

# Briefing

## Review of the COVID-19 Public Health Response (Required Testing) Order 2020

<b>Date due to MO:</b>	7 December 2020	<b>Action required by:</b>	11 December 2020
<b>Security level:</b>	IN CONFIDENCE	<b>Health Report number:</b>	20202039
<b>To:</b>	Hon Chris Hipkins, Minister for COVID-19 Response		

### Contact for telephone discussion

Name	Position	Telephone
Maree Roberts	Deputy Director-General, System Strategy and Policy	s 9(2)(a)
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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 Withdrawn |  |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:

# Review of the COVID-19 Public Health Response (Required Testing) Order 2020

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**Security level:** IN CONFIDENCE      **Date:** 3 December 2020

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

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## Background

1. The COVID-19 Public Health Response (Required Testing) Order 2020 (the Order) came into effect on 29 August 2020. The purpose of the Order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring routine testing and medical examination of specified border workers for COVID-19.
2. On 1 September 2020, the Minister of Health agreed that the Order should be reviewed regularly, with an interim review by the end of October 2020 and a full review by December 2020.
3. Phase three changes to the Order took effect at 11:59 pm on 25 November 2020. The phase three amendment:
  - a. introduced duties on Persons Conducting a Business or Undertaking (PCBUs) to keep records of worker compliance with the Order and notify workers of applicable testing requirements
  - b. prohibit PCBUs from preventing or prohibiting the workers they employ or engage from undergoing testing during working hours, when testing is available during working hours.
4. Work on the Border Worker Testing Register, an online platform to help PCBUs keep records of compliance and notify affected workers of applicable testing requirements has also progressed since the interim review concluded. A graduated roll out of the Register is underway.

## The interim review is complete

5. We worked with internal and external stakeholders to develop and answer a framework of questions designed to help us assess the effectiveness of the Order, including impacts and suitability of testing requirements and the Bill of Rights Act 1990 implications.
6. Based on the evidence and information available at the time, the review showed that the Order is working well overall. The main concerns raised by agencies were negative physical and mental health impacts on workers, an increased administrative burden and decreased productivity.
7. During the review period, about 34,000 mandatory tests were performed with two positive tests returned. Since 31 October, there have been two more clusters of border workers testing positive for COVID-19 but these cases were detected because the



individuals chose to get tested after developing symptoms. The limited data available suggests that both routine testing and other protective measures (personal protective equipment, vigilance, contact tracing, strong guidance and messaging about getting tested and isolating when symptomatic) are useful in preventing and limiting the risk of a COVID-19 outbreak.

8. Phase three changes to the Order, the ongoing roll out of a border worker testing register and the introduction of a slightly less invasive nasal swab method are expected to address some of the concerns raised by agencies.
9. The review found there has been no material change to the public health risk and we do not recommend making further changes to the Order beyond the phase three changes at this time. The interim review was signed by the Director-General of Health on 30 October 2020 and is attached as Appendix One for your information.

### **We are preparing for a full review**

10. We are now preparing for a full review of the Order. We intend to use the same framework as the interim review with some changes to:
  - a. reflect what we learned from the interim review
  - b. incorporate questions to test the impacts of the Phase three changes to the Order.
11. The review framework for the full review is attached as Appendix Two for your information.
12. To inform the full review we will draw on internal (including public health) and external information sources. In addition to the border agencies we consulted with for the interim review, we propose to survey a sample of key private PCBUs and a random sample of employees (affected workers) of both private and public PCBUs. We also intend to have face to face conversations with stakeholder groups such as unions, as appropriate.
13. The challenges faced by private PCBUs may be different to border agencies and it is very important that both private PCBUs and affected workers can voice how they have been impacted by the Order.

### **Timing**

14. We recommend delaying the full review to 28 February 2021, with at least a two-week stakeholder engagement period commencing in mid-January 2021, because:
  - a. we could better test the impacts of the phase three changes. At the time of undertaking a survey, four testing cycles will be complete following the implementation of the changes
  - b. the sector is currently being consulted on several COVID-related issues and surveying before Christmas risks a low response rate due to consultation fatigue
  - c. the pre-Christmas period is a very busy time for ports and their critical infrastructure is already strained.

### **Equity**

15. We are aware that Māori and Pacific people may be overrepresented in the border worker groups required to be tested regularly under the Order. A robust border worker



testing strategy is our best defence against border workers getting COVID-19. Reviewing the Order regularly can help us reduce the risk of Māori and Pacific border workers getting COVID-19 and protect our Māori and Pacific communities as a result. Regular reviews will also ensure we are testing the minimum number of people the minimum number of times necessary while maintaining a safe border.

16. We were unable to gauge the impacts on Māori as part of the interim review due to limitations in how information was collected. We have adapted our approach to ensure we are better able to assess the impacts of the Order on Māori and Pacific people.

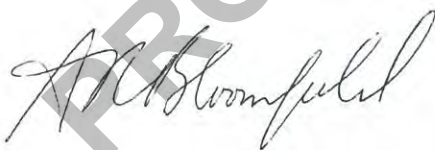
## Next steps

17. We will continue to work with agencies to clarify what the Order requires of them, understand their challenges, and address them while balancing public health needs.
18. We will share the findings of the interim review with the internal and external stakeholders who helped inform it and work with them to inform the full review.
19. If you agree, we will provide you with the findings of the full review by 28 February 2021.

## Recommendations

We recommend you:

- a) **note** the Minister of Health agreed that an interim review of the COVID-19 Public Health Response (Required Testing) Order 2020 should be completed by 31 October 2020 and a full review should be completed by December 2020
- b) **note** the interim review, attached as Appendix One, is complete
- c) **note** the interim review shows that overall, the Order is working well
- d) **note** the Ministry of Health is preparing for the full review
- e) **note** we intend to survey key public and private stakeholders and affected workers and have conversations with other stakeholder groups such as Unions to inform the full review
- f) **agree** to delay the full review to 28 February 2021 to allow the impacts of phase three changes to the Order to be tested more fully **Yes/No**



Dr Ashley Bloomfield  
**Director-General of Health**  
Date: 5/12/2020

Hon Chris Hipkins  
**Minister for COVID-19 Response**  
Date:

## Appendix One: Interim review

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## Interim review of the mandatory routine COVID-19 testing approach

30 October 2020

Prepared by System Strategy and Policy, Ministry of Health

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## Purpose

On 1 September 2020 the Minister of Health agreed that the routine mandatory COVID-19 testing approach should be reviewed regularly, with an interim review by the end of October 2020 and a full review by December 2020. This is a Ministry of Health document that will be used to inform our advice to government on mandatory testing.

## The COVID-19 Public Health Response (Required Testing) Order 2020

The COVID-19 Public Health Response (Required Testing) Order 2020 (the Order) came into force at 11.59 pm on 29 August 2020 and required one off testing of higher risk border workers. The Order was amended on 6 September 2020 to introduce routine testing of affected workers and again on 16 September 2020 to include workers outside Ports of Auckland and Tauranga, and Auckland International airport. Its purpose is to prevent, and limit the risk of, an outbreak by requiring mandatory testing for those who work in settings and/or occupational groups that are likely to place them at higher risk of exposure.

## Review of the Surveillance Strategy and Testing Plan

In parallel with a review of the Order, the Aotearoa New Zealand's COVID-19 Surveillance Strategy (the Strategy) and Testing Plan were also reviewed. The Strategy describes New Zealand's approach to surveillance for COVID-19 and the virus (SARS-CoV-2) that causes COVID-19. It aims to monitor, evaluate and inform the equitable delivery of New Zealand's COVID-19 Elimination Strategy. The Surveillance Strategy has five objectives:

1. identify cases for public health management
2. evaluate the effectiveness of the public health response
3. generate knowledge about disease risks and patterns
4. monitor to ensure equity
5. engender public and stakeholder confidence and participation in the response.

A robust testing plan that detects cases early (in all scenarios such as border arrivals, border workers and in the community) forms a key pillar of surveillance. An important component of the Testing Plan, the Order focuses on the early identification of cases in border workers. The review of the Strategy and the Plan found that nothing has materially changed since the existing documents were published that would require a fundamental change to the existing surveillance and testing approaches. New Zealand's goal remains to eliminate COVID-19 in New Zealand.

## The review process

We worked with internal (including public health officials) and external<sup>1</sup> stakeholders, to develop and answer a framework of questions to help us understand the impacts and suitability of the Order, the Bill of Rights Act 1990 (BORA) implications and how to improve on the process used to develop the Order and amendments.

## Findings

Evidence and information were limited because the Order had only been in place for a few months, but **overall, the information we gathered showed that the Order is working well.** Stakeholder

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<sup>1</sup> Ministry for Business, Innovation and Employment, Ministry of Justice, NZ Customs Service, Ministry of Transport, Ministry for Primary Industries, Maritime New Zealand, New Zealand Aviation Security Service, WorkSafe New Zealand, New Zealand Police, The Treasury New Zealand and Crown Law



feedback is summarised below with a summary of the types of questions asked provided in Appendix One.

## Impacts of the Order

### Cost

Between when the Order took effect and 23 October, about 34,700 mandatory tests were performed on border workers at a cost of about \$7 million with two positive tests returned. At the current rate of testing, the Order is estimated to cost about \$54 million<sup>2</sup> per annum plus additional costs to Persons Conducting a Business or Undertaking (PCBUs) through any increased administrative burden and decreased productivity.

Further work is needed to calculate the estimated cost of a regional outbreak and lockdown that may have been avoided due to the testing regime in place.

### Cases detected

The low rate of positive tests detected as part of the routine mandatory testing approach could be because border workers are not being exposed to COVID-19 or because other protective measures are working. Between the Order coming into effect and 31 October there were two events which led to four border workers getting COVID-19; indicating at least some exposure is occurring. A list of positive tests in border workers and their circumstances is included in Appendix Two.

One health border worker and one border worker at the port tested positive during routine testing. The remaining two cases were tested because they were contacts of the original port border worker and they developed symptoms. Although the data is very limited, this demonstrates that both routine testing and other protective measures (vigilance, contact tracing, strong guidance and messaging about isolating and getting tested when symptomatic) are working. It is important that the message that any symptomatic border worker should immediately seek testing remains a core part of public health messaging.

### Assurance

Border agencies have informed us of a range of effects on their workers, from those who find it gives them peace of mind and confidence that they are being protected, to those who have experienced negative impacts on their physical and mental health. We consider that PCBUs will create safe and healthy workplaces as part of their Health and Safety at Work Act 2015 obligations.

### Access to testing

PCBUs have experienced difficulties in helping workers access tests at medical centres and general practices when they cannot access on-site testing. Difficulty in understanding the requirements for casual or ad-hoc workers has also been reported. PCBUs have also experienced varying degrees of administrative burden and decreased productivity posed by the requirements.

The Ministry is working on a Border Worker Testing Register which will help PCBUs and affected workers meet their obligations under the Order.

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<sup>2</sup> 25,939 tests were undertaken in the 5 weeks between 19 September, when the last group of workers was included, and 23 October. 25,939 tests / 5 weeks x 52 weeks x \$200 = \$53,953,120



## Compliance and enforcement

Compliance with the Order is understood to be high and we expect to have fuller data on compliance by the time of the full review. The speed at which the Order was created meant that information sharing arrangements were not in place prior to it coming into force. Agencies are confident that their workers understand their obligations and how to meet them and are doing so. The Ministry has also been developing a strategy for compliance, assurance and enforcement for workers and employees so that these processes are clear for all concerned.

Ongoing cross-agency legal work is exploring the consistency of offences across COVID-19 Orders and how infringement notices are used. This is because a number of orders have references to “practicable steps”, “to the extent reasonably practicable”, “without reasonable excuse” – all of which are unusual within the context of infringement regimes. An enforcement officer cannot decide on the spot if an infringement offence has been committed, a key requirement of infringement offences. Further, infringement regimes are usually justified where people have a reasonable expectation going into a particular industry they’ll be regulated, which is not true in the case of routine border worker testing.

The Phase three changes to the Order remove the “without reasonable excuse” defence.

### Suitability of the Order

We assessed whether the public health evidence continues to support surveillance testing of border workers, and if the current arrangements (tests used, people tested, and frequency of testing) remain appropriate.

There are no new less invasive tests that are equally as effective as the current nasopharyngeal swab. The Ministry of Health is working with testing providers to roll out an alternative swab option that is considered less invasive but slightly less effective than the nasopharyngeal swab. The high frequency at which border workers are undergoing testing offsets the reduced effectiveness.

The sector identified several groups of workers who should also be included in the Order based on the risk profile of their roles.

These groups were included as part of the phase three amendments to the Order.

There has been no material change to the public health risk posed by COVID-19, and we do not have enough data (as the testing regime has only been in place for two months) to consider a change to the approach. Our view is that there is no need to change mandatory testing settings beyond those changes outlined above at this time, but we will reconsider this in December 2020 when there is more data and evidence available for the final review.

### Bill of Rights Act 1990

The power to make an order in section 11 of the COVID-19 Public Health Response Act must be exercised consistently with BORA. To ensure BORA compliance it is important that specific testing requirements serve a public health purpose that is sufficiently important and pressing to justify intrusion upon people’s bodily integrity and privacy, two principles protected by BORA. Public health officials were consulted as part of the review and their advice supports the current testing regime remaining in place.



Mandatory testing requirements will be reviewed on an ongoing basis to ensure continued BORA compliance, and we will work on this with the Ministry of Justice.

#### The process of making the Order

The Order was created in a short timeframe, in response to a resurgence, and rolled out in phases. While unavoidable, agencies felt the process was too quick, and that more time for consultation would have meant they could identify operational impacts in the draft orders and mitigated these before they occurred.

In the preparation of phase three of the Order the Ministry was able to engage more fully with agencies, so they could undertake targeted engagement in their sectors, and we have had great feedback on this.

#### Next steps

Phase three of the Order is likely to address some of the concerns raised by agencies during this review process. We will continue to work with agencies to clarify requirements, understand their challenges and address them while balancing public health needs. We will also continue to monitor and review the settings of the Order in response to any developments that occur or information as it becomes available.

In line with the findings of the review of the Strategy and the Plan, we found no material change to the public health risk that would justify amending the Order further at this stage.

#### December review

We will review the Order in full by 31 December 2020. The December review will build on the framework used in the interim review. We intend to include additional data sources (eg, affected workers, public health services, private PCBU's) and opportunities for sector input to build on the learnings from, and findings of, the interim review. We will further investigate ways to understand the impacts of the Order on Māori and Pacific people. The review will look at the effects of any changes made to the Order since 31 October (eg, the phase three changes) based on the information and evidence that will be available at that time.



## Appendix One: Summary of questions

The review focussed on four categories of questions; impacts of the Order, suitability of the Order, BORA implications and the process of making the Order and amendments.

### Impacts of the Order

To understand the impacts of the Order at a population level we looked at the cost to the public of carrying out the tests in relation to the number of positive tests (and therefore possible outbreaks averted) returned.

To understand the impacts on workers we asked:

- How has the Order impacted affected workers?
- What difficulties have workers experienced trying to get tested and prove their compliance?
- How have casual/ad hoc workers been impacted?
- What percentage of affected persons are Māori or Pasifika?
- How has the Order changed the way people are doing their work, and what are the consequences of this?

To understand the impacts on PCBUs we asked:

- How has the Order impacted PCBUs who employ affected workers?
- What has gone well?
- What are the tangible costs and unseen impacts to the PCBUs in meeting the requirements of the Order and supporting their affected workers to comply?
- What percentage of affected persons were being tested regularly before the Order took effect?
- What difficulties have PCBUs faced?
- How has the Order affected the ability of organisations to fulfil their core roles?

To understand how the compliance and enforcement provisions are working we asked:

- What have been the difficulties in, and consequences of, enforcing the Order?
- How many individuals have been granted a testing exemption?
- Are the infringements justified and are they implementable?
- How are we ensuring we meet privacy considerations while sharing the information needed to ensure effectiveness and compliance?

To understand the challenges faced when communicating about the Order we asked:

- How confident are we that workers are disclosing that they are working in a higher-risk environment (eg, came into contact with crew on a foreign vessel in the course of doing maintenance work, gloves and masks compromised or forgotten etc)?
- How confident are we that affected workers understand their obligations and how to meet them? Do they know how to find out? Do they understand when testing is required and why?
- How are PCBUs impacted by the need to relay key information and updates to workers?

### Suitability of the Order

For the Order to be suitable, we need to be confident that we are performing the right tests at the right time on the right people, and there is a reasonable expectation that these actions will mitigate the risk of outbreak.

To understand if the requirements of the Order are suitable we asked:

- Are the testing requirements fit for purpose?
- Are there other border workers who are currently captured by the Order who should be excluded from the order and why?
- Are there other border workers who should be included?

### Bill of Rights Act 1990 implications

When the Order was made, it was considered that the routine mandatory COVID-19 testing approach for the specific settings and specific occupational groups covered by this Order justified intrusion upon bodily integrity and privacy. To understand if these limitations remain justified we asked:

- Does the evidence around exposure risk suggest that the roles being tested are still appropriate? Are these groupings sufficiently granular to ensure testing is proportionate?
- Does the evidence still suggest that the frequency of testing in the Order for the groups is reasonable and proportionate?

### The process of making the Order

To understand the impacts of the short timeframes involved in making the Order and amendments has impacted on PCBU's and how we could improve it for the future we asked PCBU's how they found the process.



## Appendix Two: Positive tests in border workers and their circumstances

Number of COVID-19 positive cases per event relating to a border worker	Date of public notification	COVID-19 positive individual	Method of identification
1	13 September 2020	1 health border worker	Routine border worker testing
4	18 October 2020	1 border worker at the port	Routine border worker testing
	21 October 2020	2 work contacts (1 casual and 1 close)	Tested after developing symptoms
	23 October 2020	1 household contact	Tested after developing symptoms

## Appendix Two: Final review framework

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# Framework for the Full Review of Mandatory Routine Testing Approach

## Purpose

This framework outlines the intent of, and criteria for, the full review of mandatory routine testing of border workers.

## Background

### **The COVID-19 Public Health Response Act 2020 (the COVID-19 Act)**

The COVID-19 Act came into force on 13 May 2020 to support a public health response to COVID-19. The Act allows orders to be made that require a class or classes of people to either refrain from taking specific actions that may contribute to the risk of the outbreak or spread of COVID-19 or take specific actions that may contribute to the prevention of the risk of the outbreak or spread of COVID-19.

### **The COVID-19 Public Health Response (Required Testing) Order 2020**

- The Required Testing Order is made under s 11 of the COVID-19 Act. The order came into force at 11.59 pm on 29 August 2020.
- The purpose of Required Testing order is to prevent, and limit the risk of, the outbreak of COVID-19 by requiring the mandatory testing for COVID-19 for those who work in settings and/or in occupational groups that are likely to place them at higher risk of exposure to COVID-19.
- In addition to protecting the health of workers, surveillance and reducing the chance of undetected COVID-19 cases, the public health rationale for routine testing of border workers is to assess the effectiveness of other protective measures already in place for border workers.
- The order initially required a one-off test for any person who, since 11.59 pm on 29 August 2020, had carried out work while employed as a member of the specified occupational groups while in a setting covered by the order. Since then, routine testing has been implemented for high risk border workers

### **Routine Mandatory Testing approach**

Routine testing of border workers is a part of the COVID-19 Surveillance Plan and Testing Strategy. The goal of the COVID-19 Surveillance Plan and Testing Strategy is to keep COVID-19 out of the community by finding any new cases arriving at our borders or infections occurring at the border and stamping the disease out as quickly as possible before it has a chance to spread.

The Ministry has developed the mandatory testing plan for occupational groups working at the border with input from other agencies.

The routine testing plan is based on a public health risk assessment framework to determine the testing frequency for different occupational groups and settings.

On 1 September 2020, the Minister of Health agreed to the plan for rolling out mandatory routine testing of border workers in three phases (HR 20201513 refers). This is to allow for implementation arrangements to be put in place and to avoid 'spikes' of large volumes of testing at once.



## Review of the Routine Mandatory Testing Approach

On 1 September 2020, the Minister of Health agreed that the routine mandatory testing approach should be regularly reviewed, with an interim review by the end of October 2020 and a full review by December 2020. The Ministry is responsible for conducting the interim and final reviews of the Ministry's approach to the mandatory routine testing of the border workers.

The purpose of the reviews is to assess whether the mandatory testing plan is working well to achieve the outcome of preventing the risk of outbreak or spread of COVID-19. This will include ensuring that the risk settings for occupational groups and settings reflect current public health guidance and reviewing whether limitations on rights under the Bill of Rights Act 1990 continue to be justified. It will also determine whether the risk assessments of occupational groups and frequencies of testing remain appropriate, and the impact the routine testing has had on testing capacity and operations and affected sectors and stakeholders.

### Evidence and Research needs for conducting the Interim Review

The reviews will draw on data from the COVID-19 border testing dashboard, which will be supplemented by data to be provided on request by the COVID-19 testing team and the COVID-19 Science and Technical Advisory Team.

The review will also draw upon:

- Costing data provided by the agencies
- The mini-RIA prepared by System Strategy & Policy Economics team
- Insights provided by border agencies/border sector about the on the ground implementation of the Order
- Public health advice

### Context:

The order was made while Auckland was in level 3 and the rest of New Zealand was in level 2 due to a community outbreak in the Auckland area. The source of the outbreak has never been confirmed but is widely accepted to have come across the border. Auckland has been in level 1 since 7 October and the rest of New Zealand has been in level 1 since 21 September 2020.

Since the order was made, international infection rates and deaths have continued to climb, with sharp increases seen in France, Spain, the UK, the Russian Federation, Argentina, Greece, Germany, the US and Ireland. According to the US Centre for Diseases Control, very few countries have a risk profile similar to or lower than New Zealand<sup>1</sup>.

An effective vaccine is expected to be available in New Zealand in early 2021 at the soonest but it will take time for supply to meet demand and then for a sufficient number of individuals to receive the vaccine.

### Criteria:

Given the invasive and stressful nature of the current testing requirements on affected persons we need to aim to perform the minimum amount of testing necessary to prevent and/or mitigate the impacts of a COVID outbreak.

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<sup>1</sup> <https://www.cdc.gov/coronavirus/2019-ncov/travelers/map-and-travel-notice.html#travel-3>



To determine the effectiveness of the Order in achieving its purpose, three criteria have been selected.

1. The impacts of the testing requirements.
2. The suitability of the testing requirements.
3. The Bill of Rights Act 1990 implications.

#### **Impacts: do the benefits outweigh the costs?**

Section 4(c) of the Act requires the impacts of the order to be proportionate to the risks.

##### *Implementation*

To investigate the impacts of the Order on affected workers we will look at:

- affected workers understanding of their obligations and how to meet them
- the physical, psychological and logistical impacts of regular testing
- the impacts on Māori and Pacific people
- PPE use
- the effectiveness of public health messaging
- how it's changed the way they do their work
- how workers respond when they are sick.

To investigate the impacts of the Order on PCBU's who employ affected workers we will look at:

- the costs and logistics
- the introduction of the phase three changes to the Order and the Border Worker Testing Register
- how it's affected the organisation's ability to fulfil their core role

To understand the implementation impacts of the Order more broadly we will look at:

- how the testing exemption and infringement regime are being used
- our testing capacity
- privacy considerations

##### *Costs and benefits*

To understand the potential benefits the Order has delivered to New Zealand in relation to the costs we will look at:

- the number of individuals, planes and vessels that have entered New Zealand since the Order took effect
- the number of border worker tests performed in comparison to the number of positive results returned
- the total cost of border worker tests performed to date and the estimated continued cost
- the estimated cost of the previous outbreaks and future outbreaks
- the number and value of lives that might be saved for every outbreak avoided.

#### **Suitability: are the testing requirements fit for purpose?**

In determining whether the public health evidence continues to support surveillance testing of border workers, fit for purpose means the right tests are being performed at the right time on the right people, and there is a reasonable expectation that these actions will mitigate the risk of outbreak.

##### *Right tests*

Currently, the minimum testing requirements established by the order are a nasal or throat swab or both. Testing personnel generally decide which they will perform, or they may perform both.



We will look at testing developments to see if, from a public health perspective, we could implement less invasive tests in addition to or in combination with the current test.

#### *Right time*

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 international aircrew
- weekly for higher-risk groups and fortnightly for lower-risk groups in managed isolation and quarantine facilities
- weekly for higher-risk and fortnightly for lower-risk groups in airports and maritime ports receiving international passengers or vessels.

Current testing advice is that affected persons should also be tested if they have COVID-19 symptoms.

We will investigate:

- if any changes to the testing frequency or approach for each group might be justified
- the effectiveness of protective measures other than testing

#### *Right people*

We currently test only those individuals at the border who are likely to come into contact with infected surfaces, goods or individuals for a sustained period of time or those who come into contact with those individuals. Remaining individuals (ie, those in other areas of the port) use PPE and good hygiene practice.

We will look at whether there are other border workers who should be included or excluded from the Order, based on the risk profile of their roles.

#### **Bill of Rights Act 1990 implications**

Section 21 of BORA provides that every person has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise. Testing of the nature required by the order (nasal and/or throat swab) is likely to constitute a search under section 21 of BORA.

Section 11 provides the right for every person to refuse to undergo any medical treatment. It is unlikely that s 11 would encompass surveillance testing, however, analysis has nonetheless been conducted in relation to this right when Orders have been made.

In making an Order, the Minister must be satisfied that the Order does not limit or is a justified limit on the rights and freedoms in the NZ BORA.

The factors that may influence whether BORA limitations remain justified are:

- data collection over several months to indicate the effectiveness of other protective measure and the actual level of risk faced by groups of border workers
- scientific and technological advancements (eg, less invasive but similarly effective test methods, availability of a vaccine)
- a sustained reduction in alert levels

We will investigate if:

- we are still testing the right groups of people, based on exposure risk,
- the groups of people are tight enough to ensure that testing is proportionate for everyone
- the frequency of testing for the groups is reasonable and proportionate



- there changes that could make the testing requirements more proportionate
- the order aligns with section 25(c) (the right to be presumed innocent until proved guilty according to law) of BORA.

**Decision required after the final review is received:**

- 1) Maintain the status quo (the Order should be reviewed if new, less invasive test methods that are suitably effective emerge or a vaccine becomes available), or
- 2) Change some of the requirements in line with arguments above. We would need to have a strategy for increasing/tightening the testing strategy in response to high risk events eg, a community case that is not in managed isolation or quarantine; or
- 3) Revoke the order

**If it's too soon to reduce or change testing requirements, the things that would likely need to change in the future in order for us to do so are:**

- an effective vaccine administered to ~95% of the population
- a less invasive test becoming available
- increased use of PPE by affected workers and possibly communities
- other countries reducing their risk profile to one similar to New Zealand (no community transmission)
- no (or less than 0.001%) cases being detected through routine border testing.