

Briefing

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

Date due to MO: 8 July 2021 **Action required by:** 11 July 2021

Security level: IN CONFIDENCE **Health Report number:** 20211520

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)
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 Withdrawn | |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) Amendment Order 2021 for signing

Security level: IN CONFIDENCE **Date:** 8 July 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) Amendment Order 2021 (the Amendment Order). The Amendment Order expands the groups of workers required to be vaccinated to include all government workers and private workers who undertake specified work at the border.
2. This report discloses all known relevant information and implications.

Summary

3. The Ministry of Health (the Ministry) considers there is a public health rationale for requiring that specified 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.
4. On 17 May 2021, you agreed to amend the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) to require additional groups of workers to be vaccinated to work at certain higher-risk workplaces [OC210396 refers].
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 all, or part of, the Order may be successfully challenged in court and found to be ultra vires.
6. You undertook Ministerial consultation, and this was completed on 5 July 2021.
7. We recommend that you sign the attached Amendment Order by 11 July 2021. This will allow the Amendment Order to be gazetted on or before 12 July 2021 to ensure we meet our statutory obligation to provide at least 48 hours' notice between gazetting and the Amendment Order coming into effect.

8. The Amendment Order will then come into effect at 11:59pm on Wednesday 14 July 2021. This will enable persons conducting a business or undertaking (PCBU)s to access the vaccination status of their employees from the Border Workforce Testing Register from this date.
9. The requirement for the new groups of workers to have received at least one dose of the vaccine will commence on:
 - a. 11:59pm Thursday 26 August 2021 for government workers not already captured by the Order
 - b. 11:59pm Thursday 30 September 2021 for all other groups brought under the Order.
10. All workers will need to have received two doses of the vaccine within 35 days of the commencement date for their group.

Recommendations

We recommend you:

- a) **Note** that the Ministry considers there is a public health rationale for requiring specified roles be performed by vaccinated individuals only, in response to the current pandemic.
- b) **Note** that officials advise that the COVID-19 Public Health Response (Vaccinations) Amendment 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.
- c) **Note** that these measures engage rights protected by the New Zealand Bill of Rights Act 1990 (NZBORA).
- 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.
- e) **Note** that following Ministerial consultation, the COVID-19 Public Health Response (Vaccinations) Amendment Order 2021 has been finalised for your approval.
- f) **Sign** the attached COVID-19 Public Health Response (Vaccinations) Amendment Order 2021 by 11 July 2021. **Yes/No**



Dr Ashley Bloomfield

Director-General of Health

Te Tumu Whakarae mō te Hauora

Date: 08/07/2021



Hon Chris Hipkins

Minister for COVID-19 Response

Date: 8/7/2021

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

Background

1. The COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) came into force on 1 May 2021. It requires that specified work at the border only be performed by workers who have been vaccinated.
2. The Order currently applies to:
 - a. all work undertaken in the context of managed isolation and quarantine facilities (MIQFs) (MIFs) - including transportation to and from these facilities, and
 - b. work undertaken by certain government officials in affected workplaces (airports and aircraft, ports and ships).
3. On 17 May 2021, you agreed to amend the Order to require additional groups of workers be vaccinated to work at certain workplaces [OC210396 refers].
4. On 9 June 2021, you agreed that certain workers who handle “affected items” removed from MIQFs, MIFs, aircraft and ships would be included in the Order if those workers routinely provide services in relation to a MIQF, MIF, affected aircraft or affected ship, and ‘have contact with’ persons who belong to different groups in the Order [HR20211235].

Contents of the Amendment Order

The Amendment Order expands the requirement to be vaccinated to additional groups

5. The Amendment Order expands the groups of persons required to be vaccinated to perform certain kinds of work at specified workplaces. The impact of this will be that persons must be vaccinated to perform the following:
 - a. all work at MIQFs and MIFs
 - b. all work in airside areas of affected airports, and some other higher risk work at airports
 - c. certain higher risk work at affected ports
 - d. work conducted at accommodation services where specified aircrew members are self-isolating
 - e. work that involves handling affected items removed from ships, aircraft or MIQFs or MIFs, where the worker works for a PCBU routinely engaged to provide services for an aircraft, ship, MIQF or MIF, and ‘has contact with’ persons who belong to different groups in the Order.

Exemptions

6. In addition to the exceptions that are already under the Order, the Amendment Order provides two conditions that allow for an exemption from the vaccination requirement: an exemption under medical grounds; and an exemption if it is necessary to avoid significant negative economic impacts arising from the disruption of the supply chain.

Medical grounds

7. A person who handles affected items is not subject to the Order if a suitably qualified health professional determines that it would be inappropriate for that person to be vaccinated.

Avoiding significant negative economic impacts arising from the disruption of the supply chain

8. The Amendment Order provides the Minister with the power to grant an exemption for specified workers from the vaccination requirement if satisfied that it is necessary to avoid significant negative economic impacts arising from the disruption of the supply chain.
 - a. To ensure this provision is consistent with the underlying public health rationale for the Order, this provision does not come into force until 28 days after the commencement of the Amendment Order (11:59pm Wednesday 11 August 2021).
 - b. This will ensure that PCBUs do not apply for the economic exemption before they have had the opportunity to genuinely engage with their obligations under the Amendment Order.
 - c. This commencement date allows seven weeks for PCBUs to make their exemption applications and for officials to process them before the commencement of the vaccination obligations.

Process for amending a section 11 Order

9. 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); or
 - c. it has been authorised by the Prime Minister.
10. There is currently an epidemic notice in place, which allows orders to be made under section 11 of the Act.
11. As the Minister for COVID-19 Response, you may make orders under section 11 of the Act.
12. To make or amend 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
 - 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 NZBORA
 - 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 the order is appropriate to achieve the purposes of the Act.
13. 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 [HR20210994 refers] and is also set out below.

The Vaccinations Order 2021 will be reviewed in the first quarter of 2022

14. You and the Director-General of Health have obligations under the Act to review the Order on an ongoing basis. A review would ensure that the Order is fit for purpose, especially given that most of the New Zealand population 16 years of age or older are expected to have been offered a COVID-19 vaccine by the end of the year.
15. The Ministry will review the Order on an ongoing basis and advise you on any changes that may be required. Additionally, as agreed, officials will provide you detailed advice by the end of the first quarter of 2022 after undertaking a cross-agency policy review. This approach takes into consideration your obligations under the Act and will provide a timely opportunity to consider how the COVID-19 vaccine rollout has impacted on settings. It also has a greater potential to support compliance within the sector, as it does not signal that compliance requirements are time-limited.

Consultation

16. You undertook Ministerial consultation, and this was completed on Monday 5 July 2021.
17. During consultation, the Ministry of Justice suggested that consideration could be given to including an exemption for religious beliefs, should the Minister wish to reduce risk further in relation to the discrimination issue arising from the exemption on medical grounds.
18. As per previous advice to you [HR20211235], we do not propose an exemption for individuals with an ethical or religious objection to vaccination.
19. Crown Law Advice on this matter is contained in Annex One.

Public health rationale

20. You have previously been provided with detailed public health rationale for the Amendment Order [OC210396 and HR20210994 refers].
21. The Ministry has advised that there is a public health rationale for requiring that specified 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 and may transmit the disease to others. However, this may not be required indefinitely into the future, as information about disease transmission and population immunity may change.

22. A number of international studies have shown that vaccination leads to a significant reduction in the rate of transmission of COVID-19.¹
23. 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.
24. Therefore, while vaccination does not prevent all possible episodes of transmission, it 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 greatly protect the wider community.

Border Workers

25. It is important to note that not all border work carries the same level of public health risk. Factors that influence the risk of being exposed to COVID-19 include the following:
 - a. the number of international travellers (potentially infected people) the border worker may come in contact with (the more travellers, the higher the risk)
 - b. the ability of the border worker to maintain physical distancing from international travellers (the less physical distancing, the higher the risk)
 - c. the length of interactions the border worker may have with international travellers (the longer the interaction, the higher the risk)
 - d. whether the interaction is inside or outside (inside is higher risk).
26. MIQF and MIF workers are likely to be higher-risk when assessed against the above criteria. However, a person that handles affected items, and does not have any contact with international travellers is at lower risk.
27. The risk of exposure for border workers is recognised in the COVID-19 Public Health Public Health Response (Required Testing) Order 2020 (RTO). The RTO focusses on high-risk workers at the border and, even within this group, not all workers are tested to the same frequency. Some border workers are not required to be tested at all because of the low-risk nature of their work.

New Zealand Bill of Rights Act 1990

28. A summary of Crown Law's advice is attached as Annex One.

Te Tiriti o Waitangi

29. Requiring specified work to be undertaken by workers who have been vaccinated could potentially undermine equity and may have Te Tiriti o Waitangi implications. This is because Māori traditionally have lower vaccination rates than non-Māori. This may mean that Māori are more likely to be negatively impacted by the Amendment Order.

¹ https://www.health.govt.nz/system/files/documents/pages/science_updates_7_may_2021.pdf

30. However, we know from historical examples that Māori 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.

Equity

31. There is potential for the Amendment Order to discriminate against workers on the grounds of sex, disability and 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 impacted.
32. If workers who are subject to the Order are not vaccinated, their employers may choose to redeploy them or (following appropriate HR process) may choose to terminate their employment.
33. We also anticipate that a high number of people affected by the Order will be migrants or have English as a second language. Therefore, it may be difficult for them to understand what is being asked of them, why and the potential limitations, or exemptions of the Order. This language barrier could lead to their employment being terminated inappropriately.
34. Given that the vaccination is available to all groups, we do not consider the equity concerns above are sufficient to prohibit the requirement that specified high-risk roles only be undertaken by vaccinated people.

Implementation

35. The Border Workforce Testing Register (BWTR) is the most comprehensive database of the border and MIQF and MIF workforce. The Order allows the Ministry to pre-populate the BWTR with data from the COVID-19 Immunisation Register to proactively identify who should be vaccinated.
36. The Order authorises the sharing of vaccination status of workers (subject to the Order) with their PCBUs/employers. This provides PCBUs/employers with an accurate record of the vaccination status of their workforce and assists them to manage their obligations, under the Order, in a more efficient way.
37. Work is underway to ensure that PCBUs and workers are appropriately supported to meet their obligations under the Amendment Order.
38. The interagency engagement group will communicate the new requirements with key stakeholders. This will enable us to circulate key messages and address any misinformed speculation.

Next steps

39. We recommend that you sign the attached Amendment Order by 11 July 2021. This will allow the Amendment Order to be published and gazetted on 12 July 2021 to ensure we meet our statutory obligation to provide at least 48 hours' notice between gazetting and the Amendment Order coming into effect.

40. The Amendment Order and will come into force at 11:59pm 14 July 2021. This will enable all PCBUs to access the vaccination status of their employees from the BWTR from this date.
41. The requirement for the new groups of workers to have received their vaccines are as follows:

Groups	1st dose	2nd dose
All other government workers	11:59pm 26 August 2021	11:59pm 30 September 2021
All other groups	11:59pm 30 September 2021	11:59pm 4 November 2021

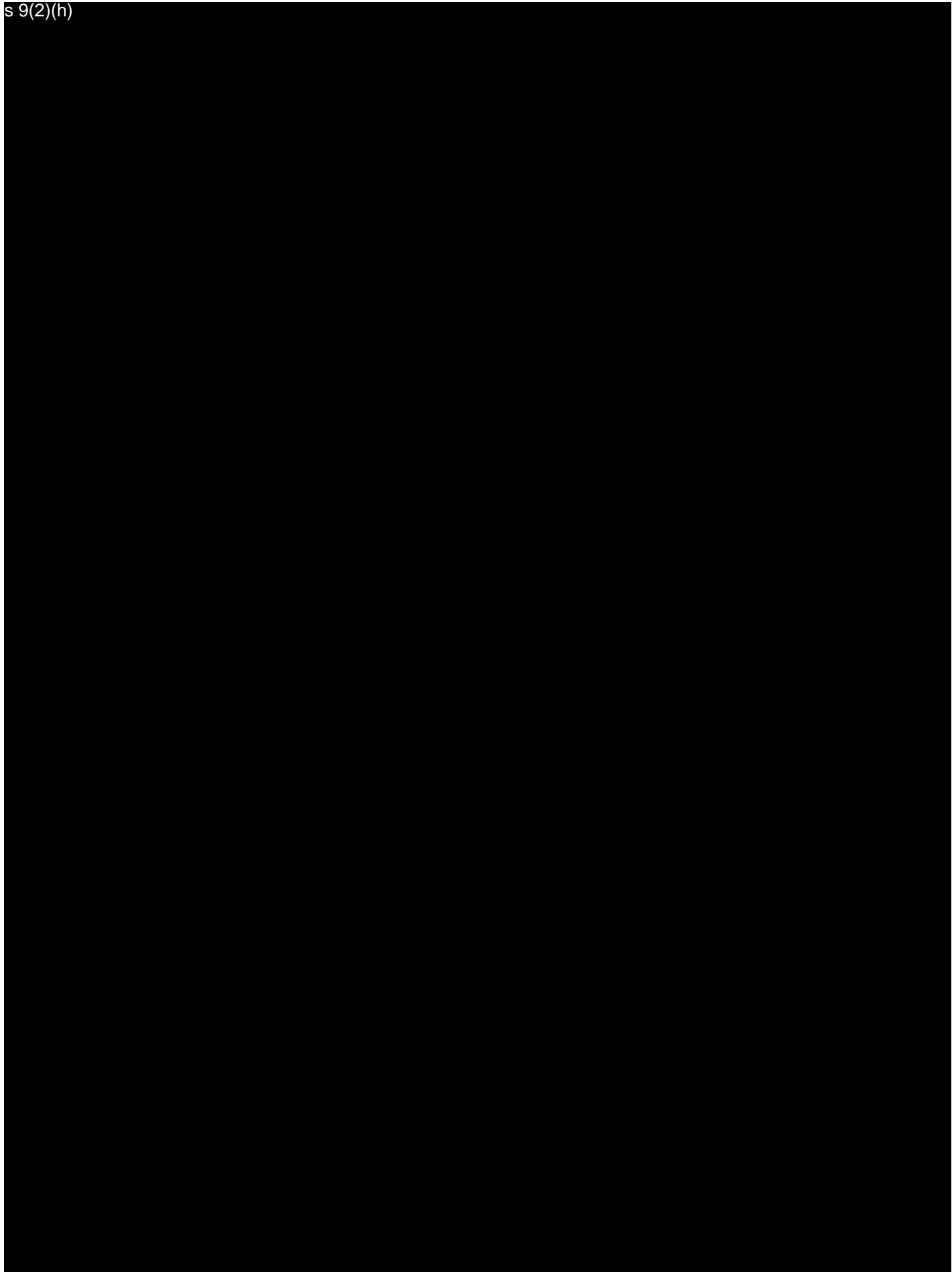
42. There is no change to requirements for workers already subject to the Order.

ENDS

PROACTIVELY RELEASED

Annex 1 – Crown Law advice (Legally Privileged)

s 9(2)(h)





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