

# Briefing

## COVID-19 Public Health Response (Required Testing) Amendment Order (No 4): Alert Level 3 testing requirements for educators – for signature

**Date due to MO:** 15 October 2021      **Action required by:** 15 October 2021

**Security level:** IN CONFIDENCE      **Health Report number:** 20212279

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

### Contact for telephone discussion

Name	Position	Telephone
<b>Dr Ashley Bloomfield</b>	Te Tumu Whakarae mō te Hauora Director-General of Health	s 9(2)(a)
<b>Jolanda Meijer</b>	Policy Director, System Strategy and Policy	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 Withdrawn |  |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 4): Alert Level 3 testing requirements for educators – for signature

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**Security level:** IN CONFIDENCE      **Date:** 15 October 2021

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

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## Purpose of report

1. The report recommends that you sign the attached COVID-19 Public Health Response (Required Testing) Amendment Order (No 4) 2021 which outlines testing requirements that apply to the education sector in Alert Level 3 areas.

## Summary

2. On Monday 11 October 2021, Cabinet agreed to a range of amendments to the COVID-19 Public Health Response (Required Testing) Order 2021 regarding testing requirements within the education system [CAB-21-MIN-0414 refers].
3. The COVID-19 Public Health Response (Required Testing) Amendment Order (No 4) 2021 provides the following requirements for education staff who are in Alert Level 3 areas:
  - a. weekly testing of education service staff or other people who are not fully vaccinated with Pfizer/BioNTech vaccine that are in Alert Level 3 areas
  - b. individual school staff to return a negative COVID-19 test result ahead of physically returning to a school regardless of vaccination status
  - c. individual early learning staff to return a negative COVID-19 test result by 26 October 2021, or before they physically return to service, regardless of vaccination status.
4. Officials recommend that you sign the final Amendment Order on Friday 15 October 2021 (today), so that it can be published in the *New Zealand Gazette* that afternoon. This will allow officials to meet the statutory obligation to provide at least 48 hours' notice between gazetting and the Amendment Order coming into effect.
5. Once signed the Amendment Order will then come into effect at 11:59pm on Sunday 17 October 2021.

## Recommendations

We recommend you:

- a) **Note** that on Monday 11 October 2021 Cabinet agreed to range of amendments to the COVID-19 Public Health Response (Required Testing) Order 2021 relating to testing requirements within the education system [CAB-21-0414 refers]. **Noted**
- b) **Note** that officials advise that the draft COVID-19 Public Health Response (Required Testing) Amendment Order (No 4) 2021 (Amendment Order) 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**
- c) **Note** that you must be satisfied that the Amendment 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 in the Amendment Order. **Noted**
- d) **Sign** the attached Amendment Order on Friday 15 October 2021 (today).  **Yes/No**
- e) **Note** that if you sign the attached Amendment Order, it will be gazetted by 5pm Friday 15 October 2021 (today) and come into force at 11:59pm Sunday 17 October 2021. **Noted**



Dr Ashley Bloomfield

**Te Tumu Whakarae mō te Hauora**  
Director-General of Health

Date: 15 October 2021



Hon Chris Hipkins

**Minister for COVID-19 Response**

Date: 15/10/2021

# COVID-19 Public Health Response (Required Testing) Amendment Order (No 4): Alert Level 3 testing requirements for educators – for signature

## Background

1. On Monday 11 October 2021, Cabinet agreed to a range of amendments to the COVID-19 Public Health Response (Required Testing) Order 2021 regarding testing requirements within the education system [CAB-21-MIN-0414 refers].

## Contents of the Amendment Order

### *Testing requirements within the education system*

2. Part 1A of the Amendment Order implements the Cabinet decision and provides the following requirements for education staff who are in Alert Level 3 areas:
  - a. weekly testing of any affected person who is not fully vaccinated with Pfizer/BioNTech vaccine that are in Alert Level 3 areas
  - b. individual school staff to return a negative COVID-19 test result ahead of physically returning to a school regardless of vaccination status
  - c. individual early learning staff to return a negative COVID-19 test result by 26 October 2021, or before they physically return to service, regardless of vaccination status.

### *Definition of affected person within Part 1A*

3. For the purposes of Part 1A, an affected person is:
  - a. every employee within an education service
  - b. every person performing any work or service at an education service, including a volunteer or unpaid worker, who may have contact with children or students in the course of performing the work or service
  - c. every person over the age of 12 years old who resides in the home where the home-based education and care services is provided.

## Process for amending a section 11 Order

4. Under the COVID-19 Public Health Response Act 2020 (the Act) an order may be made if either:
  - a. an epidemic notice is in force (under the Epidemic Preparedness Act 2006)
  - b. a state of emergency has been declared (under the Civil Defence Emergency Management Act 2002)

- c. it has been authorised by the Prime Minister.
5. There is currently an epidemic notice in place, which allows orders to be made under section 11 of the Act.
6. As the Minister for COVID-19 Response, you may make orders under section 11 of the Act.
7. To make or amend an order under section 11 you must:
  - a. have received advice from the Director-General of Health about:
    - i. the risks of the outbreak or spread of COVID-19
    - ii. the nature and extent of measures that are appropriate to address those risks
  - b. be satisfied that the proposed Amendment Order does not limit or is a justified limit on the rights and freedoms as specified in New Zealand Bill of Rights Act 1990 (NZBORA).
  - c. consult with the Prime Minister, the Minister of Justice, Minister of Health, and any other Ministers you think necessary
  - d. be satisfied that the order is appropriate to achieve the purposes of the Act.
8. Public health 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 was previously provided [HR20212018 refers] and is also set out below.

### **Public health rationale**

9. Reopening places of learning is likely to increase the risk of COVID-19 transmission. Therefore, to control the virus, avoid transmission and hospitalisations, enjoy our freedoms and reconnect with the world, certain measures, such as vaccination and testing, have to be put in place.
10. These measures should aim to: support vaccination uptake; maintain social cohesion; protect vulnerable people from COVID-19 transmission (especially those that cannot get vaccinated); facilitate excellent and equitable outcomes for learners; be rights consistent (including in relation to the right to education, the right to privacy, freedom from discrimination, and the right to refuse to undergo medical treatment); and provide certainty to regulated parties.

### **New Zealand Bill of Rights Act 1990**

11. The 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.
12. As Order are delegated legislation and any unjustified inconsistency with the rights confirmed in NZBORA renders an order ultra vires. That has the effect of making the entire order null and void. This also applies to an amendment to an order.
13. If any amendment unjustifiably infringes upon an individual's human rights, then all, or part, of the Order is ultra vires. It is therefore important to be clear that orders are NZBORA consistent.

## How NZBORA applies to the proposed mandatory testing regime for educators

14. 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 the right. We need to consider the rationale for testing, the degree of intrusiveness and nature of search, and the frequency of testing of different groups.
15. At present, COVID-19 is not contained within Auckland but is considered likely to be contained within the rest of New Zealand. Regular testing of educators who are not yet fully vaccinated in Alert Level 3 areas is likely to reduce the risk of transmission of COVID-19 outside of these areas.
16. A limitation on a right should be no more than reasonably necessary. Alternatives that do not limit rights (such as voluntary testing and strengthening existing infection prevention and control measures) should be explored before considering whether to limit rights through mandatory testing.
17. The limit serves a focussed and important objective – to prevent and/or limit the risk of the spread of a pandemic throughout the general public of New Zealand. The focus of the scope of the Amendment Order and the inclusion of exemptions ensures minimal impairment and an overall proportionate response given the high public health risk.

## Equity

18. In Aotearoa New Zealand, people have differences in health that are not only avoidable but unfair and unjust. Equity recognises different people with different levels of advantage require different approaches and resources to get equitable health outcomes.
19. 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. Testing has been a key part of the response to prevent the transmission of COVID-19 into the community, particularly to those communities with many essential workers and higher-risk settings.
20. The implementation of testing regimes may be particularly challenging in some rural or isolated communities and settings, which may have further impact on Māori education providers and ākonga. Consideration could be given to additional supports from iwi and health to work with impacted communities to meet testing requirements.

## Consultation

21. We have consulted with the Ministry of Education throughout the drafting of this amendment order.

## Next steps

22. Officials recommend that you sign the final Amendment Order on Friday 15 October 2021 (today), so that it can be published in the *New Zealand Gazette* that afternoon. This will allow officials to meet the statutory obligation to provide at least 48 hours' notice between gazetting and the Amendment Order coming into effect.

23. Once signed the Amendment Order will then come into effect at 11:59pm on Sunday 17 October 2021.

**ENDS.**

PROACTIVELY RELEASED