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28 February 2023

s 9(2)(a)

By email: s 9(2)(a)  
Ref: H2023019241

Tēnā koe s 9(2)(a)

### **Response to your request for official information**

Thank you for your request under the Official Information Act 1982 (the Act) to Manatū Hauora (the Ministry of Health) on 14 January 2023 for information regarding exemptions to vaccine mandates.

On 14 February 2023, you received a partial response from Manatū Hauora to parts 4 and 5 of your request. Parts 6 and 7 were transferred to Te Whatu Ora – Health New Zealand under section 14(b)(i) of the Act. The remaining parts of your request are responded to below.

- 1) *the criteria used by the DG for granting medical and any other exemptions to NoJobNo Job mandates. Please include any dates this criteria changed*
- 2) *analysis to show how these criteria were reconciled with risks and uncertainties about short and long term safety and/ or effectiveness identified by the manufacturer Pfizer and/ or Medsafe in documents such as the Pfizer application for approval of a new medicine, the datasheet for Comirnaty and/ or the risk management plan*
- 3) *information to show how this exemptions process was reconcile with fundamental rights and freedoms protected by NZBill of Rights, and the International Covenant on Civil and Political Rights*

On 26 September 2022, the vaccine mandate was revoked. Prior to that, a suitably qualified medical practitioner could apply to the Director-General of Health on behalf of an affected worker for a temporary exemption. This was on the ground that they met the specified COVID-19 vaccination exemption criteria. The criteria are publicly available here:

[https://gazette.govt.nz/assets/pdf-cache/2022/2022-go169.pdf?2022-06-22\\_12%3A22%3A32=](https://gazette.govt.nz/assets/pdf-cache/2022/2022-go169.pdf?2022-06-22_12%3A22%3A32=).

Manatū Hauora has identified a briefing in scope of your request, titled 'Review of COVID-19 vaccination exemptions.' This is attached to this letter as Document 1 and is released to you with some information withheld under the following sections of the Act:

- Section 9(2)(a), to protect the privacy of natural persons;
- Section 9(2)(ba)(i), to protect information that is subject to an obligation of confidence and making it available would likely prejudice the supply of similar information, or information from the same source; and
- Section 9(2)(h), to maintain legal professional privilege.

I have considered the countervailing public interest in releasing information and consider that it does not outweigh the need to withhold at this time.

Under section 28(3) of the Act, you have the right to ask the Ombudsman to review any decisions made under this request. The Ombudsman may be contacted by email at: [info@ombudsman.parliament.nz](mailto:info@ombudsman.parliament.nz) or by calling 0800 802 602.

Please note that this response, with your personal details removed, may be published on the Manatū Hauora website at: [www.health.govt.nz/about-ministry/information-releases/responses-official-information-act-requests](http://www.health.govt.nz/about-ministry/information-releases/responses-official-information-act-requests).

Nāku noa, nā



Stephen Glover  
**Group Manager – COVID-19 Policy**  
**Strategy Policy and Legislation | Te Pou Rautaki**

# Briefing

## Review of COVID-19 vaccination exemptions

**Date due to MO:** 29 July 2022

**Action required by:** N/A

**Security level:** IN CONFIDENCE

**Health Report number:** HR 20221121

**To:** Hon Dr Ayesha Verrall, Minister for COVID-19 Response

### Contact for telephone discussion

| Name                 | Position  | Telephone |
|----------------------|---|-----------|
| Dr Ashley Bloomfield | Te Tumu Whakarae mō te Hauora /<br>Director-General of Health | 9(2)(a)   |
| Stephen Glover       | Group Manager, COVID-19 Policy                                | 9(2)(a)   |

### Action for Private Secretaries

N/A

**Date dispatched to MO:**

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

# Review of COVID-19 vaccination exemptions

## Purpose of report

1. This report responds to a request from the Minister for COVID-19 Response for a briefing which reviews the rationale for the current process for COVID-19 vaccination exemptions under the VO, and whether there is scope for improvement.
2. It also provides further information building on the letter from the Director-General of Health (the DG) to the Minister of Health dated 4 July 2022. That letter responded to the Minister of Health letters of 14 March 2022 and 23 June 2022, requesting that the Manatū Hauora (Ministry of Health, the Ministry) review the appropriateness of the temporary medical vaccination exemption scheme (TME) enabled by the COVID-19 Public Health Response (Vaccinations) Order 2021 (the VO).
3. This report also provides the Ministry's response to Crown Law advice provided on 8 April 2022 (as discussed in a letter from the Ministry to the Minister of Health of 4 July 2022).
4. This report discloses all relevant information and implications.

## Summary

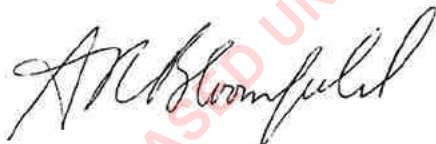
5. The government operates two main types of COVID-19 vaccination exemption under the VO: TMEs and temporary significant service disruption exemptions (SSDEs).
6. TMEs may be granted in situations where an individual is unable to receive a COVID-19 vaccine for medical reasons. SSDEs may be granted where an employer who provides a critical service is at risk of a significant disruption of their services because a critical worker/s has not met vaccination requirements. A fuller summary of both schemes is attached as Appendix 1.
7. Only workers in the health and disability sector are still subject to a vaccination mandate under the VO. All of these workers may be eligible for a temporary vaccination exemption.<sup>1</sup>
8. The Ministry in conjunction with the National Immunisation Programme (NIP) has reviewed temporary vaccination exemption schemes. [REDACTED]  
9(2)(h), 9(2)(ba)(i)
9. On the basis of the findings of the review, the Ministry has developed a process (the legal tests process) for applying the legal tests to all applications assessed by the TME panel. No changes to legal instruments are required to implement the legal tests process. The Ministry will implement the legal tests process if the Minister of COVID-19 Response decides to retain the vaccination mandate, following a report on the VO due to be delivered to the Minister in the near future.

<sup>1</sup> Under the COVID-19 Public Health Response (Air Border) Order 2021 (ABO), a vaccination mandate continues to apply to New Zealand-based aircrew members who arrive in New Zealand by air. Exemptions from the vaccination requirement in the ABO are granted by the DG or by the Minister for COVID-19 Response. Vaccination arrangements under the ABO are out of the scope of this report.

## Recommendations

We recommend that you:

- a) **Note** that the Temporary Medical Exemptions scheme (TME) enabled by clause 9B of the COVID-19 Public Health Response (Vaccinations) Order 2021 (VO) has been in operation since 8 November 2021 and has considered a total of 7501 completed applications to 30 June 2022, of which 5547 were granted and 905 were declined; **Noted**
- b) 9(2)(h), 9(2)(ba)(i) **Noted**
- c) **Note** that an equivalent of the legal tests is already incorporated in the Significant Service Disruption Exemption test in clause 12A of the VO;
- d) **Note** that the Ministry has developed prompts for ensuring that the legal tests are applied to all applications assessed by the TME panel (the legal tests prompts) which do not require changes to any legal instrument; **Noted**
- e) **Note** that the Ministry will apply the legal tests prompts if the Minister for COVID-19 Response decides to retain a vaccination mandate, following a report on the COVID-19 Public Health Response (Vaccinations) Order 2021 which is due to be delivered shortly. **Noted**
- f) **Forward** a copy of this report to the Minister of Health. **Yes/No**



Dr Ashley Bloomfield

**Te Tumu Whakarae mō te Hauora**

Director-General of Health

Date: 27/07/2022



Hon Dr Ayesha Verrall

**Minister for COVID-19 Response**

Date: 2/8/22

# Review of COVID-19 vaccination exemptions

## Background

### COVID-19 vaccination exemptions are linked to COVID-19 vaccination mandates

1. Vaccination has been a key tool in our efforts to combat COVID-19 since effective COVID-19 vaccines first became available.
2. COVID-19 vaccination mandates under the COVID-19 Public Health Response (Vaccinations) Order 2021 (VO) have been applied in settings where the risk of infection and transmission of the virus is particularly high. For example, New Zealand introduced vaccination mandates early for border workers, as part of a “keep it out” strategy.
3. Imposing vaccination mandates involves restrictions on rights and freedoms affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA); for example, the right to refuse medical treatment. The COVID-19 Response Act 2020 (the Act) requires that the Minister be satisfied that such restrictions are justified in terms of the purpose of the Act.
4. Vaccination exemption provisions under the VO moderate the impact of vaccination mandates on NZBORA rights and freedoms and reflect the Government’s expectation that some people would not be able to be vaccinated.

### In 2022, the number of categories of worker covered by a vaccination mandate has been significantly reduced

5. Recent legislative changes have revoked the COVID-19 Public Health Response (COVID-19 Vaccination Certificate) Order 2021 and limited the coverage of the vaccination mandate under the VO to certain categories of worker in the health and disability workforce. The changes reflected public health and legal advice that vaccination mandates can only be justified in settings where the risk of transmission between the worker and vulnerable members of the community is high compared to the risk of infection prevailing in the wider community.
6. Vaccination mandates now apply only to the following categories of health and disability worker (as listed in Schedule 2 of the VO):
  - a. Health practitioners providing health services to patients in person.
  - b. Workers who are employed or engaged by a general practice or a pharmacy and whose role involves being within 2 metres or less of a health practitioner or a member of the public for a period of 15 minutes or more.
  - c. Workers who are employed or engaged by a certified provider and who, as part of their ordinary duties, come within 2 metres or less of a health practitioner or a person to whom health care services are provided for a period of 15 minutes or more.

- d. Care and support workers.<sup>2</sup>

### Temporary COVID-19 vaccination exemption schemes under VO

7. The government operates two main types of COVID-19 vaccination exemption under the VO: temporary medical exemptions (TMEs) and temporary significant service disruption exemptions (SSDEs). Only categories of health and disability worker listed in Schedule 2 of the VO are eligible for an exemption under these schemes.

*TMEs (see Appendix 1 for a fuller summary)*

8. TMEs may be approved where there is a medical justification for not administering a COVID-19 vaccine. Applications are assessed according to medical criteria which are established by a Director-General of Health (DG) notice. Current criteria are grouped in the following categories:
- a. **Acute illness.** This category covers COVID-19 infection, acute moderate to severe non-COVID-19 illness and those receiving high dose immunosuppression treatment.
  - b. **Previous reaction to a COVID-19 Vaccine** that is significant, and no alternative vaccine is available.
  - c. **Pre-existing condition impacting on vaccination.** This category covers a person who has previously been diagnosed with a contraindication (and no alternative vaccine is available), situations where more supportive arrangements need to be put in place for vaccination and those suffering from a terminal illness.
  - d. **Vaccine trials.**

*SSDEs (see Appendix 1 for a fuller summary)*

9. SSDEs are operated for employers who are at risk of a significant disruption of their services because worker/s have not met the mandated vaccination and/or booster vaccination timeframe. Applications are assessed according to whether they meet the tests laid down in the VO, as follows:
- a. The Minister must be satisfied that the exemption is required in order to prevent significant disruption to health services.
  - b. The Minister must also take into account—
    - i. the extent of the risk to the public interest if the work does not occur
    - ii. whether the work could reasonably be delayed to facilitate the vaccination of the persons needed to carry out work
    - iii. whether the work could be performed by other persons who have been vaccinated or have received a booster dose
    - iv. the public health risk associated with the work.

<sup>2</sup> A recent Employment Court decision has brought into question whether some categories of care and support worker should be covered by a vaccination mandate.

### Ministers requested a review of temporary vaccination exemptions

10. On 4 July 2022, the DG replied to letters dated 14 March 2022 and 23 June 2022 from the Minister of Health, raising issues with the operation of the TME scheme. The letter of 14 March 2022 requested that the Ministry of Health (the Ministry) obtain a Crown Law opinion on the scheme. A Crown Law opinion was provided in draft on 8 April 2022.
11. On 30 May 2022, the Minister for COVID-19 Response requested a briefing which would review the rationale for the current process for COVID-19 vaccination exemptions under the VO and whether there is scope for improvement.

### Overview of TME applications November 2021-July 2022

10. An analysis of TME applications between November 2021 and July 2022 shows the following:
  - a. A large proportion (87%) of completed applications under the TME scheme have been approved since the scheme came into effect.
  - b. Of the 7138 complete applications received, 1509 were assessed by the TME panel. Applications for an exemption under criterion 1A (COVID-19 infection) and 4A (Non-placebo participant in a vaccine trial) are not considered by the TME panel, but are instead approved provided that a qualified health professional verifies that the relevant criterion has been met.
  - c. The number of applications received per month increased to a peak of 1869 in April, and have since reduced to 595 for the month of June.
  - d. For the first three weeks of July, a total of 87 applications have been received, of which a total of five were assessed by the TME panel.
  - e. Over the review period, the TME panel declined 60% of the applications it considered (609 of 900 applications).
  - f. The percentage of applications declined by the panel has fallen steadily from a peak of 77% in February 2022 to 13% in May 2022.
11. These results are consistent with the Government's expectation that some people would not be able to be vaccinated, which was part of the policy by which extraordinary powers of compulsion were delegated to the DG.
12. They also confirm expectations that recent changes in the coverage of the vaccination mandate have resulted in a significant drop in the number of applications.
13. Due to Privacy Act considerations, we do not have sufficiently granular data to comment in depth on the reasons why applications were declined by the TME panel.
14. A more detailed breakdown of TME applications between November 2021 and July 2022 is attached as Appendix 2.

### (Legally privileged) Crown Law comments on current vaccination exemption provisions

15. 9(2)(h), 9(2)(ba)(i)



9(2)(h), 9(2)(ba)(i)

9(2)(h), 9(2)(ba)(i)

## Discussion

### Are current exemption provisions fit for purpose?

20. In reviewing the current temporary exemption provisions, the Ministry focused on the question of whether the provisions continue to be appropriate, given:
- a) The Crown Law comments presented above (paragraphs 15-19).
  - b) Recent reductions in the scope of vaccination mandate coverage.

### Implications of Crown Law advice regarding the legal tests

9(2)(h), 9(2)(ba)(i)

22. An equivalent of the legal tests is already incorporated in the SSDE tests in the VO. Provided that decisions are appropriately documented, in the interests of transparency and consistency, there is no need to modify the SSDE tests 9(2)(h) 9(2)(h)

9(2)(h)

23. The approach in question would involve the TME panel using the legal tests as a further check on applications presented for its consideration. Prompts based on the legal tests have been developed for use by the panel (attached as Appendix 3). The underlying aim of this approach is to ensure that wider considerations of public health risk and the circumstances underlying an individual application are factored into a decision by the panel.

24. As noted, due to Privacy Act considerations, we do not have sufficiently granular data to comment in any depth on the likely impact of introducing explicit prompts for the legal tests into the TME panel process. However, it seems likely that the panel would already be considering the relevant information (albeit not in the explicit prompts for the legal tests), so the impact on decisions should be modest.

### **Impact of recent reductions in vaccination mandate coverage**

25. Since 7 July 2022, vaccination mandates apply only to a group of workers who continue to be at high risk of transmitting the COVID-19 virus to vulnerable groups in the population (for example, people in aged resident care). Public health advice is that the recent reductions in vaccination mandate coverage have had no impact on the justification for vaccination exemption provisions.

### **Linkage between reviews of temporary vaccination exemptions and the vaccination mandate**

26. The Ministry is reviewing the vaccination mandate enabled under the VO (the mandate review), with a report due to the Minister shortly.
27. The Minister's decision in response to the recommendations on vaccination mandates in the report could affect the outcome of the exemptions review. For example, if a decision were made to revoke the mandate in the near future, this would automatically remove the need to modify the TME process.
28. In light of this dependence, the Ministry will modify the TME process as discussed above if the Minister decides to retain the vaccination mandate.
29. The Ministry notes that the proposed approach to incorporating the legal tests in the vaccination exemptions process provides a useful model for use in similar settings in the future.

### **Next steps**

30. We recommend that you forward a copy of this report to the Minister of Health, who has signalled his interest in the TME process in correspondence with the Ministry.

### **Equity**

31. A key consideration in developing the recommendations in this report is whether the proposals involved support equitable health outcomes. From an equity perspective, the changes to the TME application process discussed in this report are unlikely to have a significant impact on health outcomes but will ensure that processes are equitable in terms of the rights and freedoms under the NZBORA.
32. As articulated by the Courts and the Waitangi Tribunal, equity is a principle of Te Tiriti. It is also one of the principles recommended by the 2019 Hauora report for the Health system. It is considered that the proposals in this briefing would not lessen rights for Māori either directly or indirectly.

**ENDS.**

## Appendix 1: Summary of temporary vaccination exemption schemes under the Vaccinations Order

|   | Temporary Medical Exemption (TME)  | Temporary Significant Service Disruption Exemption (SSDE)  |
|---|--|--|
| <b>VO clause</b>                            | Clause 9B  | Clause 12A   |
| <b>Who may be eligible for an exemption</b> | A health and disability worker in one of the categories listed in Schedule 2 of the VO   | A health and disability worker in one of the categories listed in Schedule 2 of the VO   |
| <b>Who applies for an exemption</b>         | A suitably qualified medical practitioner or nurse practitioner on behalf of an individual   | A Person Conducting Business or Undertaking (PCBU) on behalf of a worker or workers  |
| <b>Who grants exemptions</b>                | DG   | Minister for COVID-19 Response   |
| <b>Criteria</b>                             | <p>Exemptions can only be justified on the medical grounds specified in the DG notice. Currently, these are:</p> <p><b>1 Acute illness.</b> This category covers COVID-19 infection, acute moderate to severe non-COVID-19 illness and those receiving high dose immunosuppression treatment.</p> <p><b>2 Previous reaction to a COVID-19 Vaccine</b> that is significant, and no alternative vaccine is available</p> <p><b>3 Pre-existing condition impacting on vaccination.</b> This category covers a person who has previously been diagnosed with a contraindication (and no alternative vaccine is available), situations where more supportive arrangements need to be put in place for vaccination and those suffering from a terminal illness.</p> <p><b>4 Vaccine trials</b></p> | <p>The Minister must be satisfied that the exemption is necessary or desirable to promote the purposes of the Act and prevent significant disruption to health services; and that the extent of the exemption is not broader than is reasonably necessary to address the matters that gave rise to the exemption.</p> <p>The Minister must also take into account:</p> <ol style="list-style-type: none"> <li>the extent of the risk to the public interest if the work does not occur</li> <li>whether the work could reasonably be delayed to facilitate the vaccination of the persons needed to carry out work</li> <li>whether the work could be performed by other persons who have been vaccinated or have received a booster dose</li> <li>the public health risk associated with the work.</li> </ol> |
| <b>How applications are processed</b>       | A TME Panel of medical experts reviews applications other than applications under criterion 1A (COVID-19 infection) and 4A (Non-placebo participant in a vaccine trial) and makes recommendations to the DG.   | An SSDE Panel with interagency representation reviews applications and makes recommendations. Recommendations are approved by the Director of the National Immunisation Programme and the DG before being provided to the Minister.  |

## Appendix 2: Breakdown of TME applications November 2021-July 2022

| <b>November 2021</b>                 |  |  |  | <b>Number</b> | <b>Percentage of total</b> |
|--------------------------------------|--|--|--|---------------|----------------------------|
| Total complete applications received |  |  |  | 523           |                            |
| Granted                              |  |  |  | 323           | 62%                        |
| Declined                             |  |  |  | 200           | 38%                        |
| Total considered by panel            |  |  |  | 513           |                            |
| Granted                              |  |  |  | 316           | 62%                        |
| Declined                             |  |  |  | 197           | 38%                        |
| <b>December 2021</b>                 |  |  |  | <b>Number</b> | <b>% of total</b>          |
| Total complete applications received |  |  |  | 601           |                            |
| Granted                              |  |  |  | 228           | 38%                        |
| Declined                             |  |  |  | 373           | 62%                        |
| Total considered by panel            |  |  |  | 543           |                            |
| Granted                              |  |  |  | 174           | 32%                        |
| Declined                             |  |  |  | 369           | 68%                        |
| <b>January 2022</b>                  |  |  |  | <b>Number</b> | <b>% of total</b>          |
| Total complete applications received |  |  |  | 200           |                            |
| Granted                              |  |  |  | 71            | 36%                        |
| Declined                             |  |  |  | 129           | 65%                        |
| Total considered by panel            |  |  |  | 182           |                            |
| Granted                              |  |  |  | 53            | 29%                        |
| Declined                             |  |  |  | 129           | 71%                        |
| <b>February 2022</b>                 |  |  |  | <b>Number</b> | <b>% of total</b>          |
| Total complete applications received |  |  |  | 201           |                            |
| Granted                              |  |  |  | 100           | 50%                        |
| Declined                             |  |  |  | 101           | 50%                        |
| Total considered by panel            |  |  |  | 130           |                            |
| Granted                              |  |  |  | 30            | 23%                        |
| Declined                             |  |  |  | 100           | 77%                        |

| <b>March 2022</b>                    |  |  |  | <b>Number</b> | <b>% of total</b> |
|--------------------------------------|--|--|--|---------------|-------------------|
| Total complete applications received |  |  |  | 1558          |                   |
| Granted                              |  |  |  | 1502          |                   |
| Declined                             |  |  |  | 56            |                   |
| Total considered by panel            |  |  |  | 74            |                   |
| Granted                              |  |  |  | 18            | 24%               |
| Declined                             |  |  |  | 56            | 76%               |
| <b>April 2022</b>                    |  |  |  | <b>Number</b> | <b>% of total</b> |
| Total complete applications received |  |  |  | 1815          |                   |
| Granted                              |  |  |  | 1797          | 99%               |
| Declined                             |  |  |  | 18            | 1%                |
| Total considered by panel            |  |  |  | 26            |                   |
| Granted                              |  |  |  | 8             | 31%               |
| Declined                             |  |  |  | 5             | 19%               |
| <b>May 2022</b>                      |  |  |  | <b>Number</b> | <b>% of total</b> |
| Total complete applications received |  |  |  | 1558          |                   |
| Granted                              |  |  |  | 1553          | 100%              |
| Declined                             |  |  |  | 5             | 0%                |
| Total considered by panel            |  |  |  | 11            |                   |
| Granted                              |  |  |  | 6             | 55%               |
| Declined                             |  |  |  | 5             | 45%               |
| <b>June 2022</b>                     |  |  |  | <b>Number</b> | <b>% of total</b> |
| Total complete applications received |  |  |  | 595           |                   |
| Granted                              |  |  |  | 572           | 96%               |
| Declined                             |  |  |  | 23            | 4%                |
| Total considered by panel            |  |  |  | 25            |                   |
| Granted                              |  |  |  | 2             | 8%                |
| Declined                             |  |  |  | 23            | 92%               |
| <b>July 2022 (first three weeks)</b> |  |  |  | <b>Number</b> | <b>% of total</b> |
| Total complete applications received |  |  |  | 87            |                   |
| Granted                              |  |  |  | 84            | 97%               |
| Declined                             |  |  |  | 3             | 3%                |
| Total considered by panel            |  |  |  | 5             |                   |
| Granted                              |  |  |  | 2             | 40%               |
| Declined                             |  |  |  | 3             | 60%               |

### **Appendix 3 : Prompts to be applied to applications for Temporary Medical Exemptions (New Zealand Bill of Rights Act 1990, Covid-19 Response Act 2020)**

The following prompts have been developed by the Ministry of Health in conjunction with the National Immunisation Programme 9(2)(h)

Applying these prompts will assist the TME panel to give due weight to the requirements of the underpinning legislation when reaching decisions on individual TME applications.

The prompts are intended to act as a final check before a decision on an individual application is reached.

- 1/ If the applicant isn't vaccinated against COVID-19, what level of public health risk will result?
- 2/ Is there anything in the applicant's background - for example, family circumstances or general state of physical and mental health - that should be weighed up in considering whether or not to grant an exemption?
- 3/ Is a decision on this application justified and proportionate, given the TME criteria and also given the level of public risk involved and other relevant factors?

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