

Vaccinations revisited

The Government's COVID-19 Response Plan has succeeded in eliminating the virus from the community. Unfortunately, it has not been so successful at our borders. That is a real problem while the rest of the world continues to struggle to contain the virus, but travelers continue arriving in New Zealand.

When a vaccine became available, it was possible to reduce the risks of the virus slipping through at the border, by vaccinating border control staff. So, the Government issued the [COVID-19 Public Health Response \(Vaccinations\) Order 2021](#), requiring that all work in Managed Isolation and Quarantine (MIQ) settings must be undertaken by people who have been vaccinated against COVID-19. The order also applies to all government officials undertaking work in other high-risk border settings.

No other workers are affected by the order and the Covid rules for Level 1 remain throughout New Zealand. So far Level 1 controls have been effective for the rest of New Zealand.

Can the Government order vaccinations?

Yes. To prevent and control the spread of contagious diseases the Government can issue Public Health Orders (PHOs), ordering anyone to do or not to do specific things. The [COVID-19 Public Health Response Act 2020](#) authorises the Minister of Health (or the Director-General of Health in specified circumstances) to make PHOs give effect to New Zealand's public health response to COVID-19. A list of the most recent PHOs can be found [here](#).

When a few border workers covered by the Vaccinations Order refused vaccination and were dismissed, a public debate erupted over whether a PHO can override someone's personal rights under the Bill of Rights Act (BRA), in this case, the [right to refuse to undergo medical treatment](#). Whether the workers involved will challenge their dismissal, and if so, on what grounds (eg breach of the BRA or breach of the Employment Relations Act), is not known yet.

It's fair to say that many employees are worried that they, too, might lose their jobs unless they vaccinate. Much of the debate referred to focused on changing employment agreements, developing new employment agreements and all the laws that play a role, not least the Health and Safety at Work Act.

Keep calm and carry on

In our view a dose of reality and common sense does wonders to clear the air. Hopefully you'll agree.

- It seems counter-intuitive, but the availability of a vaccine doesn't change the COVID-19 risk [within the community](#) in New Zealand.
- Experience has shown that present controls outside of those areas referred to in the Vaccinations Order are effective. That includes the Ministry of Health's [directives for Aged Care providers](#). The Level 1 rules are working.
- For a job to suddenly present a severe COVID-19 risk would raise immediate questions about the adequacy of the employer's risk assessment processes. In that unlikely situation

you should take advice before you act. Most of the current debate is on this issue, which is much more apparent than real.

- Employees can legally refuse vaccination and their personal information, including their vaccination status, is private. This has not presented any issues so far. Where an employee's status is unknown and that information is genuinely necessary to assess how to manage the COVID-19 risk in their job, they could be informed that they are regarded as unvaccinated. If PPE is required at the moment, no doubt it will suffice in future.
- Staff [going overseas](#) for [work or holiday](#) are subject to [border controls](#) when they return. This includes health screening and testing for all arrivals, and mandatory 14 day MIQ.
- So far we've coped without discriminating between vaccinated and unvaccinated staff and one can comfortably expect that to continue. Call the helpline if you're in doubt.
- Whatever your own beliefs, allow others the same right.

Privacy case on belated Police checks

A recent complaint to The Privacy Commissioner (PC) touches on a common issue: Police checks not being done immediately once an employee starts. In this case a Police check done 14 months after a person was employed, was ruled to be a breach of privacy.

A caregiver applied for a role at a care home. As part of the application process, they consented to a Police background check on them. Unbeknown to the caregiver, no check was carried out. They were hired and started shortly afterwards.

More than a year later, the caregiver had an acrimonious employment dispute with the care home. During this period, management investigated the caregiver's record. The situation culminated when the care home gave the caregiver a print-out of a Police vetting report it had recently obtained. The caregiver was then dismissed for failure to disclose previous convictions, as well as inappropriate conduct relating to the employment dispute.

The complaint

The caregiver complained to the PC that firstly, the collection of information by the care home was unnecessary as they had already worked there for more than a year. The second part of their complaint was that although they had consented to the initial Police background check, they had not consented to the check being carried out more than a year into their job. They said that at the time they were interviewed for the job, they indicated they had previous convictions, which were of a nature that would not disqualify them from doing the job. They believed the care home was using the Police check as an excuse to fire them.

They sought compensation from the care home for humiliation, loss of earnings, emotional trauma, and a breach of their privacy rights.

The privacy principles

Privacy principles 1 and 2 of the Privacy Act are at issue.

Under privacy principle 1, organisations must only collect personal information if it is for lawful purposes connected with their functions or activities, and the information is necessary for that purpose.

Under privacy principle 2, organisations must collect personal information directly from the individual unless it believes, on reasonable grounds, that an exception applies, such as if the person concerned gives the organisation permission to seek information from other sources.

It is also important to note that under privacy principle 8, an employer must take reasonable steps to ensure that information it intends to rely on is accurate, up to date, complete, relevant, and not misleading. There might be occasions when reliance on very old information about criminal offending is not justified in assessing a person's suitability for a current job.

The investigation

When contacted, the care home confirmed that it had collected information about the caregiver 14 months after they started their job. It said it believed a background check had been carried out when the caregiver first started but when it checked its records, this had not occurred. The care home claimed that due to "concerning events" relating to the employment dispute, they wished to check the caregiver's file to see if there was any fraudulent or criminal behaviour on their file.

The PC's view

Regarding privacy principle 1, the PC did not accept that it was necessary for the care home to collect information about the caregiver from Police due to its concerns over the employment dispute. The PC therefore considered that there had been a breach of privacy principle 1.

Under Police guidelines, vetting requests must be made within three months of the date an applicant gives consent for it to be carried out. It was the care home's responsibility to ensure it was aware of the requirements for obtaining the background check. It did not have permission from the caregiver to collect information from Police about them so many months later and it could not rely on any exception. The PC therefore considered that privacy principle 2 had also been breached.

The PC accepted that caregiver's experience with the care home had caused them anxiety and humiliation and it was satisfied there had been an interference with their privacy. The caregiver sought significant compensation from the care home. Some matters factoring into their request for compensation were employment related and not within the PC's jurisdiction.

Unable to mediate the dispute, the PC provided the caregiver with a Certificate of Investigation which they could use, if they chose, to take the case to the Human Rights Review Tribunal. The file was then closed.

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