

Briefing

Policy decisions required for further amendments to the COVID-19 Public Health Response (Vaccinations) Order 2021

Date due to MO: 3 November 2021 **Action required by:** 4 November 2021

Security level: IN CONFIDENCE **Health Report number:** H202212418

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

Copy to: Hon Andrew Little, Minister of Health

Contact for telephone discussion

Name	Position	Telephone
Maree Roberts	Deputy Director-General, System Strategy and Policy	s 9(2)(a)
Alison Cossar	Manager, Public Health Policy, 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 Withdrawn | |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:

Briefing title

Security level: IN CONFIDENCE **Date:** 03 November 2021

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

Purpose of report

1. This report provides advice on further amendments to the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) to clarify issues and processes for relevant groups of workers prior to the deadline for mandatory vaccination, and seeks your agreement to issue drafting instructions for the amendments.
2. This report discloses all relevant information and implications known at this time.

Summary

3. On 25 October 2021 the COVID-19 Public Health (Vaccinations) Amendment Order (No 3) 2021 came into force, extending mandatory vaccination to all healthcare workers undertaking high risk work in the health and disability care sector, as well as all workers in affected education services who may have contact with children or students, and all workers who will enter a prison, either as staff or to provide prison services.
4. Further amendments are now required to address practical issues that have been identified in the lead up to the dates specified for mandatory vaccinations. It is necessary to clarify the policy intent to ensure that amendments to the Order align and are lawful, are practical and robust, and so employers and affected workers understand their vaccination obligations.
5. Amendments to be included are from the Ministry of Health, Ministry of Education, Department of Corrections and New Zealand Police. The Department of Corrections and NZ Police are briefing you separately.
6. Amendments to the Order are needed urgently before the first dose for Corrections staff is required, and therefore the amendments will need to be signed and gazetted on Friday 5 November 2021.
7. If you agree to the Ministry issuing drafting instructions to the Parliamentary Counsel Office (PCO), the Ministry will provide you with a draft Amended Order for Ministerial consultation by 5 November 2021. The Amended Order is proposed to come into force on 7 November 2021 after being signed.

Recommendations

We recommend you:

- a) **Note** that the amendments to the COVID-19 Public Health Response (Vaccinations) Order 2021 are required to ensure that the mandatory vaccinations are workable. The amendments will include changes from NZ Police and the Department of Corrections that are addressed in separate advice.
- b) **Agree** that an amendment is drafted that refines the scope of clause 7A of the COVID-19 Public Health Response (Vaccinations) Order 2021 for clinical exemptions from vaccination Yes/ No
- c) **Agree** to the proposed process outlined in this report for workers applying for clinical exemptions from being vaccinated against COVID-19 Yes/ No
- d) **Agree** that health practitioners who solely conduct consultations with patients online or remotely are not included in the COVID-19 Public Health Response (Vaccinations) Order 2021 Yes/ No
- e) **Note** the current exemption for care and support workers living in the same house as the person they are providing services to, is inconsistent with the government's overall policy of having a workforce that is vaccinated against COVID-19, and is inconsistent with the Government's overall response to the Family Carers' litigation
- f) **Agree** to an amendment to the COVID-19 Public Health Response (Vaccinations) Order 2021 to include care and support workers living in the same house as the person they are providing services to Yes/ No
- g) **Agree** that the COVID-19 Public Health Response (Vaccinations) Order 2021 be amended to enable the Minister to grant exemptions to prevent the significant disruption to the operation of learning in registered schools or to the essential operations of hostels Yes/ No
- h) **Agree** that the power to grant exemptions for schools and hostels ceases on 1 January 2022 Yes/ No
- i) **Agree** that the power to grant exemptions to prevent the significant disruption to the operation of learning in registered schools or to the essential operations of hostels is delegated by the Minister for COVID-19 Response to the Secretary for Education Yes/ No
see comment
- j) **Agree** that the COVID-19 Public Health Response (Vaccinations) Order 2021 and the COVID-19 Public Health Response (Required Testing) Order 2020 be amended to clarify that only licensed early childhood services are captured by the requirements in these orders Yes/ No

Regarding re (i) I would like the delegations consistent across all exemptions processes. As Minister I currently approve the border and health worker exemptions so don't agree to this current proposal, but I'm happy to consider a proposal to delegate in a more consistent way across the workforces. CH

- k) **Note** that advice on further amendments to the COVID-19 Public Health Response (Vaccinations) Order 2021 regarding workers at the Department of Corrections and NZ Police will be provided to you separately
- l) **Agree** the Ministry will issue drafting instructions to Parliamentary Counsel Office to draft the COVID-19 Public Health Response (Vaccinations) Amendment Order (No 4) 2021. Yes/No
- m) **Note** that under section 9(1)(c) of the COVID-19 Act you are required to consult with the Prime Minister, Minister of Justice and Minister of Health before making or amending a COVID-19 Order.

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


Hon Chris Hipkins
Minister for Covid-19 Response
Date: 4/11/2021

PROACTIVELY RELEASED

Policy decisions required for further amendments to the COVID-19

Public Health Response (Vaccinations) Order 2021

Background

10. The COVID-19 Public Health (Vaccinations) Order 2021 (the Order) came into force on 1 May 2021. It makes it mandatory for work at certain places to be carried out by affected persons who are vaccinated. This is due to the risk of exposure to, and transmission of COVID-19 by these workers. In the originating Order this applied to specified work performed at the Border.
11. On 14 July 2021 the COVID-19 Public Health (Vaccinations) Amendment Order 2021 came into force, extending the scope of the Order to cover additional work performed at the Border, and to create a public health exception for certain workers at the Border who have no interaction with travellers or crew.
12. On 17 October 2021 the COVID-19 Public Health (Vaccinations) Amendment Order (No 2) 2021 came into force, to make allowance for affected persons to be vaccinated with COVID-19 vaccines other than the Pfizer/BioNTech vaccine.
13. On 25 October 2021 the COVID-19 Public Health (Vaccinations) Amendment Order (No 3) 2021 came into force, extending mandatory vaccination to all healthcare workers undertaking specific work in the health and disability care sector, all workers in affected education services who may have contact with children or students, and all workers who will enter a prison, either as staff or to provide prison services.
14. Further amendments are now required to address practical issues that have been identified in the lead up to the dates specified for mandatory vaccinations. It is necessary to clarify the policy intent to ensure that amendments to the Order align and are lawful, are practical and robust, and so employers and affected workers understand their vaccination obligations.

Comment

Amendments to clinical exemptions

Context

15. Evidence of clinical exemption for vaccination is important for people who are mandated to be vaccinated under the Order.
16. Currently the COVID-19 Public Health (Vaccinations) Order 2021, at clause 7A, outlines that the relevant PCBU who employs the affected person can provide the register with written confirmation that a suitably qualified health practitioner:
 - (i) has examined the affected person; and
 - (ii) has determined that vaccinating the affected person would be inappropriate.
17. This clause is no longer fit for purpose and requires amendment. The Ministry is aware some people have already sought an exemption from their healthcare practitioners. However, it has become clear that some people who wish to avoid vaccination, but do not

meet the clinical criteria, have been approaching healthcare practitioners requesting an exemption, and some practitioners have provided one.

18. The Ministry is also aware that some healthcare practitioners have received excessive demands from patients including some who have used aggression towards their practitioner.
19. The COVID-19 Vaccine Technical Advisory Group (CV TAG) have advised that to date, the Pfizer COVID-19 vaccine has shown an excellent safety and efficacy profile and is recommended for all New Zealanders 12 years of age and over.
20. The only contraindication to the Pfizer vaccine is hypersensitivity to the active substance or to any of the excipients, for example anaphylaxis to a vaccine component, such as polyethylene glycol (PEG). Such reactions are rare and, even people with this history can usually receive the Pfizer vaccine after specialist assessment under supervision.
21. Well-defined clinical criteria for a temporary clinical exemption from full vaccination are needed for both the health professionals who will be asked to provide the exemption and for the people applying for an exemption.

Proposed principles of clinical exemptions

22. As there are very few situations where a vaccine is contraindicated a clinical exemption is expected to be rarely required.
23. Vaccinations may reasonably be temporarily deferred for individuals with some acute major medical conditions, such as undergoing major surgery or hospital admission for a serious illness. Typically, these conditions are considered time-limited, and therefore a temporary exemption is considered appropriate.
24. Exemptions should only be given where a suitable alternative COVID-19 vaccine is not readily available for the individual.
25. Exemptions should be for a specified time, reflecting, for example, recovery from clinical conditions or the availability of alternate vaccines.
26. It is likely that most people who have other medical conditions or who have experienced adverse events can be safely vaccinated with extra precautions.

Proposed process for clinical exemptions requests

27. Amending the Order to provide a clear centralised process for approving exemptions will ensure the narrow scope of the exemption's framework is maintained. It will also provide clarity and certainty for those who truly cannot receive the vaccine and avoid confusion for those who do not meet the clinical criteria.
28. The Ministry proposes the following process for people who need to request a clinical exemption. This process aligns with the process already proposed as part of the CVC Order:
 - i) When seeking a clinical exemption:
 - a. The person must be examined by a medical practitioner or a nursing practitioner

- b. The medical practitioner or nursing practitioner must assess whether the individual meets a clinical contraindication specified by the Director-General by notice in the gazette. If satisfied that such a clinical contraindication exists, the health practitioner must:
- complete a request for an exemption on behalf of the individual, setting out the gazetted clinical contraindication that the individual is considered to have and the reasons for that belief; and
 - submit the exemption to the Ministry of Health approval panel for consideration.
- ii) The approval panel will consider exemption requests that are submitted in accordance with these requirements and decide:
- a. if an exemption is to be granted; and
 - b. the duration of the exemption (maximum duration of 6 months).
- iii) The Ministry must notify the applicant practitioner and the individual in writing of their decision.
29. The Order will make exemptions obtained before the 7 November 2021 void and people will have to re-submit via the new process. This will ensure that only those who genuinely require clinical exemptions receive them. This is likely to require a short transition period for some workers to arrange a new exemption, or get vaccinated for those whose first dose would be due on the 6 November 2021.
30. We anticipate this new process will create frustration for those people who have already obtained an exemption from their healthcare practitioner. This situation will apply to a very small number of people as there are very few people in New Zealand who are likely to meet the clinical criteria.

Healthcare practitioners who conduct consultations via remote means

31. On 11 October 2021, Cabinet agreed that high risk work in the health and disability sector be undertaken by vaccinated workers (CAB-21-MIN-0413 refers). The Amendment Order was amended to reflect this decision. However, there have been uncertainty as to whether the Amendment Order applies to healthcare practitioners who conduct their work through either online or phone consultations.
32. As the policy intent for the Amendment Order was intended to be directed at those health care workers undertaking high risk work in the health and disability sector, the risk for healthcare practitioners conducting consultations virtually (i.e. online or by phone) is very low thus should not be captured by the Amendment Order.
33. The Amendment Order does not currently specify this, and the Ministry proposes an amendment to clarify this situation for virtual consultations. These practitioners would not be required to be vaccinated as long as the risk remains low and consultations are virtual or remotely.
34. The amendment will stipulate that these practitioners must conduct consultations remotely for all their patients and for all consultations.

Care and support workers who live in the same house as the person they provide service to (usually family carers)

Context

35. The Family Carers litigation found that the policy of not paying family carers to support disabled people was inconsistent with the Human Rights Act 1993 and could not be justified under the New Zealand Bill of Rights Act 1990. This Government's general response to the litigation is to treat paid family carers the same as other carers.
36. The COVID-19 Public Health Response (Vaccinations) Order 2021, however, creates different vaccination requirements for different groups of people who are employed or engaged to provide care and support to disabled people:
 - a. care and support workers are generally required to be vaccinated under the COVID-19 Public Health Response (Vaccinations) Order 2021.
 - b. but, care and support workers who live in the same house as the person they are providing services to (usually family carers), are not required to be vaccinated.
37. Whilst this exception was included in CAB-21-MIN-0413, requiring all people who are employed or engaged as care and support workers to be vaccinated is consistent with the government's overall policy of having a workforce that is vaccinated against COVID-19 and is consistent with the Government's overall response to the Family Carers' litigation. It also removes the risk of recreating policies that may be found to be inconsistent with the Human Rights Act 1993. The disability community – including carers - is strongly supportive of this approach.
38. The Ministry proposes an amendment to the Order that revokes the exemption for care and support workers who live in the same house as the person they provide services to and includes them in the general definition of care and support workers, to ensure they are captured by the Order.
39. Some paid family carers may consider that this means they are being forced to be vaccinated, and there are likely to be difficulties enforcing vaccination requirements, especially when the paid family carer lives in the same house as the disabled person. This requirement, however, flows from them seeking to be treated the same as other employees.

Amendments for schools and hostels

40. The COVID-19 Public Health Response (Vaccinations) Order 2021 requires most members of the early learning and schooling workforce to have a first dose of the COVID-19 vaccine by 15 November 2021. After this date, an unvaccinated person who provides a service in which they may have contact with children or students or works onsite while children or students are present is in breach of the vaccination order and commits an infringement offence.
41. While employers will not be in breach of the vaccination order at this point in time, they will have other legal responsibilities which makes it unlikely that they will allow unvaccinated persons to provide an onsite service to children and students after 15 November 2021.

42. As a result of this, some education services, particularly if they are small, rural, or whānau-led, have been concerned about their ability to continue operating face-to-face services after 15 November 2021. The Ministry of Education has already received multiple reports of education services not having enough vaccinated staff to continue operating after 15 November 2021.
43. To give more flexibility for employers to manage staff ahead of 1 January 2022 and to ensure the continuity of face-to-face learning for children and students, we consider that the vaccinations order should be amended to enable the Minister for COVID-19 Response (the Minister) to grant exemptions to prevent the significant disruption to the operation of face-to-face learning in registered schools; or to the essential operations of a hostel.
44. The Ministry of Education does not propose including the early learning sector in this exemption process as we have advised that due to the diverse nature of arrangements that exist in the early learning context an exemption would create possible public health risks. Additionally, unlike compulsory schooling, attendance at early learning is not compulsory. Children do not have a statutory right to attend early childhood education services, and parents do not have a corresponding obligation to send their children there.
45. The Minister would only be able to provide such an exemption until 1 January 2022. After this date, only clinical exemptions would be allowed.
46. Enabling the Minister to grant an exemption for schools and hostels is consistent with the existing exemptions that the Minister can grant to prevent the significant disruption to essential supply chains, health services and essential operations of a prison.
47. In addition to ensuring continuity of face-to-face education and/or care and providing employers with more flexibility to make staffing arrangements ahead of 1 January 2022, the exemption application process would provide further insight into communities that are struggling with vaccination. This could better enable the Government to provide targeted vaccination support to these education services and communities.
48. It is recommended that the power to grant exemptions to prevent the significant disruption to the operation of face-to-face learning in registered schools; or to the essential operations of a hostel is delegated by the Minister to the Secretary for Education.

Clarification of vaccination and testing orders application to early childhood education services

49. As part of the education system vaccination and testing requirements decisions made by Cabinet on 11 October, Cabinet agreed that the definition of 'education services' includes 'all early childhood education services, including homebased education and care services, but excluding playgroups' [CAB-21-MIN-0414]. This definition could be argued to inadvertently capture unlicensed early childhood education services. We recommend an amendment to the order clarifying that only licensed early childhood services are intended to be captured.

Further amendments to the Order by Department of Corrections and New Zealand Police

50. Further amendments are being provided in separate advice from the Department of Corrections and NZ Police and will have staggered commencement dates. For Police, this will be immediate when gazetted to ensure that the new requirement is in place before their deadline, and after 48 hours of gazetting for the other changes.

Human Rights

51. Previous Bill of Rights Act advice has been given on the policy of the recent amendments to the COVID-19 Public Health Response (Vaccinations) Order 2021. These new changes ensure the Order appropriately implements those decisions and no further BORA considerations apply.

Equity

52. The relevant equity issues have been outlined in CAB-21-SUB-0413.
53. If workers who are subject to the Amendment Order are not vaccinated, their employers may choose to redeploy them or (following appropriate human resource process) may choose to terminate their employment.
54. Given that the vaccination is available to all groups, we do not consider the equity concerns above override the public health need for specified high-risk roles to only be undertaken by vaccinated people.
55. Requiring vaccination may lower the risk of transmission to communities of people that these workers ordinarily interact with including place, ethnicity, faith, and age-based communities. It is also important to reduce risks to the community through the overwhelming of health capacity.
56. Requiring vaccination may lower the risk of infection for these workers and the risk of transmission to communities of people that these workers ordinarily interact with including place, ethnicity, faith, and age-based communities.

Te Tiriti o Waitangi implications

57. The Government as Kāwanatanga and Ōritetanga has responsibilities to support health and socio-economic outcomes for Māori. While there continues to be a focus on increasing vaccination uptake for Māori, the Amendment Order may undermine the agency of iwi, hapū and whānau to protect their own wellbeing, afforded to them under the principle of tino rangatiratanga.
58. In the past, and particularly throughout the COVID-19 response, iwi, hapū and whānau have exercised, and in many cases exceeded, good practice in line with government guidelines to maintain the wellbeing of their own whānau.
59. The Ministry and other stakeholders (eg Immunisation Implementation Advisory Sector) will continue to work with Māori (and Pacific) providers to increase the number of kaimahi (staff) able to deliver the COVID-19 vaccination. This will remain a critical enabler for lifting Māori (and Pacific) vaccination rates, encouraging uptake and increasing trust and transparency.

60. It will also be important to ensure clear, constant and consistent information is provided to Māori in English and Māori through appropriate channels.
61. The Amendment Order supports health system resilience, the minimisation of community outbreaks, and any associated increase in Alert Level restrictions. This is critical to minimising and addressing existing inequities and is consistent with Te Tiriti principle of active protection.

Next steps

62. Officials recommend you sign this report no later than midday Thursday 4 November 2021 to ensure that drafting of the amendments can be undertaken by Parliamentary Counsel Office.
63. The final Order will be provided to you on Friday 5 November for signature, so that it can be published in the *New Zealand Gazette* on that date. 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.

ENDS.

PROACTIVELY RELEASED