

Briefing

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

Date due to MO: 28 April 2021

Action required by: 28 April 2021

Security level: IN CONFIDENCE

Health Report number: 20210940

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

Contact for telephone discussion

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

Minister's office to complete:

☐ Approved

☐ Decline

☐ Noted

☐ Needs change

☐ Seen

☐ Overtaken by events

☐ See Minister's Notes

☐ Withdrawn

Comment:

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

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

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

Purpose of report

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

Summary

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

Recommendations

We recommend you:

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



Dr Ashley Bloomfield

Director-General of Health

Date: 28 April 2021



Hon Chris Hipkins

Minister for COVID-19 Response

Date:

AYESHA VERRILL
Assoc MIN OF HEALTH
28/4/21

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

Background

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

Contents of the Vaccinations Order

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

Changes to the draft Order

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

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

Process for making a section 11 Order

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

Public health rationale

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

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

New Zealand Bill of Rights Act 1990

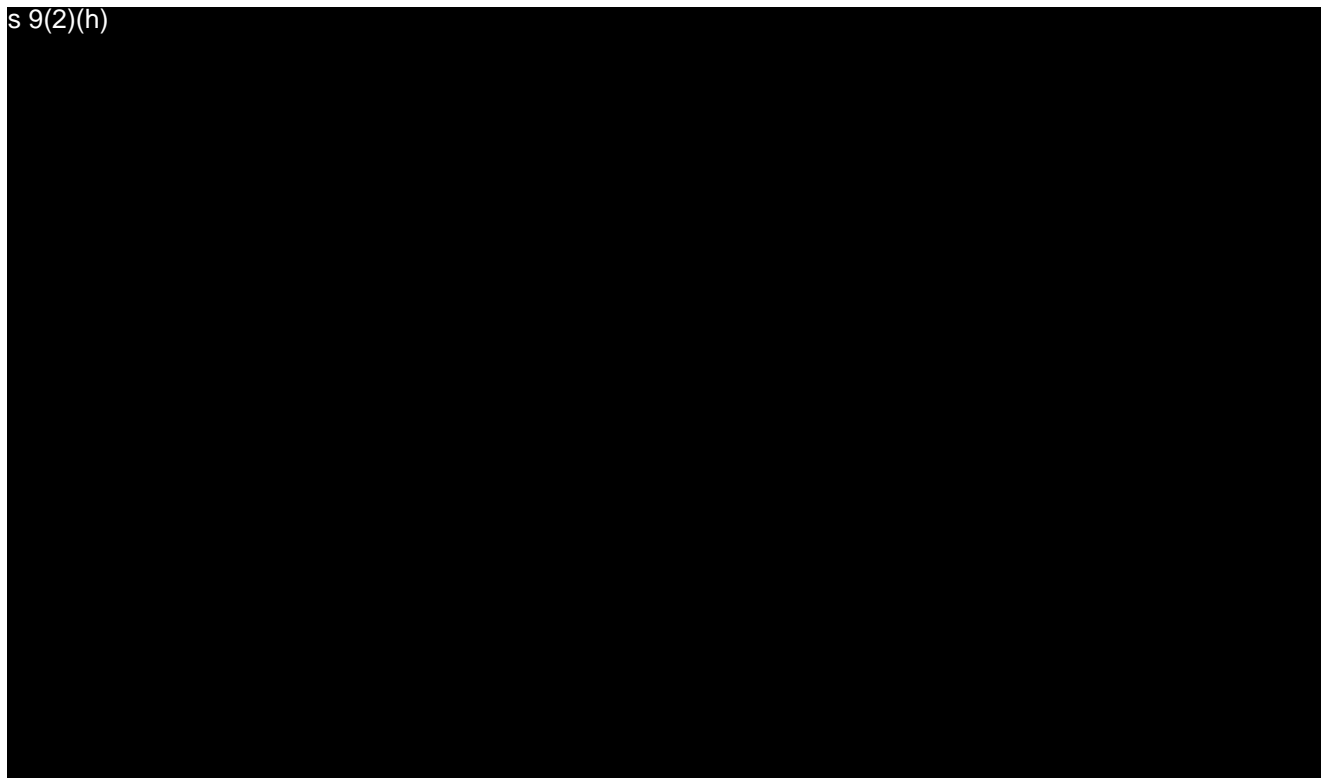
15. Section 9(ba) of the COVID-19 Public Health Response Act 2020 explicitly requires that orders made under section 11 of the Act be made consistently with the New Zealand Bill of Rights Act (NZBORA). If an order limits a right or freedom affirmed in that Act, all or part of the order may be invalid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

Finely balanced issue

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

s 9(2)(h)

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



Equity

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

Implementation

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

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

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

Next steps

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

ENDS.

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 affected persons who are vaccinated.

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 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 means a port where a ship arrives from a location outside New Zealand

affected ship 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 means an affected person whose relevant PCBU is a public service agency

group means a group of affected persons specified in the second column of an item of the table set out in Schedule 2

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

managed quarantine facility 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 set out in Schedule 2 that applies to the group

public service agency means any of the agencies listed in section 10(a) of the Public Service Act 2020

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

vaccinated, in relation to a person, means that the person has received 2 injections of the Pfizer/BioNTech COVID-19 vaccine.

5 Transitional, savings, and related provisions

The transitional, savings, and related provisions 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 affected person not to carry out work unless vaccinated

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

8 Duties of relevant PCBUs in relation to vaccinations

(1) A relevant PCBU must not allow an affected person to carry out work or otherwise conduct an activity at a place unless satisfied that the affected person is vaccinated.

(2) A relevant PCBU—

- (a) must notify each affected person of their duty to be vaccinated; and
- (b) must not prevent the affected person from reporting for, and undergoing, vaccination during their working hours, if vaccinations are available during those hours.

9 Exceptions

(1) This clause applies despite anything in clause 7 or 8.

(2) A chief executive may authorise a person who has not been vaccinated to enter and carry out work at a place if the work—

- (a) is unanticipated, necessary, and time-critical 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 a place under subclause (2) may be authorised to re-enter as many times as is necessary to complete the work.
- (4) A person who is not vaccinated may enter a place without approval if they—
 - (a) need to enter to preserve or protect a person's life, health, or safety in an emergency; or
 - (b) are authorised or required to by law.
- (5) In this clause, **chief executive**,—
 - (a) in relation to a managed isolation facility or managed quarantine facility, means a chief executive of the public service agency responsible for the place where the work is carried out;
 - (b) in relation to any other place, means a chief executive of the relevant PCBU for whom the person described in subclause (2) carries out work.

10 Duties of relevant PCBUs regarding vaccination status

- (1) The relevant PCBU must—
 - (a) ask the Ministry of Health to confirm whether an affected person is vaccinated; or
 - (b) access the register specified in clause 12 to confirm whether the person is vaccinated.
- (2) The relevant PCBU must notify the affected person that—
 - (a) the affected person has a duty to be vaccinated; and
 - (b) the relevant PCBU has checked the affected person's vaccination status under subclause (1).
- (3) The relevant PCBU must, as soon as practicable, notify the Ministry of Health—
 - (a) of any change reported to the relevant PCBU under clause 11;
 - (b) that a person that the relevant PCBU has engaged or employed has ceased to be an affected person for the relevant PCBU.

11 Duties of affected person regarding vaccination status

An affected person who is to carry out work at a place—

- (a) must allow the relevant PCBU to access any records regarding the COVID-19 vaccination status of the affected person that the Ministry of Health may have;

- (b) must notify the relevant PCBU of any change in their vaccination status as soon as practicable, including the dates on which they receive any injections of the Pfizer/BioNTech COVID-19 vaccine.

12 Duty of Director-General to keep, maintain, and monitor vaccination register

The Director-General must—

- (a) keep, maintain, and monitor a register that records the COVID-19 vaccination status of affected persons; and
- (b) provide to the relevant PCBU the vaccination status of an affected person who the relevant PCBU has identified as being subject to this order.

Infringement offences

13 Infringement offence

A breach of clause 7, 8, 10, or 11 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 or before the commencement of this clause, an affected person has had 1 injection of the Pfizer/BioNTech COVID-19 vaccine, the affected person must 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 COVID-19 vaccine before becoming an affected person.

Schedule 2

Groups of affected persons and relevant requirements

cl 4

Item	Group
<i>Part 1: Groups in relation to managed quarantine facilities</i>	
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
<i>Part 2: Groups in relation to managed isolation facilities</i>	
2.1	Workers at managed isolation facilities
2.2	Workers who transport to or from managed isolation facilities persons required to be in isolation or quarantine under COVID-19 order
<i>Part 3: Groups in relation to affected airports</i>	
3.1	Airside government officials
3.2	Government officials who interact with international arriving or international transiting passengers (other than passengers arriving on QFT flights)
<i>Part 4: Groups in relation to affected ports</i>	
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 and who interact with persons required to be in isolation or quarantine under COVID-19 order
<i>Part 5: Groups in relation to aircraft</i>	
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 Wednesday this 28 day of April 2021.


Minister for COVID-19 Response.

Explanatory note

AYESHA VERRALL
ASSOC. MIN. OF HEALTH

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 work at certain places to be carried out by affected persons who are vaccinated. The order creates duties in this regard for certain persons and relevant PCBUs.

A breach of the requirements is an infringement offence under section 26(3) of the COVID-19 Public Health Response Act 2020 (the **Act**) for which a person or a relevant PCBU 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.

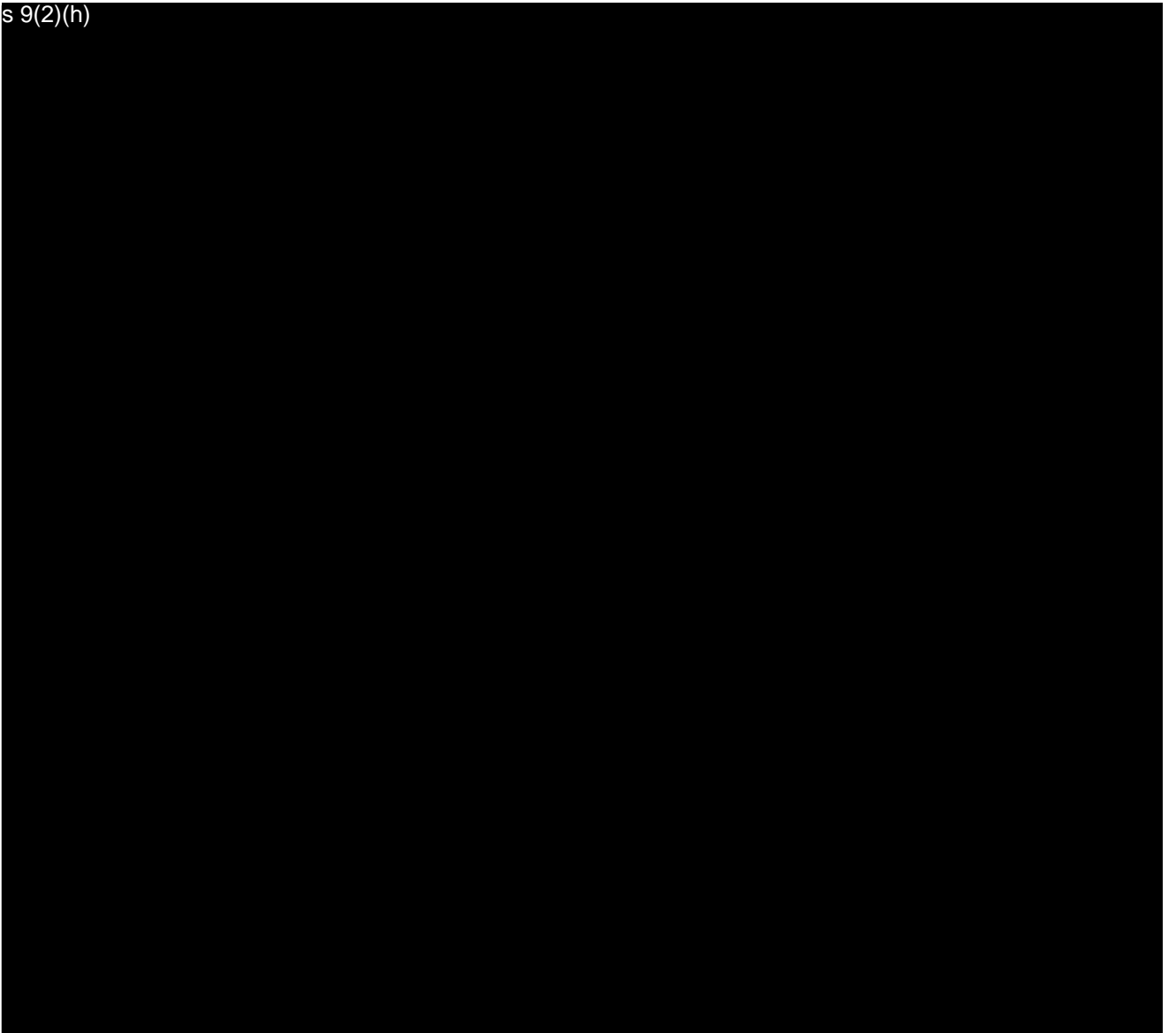
Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

This order is administered by the Ministry of Health.

PROACTIVELY RELEASED

s 9(2)(h)



PROACT