



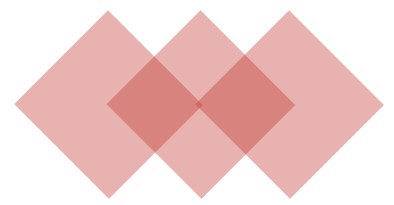
**NZ
Human
Rights.**

Te Kāhui Tika Tangata
Human Rights Commission

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

January 2022

Te Kāhui Tika Tangata
Human Rights Commission



OVERVIEW

Purpose

The COVID-19 Protection Framework ('the traffic light system') incorporates multiple elements, and this briefing assesses the human rights and Te Tiriti implications of vaccination mandates 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 to guide implementation of the Covid-19 Protection Framework legislation.

The information in our briefings has been drawn from an analysis of complaints to the Human Rights Commission, which have more than doubled in recent months. 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 that respond to the outbreak of a disease posing a serious threat to the health of a population.² Also, balances often 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 other rights such as rights to work, assembly and movement, religion, and non-discrimination 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, 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.

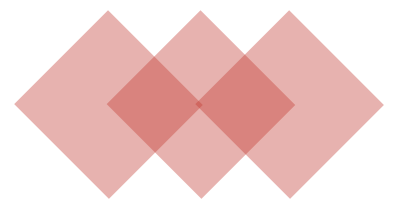
¹ The International Bill of Human Rights is the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

² Our own domestic human rights law enables rights to be limited under the provisions of the New Zealand Bill of Rights Act 1990. See also *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).

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.



In the Aotearoa context, Te Tiriti must be considered alongside this assessment, and Tiriti obligations taken into account when evaluating, for example, whether measures are proportionate, reasonable and necessary.

It is notable that the COVID-19 pandemic has

necessitated the development of an extensive toolbox of public health measures, including border controls, mandatory quarantining, vaccinations, social distancing and limitations upon access to places and events, testing procedures, mask-wearing, hygiene procedures and so on.

Vaccination Mandates

Vaccination mandates are an integral part of the COVID-19 Protection Framework.

A vaccination mandate is a requirement that a person is vaccinated against COVID-19 to carry out a certain activity or be in a particular location.⁶ No mandates require someone to be vaccinated regardless of context.

Mandating vaccination under the Protection Framework has clear human rights and Te Tiriti o Waitangi implications. Those who are not vaccinated are treated differently from those that are and may have their rights limited, for example, freedom of movement, and the rights to assembly, religion and non-discrimination. Some people who are not vaccinated have lost their jobs. They may not have access to particular places, facilities, goods, and services. This approach has an exclusionary effect and differs from the alert level system where restrictions generally applied to everyone in a defined geographical area.

The use of vaccine mandates under the Protection Framework system is helping to achieve a high vaccination rate, as well as containing and minimising transmission, infection, illness and death. Reducing the risk of COVID-19 is particularly important among populations that may be unable to be vaccinated (such as young children), are at increased risk of severe illness from COVID-19 (such as immunocompromised or elderly people), or who live in circumstances with a higher risk of

outbreak such as rest homes and correctional facilities. These are crucial public health and human rights goals.

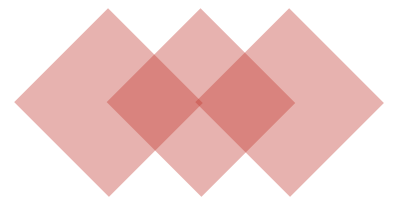
A wide range of activities and locations require vaccination for a person to do their work:

- Workforces mandated by a COVID-19 Order, such as corrections, education, health and disability sector, Fire and Emergency, Police, and border and MIQ workers.
- Workers whose workplace is covered by the COVID-19 Protection Framework, such as hospitality, events, gatherings, close contact businesses such as hairdressers, and gyms.
- Workplaces not covered by the COVID-19 Protection Framework, or COVID-19 Order but whose employer requires workers to be vaccinated because a risk-assessment identifies this as necessary for workplace health and safety.

Aside from work, a person might be required to be vaccinated if:

- They are a non-New Zealand citizen entering New Zealand and they are 17 years or older.
- They want to enter certain premises such as gyms, hospitality venues, and close contact businesses under the COVID-19 Protection Framework.

⁶ Vaccination mandates have been used in other countries including the United States, Canada, Italy, and Germany.



- They want to enter a premise where the organisation's internal policies require vaccination as a result of a risk-assessment (eg: private visitors to prisons and employees of and visitors to some law firms and consultancies).

The Human Rights Commission welcomes the government's clear confirmation that vaccination is not required to access essential public services such as hospitals and transport.

Human rights implications

A person can decide whether they (or in some cases, their children) get vaccinated against COVID-19. Those that have chosen not to continue to have access to essential services, but many activities and locations are unavailable to them.

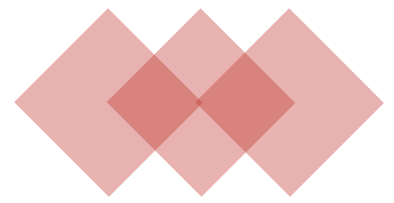
Requiring vaccination for a person to undertake certain activities (including work) and to gain access to premises or events engages a number of human rights such as rights to work, assembly and movement, religion, and non-discrimination. Significant negative impacts have arisen for adults and children who are not vaccinated. These impacts can have human rights implications. For example, some people have lost their job because the work they were doing must be done by a vaccinated person under workforce mandates, the COVID-19 Protection Framework, or as a result of employer health and safety decision-making. Losing a job can have a huge impact on a person's standard of living. Loss of income can lead to difficulties in covering mortgage, rent, food and other expenses. Unvaccinated people are also unable to participate in many social activities, such as gathering with friends at restaurants or going to concerts, or access places that vaccinated people can.

In addition to workforces and workplaces where vaccination is mandated by a COVID-19 Order and the Protection Framework, some businesses, events, or organisations have implemented a vaccination requirement for their staff and/or people entering their premise because, for example, their risk-assessment identifies this as necessary for workplace health and safety. This means people may lose their jobs or be denied access to a service because of a discretionary decision rather than a government ordered mandate.

It is important, therefore, that there is clear, understandable and accessible guidance on the legislative requirements. In the absence of this guidance, there is a risk that enforcement of the law becomes unjustifiably discretionary, or that people are penalised for non-compliance with a law that cannot be reasonably understood. The government needs to ensure that there is clarity about people's obligations, as well as their human rights.

Vaccination mandates under the COVID-19 Protection Framework, or a COVID-19 Order need to comply with national and international human rights. They need to be designed carefully to avoid unjustified limitations on human rights, especially where there has been inequitable access to the vaccine between different groups. Mandates must be necessary to achieve a pressing social aim (which can include protecting rights to life, healthcare and health protection), go no further than necessary to achieve that aim, and be proportionate. If a measure involving less interference with people's rights could achieve the aim, it ought to be used. An essential element of proportionality is that the interference is timebound, lasting no longer than strictly necessary.

⁷ *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc. HR/PUB/11/04 (2011), available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (in particular Principles 11-24).



Where a risk-assessment identifies vaccination as necessary for workplace health and safety, any vaccination mandate should not unlawfully discriminate (for example, on the grounds of disability). This will mean being able to show that there is a good reason or genuine justification for any discrimination. As part of this assessment, businesses should have a process for identifying, preventing, and mitigating any risks to human rights and be able to explain how any negative impacts will be addressed.⁷ This includes engaging directly with people whose rights might be being limited.

Protection of human rights and promotion of social inclusion need to be seen in a broad context of investment in the public health system. Such investment needs to be urgently prioritised to increase capacity to respond to and manage COVID-19 and enable restrictions to be lifted.⁸ Within such additional investment, priority is given to targeting public health resources towards increasing the vaccination rates among Māori and boosting the accessibility of health care services for Māori who may become ill from COVID-19. All such initiatives must be developed in partnership with Māori. Priority should also be given to directing health resources towards other vulnerable population groups who face current health system inequities, including Pacific people and disabled people. Public health programmes and initiatives should also be driven by, or involve the active participation, of those communities.

Te Tiriti Implications

In its December 2021 report *Haumarū: The COVID-19 Priority Report*, the Waitangi Tribunal found that a number of key aspects of the government's COVID-19 response breached its partnership and active protection and

equity obligations under articles 2 and 3 of Te Tiriti and led to inequitable outcomes for Māori. These aspects include the government's implementation of the Covid Protection Framework in the face of unanimous opposition among the Māori health leaders and iwi leaders it consulted with, the government's failure to jointly design the vaccine sequencing framework with Māori, and the government's failure to consistently engage with Māori on key decisions in the pandemic response. The Tribunal also found that the government's approach placed Māori health at risk and Māori health providers under undue pressure.⁹

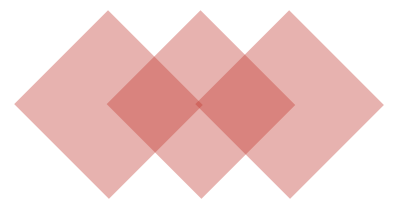
Therefore, moving forward, the active consent and full participation of iwi Māori, Māori health experts and public health service providers in future decisions on COVID-19 vaccination policies, including mandates, is required.

To this end, the Waitangi Tribunal made several specific recommendations regarding future engagement between Māori and the Crown on COVID-19 public health measures. These include that the Crown must give effect to tino rangatiratanga in its constitution and decision-making processes; these processes must be broadly representative of Māori iwi, providers, and other national groups and have access to a broad range of expertise, including from Māori health, Whānau Ora, and disability service providers; the Crown must meet regularly with Māori and Māori must influence the agenda of those meetings; key Ministers and officials (including chief executives) must be actively engaged in all processes; pending Cabinet papers that materially impact on the Māori pandemic response should be tabled and discussed by Cabinet.¹⁰

⁸ The Committee on Economic, Social and Cultural Rights has noted in its statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, E/C.12/2020/1 (6 April 2020) that "Health-care systems and social programmes have been weakened by decades of underinvestment in public health services and other social programmes, accelerated by the global financial crisis of 2007–2008. Consequently, they are ill equipped to respond effectively and expeditiously to cope with the intensity of the current pandemic."

⁹ [Waitangi Tribunal, Haumarū: The COVID-19 Priority Report \(Pre Publication Version\)](#) at p 82, 90 and 91

¹⁰ [Waitangi Tribunal, Haumarū: The COVID-19 Priority Report \(Pre Publication Version\)](#) at p 114



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 mandates, must be accompanied by the following specific conditions:¹¹

- a. Vaccination mandates should only be implemented on the basis of clear evidence-based advice regarding the overall effectiveness of vaccinations in protecting life and health, and where it is assessed as both necessary and proportionate to do so. In short, will a vaccination requirement, alongside the other available public health measures, achieve what it seeks to do?
- b. A necessity and proportionality analysis should be carried out in relation to the specific contexts in which vaccination is deemed required. Te Tiriti obligations, including for example in relation to equity and tino rangatiratanga, should be part of this analysis. If there are less restrictive measures available to protect life and health, they must be used. For example, when businesses are deciding whether to require employees to be vaccinated, they should consider the effectiveness of alternative protective controls and infection prevention measures. They are also required to consider whether imposing testing regimes (such as laboratory-based PCR Testing or the much faster, but less sensitive, Rapid Antigen Testing process¹²) or relocating an employee to alternative duties may be reasonable alternatives to dismissing the employee.
- c. The decision-making process must be open and transparent, with reasoning, evidence and advice relied upon, clearly set out.
- d. The use of vaccination mandates must be temporary, and there must be regular, open and transparent review of the ongoing necessity and proportionality of the mandate, generally and in each setting in which they are used. This should include regular assessment of the impact on people's human rights and Te Tiriti implications, as well as the effectiveness of the mandate in achieving its aim. A sunset provision should be included in any mandate, 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 there are low rates of community transmission.¹³
- e. All the recommendations of the Waitangi Tribunal in its *Haumarū* report should be implemented.¹⁴ This means that all decisions on vaccination mandates (end dates, which services are mandated, etc) must be made in partnership with iwi Māori and informed by Māori health experts, Whānau Ora and disability service providers.¹⁵
- f. Exemptions must be readily available to all those that are unable to be vaccinated 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.
- g. Vaccination status 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.

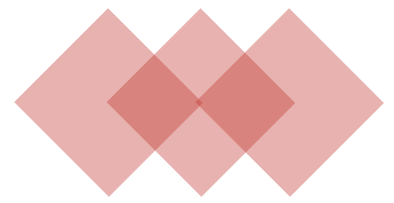
¹¹ These conditions specific to vaccination mandates should be read together with the general conditions set out in our Briefing Two: *General Conditions Briefing: upholding human rights protections under Aotearoa's proposed Covid-19 Protection Framework* (November 2021).

¹² See Ministry of Health, Rapid Antigen Testing at <https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-health-advice-public/assessment-and-testing-covid-19/rapid-antigen-testing>

¹³ Unless repealed sooner, the empowering legislation is repealed on 23 May 2023: COVID-19 Public Health Response Act 2020, s 3.

¹⁴ Waitangi Tribunal, *Haumarū*: The COVID-19 Priority Report (Pre Publication Version at p 114

¹⁵ Waitangi Tribunal, *Haumarū*: The COVID-19 Priority Report (Pre Publication Version at p 114



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 COVID-19 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, and make health and safety decisions, 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.