The High Court Defence and Police vaccine mandate decision

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Introduction

On 25 February 2022 the High Court released a decision by Justice Cooke that found that the vaccine mandate applying to Police and Defence staff was unlawful because it was an unjustified incursion on the Bill of rights. The rights affected were the right to be free to refuse medical treatment recognised by s 11 of the New Zealand Bill of Rights Act (including because of its limitation on people's right to remain employed); and the right to manifest religious beliefs under s 1 for those who declined to be vaccinated because the vaccine had been tested on cells derived from a human foetus, which is contrary to their religious beliefs.

The decision has a limited direct application, affecting just the Police and Defence force staff who were subject to an order whose purpose was to maintain Police and Defence capacities to operate, and to maintain the confidence of the public.

The purpose of this short note is to consider the implications of this decision for other parties affected by vaccine mandates.

The decision

Justice Cooke's reasoning was as follows:

97. I am not satisfied that the Crown has put forward sufficient evidence to justify the measures that have been imposed, even giving it some benefit of the doubt.

The apparently low numbers of personnel the Order actually addresses, the lack of any evidence that they are materially lower than would have been the case had the internal policies been allowed to operate, and the evidence suggesting that the Omicron variant in particular breaks through any vaccination barrier means that I am not satisfied that there is a real threat to the continuity of these essential services that the Order materially addresses.

If there is a threat to these services it will arise precisely because vaccination and other measures are not able to prevent the risk that Omicron will sweep through workforces.

Further:

It is apparent from the evidence that Omicron is highly transmissible, and that it could affect a significant number of New Zealanders, and accordingly a significant number of Police and NZDF personnel. But it is apparent from such waves of infection in other countries that ultimately the levels of infection drop. In other words it has a relatively temporary but very significant impact. That is of importance in my view. The major impact for a period of three to six months may need to be addressed. But the terminations arising from the Order are permanent.

The main point of difference for other parties affected by the vaccine mandates that the purpose of the Police and Defence mandate was to maintain continuity of service. The other mandates are intended to suppress the spread of the virus.

In that respect the key element of the decision was Justice Cooke's understanding that vaccinations were relatively ineffective against the spread of Omicron and that this:

significantly changes the benefits that vaccination provides by preventing people contracting and transmitting COVID-19 (as opposed to the seriousness of the illness).

The basis for this finding was evidence presented by the applicants' expert and the lack of contrary evidence from Dr. Town, the Ministry Of Health's Chief Science Advisor.

Expert testimony

Justice Cooke's description of the expert evidence was as follows:

*He (*Dr. Dr Petrovski for the Complainants) *explained in his evidence that vaccination has potential benefit in reducing the severity of disease, even with the Omicron variant. But in his view mandatory vaccination does not assist in preventing workers in affected roles from contracting COVID-19, or transmitting it to others. Indeed his view was that it may ultimately increase the spread of the virus in a workforce because of increased asymptomatic transmission by the vaccinated, or undue reliance by them on the vaccine's apparent protection. His view was that the more effective measures involved other techniques, such as the use of rapid antigen testing and isolation.*

Dr Petrovski's analysis is detailed, relying on a number of studies.

Petroski's conclusion on the ineffectiveness of the vaccine in preventing Omicron's spread would apply to other workplaces and venues restricted to the unvaccinated.

Justice Cooke's description of the Crown's expert witnesses evidence was as follows:

[89] The Ministry's Chief Science Adviser, Dr Town gives different evidence. As I explained in Four Aviation Security Service Employees v Minister of COVID-19 Response, there are limits on the Court's ability to make findings on disputed questions of expert evidence in a judicial review proceeding, particularly in the absence of crossexamination. In my view, provided the Crown provides expert evidence that establishes the pre-requisite for the justified limitation on rights it is for the applicant to show why that evidence is wrong. But there is some difficulty in relying on that approach here given the absence of full engagement with the analysis conducted by Dr Petrovski in the evidence filed by the respondents.

Or, in other words, the Crown should ordinarily have the inside running on the expert evidence.

I accept that Dr Town is qualified to give expert evidence relevant to these issues, although he is not an immunologist. He explains his speciality is "in evaluating scientific evidence and helping to ensure that credible science is at the core of decision-making".

He considered Dr Petrovski's evidence, and directly addressed his analysis on some topics — for example Dr Petrovski's evidence about the adverse events and mortality rates during the Pfizer trials, and the risk of myocarditis and pericarditis. But in terms of Dr Petrovski's analysis of the effectiveness of the vaccine to inhibit the spread of COVID-19 in a workforce such as Police and NZDF ***he did not directly respond*** *(our emphasis), but instead provided his own more generalised opinions, effectively in parallel. His evidence is then reasonably carefully expressed.*

Justice Cooke found Dr. Town to be somewhat evasive.

He says:

60. In relation to Omicron, studies show that vaccination provides some protection against symptomatic disease. However, vaccine effectiveness is reduced compared to Delta. Rapid waning of vaccine effectiveness occurs against Omicron, but a booster dose restores protection. Vaccine effectiveness against hospitalisation appears to be 60-70% after a primary vaccine course, but declines to around 45% from 25 weeks after the second dose. Vaccine effectiveness against hospitalisation increases to around 90% after a booster dose (including in those over 65 years of age). The most recent variants science updates dated 27 January and 3 February 2022 are attached at Exhibit GT-05 and Exhibit GT-06 respectively.

There is nothing here that would directly assist in drawing a conclusion on whether vaccinations can supress the Omicron virus or whether the there will be runaway growth in case numbers. At the time there was overwhelming overseas evidence that it was the latter, even in highly vaccinated countries. This is now obvious in the New Zealand numbers.

Justice Cooke's response to Dr. Town's evidence was as follows:

[90] I note that the advice summarised in the attached exhibits in relation to Omicron suggested effectiveness against infection at much lower levels than for Delta and that it declined "rapidly after the first month".

It appears that Justice Cooke felt it necessary to present the underlying evidence because it gave a less positive account of the vaccine's performance than was apparent in Dr. Town's summary. Justice Cooke was correcting for the misleading impression given by Dr.Town.

It also contained information about symptomatic disease suggesting that early evidence was that a booster restored rapidly waning protection, but that protection also dropped within a period after the booster.

In essence Justice Cooke concluded that on the basis of the complainants' expert evidence the vaccine was not effective in preventing widespread infections. Dr. Town's attempt to avoid this issue by not responding to the complainants expert evidence and by offering misleading testimony did not work.

Justice Cooke concluded:

It is clear from the evidence that vaccination does not prevent persons contracting and spreading COVID-19, particularly with the Omicron variant

[92*] I have no other evidence that this remaining protective effect significantly contributes to maintaining the continuity of Police and NZDF services in light of a number of personnel within those services who might remain in the services unvaccinated without the Order*.

Preliminary issues

Justice Cooke also did not accept the Crown's submissions on a number of potentially important preliminary issues.

A Margin for appreciation or deference

The Crown argued that it was necessary for the Court to allow for a degree of deference to the assessment made by the Minister when assessing whether the measures involved a demonstrably justifiable limit on fundamental rights. Justice Cooke was clear that the burden of proof that the intervention was demonstrably necessary still sat with the Crown.

Information should be restricted to that available at the time of decision

The Crown comtended that In addressing the evidence of the number of unvaccinated Police officers the Court should limit itself to the information that was available at the time of the decision.

Justice Cooke rejected this argument on a number of grounds including:

Thirdly, there is a statutory duty for the Minister to keep the orders he has decided to implement under review in s 14(5) of the Act. That reflects a legislative intention to monitor the justifications for orders in light of changing circumstances. It is accordingly consistent for the Court to also monitor the question of legality on that basis.

Justice Cooke noted that Crown witnesses had not updated their evidence to address the changed impact with Omicron.

The evidence of particular witnesses assume that the vaccine has a significant effect. For example Deputy Commissioner Kura's evidence was that the advice to Police was that unvaccinated and partially vaccinated Police staff were more likely to contract the virus. But the health advice so provided for the opinion is not in evidence.

The precautionary principle

Justice Cooke discussed the precautionaty principle citing a Canadian covid decision

The precautionary principle is a foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health of Canadians.

Viewed in light of the precautionary principle, the fact that the Order may not provide perfect protection is not particularly significant. The evidence shows that the challenged measures are a rational response to a real and imminent threat to public health, and any temporary suspension of them would inevitably reduce the effectiveness of this additional layer of protection

But he concludes:

One of the main justifications for the precautionary approach is the health risk to the wider public. That is not suggested as relevant here.

[96] But the burden still is on the Crown to demonstrate that the limitation on the applicants' rights is reasonable and demonstrably justified in light of the precautionary principle.

It is likely that the Crown, will take an expansive approach to the 'precautionary principle' in defending other vaccine mandate orders. But it should not be a strongly relevant consideration. There is a good understanding (if not in the Ministry of Health but amongst competent and independent analysts) of how the Omicron epidemic will unfold. It is simply impossible to argue that the vaccination of 3.5 percent of the population will make an appreciable difference to the course of the epidemic in New Zealand. If the Crown wants to argue this then they should be able to present modelling evidence of the adverse effect with a lower vaccination rate even under adverse assumptions. There is no evidence that they have any done any such modelling.

That is not to say that the Crown will not try to make a case. If the Police and Defence case is a guide the strategy might be to use 'expert' witnesses to obfuscate and deceive in the hope that a Judge will be so uncertain that the Crown evidence will be preferred as the default option because there is expert disagreement on the scientific evidence and the implications for epidemic outcomes. This didn't work in this case and the Crowns expert was rebuked by the Justice. But rather than conceding on the science it is likely that the Crown will only be motivated to try harder to fudge the inconvenient truth that Omicron cannot be stopped or appreciably slowed by a higher vaccination rate.

The health system will be overwhelmed argument

It is possible that the Crown will argue that some mandates are necessary to prevent the health system being overwhelmed, or at least being placed under significant pressure. With respect to the direct impact of increased illness amongst the education and health and disability workers the argument that there will be any sort

of 'threat' to the health system is obviously nonsense. The unvaccinated numbers involved are very small and the hospitalisation rates with Omicron are low even for the unvaccinated.

It is more likely that the health system argument will be invoked to defend measures designed to coerce and punish the 150,000 or so unvaccinated in the general population by denying them access to services.

However, the argument of necessity does not stack up.

In its 28 February 2022 'News Article' the MOH presented the following under the heading 'The Vaccination and COVID-19 hospitalisations'.

As the number of COVID-19 cases increases, we are continuing to see a disproportionate number of unvaccinated cases requiring hospital care.

Just 3% of eligible people aged 12 and over in New Zealand have had no doses of the vaccine, however, of the eligible people in Northland and Auckland hospitals with COVID-19, 12% have had no doses of the vaccine.

Even this early in the Omicron outbreak, the figures show that, based on the data available, unvaccinated people are four times over-represented in the current hospitalisation data.

This analysis was not entirely accurate. First, the proportion of eligible unvaccinated people was 3.5 percent, not 3 percent. Second the eligible population figure is understated because not all people are in the health database. We assume that people not in the database will be unvaccinated (if they were vaccinated they would be in the database) so the true number of unvaccinated could well be, sat 5 or 6 percent of the population. Hence the over representation rate was more like 2.5 rather than four times.

But even if it were four times, this would not provide a case that there would be a threat to the health system. At most it would increase the number of hospitalisations by, say, 10-15 percent. This will not push the system over some credible capacity threshold. If the Crown were to make this argument it would have to support it with evidence on health system capacity and the impact of the unvaccinated onhospitalisation numbers.

A key problem in assessing the Ministry's claims is that the Ministry has made it difficult to assess hospitalisation rates for the vaccinated and unvaccinated populations in the Omicron outbreak. From the outset it has combined the ineligible and unvaccinate hospitalisation numbers in its case demographic data so we are

dependent on periodic releases of the unvaccinated hospitalisation numbers when the Ministry want to make a particular point.

Of more concern is that the MOH failed to close off the August Delta outbreak data and produce Omicron data in its case demographic information set. Hence it is not possible to read off the Omicron data from the reporting tables. This is important because the hospitalisation rate with Delta, at about 5 percent, was much higher than with Omicron. Our rough estimate of the Omicron hospitalisation rate is about 0.6 - 0.7 percent.

It is also likely that the average length of stay in hospital with Omicron will be lower than with Delta, which would further reduce pressure on the health system. Te Punaha Matatini, the Government's favoured covid modeller, assumed an average length of stay of 4 days in its preliminary Omicron outbreak modelling,[1] compared to around 8 days in its previous modelling.

An important statistic is the number of people in ICU, because ICU cases are much more resource intensive. The current number (3 March 2022) is 11. There is no information of how many were unvaccinated. There should be. And if the Crown does go down the 'threat to the health system' route it should be required to produce it.

A survey of hospitals reported in the November 2021 NZMJ reported a capacity of around 200 ICU beds. The Government has claimed that it has a higher surge capacity.

At the time of writing the number of hospitalisations was 562. While numbers will grow they are likely the peak will be well short of capacity. The early Te Punaha Matatini modelling suggested a hospitalisation peak of 1200-2400 depending on which country experience was replicated.

The Director General of Health is on the public record providing assurances that the Heath system is well placed to meet the demands of a covid surge. So Bloomfield or other Ministry employees would have problems in reconciling these remarks with any attempt to employ the precautionary principle to justify coerced vaccinations.

And even if the unvaccinated could be coerced into becoming vaccinated, say in the next two weeks, it will likely be too late to make much difference to the peak hospitalisation numbers. It will take a month for these vaccinations to become effective. The case numbers are likely to peak in two or three weeks, or possibly sooner, with the peak in hospitalisations coming a week or so later.

[1] A preliminary assessment of the potential impact of the Omicron variant of SARS-CoV-2 in Aotearoa New Zealand 8 February 2022

The Ministry would also have to explain its lackadaisical approach to pushing the booster programme if vaccination rates were critical to health system functioning. The Big Boost campaign did not get underway until case numbers were growing strongly, and there was delay in moving from a four month to a three gap from the second vaccination.

With respect to education workers the Crown may well push the narrative that it is necessary to protect school children. Stoking fear about the risk to children has been part of the Ministry's strategy. But as Justice Cooke understood vaccinating a few employees will not make a material difference to the risk of infection for school children. Importantly, school children are not at a material risk. The following table was taken from the Te Punaha Matatini paper referenced above. It shows that the proportion of infections casing death are extremely low at 1:250,000, even for the unvaccinated. These estimates include children with existing conditions. So the rate for healthy children is close to zero.

Figure one: hospitalisation and death rates by ahe unvaccinated

Age band (years)															
0-4	5-9	10-14	15-19	20-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60-64	65-69	70-74	75+
Proportion of infections causing hospitalisation (%)															
0.31	0.31	0.13	0.20	0.29	0.42	0.61	0.90	1.27	1.87	2.77	3.90	5.65	7.94	11.1	19.9
Proportion of infections causing death (%)															
0.0004	0.0004	0.0004	0.0008	0.002	0.003	0.006	0.011	0.023	0.045	0.087	0.168	0.331	0.635	1.22	4.27

Table 2. Hospitalisation and death rates for unvaccinated infected people in five-year age bands

Conclusion

The nub of the issue is that Omicron impacts fundamentally on the rationale for the present coercive approach to vaccination. There is no vaccination level that can have a material impact on the spread of the virus and Omicron is much less virulent than previous variants. If it assumed that the Bill of Rights means anything at all it is extremely difficult to make any argument that the vaccine mandates are now demonstrably necessary. The Government has not made this mental shift. It is still operating in a Delta world. But they are bound to make the shift. There is a statutory duty in s 14(5) of the Act for the Minister to keep the orders he has decided to implement under review.

Appendix

New Zealand Bill of Rights

Justified limitations
5. Subject to section 4, 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.

6. Interpretation consistent with Bill of Rights to be preferred
Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

11. Right to refuse to undergo medical treatment
Everyone has the right to refuse to undergo any medical treatment.

Other rights and freedoms not affected
An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

International Covenant on Civil and Political Rights

PART I

Article 4

1 . In time of public emergency which **threatens the life of the nation (**our emphasis**)** and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further

communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

International Covenant on Economic, Social and Cultural rights

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.