

Briefing

COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021 for Ministerial consultation

Date due to MO: 27 July 2021 **Action required by:** 3 August 2021

Security level: IN CONFIDENCE **Health Report number:** 20211637

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 Withdrawn | |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 (Required Testing) Amendment Order (No 3) 2021 for Ministerial consultation

Security level: IN CONFIDENCE **Date:** 27 July 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, and any other Ministers that you think fit, on the attached draft COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021 (Amendment Order).

Summary

2. The Amendment Order will increase existing testing options for workers subject to mandatory testing by enabling regular saliva testing. Workers who opt-in to saliva testing must complete two saliva tests within a seven-day period if they are an affected person. Undertaking multiple, evenly spaced tests is essential as it ensures that saliva testing is a valid replacement for nasopharyngeal testing.
3. Workers can select their testing type for each testing cycle (saliva, nasopharyngeal or dual oropharyngeal / nasal swab test) and must complete a full cycle using that testing modality. Testing locations will be designated by the Director-General of Health via a notice, which will allow the progressive roll-out of saliva testing over time.
4. A Person Conducting a Business or Undertaking (PCBU) will be required to update the Border Worker Testing Register when an affected person notifies the PCBU that they are undergoing saliva testing.
5. The Amendment Order also aligns the monitoring and enforcement provisions of the COVID-19 Public Health Response (Required Testing) Order 2020 with the COVID-19 Public Health Response (Vaccinations) Order 2021.

Recommendations

We recommend you:

- a) **Note** that on 14 July 2021, you announced that all frontline border workers would soon be able to choose regular saliva testing as a full replacement for nasopharyngeal testing.

- b) **Agree** that the option of providing two saliva samples within seven days can be offered to border workers required to be tested under the COVID-19 Public Health Response (Required Testing) Order 2020 as a full replacement for nasopharyngeal testing. **Yes/No**
- c) **Note** that the draft COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021 gives effect to your decision to enable affected persons to provide saliva samples as an alternative to nasopharyngeal testing.
- d) **Note** that officials advise that the draft COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 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.
- e) **Note** these measures engage rights protected by the New Zealand Bill of Rights Act 1990.
- f) **Note** that you must be satisfied that the COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021 does not limit, or is a justified limit, on the rights and freedoms in the New Zealand Bill of Rights Act 1990.
- g) **Agree** to consult on the draft COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021. **Yes/No**



Maree Roberts
Deputy Director-General
System Strategy and Policy
Date:



Hon Chris Hipkins
Minister for COVID-19 Response
Date: 3/8/2021

COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021 for Ministerial consultation

Background

1. The COVID-19 Public Health Response (Required Testing) Order 2020 (the RTO) has been in place since 29 August 2020. The purpose of the RTO is to prevent, and limit the risk of, the outbreak or spread of COVID-19, by ensuring specified border workers at risk of exposure to COVID-19 are tested on a regular basis.
2. On 5 May 2021, you agreed to implement an alternative option for workers subject to mandatory testing every seven days, consisting of a single nasopharyngeal PCR test every fortnight supplemented with saliva PCR tests every two to three days in the intervening period [HR20210642 refers].
3. On 8 July 2021, you were provided with an update on the emerging science on the efficacy of saliva testing [HR20211563 refers]. As the Ministry of Health (the Ministry) continues to review emerging science and validation studies by New Zealand and overseas laboratories, it is confident that for surveillance purposes, providing two saliva samples within a 72 hour period, without a nasopharyngeal PCR test, can be offered to border workers without increasing the risk of a COVID-19 outbreak.
4. Where an affected person is symptomatic, they would still be expected to take all the usual precautions including self-isolation and obtaining a nasopharyngeal PCR test for diagnostic purposes.

Making an order under the COVID-19 Public Health Response Act 2020

5. Under the COVID-19 Public Health Response Act 2020 (COVID-19 Act), an order may be made or amended 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 that 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 Act. In order to make an order under section 11 you must have received advice from the Director-General of Health (Director-General) about:
 - a. the risks of the outbreak or spread of COVID-19
 - b. the nature and extent of measures that are appropriate to address those risks.
8. You must have regard to any decision by the Government on how to respond to those risks and avoid, mitigate or remedy the effects of the outbreak or spread of COVID-19

(including taking into account any social, economic or other factors) and you must have consulted with the Prime Minister, Minister of Health and the Minister of Justice as required under the Act. You must be satisfied that this order is appropriate to achieve the purpose of that Act.

9. 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 (NZBORA).
10. My advice about the risks of the outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to address those risks is set out below.

Amendments to the RTO to enable regular saliva testing

11. The COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021 (the Amendment Order) will increase existing testing options for workers subject to mandatory testing by enabling regular saliva testing. This amendment will also make it clear that a Person Conducting a Business or Undertaking (PCBU) cannot prevent an affected worker from choosing to receive a saliva test instead of a nasopharyngeal or dual oropharyngeal / nasal swab test.

Testing frequency

12. The draft Amendment Order proposes the following testing requirements and will replace the existing testing requirements for workers who opt-in to saliva testing:
 - a. Workers who select saliva testing must complete two saliva tests within a seven-day period in which they perform affected work.
 - b. There will need to be a period between each saliva test in a testing cycle of no less than two days and no more than three days. This avoids both tests being done in one day, for example, which would negate the public health value of multiple tests. Undertaking multiple, evenly spaced tests is essential as it ensures that saliva testing is a valid replacement for nasopharyngeal testing.
13. Workers can select their testing type for each testing cycle and must complete a full cycle using that testing modality. As such, a worker must complete two consecutive saliva tests before they can return to nasopharyngeal testing for future cycles (for example, if they decide that saliva testing does not work for their work schedule or they need a confirmed negative test result within a shorter timeframe than saliva testing will allow).

Testing locations

14. Affected persons will be able to do their saliva test at any location but will be required to drop the test off at a designated testing place. This negates the need for the worker to report to a specific testing centre as currently required to provide a nasopharyngeal swab. The proposed Amendment Order enables the Director-General to designate testing locations by notice.
15. While all affected persons will be able to access saliva testing eventually it will not be offered to everyone who is required to take a test when the Amendment Order comes into force. The logistics around delivery of saliva testing means that it will need to be scaled up in a sustainable way. The number and location of designated testing places will be expanded as saliva testing is rolled out.

PCBU Obligations

16. An affected person who chooses to undertake recurring saliva testing must notify their PCBU so that the PCBU can meet its obligations to update the Border Worker Testing Register (BWTR). As the process for dropping off a saliva test includes a real time record that the person has been tested, PCBUs will no longer need to update the BWTR to show that the affected person has been tested.

Enforcement provisions

17. The proposed Amendment Order will also improve the ability of the Ministry to monitor and enforce the RTO by:
 - a. permitting enforcement officers to directly access the BWTR, and
 - b. imposing an obligation on PCBUs to make records available to an enforcement officer on request as part of an investigation or enforcement action.
18. These changes are consistent with recent amendments to the COVID-19 Public Health Response (Vaccinations) Order 2021.

New Zealand Bill of Rights Act 1990 considerations

19. The COVID-19 Act requires the Minister for COVID-19 Response to be satisfied that the order does not limit or is a justified limit on rights and freedoms under NZBORA. An order that is inconsistent with NZBORA is unlawful.

How NZBORA applies to the mandatory testing regime

20. Testing engages section 21 of NZBORA - the right to be secure against unreasonable search and seizure. If this search is to be reasonable, the public health rationale for any mandatory testing requirements needs to be clear to justify limits to rights under NZBORA. We need to consider the rationale for testing, the degree of intrusiveness and nature of search, and the frequency of testing of different groups.
21. The rationale for testing remains unchanged – COVID-19 is largely uncontrolled outside of New Zealand and regular testing of border workers is likely to reduce the risk of transmission of COVID-19 into the community.
22. The inclusion of saliva testing within the mandatory testing regime is intended to address concerns regarding the degree of intrusiveness of the nasopharyngeal swab and dual swab tests and increases the range of choices available to those subject to the mandatory testing regime. Furthermore, the sample can be taken at any location and deposited at a designated testing place within 24 hours. The sample can be given without the need for an intrusive swab test of any kind (the saliva test chosen for border workers requires the worker to provide a sample of drool rather than have a sample taken by an oral swab).
23. The testing frequency assigned to different groups should correspond to their risk of exposure to COVID-19. For example, those who are required to provide two samples every seven days should have the same risk of exposure as other groups required to provide two samples every seven days. Despite this, there are good clinical reasons to require that anyone using saliva testing is tested on the same frequency regardless of their risk of exposure. Saliva testing requires more frequent and regular testing in order

to achieve the same level of concordance with nasopharyngeal sampling. Saliva testing will only be available to affected persons as a choice. Anyone on an existing 14day testing cycle who chooses to switch to recurring saliva testing will do so knowing that this obliges them to more frequent testing.

Equity

24. The impacts of COVID-19 are felt differentially across New Zealand communities. Māori and Pacific communities and those living with disabilities, in lower socio-economic groups and crowded or institutional settings bear a greater portion of both health and economic impacts and risks. The mandatory border worker testing regime has been a key part of the response to prevent the outbreak or spread of COVID-19 to the community, particularly those communities with many workers in border settings.
25. There is a higher proportion of Maori and Pacific individuals working at our borders when compared to the general population, and any changes to the testing regime will have a greater impact on this workforce. This impact will continue to be factored into the design and implementation of the wider saliva testing programme.

Next steps

Amending the RTO

26. As per the COVID-19 Act, you must consult on the proposed Amendment Order with the Prime Minister and the Ministers of Justice and Health, and any other Minister you think fit. Comments from this consultation will need to be provided to officials by 5pm Tuesday 3 August 2021, to allow for inclusion into the Amendment Order.
27. Following Ministerial consultation, officials and the Parliamentary Counsel Office will finalise the Amendment Order and provide you with a final version on Friday 6 August 2021 for signing by Monday 9 August 2021.
28. The Amendment Order will be gazetted on Monday 9 August 2021, and will come into effect at 11:59pm Wednesday 11 August 2021.

ENDS.

The COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2021 is publicly available at: www.legislation.govt.nz/regulation/public/2021/0202/latest/LMS532473.html