

Our advice

Prepared for Karen Thomas, Chief Executive, Taituara – Local Government Professionals Aotearoa

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Taituara Member queries regarding COVID-19 Vaccinations

Background

Taituara – Local Government Professionals Aotearoa (**Taituara**), is currently receiving regular queries from members about different aspects of, and issues relating to, the Covid-19 pandemic, and in particular the impact (actual and potential) of the Delta strain on their communities.

Many of these current queries relate to the drive across New Zealand to vaccinate against Covid-19, and the steps that local authorities can take to ensure that the health and safety of their staff and of all those who live within their region is protected.

Given the New Zealand Government's expansion of its mandatory vaccination order, to cover education and health, announced earlier this week, your members have recognised that many of these issues are becoming time critical. The situation is rapidly evolving, and it is anticipated that further questions will be forthcoming. As the Government's approach to the Covid-19 pandemic moves from a strategy of elimination towards one of suppression, Taituara would like to consider what this means for its members, who serve as both employers and heavily customer facing enterprises in their regions. In the first instance, you have asked for our urgent advice on the issues set out below, appreciating that more questions are likely to follow.

Questions

1. To what extent, and how, can local authorities mandate the vaccinations of their workforces, and what are the relevant considerations when looking at the groups of employees potentially impacted by such a mandate?
2. If local authority employees work in roles where their duties include school visits, or regular interaction with children in an education context, can the employer require them to be vaccinated?
3. How are local authorities to accommodate requirements communicated by local iwi that non-vaccinated employees of local authorities will not be permitted on to any marae or iwi land? We anticipate that the same request may, in the short term, also be raised by other private landowners or businesses – our comments below will

also apply to these groups.

Answers

1. While this area of law is developing at pace, we consider it unlikely that any local authority would be able to justify mandatory vaccinations across all aspects of its operations as of today's date. However, they are likely to be able to introduce mandatory vaccinations for some roles (*i.e.* those roles that are at a high risk of exposure to Covid-19, those roles that are client facing with vulnerable members of the community or children, and those roles on which business continuity is heavily reliant). Before doing so, the local authority must undertake a risk assessment, follow a fair and reasonable process in doing so (including consultation with employees, unions and health and safety representatives) and take into account relevant privacy and discrimination considerations.
2. The Government has announced mandatory vaccination for the education workforce. This includes home-based educators, and all those support people in schools and early learning services such as teacher-aides, administration, parent volunteers, maintenance staff and contractors. Given the broad language used by the Covid-19 Response Minister, Chris Hipkins, during his announcement, we consider this expanded mandate will:
 - (a) include local authority employees or workers who enter schools/early learning premises to provide a service; and
 - (b) not include local authority employees or workers who do not enter schools/early learning premises such as local authority libraries.

In any event, outside of the COVID-19 Public Health Response (Vaccinations) Order 2021 (**Vaccinations Order**), we consider it is open to local authorities to introduce mandatory vaccinations for local authority employees who work with children on a regular basis outside of schools, such as local authority libraries. This is lawful provided that a risk assessment (as summarised at question one above and detailed further below) has been undertaken which identifies that these roles are at a high risk of exposure to Covid-19, or high risk of infecting others (such as children under 12 who cannot be vaccinated at this time).

3. As recently as yesterday, we have started seeing private businesses who are refusing premises access by unvaccinated people. This is not dissimilar to the approach taken by some iwi as you have explained. That being the case, we consider a local authority will need to accommodate the request.

In the first instance a local authority should ascertain whether there is a sufficient vaccinated workforce to conduct whatever work is required on marae or iwi land (which could involve the deployment of unvaccinated workers elsewhere).

To the extent a risk assessment is carried out in these roles, a

local authority should consider the extent to which they are dealing with health-vulnerable communities. We anticipate that such an assessment would warrant mandated vaccination such as those referred above. Even if they did not, however, local authorities can rely on:

- (a) all workers having a duty to minimise risk to themselves and others while at work – compliance with this duty when the country is under a pandemic order is to get vaccinated, or not perform the role anymore; and
 - (b) if work on iwi land or at a marae is part of an employee's role, and the iwi has a position that only vaccinated persons can come on iwi land or visit a marae then the employer can require the employee to vaccinate in order to perform their role. If they refuse to do so, the employee is no longer able to perform the role they were hired to do. Accordingly, action could be taken against them. Although we recommend that this step only be taken with care, and if there are insufficient numbers of other individuals in the same role who are vaccinated and could perform the required marae duties.
4. We note that aspects of this advice are necessarily high level given the short turnaround time requested by Taituara to receive our initial thoughts. We are happy to provide more detailed advice or analysis on any matter in due course.
 5. Any assistance your members might require with the preparation of correspondence with staff (which would likely require both personalised letters and a Q&A document) can be provided in due course once each local authority has formed a view about the extent to which they wish to implement vaccination mandates in parts of their business.

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Reasoning (summary)	
This is because:	
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• Impact the Government's expanded Vaccinations order, now covering the education sector, has on a local authority	9
• Dealing with a position that non-vaccinated employees of local authorities will not be permitted on to any marae or iwi land	10

Reasoning explained

Overview of a	1. Subject to the usual obligations of consultation in workplace change
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**local authority's
ability to
mandate
vaccinations**

in health and safety matters under New Zealand law, there is no specific legal provision or case law preventing mandatory vaccination in principle. This is also subject to employees having the right to refuse on medical or religious grounds.¹ However, as at today's date, we consider it unlikely that local authority could justify mandatory vaccinations for **all** employees. Instead, the ability to require employees to be vaccinated will depend on a risk assessment being carried out as applicable to the local authority's business and the prevalence (or anticipated prevalence) of Covid-19 within the community at the time which, given the current outbreak, is a fluid situation. Our views are based on the following:

- (a) there is currently no statutory or regulatory requirement in New Zealand for employees such as those at a local authority to be vaccinated against Covid-19 (and the Government has indicated that it will not make any vaccination mandatory for the entirety of the New Zealand public – consistent with New Zealand Bill of Rights Act rights, which includes the right to refuse medical treatment);
 - (b) we understand from our discussion earlier in the week that local authorities are at a variety of different stages in terms of completing any risk assessments under the Health and Safety at Work Act 2015 (**HSWA**) for any role or groups of roles to identify the risks to employees of exposure or infection of Covid-19 in the workplace (this includes both in and out of the office); and
 - (c) for some, but not all, roles, there may be other controls able to be implemented in the workplace, which would achieve the same outcome of minimising the risk of infection among employees and others, such as wearing masks, social distancing, working from home and hygiene and cleaning practices.
2. Depending on the risk assessment, a local authority may want to recommend or require vaccination for certain groups. The groups it may consider mandating vaccinations for may, in part, be driven by the Government. For example, the expansion of the Vaccinations Order to cover all those working in schools would mean any local authority will be well placed, and will likely have no option, to require staff interacting with children in a school on a regular basis to be vaccinated.²
3. The ability to mandate vaccinations (and the breadth of roles to which such an ability can be applied) across local authorities should be considered on a regular basis as the Government's mass Covid-19 vaccination roll out in New Zealand progresses further. Relevant

1 Human Rights Act 1993, s 21(1)(c) and (h).

2 Please note that, at the time of providing this advice, the details of the proposed statutory vaccinations mandate for the education sector have yet to be finalised by the Government. However, the wording of the Government's announcement as to which roles could be affected in the education sector was very broad. Specifically, the Government stated that it will extend beyond those providing an education service, such as administrative, contractors, maintenance, and parent volunteers.

factors reinforcing more widespread vaccination mandates include:

- (a) the Government transitioning from an elimination to suppression strategy and acceptance of community transmission of Covid-19;
 - (b) the prevalence of Covid-19, particularly the more transmissible Delta variant, within the community;
 - (c) recent further guidance issued by the Government, such as WorkSafe³ and the Government's vaccination mandate for the education sector;⁴ and
 - (d) the completion of risk assessments specific to local authority staff (conducted in conjunction with employees and union representatives) showing some level of risk to staff, local authority, or members of the public that cannot be addressed by other means.
4. If a local authority assesses its position and proceeds with a plan to require some categories of employees to be vaccinated before they can come to work, it should proceed with caution. We are not yet aware of any local authorities that have decided to require blanket vaccination mandates; it is only being rolled out within certain groups of employees. A local authority's plan should involve consultation with employees, and should also factor in exemptions to the requirement for non-medical reasons such as religious grounds.

*Mandate
vaccination under
HSWA*

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5. We consider that an employer can proceed with a vaccination mandate, based on certain roles, on the basis that in order to comply with its duties to ensure, so far as is reasonably practicable, the health and safety of workers and other persons under HSWA,⁵ certain roles may need to be performed by a vaccinated person. Following completion of the appropriate risk assessment, discussed further below, such staff could, for local authority, include:
- (a) *"front line"*, public or customer-facing staff; and
 - (b) all staff who regularly interact with vulnerable members of the community, or with members of the public who fall outside the current vaccination programme, such as children under the age of 12.
6. In each case, determining how a local authority can best meet its duties under HSWA will depend on the risk assessment being undertaken to consider the likelihood, and consequences, of a worker being exposed to Covid-19 in the performance of their work, or the consequences for others if that worker were to be exposed to

3 WorkSafe New Zealand "Assessing whether a specific role needs to be performed by a vaccinated worker" (2021) WorkSafe New Zealand (27 October 2021 guidance) www.worksafe.govt.nz (accessed 4 October 2021).

4 Chris Hipkins "Mandatory vaccination for two workforces" (2021) Beehive.govt.nz www.beehive.govt.nz (accessed 15 October 2021).

5 Health and Safety at Work Act 2015, s 36.

Covid-19.

7. There are other roles where the duty to minimise risks to the health and safety to others as far as is reasonably practicable while at work needs to be assessed in a slightly different way.⁶ There will be groups of specialised employees within a local authority who perform roles that are essential to the safe operation of their community; for example, wastewater and fresh water specialist teams. If Covid-19 were to spread amongst those teams, a local authority's ability to perform necessary public functions would be affected. Factors like this are critical for a risk assessment and these types of roles, too, are likely to justify a mandated vaccination approach.⁷
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*Risk assessment
under HSWA*

8. In undertaking a risk assessment, the local authority should consider the guidelines set out by WorkSafe New Zealand, in relation to assessing whether a role should be vaccinated, which includes risk factors to take into account, which we have set out in **Appendix A**.
9. There are also other relevant factors that are relevant for local authorities when considering a vaccination mandate in relation to certain roles. These include:
- (a) on Monday, 4 October 2021, the Prime Minister announced that New Zealand would be "*transitioning*" away from the elimination strategy and emphasised vaccination is critical to this. As Covid-19 continues to linger, public health experts agree that the current elimination strategy using the alert level framework and managed isolation at the border needs to be supplemented or replaced by population wide vaccinations;
 - (b) as the New Zealand government moves past its current elimination strategy towards the suppression strategies adopted elsewhere in the world, population-wide vaccinations are clearly considered by the Government as providing the best protection against contracting or infecting others with Covid-19;
 - (c) the effectiveness and availability of the vaccine versus other control measures (for example, social distancing, alert levels, wearing masks, working from home arrangements and sanitising of hands and surfaces);
 - (d) the risks on certain groups of employees;
 - (e) the make-up of a local authority's employees and constituents. For example, a local authority may have a higher risk profile if it has a number of people within its business or its community who are immune compromised; and
 - (f) the prevalence of the virus at the relevant time.
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6 Health and Safety at Work Act 2015, ss 30(1) and 36.

7 Please note that the risk assessment for these 'technically critical' employees is not covered by the current WorkSafe risk assessment guidelines set out in Appendix A. We note, however, that employers are not precluded from asking additional relevant questions in the course of their risk assessment.

*Law on
discrimination*

10. A local authority considering the implementation of a vaccine mandate on certain groups of employees will also need to consider the law on discrimination. Under the Human Rights Act 1993 and the Employment Relations Act 2000 (**ERA**), it is unlawful for employers to discriminate against employees, either directly or indirectly, on any of the specified prohibited grounds in those Acts.
11. We consider a very small number of people could actually fall into this category. Therefore, the risk of a successful claim is low but still subject to a case by case basis assessment.

Privacy

12. A local authority, in making decisions relating to current employees including whether to undertake a mandatory vaccination approach in relation to some categories of employees, will also need to be aware of privacy considerations.
13. Under the Privacy Act 2020 (**PA**), employers are only entitled to seek information about the vaccination status of employees or customers for a lawful purpose, and if the information is necessary for that purpose.
14. Under section 22(1)(a) and (b) of the PA (regarding Information Privacy Principle 1):

Personal information must not be collected by an agency unless the information is collected for a lawful purpose ... and the collection is necessary for that purpose.
15. While this is still a developing area of law in relation to vaccinations, our view is that as New Zealand is currently in a pandemic and we currently have some community transmission of COVID-19, employers have a lawful purpose to know whether their staff are vaccinated. This is so that they can appropriately assess the level of risk there is in terms of staff wellbeing, customer service and/or business continuity (or, once our borders reopen, for contingency planning in the event of an outbreak, or to protect vulnerable employees or customers).

*Timing issues
relating to the
enforcement of a
vaccination
mandate*

16. Ministry of Health guidelines provide useful parameters for local authorities in terms of the time needed to be taken to roll out any vaccination mandate. The need to consult with employees and comply with the rules of procedural fairness required in employment relationships will continue to apply. Thus, you will need to factor in time for employees to take advice, and provide feedback to the proposed mandate, at each stage.
 17. Once a mandate has been decided upon, and the decision conveyed to staff, the existing guidance that a minimum of three weeks should pass between first and second vaccines is also a consideration. Thus, any planned timetable needs to factor in sufficient time (after the decision to require compulsory vaccination has been made) for unvaccinated staff to obtain a first dose of vaccination, and for all affected staff to obtain their second dose of vaccination if they have
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not yet done so.

Implementing a mandatory vaccination approach?

18. If a local authority wishes to consider a mandatory vaccination approach we consider that it would need to:
- (a) undertake a risk assessment to assess and identify whether there is sufficient risk justifying mandatory vaccination for each role. This requires a focus on the role and not the worker performing it because it is not possible to require an individual to be vaccinated. For the reasons set out above different roles will have differing assessment results, based on the criteria set out in a local authority's risk assessment;
 - (b) subject to the provisions of the PA, undertake a staff survey to ascertain the rate of vaccination within the relevant roles which might otherwise be subject to a mandate. It may be the case, as a result of such a survey, that the steps detailed below are not necessary. The local authority could then future-proof this stance by implementing a policy whereby proof of vaccination against Covid-19 is compulsory for all new employment (a position the Minister of Workplace Relations has confirmed is reasonable);
 - (c) consult with employee unions and health and safety representatives in relation to a mandatory vaccination policy for specified roles. This will include consulting on the risk assessment. A local authority should note that it has a number of specific consultation obligations, including:
 - i. the duty of a local authority to act in good faith towards its employees (and unions), which imposes mutual obligations to be active and constructive, responsive and communicative.⁸ This duty also requires a local authority to provide employees access to all relevant information and an opportunity to comment on such information, in situations where they are proposing to make a decision that will, or is likely to have, an adverse effect on the continuation of an employee's employment (such as, in relation to mandatory vaccination); and
 - ii. a local authority's duty, as a person conducting a business or undertaking (**PCBU**) under HSWA, to engage with workers, so far as is reasonably practicable in relation to matters of health and safety (including when making decisions about ways to eliminate or minimise risks to health and safety, such as mandatory vaccinations). Similar to the duty of good faith, a local authority is required to provide workers with relevant information, an opportunity to comment on the information and contribute to the decision making process, as well as taking their views into

8 Employment Relations Act 2000, s 4.

account before a decision is made;⁹ and

(d) confirm its decision in relation to the policy and (if it decides to proceed with mandatory vaccinations for some roles) provide staff with sufficient time to obtain their vaccination. We recommend working with staff who remain reluctant to obtain the vaccine to understand their concerns and to provide them with any further information or support they may need to obtain the vaccine.

19. In relation to any employees who refuse to be vaccinated, a local authority would need to follow a fair process with them to consider alternative options (such as whether there is work they could be redeployed to (whether temporarily or permanently), leave without pay or temporary variation of duties (location of work). Dismissal should be used as a last resort.

Impact of the Government's expanded compulsory vaccination order, on those Council employees who work with children (either within schools or elsewhere such as libraries) on a regular basis

20. This week, on 11 October 2021 the Government announced that it will be mandatory for school and early learning staff and support people who have contact with children and students to be fully vaccinated by 1 January 2022 and to receive their first dose by 15 November 2021. Education and Covid-19 Response Minister Chris Hipkins stated that:¹⁰

vaccination remains our strongest and most effective tool to protect against infection and disease, and we need as many workers as possible to be vaccinated to allow sectors to respond to the pandemic and deliver everyday services with as little disruption as possible.

21. The details of the proposed statutory vaccinations mandate for the education sector have yet to be finalised. However, the wording of the Government's announcement, as to which roles could be affected in the education sector, was broad and included:¹¹

home-based educators, and **all those support people in our schools and early learning services** such as teacher-aides, administration and maintenance staff and contractors.”

(our emphasis)

22. Given the broad language used in the announcement, in addition to direct teaching roles, workers who “*support*” the provision of education services will also be covered. This will likely include: contractors, cleaners, parents volunteering at schools, and administrative employees who enter school/early learning premises. We consider the expanded Vaccinations Order will likely cover any worker, including local authority employees, who enter school/early learning services premises to provide a service.

9 Health and Safety at Work Act 2015, ss 58 - 60.

10 Office of the Prime Minister “Post-Cabinet Press Conference: Monday 11 October 2021 Hansard Transcript” (2021) Hansard https://www.beehive.govt.nz/sites/default/files/2021-10/Press%20Conference%20-%2011%2010%202021_0.pdf (accessed 15 October 2021).

11 Office of the Prime Minister “Post-Cabinet Press Conference: Monday 11 October 2021 Hansard Transcript” (2021) Hansard https://www.beehive.govt.nz/sites/default/files/2021-10/Press%20Conference%20-%2011%2010%202021_0.pdf (accessed 15 October 2021).

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23. Our view is supported by the broad wording included in the Vaccinations Order in relation to port and border workers. For example, Schedule 2 of the Vaccinations Order, includes the following definition of those “*affected persons*”:¹²
- 1.1 Workers at managed quarantine facilities
 - 2.1 Workers at managed isolation facilities
 - 4.1 All workers (other than excluded port persons) who board affected ships.
24. It is reasonable to assume a similarly broad definition will be included for the education sector. We can provide further advice once the detail around the scope of the mandate for this sector is released.
25. As stated above, the proposed statutory mandate in relation to the education sector will likely not cover work undertaken outside of schools, such as education work conducted in public libraries. For roles such as library roles, it is open for local authorities to identify that these roles are at a high risk of exposure to Covid-19, or high risk of infecting others such as children under 12 who cannot be vaccinated, provided a risk assessment (as outlined at question 1 above) has been undertaken that supports this decision.

Dealing with iwi positions that non-vaccinated employees of local authorities will not be permitted on to any marae or iwi land

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26. The extent to which private landowners can limit access on to land (even for purposes required by legislation, for example building or health inspections) by non-vaccinated individuals, and how to accommodate this, is vexing a wide variety of employers. As recently as yesterday, you will have seen announcements from large corporate enterprises that non-vaccinated individuals would not be able to attend their premises. We anticipate that this will be the start of a rapidly expanding trend.
27. From a local government standpoint, your initial query relates to a requirement by some iwi that local authority related work may only be done on their marae or land by vaccinated local authority staff. This position by iwi is consistent with these recent public announcements, and local authorities will need to work out how best to accommodate such a requirement.
28. Within the context of employment and health and safety law, we consider that local authorities are well placed to comply with any such request made by iwi groups, by ensuring that the staff members undertaking the marae work are vaccinated. This is because:
- (a) Maori are deemed at greater risk of requiring hospitalisation if they contract Covid-19;¹³

12 Covid-19 Public Health Response (Vaccinations) Order 2021, s 4: “*affected person*” means a person who belongs to a group (or those whose work would cause them to belong to a certain group), who is covered by the Vaccinations Order.

13 Stuff New Zealand “Covid-19: Maori and Pacific people more likely to be hospitalised – and younger” (2021) Stuff New Zealand: Coronavirus www.stuff.co.nz (accessed on 15 October 2021).

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- (b) as a PCBU, for the purposes of HSWA, a local authority has duties to eliminate or minimise risks to the health and safety of its workers and to members of the public. Thus, when 'work' is being done on iwi land and/or a marae, the local authority needs to take all reasonably practicable steps to minimise the risk of harm. We consider that requiring only vaccinated employees carry out certain types of work assists a local authority to comply with this duty. We also note that the marae making the request of the local authority may also be a PCBU, with the same duty to its workers and members of the public, thus supporting our view that the request itself is reasonable;
 - (c) individual workers owe a similar duty to themselves and those around them while at work, and the best way they can comply with their duty is by getting a vaccination; and
 - (d) to the extent to which an employee's role requires them to carry out inspections or other tasks that involve them having access iwi land, a failure to be vaccinated places an employee in a position where they are unable to meet their end of the contractual bargain they agreed to when accepting the employment.
- 29.** Surveying the relevant staff (in such a way that any PA concerns are addressed) in the first instance to ascertain the rate of vaccination within the team may result in a local authority being able to accommodate the iwi's requirement by allocating non-vaccinated staff elsewhere. Such a survey would be a useful first step and we can provide wording for such an enquiry quickly if required. If work reallocation is not appropriate or practicable, then the various steps outlined above at paragraphs 19-20 should be worked through.
- 30.** We note that for the purposes of this advice we have not reviewed the various statutory rights of entry, or private contractual arrangements, that may exist permitting access to marae in the 'normal' course of business. We can do so in due course if there are particular arrangements that a local authority would like us to review.

Conclusion

- 31.** Both the law and the government's guidance relating to vaccinations is developing at a fast pace. Businesses can require that certain work must only be done by vaccinated workers.
- 32.** Please let us know if you have any further queries. We will of course be happy to assist further as matters develop.
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**Please call or
email to discuss
any aspect of this
advice**

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Appendix A

WorkSafe: How to decide what work requires a vaccinated employee (dated 5 October 2021)

Consider these risk factors:

1. How many people does the employee carry out the work come into contact with? (very few equal lower risk – many equal higher risk).
2. How easy will it be to identify the people who the employee comes into contact with? (easy to identify, such as co-workers equals lower risk; difficult to identify, such as unknown members of public equals higher risk).
3. How close is the employee carrying out the tasks in proximity to other people? (2 metres or more in an outdoor space equal lower risk; close physical contact in an indoor environment equal higher risk).
4. How long does the work require the employee to be in that proximity to other people? (brief contact equals lower risk; lengthy contact equals higher risk).
5. Does the work involve regular interaction with people considered at higher risk of severe illness from Covid-19, such as people with underlying health conditions? (little to none equals lower risk; whole time equals higher risk).
6. What is the risk of Covid-19 transmission in the work environment when compared to the risk outside work? (equal to outside work equals lower risk; higher than outside work equals higher risk).
7. Will the work continue to involve regular interaction with unknown people if the region is a higher alert level? (no equals lower risk; yes equals higher risk).