



## BRIEFING

### COVID-19 vaccination: Instrument for secondary legislation

<b>Date:</b>	28 October 2021	<b>Priority:</b>	Urgent
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2021-1569

Action sought		
	Action sought	Deadline
Hon David Parker <b>Attorney-General</b>	Agree that work-related vaccination/testing mandates be made by the Minister for Workplace Relations and Safety through Orders.  Agree that the prescribed risk assessment process for PCBUs be made through Order in Council on the recommendation of the Minister for Workplace Relations and Safety.	29 October 2021
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>		

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Privacy of Natural Persons			✓

The following departments/agencies have been consulted
Crown Law Office

Minister's office to complete:

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

Comments



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#### Purpose

To seek your decisions on the type of instrument to be used for secondary legislation relating to COVID-19 vaccination/testing in the work context.

#### Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** on 26 October 2021, Cabinet authorised the Attorney-General and Minister for Workplace Relations and Safety to decide the instrument used for:
- Further work-related vaccination/testing mandates, and
  - A prescribed risk assessment process for persons conducting a business or undertaking (PCBU) to decide whether to require vaccination/testing for work.

*Noted*

- b **Agree** that further work-related vaccination/testing mandates be made by the Minister for Workplace Relations and Safety through Orders, with the requirements for these orders based on those in section 11 of the COVID-19 Public Health Response Act 2020.

*Agree / Disagree*

- c **Agree** that the prescribed risk assessment process for PCBUs be made through Order in Council on the recommendation of the Minister for Workplace Relations and Safety.

*Agree / Disagree*

Shane Kinley  
**Policy Director, Workplace Relations and  
Safety Policy Branch**  
Labour, Science and Enterprise, MBIE

28 / 10 / 2021

Hon David Parker  
**Attorney-General**

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Hon Michael Wood  
**Minister for Workplace Relations and  
Safety**

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## Background

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1. Following Cabinet's consideration of proposals to support COVID-19 vaccination requirements in the workplace, Cabinet authorised you to make decisions regarding the appropriate form of legislative instrument to give effect to vaccination/testing mandates for work and the prescription of a risk assessment process.

## Recommended approach to secondary legislation

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2. Officials from MBIE and Crown Law have met to discuss this, and recommend that the COVID-19 Public Health Response Act 2020 be amended to:
  - a. Enable the Minister for Workplace Relations and Safety to make Orders that mandate vaccination/testing for work; and
  - b. Authorise the Minister for Workplace Relations and Safety to recommend regulations be made through Order in Council prescribing a risk assessment process that PCBU's (and persons conducting a business or undertaking) must follow when determining whether certain work requires vaccination or testing.

## Vaccination/testing mandates

3. We consider the making of such orders should be authorised through a separate provision to section 11 as it should involve a different Ministerial decision-maker. A separate process to that which applies under section 11 would also enable enhanced consultation requirements to be applied, which we consider appropriate given the relationships that will be impacted by mandates.
4. Further, the requirement to have regard to advice from the Director-General of Health about the risks of the outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to address those risks could be modified so that it is something the Minister may take into account when making an Order. This reflects the broader range of public interest considerations involved in this decision-making and the fact that public health considerations are unlikely to be the sole driver of decision-making about mandates in work settings.

## Risk assessment process

5. We consider it appropriate to prescribe the risk assessment process in regulations. This is because the regulation-making process involves Cabinet consideration. Further, once made, the process is unlikely to be amended frequently. If it is amended, it would be appropriate for a longer lead-in time to apply given the impacts for PCBU's decision-making.

Legal professional privilege



## **Next steps**

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13. We recommend you discuss this briefing. Your decisions will allow us to complete drafting instructions for PCO on the vaccination Bill, on which these two matters are outstanding.