



The vaccine passport regime: ineffective and unlawful

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The author of this report is double vaccinated and boosted.

Key findings

- The vaccine is ineffective in suppressing the spread of Omicron. Forcing a small group to be vaccinated will make little difference to the rate or extent of the spread of the virus.
- The mandate will make little difference to the risk to vaccinated people in controlled venues. They will be infected by other vaccinated people.
- The unvaccinated will have a higher hospitalisation rate, but because of their low numbers and the much lower virulence of Omicron, there is little risk that they will pose a threat to the functioning of the health system.
- Under the Bill of Rights Act all covid measures must be '*demonstrably justified in a free and democratic society*'. They must be necessary and proportionate. It is difficult to argue that the vaccine mandate is necessary if the vaccine does not control the spread of the virus.

- New Zealand is a party to the International Covenant on Civil and Political Rights. A set of principles (the Siracusa principles) constrain the Government's capacity to override citizens rights in this pandemic. The strong presumption is that rights should be respected. The burden of proof lies with the Government to demonstrate, objectively, how each measure combats a threat to the life of the nation. There is no sight of the necessary proof. As it seems clear that the Government cannot not meet the relevant tests it is likely that the vaccine mandates are unlawful.
- The Covid Response Minister, Chris Hipkins, is aware of his legal obligations. He recently told the Waitangi Tribunal that the Government risked breaching the Bill of Rights Act in the latter stages of the Auckland level 4 lockdown and that they had to move to level 3.
- The legal position on the vaccination mandates is not even close. Hipkins should grasp the nettle and recommend dropping the vaccine mandates.

Vaccine passport is ineffective

The intent and effect of the vaccination passport regime is to make life unpleasant or unworkable for those who have chosen not to be vaccinated.

A number of arguments have been advanced in support of this policy. While some may have had some sort of logic with Delta they do not make sense with the Omicron outbreak.

Arguments for the vaccine passport.

1. *It is for the unvaccinated person's own good.*

It is not lawful to coerce someone into being vaccinated for 'their own good'. Section 11 of the New Zealand Bill of Rights Act 1990 provides that: *'Everyone has the right to refuse to undergo any medical treatment'*.

2. *It helps to suppress the spread of covid*

With the Delta outbreak, herd immunity (which would reduce inflections to manageable levels) required an adult vaccination rate of between 80 and 90 percent. Because Omicron is so much more transmissible, and the vaccine much

less effective against infection (30-40 percent compared to 80 percent for Delta) there is no vaccination rate that can prevent widespread infections. Vaccinating the last five percent of the population will not make a material difference to the spread of Omicron.

3. It protects the vaccinated in venues such as restaurants and bars

Allowing the unvaccinated access to bars and other restricted venues will not make a material difference to vaccinated peoples' risks. Over time they will have a relatively high probability of being infected by vaccinated customers. For younger, healthy people the risk of a serious outcome with Omicron is very low. And the more vulnerable elderly are hardly likely to be haunting the hottest nightspots.

4. It will reduce pressure on the health system

Unvaccinated people have a higher risk of being hospitalized if infected so there will be an impact on hospitalisation rates if they remain unvaccinated. However, this should be manageable. The Director General of Health is on record as saying that Omicron is only 10 to 15 percent as virulent as Delta, so the base rate of hospitalisations will be much lower than with a full blown Delta outbreak. The Government should have planned for a Delta outbreak so the health system should be able to manage an Omicron outbreak, even if it is likely to be more compressed.

In the Delta outbreak the unvaccinated hospitalisation rate was about five times the vaccinated rate. If this rate is repeated with Omicron then the unvaccinated will increase overall hospitalisations by about 20 percent. It is unlikely that this increase will trigger some kind of 'breakdown' in the health system.

The vaccine mandate is unlawful

A limited capacity to limit human rights in response to a health emergency is provided for in the New Zealand Bill of Rights Act. Section 5 states:

The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

'Demonstrably justified', is open to a range of interpretations. However, there are constraints, requirements and guidance under international law, which are relevant

to an assessment of the New Zealand measures. These are set out in the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. New Zealand is a party to the Covenant.

The relevant tests with some comments are (the boldings are our emphases):

- *The scope of a limitation referred to in the Covenant shall not be interpreted so as **to jeopardize the essence** of the right concerned.*
- *All limitation clauses shall be interpreted strictly and **in favor** of the rights at issue.*
- *No limitation shall be applied in **an arbitrary** manner.*
- *Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.*
- *Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation*
 - (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,*
 - (b) responds to a pressing public or social need,*
 - (c) pursues a legitimate aim, and*
 - (d) **is proportionate** to that aim. Any assessment as to the necessity of a limitation shall be made on **objective** considerations.*

The mandates do substantial harm to many of those affected for little benefit in terms of managing the outbreak. They are not proportionate.

- *In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.*
- *The **burden** of justifying a limitation upon a right guaranteed under the Covenant **lies with the state**.*
- *Adequate safeguards and effective remedies **shall be provided by law against illegal or abusive imposition** or application of limitations on human rights*

There are no such safeguards in the New Zealand covid legislation.

- *The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.*

- *A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger **which threatens the life of the nation.***

As discussed above a small group of unvaccinated people do not threaten the life of the nation.

- *A state party derogating from its obligations under the Covenant shall **immediately notify the other states parties** to the Covenant, which it has derogated;*

Has this been done? We suspect not.

- *A state party availing itself of the right of derogation pursuant to Article 4 shall terminate such derogation in the **shortest time** required to bring to an end the public emergency which threatens the life of the nation.*

This suggests that foot dragging due to 'an abundance of caution' may not be permissible.

- *A **review** of the continuing consequences of derogation measures shall be made as soon as possible. **Steps shall be taken to correct injustices and to compensate those who have suffered injustice during or in consequence of the derogation measures.***

Where are the reviews of past impositions?

- *The competent national authorities shall be under a duty to assess **individually** the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.*

The Government will need to present objective evidence that the vaccine mandates, specifically, are necessary and proportionate in the Omicron outbreak.

- *The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and **may not be imposed merely because of an apprehension of potential danger.***

The vaccine mandate can not be retained because it might be useful sometime in the future.

- *In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities **cannot** be accepted as conclusive.*

It is not acceptable for Crown Law to conclude that the mandates are 'necessary and proportionate' because the Government says they are. This is what they did, in essence, in their opinion on the legality of the alert level restrictions. They have to do their own fact based assessment. Similarly a Judge, deciding on the legality of the mandates, cannot simply accept the Government's opinion as authoritative. She would have to consider all of the factual evidence and the burden of proof would lie with the Government.

Taken together the Siracusa principles represent a more demanding set of tests and constraints than a mere insistence that an imposition is 'demonstrably necessary' or 'necessary and proportionate'.

The Government needs to demonstrate that it has objectively assessed the necessity of the vaccine mandate in the Omicron outbreak. If no such written assessment exists then there would be a strong presumption that the vaccine mandate is unlawful. If there is a written assessment then the burden of proof lies with the Government that the mandate is necessary to preserve the life of the nation.

Given the evidence on the characteristics of the Omicron outbreak the Government would be hard pressed to make its case. Obviously if the vaccine does not work in suppressing the outbreak it can hardly be necessary.

The Covid-19 Response Minister, Chris Hipkins, is aware of his legal obligations. He recently told the Waitangi Tribunal that the Government risked breaching human rights law in the latter stages of the Auckland level 4 lockdown.

The legal position on the vaccination mandates is not even close. Hipkins should grasp the nettle and recommend dropping the mandates.