

**HOLLY MANNING**

**A case for mandatory COVID-19 vaccination? The blurred line between individual autonomy and collective responsibility, and balancing the competing obligations of employers**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2021

---

---

*This paper discusses the legitimacy of mandatory vaccination in the context of COVID-19. Vaccination is essential to minimise future health impacts of the virus and recover from the economic and social strains it has caused. However, it gives rise to the contentious question of whether people should be at liberty to choose or refuse the vaccine, or if there are circumstances in which it can be mandated. This paper addresses this debate in the context both of a government mandate, and an employment setting. It suggests that government mandated vaccination, while arguably lawful under the New Zealand Bill of Rights Act 1990, is unlikely to be pursued on a widespread basis. Without a government directive, employers are left with significant uncertainty regarding their ability to require vaccination. Competing statutory obligations require employers to provide a healthy and safe work environment, while not unreasonably infringing on individual employees' interests. This paper argues that in certain circumstances, the health and safety risk presented by COVID-19 will be sufficient to justify mandatory vaccination of employees.*

---

Key Words: COVID-19, mandatory vaccination, human rights, health and safety, employment law

## ***Table of Contents***

<b><i>I</i></b>	<b><i>Introduction</i></b> .....	<b>3</b>
<b><i>II</i></b>	<b><i>COVID-19 statistics: the virus and the vaccine</i></b> .....	<b>4</b>
<b><i>III</i></b>	<b><i>Government Mandated Vaccination Policies</i></b> .....	<b>7</b>
<b><i>A</i></b>	<b><i>Public Health Justifications</i></b> .....	<b>7</b>
<b><i>I</i></b>	<b>Protecting individuals</b> .....	<b>7</b>
<b><i>II</i></b>	<b>Establishing herd immunity</b> .....	<b>8</b>
<b><i>B</i></b>	<b><i>Effectiveness of coercion</i></b> .....	<b>9</b>
<b><i>I</i></b>	<b>What constitutes ‘mandatory’?</b> .....	<b>9</b>
<b><i>II</i></b>	<b>Are mandatory policies effective?</b> .....	<b>10</b>
<b><i>III</i></b>	<b>Improving effectiveness</b> .....	<b>11</b>
<b><i>C</i></b>	<b><i>The Jacobson case and its modern reception</i></b> .....	<b>11</b>
<b><i>I</i></b>	<b>The Jacobson case</b> .....	<b>11</b>
<b><i>II</i></b>	<b>Post Jacobson</b> .....	<b>12</b>
<b><i>D</i></b>	<b><i>New Zealand Bill of Rights Act 1990</i></b> .....	<b>14</b>
<b><i>I</i></b>	<b>Right to refuse medical treatment</b> .....	<b>14</b>
<b><i>II</i></b>	<b>Limitations on the right to refuse medical treatment</b> .....	<b>15</b>
<b><i>III</i></b>	<b>Justified limitation?</b> .....	<b>15</b>
<b><i>E</i></b>	<b><i>Summary</i></b> .....	<b>18</b>
<b><i>IV</i></b>	<b><i>Mandatory Vaccination in Employment</i></b> .....	<b>19</b>
<b><i>A</i></b>	<b><i>Judicial responses to mandatory vaccination</i></b> .....	<b>20</b>
<b><i>I</i></b>	<b>Australia</b> .....	<b>20</b>
<b><i>II</i></b>	<b>Canada</b> .....	<b>21</b>
<b><i>III</i></b>	<b>New Zealand</b> .....	<b>22</b>
<b><i>B</i></b>	<b><i>Competing obligations under statute</i></b> .....	<b>23</b>
<b><i>I</i></b>	<b>Health and Safety at Work Act 2015</b> .....	<b>23</b>
<b><i>II</i></b>	<b>Human Rights Act 1993</b> .....	<b>25</b>
<b><i>III</i></b>	<b>Employment Relations Act 2000</b> .....	<b>28</b>
<b><i>V</i></b>	<b><i>Conclusion</i></b> .....	<b>32</b>
<b><i>VI</i></b>	<b><i>Bibliography</i></b> .....	<b>34</b>

## I Introduction

COVID-19 is a highly contagious virus which has spread rapidly around the world, destroying livelihoods, and accounting for 4.5 million deaths to date.<sup>1</sup> Since the outset of this pandemic, there has been a race to develop a vaccine to slow the spread of the virus and minimise its impacts. Nearly two years since the first cases, several vaccines have been developed, approved, and made publicly available. The issue now becomes ensuring as many people as possible get vaccinated. Immunising significant portions of the population is the most effective means of preventing infection.<sup>2</sup> However, New Zealand's low vaccine uptake rates,<sup>3</sup> combined with the novelty and scepticism surrounding COVID-19 vaccines, makes it unlikely this will be achieved under a voluntary scheme.

Several overseas companies, including United Airlines and Qantas, have announced their intention to mandate vaccination for their employees.<sup>4</sup> Ordinarily, people have the right to refuse vaccination. This leaves significant uncertainty as to the circumstances in which it can be required. The question of mandatory vaccination has arisen previously, but due to political reluctance, nothing eventuated from discussions.<sup>5</sup> The unprecedented nature of COVID-19, however, provides an opportunity to revisit this question. Mandatory vaccination is a

---

<sup>1</sup> World Health Organization "WHO Coronavirus (COVID-19) Dashboard" (29 August 2021) <<https://covid19.who.int>>.

<sup>2</sup> Ministry of Health *Immunisation Handbook 2017* (2nd ed, Ministry of Health, Wellington, 2018) at [11.2].

<sup>3</sup> 85.4 per cent of 5 year olds meet the full immunisation requirements for their age groups. See Ministry of Health "National and DHB immunisation data" (19 May 2021) <<https://www.health.govt.nz/our-work/preventative-health-wellness/immunisation/immunisation-coverage/national-and-dhb-immunisation-data>>; In 2019 one in four New Zealander's got influenza vaccine, and in 2020 a record high of one in three. See Hot Julie Anne Genter "Record numbers of New Zealander's protected with flu vaccine" (27 April 2020) Beehive <<https://www.beehive.govt.nz/release/record-numbers-new-zealanders-protected-flu-vaccine>>.

<sup>4</sup> Lori Aratani and Michael Laris "United airlines becomes first carrier to mandate vaccine for US based employees" (6 August 2021) <<https://www.washingtonpost.com/transportation/2021/08/06/united-airlines-covid-vaccine-mandate/>>; and Nassim Khadem "Qantas makes COVID-19 vaccinations mandatory for all of its workers" (18 August 2021) <<https://www.abc.net.au/news/2021-08-18/qantas-mandatory-vaccinations-covid19-workers-pandemic/100386206>>.

<sup>5</sup> Debate arose in regard to the 2019 measles outbreak but the Prime Minister dismissed the possibility of mandatory vaccination. See Zane Small "PM Jacinda Adern rules out 'no jab, no play' policy adopted in Australia" (3 August 2019) Newshub <<https://www.newshub.co.nz/home/politics/2019/09/pm-jacinda-ardern-rules-out-no-jab-no-pay-policy-adopted-in-australia.html>>.

contentious debate due to people's strongly held beliefs on both sides of the issue. It raises legal and ethical questions as to when collective responsibility prevails, justifying an infringement on people's individual autonomy. The first half of this paper will focus on mandating vaccination at a government level, whether this be widespread or in defined circumstances. This involves discussion of public health justifications, as well as implications for the right to refuse medical treatment under the New Zealand Bill of Rights Act 1990 (BORA). The second half addresses mandatory vaccination in an employment context, where it is not supported by a government directive. This is a complex issue due to the intersection between health and safety, employment, and human rights laws.

## *II COVID-19 statistics: the virus and the vaccine*

To give context to the remainder of this paper, it is important to understand the nature of COVID-19 and the available vaccines.<sup>6</sup> The starting assumption is that mandatory vaccination should only be considered in the face of a serious threat to public health, and strong medical evidence as to the efficacy of vaccines.

COVID-19 became known to the World Health Organisation in late 2019, and over 216 million cases have since been confirmed globally.<sup>7</sup> Several variants of the original virus have emerged, making it difficult to manage and predict. COVID-19 spreads through mouth and nasal fluids as droplets or aerosols.<sup>8</sup> Transmission usually requires coming within one metre of an infected individual, but the virus can also last up to seven days on certain surfaces.<sup>9</sup> The incubation period is 1 - 14 days, with most people becoming infected five to six days after exposure.<sup>10</sup> Common symptoms include fever, dry cough, fatigue, shortness of breath,

---

<sup>6</sup> The statistics provided in this paper regarding COVID-19 and the available vaccines are up to date as of 1 September 2021.

<sup>7</sup> World Health Organization, above n 1.

<sup>8</sup> World Health Organization "Coronavirus disease (COVID-19): How is it transmitted?" (13 December 2020) <<https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted#:~:text=%20>>.

<sup>9</sup> World Health Organization, above n 8.

<sup>10</sup> World Health Organization "Coronavirus disease (COVID-19)" (12 October 2020) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19>>.

sore throat, and headache.<sup>11</sup> The majority of cases experience relatively mild symptoms and 80 per cent recover without hospital treatment.<sup>12</sup> However, 15 per cent of cases require oxygen, five per cent become critically ill needing intensive care,<sup>13</sup> and two per cent result in fatality.<sup>14</sup> The risk is greatest for vulnerable groups including 60 and over and those with underlying medical conditions.<sup>15</sup> However, the emergence of the more infectious delta variants has seen young people become more at risk than previously thought.<sup>16</sup>

New Zealand has emerged relatively unscathed, with just over 3000 cases and 26 deaths.<sup>17</sup> This equates to a death rate of less than one per cent. However, this is due to stringent lockdown and border measures. Sixty four per cent of New Zealand's cases have been directly or indirectly linked to international travel meaning they were already in managed isolation, or promptly isolated upon contact tracing.<sup>18</sup> In the worst affected countries, however, death rates are as high as nine percent.<sup>19</sup>

Unprecedented levels of global collaboration among scientists and governments has resulted in the development of several vaccines. Globally, over five billion doses of vaccines have been administered,<sup>20</sup> and nearly 2.5 million in New Zealand.<sup>21</sup> New Zealand has entered purchase agreements for several vaccines, but designated Pfizer as its primary vaccine.<sup>22</sup>

---

<sup>11</sup> World Health Organisation, above n 10.

<sup>12</sup> World Health Organisation, above n 10.

<sup>13</sup> World Health Organisation, above n 10.

<sup>14</sup> World Health Organization, above n 1.

<sup>15</sup> World Health Organisation, above n 10.

<sup>16</sup> Delta outbreaks in Victoria and New South Wales have been driven by infections in people under the age of 40. Twenty-four per cent of New South Wales patients in intensive care are 30 or younger. See Melissa Cunningham "Delta is very unusual: young people warned the variant may pose greater risks" (27 July 2021) *The Sydney Morning Herald* <<https://www.smh.com.au/national/delta-is-very-unusual-young-people-warned-the-variant-may-pose-greater-risks-20210726-p58cyo.html>>; and Roni Caryn Rabin "Is the delta variant making younger adults 'sicker, quicker'" (3 April 2021) <<https://www.nytimes.com/2021/08/03/health/covid-young-adults-sicker.html>>.

<sup>17</sup> World Health Organization, above n 1.

<sup>18</sup> Ministry of Health "COVID-19: Source of cases" (31 August 2021) <<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-data-and-statistics/covid-19-source-cases>>.

<sup>19</sup> Countries with the highest death rates are Peru (nine percent), Bosnia and Herzegovina (4.7 per cent), and Hungary (3.7 per cent). See World Health Organization, above n 1.

<sup>20</sup> World Health Organization, above n 1.

<sup>21</sup> World Health Organization, above n 1.

<sup>22</sup> Ministry of Health "COVID-19: Purchasing the vaccines" (29 July 2021)

Pfizer is an mRNA vaccine meaning it does not contain any version of the virus.<sup>23</sup> It stimulates your immune system to produce and recognise ‘spike proteins’ so it can learn to attack the virus.<sup>24</sup> Two doses are required to ensure maximum effectiveness.<sup>25</sup> Pfizer reduces the risk of infection, and is 95 per cent effective in protecting from serious illness.<sup>26</sup> Its effectiveness in preventing transmission is less well understood. Initial studies estimate that those who are infected after the first dose become 38 to 49 per cent less likely to transmit the virus to unvaccinated household contacts.<sup>27</sup>

Prior to approval, Pfizer underwent a three-stage clinical trial to ensure safety and effectiveness.<sup>28</sup> These trials are ongoing to monitor patients’ long-term health. Approval in New Zealand was delegated to Medsafe who granted provisional consent for a period of nine months under s 23 of the Medicines Act 1981.<sup>29</sup> The purpose of this provision is to allow approval where there is a clear and immediate need for medicine, but an absence of information required for full consent.<sup>30</sup> Approval of Pfizer on this basis was challenged but upheld by the High Court in *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health*.<sup>31</sup> While it was reasonably arguable that consent was ultra vires, the repercussions of halting the vaccine rollout were too significant to allow injunctive relief.<sup>32</sup> In response to this decision, the government passed an amendment under urgency removing the

---

<<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines/covid-19-vaccine-strategy-planning-insights/covid-19-purchasing-vaccines>>.

<sup>23</sup> Ministry of Health, above n 22.

<sup>24</sup> Ministry of Health, above n 22.

<sup>25</sup> Ministry of Health, above n 22.

<sup>26</sup> Ministry of Health, above n 22. However, Pfizer CEO says a third ‘booster’ dose is likely to be necessary. See Jacqueline Howard “Pfizer data suggests third dose of Covid-19 vaccine ‘strongly’ boosts protection against delta variant” (28 July 2021)

<<https://edition.cnn.com/2021/07/28/health/pfizer-third-dose-data-bn/index.html>>.

<sup>27</sup> Ministry of Health “COVID-19 Science Updates” (7 May 2021)

<[https://www.health.govt.nz/system/files/documents/pages/science\\_updates\\_7\\_may\\_2021.pdf](https://www.health.govt.nz/system/files/documents/pages/science_updates_7_may_2021.pdf)>.

<sup>28</sup> Ministry of Health “COVID-19: vaccine effectiveness and protection” (2 August 2021)

<<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines/covid-19-vaccine-effectiveness-and-protection>>.

<sup>29</sup> Medsafe “COVID-19 Vaccine approval process” (27 November 2000)

<<https://www.medsafe.govt.nz/COVID-19/vaccine-approval-process.asp>>.

<sup>30</sup> *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107 at [58].

<sup>31</sup> At [48] and [75].

<sup>32</sup> At [68].

requirement that provisional consent only be given for products available to limited segments of the population.<sup>33</sup>

### *III Government Mandated Vaccination Policies*

#### *A Public Health Justifications*

Public health operates off a precautionary principle, and elimination of avoidable harm.<sup>34</sup> This is especially necessary during crisis decision-making when “reasonable efforts to reduce risk need not wait for scientific certainty”.<sup>35</sup> Delays in decision-making can result in catastrophic health impacts.<sup>36</sup> However, the precautionary principle must be balanced against the ethical consideration of ‘first do no harm’. Presuming the safety and effectiveness of COVID-19 vaccines, public health objectives provide strong support for mandatory vaccination.

#### *I Protecting individuals*

Public health objectives seek to protect as many individuals from deadly disease as possible. Paternalistic justifications consider the state is best placed to protect citizens from their own arguably ‘poor’ choices. This is contrary to the theory that people will choose to be vaccinated due to inherent self-interest.<sup>37</sup> Therefore, paternalism assumes there are reasons why people will reject voluntary vaccination. This assumption is confirmed by vaccination uptake rates.<sup>38</sup> Understanding why people refuse vaccination is crucial to improving uptake. The three main reasons identified in literature, are scepticism of pharmaceutical companies, omission bias, and religious beliefs.<sup>39</sup>

---

<sup>33</sup> Andrew Little “Technical amendment to Medicines Act” (18 May 2021) <<https://www.beehive.govt.nz/release/technical-amendment-medicines-act>>.

<sup>34</sup> Rebecca Rodal, Nola M Ries and Kumanan Wilson “Influenza vaccination for healthcare workers: towards a workable and effective standard” (2009) 17 Health Law Journal 297.

<sup>35</sup> At 321.

<sup>36</sup> At 320.

<sup>37</sup> Julian Savulescu “Good reason to vaccinate: mandatory or payment for risk?” (2020) 47 Med Ethics 78 at 80.

<sup>38</sup> Ministry of Health, above n 2; and Genter, above n 2.

<sup>39</sup> Emma Cave “Voluntary vaccination: the pandemic effect” (2017) 37 Legal stud 279 at 282.



Anti-vaccination rhetoric has emerged largely as a result of unsubstantiated claims linking the MMR vaccine to autism.<sup>40</sup> Despite proven false, these claims continue to persist and undermine public trust in vaccines.<sup>41</sup> Messaging from conspiracist groups such as QAnon continues to spread anti-vaccination rhetoric in relation to COVID-19. This includes claims the vaccine is an attempt to insert the population with tracking devices.<sup>42</sup>

A greater number of people fall into the category of ‘vaccine hesitant’.<sup>43</sup> This is a spectrum whereby people are reluctant to form strong opinions in favour or opposition of a vaccine.<sup>44</sup> Reasons for hesitancy include lack of confidence, lack of convenience, and complacency.<sup>45</sup> The novel nature of COVID-19, and speed at which vaccines were developed, has generated a high degree of hesitancy.<sup>46</sup> In New Zealand, the successful management of the virus means most people have not directly experienced its severity. As a result of this lack of exposure, people might perceive the risk of the vaccine as greater than the risk of the disease.<sup>47</sup>

## *II Establishing herd immunity*

Preventing harm to individuals is unlikely to be sufficient justification in itself. According to J S Mills, interference with an individual’s liberty can only be justified to prevent harm to others.<sup>48</sup> Vaccination has “communitarian public health goals”, meaning its benefits are societal rather than purely individual.<sup>49</sup> Therefore, there is stronger justification for mandatory vaccination on the basis of establishing herd immunity.

---

<sup>40</sup> At 282.

<sup>41</sup> At 282.

<sup>42</sup> Jacob Silverman (ed) *Vaccine denialism is the right wing’s favourite new conspiracy theory* (online ed, The New Republic).

<sup>43</sup> Shixin Shen and Vinita Dubey “Addressing vaccine hesitancy” (2019) 65 *Can Fam Physician* 175.

<sup>44</sup> Shen and Dubey, above n 43.

<sup>45</sup> Shen and Dubey, above n 43.

<sup>46</sup> Samuel Pullan and Mrinalini Dey “Vaccine hesitancy and anti-vaccination in the time of COVID-19: a google trends analysis” (2021) 39 *PMC* 1877.

<sup>47</sup> Jessica Kerr “Immunisation and the Law: Slippery Slope to a Health Society” (2006) 37 *VUWLR* 93.

<sup>48</sup> John Stuart Mills *On Liberty* (J. W. Parker and Son, 1859) at 23.

<sup>49</sup> Cave, above n 39, at 279.

Herd immunity is the point reached when a certain percentage of people are vaccinated, and the population becomes resistant to the spread of a disease.<sup>50</sup> The estimated threshold for herd immunity to COVID-19 in New Zealand is 83 per cent for the Alpha variant and 97 per cent for the Delta variant.<sup>51</sup> To achieve this, refusal of vaccination must be reserved for those with legitimate reasons.<sup>52</sup> ‘Free-riders’ undermine the effectiveness of vaccine rollouts, and as a result, present a risk to the community. Distributive justice means the benefits and burdens of vaccination must be shared across a population in order to effectively manage disease.<sup>53</sup>

Herd immunity is also necessary for logistical reasons. Low vaccination rates will delay national recovery, pose a risk to our Pacific neighbours, and cause further economic and social impacts from coming in and out of lockdowns.<sup>54</sup> The GDP reduction caused by the COVID-19 response is estimated to range from four per cent at alert level one, to 37 per cent at alert level four.<sup>55</sup> Therefore, vaccination is crucial to social and economic recovery, as well as for public health outcomes.

## ***B Effectiveness of coercion***

Public health objectives provide strong support for ensuring high rates of COVID-19 vaccination. However, it is important to consider whether compulsion is the most effective way to improve uptake. Furthermore, ethical considerations require public health objectives to be achieved with the least coercion possible.<sup>56</sup>

### *I What constitutes ‘mandatory’?*

---

<sup>50</sup> At 281.

<sup>51</sup> Nicholas Steyn and others “A COVID-19 Vaccination Model for Aotearoa New Zealand” (paper produced by Te Punaha Matatini, June 2021).

<sup>52</sup> Savulescu, above n 37, at 80; and Sylvia Law “Human Papillomavirus Vaccination, Private Choice, and Public Health” (2008) 41 UC Davis LR 1731 at 1752.

<sup>53</sup> Savulescu, above n 37, at 82.

<sup>54</sup> These reasons identified by Dr Ashleigh Bloomfield in opposition of the application to halt to vaccine rollout. See *Nga Kaitiaki Tuku Iho Medical Action Society Inc*, above n 30, at [71].

<sup>55</sup> Tom Stannard, Gregorius Steven and Chris McDonald *Economic impacts of COVID-19 containment measures* (Reserve Bank of New Zealand, Wellington, 2020) at 2.

<sup>56</sup> Savulescu, above n 37, at 81.

In reality, all ‘mandatory’ policies involve an element of choice. Most commonly, policies involve a non-voluntary element to consent with justified grounds of refusal and consequences for unjustified refusals.<sup>57</sup> Consequences may involve penalties, withholding benefits, or losing freedoms.<sup>58</sup> There is an element of choice in that vaccines can be refused, albeit at the expense of a consequence. While some distinguish the use of sanctions with compulsive physical enforcement,<sup>59</sup> others believe verbal compulsion is no less threatening than physical enforcement.<sup>60</sup> It would not be practical nor possible to require vaccination in every case. For the purpose of this paper, policies of the kind described can be considered mandatory on the basis they restrict freedom and influence decision-making.

## *II Are mandatory policies effective?*

Mandatory policies still contain a degree of choice, and therefore, risk of refusal. Their effectiveness relies on people being motivated by coercive measures. Where people have strong beliefs against vaccination, there is a risk that a mandatory approach will fuel these beliefs and give rise to further anti-vaccination rhetoric. Some evidence suggests compulsion is counterproductive as it renders vaccination undesirable, undermining the appeal of voluntary obedience.<sup>61</sup> The 1896 Herschell Commission found that coercive measures contained in the United Kingdom Vaccination Act 1853 had a negative effect on voluntary uptake.<sup>62</sup> This led to a more moderate approach in the amended 1898 Act.<sup>63</sup>

The impact of coercion on voluntary uptake is a legitimate concern. However, it must be considered in light of the circumstances and likely effectiveness of a voluntary approach to begin with. Low vaccination rates and the high threshold for herd immunity to COVID-19, suggests a voluntary approach is unlikely to be successful. The severity of COVID-19 could minimise the negative connotations which mandatory policies give rise to.

---

<sup>57</sup> At 81.

<sup>58</sup> At 78.

<sup>59</sup> Cave, above n 39, at 286.

<sup>60</sup> At 286.

<sup>61</sup> Meir Dan-Cohen “In Defense of Defiance” (1994) 23 *Philosophy & Public Affairs* 24.

<sup>62</sup> Lord Herschell *Report of the Royal Commission Appointed to Inquire into the Subject of Vaccination* (London, 1889-1897).

<sup>63</sup> Cave, above n 39, at 285.

### *III Improving effectiveness*

The effectiveness of mandatory policies can be improved by incorporating a no fault compensation scheme for vaccine related injuries.<sup>64</sup> Fear of injury reduces uptake and can be exacerbated by mandatory policies which render vaccines undesirable. A compensation scheme could minimise this fear, and therefore, improve uptake. Slovenia has one of the world's most rigorous vaccination policies, involving non-compliance fines and medical exemptions only.<sup>65</sup> However, this is coupled with a generous no fault compensation scheme which instils confidence in vaccines.<sup>66</sup>

Mandatory schemes rely on enforcement mechanisms to give rise to a credible threat of consequence.<sup>67</sup> Therefore, the criminal law could play a role in improving their effectiveness. This approach can be conceptualised on the basis of penalising the causing of harm to others.<sup>68</sup> The case of *R v Dica* could be extended to support for this approach.<sup>69</sup> It was held that reckless and foreseeable transmission of a sexually transmitted infection was capable of constituting harm for the purposes of the Offences Against the Person Act.<sup>70</sup> This is comparable to the New Zealand man who was charged with endangering life by criminal nuisance for deliberately coughing on another in a supermarket.<sup>71</sup> While the criminal law is capable of expanding to support mandatory vaccination, this should be considered with caution. The degree of enforcement could be disproportionate to the risk of harm and intrusion of liberty.

### *C The Jacobson case and its modern reception*

#### *I The Jacobson case*

---

<sup>64</sup> Rodal, above n 34, at 334.

<sup>65</sup> Erin Walkinshaw "Mandatory vaccinations: the international landscape" (2011) 183 CMAJ 1167.

<sup>66</sup> At 1168.

<sup>67</sup> Cave, above n 39, at 296.

<sup>68</sup> At 295.

<sup>69</sup> *R v Dica* [2004] EWCA Crim 1103, [2004] All ER 45.

<sup>70</sup> At [59].

<sup>71</sup> RNZ "Man charged over supermarket coughing video" (6 April 202)

<<https://www.rnz.co.nz/news/national/413555/man-charged-over-supermarket-coughing-video>>.

*Jacobson v Massachusetts* was the first case where the United States Supreme Court was presented with the question of where our rights over our bodies end in favour of our duty to the community.<sup>72</sup> The defendant refused to be vaccinated during the smallpox pandemic, in contravention of a state law requiring individuals without proof of an exemption, to be vaccinated to pay a fine. The Court upheld the policy, and the defendant was charged for his failing. Harlan J observed that:<sup>73</sup>

“real liberty for all could not exist under the operation of a principle which recognises the right of each individual to use his own ... regardless of the injury that may be done to others”.

This principle was extended in subsequent decisions giving rise to further restrictions and a fear of the floodgates. The United States Supreme Court in *Buck v Bell* cited *Jacobson* in support of its decision to approve the sterilization of a mildly disabled woman.<sup>74</sup> It has been described as “the scariest United States Supreme Court decision of all time”.<sup>75</sup>

*Jacobson* illustrates the capability of the courts in endorsing mandatory vaccination, but also the risks associated with doing so. The case was decided over a century ago, however, and it must be considered whether the outcome would differ today.

## II *Post Jacobson*

Restrictions invoked to slow the spread of COVID-19 have given rise to a wave of litigation in the United States on the basis of interference with people's rights and liberties. Many of these cases have cited *Jacobson* to uphold state actions.

Applicants in *Roman Catholic Diocese v Cuomo* claimed the ban on attending religious services was contrary to their first amendment right of religious exercise.<sup>76</sup> Although

---

<sup>72</sup> *Jacobson v Massachusetts* 197 US 11 (1905).

<sup>73</sup> At [26].

<sup>74</sup> *Buck v Bell* 274 US 200 (1927).

<sup>75</sup> Michael Willrich “The crime of refusing vaccination” (25 March 2021) The Atlantic <<https://www.theatlantic.com/podcasts/archive/2021/03/jacobson-supreme-court-vaccination/618359/>>.

<sup>76</sup> *Roman Catholic Diocese v Cuomo* 592 US (2020) at [66].

*Jacobson* was not relevant to that same right, the Court commented on the decision. It said other courts had mistaken the “modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic”.<sup>77</sup> Rather, it applied principles which later became the traditional legal test of strict scrutiny, which applies whenever a constitutional right is at issue.<sup>78</sup> This test is comparable to New Zealand’s justified limitation inquiry under BORA. It requires the state to show the narrowest measure available has been taken to satisfy the objective.<sup>79</sup> The Court observed that *Jacobson* would have passed this test as the claimed imposition on bodily integrity was easily avoidable by accepting a fine.<sup>80</sup> This interpretation of *Jacobson* suggests the subsequent case of *Buck v Bell* was an incorrect application of the authority.

*Vincent v Bysiewicz* questioned the validity of requiring face masks to be worn in public, in response to claims it denied liberty and privacy.<sup>81</sup> Quoting *Jacobson*, the defendants argued the plaintiff’s liberty was not violated because liberty “is not an unrestricted license to act according to one’s own will ... [i]t is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others”.<sup>82</sup> Requiring face masks was held to be valid as it struck the necessary balance between liberty and protecting the safety of society.

While cases have endorsed the general proposition of collective responsibility which *Jacobson* stood for, it has not been directly applied to another mandatory vaccination situation. The general principle is that orders will be valid where they have a “real and substantial relationship to maintaining the health and safety of residents during a public health crisis”.<sup>83</sup> This is of assistance in determining whether mandatory vaccination for COVID-19 could be justified. However, the case should not be treated as a broad-brush endorsement of mandatory vaccination. That will depend on fact and degree and striking the necessary balance between liberty and safety.

---

<sup>77</sup> At [70].

<sup>78</sup> At [70].

<sup>79</sup> At [70].

<sup>80</sup> At [70].

<sup>81</sup> *Vincent v Bysiewicz* (D Conn 2020).

<sup>82</sup> At [24].

<sup>83</sup> At [27].

## ***D New Zealand Bill of Rights Act 1990***

The discussion so far has focused on broader principles which might sustain mandatory vaccination. However, it is necessary to consider the issue within New Zealand’s legal context. The relevant piece of legislation, being BORA. The Act is designed to “affirm, protect, and promote human rights and fundamental freedoms in New Zealand”.<sup>84</sup> Since all government decisions are subject to BORA,<sup>85</sup> it creates a barrier to implementing mandatory vaccination.

### *I Right to refuse medical treatment*

The relevant right at issue, is the right to refuse medical treatment under s 11. The first question is whether the administration of vaccines amounts to a medical treatment. A narrow view is that vaccination is preventative and therefore, not a treatment as it does not cure an existing injury or illness.<sup>86</sup> A wider view, is that for “*whatever the purpose ... the insertion of a needle may be said to constitute a medical procedure which ‘treats’*”.<sup>87</sup>

The Supreme Court in *New Health New Zealand Inc v South Taranaki District Council* held that fluoridation of drinking water constituted a medical treatment.<sup>88</sup> The definition of ‘medical treatment’ was extended to those provided as a public health measure, as well as in the course of a practitioner/patient relationship.<sup>89</sup> New Zealand courts favour the broad approach as it is consistent with the White Paper commentary,<sup>90</sup> and the Act’s purpose. Given this tendency, courts would find vaccination to constitute a medical treatment.

---

<sup>84</sup> New Zealand Bill of Rights Act 1990, long title.

<sup>85</sup> Section 3.

<sup>86</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

<sup>87</sup> Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Victoria, 2004) at 96.

<sup>88</sup> *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [97].

<sup>89</sup> At [97].

<sup>90</sup> Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” (1985) AJHR A6 at [10.167].

## II *Limitations on the right to refuse medical treatment*

Whether mandatory vaccination limits the right to refuse medical treatment depends on the specifics of the policy adopted. Policies deeming unvaccinated individuals to be ineligible for certain benefits may preserve a sufficient degree of freedom to not limit the right. Such a case could arguably be distinguished from *New Health* where there was “no practical option but to ingest fluoride”.<sup>91</sup> On the other hand, any policy which incentivises certain conduct, limits the right of refusal by influencing decision-making. At the core of s 11 is the idea of informed consent. While refusal and consent are distinct concepts, the former cannot be analysed without reference to the latter.<sup>92</sup> In *Cropp v Judicial Committee* it was said that Ms Cropp could not “have given her consent freely when she was required to give it before she could obtain a licence to undertake her occupation”.<sup>93</sup> Therefore, courts are likely to find any policy which affects a person’s ability to refuse medical treatment *freely*, operates to limit the right to refuse medical treatment.

## III *Justified limitation?*

The rights contained in BORA are not absolute, and are subject to limitations which are “demonstrably justified in a free and democratic society”.<sup>94</sup> The Supreme Court of Canada in *R v Oakes* established a three-stage test for determining whether a limit is justified.<sup>95</sup> This test was adopted by the New Zealand Supreme Court in *R v Hansen*, and requires the following:<sup>96</sup>

- (a) The purpose of the limiting provision is sufficiently important to justify curtailing rights
- (b) There is a rational connection between the limit and the purpose
- (c) The right is limited no more than reasonably necessary

---

<sup>91</sup> *New Health*, at [99].

<sup>92</sup> Butler and Butler, above n 86, at [11.10.2].

<sup>93</sup> *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774, at 785.

<sup>94</sup> Section 5.

<sup>95</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>96</sup> *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.



(d) The limit is proportionate to the purpose

(a) Sufficiently important purpose

Since this analysis precedes the implementation of any policy, there is no specific infringing provision of which we can ascertain its purpose. However, likely purposes would include achieving herd immunity, preventing the spread of infection, and protecting vulnerable people who cannot get the vaccine for legitimate medical reasons.

Courts tend to be lenient at this stage of the analysis and give a high degree of deference to the legislature.<sup>97</sup> Lord Hoffman in *Handyside's* case stated “it is for the natural authorities to make the initial assessment of the reality of the pressing social need”.<sup>98</sup> In *New Health*, the fact that dental decay was a significant problem meant the object of reducing dental decay was sufficiently important.<sup>99</sup> The Court also noted that where there is a sufficient evidentiary basis, it was not their place to question the merits of scientific consensus.<sup>100</sup> Courts will most likely find the stated purposes for mandatory vaccination are sufficiently important to justifying curtailing rights. The argument is even stronger given the fact a failure to vaccinate puts others at risk, whereas fluoridation is only intended to protect individuals.<sup>101</sup>

(b) Rational connection

There is a well-established link between vaccination and disease prevention.<sup>102</sup> Initial trials of COVID-19 vaccines have also shown promising rates of reduction in infection and transmission.<sup>103</sup> It is also necessary that there is a rational connection between mandatory policies and increased vaccine uptake. A study by Ipsos showed just over half of New Zealanders were willing to get the COVID-19 vaccine.<sup>104</sup> More recent studies estimate this

---

<sup>97</sup> At [18].

<sup>98</sup> At [113].

<sup>99</sup> *New Health*, above n 88, at [126].

<sup>100</sup> At [122].

<sup>101</sup> At [125].

<sup>102</sup> Ministry of Health, above n 2.

<sup>103</sup> Ministry of Health, above n 22; and Ministry of Health, above n 27.

<sup>104</sup> Ipsos “COVID-19: one year into the pandemic” (9 March 2021)

has increased to 67%.<sup>105</sup> However, that is still not enough to achieve herd immunity on a voluntary basis.

Under Tipping J’s formulation of the rational connection requirement, a logical relationship is sufficient.<sup>106</sup> However, a rational connection has also been associated with ensuring the limit is not arbitrary, unfair, or based on irrational considerations.<sup>107</sup> These questions cannot be answered without reference to a specific provision. It should be assumed, that no person can be expected to be vaccinated prior to becoming eligible in the rollout process. Furthermore, the vaccine is free, removing a significant barrier to accessibility.<sup>108</sup> Concerns have been raised as to inequalities in accessibility for Māori and Pasifika.<sup>109</sup> However, this can be dealt with as an issue of policy design.

(c) Limit is no more than reasonably necessary

The measure in question must be within the range of reasonable alternatives for addressing the problem.<sup>110</sup> Less intrusive alternatives will not necessarily defeat a more coercive approach, if the latter can be reasonably justified as necessary for achieving the objective. Alternatives for preventing the spread of COVID-19 include social distancing, contact tracing, and personal protective equipment (PPE). These measures, while less physically intrusive, are not as efficacious as they rely on trust that individuals will follow them. If the purpose is framed too broadly, as simply reducing infection, then these might be more reasonable alternatives. However, where the objective is achieving herd immunity, a mandatory policy is likely to be within the range of reasonably necessary options.

---

<sup>105</sup> <<https://www.ipsos.com/enz/covid-19-one-year-pandemic>>. Jagdish Thacker *Panel Aotearoa-New Zealand public attitudes and intentions for COVID-19 vaccination – March 2020 to June 2021* (Massey University, Wellington, 2021).

<sup>106</sup> *R v Hansen*, above n 96, at [125].

<sup>107</sup> At [64].

<sup>108</sup> Ministry of Health “COVID-19: The vaccine rollout” (30 June, 2021) <<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines/covid-19-getting-vaccine/covid-19-vaccine-rollout>>.

<sup>109</sup> University of Waikato “The real challenge to COVID-19 vaccination rates isn’t hesitancy - it’s equal access for Maori and Pacific people” <<https://www.waikato.ac.nz/news-opinion/media/2021/the-real-challenge-to-covid-19-vaccination-rates-isnt-hesitancy-its-equal-access-for-maori-and-pacific-people>>.

<sup>110</sup> *New Health*, above n 88, at [132].

## (d) Limit is proportional

The proportionality requirement is where a policy is most likely to fall down. The physically invasive nature of vaccination places a greater limit on the s 11 right than in the case of fluoridation. Furthermore, low rates of community transmission mean the risk of infection is relatively low. The wider the grounds for exemption, the more likely that mandatory vaccination will be proportional. However, there is scope to argue that mandatory policies with medical exemptions only, are proportional limit to the objective of achieving herd immunity. Despite low transmission, the extremely infectious nature of new variants poses an increased risk.<sup>111</sup> Eventful relaxing of border restrictions must also be considered. These factors make the object more pressing, and arguably proportional to the limit.

*E Summary*

It is certainly arguable that a government mandated policy requiring vaccination, on either a widespread basis or in defined circumstances, would be lawful and reasonable. There are strong public health justifications for protecting individuals and the community. The severity of COVID-19 also means a mandate could arguably be a justified limit on the right to refuse medical treatment under BORA. Despite the possibility of being lawful, the threat to individual liberty and autonomy has made mandatory vaccination controversial and politically unpalatable. The New Zealand Government has ruled out the possibility of mandating COVID-19 vaccines on a widespread basis.<sup>112</sup> However, they have required that certain high-risk work at the border is only to be carried out by vaccinated workers.<sup>113</sup> This

---

<sup>111</sup> Illustrated by the recent Delta community outbreak. The country re-entered level four lockdown after one case appeared in the community, and in just two weeks this became nearly 700 cases (as of 1 September 2021). See Hannah Martin “Covid-19: 75 new cases in Delta community outbreak, but the curve is ‘gradually bending’ (1 September 2021) <<https://www.stuff.co.nz/national/health/coronavirus/300396632/covid19-75-new-cases-in-delta-community-outbreak-but-curve-is-gradually-bending>>.

<sup>112</sup> Burrows Matt “Coronavirus: NZ Government won’t make COVID-19 vaccine mandatory, but may ‘exclude’ Kiwiwa who don’t get the jab - expert” (4 August 2020) Newshub <<https://www.newshub.co.nz/home/new-zealand/2020/09/coronavirus-nz-government-won-t-make-covid-19-vaccine-mandatory-but-may-exclude-kiwis-who-don-t-get-jab-expert.html>>.

<sup>113</sup> COVID-19 Public Health Response (Vaccinations) Order 2021 cl 3.

covers workers at MIQ facilities, government officials at affected ports, and aircraft cabin crew transporting international arrivals.<sup>114</sup> Workers are free to choose not to be vaccinated, but will be unable to carry out work of the given description, and must consult their employer regarding alternatives.<sup>115</sup>

#### *IV Mandatory Vaccination in Employment*

Where an instruction is authorised by law, employers cannot be exposed to legal action under health and safety or employment law. Instructions which are not pursuant to a government order, however, become an employment issue. Since the Government has rejected the mandating of COVID-19 vaccines on a nationwide basis, situations are likely to arise where employers are unsure of their legal position in requiring employees to be vaccinated.

There are numerous incentives for workplaces to mandate vaccination. Most obviously, to protect co-workers, clients, and communities. Especially those who cannot be vaccinated for medical reasons. Vaccinating employees also avoids the legal and economic liabilities of COVID-19 transmission in the workplace. Infected workers require sick leave, and in the short-term following a positive case, businesses might need to close. In terms of legal liability, workers overseas have brought claims against their employers for failing to protect them from infection.<sup>116</sup>

Employers can impose any condition on employees, subject to statutory and contractual obligations. It is not sufficient to justify mandatory vaccination on the basis of being ‘good corporate citizens’.<sup>117</sup> A policy must be lawful by reference to a number of legislative schemes governing employer conduct. The competing obligations of employers under these schemes ultimately comes back to the tension between individual autonomy and collective responsibility. Employers are tasked with protecting the health and safety of their workforce,

---

<sup>114</sup> Schedule 2.

<sup>115</sup> New Zealand Government “Vaccination requirements for workers in high-risk border settings” (30 April 2021) <<https://www.lawfoundation.org.nz/style-guide2019/chapter-7.html#7.1>>.

<sup>116</sup> United States Department of Labour “OSHA News Release - Region 8” (10 September 2020) <<https://www.osha.gov/news/newsreleases/region8/09102020>>.

<sup>117</sup> Michael Byrnes and Emily Capener *Compulsory Vaccination for Employees: The Legal Position* (online ed, Swaab).

whilst not infringing on the rights and liberties of individual employees. Analogies can be drawn to commonplace drug and alcohol policies which are justified on the basis of ensuring fitness for work.<sup>118</sup> However, the physically invasive nature of vaccination combined with the existence of strongly held beliefs against it, creates a distinct set of circumstances which is less easily justified. This section will discuss recent case law on the issue of mandatory vaccination, and then turn to the specific legislative barriers facing employers.

### ***A Judicial responses to mandatory vaccination***

Case law on mandatory vaccination is limited as employers are cautious to implement policies which might give rise to legal action. While courts have not provided outright support for mandatory vaccination, there are several decisions which entertain the possibility it could be lawful and reasonable in certain circumstances.

#### ***I Australia***

In *Arnold v Goodstart Early Learning Ltd* the Australian Fair Work Commission held it was at least arguable that a policy requiring vaccination was lawful and reasonable.<sup>119</sup> Since the case involved a request for an extension period to file an unfair dismissal application, it was unnecessary to decide the issue beyond it being arguable. The respondents operations involved the provision of care towards children, making the policy necessary to ensure their duty to the children was fulfilled.<sup>120</sup> The inclusion of exemptions on medical grounds was seen as a reasonable attempt to balance employees' interests.<sup>121</sup> The Commission emphasised that the decision related specifically to influenza in a childcare environment, and it would be "audacious if not improvident" to extend its application to circumstances not

---

<sup>118</sup> *New Zealand Amalgamated Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614; and *Electrical Union 2001 Inc v Might River Power Ltd* [2013] NZEmpC 197, (2013) 11 NZELR 252.

<sup>119</sup> *Arnold v Goodstart Early Learning Ltd* [2020] FWC 6093 at [32].

<sup>120</sup> At [32].

<sup>121</sup> At [32].

contemplated.<sup>122</sup> However, commentators have said it would be “difficult to see why the same reasoning would not apply to Covid vaccinations”.<sup>123</sup>

The decisions of *Glover v Ozcare* and *Kimber v Sapphire Coast Community Aged Care Ltd*, both involved dismissal of applications who refused influenza vaccination in contravention of mandatory policies.<sup>124</sup> Neither dismissal was unjustified, because vaccination was considered an inherent requirement of the applicants’ roles which involved interactions with elderly clients.<sup>125</sup> In *Kimber*, vaccination became an inherent requirement by way of an order from the NSW Minister of Health. Continued employment of unvaccinated workers would be inconsistent with these orders. In *Glover*, however, the ‘inherent requirement’ came about as a result of circumstance and the nature of the role.<sup>126</sup> On this basis it was reasonable for employers to safeguard their clients and employees against the risks of influenza transmission by requiring vaccination.

## II Canada

The case of *North Bay General Hospital v Canadian Union of Public Employees* concerned the unpaid suspension of a paramedic who refused the influenza vaccine.<sup>127</sup> The decision was upheld, primarily on the basis of the Ambulance Act which precluded employment of paramedics who refused vaccination.<sup>128</sup> Therefore, the plaintiff had no right to continued employment, and granting such a right would have been inconsistent with regulation.<sup>129</sup> As a result, the union’s argument that suspension was contrary to the collective agreement, as it was not exercised in a “fair and reasonable” manner, was rejected.<sup>130</sup> This case was

---

<sup>122</sup> Paul Karp “Australian employers could require some workers to be vaccinated after commission ruling” (21 April 2021) *The Guardian* <[https://www.theguardian.com/australia-news/2021/apr/21/australian-employers-could-require-some-workers-to-be-vaccinated-after-commission-ruling?CMP=Share\\_AndroidApp\\_Other](https://www.theguardian.com/australia-news/2021/apr/21/australian-employers-could-require-some-workers-to-be-vaccinated-after-commission-ruling?CMP=Share_AndroidApp_Other)>.

<sup>123</sup> Karp, above n 122.

<sup>124</sup> *Glover v Ozcare* [2021] FWC 231; and *Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818.

<sup>125</sup> *Glover*, above n 124, at [128]; and *Kimber*, above n 124.

<sup>126</sup> At [126] and [128].

<sup>127</sup> *North Bay General Hospital v Canadian Union of Public Employees* [2003] O.L.L.A.A. No. 580.

<sup>128</sup> Ambulance Act RSO 1990 c A.19. See *North Bay General Hospital* at [30].

<sup>129</sup> At [43].

<sup>130</sup> At [5].

ultimately decided by the statutory backdrop. However, it lends support in principle for mandatory vaccination of healthcare workers. The consequential amendment to the Ambulance Act highlights governments' reluctance to become involved in the issue of mandatory vaccination.<sup>131</sup> The replacement of education campaigns is unsatisfactory as it does not directly protect against the risk of influenza.<sup>132</sup>

Two recent arbitration decisions demonstrated a shift away from enforcing mandatory vaccination, holding 'vaccinate or mask' policies to be an unreasonable exercise of management.<sup>133</sup> Both cases turned on the lack of medical evidence regarding effectiveness of the vaccine in reducing transmission.<sup>134</sup> Arbitrator Hayes conceded that in "truly exceptional circumstances" the precautionary principle would apply, and evidence of moderate effectiveness would be sufficient.<sup>135</sup> It is uncertain how effective COVID-19 vaccines are in reducing transmission. However, many would argue COVID-19 amounts to an exceptional circumstance of the kind envisaged. The nature and increasing severity of the virus has already seen the imposition of requirements which previously would not have been justified. For example, wearing a mask is now a norm, where previous courts described it as an "unreasonable ask".<sup>136</sup>

### III *New Zealand*

Mandatory vaccination has only been dealt with briefly in New Zealand courts. The District Court cases of *Department of Labour v Idea Services Ltd* and *WorkSafe New Zealand v Rentokil Initial Ltd* took it as a given that employers did not have authority to require employees to undergo blood tests or immunisation.<sup>137</sup> Both cases involved employees who contracted Hepatitis B in the course of employment, and claimed their employer had failed

---

<sup>131</sup> Rodal, above n 34, at 328.

<sup>132</sup> At 328.

<sup>133</sup> *Sault Area Hospital v Ontario Hospital Association* 2015 CanLII 55643 (ON LA); *St. Michael's Hospital v ONA* 2018 CLAS 172.

<sup>134</sup> *Sault Area Hospital*, above n 133, at [319]; and *St. Michael's Hospital*, above n 133, at [105].

<sup>135</sup> *Sault Area Hospital*, above n 133, at [340].

<sup>136</sup> At [323].

<sup>137</sup> *Department of Labour v Idea Services Ltd* DC Hastings CRN 08020500068, 4 November 2008 at [73] and [74]; and *WorkSafe New Zealand v Rentokil Initial Ltd* [2016] NZDC 21294 at [73].

to take reasonable steps to protect their health and safety by not requiring vaccination.<sup>138</sup> The defendant in *Department of Labour* had taken all reasonably practicable steps, by having a robust health and safety programme in place.<sup>139</sup> The plaintiff was aware the cost of the vaccine would be covered if she chose to get it. This finding was accepted in *WorkSafe NZ* but distinguished as no equivalent screening or vaccination was offered to employees.<sup>140</sup> Neither case was a direct challenge to mandatory vaccination. The issue was raised as a natural extension to the question of what reasonable and practicable steps an employer was expected to take. Therefore, neither case explored the jurisprudence in depth.<sup>141</sup> The unprecedented nature of COVID-19 provides an opportunity to revisit this question.

Most recently, *Nga Kaitiaki Tuku Iho Inc* challenged the validity of provisional consent given to the Pfizer vaccine.<sup>142</sup> Although the plaintiffs expressed concern the vaccine would be made compulsory in certain types of employment, the Court focused narrowly on the issue arising in regard to s 23.<sup>143</sup> Ellis J stated that “any question of mandatory vaccination for certain individuals is an employment matter ... for those specifically affected by any such requirement”.<sup>144</sup>

## ***B Competing obligations under statute***

### ***I Health and Safety at Work Act 2015***

The Health and Safety at Work Act 2015 (HSWA) came about as a result of two enquiries into New Zealand’s health and safety legislation.<sup>145</sup> The Act applies broadly to any person conducting a business or undertaking (PCBU).<sup>146</sup> The primary duty of a PCBU is to ensure,

<sup>138</sup> *Department of Labour*, above n 137, at [73]; and *WorkSafe New Zealand*, above n 137, at [73].

<sup>139</sup> *Department of Labour*, above n 137, at [61].

<sup>140</sup> *WorkSafe New Zealand*, above n 137, at [73].

<sup>141</sup> Anthony Drake and Katja Heesterman “Can employers require employees to get the jab?” (3 February 2021) <[www.wynnwilliams.co.nz](http://www.wynnwilliams.co.nz)>.

<sup>142</sup> *Nga Kaitiaki Tuku Iho Medical Action Society Inc*, above n 30.

<sup>143</sup> At [73].

<sup>144</sup> At [8].

<sup>145</sup> The Independent Taskforce on Workplace Health and Safety *Workplace Health & Safety: He Korowai Whakaruruhau* (April 2013); and Graham Pankhurst, Stewart Bell and David Henry *Royal Commission on the Pike River Coal Mine Tragedy: Volume 2* (October 2012).

<sup>146</sup> Section 17.



so far as is reasonably practicable, the health and safety of workers and other persons who might be put at risk by work carried out.<sup>147</sup> Those who fail to fulfil this duty, and as a result expose any individual to a risk of death, or serious injury or illness, are liable under s 48(1).

Providing a healthy and safe work environment naturally includes preventing the spread of infectious disease. Despite low community transmission, emerging variants, and eventual border openings present an imminent and real risk. It is important that workplaces are prepared for this heightened risk. The issue is whether mandatory vaccination, as a method of managing this risk, would be reasonably practicable.

(a) Reasonably practicable

‘Reasonably practicable’ is narrower than ‘physically possible’, and requires a comparison of the risk compared with the sacrifices of averting it.<sup>148</sup> It does not require a business to provide complete protection.<sup>149</sup> However, Lord Reid has cautioned that “it should not lightly be held that to take a practicable precaution is unreasonable”.<sup>150</sup> The test for reasonably practicable is twofold.<sup>151</sup> Firstly, the measure must be possible. Secondly, it must be reasonable in the circumstances. Vaccination of a workforce is possible as the vaccine comes at no cost to the receiver, and will eventually be available to all New Zealander’s.<sup>152</sup> The contentious issue is in which circumstances, if any, would it be reasonable. The HSWA definition requires weighing up all relevant factors including the following:<sup>153</sup>

- a) Likelihood of the risk occurring
- b) Degree of harm which might result

---

<sup>147</sup> Section 36.

<sup>148</sup> *Edwards v National Coal Board* [1949] 1 KB 704 at 712 per Asquith LJ.

<sup>149</sup> *Buchanans Foundry Ltd v Dept of Labour* [1996] 3 NZLR 112 (HC) at 115.

<sup>150</sup> *Marshall v Gotham Co Ltd* [1954] AC 360 (UKHL) at 373.

<sup>151</sup> WorkSafe New Zealand “Reasonably practicable” (July 2017)  
<<https://www.worksafe.govt.nz/assets/dmsassets/zero/848WKS-6-HSWA-reasonably-practicable.pdf>>.

<sup>152</sup> Ministry of Health, above n 108.

<sup>153</sup> Section 22.

- c) PCBU's knowledge (actual or constructive) as to the risk and ways of eliminating or minimising the risk
- d) The availability and suitability of elimination or minimisation measures
- e) Costs associated with the available elimination or minimisation measures, and whether this is grossly disproportionate to the risk

The likelihood of infection in the community is relatively low. However, there are certain jobs where the risk is greater due to interaction with international arrivals. This risk has increased even more since the emergence of the Delta variant. There is a strong argument that vaccination is reasonably practicable in these 'high-risk' workplaces. Even in 'low-risk' workplaces, it is arguably irresponsible to require increased transmission before considering there to be a sufficient risk. Furthermore, WorkSafe has advised that where the likelihood of a risk is low, but the potential harm is great, businesses should consider credible worst-case scenarios.<sup>154</sup> COVID-19 is highly infectious and in the most severe cases causes serious health implications. The degree of harm is most concerning for vulnerable populations such as elderly and immunocompromised. This provides a strong justification for vaccination of workers interacting with vulnerable clients.

The availability and suitability of alternative measures to mitigate the risk is also relevant. Whether alternatives are more reasonably practicable will depend on the nature of a job, and if it can be safely performed without requiring vaccination. For example, office work is more capable of being completed from home, or while observing social distancing, than jobs involving a high degree of client interaction. Where the nature of a job presents a high risk, and alternative measures are not a viable option for mitigating the risk, then vaccination might be considered reasonably practicable. The category of workers who fall into this 'high-risk' classification is relatively narrow. However, this could change as New Zealand's risk profile evolves.

## *II Human Rights Act 1993*

---

<sup>154</sup> WorkSafe New Zealand, above n 151.

Employers' conduct is restricted by the Human Rights Act 1993 (HRA). BORA is not applicable to private employment relationships where policies are not pursuant to government orders. Therefore, the HRA is the main statutory safeguard protecting employees' rights and liberties. It aims to prevent differential and unfair treatment on any of the prohibited grounds of discrimination.<sup>155</sup> Employers' obligations under this Act are relevant to whether they can mandate vaccination. Section 22 deals specifically with employment, and states that employers are not to do any of the following by reason of a prohibited ground of discrimination:

- a) Refuse or omit to employ an applicant
- b) Offer an applicant less favourable terms, conditions, opportunities, or benefits
- c) Terminate employment or subject an employee to detriment where other employees would not have been
- d) Retire an employee, or require or cause them to retire

The most relevant grounds of discrimination in the context of vaccination, are religious and ethical beliefs.<sup>156</sup> These are two key contributors to vaccine opposition. There is an argument as to whether the ground of disability might be relevant on the basis that not being vaccinated is a vulnerability which amounts to a disability.<sup>157</sup> This would require a wide interpretation of the definition of 'disability' under s 21(1)(h)(vii), whereby "presence in the body of an organism capable of causing illness" is read to include *absence* of an organism.<sup>158</sup> If this argument was accepted, then the s 29 exception would allow for discrimination where an employer cannot reasonably accommodate that person. This requires the person to be putting others at risk of infection, and there being no reasonable means available to the employer to prevent this.

(a) 'Qualified for work'

---

<sup>155</sup> Section 21.

<sup>156</sup> Section 21(1)(c) and (d).

<sup>157</sup> Drake and Heesterman, above n 141.

<sup>158</sup> Drake and Heesterman, above n 141.

The obligations under s 22 apply where an employee, or applicant for employment, is ‘qualified for work of any description’. Therefore, it could be argued that vaccination is a prerequisite for qualification. Relevant factors include the extent and likelihood of the risk, and availability of reasonable alternatives to prevent infection. The circumstances where vaccination might be considered a requirement for qualification, are likely to be the same as those where vaccination would be considered reasonably practicable under the HSWA.<sup>159</sup> This is because the job cannot be reasonably and safely performed without it. Therefore, resulting bias is attributable to the lack of qualification, not discrimination. Where the opposite is true, and alternative measures can provide sufficient protection without impeding on the ability to perform a job, then vaccination would not be a prerequisite for qualification.

(b) ‘By reason of’

The conduct outlined in s 22 is unlawful if it occur ‘by reason of’ a prohibited ground of discrimination. Employers may argue that a given outcome was not a result of a person’s religious or ethical beliefs, but rather their consequential failure to be vaccinated.<sup>160</sup> However, ‘by reason of’ does not require the discriminatory ground to be a substantial and operating factor, provided it was a material ingredient.<sup>161</sup> This is consistent with the HRA purpose of providing better protection of human rights.<sup>162</sup> Whether a religious or ethical belief constitutes a ‘material ingredient’ will depend on the existence of, and weight given to, other legitimate factors in the decision to mandate vaccination. The other relevant factor most likely being risk to health and safety. The risk might be so significant that religious or ethical beliefs do not amount to a material ingredient. If the risk is low, however, then the underlying belief which led to refusal is more likely to be considered a material ingredient. This requires consideration of similar factors as the ‘qualified for work’ assessment.

---

<sup>159</sup> These being situations where there is a high risk of infection, potential of significant harm to vulnerable patients, and job cannot be performed from a distance. Most likely border workers, healthcare workers, and aged care facility workers.

<sup>160</sup> *Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51. Employer argued that the threat of a dismissal was due to an employee’s refusal to honour an arrangement of being rostered as back up on Saturdays’, and not due to the religious reasons underlying the employees refusal to work Saturday’s. This argument, however, was rejected.

<sup>161</sup> *McAlister v Air New Zealand* (2009) NZSC 78, (2010) 1 NZLR 153 at [49].

<sup>162</sup> Human Rights Act, long title.

### III *Employment Relations Act 2000*

The validity of mandatory vaccination requirements depends on substantive lawfulness, and the process followed to give effect to them. The Employment Relations Act 2000 (ERA) is relevant to procedural issues. It intends to facilitate productive employment relationships through the promotion of good faith.<sup>163</sup> This obligation requires parties to be active, constructive, and communicative in dealing with each other.<sup>164</sup> Section 4A sets out the requirements of liability for failing to comply with good faith. Employees can also bring personal grievance claims under pt 9, including unjustified dismissal, unjustified disadvantage, and discrimination. The importance of employment security warrants legal protection against unjustified termination or treatment.<sup>165</sup> Therefore, employers must consider how they implement mandatory vaccination, and deal with situations of refusal.

#### (a) Methods of implementation

There are three avenues for implementing a vaccination requirement, all of which must be underpinned by good faith.<sup>166</sup> Firstly, is a condition of individual employment agreements. The position is more straightforward for prospective employees. Employers can include any condition in new agreements, provided it is lawful and reasonable. The difficulty with existing employees, is that employers cannot unilaterally vary employment agreements.<sup>167</sup> An employee who opposes vaccination is unlikely to agree to a variation requiring it, regardless of the health and safety risk.

Secondly, is a condition of collective agreements (CA). CA's are binding between unions, employers, and employees covered by the relevant clauses.<sup>168</sup> Employers and employees may share the common interest of promoting health and safety, but due to personal views on vaccination, disagree on how to achieve this. Good faith recognises that managing separate

---

<sup>163</sup> Section 3.

<sup>164</sup> Section 4(1A).

<sup>165</sup> Gordon Anderson, *Employment Law in New Zealand* (2nd Ed, LexisNexis, Wellington, 2017) at 9.2.

<sup>166</sup> Employment Relations Act, s 4(4).

<sup>167</sup> Anderson, above n 165, at 7.99.

<sup>168</sup> Employment Relations Act 2000, s 5 and s 56(1).

interests will inevitably result in compromise.<sup>169</sup> For example, mandatory vaccination could be accompanied by opportunities for redeployment. In any event, an employee is free to withdraw from the CA if they do not wish to adhere to its conditions.

Thirdly, is incorporation in workplace policies. Policies set consistent expectations which apply equally to union and non-union members, and prospective and existing employees. They are enforceable to the extent that they are not inconsistent with individual or collective agreements.<sup>170</sup> An inconsistent policy is essentially a unilateral variation of contract. Most employment agreements, however, contain a clause requiring employees to familiarise themselves, and comply with, workplace policies as they arise. As a matter of good faith, affected employees must be made aware of adverse impacts to the continuation of their employment.<sup>171</sup>

Whether policies must be preceded by consultation depends on factors including the terms of existing employment agreements.<sup>172</sup> However, consultation is a method for ensuring good faith, especially where the policy is likely to be contentious. A lack of consultation can frustrate an otherwise lawful policy.<sup>173</sup> Consultation requires more than mere notification, time for employees to state a view, genuine efforts to accommodate views, and is not to be treated as a mere formality.<sup>174</sup> The necessary extent of consultation depends on context.<sup>175</sup> The imposition on bodily autonomy when requiring vaccination, makes a high degree of consultation an important factor.

---

<sup>169</sup> Employment New Zealand “Good faith”  
<<https://www.employment.govt.nz/resolving-problems/employer-and-employee-must-dos/good-faith/>>.

<sup>170</sup> *Electrical Union 2001 Inc v Mighty River Power Ltd*, above n 118, at [96].

<sup>171</sup> Section 4(1A)(c).

<sup>172</sup> Employment New Zealand “What are workplace policies”  
<<https://www.employment.govt.nz/workplace-policies/what-are-workplace-policies/>>.

<sup>173</sup> *OCS Ltd v Service and Food Workers Union Nga Ringa Tota Inc* (2006) 3 NZLR 558 at [97]. The defendant's decision to implement fingerprint technology for timekeeping purposes would have been a lawful and reasonable instruction, if it were not for the lack of consultation prior to implementation. The obligation to consult arose out of a combination of the general obligation of good faith, combined with recognition in the CEA of the preference for consultation.

<sup>174</sup> *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at 674; and *Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429.

<sup>175</sup> *OCS Ltd*, above n 173, at [65].

## (b) Personal grievance claims for refusal

## (i) Unjustified dismissal

Unjustified dismissal claims are inevitable where a vaccination requirement specifies dismissal as the consequence for refusal. Dismissal includes situations where employees are compelled to leave due to an employer's breach of duty (constructive dismissals).<sup>176</sup> The test for justification of actions or dismissals asks "whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred".<sup>177</sup>

Justification requires a substantive reason,<sup>178</sup> and procedural fairness.<sup>179</sup> Employers may argue that dismissal is justified where employees are not prepared to accept new conditions, or adhere to new policies, as they now lack capacity for the job. Failure to adhere to a policy does not in itself justify dismissal. The policy must be lawful and reasonable by reference to health and safety and human rights legislation.

The procedural requirements include those set out in s 103A(3), the good faith requirement in s 4, and any internal agreed procedures.<sup>180</sup> If minimum standards of fair and reasonable dealings are not met, a dismissal will be unjustified despite being substantively reasonable.<sup>181</sup> It is important employees are given an opportunity to state their case.<sup>182</sup> Employers cannot be said to have considered the full extent of adverse impacts on employee's without having heard their concerns.<sup>183</sup> Procedural fairness also involve discussion of alternatives to

---

<sup>176</sup> *Wellington Clerical Union v Greenwich* (1983) ACJ 965 at 975; *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* (1994) 2 NZLR 415 (CA) at 419.

<sup>177</sup> Employment Relations Act, s 103A.

<sup>178</sup> Anderson, above n 165, at 9.18.

<sup>179</sup> Anderson, above n 165, at 9.18 and 9.19; and *Air New Zealand v V* (200) ERNZ 185, (2009) 6 NZELR 582 (EmpC) at [36]. This case rejected the argument that the test applied solely to procedural fairness, while the substantive reason for dismissal was a matter for the employer to determine as justified.

<sup>180</sup> Anderson, above n 165, at 9.3 and 9.32.

<sup>181</sup> *New Zealand Food Processing Union v Unilever New Zealand Ltd* (1990) 1 NZLR 35 (LC) at 45.

<sup>182</sup> *Auckland City Council v Hennesey* (1982) ACJ 699 (CA) at 703.

<sup>183</sup> *Madden v New Zealand Railways Corp* (1991) 2 ERNA 690 (EmpC).

dismissal.<sup>184</sup> For example, offering redeployment to a role with lesser risk. Where redeployment was a reasonably available alternative, but not offered, dismissal is more likely to be unjustified.

(ii) Unjustified disadvantage

A claim can be brought where an employee's employment, or conditions thereof, is affected to their disadvantage by an unjustified action of their employer.<sup>185</sup> The test for justification is the same as that for dismissal.<sup>186</sup> The conduct must be fair and reasonable in the circumstances, and minimum procedural requirements adhered to.

While redeployment will be an important factor in avoiding unjustified dismissals, it might give rise to claims of unjustified disadvantage if employees are not satisfied with this alternative. *Alliance Freezing Co (Southland) Ltd v New Zealand Engineering Union* departed from the previously restrictive approach where disadvantage required material or financial loss.<sup>187</sup> Therefore, a transfer to another position can amount to disadvantage "even if unaccompanied by any demotion [or] reduction in pay".<sup>188</sup> While no particular kind of harm is envisaged, a subjective belief that the new position is less desirable is not sufficient.<sup>189</sup> Justification will depend on the particular circumstances of redeployment.

(iii) Discrimination

Discrimination is a non-justification grievance, meaning liability follows automatically upon establishing that discrimination occurred.<sup>190</sup> It requires that an employee, by reason directly or indirectly of any prohibited ground of discrimination, is given different conditions of employment, dismissed, subjected to any detriment, or caused to resign.<sup>191</sup> The relevant

---

<sup>184</sup> Anderson, above n 165, at 9.100.

<sup>185</sup> Employment Relations Act, s 103(1)(b).

<sup>186</sup> Employment Relations Act, s 103A.

<sup>187</sup> *Alliance Freezing Co (Southland) Ltd v New Zealand Engineering Union* (1989) 3 NZILR 785 (CA).

<sup>188</sup> *Chief Executive of Dept of Corrections v Harris* (2001) ERNZ 426 (EMPC) at [43].

<sup>189</sup> At [43].

<sup>190</sup> Anderson, above n 165, at 9.114.

<sup>191</sup> Employment Relations Act, s 104(1).



grounds of discrimination are the same as those under the HRA. These being disability, religious beliefs, and ethical beliefs.<sup>192</sup> While the HRA applies to pre-employment and employment issues, the ERA only protects existing employees. Existing employees have the choice of pursuing a claim under either Act but cannot claim under both.<sup>193</sup>

Establishing that conduct occurred ‘by reason of’ a discriminatory ground can be difficult where there are mixed motives. The existence of a legitimate motive, in this case health and safety, might prevent a successful claim of discrimination.<sup>194</sup> This high threshold means that where discrimination is established, there is likely to also be a successful unjustified dismissal or disadvantage claim.<sup>195</sup>

## *V Conclusion*

Mandatory vaccination is not a straightforward issue. It raises legal and ethical questions which give rise to a contentious debate. The emergence of COVID-19, and subsequently developed vaccines, has brought this debate to the forefront of conversation. This paper began by looking at the possibility of a government mandate for vaccination. There are strong public health incentives for ensuring as many people are vaccinated as possible and that herd immunity is achieved. However, a mandatory approach risks a significant infringement on individual liberty, making it politically unfavourable. It is possible that in certain circumstances, such an infringement would be demonstrably justified, and therefore, lawful under BORA. COVID-19 has produced significant risks which would arguably fall within such circumstances. Regardless of the theoretical plausibility of mandating the COVID-19 vaccine, the government has ruled this out with the exception of those covered by the COVID-19 Public Health Response (Vaccinations) Order 2021.

In the absence of a government mandate, employers are left to question how they can best protect their employees, clients, and communities, without breaching their obligations. The

---

<sup>192</sup> Section 106.

<sup>193</sup> Section 112.

<sup>194</sup> Same argumenta are applicable as were discussed under the HRA section.

<sup>195</sup> Anderson, above n 165, at 9.114.

second half of this paper looked at the competing obligations of employers, and considered in which circumstances a mandatory COVID-19 vaccination requirement might be lawful and reasonable. The importance of individual liberty and employment security means there is a baseline assumption that vaccination cannot be required, unless the circumstances justify it. Relevant factors include the likelihood and severity of risk posed by COVID-19, and the availability of effective alternatives to minimise such risk. Work which, upon consideration of these factors, cannot be carried out without creating a risk to workers or clients, will be classed as “high-risk”. This is likely to include border workers, healthcare workers, and aged care facility workers. In these circumstances, it is possible that mandating vaccination will be lawful and reasonable as it is a necessary requirement to fulfil the role in a safe manner. Even where a mandate is justified on health and safety grounds, employers must ensure it is implemented according to principles of good faith and consultation. Employers in “low-risk” industries, where there are reasonable alternatives for protecting health and safety, should be much more cautious. The risk is unlikely to be sufficient enough to justify an infringement on employees' ability to exercise autonomy over their bodily integrity. Requiring vaccination would be a breach of an employers' obligations and may give rise to claims of unjustified dismissal, unjustified disadvantage, or discrimination.

As the COVID-19 vaccine rollout continues, employers will be forced to make decisions as to whether they require their employees to be vaccinated. It is likely that some of these decisions will be challenged in the courts, hopefully leading to constructive debate regarding the legality of mandatory vaccination.

## VI *Bibliography*

### A *Cases*

#### I *New Zealand*

*Alliance Freezing Co (Southland) Ltd v New Zealand Engineering Union* (1989) 3 NZILR 785 (CA).

*Angus & McKean v Ports of Auckland Ltd (No 2)* (2011) NZEmpC 160, (2011) 9 NZELR 40.

*Auckland City Council v Hennessey* (1982) ACJ 699 (CA).

*Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415 (CA).

*Buchanans Foundry Ltd v Dept of Labour* [1996] 3 NZLR 112 (HC).

*Chief Executive of Dept of Corrections v Harris* (2001) ERNZ 426 (EMPC).

*Communication & Energy Workers Union Inc v Telecom NZ Ltd* [1993] 2 ERNZ 429.

*Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774.

*Department of Labour v Idea Services Ltd* at [73].

*Department of Labour v Idea Services Ltd* DC Hastings CRN 08020500068, 4 November 2008.

*Electrical Union 2001 Inc v Might River Power Ltd* [2013] NZEmpC 197, (2013) 11 NZELR 252.

*Madden v New Zealand Railways Corp* (1991) 2 ERNA 690 (EmpC).

*McAlister v Air New Zealand* (2009) NZSC 78, (2010) 1 NZLR 153.

*Meulenbroek v Vision Antenna Systems Ltd* [2014] NZHRRT 51.

*New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

*New Zealand Amalgamated Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614.

*New Zealand Food Processing Union v Unilever New Zealand Ltd* (1990) 1 NZLR 35 (LC).

*Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107.

*OCS Ltd v Service and Food Workers Union Nga Ringa Tota Inc* (2006) 3 NZELR 558 at [65].

*R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

*Toll NZ Consolidated Ltd v Rail and Maritime Union Inc* [2004] 1 ERNZ 392.

*Wellington Clerical Union v Greenwich* (1983) ACJ 965.

*Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671.

*WorkSafe New Zealand v Rentokil Initial Ltd* [2016] NZDC 21294 at [73].

## **II**      *Canada*

*North Bay General Hospital v Canadian Union of Public Employees* [2003] OLLAA No. 580.

*R v Oakes* [1986] 1 SCR 103.

*St. Michael's Hospital v ONA* 2018 CLAS 172.

*Sault Area Hospital v Ontario Hospital Association* 2015 CanLII 55643 (ON LA).

## **III**     *United States*

*Buck v Bell* 274 US 200 (1927)

*Jacobson v Massachusetts* 197 US 11 (1905).

*Roman Catholic Diocese v Cuomo* 592 US (2020).

*Vincent v Bysiewicz* (D Conn 2020).

## **IV**     *Australia*

*Arnold v Goodstart Early Learning Ltd* [2020] FWC 6093.

*Glover v Ozcare* [2021] FWC 231.

*Kimber v Sapphire Coast Community Aged Care Ltd* [2021] FWC 1818.

## **V**      *England and Wales*

*Edwards v National Coal Board* [1949] 1 KB 704.

*Marshall v Gotham Co Ltd* [1954] AC 360 (UKHL).

*R v Dica* [2004] EWCA Crim 1103, [2004] All ER 45.

## **B**      *Legislation*

*I New Zealand*

COVID-19 Public Health Response (Vaccinations) Order 2021 cl 3.

Employment Relations Act 2000.

Health and Safety at Work Act 2015.

Human Rights Act 1993.

*II Canada*

Ambulance Act RSO 1990 c A.19.

**C Books**

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

Gordon Anderson, *Employment Law in New Zealand* (2nd Ed, LexisNexis, Wellington, 2017).

John Stuart Mills *On Liberty* (J. W. Parker and Son, 1859).

Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Victoria, 2004).

**D Journal Articles**

Emma Cave “Voluntary vaccination: the pandemic effect” (2017) 37 *Legal stud* 279.

Eric Walkinshaw “Mandatory vaccinations: The International Landscape” (2011) 183 *CMAJ* 1167.

Jessica Kerr “Immunisation and the Law: Slippery Slope to a Health Society” (2006) 37 *VUWLawRw* 93.

Julian Savulescu “Good reason to vaccinate: mandatory or payment for risk?” (2020) 47 *Med Ethics* 78.

Meir Dan-Cohen “In Defense of Defiance” (1994) 23 *Philosophy & Public Affairs* 24.

Rebecca Rodal, Nola M Ries and Kumanan Wilson “Influenza vaccination for healthcare workers: towards a workable and effective standard” (2009) 17 *Health Law Journal* 297.

Samuel Pullan and Mrinalini Dey “Vaccine hesitancy and anti-vaccination in the time of Covid-19: a google trends analysis” (2021) 39 *PMC* 1877.

Shixin Shen and Vinita Dubey “Adressing vaccine hesitancy” (2019) 65 *Can Fam Physician* 175.

Sylvia Law “Human Papillomavirus Vaccination, Private Choice, and Public Health” (2008) 41 *UC Davis Law Review* 1731.

Vanessa Gurben, Reed A Siemieniuk and Allison McGeer “Health care workers, mandatory influenza vaccination policies and the law” (2014) 186 CMAJ 1076.

## ***E Reports***

Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” (1985) AJHR A6.

Graham Pankhurst, Stewart Bell and David Henry *Royal Commission on the Pike River Coal Mine Tragedy: Volume 2* (October 2012).

Jagadish Thacker *Panel Aotearoa-New Zealand public attitudes and intentions for COVID-19 vaccination - March 2020 to June 2021* (Massey University, Wellington, 2021).

Lord Herschell *Report of the Royal Commission Appointed to Inquire into the Subject of Vaccination* (London, 1889-1897).

Ministry of Health *Immunisation Handbook 2017* (2nd ed, Ministry of Health, Wellington, 2018) at [11.2].

Nicholas Steyn and others “A COVID-19 Vaccination Model for Aotearoa New Zealand” (paper produced by Te Punaha Matatini, June 2021).

The Independent Taskforce on Workplace Health and Safety *Workplace Health & Safety: He Korowai Whakaruruhau* (April 2013).

Tom Stannard, Gregorius Steven and Chris McDonald *Economic impacts of COVID-19 containment measures* (Reserve Bank of New Zealand, Wellington, 2020).

## ***F Internet Materials***

Andrew Little “Technical amendment to Medicines Act” (18 May 2021)  
<<https://www.beehive.govt.nz/release/technical-amendment-medicines-act>>.

Anthony Drake and Katja Heesterman “Can employers require employees to get the jab?” (3 February 2021)  
<[www.wynnwilliams.co.nz](http://www.wynnwilliams.co.nz)>.

Burrows Matt “Coronavirus: NZ Government won’t make COVID-19 vaccine mandatory, but may ‘exclude’ Kiwi who don’t get the jab - expert” (4 August 2020) Newshub <<https://www.newshub.co.nz/home/new-zealand/2020/09/coronavirus-nz-government-won-t-make-covid-19-vaccine-mandatory-but-may-exclude-kiwis-who-don-t-get-jab-expert.html>>.

Employment New Zealand “Good faith” <<https://www.employment.govt.nz/resolving-problems/employer-and-employee-must-dos/good-faith/>> .

Employment New Zealand “What are workplace policies” <<https://www.employment.govt.nz/workplace-policies/what-are-workplace-policies/>>.

Hannah Martin “Covid-19: 75 new cases in Delta community outbreak, but the curve is ‘gradually bending’ (1 September 2021) <<https://www.stuff.co.nz/national/health/coronavirus/300396632/covid19-75-new-cases-in-delta-community-outbreak-but-curve-is-gradually-bending>>.

Hon Julie Anne Genter “Record numbers of New Zealanders protected with flu vaccine” (27 April 2020) Beehive <<https://www.beehive.govt.nz/release/record-numbers-new-zealanders-protected-flu-vaccine>>.

Ipsos “COVID-19: one year into the pandemic” (9 March 2021) <<https://www.ipsos.com/en-nz/covid-19-one-year-pandemic>>.

Jacob Silverman (ed) *Vaccine denialism is the right wing’s favourite new conspiracy theory* (online ed, The New Republic).

Jacqueline Howard “Pfizer data suggests third dose of Covid-19 vaccine ‘strongly’ boosts protection against delta variant” (28 July 2021) <<https://edition.cnn.com/2021/07/28/health/pfizer-third-dose-data-bn/index.html>>.

Lawrence Mai, Tarsha Gavin, Tommy Bleby and Laura Miller “FWC upholds mandatory jab again” (2 June 2021) Allens and Linklaters <<https://www.allens.com.au/insights-news/insights/2021/06/fwc-upholds-mandatory-jab-again/>>.

Lori Aratani and Michael Laris “United airlines becomes first carrier to mandate vaccine for US based employees” (6 August 2021) <<https://www.washingtonpost.com/transportation/2021/08/06/united-airlines-covid-vaccine-mandate/>>.

Medsafe “COVID-19 Vaccine approval process” (27 November 2020) <<https://www.medsafe.govt.nz/COVID-19/vaccine-approval-process.asp>>.

Melissa Cunningham “Delta is very unusual: young people warned the variant may pose greater risks” (27 July 2021) The Sydney Morning Herald <<https://www.smh.com.au/national/delta-is-very-unusual-young-people-warned-the-variant-may-pose-greater-risks-20210726-p58cyo.html>>.

Michael Byrnes and Emily Capener *Compulsory Vaccination for Employees: The Legal Position* (online ed, Swaab).

Michael Willrich “The crime of refusing vaccination” (25 March 2021) The Atlantic <<https://www.theatlantic.com/podcasts/archive/2021/03/jacobson-supreme-court-vaccination/618359/>>.

Ministry of Health “COVID-19: Source of cases” (1 August 2021) <<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-data-and-statistics/covid-19-source-cases>>.

Ministry of Health “COVID-19 Science Updates” (7 May 2021) <[https://www.health.govt.nz/system/files/documents/pages/science\\_updates\\_7\\_may\\_2021.pdf](https://www.health.govt.nz/system/files/documents/pages/science_updates_7_may_2021.pdf)>.

Ministry of Health “COVID-19: Purchasing the vaccines” (21 May 2021) ,<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines/covid-19-vaccine-strategy-planning-insights/covid-19-purchasing-vaccines>>.

Ministry of Health “COVID-19: The vaccine rollout” (30 June, 2021) <<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines/covid-19-getting-vaccine/covid-19-vaccine-rollout>>.

Ministry of Health “COVID-19: vaccine effectiveness and protection” (2 August 2021) <<https://www.health.govt.nz/our-work/diseases-and-conditions/covid-19-novel-coronavirus/covid-19-vaccines/covid-19-vaccine-effectiveness-and-protection>>

th “National and DHB immunisation data” (19 May 2021) <<https://www.health.govt.nz/our-work/preventative-health-wellness/immunisation/immunisation-coverage/national-and-dhb-immunisation-data>>.

Nassim Khadem “Qantas makes COVID-19 vaccinations mandatory for all of its workers” (18 August 2021) <<https://www.abc.net.au/news/2021-08-18/qantas-mandatory-vaccinations-covid19-workers-pandemic/100386206>>.

New Zealand Government “Vaccination requirements for workers in high-risk border settings” (30 April 2021) <<https://www.lawfoundation.org.nz/style-guide2019/chapter-7.html#7.1>>.

Paul Karp “Australian employers could require some workers to be vaccinated after commission ruling” (21 April 2021) The Guardian <[https://www.theguardian.com/australia-news/2021/apr/21/australian-employers-could-require-some-workers-to-be-vaccinated-after-commission-ruling?CMP=Share\\_AndroidApp\\_Other](https://www.theguardian.com/australia-news/2021/apr/21/australian-employers-could-require-some-workers-to-be-vaccinated-after-commission-ruling?CMP=Share_AndroidApp_Other)>.

RNZ “Man charged over supermarket coughing video” (6 April 2021) <<https://www.rnz.co.nz/news/national/413555/man-charged-over-supermarket-coughing-video>>.

Roni Caryn Rabin “Is the delta variant making younger adults ‘sicker, quicker’?” (3 April 2021) <<https://www.nytimes.com/2021/08/03/health/covid-young-adults-sicker.html>>.

United States Department of Labour “OSHA News Release - Region 8” (10 September 2020) <<https://www.osha.gov/news/newsreleases/region8/09102020>>.

University of Waikato “The real challenge to COVID-19 vaccination rates isn’t hesitancy - it’s equal access for Maori and Pasific people” ,<https://www.waikato.ac.nz/news-opinion/media/2021/the-real-challenge-to-covid-19-vaccination-rates-isnt-hesitancy-its-equal-access-for-maori-and-pacific-people>>.

WorkSafe New Zealand “Reasonably practicable” (July 2017) <<https://www.worksafe.govt.nz/assets/dmsassets/zero/848WKS-6-HSWA-reasonably-practicable.pdf>>.

World Health Organization “Coronavirus disease (COVID-19): How is it transmitted?” (13 December 2020) <<https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted#:~:text=%20Current%20evidence%20suggests%20that,nose%2C%20or%20mouth>>.

World Health Organization “Coronavirus disease (COVID-19)” (12 October 2020) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19#:~:text=symptoms>>.

World Health Organization “WHO Coronavirus (COVID-19) Dashboard” (29 June 2021) <<https://covid19.who.int>>.

Zane Small “PM Jacinda Adern rules out ‘no jab, no play’ policy adopted in Australia” (3 August 2019) Newshub <<https://www.newshub.co.nz/home/politics/2019/09/pm-jacinda-ardern-rules-out-no-jab-no-pay-policy-adopted-in-australia.html>>.



***Word Count***

The text of this paper (excluding title page, abstract, table of contents, footnotes, and bibliography) is approximately 7994.