

Briefing

COVID-19 Public Health Response (Vaccination) Amendment Order (No 6) 2021

Date due to MO: 30 November 2021 **Action required by:** 30 November 2021

Security level: IN CONFIDENCE **Health Report number:** 20212648

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

Contact for telephone discussion

Name	Position	Telephone
Dr Ashley Bloomfield	Director-General of Health	S9(2)(a)
Steve Waldegrave	Group Manager, COVID-19 Policy	

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 Withdrawn | |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 (Vaccination) Amendment Order (No 6) 2021 – for signature

Security level: IN CONFIDENCE **Date:** 30 November 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 (No 6) 2021.

Summary

2. On 26 November 2021, Cabinet agreed [CAB-21-MIN-0436] that, under the COVID-19 Protection Framework (CPF), at all colour settings vaccinations will be required for work done in certain business and services. This requirement is regardless of whether a business or service chooses to require COVID-10 Vaccination Certificates from its customers.
3. To give effect to Cabinet's decision above, the COVID-19 Public Health Response (Vaccinations) Amendment Order (No 6) 2021 (the Amendment Order) broadens the range of work covered by vaccination requirements, in line with the CPF. The Amendment Order will introduce vaccination requirements for workers at food and beverage businesses or services, gyms, permitted events, close-proximity businesses or services, and at tertiary education providers.
4. Once Ministerial consultation on the draft Amendment Order is complete, Officials recommend that you sign the final Amendment Order on Tuesday 30 November 2021, so that it can be published in the *New Zealand Gazette* that day. 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. It is anticipated that Order will come into effect at 12:00 am on Friday 3 December 2021, one minute after the COVID-19 Protection Framework (CPF) Order commences at 11:59pm on Thursday 2 December 2021. This one minute difference is needed because the Amendment Order references terms defined in the CPF Order.

Recommendations

We recommend you:

- a) **Note** that on 26 October 2021, Cabinet agreed to require vaccination for work done in settings where COVID-19 Vaccination Certificates (CVCs) must be used to operate or operate with fewer restrictions under the COVID-19 Protection Framework (CPF) [CAB-21-MIN-0436]. **Noted**
- b) **Note** that you and the Minister for Workplace Relations and Safety have since confirmed that the above decision includes the Green level of the COVID-19 Protection Framework (i.e. the vaccination requirements are intended to apply across all CPF colour settings). **Noted**
- c) **Note** that on 24 November 2021, the Social Wellbeing Committee (SWC) agreed that the mandate referred to in paragraphs a and b above will apply to gatherings covered by the COVID-19 Protection Framework only if they choose to apply the CVC requirements [SWC-21-MIN-0199]. **Noted**
- d) **Note** that Officials advise that the attached draft 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**
- e) **Note** that the Cabinet decisions referred to in this paper fulfil your requirement to consult on the contents of the attached Amendment Order with the Prime Minister, the Minister of Justice, Minister of Health, and any other Ministers you think necessary. **Noted**
- f) **Agree** to sign the attached Amendment Order. **Yes/No**



Dr Ashley Bloomfield
Te Tumu Whakarae mō te Hauora
Director-General of Health

Date: 30 / 11 / 2021

Hon Chris Hipkins

Minister for COVID-19 Response

Date:

COVID-19 Public Health Response (Vaccination) Amendment Order (No 6) 2021 – For signature

Contents of the Order

6. The Amendment Order broadens the range of work covered by vaccination requirements, corresponding to the introduction of the COVID-19 Protection Framework (CPF). Vaccination will be required at all levels of the CPF for work done in the following businesses or services, regardless of whether the business or service chooses to require CVCs from customers [CAB-21-MIN-0436]:
 - a. Hospitality,
 - b. Events,
 - c. Close contact businesses,
 - d. Gyms, and
 - e. At the Red level only, tertiary education.
7. To facilitate the introduction of the CPF, a new part will be added to Schedule 2 (“groups of affected persons”) of the Amendment Order to include workers at food and beverage businesses or services, gyms, permitted events, close-proximity businesses or services, and at tertiary education providers. The definition of these terms will refer to the order establishing the CPF, to ensure consistency.
8. The following existing clauses of the Amendment Order are amended to apply to the new types of work being added to Schedule 2:
 - a. Clause 7 (duty of affected person not to carry out certain work): this will apply to the new types of work.
 - b. Clause 8 (duties of relevant PCBUs in relation to vaccination): this will apply to the new types of work.
 - c. Clause 9: the Chief Executive of MBIE will be able to authorise affected persons who are not vaccinated to carry out work that is unanticipated, necessary, time-critical, cannot be carried out by someone who is vaccinated, and that must be carried out to prevent the ceasing of operations.
 - d. Clauses 9A and 9B (Director-General authorisation for workers to work without being fully vaccinated, and exemptions from vaccination requirements): these clauses will apply to the new types of work.
 - e. Clauses 10 and 11: these clauses will not apply to the new types of work because the Ministry of Health register will not be available for these types of work.
 - f. Clause 11A (record-keeping duties for employers): this clause will apply to the new types of work, except clause 11A(4). This is to avoid workers being liable for a

penalty when the likely consequence of not providing updated information includes job loss.

- g. Clause 12A (power of Minister to grant exemptions): this clause will apply to the new types of work, but additional exemption grounds are not being added to clause 12A. MBIE officials consider this means it is highly unlikely a business would meet the existing thresholds in clause 12A (e.g. preventing significant disruption of essential supply chains).
 - h. Clause 13 (infringement offence): this clause will apply to the new types of work.
9. Cabinet has since decided that work done at gatherings does not require vaccination. Instead, if the organiser of a gathering has decided to require CVCs from attendees, workers in those settings will be treated similarly [SWC-21-MIN-0199].
10. Workers carrying out the new types of work being added to the Amendment Order can continue working with a single dose of a COVID-19 vaccine until 17 January 2021, at which point two doses of a COVID-19 vaccine will be required.

Process for making a section 11 Order

11. 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.
12. There is currently an epidemic notice in place, which allows orders to be made under section 11 of the Act.
13. As the Minister for COVID-19 Response, you may make orders under section 11 of the Act.
14. 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 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.
15. 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

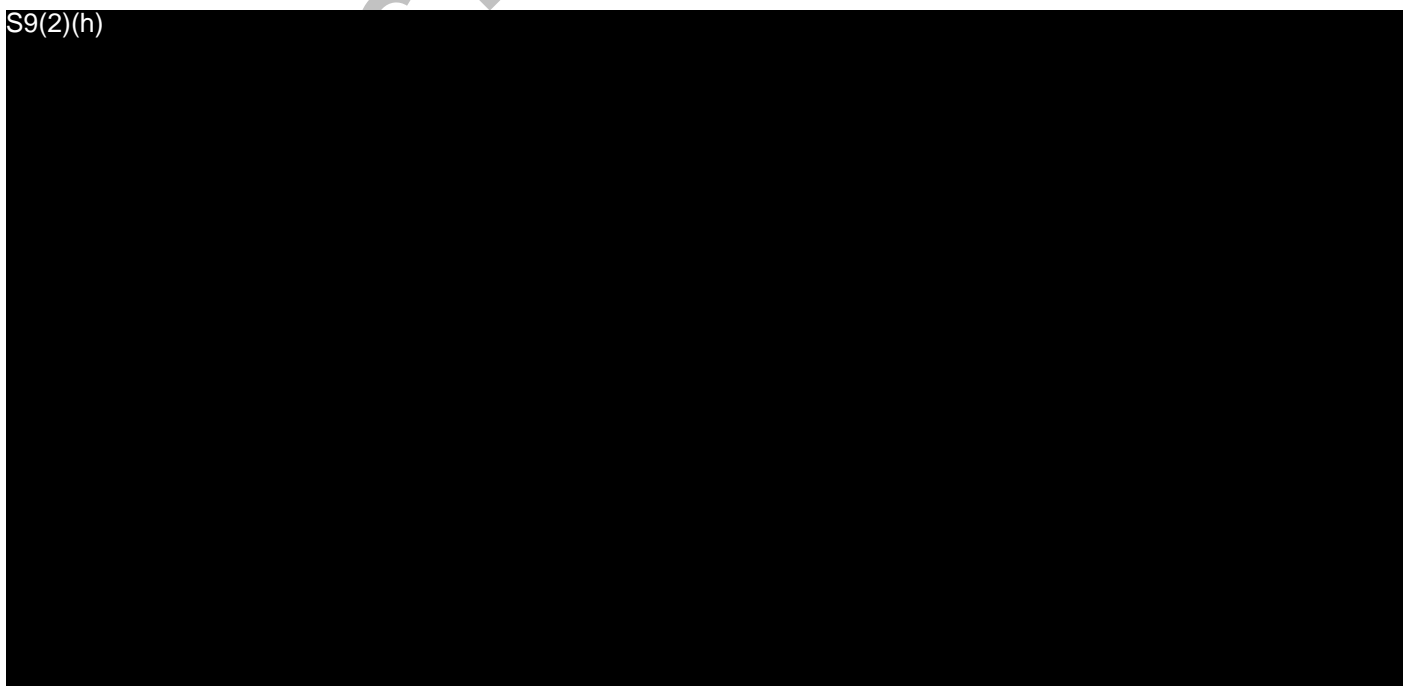
16. The public health issues have been outlined in the joint Ministry of Health and Department of the Prime Minister and Cabinet (DPMC) briefings DPMC-2021/22-412 dated 24 September 2021 and DPMC-2021/22-585 dated 14 October 2021.

New Zealand Bill of Rights Act 1990

17. Requiring vaccination for work (e.g. in CVC settings) limits section 11 (the right to refuse to undergo medical treatment) and section 19 (freedom from discrimination) of the New Zealand Bill of Rights Act 1990 (BORA).
18. The proposals limit the right to refuse to undergo medical treatment because, faced with a choice between being vaccinated and losing their job, a person may feel compelled to be vaccinated (i.e. their decision to refuse may be overborne). The proposals may also limit the right to be free from discrimination in the case of individuals who have a medical reason for not being vaccinated, such as a severe allergy. This may constitute a "disability" for the purposes of section 19 of BORA.
19. In order for the Government to impose limits on these rights, the purpose that mandatory vaccination seeks to achieve must be an important one. Vaccination must be clearly linked with the intended purpose, and there must not be an alternative that restricts the rights less (such as frequent testing or wearing of PPE) which would achieve the objective instead.
20. Limitations on these rights are justified because of the strong public health objectives of the CPF, and the apparent lack of less-restrictive alternatives to achieve those objectives. The Employment Relations Act was amended last week to protect workers who lose their job because of a Government-imposed vaccination mandate. This includes a requirement for employers to provide a minimum of four weeks' paid notice of termination. The possibility for exemptions for people who cannot be vaccinated for medical reasons is also relevant.

Crown Law advice

S9(2)(h)



Equity

26. The relevant equity issues have been outlined in the Cabinet submission under CAB-21-MIN-0436.

Next steps

27. Officials strongly recommend that you sign the Amendment Order on Tuesday 30 November 2021, so that it can be published in the *New Zealand Gazette* that day. This will allow officials to meet the statutory obligation to provide at least 48 hours' notice between gazetting and the Order coming into effect.
28. Once signed the Order will come into effect at 12:00 am on Friday 3 December 2021, one minute after the CPF Order commences at 11:59pm on Thursday 2 December 2021.

ENDS.