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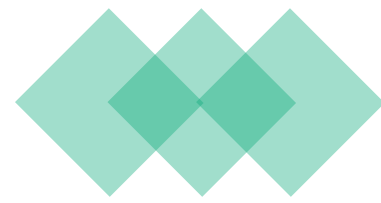
Te Kāhui Tika Tangata
Human Rights Commission

He huarahi tika tangata me Te Tiriti o Waitangi ki te Anga Tiaki Covid-19 e tūtohu ana mō Aotearoa

A human rights and Te Tiriti o Waitangi approach to Aotearoa New Zealand's proposed Covid-19 Protection Framework

Specific Conditions Briefing: upholding human
rights protections in the use of vaccination
certificates under Aotearoa's proposed
Covid-19 Protection Framework

November 2021



Overview

Purpose

The Protection Framework incorporates multiple elements, and this briefing assesses the human rights and Te Tiriti implications of vaccination certificates, and provides specific recommendations.

These statements are intended to aid public understanding about the impact on their human rights, presented in a simple and accessible format. They are also published as guidance for policy-makers and parliamentarians as legislation to support the new Covid-19 Protection Framework is tabled and implemented.

The information has been drawn from an analysis of recent complaints to the Human Rights Commission, which have more than doubled since the appearance of the Delta variant three months ago. The Briefings also come after careful assessment of all arguments in terms of the respective issues, and after seeking advice from outside the Commission on specific issues.

At the most fundamental level, wellbeing, human rights and Te Tiriti o Waitangi must lie at the heart of the policies and laws that establish and govern the Government's response to Covid-19. The International Bill of Human Rights¹ and the UN Declaration on the Rights of Indigenous Peoples underpin this approach. Recognition that efforts to address health and other disparities affecting Māori are unlikely to be effective if they are not real partnerships upholding Māori tino rangatiratanga, are clearly vital to any response to Covid-19.

Human rights in a public health emergency

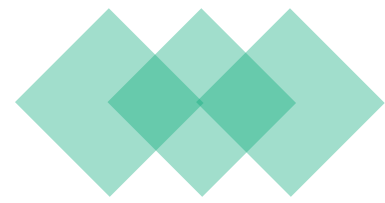
Under human rights law some rights can be limited by public health measures which respond to the outbreak of a disease posing a serious threat to the health of a population.² Also, balances have to be struck between competing human rights. In the context of COVID-19, for example, a balance has to be struck between the rights to life, healthcare and health protection, on the one hand, and the rights to work, assembly and movement, on the other.

International human rights law principles set out when and how public health measures may limit rights.³ Such measures must be specifically aimed at preventing disease. They must also be provided for, and carried out in accordance with, the law and be strictly necessary in a democratic society to achieve their objective. They must be proportionate, reasonable, non-discriminatory,

¹ The International Bill of Rights is the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

² Our own domestic human rights law enables rights to be limited under the provisions of the New Zealand Bill of Rights Act 1990. Also see Footnote 2 above: *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012 at [24] and [143].

³ The [Siracusa Principles 1984](#) in particular clauses 25 and 26; see also the UN Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, CCPR/C/128/2 (24 April 2020)



and subject to independent review. There must be no less intrusive and restrictive means available to reach the public health objectives. They must also be based on scientific evidence.⁴ Additionally, public health resources must be mobilised in the most equitable manner and should prioritise the needs of marginalised or vulnerable groups.⁵

These principles provide a check on limitations imposed on human rights. They also provide guidance on assessing whether balances between competing rights are fair and reasonable.

Vaccination certificates⁶

Vaccination certificates are an integral part of the Covid-19 Protection Framework. A vaccination certificate is a health document that records that an individual has received a vaccination.⁷ In general, they note key details about the vaccinated person, the vaccine administered, date administered, and any other relevant information. The proposed use of vaccination certificates under the Protection Framework has clear human rights and Te Tiriti o Waitangi implications. People who do not hold a vaccination certificate will be treated differently from those that do and may have their rights limited, for example, freedom of movement, and the rights to assembly, and non-discrimination. This approach differs from the alert level system where restrictions generally apply to everyone in a defined geographical area.

The use of vaccination certificates under the Protection Framework system may help to achieve a high vaccination rate, as well as containing and minimising illness and death. These are crucial public health and human rights goals.

The Ministry of Health has released the following broad outline of how the system will work:

A vaccination certificate is a confidential way of proving you are fully vaccinated.

Requiring a vaccination certificate will be optional for many locations. There will be some higher-risk settings where they will be required in order to open to the public.

Businesses, events, organisations, community, and a range of sectors may legally choose to implement a vaccination entry requirement for customers.

If a business, organisation or service doesn't wish to request proof of vaccine, they will have to operate with strict limits on capacity and space requirements. They may need to close in Orange and/or Red levels.

Everyone aged 16 and over will be able to access their COVID-19 vaccination records through a website called My COVID Record.

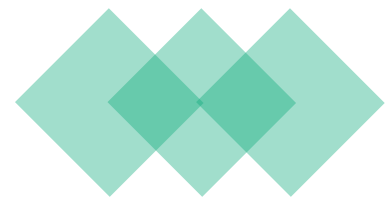
This will also be where you can download domestic and international digital vaccination certificates and find your COVID-19 test results.

⁴ The Siracusa Principles as summarised by the [World Health Organisation](#), see also *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* by the Committee on Economic, Social and Cultural Rights, E/C.12/2020/1 (6 April 2020) at 10-12

⁵ *Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights* by the Committee on Economic, Social and Cultural Rights, E/C.12/2020/1 (6 April 2020) at 14

⁶ This Briefing has made extensive use of materials on the issue by our colleagues the Scottish Human Rights Commission, to whom we are thankful.

⁷ Vaccination certificates have been implemented in various forms in other countries, including the UK, the EU, Canada and Australia.



Take this link for [My Covid Record](#) or you can take the following link for the same information <https://app.covid19.health.nz/>⁸

The Human Rights Commission welcomes the Government's clear confirmation that proof of vaccine status will never be used for essential public services such as hospitals and transport.

Human rights implications

Requiring evidence of vaccine status to secure entry to premises or events engages a number of human rights, such as freedom of assembly and freedom of religion.

Ensuring that any use of vaccination certificates complies with human rights involves demonstrating that the use in question is necessary to achieve a pressing social aim (eg. protection of public health), goes no further than necessary to achieve that aim, and is proportionate.

If a measure involving less interference with people's rights could achieve the stated objective, it ought to be used. An essential element of proportionality is that the interference is time-bound, lasting no longer than strictly necessary.

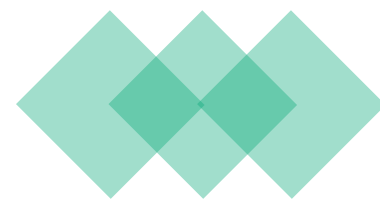
In terms of necessity, the aims of introducing vaccination certificates are, for example, to protect people from the virus; encourage vaccine uptake among younger people; and avoid closure of areas of the economy.

In terms of proportionality, the Government must be able to demonstrate that it has fully considered the potential negative impact on people's human rights and balanced that against the societal interest. An important element of this will be to explain why the proposed scheme does not include the alternative of a negative COVID-19 test for those who cannot prove they have been vaccinated. At the time of writing the Government had not set out its assessment of proportionality. In the interests of transparency and accountability, the Government should publish its full reasoning, including any evidence relied upon.

Take-up of COVID-19 vaccines is lower among some groups, and use of vaccination certificates will therefore particularly impact people in these groups. Many of these groups have also been disproportionately impacted by the virus, and the response to it.

If considering the introduction of vaccination certificates in new areas it will be important to hear directly from people who would be excluded from those spaces, in order to properly understand the impact on them before weighing that against the societal interest. The Government must ensure that vaccination certificates are not used in a way that results in disproportionate interference with people's rights. That requires ensuring that any scheme is temporary, with regular, open and transparent review of its ongoing necessity and proportionality.

⁸ See the Government's Covid-19 website: <https://covid19.govt.nz/alert-levels-and-updates/covid-19-protection/>



Specific conditions

Adherence to a human Rights and Te Tiriti based approach requires that all measures implemented as part of the Covid-19 Protection Framework, including the use of vaccination certificates, must be accompanied by the following specific conditions⁹:

- a. Use or support of vaccination certificates should only be permitted on the basis of clear advice regarding the overall effectiveness of the proposed certification scheme in protecting life and health, and managing the pandemic, and it is assessed as both necessary and proportionate to do so.
- b. Vaccination certificates should be available in paper, digital and all accessible forms and be able to be replaced easily if lost. The system should be practicable for all, for example by including suitable and accessible alternatives for those who do not own or use smartphones, and for those who do not wish to use the technology for other reasons.
- c. Exemptions must be readily available to all those that are unable to be vaccinated, and thus unable to be certified, as a result of a disability or medical condition. The conditions upon which exemptions rely are clearly articulated, fully accessible, including an appeal or review process. The system to obtain exemptions and any associated documentation must be accessible, equitable and efficient.
- d. A necessity and proportionality analysis should be carried out in relation to the general use of vaccination certificates and the specific contexts in which it is proposed that certification will be used. The least restrictive measures that achieve the legitimate aim must be used.
- e. Access to vaccination certificates must be equitable and non-discriminatory. The verification process should accommodate those who have been vaccinated but may have difficulty obtaining proof of identity documentation or have been vaccinated overseas.
- f. The decision-making process must be open and transparent, with reasoning, evidence and advice relied upon, clearly set out.
- g. The use or support of vaccination certificates in certain settings must be temporary, and there must be regular, open and transparent review of the ongoing necessity and proportionality of the scheme, generally and in each setting in which it is used. This should include regular assessment of the impact of the scheme on people's human rights and Te Tiriti implications, as well as the effectiveness of the scheme in achieving its aim. A sunset provision should be included in any certification scheme, ensuring that the measures are to come to an end on a specified date, or as soon as specific conditions are satisfied, for example when a sufficient number of people have been vaccinated.
- h. Failure to produce a vaccination certificate must not lead to a denial of access to any essential service. This includes access to essential goods and services, as well as access to government services.

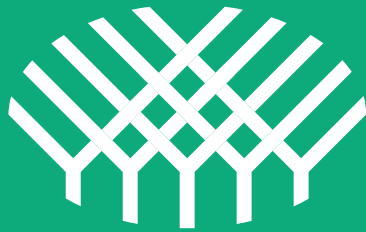
⁹ These conditions specific to vaccination certificates should be read together with the general conditions in Briefing Two above.



Conclusion

Human rights sometimes require a balancing of competing rights. Also, human rights may sometimes be subjected to lawful limitations. These complex and sensitive issues are relevant to the Covid-19 Protection Framework. In these statements, we introduce some of the human rights and Te Tiriti issues arising from the Protection Framework. The statements are not comprehensive; they are as accessible as possible.

We hope they may help members of the public, parliamentarians, policy makers and those who have to apply the Protection Framework in practice. We expect to refine the existing statements and add new ones as we monitor the different dimensions of the country's unfolding response to the global pandemic.



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