant Ministers **Yes/No**
- o) **Note** that if the Phase 3 Order is signed on Wednesday 11 November, it can come into force from Monday 16 November. **Yes/No**
- p) **Note** that officials will develop guidance on the Order for impacted PCBU's and workers to understand their obligations. **Yes/No**
- q) **Agree** that officials will communicate with stakeholders who are most impacted by the proposed changes to testing frequencies, such as the Maritime Pilots Association, as soon as possible following final decisions on the Phase 3 Order **Yes/No**
- r) **Note** that you received advice on 5 November 2020 on further measures to decrease COVID-19 transmission at the maritime border [HR 20201869 refers] and will receive advice on testing of maritime crew on 13 November 2020 **Yes/No**
- s) **Forward** a copy of this report to the Minister of Finance, Minister of Health and the Minister for Workplace Relations and Safety **Yes/No**



Dr Ashley Bloomfield

Director-General of Health

Date:



Hon Chris Hipkins

Minister for COVID-19 Response

Date: 10/11/2020

Routine Mandatory COVID-19 Testing of Border Workers: Progressing Phase 3 of the Required Testing Order

Background and context

1. The purpose of this report is to provide you with advice on decisions needed to progress phase 3 of the COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020 (the Order).
2. On 30 October 2020 you requested advice on changing the testing frequency for higher-risk port workers from fortnightly to weekly [HR 20201904 refers]. This report responds to that request. This report also proposes to extend routine testing to further groups of port and airport workers.
3. On 16 September 2020 we provided you with advice about the duties and obligations involved in the roll out of routine mandatory testing of border workers, and you indicated that an explicit duty in the Order would be preferable [HR 20201578 refers].
4. On 22 September 2020, you asked that the Order incorporate a duty on PCBU's to facilitate testing based on a request from the Minister for Workplace Relations and Safety [HR 20201578 refers].
5. In response to this request, our suggested solution was the addition of a specific duty on PCBU's to keep records in relation to the mandatory testing regime. We suggested an obligation to keep records rather than a specific duty to facilitate testing because an Order made under section 11 of the COVID-19 Public Health Response Act (the Act) can only require specified measures or actions that are likely to contribute to preventing the risk of outbreak or spread of COVID-19. The need to keep records is most likely the only requirement in common for all PCBU's across various settings that employ workers who are subject to the mandatory testing requirement.
6. Although the record-keeping provision is not a broad duty to facilitate testing in such explicit terms, in practice it would serve as a good indication that the PCBU is taking the right steps to enable its workers to undergo testing.
7. Following feedback from agencies and Ministerial consultation, we worked towards including more explicit wording in the Order for the following additional requirements:
 - a. duty on workers to provide information to demonstrate they had undergone testing
 - b. duty on PCBU's to notify their workers of the testing requirements and the testing deadlines that apply to them
 - c. duty on PCBU's to provide workers with reasonable opportunity to access testing.

Consultation on progressing phase 3

8. Officials have run two rounds of consultation with the Ministry of Business, Innovation and Employment (MBIE), Ministry of Transport, Ministry of Justice (MoJ), Ministry for

Primary Industries, Police, Customs, Maritime NZ, Civil Aviation Authority, and WorkSafe to ensure the proposals for Phase 3 reflect their input as much as possible. Agencies also consulted with key sector stakeholders on the proposals where possible. Appendix 1 sets out the stakeholders consulted.

9. The first round of consultation in early October focused on proposed duties on PCBU's and the inclusion of additional groups of workers in the Order. The second round of consultation in late October focused on more specific PCBU duties and proposals regarding testing frequencies. Feedback from agencies and their sector stakeholders is noted in the relevant sections of this report.

Phase 3 proposals

10. The three broad proposals for phase 3 include extending the testing requirements to new groups of workers, revising the frequency of testing for some workers and adding new duties to the Order.

Extending the testing requirements to three new groups of workers

11. As we advised in HR20201636, the Phase 3 planned amendments to the Schedule to the current Order would expand the mandatory testing regime to the following groups:
 - a. all other airside workers (other than excluded airport persons). The effect of this is to capture any airside workers that may not be captured by the occupational groups currently listed in the Schedule.
 - b. all landside workers at airports who routinely interact with international arrivals (other than excluded airport persons). The effect of this is to include those landside workers who interact with international arrivals in the same way as their airside colleagues from the same occupational group, meaning that their actual exposure risk may be equivalent.
 - c. all other port workers (other than excluded port workers) who interact with persons required to be in isolation or quarantine under a COVID-19 Order. This has been added as a catch-all category following advice from Customs that Customs Officers who process crew from ships entering New Zealand undertake this activity on the port.
12. There are no changes to routine testing in MIQFs, as all staff in these facilities are included in the current Schedule.

Public health advice on testing frequency

Risk assessment framework for determining testing frequencies

13. In August 2020 the Ministry developed a risk assessment framework to determine the frequency of testing for different occupational groups at the border [HR20201513 refers]. Testing frequency is based on risk assessment of both the work setting and the likelihood of the occupational groups within the settings being exposed to COVID-19.
14. On 20 August 2020 you agreed that the main criterion for assessing risk to determine the need for mandatory testing is potential for exposure to COVID-19 [HR 20201466 refers].

15. Public health advice recommended that:
- in managed isolation and quarantine facilities, higher-risk occupational groups be tested weekly and lower-risk groups be tested fortnightly
 - in airports receiving international passengers and maritime ports, higher-risk occupational groups be tested fortnightly
16. Officials recommended that lower-risk workers within airports and ports should not be subject to mandatory testing under the Order because they do not face a risk of exposure that is greater than others in the community [HR 20201636 refers]. This means that mandatory testing of lower-risk workers would not be justified on public health grounds, and therefore may not be justifiable under the New Zealand Bill of Rights Act 1990 (BORA).
17. The categorisation of workers ensures that testing is done on a frequency which is reasonable and proportionate to the worker's level of risk.

Key considerations for reviewing testing frequencies

18. Officials' advice is that there are four key considerations in reviewing testing frequencies:
- whether there has been a material change to the risk profile at ports since frequency was determined
 - whether other risk reduction measures are being adhered to
 - compliance with the Bill of Rights Act 1990
 - the feasibility of the testing requirements, including increased need for health system resources to support the testing requirements.

Increasing the testing frequency for some port workers

19. On 30 October 2020 you indicated that you would like to increase the frequency of testing for high risk port workers to increase from fortnightly to weekly [HR 20201904 refers].

Overview of how the status quo is currently working

20. With some exceptions for ports where vessels are received intermittently or where affected persons obtain an exemption from a health practitioner, affected persons are currently tested:
- **weekly** for workers at managed quarantined facilities, and workers who transport to or from managed quarantine facilities people required to be in isolation or quarantine
 - **weekly** for aircrew members
 - **fortnightly** for workers at managed isolation facilities, and workers who transport to or from managed isolation facilities people required to be in isolation or quarantine
 - **fortnightly** for other airside workers as identified in the Order

- **fortnightly** for pilots and stevedores carrying out work on or around affected ships, people who board an affected ship, and workers who transport people to or from an affected ship.
21. The current approach of categorising workers by occupational group has the following advantages:
- provides sufficient specificity to minimise discretion in how the approach is interpreted
 - is simpler to communicate and provide guidance for border workforces
 - decreases administrative burden.
22. We have considered whether there are border workers who, by the nature of their work, are at higher risk of infection of COVID-19. On public health advice and after consultation with border agencies and their sectors, we have identified that there are some workers who spend time on board affected ships or aircraft that arrive from outside of New Zealand, in enclosed spaces, and in circumstances that can require them to come into relatively close contact with crew or passengers who have recently arrived from overseas. These workers are at higher exposure risk, and could be subject to a testing frequency of weekly, which is equivalent to other higher risk border workers such as New Zealand based air crew who also work in close proximity to international arrivals in enclosed spaces.
23. Examples of the type of port workers that may be captured by this requirement include all maritime pilots and some shipping agents, surveyors, engineers, customs officers, and health protection officers. It is unlikely to capture stevedores.
24. We do not expect to capture large groups of airport workers, but including this category would capture workers such as Police officers who respond to an incident on board an aircraft or the occasional engineer or cleaner who boarded an aircraft while passengers and crew were on board. We do not expect that workers such as cleaners who go on board an aircraft after passengers and crew have disembarked would be captured by this new category; these workers would remain on their existing 14 day testing cycle.
25. This option would move the regime into an individualised approach that takes account of a workers' unique circumstance rather than the current approach of capturing whole occupational groups within a setting.
26. Officials' view is that the 15-minute criteria could be used to clearly separate and identify higher risk workforces, as it is specific enough for workers and PCBU's to identify who falls into this group while also being general enough to capture the range of occupational groups who may be covered.
27. In our view, this option is BORA compliant as the proposed criteria is proportionate and based on an assessment of an individual's risk of exposure to COVID-19.
28. This option is likely to increase costs and administrative burden on agencies and PCBU's, who would be required to determine which of their workers meet the criteria for weekly testing. This may increase the likelihood of error and may disincentivise workers from disclosing to their employers when they have been on board a ship or aircraft. MPI noted that this change may have a challenging impact on how it manages testing cycles.
29. Maritime NZ has indicated that maritime pilots are supportive of moving to a weekly testing cycle as an occupational group. This is because their role requires them to

interact with ships' crew, including by boarding every ship, going on the bridge of the ship and handling the paperwork. Changing the testing frequency for this group as a whole is recommended as it would maintain the current approach of differentiating risk by occupational group, and maritime pilots themselves have identified their higher risk profile.

Other options for increasing testing frequency considered by officials

30. We have considered whether to increase testing frequency for all port and airport workers covered by the order from fortnightly to weekly. This is not recommended.
31. This option would make the testing requirements inconsistent for workers with a similar risk profile, and therefore to be consistent workers in Managed Isolation Facilities (MIF) would likely need to move to a weekly schedule too.
32. While this option would make the testing frequency requirements simple to understand (i.e. everyone would be on a weekly cycle) the change is not justified based on the risk profile of the majority of these workers. This option would also mean all workers currently captured by the Order would be on a weekly testing schedule and there would be significant resource implications both for agencies/employers and DHBs.
33. This option is unlikely to be BORA compliant. There is currently a link between each person's risk of exposure to COVID-19 and the frequency with which they are tested, and officials advise that the exposure risk for border workers has not materially changed to justify an increase in testing for all. s 9(2)(h)
[REDACTED]
[REDACTED]
[REDACTED]
34. Some agencies raised concerns that changing the testing frequency for their workers would incur unnecessary stress for staff along with logistics and resource pressure. Most thought it was feasible (but not desirable), though it would require time to plan and implement, and would be costly. It would require a greater degree of coordination than the current regime. Agencies also highlighted this option may erode goodwill, and may result in workers declining shifts, potential physical effects, risk of increased absenteeism, alienation of workers subject to testing and difficulty attracting new employees to the industry.

Officials also considered the feasibility of aligning the approach to ports with dual-use Managed Isolation and Quarantine Facilities

35. Officials also considered whether it would be feasible to align the approach to ports with the current practice for dual-use Managed Isolation and Quarantine Facilities (MIQF). This is not recommended.
36. The testing frequency for workers at dual-use MIQF changes according to set criteria. Dual-use MIQF are operating as Managed Quarantine Facilities (MQFs) where there is a confirmed or probable case of COVID-19 in the quarantine zone of the facility, or where fewer than 14 consecutive days have passed since any confirmed or probable case of COVID-19 last occupied the facility. Workers at all MQFs are subject to a weekly testing cycle, including workers who do not enter the quarantine zone of the dual-use facilities. If it has been at least 14 consecutive days since any confirmed or probable case of

COVID-19 last occupied the quarantine zones of the facilities, the facility operates as a MIF and therefore its workers are subject to the fortnightly mandatory testing cycle.

37. In the port environment, the same criteria could be applied such that an exposure event at an affected port triggered a re-designation of that port to a 'higher-risk affected port', with all workers at that location to be subject to a weekly testing cycle until 14 consecutive days have passed since the COVID-19 exposure event.
38. Officials' view is that there is merit in only increasing testing frequency in response to a known outbreak, however this approach would capture many more people than may be justified and there is a risk that this would not be compliant with the BORA. Moreover, testing and isolation of close contacts has so far been an effective response to exposure events in border settings, and triggering a weekly testing cycle in port environments in response to an exposure event would likely be unnecessary.
39. Several agencies commented there was not a compelling rationale for this option, as current case management and contact tracing protocols are effective. Others felt this was the most appropriate and measured response. Most agencies advised they could implement this option if it was required, but it would be challenging and confusing for PCBU's and workers. It was noted if there were a positive result, increased testing would take place anyway. Benefits included reducing anxiety for affected workers and the general public, and confirmation that risk management controls are working.
40. Agencies also highlighted that increasing testing requirements under this option could lead to people missing tests, increased non-compliance, and also alienation of workers who are subject to testing, increased administration and logistics, and potential to overload testing capacity.

Infection prevention and control measures are key to mitigating maritime border risks

41. COVID-19 testing of border workers supplements other infection protection and control measures such as physical distancing, use of personal protective equipment (PPE), other health screening, and other risk mitigating restrictions and measures required under different COVID-19 Alert Levels, such as symptomatic people staying home and seeking a COVID-19 test.
42. An ongoing testing approach for border workers provides insight into whether there have been any failures in these other infection control and prevention measures. A regular COVID-19 test is not a protection against being exposed, but rather establishes whether other preventative measures are working.
43. In addition to these measures, there are daily health checks and/or symptom checks of border workers and any symptomatic staff are tested. These would continue alongside regular testing of border workers. There are also specific PPE requirements for border and MIQF workers.
44. Alongside infection prevention and control measures, voluntary testing will remain available for border workers who are not covered by the Order. Current testing advice is that affected persons should also be tested as soon as they develop any COVID-19 symptoms regardless of when their last routine test was.
45. Work is currently underway on potential improvements to public health and infection prevention and control measures currently in place at the maritime border [HR 20201904 refers].

Proposed new duties on workers and PCBUs

46. On 16 September 2020 we provided you with advice about the duties and obligations involved in the roll out of routine mandatory testing of border workers, and you indicated that explicit duties on employers or PCBUs in the Order would be preferable [HR 20201578 refers].
47. On 22 September 2020, you asked that the Order incorporate a duty on PCBUs to facilitate testing based on a request from the Minister for Workplace Relations and Safety [HR 20201578 refers].
48. In response to this request, our suggested solution was the addition of a specific duty on PCBUs to keep records in relation to the mandatory testing regime. We suggested an obligation to keep records rather than a specific duty to facilitate testing because an Order made under section 11 of the COVID-19 Public Health Response Act (the Act) can only require specified measures or actions that are likely to contribute to preventing the risk of outbreak or spread of COVID-19. The need to keep records is most likely the only requirement in common for all PCBUs across various settings that employ workers who are subject to the mandatory testing requirement.
49. Although the record-keeping provision is not a broad duty to facilitate testing in such explicit terms, in practice it would serve as a good indication that the PCBU is taking the right steps to enable its workers to undergo testing.
50. Following feedback from agencies and Ministerial consultation, we worked towards including more explicit wording in the Order for the following requirements:
 - a. duty on workers to provide specific evidence to demonstrate they had undergone testing
 - b. duty on PCBUs to notify their workers of the testing requirements and the testing deadlines that apply to them
 - c. duty on PCBUs to facilitate testing and/or remove any barriers to testing.
51. You requested further advice on enforcement and compliance arrangements to support the mandatory testing regime on 22 September 2020 [HR 20201578 refers].

Consultation with relevant agencies on the proposed worker and PCBU duties

52. We consulted with WorkSafe and border agencies in early October and again in late October to ensure the proposals for Phase 3 reflect their input as much as possible. Agencies also consulted with key sector stakeholders on the proposals in two stages, and a list of those engaged is included as Appendix 1.
53. Agencies were generally comfortable with including obligations on PCBUs in the Order, but there was agreement that the Order and guidance must not leave any ambiguity about the roles and duties of workers and PCBUs where penalties for non-compliance will apply. Some agencies questioned whether the additional roles and duties on PCBUs are necessary, especially given that most PCBUs are already working to ensure that their workers are able to meet their testing requirements.
54. PCBUs are generally supportive of the mandatory testing regime and are already taking steps to ensure their workers comply with the testing requirements, such as by providing testing on site or allowing workers time off to get tested, depending on the measures

that best fit their circumstances. However, some employers in the maritime sector have questioned whether mandatory routine testing is a necessary long-term measure.

55. Unions were also generally supportive of the mandatory testing regime and felt that it was appropriate to create new duties for PCBU's. For example, the Rail and Maritime Transport Union supported greater clarity about PCBU's obligations to facilitate testing of workers during their working hours.

Duties in the Order must be consistent with section 11 of the Act

- s 9(2)(h)
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59. Based on Crown Law's advice and agency feedback, we explored a range of specific duties with Crown Law and agencies in late October that would have the cumulative effect of creating a duty to facilitate testing. The duties explored were:

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| 1. Duty to let workers get testing during work time | 2. Duty to actively monitor/follow up workers who haven't been tested |
| 3. Duty to keep records | 4. Duty to stand down workers (with or without pay) for non-compliance |
| 5. Duty to notify staff of when testing is required | 6. Duty to report people who haven't been tested to enforcement officers |
| 7. Prohibition on workers who haven't been tested working at an affected place | 8. Duty to transfer non-compliant workers to other settings |
| 9. Give people paid time to be tested/duty to provide reasonable compensation (pay, time in lieu, additional sick leave) | 10. Duty to have an internal policy on testing and make it available to staff (e.g. on their intranet) |
| 11. If not possible to provide testing on site, requirement to provide transport (e.g. to testing centre) | 12. Duty to support workers' wellbeing in relation to testing requirements (e.g. psychosocial support) |

60. s 9(2)(h) However, three duties were identified that would be consistent with section 11 of the Act:
- a. duty to let workers get testing during work time
 - b. duty to keep records
 - c. duty to notify staff of when testing is required.
61. These provide the basis of our recommended approach to creating new duties for PCBU, as set out below.

Requirement on PCBU to keep records of testing and medical examination

62. Agencies were generally supportive of including a requirement on PCBU to keep records of testing and medical examination and it was noted that many PCBU are already doing this.
63. Some stakeholders wanted clarification that this obligation would sit with the PCBU that employs or engages a worker. This is important as lead PCBU have limited ability to fulfil this role on behalf of other PCBU. For example, Air New Zealand noted that it only has obligations to its workers, not the workers of its suppliers.
64. The policy intent is that the obligation to keep records sits with the PCBU that employs or engages an affected person to perform work on a paid or voluntary basis, including through a contract for services or a contract of service.
65. MIQFs present a different situation where MBIE wants to receive testing information from all workers on site and keep records on this, as the lead PCBU. This reflects that MBIE controls the MIQF environments in a way that is substantively different to an airport or port work environment. We will continue to work with MBIE on how it can receive the information it requires for the effective operation of MIQFs, including through the use of the privacy statement and protocols.
66. The draft Order includes a requirement for the relevant PCBU to keep and maintain a record of:
- a. the affected person's full name and date of birth
 - b. a telephone number
 - c. the testing period that applies to the affected person
 - d. the dates on which the affected person has undergone testing and medical examination
 - e. details of any exemption, if applicable.

Duty on workers to provide information/evidence of a test to the PCBU that employs or engages them

67. Agencies were generally supportive of including a duty on workers to provide information/evidence of a test to PCBU that employ or engage them as it enables PCBU to meet their complementary obligations.

68. A common theme in feedback was that clarity was needed about what would be considered 'information' or 'evidence' and that guidance and system solutions would be required to enable the easy sharing of information.
69. Guidance is prepared for all Orders and officials are actively working on system solutions to ensure that the obligation to provide evidence is not overly burdensome and workers have options. This includes the development of an IT solution that will provide automatic notifications of workers' testing to PCBU. While this system is being developed and tested interim solutions are being put in place, including the use of QR codes at testing facilities and the provision of physical certificates. Manual process will need to remain in place until the IT solution is fully rolled out.
70. The draft Order includes a requirement for the affected person to provide the relevant PCBU with the information that is required for PCBU to meet their record keeping duty.

Requirement on PCBU to ensure that any affected persons that carry out work for them are aware of their testing requirements

71. Agencies were generally comfortable with including a requirement on PCBU to ensure that any affected persons that carry out work for them are aware of their testing requirements and noted that many PCBU are already fulfilling this role.
72. The Ministry of Justice (MoJ) noted that ensuring workers are made aware of their testing requirements is somewhat vague and that it could be difficult to show that this requirement has been met. As an alternative, MoJ suggested wording this requirement as an obligation for PCBU to *notify* affected persons of their testing requirement. We agree with this approach have incorporated this in the draft Order.
73. The draft Order includes a requirement for the relevant PCBU to notify the affected person of their requirement to undergo testing and medical examination and the testing period that applies to the person.

Requirement on PCBU to facilitate testing or reduce or remove any barriers to testing

74. Agencies generally supported the concept of including an obligation on PCBU to facilitate or remove/reduce barriers to testing, and once again noted that many PCBU are already fulfilling this role.
75. Some agencies raised that a facilitation duty cannot fall solely on the PCBU as they rely on other aspects of the system being in place to get their workers tested. In particular, Aviation Security (AvSec) and MBIE noted that some barriers are outside of the control of the PCBU, for example, having testing available on site at appropriate times for 24/7 workforces.
76. Almost all agencies raised issues with the imprecision of the proposed 'facilitate' and 'remove or reduce barriers' wording. There was agreement across agencies that the wording in the Order needs to be precise and supported by explicit guidance and sector specific examples.
77. The objective of this duty is to confirm that the PCBU who engages or employs a worker is expected to, where practicable, take steps to make it easier for their workers to comply with the testing requirements.

78. What can be reasonably expected of PCBU's will vary depending on the situation. For example, large PCBU's at airport precincts and managed isolation and quarantine facilities are already allowing on-site testing and letting their workers undergo testing during working hours. However, what is reasonable to expect of PCBU's at the maritime border outside the main urban centres is likely to differ. For example, some agencies suggested that it may be reasonable in some circumstances for PCBU's to provide transport for workers to a testing location if on-site testing is not practicable.
79. Agency feedback indicates that PCBU's are generally already taking the steps they can to enable workers to get tested during working hours. Representatives from the aviation sector agreed that stricter options are inflexible and likely to negatively impact operations, for example the requirement to provide paid time would be very disruptive as the testing frequency of shift workers is not aligned to their rostering arrangements. The aviation sector considered that they were already taking the necessary steps to ensure that their workers had easy access to testing, and any additional requirements would be unnecessary and may impose significant extra costs.
80. We have explored three broad options for achieving the objective of this duty with border agencies and their sectors including:
- a) a prohibition on PCBU's to prevent or prohibit workers who are due to be tested from accessing testing, when that testing is available during their working hours
 - b) duty on PCBU's to provide reasonable opportunity for workers to access testing during working hours, when testing is available during their working hours
 - c) duty on PCBU's to provide paid time for workers to access testing, when testing is available during working hours [similar to option b but more specific]
81. s 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] For this reason, we recommend proceeding with option 'a' because it frames the duty in a specific way that gives certainty and does not create a burden on PCBU's who are already taking the necessary steps to help their workers access testing. This option also has the effect of clarifying that PCBU's cannot do things like roster staff on to undertake work that would stop them meeting their testing requirements.
82. The alternative framing, of providing an absolute duty to provide testing or opportunity to be tested, was deemed not feasible as PCBU's rely on DHBs/PHUs to provide testing, often on site and they should not be held liable if testing is not available.
83. It is not intended that the duty on PCBU's extends to ensuring that testing happens. This is because there are several factors outside a PCBU's control, such as a worker refusing to undergo a test and the testing service not being available at the appropriate time. MBIE and AvSec both noted the need for testing to be available and provided on/close to work sites to enable PCBU's to comply with this duty.
84. It is intended that the workers still hold ultimate responsibility for ensuring they undergo the actual test by the applicable deadlines.

85. The draft Order includes a requirement that relevant PCBUs must not prevent an affected person who is due to be tested from accessing testing, if testing is available during an affected person's working hours.

The Border Worker Testing Register will support compliance with the new duties

86. The Ministry continues to work on a digital solution to minimise the administrative burden on employers and help them ensure that their workers are being tested. This will be called the Border Worker Testing Register (BWTR) and work is progressing at pace.
87. A Proof of Concept (POC) commenced at Wellington Managed Isolation and Quarantine Facilities (MIQFs) the week of 5 October 2020, with an employer briefing and privacy statement provided to employers prior to the POC trial.
88. The first phase of the POC involves data gathering for the first cohort of Wellington MIQFs' workers (New Zealand Defence Force staff), and feedback loops remain open to ensure necessary improvements can be made. The BWTR will then be incrementally rolled out to other sites, first to MIQFs in Christchurch and then the rest of New Zealand, closely followed by Customs staff. Engagement is also underway with Air New Zealand about rolling out the BWTR to their staff.
89. The Ministry is working closely with PCBU operators and employers in the Maritime and Aviation sectors to ensure that the BWTR meets their requirements. An engagement plan is underway to increase understanding of the BWTR and buy-in from these stakeholders.
90. The Border Testing Taskforce, responsible for the rollout of the BWTR, is working closely with Ministry of Health Policy to ensure that it aligns with updates to the Order. The BWTR will not be compulsory for PCBUs to use, but we expect that it will be widely used as it will support compliance with the new duties.

Compliance and enforcement

General approach to compliance and enforcement

91. The purpose of agreeing an enforcement function is to ensure there is a process in place for addressing any potential non-compliance (by worker or PCBU) with the Order. As we do not anticipate significant levels of non-compliance with the Order because individuals understand the risk of non-compliance to them and their families, we do not expect that the enforcement function will need to be extensive or active.
92. We expect that the PCBU would follow up with their worker in the first instance where the worker fails to comply with the testing requirements or to provide evidence of their compliance to the PCBU that employs or engages them.
93. We expect that in the event non-compliance (by a worker or PCBU) is reported, any action by the enforcement officer would take a graduated approach beginning with education efforts.
94. The additional obligations to be placed on employers and workers must be fair and proportionate as there is no evidence to suggest workers are not complying with the testing requirements.

The Director-General may authorise enforcement officers under section 18 of the COVID-19 Act

95. Under section 18 of the COVID-19 Public Health Response Act 2020, the Director-General of Health may authorise a suitably qualified and trained person (or class of persons) who is employed or engaged by the Crown or a Crown entity, to carry out any functions and powers as enforcement officers. A Section 18 authorisation describes the class of people that are authorised as enforcement officers, the powers (available under the COVID-19 Public Health Response Act) that they may exercise, and the functions which they may carry out.
96. There is no enforcement officer role specified to ensure compliance with the Routine Testing Order, however an existing Section 18 Authorisation authorises WorkSafe inspectors to carry out functions and powers of an enforcement officer with respect to workplaces for which WorkSafe is the regulator. This includes ports, airports and Managed Isolation and Quarantine facilities (MIQFs).
97. If you agree with the approach of utilising enforcement officers authorised under Section 18 of the COVID-19 Public Health Response Act 2020 to enforce the Required Testing Order, the Director-General will renew and extend the date of the Section 18 Authorisation for WorkSafe inspectors.

Utilising WorkSafe as the enforcement officer in response to specific patterns of any non-compliance

98. The Ministry of Health, MBIE and WorkSafe have been working through the role of WorkSafe inspectors acting in their existing capacity as enforcement officers under the Act, as an option for enforcing the Required Testing Order. This option has the benefit of building on WorkSafe's existing skills and infrastructure, and co-locates complementary obligations (public health, and occupational health and safety) under the purview of a single entity.
99. WorkSafe has agreed in principle, subject to seeing the final Order, to act as the enforcement officer for the mandatory testing regime, at least on an interim basis.
100. Any enforcement of the Required Testing Order undertaken by WorkSafe inspectors would only be within the bounds of WorkSafe's existing enforcement approach to the COVID-19 regime, which includes education and graduated enforcement beginning with verbal or written directives. WorkSafe is not in a position to proactively monitor compliance with the Order. It would respond to complaints about non-compliance as they are notified, and are more likely to respond to systemic or sustained breaches of PCBUs subject to the Order, rather than breaches by individual workers.
101. If enforcement action is required in response to breaches by individual workers, this would be more appropriately undertaken by Medical Officers of Health. They are authorised as enforcement officers under the COVID-19 Act as well as having complementary powers under the Health Act. This may be an appropriate option if there is a need to respond to repeated breaches by individual workers.
102. WorkSafe advises that including the proposed new duties on workers and PCBUs in the Order is an appropriate way to support compliance with the Order, as it provides clear separation between a PCBU's public health obligations and its existing occupational health and safety obligations under the Health and Safety at Work Act 2015 (HSWA).

103. WorkSafe has prepared draft guidance for PCBUs that sets out how the proposed obligations in the Order sit alongside existing obligations under HSWA, as well as a set of enforcement scenarios about how the proposed suite of duties in the Order would be enforced in practice. This was included in HR20201750.

There are plans to review the overall mandatory testing regime as well as WorkSafe's COVID-19 Response Act enforcement roles

104. WorkSafe has advised that it is not in a position to enforce the mandatory testing regime on an ongoing basis, as the regime exists for public health purposes that are outside WorkSafe's core role. WorkSafe's expectation is that there will be a commitment to building appropriate enforcement capability elsewhere if the mandatory testing regime continues in the long-term.
105. In May 2020 the Minister for Workplace Relations and Safety issued a direction to WorkSafe to undertake an additional function to monitor and enforce compliance with the COVID-19 Public Health Response Act 2020 in respect of work and workplaces for which WorkSafe is the regulator. The direction permitted WorkSafe to use its existing funding (collected through the Health and Safety at Work levy) to undertake enforcement activities under the COVID-19 Response Act.
106. The Minister for Workplace Relations and Safety has agreed with the Chair of WorkSafe to review this function in February 2021. The review will cover the effect of the function on WorkSafe's resources and its ability to continue to deliver both this function and its other work health and safety priorities. It will also consider the appropriateness of continuing to use the health and safety at work levy to perform a public health function under the COVID-19 Public Health Response Act.
107. This review provides an opportunity to assess the level of non-compliance and the sufficiency of resources available to respond. At this point, assessments can be made about whether to continue with the approach to enforcement described in this paper, or whether to consider a more extensive response.

Minor drafting changes

Clarifying that workers are compliant with their obligations if they get tested at a general practice

108. Schedule 2 to the Order currently lists community testing centres and testing centres at quarantine facilities as the permissible locations for workers to get tested. 'Other healthcare facilities' have been added to the Schedule.
109. This change is intended to enable workers who get tested at their general practice to be considered compliant with the testing requirements. Feedback from the aviation sector indicated that some workers such as aircraft pilots are based in one location for work, and live elsewhere, so it may be more convenient for them to have the option of getting tested at their general practice.

Removing 'without reasonable excuse' from the infringement offence clause

110. The current version of the Order makes a breach of the testing requirements "without reasonable excuse" an infringement offence. This was drafted into the Order at the time

because it was anticipated that the pace of implementation had not allowed for consideration of where some flexibility may be required.

111. Infringement offences are for a subset of criminal offences that do not result in criminal convictions. They are strict liability – that is they do not require proof of any mental state. Instead, a person may defend a prosecution for an infringement offence by establishing a “total absence of fault”.

112. s 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

113. To the extent that some flexibility is required, enforcement officers have a discretion as to whether or not to issue an infringement notice for breaches of the order. Where a person has a reasonable excuse, the enforcement officer may consider it not to be in the public interest to issue a notice, or may decide not to issue a notice on the basis that the person has a potential “total absence of fault” defence. Further, as part of a graduated enforcement response, an enforcement officer may decide to issue a direction under s21 of the Act, requiring a person to take action to comply with the order, rather than issue an infringement notice.

114. The draft Order has been amended to remove the ‘reasonable excuse’ element to requirements in the Order for which breach is an infringement offence.

s 9(2)(h) [REDACTED]

[REDACTED] s 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Equity

118. Previous pandemic responses have preferentially benefited non-Māori, and failed to protect whānau, hapū, iwi and Māori communities from the worst outcomes. The Crown's obligations under Te Tiriti requires applying the principles of Tino rangatiratanga, Equity, Active protection, Options and Partnership to all aspects of the COVID-19 response. Surveillance is a key tool to monitor how effectively these principles have been applied to the response to avoid inequitable outcomes.
119. While surveillance, including testing of border workers, is an important part of protecting whānau, hapū, iwi and Māori communities from experiencing inequitable health outcomes as a result of COVID-19, we also need to understand how mandatory testing is affecting different population groups, including Māori and Pacific people.
120. We are exploring ways to collect sufficient data to inform our understanding of how different populations are affected by mandatory testing.

Costs and impact on the health system

121. Increasing testing frequency and coverage also carries an opportunity cost. The use of staff time and other health resources for testing involves a trade-off with other important services such as planned care. This needs to be carefully balanced against any benefits of increased routine testing of border workers when considering changing the frequency of this testing.
122. In the event of a resurgence, particularly if it leads to a wider community outbreak, health system resources would need to be rapidly redirected towards the response. Periods without community transmission give us an opportunity to catch up on services that have been delayed due to the COVID-19 response.
123. The economic impact of the Order has not yet been quantified as it has not been in place for a long enough period for data to be identified and collected. Officials will continue to explore opportunities to gather data that will quantify the economic impact of the Order.
124. A report-back to Cabinet is being prepared on the ongoing costs of the health system response to COVID-19 post 31 December 2020 (CAB-20-MIN-460 refers). Any increase in the frequency of border worker testing that you agree to in this report will be covered by this funding request. The previous funding agreed on 5 October 2020 allowed for maintaining testing capacity at 10,000 COVID-19 tests a day. The changes to the mandatory testing regime proposed in this report are unlikely to result in a significant change to the overall daily testing numbers planned for.

Next steps

125. If the Phase 3 Order is signed on Wednesday 11 November, it can come into force from Monday 16 November. This would give the sector five days of lead-in time to implement the new requirements.
126. We strongly recommend communicating with those stakeholders who are most impacted by the changes, such as the Maritime Pilots Association, as soon as possible following final decisions on the Phase 3 Order.

127. The Cross-agency Governance Group for Border Testing is considering setting up a sector reference group to co-ordinate feedback on future proposals for changes to the mandatory testing regime. We will keep your office updated on this work.

ENDS.

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Appendix 1: Key sector stakeholders consulted by agencies on draft proposals for inclusion in the next amendment to the Order

Agency	Organisations contacted by agency in early October	Organisations contacted by agency in late October
Ministry of Justice	Internal consultation only.	
Ministry of Business, Innovation and Employment	<p>Hotel Providers</p> <p>Government agencies and other PCBU's operating in MIQF:</p> <ul style="list-style-type: none"> ○ NZ Police ○ Aviation Security Service (AvSec) ○ NZDF ○ Security firms ○ Transport operators <p>Unions:</p> <ul style="list-style-type: none"> ○ Council of Trade Unions (CTU) ○ New Zealand Nurses Organisation (NZNO) ○ E tū ○ Unite ○ First Union ○ National Union of Public Employees (NUPE) 	Internal consultation only.
Ministry of Primary Industries	<ul style="list-style-type: none"> • Quarantine officers • Fisheries officers • Compliance staff 	Internal consultation only.
Ministry of Transport	<ul style="list-style-type: none"> • Aviation sector: <ul style="list-style-type: none"> ○ Airlines (specifically, Air NZ, the Qantas Group NZ and the Board of Airline Representatives NZ) ○ Airports as PCBU's (specifically, Auckland, Wellington and Christchurch Airports) • Maritime sector (note engagement with this sector was managed by Maritime NZ) 	<ul style="list-style-type: none"> • New Zealand Aviation Coalition (NZAC) • Airlines: Air NZ, Jetstar • Avsec/CAA, • Christchurch and Auckland Airports • New Zealand Airports Association
Maritime New Zealand	<ul style="list-style-type: none"> • Stevedoring companies • Other PCBU's on the port • Port companies • Unions and their workers • Shipping agents 	<ul style="list-style-type: none"> • C3 • ISO • LPC • Southport • Port Marlborough • Port Taranaki • Port Tauranga

		<ul style="list-style-type: none"> • Shipping NZ • SSA • MUNZ • RMTU • Quadrant • Napier Port • Northport • Primeport • Eastland Port • Port Nelson • Centre Port • ISL • POAL • Wallace • Wilhelmsen • MNZ
Aviation Security Service	<ul style="list-style-type: none"> • Workforce planning • Frontline management • Frontline staff working at international airports • Frontline staff working in Managed Isolation Facilities (MIFs) • Frontline staff working in Managed Quarantine Facilities (MIQ) • Unions • Health and safety 	<ul style="list-style-type: none"> • Station Management
Customs	Internal consultation only.	Internal consultation only.
Nga Tai Ora – Public Health Northland		Internal consultation only.
Southern DHB		Internal consultation only.
Northland DHBs		Internal consultation only.
CCDHB		<ul style="list-style-type: none"> • CentrePort Management • CCDHB staff who swab Port staff
Taranaki DHB		<ul style="list-style-type: none"> • Taranaki Public Health Unit • Taranaki DHB Community Testing Team
Bay of Plenty DHB		<ul style="list-style-type: none"> • Ngati Ranginui (providing the testing under contract). • DHB • PHOs • Toi Te Ora

		<ul style="list-style-type: none"> • Port and associated companies
Nelson Marlborough Health		<ul style="list-style-type: none"> • Port Nelson • Port Marlborough • Nelson Bays Primary Health • Marlborough Primary Health Organisation • Nelson Marlborough Public Health Service – Medical Officers of Health, Health Protection Officers • Nelson Marlborough DHB • Customs • Southern Community Labs
CDHB Operational testing team		<ul style="list-style-type: none"> • C&PH • CHL • Operational testing team • MIQ

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Appendix 2: Draft COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020

The final order is publicly available at:
[https://www.health.govt.nz/node/16091/
revisions/82315/view](https://www.health.govt.nz/node/16091/revisions/82315/view)

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