



COVERSHEET

Minister	Hon Michael Wood	Portfolio	Workplace Relations and Safety
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List of documents that have been proactively released		
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Information redacted

YES

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Some information has been withheld for the reasons of Legal professional privilege.

In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet

Supporting COVID-19 vaccination requirements in the workplace

Proposal

- 1 The proposals in this paper will:
 - 1.1 Give effect to work-related vaccination requirements arising from domestic COVID-19 Vaccination Certificate (CVC) settings as part of the COVID-19 Protection Framework,
 - 1.2 Strengthen our approach to Government vaccination and/or testing mandates,
 - 1.3 For all other work, create a process to guide workplace decisions about when it is reasonable to require vaccination and/or testing,
 - 1.4 Provide paid time off for employees to be vaccinated,
 - 1.5 Clarify notice requirements when employment is terminated because employees are unvaccinated, and
 - 1.6 Seek funding for WorkSafe's COVID-19 compliance and enforcement activities.

Relation to government priorities

- 2 This paper concerns the Government's response to COVID-19.

Summary

The status quo does not provide employers and workers with certainty

- 3 At present, for work not covered by a legal vaccination requirement, employers and persons conducting a business or undertaking (PCBU) can only require vaccination for certain work on health and safety grounds. Before making this determination, they need to go through individualised health and safety risk assessments. WorkSafe has provided guidance about this process, but I have received strong feedback from employers that this does not give them the necessary support to make these decisions.

Mandating vaccination for certain work

- 4 We have recently decided that work in the health, education and corrections sectors can only be done by vaccinated workers.
- 5 We have also been discussing the settings in which COVID-19 Vaccination Certificates (CVCs) may be required, which would effectively mean requiring vaccination for work done in those settings if businesses want to operate (or operate with fewer restrictions). I propose that we mandate vaccination for work in these settings now, and communicate this early so that employer and workers have sufficient time to prepare.
- 6 In the process of preparing this paper, several agencies have raised that key public services and essential services should only be delivered by vaccinated workers. Vaccination requirements have also been suggested as a measure that might be necessary to secure our access to overseas export markets.
- 7 I propose our objectives, when considering vaccination requirements for work, should be to provide clarity and certainty to parties, while ensuring coherence across the landscape of vaccination requirements. This presents several opportunities for us:
 - 7.1 We should consider whether any additional work should only be done by vaccinated workers, such as in settings that CVCs are going to be able to be required, for key public and other essential services, and to preserve overseas market access.
 - 7.2 We should also bolster the legislative architecture for vaccination and testing mandates, given we are likely to be using it more frequently in the coming weeks and months. There is a case that vaccination and testing mandates should be set through regulations, rather than Orders made under the COVID-19 Public Health Response Act 2020 (COVID-19 Act). We should also set some rules common to all mandates in primary legislation, such as duties on parties to meet vaccination and/or testing requirements, demonstrate vaccination status/provide testing results, and to keep certain records.

For all other work, we need to provide greater clarity to employers

- 8 Outside Government vaccination mandates, we need to provide a much greater degree of certainty and support to employers and PCBUs going through their own risk assessments. I propose we provide a risk assessment process in secondary legislation, which will encompass public health and work health and safety considerations relating to vaccination and testing. This framework will prescribe when it is reasonable for an employer or PCBU to require vaccination or testing, based on stated risk criteria.

Supporting employees and employers

- 9 The cumulative effect of the above proposals is that more work across the economy is likely to require vaccination, whether through Government

mandates or employer requirements, and whether for public health or other reasons. This will impact employees, particularly those who choose to remain unvaccinated. To assist employers and employees with implementing these requirements, I propose:

- 9.1 Requiring employers to give employees reasonable paid time off to be vaccinated against COVID-19, and
 - 9.2 Requiring a minimum of four week's paid notice to occur before someone can be terminated for being unvaccinated during which time they could become vaccinated.
- 10 In addition to consulting with public sector agencies, I have also consulted the Council of Trade Unions (CTU) and BusinessNZ on the proposals in this paper. They are broadly supportive, particularly of any changes that will increase certainty and clarity for workers and employers.

Legislation is needed

- 11 The proposals in this paper will require a combination of primary and secondary legislation to implement. I seek approval to issue drafting instructions reflecting our decisions today, for a bill combining several vaccination-related matters (eg legislation to support the use of CVCs). I recommend we aim to introduce this bill during the November 2021 sitting block, and pass it under urgency.

Funding for WorkSafe

- 12 I seek \$4.373m (comprising \$3.533m operating expenditure and \$0.840m capital expenditure) to allow WorkSafe to extend its current reactive-only COVID-19 activity to more proactive and integrated regulatory services. This will be made up of a mix of education, engagement and enforcement interventions. Funding for WorkSafe will support increased COVID-19 compliance and enforcement outcomes by supporting businesses and organisations to better comply with public health controls; providing more scope for improvement/enforcement measures; and allowing proactive work to be undertaken.

Background

- 13 High vaccination rates are needed to support New Zealand's overall response to the COVID-19 outbreak by reducing the likelihood of severe illness among vaccinated people, and reducing the chances of catching COVID-19 and passing it on to others.
- 14 The COVID-19 vaccination rollout in New Zealand is well underway, with over 67% of the eligible population fully vaccinated as of 20 October 2021. While everyone who is eligible and can receive the vaccine is encouraged to do so, there will be a portion of the population who choose to remain unvaccinated. This has implications for workplaces across the country.

Vaccination is an increasingly important tool to mitigate risk in workplaces

- 15 Reaching this point in our COVID-19 vaccination programme, with more two thirds of our eligible population fully vaccinated and continuing growth in vaccination coverage, presents opportunities for workplaces. Vaccination is the best control available to employers, PCBUs and workers to manage risks associated with COVID-19 in the workplace. The Delta variant outbreak in Auckland and surrounding regions has accelerated workplace conversations about the role of vaccination in mitigating risk.
- 16 Common factors which increase the risk of COVID-19 transmission in workplaces are large numbers of workers and visitors, extended contact, and poor ventilation. Some types of work also require unavoidable close contact between workers and members of the public. Other public health measures, such as distancing, are not always practical.
- 17 Vaccinated close contacts are much less likely to get COVID-19 than an unvaccinated close contact. Vaccinations are therefore a key tool to reduce the spread of COVID-19 and limit the size of outbreaks, especially when other public health measures may be impractical. This will be particularly important for PCBUs, who have a primary duty of care to workers and other people who could be at risk of infection from their work under the Health and Safety at Work Act 2015 (HSWA).
- 18 To date, employers have been encouraged to promote and support their workers to be vaccinated, and remove any barriers to accessing vaccination (eg by allowing them to be vaccinated during work hours without using leave or losing pay). We have also seen unions, employers and workers doing their part to boost vaccination coverage.
- 19 Where there is a high risk to public health because of the potential for COVID-19 exposure and transmission, we already require vaccination as a condition of certain work (eg high-risk roles at the border, in MIQ facilities, and in the health sector and prisons). Vaccinations are also required to do work that involves a high degree of contact with vulnerable people, such as unvaccinated children in education settings and patients accessing healthcare services.
- 20 Separate to vaccination requirements in law, PCBUs can require vaccination if a risk assessment (undertaken in consultation with workers and their representatives) indicates it is a reasonably practical measure to mitigate risk. WorkSafe has provided guidance on how to carry out risk assessments, which are dynamic and unique to each type of work in their business or undertaking.

Ministers were asked to consider emerging workplace issues

- 21 On 4 October 2021, Cabinet invited the Minister for COVID-19 Response, the Minister of Health, the Attorney-General and I, in consultation with the Prime Minister, to consider issues concerning COVID-19 vaccinations and workplaces [CAB-21-MIN-0406]. These generally have to do with employers,

PCBUs and workers not knowing whether their processes and decisions relating to vaccination are robust, fair and justifiable.

- 22 On 18 October 2021, I provided an update on our discussions, and signalled I would soon bring proposals to Cabinet. This paper details those proposals, and seeks decisions to commence drafting legislation.

Strengthening our approach to Government vaccination and testing mandates

- 23 The process by which we have mandated vaccination and testing for work so far has been effective, and has imposed the least possible restriction on human rights to achieve critically significant objectives in the context of the elimination strategy.
- 24 Our emerging approach is instead about managing COVID-19 in the community. This changes the context within which employers/PCBUs must manage and mitigate health and safety risks to workers and others. It also affects the parameters for business continuity planning. It is significantly more likely workers will be exposed to COVID-19, either at home or in the workplace, and that more workplaces will be sites of transmission.
- 25 In the context of a move towards managing COVID-19, there is increasing demand for Government to take the lead and provide certainty about when vaccination is or can be required to do certain work.
- 26 To date, the mandating of vaccinations has focussed on workers in high-risk situations, ie where they are most likely to be exposed to COVID-19, such as at the border or in MIQ facilities. Recently, we have also mandated vaccination to protect vulnerable people in other high-risk settings, such as for work in healthcare, education and prison settings.
- 27 Public health advice is that the vaccination mandates made to date via public health orders, alongside the introduction of CVCs and providing more tools for PCBUs to identify when they should mandate vaccination in their workplaces (refer to further proposals in this paper), are sufficient; that is, additional vaccination or testing mandates are not required at present.
- 28 While a small number of businesses have already announced that both workers and visitors to their premises must be vaccinated, there are widespread and persistent calls from employers, sector groups and unions for greater clarity. For example, I have received specific requests from the hospitality, retail and transport sectors. SMEs in particular have expressed considerable anxiety about the risk of making these decisions themselves and potentially facing litigation.

Vaccination mandates to support CVC settings

- 29 The Minister for COVID-19 Response's paper titled "COVID-19 Vaccination Certificates: Implementation in Domestic Settings" provides information about the use of COVID-19 Vaccination Certificates (CVCs) domestically. A large range of work across the economy could be subject to vaccination

requirements if businesses want to continue operating at Green, Orange and Red levels of the COVID-19 Protection Framework, or operating without distancing and capacity limits.

30 Under the COVID-19 Protection Framework, vaccination would be required in the following settings (note the table below is current as of lodgement):

	<i>With vaccination required for work (e.g. CVC required for customers)</i>	<i>Without vaccination requirements</i>
Green	No other restrictions on: <ul style="list-style-type: none"> • Hospitality • Events • Gatherings • Close proximity businesses • Gyms 	Capacity and distancing requirements will apply to: <ul style="list-style-type: none"> • Hospitality: 100 cap or less based on 1 m distancing; seated and separated. • Events: 100 cap or less based on 1 m distancing; seated and separated. • Gatherings (eg church/marae): 100 capacity or less based on 1 m distancing. • Close proximity businesses: face coverings for workers; 1 m distancing between customers. • Gyms: 100 cap or less based on 1 m distancing.
Orange	No other restrictions on: <ul style="list-style-type: none"> • Hospitality. • Events. • Gatherings. • Close proximity businesses. • Gyms. 	<ul style="list-style-type: none"> • Hospitality can only operate without contact. • Events: cannot operate. • Gatherings: 50 capacity. • Close proximity businesses: cannot operate. • Gyms: cannot operate.
Red	<ul style="list-style-type: none"> • Hospitality: 100 cap (or less based on 1 m distancing). • Events: 100 cap (or less based on 1 m distancing). • Gatherings: 100 cap (or less based on 1 m distancing). • Close proximity businesses: open, with public health requirements. • Gyms: 100 cap (or less based on 1 m distancing). • Tertiary education: 1 m distancing. 	<ul style="list-style-type: none"> • Hospitality can only operate without contact. • Events: cannot operate. • Gatherings: 10 cap. • Close proximity businesses: cannot operate. • Gyms: cannot operate. • Tertiary education: no on-site delivery.

31 The settings above cover approximately 25% of the workforce.¹ This is in addition to the roughly 15% of the workforce covered by existing and proposed vaccination requirements (border, MIQ, health, education and corrections). In total, about 40% of our workforce could be subject to a vaccination mandate once work in CVC settings is included.

¹ This figure includes retail workers (approximately 252,000 workers), some of whom may not be involved in working in close proximity to others.

- 32 There are several ways to ensure work in the above settings is only done by vaccinated workers:
- 32.1 We could decide to mandate that work only be done by vaccinated workers. If we want to do this, it should be decided and announced imminently, to give workers and businesses enough time to be vaccinated and prepare for implementation.
 - 32.2 We could choose not to mandate, and instead allow employers to require vaccination for work in the settings above if they wish to operate with fewer restrictions at each level. We could begin to signal this in our communications, but legislative backing for this would only be able to be provided through the risk assessment process described at paragraph 62 below, which requires both primary and secondary legislation to put in place.
- 33 While the end result might be the same—that anyone doing that work in Green, Orange or Red settings is vaccinated—there needs to be clarity about the mechanism that will be used to achieve this, which is either a Government mandate or employer discretion. This is particularly important given the large proportion of our workforce this decision could affect.
- 34 I consider vaccination requirements in law need to be based on not just our current Alert Level, but any potential Alert Level or Green/Orange/Red level that we could reasonably be at in the near future. This is because imposing vaccination requirements for work at short notice will not be practical for employers and PCBUs to implement. If outbreaks do occur there may be a need to increase restrictions quickly. This may not allow enough time for businesses to implement a vaccination requirement and allow for unvaccinated workers to be vaccinated.
- 35 For business continuity and economic reasons, employers and PCBUs are likely to want to require vaccination in anticipation of potential Alert Level or Green/Orange/Red level changes. This falls outside of the current health and safety risk assessment guidance. I recommend we mandate vaccination for work done in the settings described in the table above, and announce this shortly. This will clearly signal an impending vaccination mandate. It will also remove the need for businesses and employers to make these decisions themselves, which will be tied up in assessments of whether they can operate at different settings in the COVID-19 Protection Framework, or if they should opt to operate in a manner that means fewer restrictions. In the absence of a mandate, we risk high levels of confusion and inconsistency.

Mandating vaccination for other work

- 36 In the course of preparing this paper, vaccination mandates for the following types of work and workforces were suggested:
- 36.1 Key public services, with the following specific examples provided:

- 36.1.1 Police: an outbreak could significantly impact the operation of one or multiple police stations or the ability to deliver key services such as the 111 contact centre. Frontline police officers, in particular, are out in public each day, and often working with vulnerable people who are less likely to be vaccinated.
- 36.1.2 Courts: court staff have significant face-to-face contact with the public, including vulnerable people. Courts have been considered an essential service throughout the lockdown periods. Disruptions to services could have a significant impact on parts of the community, and potentially delay timely access to justice.
- 36.1.3 The Ministry of Social Development (MSD) delivers face-to-face services to many vulnerable people. Further, their contact and processing centres would be significantly impacted by an outbreak or exposure event. There may also be implications for non-government organisations and social partners that work with MSD.
- 36.1.4 Oranga Tamariki is required to fulfil its statutory obligations related to investigating child abuse. It will become increasingly difficult for its workforce, particularly any unvaccinated workforce, to do their job if whānau want only vaccinated social workers in their home. Oranga Tamariki social workers and other frontline staff also have significant and regular engagement with vulnerable communities, which include communities with lower vaccination rates and higher levels of COVID-19 risk factors. An outbreak would put Oranga Tamariki's ability to run some key functions, such as residences and community homes and the contact centre, at risk.
- 36.1.5 Supported housing services have been classified as an essential service throughout the lockdown periods. A COVID-19 outbreak is likely to increase the demand for supported housing services (particularly COVID-19 response motels) and increase the exposure risk those who work in close contact with vulnerable people, which includes contracted security and maintenance staff.
- 36.2 Critical national infrastructure, which could be threatened if a large number of unvaccinated workers need to self-isolate for two weeks after being exposed to COVID-19. These services include, for example, supply of water, disposal of sewage, production or supply of electricity.
- 36.3 Bus and train operations.

- 36.4 Workforces who have regular and sustained contact with children (other than those covered in our recent decision to mandate vaccination in the education sector).
- 36.5 Construction work.
- 36.6 People working with those in transitional housing.
- 37 There may be other services that should also be included, such as those considered essential businesses and services under the Alert Level framework but that may not be captured by any CVC or other vaccination requirements (e.g. supermarkets). Some of these may be places where CVC requirements cannot be imposed on the public, potentially increasing the need for work to only be done by vaccinated workers in order to provide protection to the workforce and any unvaccinated people coming into those places.
- 38 It is important that we carefully consider which workforces should require vaccination and plan for any unintended consequences. For example, enforcing a vaccine mandate in essential public services has the potential to create staffing shortages, if workers are unwilling to comply with a vaccination mandate. This is especially true in industries or sectors where there are pre-existing shortages and workers are disproportionately drawn from populations which are more vaccine hesitant than average.
- 39 I consider there would be value in proactively investigating the type of work where a Government vaccination mandate should be applied across public sector workforces, as a first step, and then across the wider economy. This would help to ensure that we are not receiving requests for vaccination mandates in a piecemeal fashion. It would also provide us with a comprehensive overview of all the types of work where vaccination mandates may be required so we can make more considered decisions and better plan for the implementation of the vaccination mandates. I will discuss with the Minister for the Public Service and the Minister for Economic and Regional Development whether they consider this work should be progressed.
- 40 It will be important, as part of this further work, that the differential impact of vaccine hesitancy or resistance is considered, in particular in certain workforces or communities. As we are seeing in education, there are some Māori communities that have a very high degree of reluctance which could potentially have significant service delivery implications, as illustrated by a letter received by the Ministry of Education from a kura kaupapa Māori in Northland where over half of the workers have indicated they will not be vaccinated. This is likely to be the case in other sectors as well.
- 41 It may be possible to mandate vaccination for some of the above types of work based on the current scope and provisions of the COVID-19 Act, subject to public health advice. However, now that we have decided to start requiring vaccination for work beyond the border and MIQ facilities, the volume of these requests are likely to grow.

- 42 I am also aware of the public health advice that at present, additional vaccination or testing mandates are not required beyond vaccination being required for work at settings where customers have to show a CVC, and employers being given the tools to introduce these requirements themselves. While it may technically be possible to mandate vaccination in the situations described above, our existing framework may not be sufficiently robust to support the introduction of mandates in all of the settings we consider it appropriate.
- 43 I propose we amend the COVID-19 Act to support future vaccination mandates where there is a strong public interest in doing so, rather than solely (or mainly) for public health reasons. This would recognise that there are other reasons to support employers and PCBUs to take necessary steps to prevent COVID-19 exposure and transmission in workplaces (like ensuring overseas market access, as discussed in the following section). As an alternative:
- 43.1 This can be integrated into the design of the risk assessment process described at paragraph 62 below.
- 43.2 We could do leave the law unchanged. Legal professional privilege

Mandating vaccination to ensure overseas market access

- 44 Some overseas markets do, or may in future, prevent access to New Zealand exports due to COVID-19 related issues, such as where COVID-19 cases are reported in export food production premises. While such barriers may be unjustified, they have the potential to have a significant impact on trade. It is important that our primary sectors have access to all available tools to manage and minimise the impacts of these barriers, with immediate threats worth some \$6.8 billion. Vaccination is a critical measure for export producers to manage this specific risk to market access.
- 45 Supporting New Zealand's export market access is essential to economic recovery from the pandemic. The consequences of exporters losing access to critical overseas markets is also likely to have a significant and disproportionate impact on small communities that rely on a large local employer for work opportunities.
- 46 I therefore propose we allow vaccination to be required for work where the Director-General of the Ministry for Primary Industries has determined this is necessary in order to facilitate access for specific products or classes of products to specific overseas markets. I note vaccination alone may not be sufficient in this sector to prevent transmission, and employers may also need to apply other measures such as PPE and physical distancing which they would need to use risk assessment processes under HSWA for.

- 47 This process needs to recognise that the consequence of losing access to a particular market would be significant for a particular employer, before they can require vaccination. There may therefore also need to be an authorisation or verification system run by the Ministry for Primary Industries to ensure employers are appropriately relying on this reason to require vaccination.
- 48 Further work will also be done to assess the current framework for export requirements, and determine the most appropriate approach to reflect the proposed requirements.

Mechanism

- 49 I initially envisaged a system where the law would allow employers to require vaccination for the reasons above (ie protecting essential services and meeting overseas market access conditions), with employers having to make their own determination about whether those reasons apply to that work.
- 50 The CTU and BusinessNZ have instead suggested the Government should make decisions about appropriate mandate vaccination for such work. From their perspective, this would be more appropriate given the broader public interest, and preferable to employers having to make these decisions themselves.
- 51 Government mandating in these circumstances provides greater certainty for employers involved, ensures there is more consistency of vaccination across different employers, and reduces the likelihood of inappropriate dismissals of employees where the necessary bar has not been met.
- 52 There has been no engagement yet with representatives of a number of the services mentioned above, including ports and airports. Analysis is also needed about the impacts to systems such as essential supply chains, if enough workers in these environments are not vaccinated and therefore cannot work. Some of these impacts may be able to mitigated through exemptions and exceptions, particularly if testing is an alternative to being vaccinated.
- 53 Noting this, I agree with the views of the CTU and BusinessNZ, and therefore recommend we amend primary legislation to enable Government to mandate vaccination for these categories of work in future, particularly if public interest arguments are stronger than public health reasons for requiring vaccination.

Standardising our legal framework for vaccination and testing requirements

- 54 Given the other proposals in this paper will likely require legislation to implement, I consider there is value in strengthening and standardising the legal framework through which we set vaccination and testing requirements for work at the same time.
- 55 Although we have used Orders under the COVID-19 Act to mandate vaccination thus far, I consider the time has come to create a more

conventional legislative structure (eg regulations) for future vaccination and testing mandates that apply to work.

- 56 The existing Vaccinations Order, which has recently been tested by the High Court, can remain in place and I am not proposing removing or amending it. However, we should consider making future vaccination and testing mandates for work through regulations for the following reasons:
- 56.1 The making or amending of regulations is a Cabinet process, which is more appropriate for the phase of our COVID-19 response we are moving into, in which vaccination and/or testing requirements for work are likely to be more widespread.
 - 56.2 The current Order-making process involves advice from the Director-General of Health. While public health input will likely always be a component of vaccination and/or testing mandates, it is unlikely to always be the sole driver of a mandate.
 - 56.3 Mandates are likely to be stable. Once made, they are likely to remain while we are responding to the pandemic, meaning updating them through a regulations amendment process will not be inconvenient or inefficient.
 - 56.4 Regulations also better reflect that vaccination mandates will need to be made several weeks in advance of when they come into force, to allow businesses and workers time to prepare. This is in contrast to the Order-making framework, which is more appropriate for fast changes to rules (eg when shifting Alert Levels with several hours' notice).
- 57 In addition, I propose we also strengthen the architecture for vaccination and testing mandates for workplaces. This could include adding the following requirements for mandates made through regulations, which could also be adapted for testing requirements:
- 57.1 Clear duties and obligations on workers and PCBUs subject to vaccination requirements for specified work, which includes a duty on PCBUs to, so far as is reasonably practicable, consult, cooperate with, and coordinate activities with all other PCBUs who have a duty in relation to the same matter (reflecting the duty to consult in HSWA). This is an issue that has been raised with MBIE and WorkSafe in relation to work at ports and on construction sites where there are workers from multiple PCBUs working on site. These duties and obligations will likely be the same across the entire economy, and not specific to any particular type of work or sector. This will also support any enforcement activity needed.
 - 57.2 Authorisation for the relevant Minister to allow for exemptions. This could include creation of a ministerial exemption process to ensure supply chains can keep operating (as has been done with the vaccination mandate for work at the border). This could also

incorporate testing as an alternative to vaccination in some circumstances.

57.3 A requirement for Orders to allow a suitably qualified decision maker to grant case-by-case exceptions from vaccination requirements in exceptional or rare circumstances, with criteria included for decision-making.

57.4 A requirement for any worker doing work that requires vaccination to provide proof of vaccination to their employer or PCBU, and for employers and PCBUs to keep records about those workers' vaccination status. This should be done in the most privacy-enhancing manner. Feedback from the Ministry of Health is that a centralised register, like we use for work at the border and in MIQ facilities, is not feasible at the scale of the CVC proposals, particularly given the majority of those businesses will be in the private sector. MBIE will work with the Office of the Privacy Commissioner to provide practical guidance on how to ensure workers' records are handled in the most privacy-enhancing manner.

58 In relation to the duties and obligations mentioned in paragraph 57.1, both workers and PCBUs should have corresponding duties:

58.1 Workers should not perform certain work without being vaccinated,

58.2 PCBUs should not allow workers to perform certain work without being vaccinated.

Legal professional privilege



Creating a process to guide workplace decisions about vaccination or testing

We can provide additional support to employers and PCBUs

- 61 Outside areas where the Government has mandated vaccination, there are strong and widespread requests from many sectors for the Government to take the lead in guiding decisions on what work requires vaccination. Despite guidance having been available for several months, there is still significant concern from PCBUs that their decisions will be legally challenged. This is deterring them from taking the necessary actions to protect their workplaces from the virus.
- 62 I therefore propose we create a risk assessment process to help employers determine whether work not covered by a Government mandate requires vaccination or testing. This process can be contained in regulations under the COVID-19 Act.
- 63 The process should encompass all the reasons for which we think an employer/PCBU can require vaccination for certain work. This includes public health reasons,² but could also include other reasons such as:
- 63.1 Health and safety in workplaces in relation to COVID-19 (noting the risk assessment process will not replace PCBUs' need to separately assess and mitigate risks unrelated to COVID-19),
 - 63.2 Protecting critical infrastructure,
 - 63.3 Maintaining trust in public services,
 - 63.4 Maintaining access to overseas markets (see paragraph 46 above),
 - 63.5 Unless covered by a Government vaccination mandate, preparing for a different setting of the COVID-19 Protection Framework, where vaccination requirements for workers are necessary to continue operating (eg the settings where CVCs will likely be required for workers, if these are not covered by Government vaccination mandates)
 - 63.6 To reduce the likelihood of a workplace being closed if it is the site of an exposure event, for example if self-isolation requirements for vaccinated workers are shorter than those for unvaccinated workers.
- 64 It is likely the risk assessment will outline certain characteristics of work, and then state whether vaccination can reasonably be required based on the

² For example, WorkSafe's guidance suggests PCBUs consider the following: how many people workers come into contact with; how easy it would be to identify the people who workers come into contact with; how close workers are to other people; how long workers have to be close to other people; whether work involves regular interactions with people at higher-risk of severe illness from COVID-19; the risk of COVID-19 infection and transmission in the work environment compared to outside work; whether the work will involve regular interaction with unknown people if the region is at a higher Alert Level or particular level of the COVID-19 Protection Framework.

characteristics (or combinations of characteristics) associated with various type of work. Specific characteristics of work that may be specified include customer-facing work, close contact work, and working with vulnerable people. The risk assessment will require further design work to ensure it is simple and clear for employers and PCBUs to use. This will require distilling a range of specialist public health and health and safety knowledge.

- 65 In our health and safety and employment systems, we recognise that workers have an important role in identifying and addressing risks in the workplace. The risk assessment will therefore require employers and PCBUs to engage with workers and their representatives when going through the process. This consultation requirement could be based on similar provisions in HSWA.
- 66 Consultation with social partners will also be valuable at the design stage, because they can offer constructive assistance in designing a robust and clear process, drawing from their experience with health and safety risk assessments.

Legal professional privilege



Disputes and legal challenge

- 71 I considered whether there should be a degree of protection from legal challenge for employers and PCBUs using this process. While businesses seek this degree of certainty, I do not consider it necessary or fair to prevent or prohibit any challenge of decisions they reach following the prescribed risk assessment process.
- 72 Employees who feel their employer has not appropriately assessed risk according to the framework would be able to challenge this in the employment institutions (eg the Employment Relations Authority), and other workers would be able to access the civil system. Additionally, the greater the level of detail in the framework, the less necessary it is to insulate employers and PCBUs from legal challenge. This is particularly where they have followed mandated requirements or the prescribed risk assessment process and reached reasonable conclusions to require vaccination (or not require vaccination), and have followed reasonable, good faith employment processes.
- 73 Support will also be available for workers and employers through MBIE's early resolution service to manage any employment relationship problems that arise, and from WorkSafe to support the application of the prescribed risk assessment process.
- 74 I also note that while this risk assessment process would apply to decisions employers and PCBUs make about whether vaccination or testing is required for certain work, they can approach decisions about who is allowed on their premises differently. Private bodies can limit access to their premises by the general public, as long as this does not amount to unlawful discrimination.

Providing paid time off for employees to be vaccinated

- 75 I propose requiring employers to give employees paid time off to be vaccinated. This could support those who have not yet been vaccinated to access vaccination, where this is a barrier.
- 76 Because I propose creating this requirement in the COVID-19 Act, it will apply to any future COVID-19 vaccination rounds (eg for boosters) while the Act is still in force, unless we expressly decide that it should only apply to the first two doses a person receives.

Vaccinations are generally widely available, but some access issues remain

- 77 While vaccination rates are not available by employment type, as of 20 October 2021, approximately 460,000 people aged 20 to 64 (who are most likely to be in the workforce) are yet to receive their first dose of a COVID-19 vaccine. This represents about 16% of this age group. This number is currently decreasing by around 10-15,000 people a day.

- 78 Most urban centres currently have walk-in vaccination or appointments at convenient hours to address public demand. However, some people in rural areas still have challenges accessing convenient vaccination sites. The availability of vaccination may also change as the COVID-19 Immunisation Programme shifts from mass vaccination to targeted catch-up approaches.

Many employers are supporting their employees to get vaccinated

- 79 Business representatives have said most employers already allow employees to be vaccinated during working hours, and will sometimes take additional steps to facilitate this (such as providing transportation). This means a requirement to allow employees to be vaccinated during working hours is unlikely to be onerous for most businesses.
- 80 However, this proposal will impose a cost for some businesses, particularly where it is difficult to rearrange or continue work when some workers are unavailable for a period of time. As a result, some such employers may not have supported employees to be vaccinated during work hours as a result (eg in limited situations in the maritime sector, early on during the implementation of the border worker vaccination mandate).
- 81 The Public Service Commission has said that public sector employees should be paid for time taken to go through the vaccination process, either by doing this during normal working hours, or through paid special leave. This also applies to public servants taking time during work to support their dependents to be vaccinated, or who may experience side effects.

Requiring employers to provide paid time off for vaccination could be beneficial

- 82 The proposal could support increasing vaccination rates among people in less flexible work and who may have limited options for vaccination outside of working hours. It also supports equity, as a greater proportion of those who are yet to be vaccinated, particularly young adults, are Māori.
- 83 While there will be costs for employers where workers take up this entitlement, it is difficult to estimate the scale of the potential benefit, and any associated costs, for the following reasons:
- 83.1 There is limited information about the number of workers who have not already been offered paid time off for vaccination.
 - 83.2 There is limited information about the barriers to vaccination being faced by workers.
 - 83.3 It would not increase access to vaccination for people outside the paid workforce or self-employed people.
- 84 I consider that these costs are likely to be reasonable, and will incentivise employers to support workers to be vaccinated. This will provide benefits to employers of having a highly-vaccinated workforce. For dispersed, rural populations, where the time-off could be more significant to get to vaccination

centres, this could create demand for collective action to make vaccinations more accessible for communities.

Paid time off for vaccination could be a legislative requirement

85 I propose the entitlement to paid time off for vaccination be designed as follows:

<i>Legislation</i>	<i>Guidance or other notes</i>
Employees are entitled to reasonable paid time away from work to receive a COVID-19 vaccine, including travel to and from a vaccination centre.	This entitlement would only apply to publicly funded COVID-19 vaccinations, and could cover potential booster doses received while the entitlement exists in law. This would not apply to any other vaccinations (eg influenza, measles). What “reasonable time off” is will depend on factors including distance to the nearest vaccination centre, availability of transport, and nature of the work, ie what is reasonable in the employer and employee’s particular circumstances.
Before attending a vaccination appointment during work hours, an employee must notify their employer when they are intending to take time off and how long they expect it to take.	
If the amount of time is reasonable, an employer may only refuse if it would unreasonably disrupt the employer’s operations.	Guidance would need to make it clear that in these circumstances, parties would be expected to come to an agreement about a different time that would not be as disruptive.
An employer must pay their employee for the time in question at the rate of pay that the employee would otherwise have received if the employee was performing their ordinary employment duties during that time.	We may need to work with unions to identify what guidance should be provided in cases where this may be hard to establish (eg in some parts of the care and support workforce).
An employer who fails to allow an employee reasonable time off to be vaccinated should be liable to an infringement notice issued by a Labour Inspector.	An infringement notice is currently available for breaches of COVID-19 Orders where expressly stated. This proposal could broaden the scope of infringement notices and enforcement provisions of the COVID-19 Act, and may involve authorising Labour Inspectors as “enforcement officers” under the COVID-19 Act.

86 This proposal goes further than the vaccination duties in clause 8(2) of the COVID-19 Public Health Response (Vaccinations) Order 2021, which requires PCBUs to not prevent workers from being vaccinated during work hours. However, I consider this appropriate to support raising vaccination coverage across all workplaces.

87 I propose that the entitlement be situated in the COVID-19 Act. This means the entitlement would be repealed when the COVID-19 Act as a whole is, which will happen on or before 13 May 2023 (based on amendments currently being legislated).

Employers would be liable for an infringement notice if they do not comply

- 88 Discussions between employees and employers about time off for vaccination must take place in good faith. MBIE's early resolution and mediation services will be available to assist with any disputes.
- 89 I propose employers be liable for an infringement notice under the COVID-19 Act for any breach of this entitlement, which may require amending the offence and enforcement provisions currently in that Act. The risk of being issued with an infringement notice would deter non-compliance. If authorised as enforcement officers under the COVID-19 Act, and operating with powers provided to them by the Employment Relations Act, Labour Inspectors could issue infringement notices for a breach of this entitlement.

Clarifying notice periods when employment ends because employees are unvaccinated and their work requires them to be vaccinated

- 90 When unvaccinated employees are doing work that requires vaccination, parties can agree a mutually satisfactory alternative (eg redeployment to less risky work that does not require vaccination or options for work re-design or remote working). However, stakeholders have said that redeployment options are usually limited within the workplaces covered so far and this is likely to be the case for the majority of the workforce, particularly where close contact is a key part of work.
- 91 When parties cannot agree any alternative, a decision to end the employment relationship can either be treated as a termination or a restructuring. This is an uncertain and legally contestable area:
- 91.1 Termination could be on the basis of an employee not being ready, willing and able to work, or failing to comply with health and safety requirements after a risk assessment. Termination is usually subject to contractual notice provisions, but does not involve compensation.
- 91.2 Restructuring resulting in an employee being made redundant would be on the basis that the requirements of an employee's role have changed such that they can no longer do that job. Being made redundant would entitle them to any contractual redundancy compensation and notice.
- 92 Over time, COVID-19 vaccination is likely to become necessary for more work in our economy. As requirements to be vaccinated increase across the economy, this issue will continue to arise and be the subject of disputes.
- 93 To provide more certainty about what should happen when an employment relationship ends, either because of a Government vaccination mandate or an employer-imposed requirement, I consider there are two options we can pursue, either individually or in combination:

- 93.1 Option 1 (recommended): requiring a minimum of four weeks' paid notice to occur before someone can be terminated for being unvaccinated, during which time they could become vaccinated.
- 93.2 Option 2: requiring compensation, for example four weeks' pay or any contractual compensation based on redundancy.
- 94 I consider paid notice is more appropriate because it strikes the right balance between providing certainty for employers and employees about entitlements, and avoiding the potentially significant unintended consequences of option 2. The CTU and BusinessNZ are of the same view. Other stakeholders consulted on the proposals in this paper also prefer option 1.
- 95 I note employees working at the border and in MIQ facilities have already had their employment terminated with paid notice, but without any redundancy compensation. Legislating to require compensation now would likely be seen as unfair.
- 96 Both options would also apply in the context of regular employment law:
- 96.1 Employers must still take care to be fair and reasonable in their response, and work through processes with employees in good faith before deciding on any outcome.
- 96.2 An employee would still be able to bring a personal grievance against their employer, for example alleging unjustified dismissal or disadvantage.
- 96.3 Parties would continue to have the freedom to reach any lawful and mutually agreeable outcome at any time during the process. This could include negotiating additional compensation.
- 96.4 An employer's decision to end an employment relationship must be the last option, after all other options (eg redeployment where possible or rearranging work, agreement to a negotiated end of employment) have been exhausted.
- 97 For clarity, I note this change would only apply to employees, and not contractors. For contractors doing work that requires vaccination, contract law applies. This means employers will need to use contractual provisions to amend or cancel contracts, and could potentially invoke frustration of contract. The entitlement will also not apply to genuinely casual workers.³

Option 1 (recommended): Requiring a minimum notice period for termination

- 98 I consider that employees facing termination of their employment because they are unvaccinated, and doing work that requires vaccination, should be given a minimum of four weeks' paid notice before they are terminated, during which they could become vaccinated. This will ensure that all employees

³ Each period of work of a casual employee (when offered and accepted) is treated as a new employment, which would be incompatible with a statutory minimum notice period.

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receive a 'minimum standard' of notice, with this being worked unless the vaccination mandate or requirement applies from earlier than the end of the notice period (where employees will be able to be paid out their notice period) or unless otherwise agreed.

- 99 An employee would be able to access employment institutions (eg the Employment Relations Authority) if they considered their employer had breached this entitlement, in addition to accessing MBIE's early resolution and mediation services. The CTU also suggest clarifying that end of employment through this process should not be considered a disciplinary matter.
- 100 Both BusinessNZ and the CTU support this proposal. BusinessNZ considers that four weeks appears to be a reasonable timeframe for a minimum notice period. The CTU suggests that guidance reflects that a reasonable employer would keep jobs open for workers who get fully vaccinated in the notice period. The CTU also considers that the entitlement should not apply to situations that result in a genuine redundancy: these would follow normal contractual redundancy processes.
- 101 The minimum notice period would apply where an employment agreement contained a relevant notice period that was less than four weeks, or no notice period at all. This could represent an additional, unanticipated cost for some employers if their employee was unable to work during the period. If an employment agreement contained a relevant notice period that was more than four weeks, then the more generous notice period would apply. Some employers are likely to choose to provide a longer period of notice.
- 102 Employers will need to provide employees with a reasonable time to get vaccinated, in accordance with good faith requirements, before the date that the vaccination requirement (either form a Government mandate, or employer decision) comes into effect. If an employee gets vaccinated before the notice period expires, they should be able to retain their job, provided this would not cause unreasonable disruption to the employer's business. This would need to be legislated for and there would need to be guidance on what could be considered unreasonable. An example could be where a new employee had been hired before the employee had become vaccinated and notified their employer of their intention to continue in the job. The CTU and BusinessNZ are comfortable with this approach.
- 103 The likely impact of this on employers depends on several unknowns:
- 103.1 How much work across the economy is subject to a Government vaccination mandate or an employer-imposed vaccination requirement,
 - 103.2 For that work, the number of employees who remain unvaccinated, and are not exempt from vaccination for medical reasons,
 - 103.3 Among unvaccinated employees, how many can (and want to) do other work for their employer that does not require vaccination, and

103.4 For all other unvaccinated employees, the length of any notice periods in their employment agreements, if their employment is terminated because they are unvaccinated.

Option 2: Requiring compensation be provided

- 104 Under this option, employers could be required to compensate any unvaccinated employees whose employment relationships end because they are not vaccinated. This could either take the form of a minimum entitlement (eg four weeks' pay) or specifying that termination will trigger any contractual compensation (eg based on redundancy).
- 105 Similar to option 1, it is hard to estimate how much this would cost employers, because this depends on how many employment agreements provide for redundancy compensation, and how generous they are. This option would likely be more costly than only providing four weeks' paid notice.
- 106 There are likely to be some sectors where some long-serving employees would be entitled to a significant amount of redundancy compensation (eg 26 weeks' pay). For reference, nearly a third of collective agreements in the private sector include four to five weeks compensation for the first year of service, and nearly half of central government collective agreements provide six weeks compensation for the first year of service. The majority of collective agreements provide two weeks' additional pay for each year of service, with a cap on the total amount.
- 107 Requiring employers to pay compensation based on redundancy provisions could inadvertently incentivise employees to remain unvaccinated to get a redundancy pay-out. Ultimately, because this will send the wrong signal about the importance of COVID-19 vaccination, I do not recommend requiring employers to provide compensation in these situations.
- 108 BusinessNZ considers that contractual redundancy payments should only be paid if the contractual criteria for the payment is met.
- 109 The CTU said its affiliates are opposed to any measures which could incentivise people not to get vaccinated, and that while they have not had time to form a formal position on the matter, early sounding suggest a strong preference for option 1. They agree that any contractual terms for notice periods that are longer than 4 weeks will still need to be honoured, as will any other benefits or payments in agreements that apply to termination (excluding redundancy).

I do not recommend changing employees' ability to challenge employers' decisions

- 110 Employees' rights to test the justifiability of their employers' decisions will continue to apply. This includes decisions about a vaccination requirement (outside a Government mandate), as well as any consequent decisions about employment implications.

- 111 This does not address the demand from some businesses for a safe harbour for their vaccination decisions. One option suggested by officials in response was limiting legal challenge to disputes about process, explicitly providing only unreasonable decisions being able to be the subject of litigation. I considered this would provide limited benefit (in terms of certainty) at great cost to employees.
- 112 Instead, the cumulative effect of the proposals in this paper should provide more certainty to employers and signal what decisions are likely to be considered reasonable (eg when deciding themselves whether work should require vaccination). I prefer this to limiting legal rights of challenge. As discussed at paragraph 73, support and guidance can be provided for workers and employers on how to reasonably implement vaccination mandates or requirements, and how to handle any employment relationship problems that may arise.

Funding for WorkSafe's COVID-19 compliance and enforcement activities

- 113 Funding for WorkSafe will support increased COVID-19 compliance and enforcement outcomes by supporting businesses and organisations to better comply with public health controls; providing more scope for improvement/enforcement measures; and allowing proactive work to be undertaken.
- 114 WorkSafe has not received any funding for its COVID-19 enforcement activity, instead reprioritising within baseline resourcing. A review of WorkSafe's COVID-19 function by MBIE found that using the health and safety levy (WorkSafe's main source of funding) to fund COVID-19 was not appropriate or sustainable. Funding is required because current arrangements are negatively impacting both COVID-19 workplace compliance and enforcement and core workplace health and safety activity (which has been re-directed towards COVID-19 services).
- 115 The funding of \$3.533m operating expenditure and \$0.840m capital expenditure will enable WorkSafe to extend its current reactive-only COVID-19 activity to more proactive and integrated regulatory services using a mix of education, engagement and enforcement interventions. Approximately 50% of WorkSafe's COVID-19 outputs will be in Auckland as the frontline against COVID-19. Where possible, complex proactive activity will focus on highest-risk settings, including the border and MIQ.
- 116 As discussed with the Office of the Minister of Finance, the funding sought is for 2021/22 only, which was intended to be sought as part of the omnibus COVID-19 response functions funding package due to be considered by Cabinet in November 2021. Baseline funding for 2022/23 onwards will be submitted for consideration as part of Budget 2022. As an initiative funded by the COVID-19 Response and Recovery Fund, WorkSafe report on the use of this funding.
- 117 Consideration was also given to whether additional funding is required for the Labour Inspectorate or other functions in the employment relations system (eg

early resolution or mediation) to deal with compliance issues and dispute resolution. These would relate to the entitlements to paid time off for vaccination and paid notice requirements. At this time, MBIE's costs for these functions can be covered from within baselines. If there are material impacts on service delivery, further funding may need to be considered or reprioritisation against existing services would be required.

Review

- 118 MBIE intends to review the proposals covered in this paper after they are implemented. This will help understand the effect of these measures, and provide more information about how long they are likely to be required as part of our pandemic response.

Financial implications

- 119 Other than the proposal to fund WorkSafe's COVID-19 compliance and enforcement activities, these proposals are not expected to have direct financial implications for the Crown in terms of significant additional costs to implement the proposals.
- 120 The Government currently provides specific economic support for individuals who have to self-isolate due to COVID-19 exposure or testing (i.e. the Leave Support Scheme and Short-Term Absence Payment, respectively). Initiatives that increase vaccination rates, such as mandatory vaccination, may lessen the need for formal directions to self-isolate due to COVID-19. This may mean the need for Government economic supports for self-isolation is expected to reduce over time, and may eventually become redundant.
- 121 Welfare support may be sought by employees whose employment is terminated because they are not vaccinated, and their job requires vaccination. MSD has advised the 13-week stand-down period would not apply to such applicants.

Legislative implications

- 122 A bill is needed to implement the proposals in this paper, likely through amendments to the COVID-19 Act. In addition, the proposals envisage secondary legislation being made, on which I will seek Cabinet decisions shortly.
- 123 The paper on CVCs we are discussing today titled "COVID-19 Vaccine Certificates: Implementation in domestic settings" seeks decisions that would require legislation to implement. Together with other interested Ministers, I propose a single amendment bill for vaccination matters reflecting decisions on this paper and the CVCs paper.
- 124 The proposed bill will bind the Crown.

- 125 I recommend we aim to introduce this bill to the House in the November 2021 sitting block, and pass it under urgency. This will enable the legislative framework for CVCs and vaccination decisions to be in place as soon as possible.
- 126 Subject to the time needed for the legislative process, and drafting of any regulations or Orders, it may be possible to enact law and make regulations or Orders by the end of November 2021. This will depend on the scale of any additional vaccination mandates that are required. I note all mandates thus far have included (or plan to include) several weeks or months for workers to be vaccinated, following the commencement of Orders. Stakeholders consulted on the proposals in this paper have suggested that lead-time be allowed for any vaccination mandates or requirements, recognising that implementing the employment processes involved in these mandates or requirements in November or December 2021 may be impractical.

Impact analysis

Regulatory Impact Statement

- 127 The Regulatory Impact Analysis (RIA) Team at the Treasury has determined that the proposals to introduce a framework for COVID-19 vaccination requirements in the workplace are exempt from the requirement to provide a Regulatory Impact Statement. The exemption is granted on the grounds that the proposals are intended to manage, mitigate or alleviate the short-term impacts of the declared emergency event of the COVID-19 pandemic, and implementation of the policy is required urgently to be effective (making complete, robust and timely Regulatory Impact Statements unfeasible).
- 128 The RIA Team strongly supports MBIE's proposed review of the proposals, given the significance of potential impacts.

Climate Implications of Policy Assessment

- 129 Climate Implications of Policy Assessment requirements do not apply to the proposals in this paper.

Population implications

- 130 The main impact stems from the potential requirement to be vaccinated to do certain work. This could exacerbate existing inequities in the vaccination coverage among different groups and regions. Māori, and younger age groups of Pacific peoples currently have low rates of vaccination compared with the wider population and could be disproportionately impacted by requirements to be vaccinated to do certain work. There could be flow-on effects, for example, on poverty rates. There could also be impacts on disabled people who have experienced barriers in accessing vaccination. However, vaccination requirements for certain work could have the effect of increasing vaccination rates as people have further incentive to be vaccinated.

- 131 It is imperative that our vaccination campaign reaches these groups in time for any implementation of wider vaccination mandates. Te Puni Kōkiri has emphasised the need to build a positive, inclusive, and shared consensus towards vaccination by utilising communications and marketing campaigns, localised leadership and access to information, as well as connecting with Māori business networks and leaders to provide insight and advice. It may also be necessary to consider support structures and opportunities for transition for Māori and younger Pacific workers.

Human rights

- 132 Requiring vaccination for work (eg in CVC settings) limit section 11 (the right to refuse to undergo medical treatment) and section 19 (freedom from discrimination) of the New Zealand Bill of Rights Act 1990 (BORA).
- 133 The proposals limit the right to refuse to undergo medical treatment because, faced with a choice between being vaccinated and losing their job, a person may feel compelled to be vaccinated (i.e. their decision to refuse may be overborne). The proposals may also limit the right to be free from discrimination in the case of individuals who have a medical reason for not being vaccinated, such as a severe allergy. This may constitute a “disability” for the purposes of section 19 of BORA.
- 134 In order for the Government to impose limits on these rights, the purpose mandatory vaccination seeks to achieve must be an important one, vaccination must be linked with the purpose sought to be advanced, and there must not be an alternative that restricts the rights less (such as frequent testing or wearing of PPE) that would still achieve the objective.
- 135 I consider that limitations on these rights are justified because of the strong public health and public interest objectives outlined in this paper, and the apparent lack of less-restrictive alternatives to achieve those objectives. The proposals include safeguards to protect workers who lose their job as a consequence of a Government-imposed vaccination mandate or their employers’ decision to restrict certain work to vaccinated workers. This includes a requirement for employers to provide paid notice, and potentially also compensation, and exemptions for people who cannot be vaccinated for medical reasons.
- 136 MBIE officials will work with the Ministry of Justice while legislation is drafted to ensure that the framework provides any additional safeguards needed to mitigate the impact of limiting these rights.

Te Tiriti o Waitangi implications

- 137 Treaty principles require the Crown to do what is reasonable in the circumstances.
- 138 Māori could be disproportionately impacted by requirements to be vaccinated to do certain work because of their current low rates of vaccination compared with the wider population. Further employer or Government-mandated

vaccination requirements for workers may incentivise some to get vaccinated in advance of vaccination requirements coming into effect. The proposal in this paper relating to the requirement to provide paid time off work to get vaccinated will help increase the opportunity for this. The requirement for employers to provide minimum paid notice also helps to protect workers who lose their job as a consequence of a Government-imposed vaccination mandate or their employers' decision to restrict certain work to vaccinated workers.

Consultation

- 139 This paper was prepared by MBIE. The Ministry of Health reviewed this paper and provided specific input, including public health advice. Crown Law advised on BORA implications.
- 140 Other agencies consulted include: Department of Corrections, Department of Internal Affairs, Department of Prime Minister and Cabinet, Ministry of Education, Ministry of Housing and Urban Development, Ministry of Justice, Ministry of Primary Industries, Ministry of Transport, Ministry of Social Development, Office of the Privacy Commissioner, Parliamentary Counsel Office, New Zealand Police, Public Service Commission, Te Arawhiti, Te Puni Kōkiri, The Treasury, and WorkSafe. The Border Executive Board was also consulted.

Social partner consultation

- 141 We have consulted the CTU and BusinessNZ on the proposals in this paper. In addition to their specific comments on the employment proposals above:
- 141.1 The CTU supports the proposal to strengthen the processes by which the Government mandates vaccination in the workplace, based on public health science and workforce engagement. They consider that Government vaccination mandates, together with the risk assessment process for employers, is essential to remove ambiguity, ensure more consistent outcomes, and reduce litigation. They noted the importance of employers engaging in dialogue with unions at an industry level (tripartite engagement), as well as with their workers, and that health and safety representatives should be involved.
- 141.2 BusinessNZ is also comfortable with the proposals relating to vaccination mandates and the risk assessment process, because they will give certainty to businesses. They consider that the framework needs to clearly set out the reasons when vaccination is required for particular types of work.
- 142 In the time available, targeted consultation was also undertaken with members of MBIE's Small Business Advisory Group and Retail NZ:
- 142.1 Cautious support was expressed for the broad approach in this paper, and the increase of certainty that this would provide.

- 142.2 It was noted that a minimum paid notice period only was preferred where a worker is terminated at the end of an employment process if they are not vaccinated, and that any entitlements to paid time off to be vaccinated should be subject to a reasonableness requirement. In rural settings, where many small businesses operate, a paid time off entitlement could be a significant impost if it involves significant travel time.
- 142.3 Retail NZ also asked that personal grievances not be allowed where employers have made a decision to require vaccination, because in their view this would drive rapid vaccination uptake. They also suggested that any work-related mandate should have a lead-time of 4 – 6 weeks for a first dose, and another 4 weeks for a second dose.
- 143 Officials note that in those circumstances guidance should encourage looking at options to support broader vaccination efforts and guidance could be provided on what would be reasonable. Officials will engage with these stakeholders to ensure the overall guidance material is fit-for-purpose for small to medium sized businesses in particular.

Implications for the public sector as an employer

- 144 The Public Service Commission has engaged with agencies on the proposals in this paper, and provided the following feedback.
- 145 Public service agencies are preparing to assess whether certain work meets the threshold for requiring vaccination for much the same reasons as private sector employers: to keep public servants and customers safe. In addition, they are also considering the following:
- 145.1 Specific work done by frontline public servants creates higher risk due to uncontrolled close personal contact beyond what is ordinarily considered “close contact”, eg in the justice sector and emergency response.
- 145.2 There is a need to ensure safety of or access to vulnerable communities (eg in terms of Māori communities seeking assurance that public servants are vaccinated before entering their communities, and for Public Trust officials entering rest homes).
- 145.3 The public can lack choice about engaging with some public services (eg Police, Corrections, social workers, accessing benefits, participating in democratic institutions).
- 145.4 Ensuring safety to other people at places providing Government services (eg courts).
- 145.5 The transferability of workers across the public service and the need for workers to be mobilised immediately when responding to events such as COVID-19 Alert Level changes and disasters such as Whakaari/White Island.

- 146 Engagement with unions to date has been constructive, but the greater clarity proposed in this paper to help agencies and unions navigate these decisions in a less resource intensive way would assist.
- 147 A framework for guiding decisions about what work requires vaccination is important for helping ensure the public service has consistency across its workforce in terms of assessing similar work.
- 148 In relation to reasons other than public health considerations for requiring vaccination, there are some public service-specific drivers that should also be considered. These include ensuring safe access to public services, maintaining trust and confidence in the public service, ensuring continuity of critical services to Government and ensuring availability of public service emergency response services.

Communications

- 149 Communications on the matters in this paper will be agreed with the Office of the Prime Minister.

Proactive release

- 150 I intend to proactively release this paper following Cabinet consideration.

Recommendations

The Minister for Workplace Relations and Safety recommends that Cabinet:

- 1 **note** that on 4 October 2021, Cabinet invited the Minister for COVID-19 Response, the Minister of Health, the Attorney-General and I, in consultation with the Prime Minister, to consider issues concerning COVID-19 vaccinations and workplaces [CAB-21-MIN-0406];

Strengthening our approach to Government vaccination and testing mandates

- 2 **note** there is a significant volume of calls for the Government to mandate vaccination in work settings and workforces beyond those for which decisions have been made thus far;
- 3 **note** decisions on mandatory use of COVID-19 vaccination certificates (CVCs), and public health advice that workers should have to be vaccinated in the same settings where the public would have to show a CVC for entry, suggest vaccination mandates will be needed for a very broad range of work in the future;
- 4 **agree** to:
- EITHER** (recommended)
- 4.1 mandate vaccination for work in any settings where a CVC may be required;

OR

- 4.2 allow employers to require vaccination for work in settings where a CVC is required, by incorporating this into the risk assessment process in recommendation 14 below;
- 5 **direct** the Minister for the Public Service, Minister for Economic and Regional Development and Minister for Workplace Relations and Safety to discuss whether any additional work should be subject to vaccination or testing mandates;
- 6 **agree** to amend the COVID-19 Public Health Response Act 2020 to support future vaccination or testing mandates where there is strong public interest in doing so, with additional detail such as specific reasons (eg preserving overseas market access) potentially specified in regulations;
- 7 **agree** to include a provision that vaccination can be required for work where the Director-General of the Ministry for Primary Industries has determined this is necessary in order to facilitate access for specific products or classes of products to specific overseas markets;
- 8 **note** Legal professional privilege [REDACTED]
- 9 **note** I consider the process for mandating vaccination or testing for work can be strengthened, particularly ahead of it being used for a much wider range of work;
- 10 **agree** to:
- EITHER** (recommended):
- 10.1 create future vaccination or testing mandates for work through regulations under the COVID-19 Public Health Response Act;
- OR** Legal professional privilege [REDACTED]
- 10.2 continue to mandate vaccination or testing for work through COVID-19 Orders under the COVID-19 Public Health Response Act;
- 11 **agree** to further strengthen our legal framework for vaccination and testing requirements by:
- 11.1 setting clear duties and obligations on workers and PCBUs subject to requirements, including a duty on PCBUs to collaborate where they have overlapping duties;
- 11.2 authorising the relevant Minister to allow for exemptions, which could incorporate testing as an alternative to vaccination in some circumstances;

- 11.3 requiring a suitably qualified decision-maker to grant case-by-case exceptions from vaccination or testing requirements in exceptional or rare circumstances;
- 11.4 requiring any worker to provide proof of vaccination or testing to their employer or PCBU; and
- 11.5 requiring employers and PCBUs to keep records about workers' vaccination status, with a view to doing this in the most privacy-enhancing manner;

Creating a process to guide workplace decisions about vaccination or testing

- 12 **note** the current approach for deciding whether COVID-19 vaccination or testing can be required to do certain work, outside Government mandates, is based on individualised health and safety risk assessments, which is complicated for employers and workers to navigate without specialist public health expertise;
- 13 **note** there is also uncertainty about when it can be reasonable to require vaccination for certain work, and in the absence of clarity, these issues are likely to be the subject of litigation;
- 14 **agree** to prescribe a risk assessment process that employers and persons conducting a business or undertaking (PCBU) must follow when determining whether certain work requires vaccination or testing;
- 15 **agree** employers and PCBUs must consult workers and their representatives when using the risk assessment process referred to in recommendation 14;
- 16 **note** this risk assessment process will reflect health and safety and public health reasons for requiring vaccination or testing, and could also encompass as other reasons such as planning for future Alert Levels or settings in the COVID-19 Protection Framework;
- 17 **agree** to:
 - EITHER** (recommended):
 - 17.1 prescribe the risk assessment process referred to in recommendation 14 through regulations;
 - OR** Legal professional privilege
 - 17.2 prescribe the risk assessment process referred to in recommendation 14 through COVID-19 Orders under the COVID-19 Public Health Response Act;

Providing paid time off for employees to be vaccinated

- 18 **note** requiring employers to allow employees to be vaccinated during work hours without loss of pay or leave could improve access to vaccination;

- 19 **agree** that employers should provide reasonable paid time for employees to be vaccinated against COVID-19, with breaches of this enforced by Labour Inspectors;

Clarifying notice periods when employment ends because employees are unvaccinated and their work requires them to be vaccinated

- 20 **note** there is uncertainty about what processes and entitlements apply when unvaccinated employees are doing work that requires vaccination, and there are no alternatives (eg redeployment) that would allow them to continue working for their employer without being vaccinated;
- 21 **agree** to require employers to provide a minimum of four weeks' paid notice in situations described in recommendation 20;
- 22 **note** an option to provide a minimum amount of compensation was also considered but is not recommended because it could inadvertently incentivise remaining unvaccinated, but employees and unions could test if any contractual compensation entitlement is triggered in these situations in court;
- 23 **note** all other employment law obligations would remain as they currently are, such as the duty of good faith and ability for employees to raise a personal grievance;

Funding for WorkSafe's COVID-19 compliance and enforcement activities

- 24 **note** that on 11 May 2020, Cabinet agreed to establish tagged operating and capital contingencies of \$50 billion to support a response to and recovery from COVID-19, called the COVID-19 Response and Recovery Fund [CAB-20-MIN-0219];
- 25 **agree** to fund WorkSafe's COVID-19 compliance and enforcement role, charged against the COVID-19 Response and Recovery Fund;
- 26 **approve** the following changes to appropriations for funding for WorkSafe COVID-19 compliance and enforcement role, with a corresponding impact on the operating balance net core Crown debt:

Vote Labour Market Minister for Workplace Relations and Safety	\$m - increase/(decrease)			
	2021/22	2022/23	2023/24	2024/25 & Outyears
Non-Departmental Output Expense: Workplace Relations and Safety - Workplace Health and Safety	3.533	-	-	-
Non-Departmental Capital Expense: Workplace Relations and Safety – Capital for WorkSafe New Zealand	0.840	-	-	-
Total Operating	3.533	-	-	-
Total Capital	0.840	-	-	-

- 27 **agree** that the changes to appropriations above be included in the 2021/22 Supplementary Estimates and that, in the interim, be met from Imprest Supply;
- 28 **note** as an initiative funded by the COVID-19 Response and Recovery Fund, there will be associated reporting mechanisms;

Approve drafting of legislation

- 29 **agree** to add a bill to the 2021 Legislation Programme with Category 2 (must be passed in the year) priority to give effect to the policy decisions in this paper and the paper titled “COVID-19 Vaccine Certificates: Implementation in Domestic Settings” we are also discussing today;
- 30 **invite** the Minister for Workplace Relations and Safety, in consultation with the Minister for COVID-19 Response, to issue drafting instructions to Parliamentary Counsel Office giving effect to the policy decisions in this paper;
- 31 **authorise** the Minister for Workplace Relations and Safety, in consultation with the Minister for COVID-19 Response, to make decisions on any issues that arise during the drafting process;
- 32 **invite** the Minister for Workplace Relations and Safety to draw Cabinet’s attention to decisions referred to in recommendation 31 when seeking approval to introduce legislation;
- 33 **agree** that legislation drafted to give effect to the policy decisions in this paper will bind the Crown;

Communications

- 34 **note** that an appropriate communications plan will be developed and agreed with the Office of the Prime Minister.

Authorised for lodgement

Hon Michael Wood

Minister for Workplace Relations and Safety