



Briefing: COVID-19 Protection Framework: Omnibus Amendments

Date:	29/04/2022	Report No:	DPMC-2021/22-1769
		Security Level:	IN CONFIDENCE
		Priority level	Medium

	Action sought	Deadline
Hon Chris Hipkins Minister for COVID-19 Response	agree/disagree to recs	
Hon Kris Faafoi Minister of Justice	For information only	

Name	Position	Telephone
Ruth Fairhall	Head of Strategy and Policy	s9(2)(a)
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Minister's Office

Status:

Signed

Withdrawn

Comment for agency

Attachments: Yes/No

Briefing

COVID-19 Protection Framework: Omnibus Amendments

To: Hon Chris Hipkins Minister for COVID-19 Response Hon Kris Faafoi Minister of Justice			
Date	28/04/2022	Security Level	IN CONFIDENCE

Purpose

1. This briefing proposes an approach for running elections under the COVID-19 Protection Framework (the Framework), specifically related to face mask requirements at voting places and protections for people's access to voting. The paper also clarifies a range of technical points in the COVID-19 Public Health Response (Protection Framework) Order 2021 (the Order) regarding mixed use spaces, food courts, and the 2m face mask exception for performers.

Recommendations

We recommend you:

1. **note** that officials have been working through any potential issues relating to the Framework and the ability of the Electoral Commission to run an election (or by-election) while the Framework is active across the country;
2. **note** that there are several issues that have been worked through and do not require amendments to the Order:
 - 2.1 Distinctions between the vaccinated and unvaccinated;
 - 2.2 Operating voting places under 1m distancing rules;
 - 2.3 People being able to move across regional boundaries to vote or prepare for elections; and
 - 2.4 Voting for cases or contacts under isolation requirements;
3. **note** under the current settings, there is inconsistency with how face mask requirements would be applied to different places where voting is like to occur;

4. **agree**, that either:

4.1 face masks are required at all voting places at Red and Orange; or

YES NO

4.2 mask use in a voting place is determined by the type of facility; or

YES NO

4.3 mask use in voting places is under guidance at all three levels **[Ministry of Justice and the Electoral Commission recommended]**;

YES NO

5. subject to your decision in recommendation 4, **agree** to amend the Order to bring any change into effect;

6. **agree** to amend the meaning of designated premises in the Order to include electoral premises to protect individuals' access to voting irrespective of their vaccination status;

YES NO

7. **note** that the Order will also be amended to clarify the following technical issues:

7.1 for mixed use indoor areas, the presence of any 'walls that substantially divide that space from other spaces' sufficiently defines an indoor space and that guidance will be updated to inform venue operators of the requirements that apply when operating;

7.2 food courts are not captured by the food and drink rules and can continue to operate under rules specified for retail spaces; and

7.3 performers do not have to wear a mask when in close proximity to one another, if they are maintaining a 2 metre distance from the audience at all times;

8. **note** that once decisions have been made on the above issues, officials will issue drafting instructions and are working to have the amended order reading for signing by the week of 16 May 2022;


9. **forward** this briefing to the Minister of Justice for his information;

YES NO

10. **agree** to proactively release this report, subject to any appropriate withholding of information that would be justified under the Official Information Act 1982.

YES NO


Ruth Fairhall
Head of Strategy and Policy, COVID-19 Group
..29../..4../2022


Hon Chris Hipkins
Minister for COVID-19 Response
...03../...05../2022

Proactively Released

Executive summary

2. This briefing seeks to clarify an approach for running elections under the Framework, specifically regarding face mask requirements at voting places and protections for people's access to voting irrespective of vaccination status.
3. It summarises several issues raised by the Ministry of Justice which have been worked through by officials and do not require a change to the Framework Order. It also provides advice on two issues that will require a change:
 - a) face mask requirements at voting places; and
 - b) additional protections in the Order for people's access to voting.
4. The paper also clarifies a range of technical points in the Order relating to issues raised by other departments on mixed use spaces, food courts, and the 2m face mask exception for performers.
5. Once decisions have been made, officials will issue drafting instructions to the Parliamentary Counsel Office. Officials are working to have the amended order ready for signing by the week of 16 May 2022, with updated communications and guidance to follow.

Background

6. As part of administering the COVID-19 Public Health Response (Protection Framework) Order 2021, the Department of the Prime Minister and Cabinet (DPMC) keeps under review how the requirements are working in practice. The legislation underpinning the Framework is due to expire on 13 May 2023 and Ministers will be considering the future of the Framework in coming months. ^{s9(2)(f)(iv)}
^{s9(2)(f)(iv)}
7. Through this process, other government departments are given the opportunity to submit issues for consideration and potential amendment, which are subsequently worked through via a policy and legal amendment process led by DPMC. As a result of this process, departments have raised concerns and issues relating to the way the Framework operates in their sector, and suggested amendments to the Order to resolve the particular issue raised.

By-elections

8. Officials have been working through any potential issues relating to the Framework, specifically the ability of the Electoral Commission to run a by-election while the Framework is active across the country.
9. The most urgent need for these changes is the upcoming Tauranga by-election in June 2022, however, ^{s9(2)(g)(i)} The intention of these changes is to future-proof the Framework Order for this purpose, even if settings are made more restrictive again either by moving to Red or tightening the settings at Red or Orange (for example if a new variant arose).

Issues which don't require changes to the Framework Order:

10. Several issues originally raised by the Ministry of Justice (on behalf of the Electoral Commission) have been able to be worked through or resolved via recent changes to the Framework as part of the post-peak work. These are:

Distinctions between vaccinated and unvaccinated people

11. Vaccination requirements for entry to certain places have the potential to prevent some people from voting or participating in organising elections. However, any potential differential treatment based on vaccination status was resolved through the removal of requirements for vaccine certificates on 4 April 2022. While businesses can limit access to their premises to people with My Vaccine Passes (or similar) as a condition of entry, spaces being used as a voting places for an election will be guided by the Electoral Commission as to their operating practices for any voting space.

Challenges with operating voting places under physical distancing rules

12. The policy intention is that voting stations should be required to comply with the same capacity limits calculated by the relevant physical distancing rules as retail spaces under the Framework. While the physical distancing requirements (and in practical terms the capacity limits) for voting stations will depend upon the type of premises in which the voting occurs, officials have confirmed that any physical distancing/capacity limit rules for voting stations should be no more restrictive than those imposed on retail premises, which at the Red setting of the Framework operate with capacity limits based on 1m distancing. There is no physical distancing or capacity limits for retail premises or public facilities at Orange or Green.

People being able to move across boundaries to vote or prepare for elections:

13. There are no movement restrictions in the Framework at present and they are not reasonably expected in the near future.

Voting for cases and contacts who are under isolation requirements:

14. Voters who cannot leave their location of self-isolation currently have alternative options for voting when they are unable to do so in person. These include:

- a) authorising someone to collect and return a takeaway vote on their behalf. This requires the voter to complete a declaration and have it witnessed by the authorised person;
- b) applying for postal voting;
- c) takeaway voting is available for voters in hospital, and for rest homes (Returning Officers arrange to deliver voting services on site); and
- d) in 2020, telephone dictation voting was available for those in MIQ facilities. The Minister of Justice is currently seeking Cabinet approval to reinstate Regulation 24C of the Electoral Regulations 1996, so that this can be offered to those isolating at home, at the Electoral Commission's discretion.

Issues which will require a change to the order:

Face mask requirements at voting places

15. Under the current settings, face mask requirements at voting places will be determined by the space that the voting place is set up in. This is because at Orange and Red, face masks are mandatory in certain settings (i.e., retail, public facilities) unless a person is exempt. Under the Framework there is no requirement for the owner/operator of a retail setting to compel people to wear face masks or exclude people if they are unmasked.

16. Voting places are likely to be set up in a range of venues including school halls, retail and other community facilities, and so both the physical setting and Protection Framework colour setting will determine whether face masks would be required. While there is an argument a voting place could come within scope of "premises operated by a central government agency", where masks are required at Red and Orange, such an interpretation was not contemplated when the Framework was developed.

17. s9(2)(g)(i)



18. However, the use of face masks is a key remaining public health measure under the Framework. Requirements for face masks are based on evidence that mask use is a highly effective public health measure to limit the transmission of COVID-19, especially in indoor settings and given more transmissible variants, such as Omicron. At Orange and Red settings community transmission is still placing pressure on the health system, making face masks for places involving close contact between people still proportionate.

19. Voting is an important democratic process and access to voting places should be both enabled and protected for all members of the public. It is possible that a face mask requirement at voting places might be perceived by some as a barrier to voting. It is also important to consider whether the rights of vulnerable people to safely access a voting place is limited if that place is perceived to be unsafe due to the less mask use, in the context of widespread community cases. While the Ministry of Justice consider that the likely difference in behaviour between encouraging the use of masks and making use mandatory in voting places will be negligible, throughout the response, there has been anecdotal evidence to support significant increases in compliance when something is legally required rather than just encouraged (e.g., scanning, face masks).

20. s9(2)(h)



21.



22. Officials have identified three options to resolve this issue:

- a) face masks are required at all voting places at Red and Orange (which will require an amendment to the Order for the avoidance of doubt);
- b) mask use in a voting place is determined by the mask requirements that apply at the time to the type of facility in which voting is conducted (meaning masks would be required in some places and not in others – no amendment required); and
- c) mask use in voting places is under guidance at all levels – (will require an amendment) – **[Ministry of Justice and Electoral Commission recommended]**.

23. Option 22(a) prioritises the ongoing public health risk of COVID-19 and the benefits afforded by face masks use, against the potential to limit individual rights by requiring the use of masks in a voting place. It provides a consistent approach to mask requirements for all voting places and with the supporting rationale for face mask requirements in the Framework generally, allowing for those legitimately exempt to access a voting place (through the established mask exemption process). Enabling safe access for all people to voting places, and recognising that significant number and range of people may be accessing a voting place at any one time, supports a consistent approach to face mask requirements at all voting places. WorkSafe considers this as the most enforceable option because mandating masks in these places provides the greatest certainty to voters and people in control of voting spaces.
24. Option 22(b) would allow for face mask requirements to remain tied to the setting where the voting place is located. While this approach carries more complexity in its communications, it both allows flexibility in application of the requirements (i.e., where a voting place is in a retail setting or public facility, masks would be required, but not at a school hall). This option relies on the already established assessment of public health risk related to each venue under the Framework. This approach could however confuse the intent of the policy – as while the activity (voting) is the same regardless of venue, the face mask requirements would differ depending on the place. In this way, flexibility in the application of the requirements could create a misalignment with activity taking place in the setting. WorkSafe considers that this option is enforceable in that it most closely aligns with existing expectations and enforcement practices. However, the Ministry of Justice and the Electoral Commission consider this option is not operationally feasible and creates too much ambiguity for voters.
25. Option 22(c) is the Ministry of Justice and Electoral Commission's preferred approach because it would allow for all people to access voting places without the legal requirement to wear a mask. Under this option, mask use would still be strongly encouraged in voting places. Under the Order, places set up for electoral purposes would be specifically excluded from the application of the face mask rules in the Framework, leaving them to be dealt with by guidance. This option would mitigate any risk of mask requirements being accused of suppressing voter turnout and nullify potential criticism of COVID-19 public health requirements being expressed in voting places. It could however, raise questions about inconsistencies around mask use in different venues under the Framework.
26. If the choice is to leave mask wearing under guidance, there are options to mitigate any concerns which people might have. They include but are not limited to:
- Advanced voting: The Electoral Commission plans on the basis of providing advance voting for each by-election, and there will be early and advance voting available for voters in the Tauranga by-election. While there are no statutory rules about the length of the advance voting period, the Commission's standard planning is to provide 14 days of advance voting before election day Saturday. A benefit of advance voting is that it can spread the flow of voters and reduce the numbers of voters accessing a voting place on election day.
 - Staff and volunteers required to wear masks: Requiring staff and volunteers to wear masks at voting places would align with approach taken at most settings at Orange. The Commission will require its public-facing staff to wear masks in voting places as part of their employment requirements.
 - Guidance encouraging mask use and available masks at the door: The Ministry of Justice advise that mask use would still be strongly encouraged for voters in voting places and masks will be available for anyone arriving without one.

27. This issue involves balancing a number of important rights. Maintaining and enabling the right to vote in the context of navigating public health measures in a pandemic involves some trade-offs. While under all options people would be able to wear a mask (to protect themselves and others), the choice for Ministers is whether they prefer masks as guidance or as a requirement.

Additional protections for people's access to voting

28. Officials propose amending clause 10 (the meaning of designated premises) in the Order to include electoral premises. This amendment would protect individuals' access to voting irrespective of their vaccination status. When officials drafted the policy for vaccine certificates in 2021, work was undertaken to identify scenarios and places where limiting access on the basis of vaccination status would not be justified. It was agreed that certain businesses and service providers would be prohibited from implementing a vaccination requirement when they are necessary for the preservation of life (e.g., supermarkets, healthcare providers, certain housing services) and are necessary to ensure access to those services (e.g., public transport). Additionally, the prohibition was extended to some education services, to recognise the importance of access to education.

29. While there are currently no government vaccination requirements for entry to premises, businesses in control of premises are free to impose their own vaccination restrictions. Like the existing settings in designated premises, this would mean that no person in control of electoral premises (nor a person in control of premises that people must enter for the purpose of accessing designated premises) could refuse access to anyone on vaccination grounds.

30. Officials consider that the action of voting in an election meets an equivalent threshold (the importance of the right of New Zealand citizens to vote) and this would be a justifiable change to preserve this access and meets the original intent of the policy.

Te Tiriti o Waitangi/Treaty of Waitangi considerations for by-elections

31. Officials have considered Te Tiriti o Waitangi/the Treaty of Waitangi and its principles. Relevant Treaty obligations include the Crown's duty to actively protect Māori from adverse health outcomes, and to ensure equity for Māori. Relevant to these considerations are the lower levels of vaccination within the Māori population, the availability and cost of face masks, the difficulty for Māori living in isolated communities to access a voting place, and the higher risk that the impacts of COVID-19 pose to Māori communities.

32. Both the mask-required and mask-guidance options considered in the by-election section of this paper involve trade-offs that will impact all those who need to vote (including Māori). Of the options considered in paragraph 22 of this paper:

- a) 22(a) preferences health outcomes, which is significantly beneficial to Māori as a vulnerable population, at the cost of potentially discouraging some voters; and
- b) 22(c) preferences access to voting places while potentially increasing health risk, which may likewise discourage some vulnerable Māori voters.

33. In this way, either the risk to Māori health is reduced, or the potentially disproportionate impact on Māori from election venue measures is reduced. In either case, readily available masks at voting places (under 22(c)) and low barriers to entry or access (under 22(a)) – including remote voting options for those who are completing isolation requirements or are unable to leave their home for other reasons – work to mitigate these risks in the context of a local by-election. Paragraph 26(c) confirms that masks will be available at voting places for people arriving without one.

34. While any changes to face mask requirements for voting places need to be in place for the Tauranga by-election, the settings are intended for general implementation in any/all by-elections that may take place in the coming months. Therefore, the broad based engagement on mask use which occurred as part of work for the April Cabinet paper *The COVID-19 Response after the peak of Omicron*, supports the analysis in this paper.
35. Through that process, officials sought the views of Iwi Chairs, Māori groups, and worked with National Iwi Chairs Forum Pandemic Response Group (NICF PRG) technicians, to understand which restrictions could be removed to maximise freedoms while continuing to protect Māori and heard views from Māori groups regarding the impacts and potential benefits of mask wearing generally. Engagement indicated a preference to err on the side of caution when considering what measures are removed or endure beyond the peak of the Omicron outbreak, especially given the recent opening of our borders. Loosening restrictions in the future reduces burden on Māori but may also increase their risk of contracting COVID-19.
36. While the previous engagement did not specifically consider mask use in the context of the activity of voting, it did consider mask requirements in the venues where people would vote (e.g., churches, schools, shopping centres). The health advice for this work does not highlight any risk from the activity of voting itself but rather the indoor places where people gather or pass through. Therefore, the previous engagement is directly relevant to the paper's analysis.

Mixed use indoor spaces

37. Under the Order, capacity limits (which currently only apply at Red) apply to defined spaces. In the Order, a defined space is a single indoor space, which means:
 - a) there are walls (whether permanent or temporary) that substantially divide that space from other spaces; and
 - b) the space does not share direct airflow with another indoor space.
38. The definition of a single indoor space presents operating difficulties for large, mixed use indoor spaces such as the National Library (which has a café, retail, and library, all within the same large ground floor space) – as technically, at Red, there may only be up to 200 people within the 'defined space' of the area associated with the capacity limit (e.g., the café).
39. In practice, this means that the capacity limit of 200 people applies to the entire venue. It also presents some perceived anomalies for large single-use venues – for example, shows that occur in theatres that have a downstairs area and an upstairs area (or sometimes three tiers) – limits the number of people in the total space, despite being adequately distanced, because they still have shared airflow.
40. The rule of 'not sharing direct airflow' was intended to minimise the potential for COVID-19 transmission in indoor venues, between large groups of people. However, the requirement for no shared airflow has proven to be very restrictive for certain indoor spaces. Public Health has subsequently reconsidered the issue and advised that the presence of 'walls (whether permanent or temporary) that substantially divide that space from other spaces' is sufficient criterion alone to define an indoor space. Also relevant is that masks are required to be worn in many of the affected indoor spaces at Red.
41. It is recommended that the Order is amended to reflect this clarification, and that guidance is updated to inform venue operators of the requirements that apply when operating mixed use large spaces.

Food courts

42. Businesses are only considered food and drink businesses under the Order if they meet the criteria of 'consumption at the premises' of food and/or drink. Generally, if businesses are selling food or drink for takeaway purposes only, they can follow the retail rather than food and drink rules. However, the Order specifically includes a business or service that sells, offers, or provides food or drink to customers and clients in a shopping mall, for consumption in the shopping mall.
43. How these rules apply to food businesses, or kiosks within food courts, caused significant confusion and complaints to WorkSafe while New Zealand was at Red. The confusion generally arose because those businesses do not provide the tables themselves, so have no control over the enforcement of the seated and separated rules that apply to food and drink businesses at Red. The shopping malls, which often provide the tables and chairs to facilitate consumption in food courts, is also not technically a food and drink business because it does not "sell, offer, or provide" food or drink.
44. Public Health advice is that diners in open spaces within shopping malls, such as food courts, need not be subject to the seated and separated rules that apply to other hospitality premises. While some degree of risk is present from the activity of eating and drinking, these settings are generally amenable to groups being able to maintain distancing and do not generally promote prolonged periods of intermingling.
45. Officials recommended that the Order is amended to provide that food courts are not captured by the food and drink rules and can continue to operate under rules specified for retail spaces.

2 metre face mask exception for performers

46. The Order is currently ambiguously worded in relation to the 2 metre (2m) face mask exception for performers. As a result, the exception could be applied and interpreted one of two ways:
- a) that all performers do not have to wear a mask onstage, but must keep 2m away from each other at all times (in addition to staying 2m away from the audience at all times); or
 - b) that all performers do not have to wear a mask onstage and can mingle between themselves but must keep 2m away from the audience at all times.
47. A need for clarification as to how this exception should be interpreted has arisen due to the recent introduction of a requirement for workers at events to wear face masks, and the relaxation of the indoor capacity limits (which will allow more performances to be financially viable and go ahead), both at Orange and Red. In addition, based on engagement with the relevant sectors, officials anticipate that event organisers will soon be seeking clarification of the requirements.
48. DPMC proposes amending clause 23 of the Order to clarify that performers do not have to wear a mask when in close proximity to one another, if they are maintaining 2 metre distancing from the audience at all times.
49. The proposed interpretation is supported by the Ministry of Culture and Heritage (MCH), the Ministry of Business, Innovation and Employment (MBIE), and Public Health. MCH support more permissive settings for performers to further stimulate the industry and enable events to go ahead. MBIE support this on the basis it will provide promoters and performers clarity and is in line with other rules that would apply if the performers were instead in a defined space. Public Health advise that there is no need for masks or physical distancing between the performers, on the basis that performers are not required to distance between themselves at

rehearsals. This is due to rehearsals being classified as a gathering under the Order, and in practical terms operate under the Framework like any workplace. In this way, Public Health confirms there is no additional risk created by allowing the performers to be excepted from wearing a mask if they are less than 2m from each other during a performance.

Next steps

50. Once decisions have been made on the above issues, DPMC officials will issue drafting instructions to the Parliamentary Counsel Office. Officials are working to have the amended order reading for signing by the week of 16 May 2022.

Financial implications

51. There are no direct financial implications with the proposals in this paper.

Consultation

52. The following agencies were consulted on this briefing: the Ministry of Health, Crown Law Office, Ministry of Business, Innovation and Employment, WorkSafe, Ministry of Justice, Te Arawhiti, Ministry of Culture and Heritage, and the Policy Advisory Group (DPMC).

Communications

53. Decisions on this briefing will inform updated content for official Unite Against COVID-19 channels and any other relevant guidance to the public and key stakeholders.