

Briefing

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

Date due to MO: 23 April 2021 **Action required by:** 23 April 2021

Security level: IN CONFIDENCE **Health Report number:** 20210934

To: 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)
Steve Waldegrave	Group Manager COVID-19 Policy Response	s 9(2)(a)

Minister's office to complete:

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 Withdrawn | |

Comment:

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

Security level: IN CONFIDENCE **Date:** 23 April 2021

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

Purpose of report

1. This report recommends that you consult with the Prime Minister and Ministers of Justice, Health, Workplace Relations and Safety, and any other Ministers you think necessary, on the attached draft COVID-19 Public Health Response (Vaccination) Order 2021.
2. The draft Order requires high-risk work in Managed Isolation and Quarantine Facilities (MIQFs), and at affected airports and ports, be performed only by workers who have been vaccinated. It applies to government officials, defined as a person who is employed or engaged by the public service (defined under section 10 of the Public Service Act 2020) and, in the case of MIQFs, extends to people employed or engaged by a crown entity.

Summary

3. On 20 April 2021, you agreed to make the COVID-19 Public Health Response (Vaccination) Order requiring high-risk work in Managed Isolation and Quarantine Facilities (MIQFs) and at affected airports and ports, be performed only by workers who have been vaccinated. The Order applies to government officials, defined as a person who is employed or engaged by the public service (as defined under section 10 of the Public Service Act 2020) and, in the case of MIQFs, extends to people employed or engaged by a crown entity [MBIE paper 2021-3276 refers].
4. The recent draft of the COVID-19 Public Health Response (Vaccination) Order 2021 has been provided direct to your Office by Parliamentary Counsel Office for the purposes of ministerial consultation. It would give effect to these changes from 11:59pm 30 April 2021.
5. The Ministry considers that there is a public health rationale for requiring that specified high-risk roles only be undertaken by vaccinated people, in response to the current pandemic. This is due to the risk that these individuals may be exposed to, and infected by, COVID-19 during their work. Vaccines provide another layer of individual protection and, in doing so, may also be effective in preventing transmission in the community.
6. These measures engage rights protected by the New Zealand Bill of Rights Act (NZBORA). Limits on NZBORA rights can be justified if the measure serves an important and significant objective and there is a rational and proportionate connection between that objective and the measure. If a court decided the Order, or actions of an employer under the Order, was not justified, then the Order may be successfully challenged in court and found to be ultra vires.

7. Following Ministerial consultation, officials and the Parliamentary Counsel Office will finalise the Order and provide you with a final version by the morning of Wednesday 28 April 2021 for signing on the same day.
8. The Order will also be gazetted on Wednesday 28 April 2021 and will take effect from 11:59pm Friday 30 April 2021.

Recommendations

We recommend you:

- a) **Agree** to consult on the draft COVID-19 Public Health Response (Vaccination) Order 2021 provided direct to your Office by Parliamentary Counsel Office, which gives effect to the policy previously agreed in [MBIE 2021-3276]. **Yes, No**
- b) **Agree** that the Order will allow the Ministry to pre-populate data from the Border Worker Testing Register with the COVID-19 Immunisation Register to proactively identify who should be vaccinated. **Yes, No**
- c) **Note** that the Ministry considers that there is a public health rationale for requiring that specified high-risk roles only be undertaken by vaccinated people, in response to the current pandemic. This is because there is a risk that these individuals may be exposed to, and infected by, COVID-19 during their work. Vaccines provide another layer of individual protection and, in doing so, may also be effective in preventing transmission in the community. **Noted**
- d) **Note** that you must be satisfied that the Order does not limit, or is a justified limit, on the rights and freedoms in the New Zealand Bill of Rights Act 1990, as part of issuing the Order. **Noted**
- e) **Note** that these measures engage rights protected by the New Zealand Bill of Rights Act 1990 (NZBORA). Limits on NZBORA rights can be justified if the measures serve an important and significant objective and there is a rational and proportionate connection between that objective and the measure. If a court decided the Order, or actions of an employer under the Order, was not justified, then the Order may be successfully challenged in court and found to be ultra vires. **Noted**
- f) **Note** that further advice will be provided from the Border Executive Board agencies on the recommended approach to requiring specified high-risk work performed by other workforces operating at the border that can only be done by a vaccinated worker, including any proposed exemptions and other issues for Ministers to consider. **Noted**



Maree Roberts

Deputy Director-General,
System Strategy and Policy

Date: 23/04/21



Hon Chris Hipkins

Minister for COVID-19 Response

Date: 24/4/2021

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

Background

9. On 20 April 2021, you agreed to make the COVID-19 Public Health Response (Vaccination) Order 2021 that requires high-risk work in Managed Isolation and Quarantine Facilities (MIQFs) and at affected airports and ports, be performed only by workers who have been vaccinated. The Order applies to government officials, defined as a person who is employed or engaged by the public service (as defined under section 10 of the Public Service Act 2020) and, in the case of MIQFs, extends to people employed or engaged by a crown entity [MBIE paper 2021-3276 refers].
10. The most recent draft of the COVID-19 Public Health Response (Vaccination) Order 2021 has been provided direct to your Office by Parliamentary Counsel Office for the purposes of ministerial consultation. It would give effect to these changes from 11:59pm 30 April 2021.

Contents of the draft Order

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

Process for making a section 11 Order

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

Public health rationale

17. You have previously been provided with detailed public health rationale for the proposed draft Order [MBIE paper 2021-3276 refers].
18. The Ministry advises that there is a public health rationale for requiring that specified high-risk roles only be undertaken by vaccinated people, in response to the current pandemic. This is because there is a risk that these individuals may be exposed to, and infected by, COVID-19 during their work.
19. Vaccines offer a high degree of protection for individuals who are vaccinated, alongside a range of other public health measures. A worker who has been vaccinated will have a very high likelihood that they will be protected from serious illness or death, and are more likely to be asymptomatic if infected.
20. Evidence of the efficacy of vaccines in preventing person-to-person transmission is still evolving, however, suggests that the vaccine is also likely to be effective in preventing transmission. Real world evidence suggests that people vaccinated for Pfizer-BioNTech COVID-19 vaccine who develop COVID-19 have a four-fold lower viral load than

unvaccinated people. This observation may indicate reduced transmissibility, as viral load and symptomatic infection has been identified as a key driver of transmission.¹

21. Therefore, while vaccination does not prevent all possible episodes of transmission, vaccination has a clinically relevant impact on reducing the risk of transmission. The risk of COVID-19 infection in New Zealand is currently highest amongst those in high-risk roles at the border; ensuring that such workers are vaccinated will therefore substantially protect the wider community.

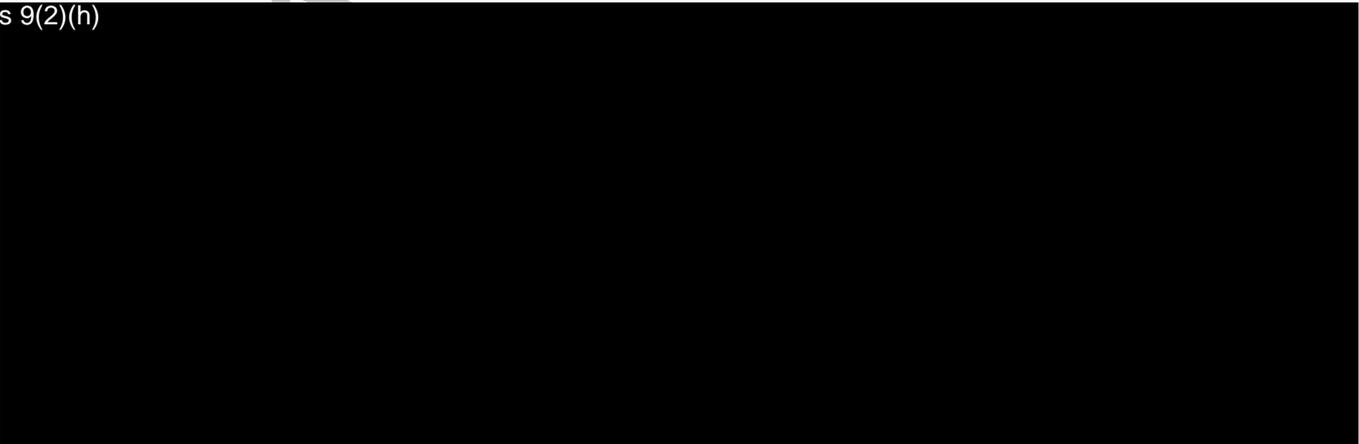
New Zealand Bill of Rights Act 1990

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

Finely balanced issue

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

s 9(2)(h)



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

Equity

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

Implementation

34. The Border Worker Testing Register (BWTR), which will become mandatory on 27 April 2021, is the most comprehensive database of the border and MIQF workforce. The Order will allow the Ministry to pre-populate data from the BWTR with the COVID-19 Immunisation Register to proactively identify who should be vaccinated.
35. The draft Order will also authorise the sharing of vaccination status of workers (subject to the Order) with their PCUBs/employers. This will provide PCUBs/employers with an accurate record of the vaccination status of their workforce, and assist them to manage their obligations, under the draft Order, in a more efficient way.
36. The Ministry of Business, Innovation and Employment will lead work on the development of the operational guidance to support the Order when it comes into effect. This will include updating guidance on [employment.govt.nz](https://www.employment.govt.nz); and working with the Public Service Commission and the Border Executive Board Chief Executives to ensure that appropriate guidance is provided to public sector employers.

37. We will update operational guidance (including the immunisation sequencing framework) to ensure that relevant provision is made for people required to be vaccinated under the Order.

Next steps

38. Further advice will be provided from the Border Executive Board agencies on the recommended approach to requiring specified high-risk work performed by other workforces operating at the border that can only be done by a vaccinated worker, including any proposed exemptions and other issues for Ministers to consider, such as the scope of work and workers impacted at affected airports and affected ports.
39. Following the further advice, an Amendment to the Order could be made to bring additional groups into the Order.
40. As per the Act, you must consult on the proposed Order with the Prime Minister and the Ministers of Justice and Health. You may also wish to consult with the Minister for Workplace Relations and Safety, and any other Minister you consider appropriate. Comments from this consultation must be provided to officials no later than 5pm on Friday 23 April 2021, to allow for incorporation into the draft Order.
41. Following Ministerial consultation, officials and the Parliamentary Counsel Office will finalise the Order and provide you with a final version by the morning of Wednesday 28 April 2021 for signing on the same day.
42. The Order will also be gazetted on Wednesday 28 April 2021 and will take effect from 11:59pm Friday 30 April 2021.

ENDS.

IN CONFIDENCE**COVID-19 Public Health Response (Vaccinations) Order
2021**

This order is made by the Minister for COVID-19 Response under section 11 of the COVID-19 Public Health Response Act 2020 in accordance with section 9 of that Act.

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Order**1 Title**

This order is the COVID-19 Public Health Response (Vaccinations) Order 2021.

2 Commencement

This order comes into force at 11.59 pm on 30 April 2021.

3 Purpose

The purpose of this order is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring work at certain places to be carried out by vaccinated individuals.

4 Interpretation

In this order, unless the context otherwise requires,—

affected aircraft means an aircraft (other than an aircraft undertaking a QFT flight) that arrives from a location outside New Zealand

affected airport, in relation to a place, means an airport at which an affected aircraft arrives from a location outside New Zealand

affected person means a person who belongs to a group (or whose work would cause them to belong to a group) and who—

- (a) carries out work in any capacity (whether paid or unpaid) at a place; or
- (b) otherwise conducts any activity at a place

affected port, in relation to a place, means a port where a ship arrives from a location outside New Zealand

affected ship, in relation to a group, means a ship with any person or persons on board who are required to be isolated or quarantined in accordance with a COVID-19 order

airside, in relation to an affected airport, means any part of the affected airport that is inaccessible to the general public but that is accessible to international arriving or international transiting passengers (for example, a Customs-controlled area)

government official, in relation to an affected airport or affected port, means a person who is employed or engaged by a public service agency listed in section 10(a) of the Public Service Act 2020

group means a group of persons specified in the second column of an item of the table

managed isolation facility, in relation to a place, means a facility that is designated by the New Zealand Government for use as a place of isolation

managed quarantine facility, in relation to a place, means a facility that is designated by the New Zealand Government for use as a place of quarantine

place, in relation to a group, means a place specified in a Part heading in the table that applies to the group

QFT flight has the meaning given by clause 4A of the COVID-19 Public Health Response (Air Border) Order (No 2) 2020

QFT person has the meaning given by clause 4(1) of the COVID-19 Public Health Response (Air Border) Order (No 2) 2020

relevant PCBU, in relation to an affected person or other individual, means the PCBU (within the meaning of section 17 of the Health and Safety at Work Act 2015) who employs or engages the affected person or individual to carry out work for the PCBU

table means the table set out in Schedule 2

vaccinated, in relation to a person, means that the person has received 2 injections of the Pfizer/BioNTech vaccine.

5 Transitional, savings, and related provisions

The transitional, savings, and related provisions (if any) set out in Schedule 1 have effect according to their terms.

6 Application of order

This order applies to the whole of New Zealand.

Duties in relation to vaccinations

7 Duty of persons may not carry work unless vaccinated

A person may not carry out work or otherwise conduct an activity at a place unless they are vaccinated

8 Duty of affected persons in relation to vaccinations

An affected person may not carry out work or otherwise conduct an activity at a place unless they are vaccinated

9 Duties of PCBUs in relation to vaccinations

- (1) A PCBU may not allow an affected person to carry out work or otherwise conduct an activity at a place unless satisfied that the person is vaccinated.
- (2) A relevant PCBU—
 - (a) must notify each affected person and each person who would become an affected person of their duty to be vaccinated; and
 - (b) may not prevent the person from reporting for, and undergoing, vaccination during their working hours, if vaccinations are available during those hours.
- (3) A PCBU may not allow a person to carry out work or otherwise conduct an activity at a place on an unanticipated basis unless satisfied that the person is vaccinated.

10 Exceptions

- (1) This clause applies despite anything in clauses 7, 8, or 9.

- (2) A chief executive may authorise a person who has not been vaccinated to carry out work at a place if the work—
 - (a) is unanticipated, necessary, and time critical work and cannot be carried out by a person who is vaccinated; and
 - (b) must be carried out to prevent the place from ceasing operations.
- (3) A person who is authorised to enter under subclause (2) may be authorised to re-enter as many times as is necessary to complete work.
- (4) A person who is not otherwise authorised or required by law to enter a place may do so without approval if they need to enter to preserve or protect a person's life, health, or safety in an emergency.
- (5) In this clause, **chief executive**,—
 - (a) in relation to an affected airport or an affected port, means a chief executive of the public sector agency for whom the person described in subclause (2) carries out work;
 - (b) in relation to a managed isolation facility or managed quarantine facility, means a chief executive of the public sector agency responsible for place where the work is carried out.

11 Duties regarding vaccination status

- (1) The Ministry of Health must—
 - (a) keep, maintain, and monitor a register that records the COVID-19 vaccination status of persons who must be vaccinated before carrying out work at a place; and
 - (b) make the registry available to relevant PCBUs, including (but limited to) on an Internet site maintained by, or on behalf of, the Ministry of Health.
- (2) A person who wishes to carry out work at a place must allow the relevant PCBU to access any records regarding the COVID-19 vaccination status of the person that the Ministry of Health may have.
- (3) To determine whether a person may carry out work at a place, the relevant PCBU must check the register to determine whether the individual needs to be vaccinated.
- (4) If the individual needs to be vaccinated to carry out work at a place, the relevant PCBU must notify the individual that it has checked the register and determined that the individual has a duty to be vaccinated before carrying out work at the place.
- (5) A individual described in subclause (4) must inform the relevant PCBU of any change in their vaccination status as soon as practicable.
- (6) The relevant PCBU must enter and update the registry when informed a change under subclause (5) as soon as practicable.

Infringement offences

12 Infringement offence

A breach of clause 7, 8, 9, or 10 is an infringement offence for the purposes of section 26(3) of the COVID-19 Public Health Response Act 2020.

**Schedule 1
Transitional, savings, and related provisions**

cl 5

**Part 1
Provisions relating to this order as made**

1 Transitional provision for affected persons on or before commencement

If, on before the commencement of this clause, an affected person has had 1 injection of the Pfizer/BioNTech vaccine, the affected person must, until the close of 4 June 2021, be treated as being vaccinated until the close of 4 June 2021.

2 Transitional provision for persons who become affected persons after commencement

- (1) This clause applies to a person who becomes an affected person on or after 1 May 2021.
- (2) The person must, until the date that is 35 days after the date on which they become an affected person, be treated as being vaccinated if they have had 1 injection of the Pfizer/BioNTech vaccine before becoming an affected person.

**Schedule 2
Groups of affected persons and relevant requirements**

cl 4

Item Group

Part 1: Groups in relation to managed quarantine facilities

- 1.1 Workers at managed quarantine facilities
- 1.2 Workers who transport to or from managed quarantine facilities persons required to be in isolation or quarantine under COVID-19 order

Part 2: Groups in relation to managed isolation facilities

- 2.1 Workers at managed isolation facility
- 2.2 Workers who transport to or from managed isolation facility persons required to be in isolation or quarantine under COVID-19 order

Part 3: Groups in relation to affected airports

- 3.1 Airside government officials
- 3.2 Government officials who interact with international arriving or international transiting passengers (other than those arriving on QFT flights)

**COVID-19 Public Health Response (Vaccinations)
Order 2021**

Explanatory note

Item Group

Part 4: Groups in relation to affected ports

- 4.1 Government officials who spend more than 15 minutes in enclosed space on board affected ships
- 4.2 Government officials who board, or have boarded, affected ships
- 4.3 Government officials who transport persons to or from affected ships
- 4.4 Government officials (other than those specified in items 4.1 to 4.3) who work at an affected port who interact with persons required to be in isolation or quarantine under COVID-19 order

Part 5: Groups in relation to aircraft

- 5.1 Cabin crew who travel on domestic flights within New Zealand that carry international arriving or international transiting passengers (other than QFT persons) who have not yet completed isolation or quarantine at managed isolation facilities or managed quarantine facilities

Dated at this day of April 2021.

Minister for COVID-19 Response.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order comes into force at 11.59 pm on 30 April 2021. Its purpose is to prevent, and limit the risk of, the outbreak or spread of COVID-19 by requiring certain work to be carried out by vaccinated individuals. The order creates duties in this regard for certain individuals and relevant PCBUs.

A breach of the requirements, without reasonable excuse, is an infringement offence under section 26(3) of the COVID-19 Public Health Response Act 2020 (the Act) for which a person is liable to an infringement fee of \$300 or a fine not exceeding \$1,000.

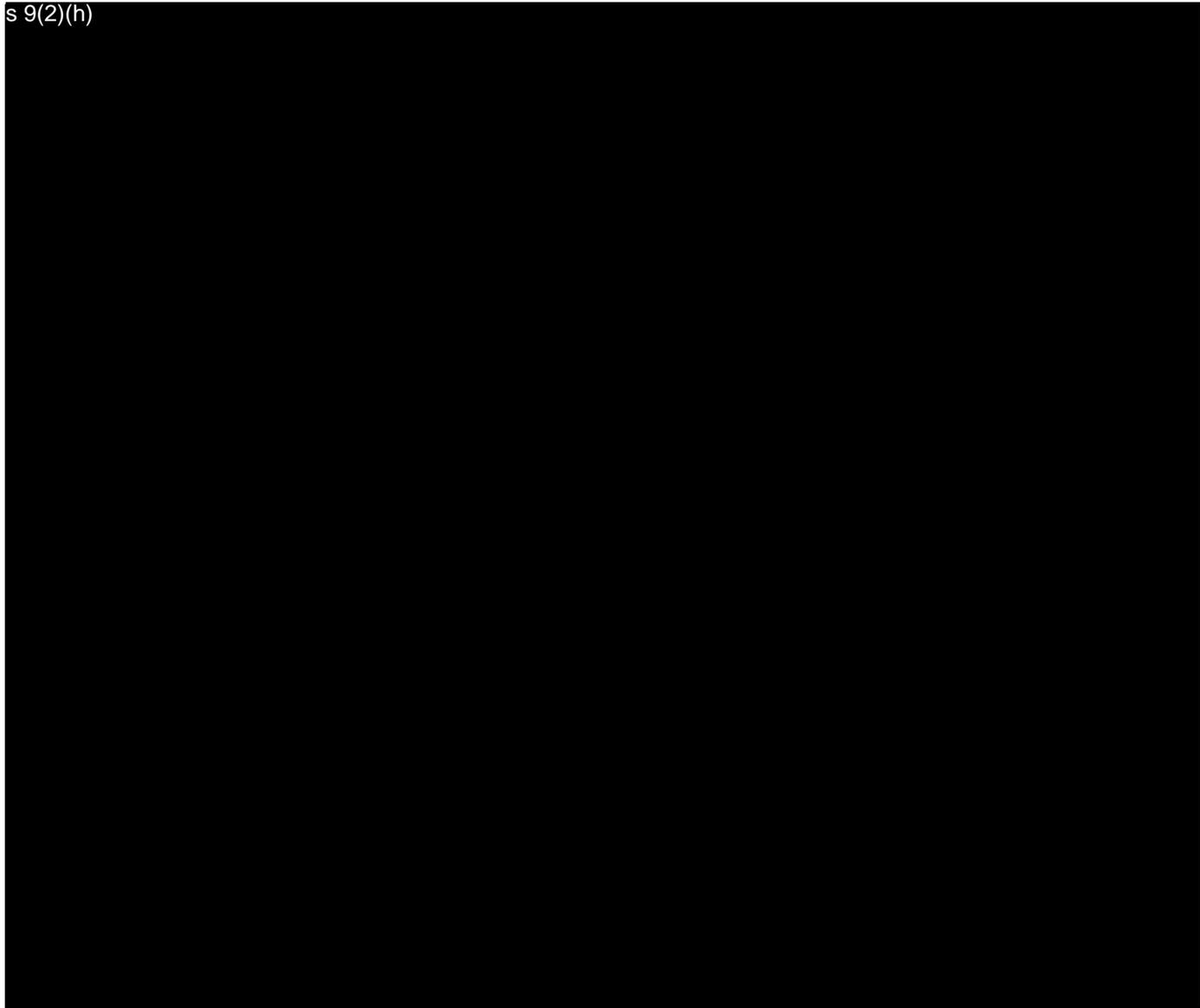
This order must be approved by a resolution of the House of Representatives before the expiry of the period described in section 16(2) of the Act. If this does not happen, the order is revoked on the expiry of that period.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

This order is administered by the Ministry of Health.

s 9(2)(h)



PROACT