

## Another unsuccessful COVID-19 vaccination mandate challenge in the High Court

**The High Court has recently dismissed a judicial review challenge to both the education sector and health and disability sector vaccination mandates. The Court held that the mandates limit on the right to refuse medical treatment were demonstrably justified for both sectors.**

### Background

The applicants had claimed back in November 2021 that the requirement to be vaccinated under the COVID-19 Public Health Response (Vaccinations) Order 2021 (**the Order**) was not within the empowering provisions of the Act.<sup>1</sup> In addition, an application for interim relief directed to the remaining claims was dismissed.<sup>2</sup> This case dealt with the remaining claims, including the claim that the Order is invalid as it is not a reasonable and demonstrably justified limit of rights under the New Zealand Bill of Rights Act 1990.<sup>3</sup>

The applicants were challenging both the education and health and disability sector vaccine mandates.

The applicants claimed:

- That the right to refuse medical treatment under s 11 of the Bill of Rights is an absolute right not subject to any limitations under s 5, and the Order ought to be set aside.
- That the Crown cannot, or can no longer show that the Order involved a reasonable limit on

the right that is demonstrably justified in a free and democratic society.

- That the Order is unreasonable and/ or irrational and ought to be set aside.
- That the exemption criteria are unreasonable, irrational or are being applied overly rigidly and the Order ought to be set aside, or other appropriate relief granted as a consequence.

The Court determined that the right in s 11 can be subject to demonstrably justified limits. The key issue to be determined was then whether the limit of the right to refuse medical treatment by the Order was demonstrably justified.

### Justification for the mandates

The Court discussed the justification for having the mandates. It noted that health and disability workers may be at heightened risk of being infected and transmitting COVID-19 given that close contact, including with those who may be unwell, is part of the delivery of most health and disability services.

Many of those that seek such services have other illnesses and conditions that may make them more vulnerable to COVID-19, or be in close contact with such persons.

Many who access health services do so out of a pressing need and without the ability to make choices. A patient admitted to hospital may not be able to make choices as the circumstances compel them to enter that environment. In those circumstances, patients can reasonably expect that all steps reasonably available to minimise the risk of them being exposed to COVID-19 have been taken. Such patients can reasonably expect a zero-tolerance approach. That is also so for those who attend health services more regularly.

<sup>1</sup> *Four Midwives, NZDSOS Inc and NZTSOS Inc v Minister for COVID-19 Response* [2021] NZHC 3064.

<sup>2</sup> *NZDSOS Inc and NZTSOS Inc v Minister for COVID-19 Response* [2021] NZHC 3071.

<sup>3</sup> *NZDSOS Inc v Minister for COVID-19 Response* [2022] NZHC 716.

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## Another unsuccessful COVID-19 vaccination mandate challenge in the High Court (Continued)

The Court found that it is of vital importance that public confidence in the delivery of health services remains high, particularly during a pandemic. So, for the health sector adopting a zero-tolerance approach, and being seen to have adopted that approach, is of importance to the overall system. The Court did however acknowledge that these justifications are less persuasive for some health and disability workers covered by the mandate.

In relation to the education sector, the Court accepted the evidence of Dr Town and Dr Bloomfield that studies showed transmission does occur within school environments, although mostly on an adult to adult and adult to child basis rather than child to child.

### Expert evidence

The expert evidence provided raised questions relating to the effectiveness of vaccination in reducing transmission, the safety of the vaccination, and any adverse implications of the mandate.

Notably, the Court held that vaccination had a significant role in minimising the transmission of the virus in October 2021. It stated that the emergence of the Omicron variant however does call into question the level of protection arising from the vaccine mandates. Nonetheless, the evidence still suggests, on the basis of clinical studies, that vaccination has an effect in reducing transmission.

The Court did not accept the Applicant's evidence that there are unknown safety concerns of the virus, or that there have been adverse effects from the vaccine mandate for health and education professionals.

### Outcome

The Court concluded that when the challenged mandates were put into effect in October 2021, they were demonstrably justified for both sectors.

Circumstances have significantly changed. The Omicron variant is far more transmissible, and

vaccination (and therefore mandatory vaccination) is a less effective measure for controlling the spread of the virus. The Court acknowledged that the Omicron variant means that COVID-19 is spreading in a largely uncontrolled way such that the vaccinated status of a teacher for example, now provides relatively less meaningful protection. It noted that it may be that sufficiently equivalent protection exists by the teacher taking other steps, such as staying away if unwell, wearing a mask, maintaining social distancing and testing.

The government has since lifted the education sector mandates, however the Court held that it was demonstrably justified at the time of trial, and accordingly at any material time before it was revoked.

The Court further held that the health sector mandate was demonstrably justified as at the time of trial notwithstanding a change in circumstances created by the Omicron variant. It did however acknowledge that its justification is less apparent for some currently captured by the Order such as dentists or other health professionals. Its view that the mandate remained justified at the point of trial proceeded on the basis that there will now be a full assessment of the scope of the Order. It commented **"if the Order is not reduced in scope it may become unjustified"**.

The Court held that the measures in the Orders remained a demonstrably justified limit on the rights in the Bill of Rights at the time of trial, and that the Order was not unlawful on that basis.

The government's decision to maintain the health mandates appears to be based on these factors the Court considered.

### Challenge to exemption criteria

The applicants' final head of challenge was that the criteria for obtaining an exemption to the vaccination requirements established by the Order were unreasonable or irrational, or applied in an overly rigid way such that the Order should be set aside. The

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applicants pointed to cases of individuals who had not been granted an exemption notwithstanding their personal circumstances. The Court accepted these people and others have understandable concerns about vaccination because of their own health background, or a concern that they may have an adverse reaction, but that it was not well placed in a judicial review to make decisions about individual cases.

Ultimately, the Court did not accept the arguments that the exemption criteria itself was unreasonable, or was being unreasonably applied. The Court dismissed the applicants' challenge to the exemption criteria.

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