



Briefing: Further Advice Regarding Face Mask Policy Changes at Red

Date:	17/02/2022	Report No:	DPMC-2021/22-1391
		Security Level:	IN-CONFIDENCE
		Priority level	Medium

	Action sought	Deadline
Hon Chris Hipkins Minister for COVID-19 Response	agree/disagree to recs	21/2/22

Name	Position	Telephone
Kay Baxter	Policy Manager	N/A
Anna Ferguson	Policy Advisor	s9(2)(a)

Minister's Office

Status:

Signed

Withdrawn

Comment for agency

Attachments: Yes/No

Briefing

Further Advice Regarding Face Mask Policy Changes at Red

To: Hon Chris Hipkins, Minister for COVID-19 Response			
Date	17/02/2022	Security Level	IN-CONFIDENCE

Purpose

1. This briefing seeks agreement to clarify the application of face covering requirements at Red, provide for an exemption for exercise and gatherings occurring outdoors, and to resolve a small number of other technical points.

Executive Summary

2. When the face mask requirements were strengthened within the Red setting of the COVID-19 Protection Framework [CAB-22-MIN-0001], masks were required in a number of new situations, including at some gatherings. This change has resulted in a number of scenarios being captured by the face mask requirement that were not intended to be, including when more than one person in close proximity (closer than 2m) is walking along a street, relaxing in a park, or observing wildlife in the harbour. Although these are places where we would still encourage people to wear masks at Red, they were not meant to be mandated in these places. Officials propose creating an exception and reverting back to encouraging their use through guidance.
3. When strengthening the face mask requirements at Red, Cabinet also noted that an 'exercise exemption' would continue for those undertaking physical activity and sports. However, face masks have not previously been required in places that most exercise takes place, and there is no existing exemption in the Order. To align the legal requirements with Cabinet's intent, officials propose that a general exception be created for those 'exercising or playing sport' in the Order.
4. This paper also seeks to remove the requirement for delivery drivers to wear face masks when they leave their vehicle. This change would resolve a misalignment within the Order where more stringent requirements are placed on delivery drivers than those providing in-home services, when the public health advice is that requiring face masks in both instances would not be appropriate in many cases and instead should be encouraged by guidance.
5. The paper also notes three technical amendments to the Order to rectify drafting errors in the previous amendment to the COVID-19 Public Health Response Order 2021 (the Order), including introducing the requirement for face masks to be worn at events, exempting people carrying out vaccine-mandated work on the premises of tertiary education providers from being required to wear medical grade face masks, and reinstating an exemption for Health workers from the new mask requirements contained in the Order.

Recommendations


We recommend you:

1. **note** that the strengthened face mask requirements within the Order have unintentionally captured settings not intended by the original policy advice, including when two or more people are sitting in a park, or during exercise;
2. **agree** for drafting instructions to be issued to introduce an exception to the face mask requirements at outdoor gatherings;
 YES / NO
3. **note** that people attending indoor gatherings that do not have exclusive use of a defined space or other outdoor settings such as events, food and drink businesses, or retail will still be required to wear a mask;
4. **agree** for drafting instructions to be issued to introduce a general exception to the face mask requirements within the Order when 'exercising or playing sport' (excluding exercise within MIQ);
 YES NO
5. **agree** for drafting instructions to be issued to remove the requirement for delivery drivers to wear face masks when they leave their vehicle; **and when undertaking contactless delivery masks should still be required for deliveries that require signature**
 YES NO
6. **note** that minor technical fixes to the COVID-19 Public Health Response (Protection Framework) Amendment (No 4) Order 2022 will include:
 - 6.1 introducing the requirement for face masks to be worn at events; and
 - 6.2 exempting people carrying out vaccine-mandated work on the premises of tertiary education providers and workers providing health services from being required to wear medical grade face masks;
7. **note** that face masks will continue not to be required for in-home services and will instead be strongly encouraged through public communications;
8. **note** that the COVID-19 Public Health Response Act requires consultation with the Prime Minister, Minister of Justice, and Minister of Health on amendments to the Order and that officials will provide the draft Order to those Ministers for their comment;

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

YES NO


Kay Baxter
Policy Manager
17.2.2021


Hon Chris Hipkins
Minister for COVID-19 Response
21.2.2021

Proactively Released

Background

6. On Sunday 23 January 2022, Ministers with Power to Act agreed to move New Zealand to Red in the COVID-19 Protection Framework, following confirmation of a number of positive Omicron cases in the community [DPMC-2021/22-1240 refers]. On Tuesday 25 January 2022, Cabinet considered the paper COVID-19 Protection Framework: Updates to Red Settings and agreed to several changes to expand face covering requirements at the Red setting of the Framework [CAB-22-MIN-0001].
7. Subsequent advice was then provided to clarify the approach to the exception agreed to by Cabinet for 'gatherings which have exclusive use of a premises', and resolve a small number of technical points that arose during drafting changes to the COVID-19 Public Health Response (Protection Framework) Order (the Order) [DPMC-2021/22-1285 refers].
8. Through that advice, and subsequent consultation with your office regarding technical issues that arose during the drafting process, the Order was amended so that:
 - a. all people at a gathering held in a defined space that is being used for the exclusive use of that gathering will be exempt from the requirement to wear a face mask;
 - b. gatherings held at private dwellings are exempt from face mask requirements;
 - c. all employees in public facing roles in workplaces captured by the legal vaccine mandate means those captured in both the Vaccinations Order and the Specified Work Vaccinations Order; and
 - d. those aged 8 years or over or who are a student who is in year 4 or above, are required to wear a face mask on public transport and on school transport services.
9. The face covering definition was also updated in the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020; the COVID-19 Public Health Response (Air Border) Order 2021 and the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 to align with the changes agreed by Cabinet to the COVID-19 Public Health Response (Protection Framework) Order 2020 (the Order).
10. This paper seeks to clarify further aspects of face mask policy where issues have arisen, including the breadth of face mask requirements when gatherings take place in a defined space where the gathering does not have exclusive use of the defined space and the introduction of an exemption for wearing a face mask while exercising. This paper also notes technical amendments to the Order rectifying drafting inconsistencies.

Further face mask policy work requiring decisions

Face mask use at gatherings occurring outside of an 'exclusive use' defined space

11. While the face mask exemption for gatherings which have exclusive use of a defined space limited the number of planned gatherings where the new face mask requirements apply, face masks are still required at any gatherings in a defined space when the gathering does not have exclusive use.
12. This requirement captures a number of everyday activities, such as two or more people out running or walking, relaxing in a public park, or spontaneously gathering around a sight-seeing attraction (e.g. ocean wildlife in the harbour).
13. The types of gatherings that require face coverings to be worn under the current settings, which we may not want the requirement to apply to, include:
 - outdoor weddings where a defined space has not been created and exclusively used;

- more than one person out running, or walking outside; and
 - more than one person at the beach or the park.
14. The types of gatherings we consider the mask requirements should continue applying to, are, by way of example:
- lots of people independently entering an indoor space such as a church, that has open access, to meditate or sightsee;
 - a group of people using a community hall to play card games while a quilting group also uses the space; and
 - amateur artists using shared community studio spaces.
15. To make sure that the face covering requirements apply to the places/situations the original policy intended, and not to the ones we don't want to capture, we recommend providing for two additional exemptions to face mask requirements in the Order:
- for people exercising and playing sports (as set out below, this will apply across the board, i.e. to events, gatherings and in education settings, but not to exercise within MIQ); and
 - those gathering in outdoor settings.
16. Narrowing the face mask legal requirements as they apply to gatherings at Red to only where people are spontaneously congregating in an indoor setting is both more proportionate and enforceable than the status quo. By creating an exception for outdoor gatherings, it will mean that face masks will not be required at outdoor protests and will instead be strongly encouraged.

Exemption for those gathering in outdoor spaces

17. As noted above, the current face mask requirements for gatherings require that masks are worn in a number of settings not intended to be captured by the Order.
18. Officials recommend that an exemption to wearing face masks is created in the Order for outdoor gatherings. This exemption will extend to all gatherings including outdoor weddings where the organiser is not necessarily able to ensure the exclusive use of the outdoor defined space (e.g. a wedding ceremony on a beach where a member of the public may inadvertently wander within two meters of the gathering, triggering the face mask requirement for everyone in attendance).
19. We consider that ongoing communications encouraging (but not mandating) the use of face masks in all outdoor public settings where you cannot physically distance from people that you don't know will provide sufficient guidance to people in those situations.
20. There is potential that an unintended outcome of this policy change is for some gatherings to be moved outside so that face mask requirements are not placed on attendees. Given that public health advise that outdoor gatherings create a lower risk of onward transmission occurring, this would be an acceptable application of the rules. Further to this, by requiring masks at all outdoor gatherings, we have created situations where the legal requirement to wear a mask is both difficult to enforce and has generated unintended consequences.
21. DPMC officials do not propose that this change be extended to other outdoor settings such as outdoor retail (e.g. farmers markets), events, and food and drink businesses. While Ministry of Health advice has highlighted some issues with requiring masks in outdoors, particularly if it is raining (issues relating to moisture making masks less effective, described in paragraph 24 below), they also advise that despite the lower risk present outdoors, face masks continue to be an appropriate public health measure at outdoor events and in outdoor retail settings where people linger for long periods of time, due to the number of people intermingling who

may not be known to one another. On balance, DPMC officials recommend keeping the face mask requirement for these settings which may also be located outside. Additionally, as an exemption already exists for when someone is eating and drinking, it is not proposed to introduce a further exemption for outdoor food and drink businesses.

Face mask exception for exercise

22. Public communications regarding face mask requirements to date have referenced that face masks are not required when exercising. Despite recent decisions made by Cabinet, there is currently no exercise exception for mask requirements at Red in the Order. This means that people are (or will be, pending the current amendment requiring masks at events) legally required to wear face coverings when exercising with others anywhere outside of a commercial (as opposed to school) gym (e.g. bootcamp or playing sport in a school gym).
23. Face masks can become ineffective due to moisture collecting on the fabric through the increase in respiration and perspiration that occurs during exercise. It is for similar reasons that we do not require face masks to be worn by spectators at swimming pools as the moisture in the air means that the face masks do not provide the same level, if any, protection as they do in dry environments. The use of face masks when exercising is also not recommended as they can create a safety issue for the wearer by restricting their breathing. In addition, face masks can be impractical (and less effective) to wear when playing sport as they can shift position on the wearer's face as they move around (e.g. when playing tennis), be pulled off when playing a contact sport (e.g. boxing and rugby).
24. Given the decreased effectiveness of face masks when moist, the physical and mental benefits of exercise (not wanting to discourage people from exercising by imposing mask requirements), and decisions already made by Cabinet to provide for an exception under these circumstances, officials recommend creating a face mask exception for exercise in the next Order amendment process. It is intended that this will be a general exception to the face covering rules to mirror the way the 'eating and drinking' exception is applied.
25. As with the existing 'eating and drinking' exception in the order and given the wide application of the exception, a common-sense interpretation approach will need to be taken. The exception will capture gentle exercise such as yoga, golf, tai chi, and walking as well as activities that are not instinctively categorised as exercising such as mini golf and dance. Consideration was not given to narrowing the exercise exception to vigorous activities only due to a number of issues in defining and enforcing a narrower exception. The exception would also not capture aspects of a multiple stage activity where exercise is not taking place (e.g. a boat ride to a walking track) or more static activities such as meditation. Guidance (led by Unite Against COVID-19 and Sport New Zealand channels) will be important in recommending the appropriate application of the exception once in force.
26. Singing is likely to cause similar issues with face masks becoming ineffective due to moisture collecting on the fabric. However, it is not proposed to extend the exception to singing as existing exceptions will cover most instances where singing occurs. For example, when singing groups and choirs come together for rehearsal, they will usually do so in a defined space, of which they have exclusive use; and are otherwise covered by the exception for performers when at a concert or showcase.
27. The exercise exception will not, however, extend to exercise in MIQ. Officials consider the public interest in preventing the spread of COVID-19 within MIQ continues to outweigh the interests set out above supporting a general exercise exception.

Face masks for delivery drivers

28. Currently delivery drivers are required to wear face masks when they leave their vehicle. This creates a misalignment within the Order whereby more stringent requirements are placed on

delivery drivers who do not enter a person's home than on those providing in-home services, as defined in the Order as 'a service provided to a person at the person's home or place of residence' such as plumbers, who are not required to wear a face mask. Officials note that those providing health care services within a home will be covered by the guidance provided by the Ministry of Health and their local District Health Boards.

29. Public health has confirmed that face masks should not be required for when providing in-home services as it may not always be appropriate, such as when providing babysitting, or in-home cleaning services. They have also confirmed that masks should not be required for delivery drivers. For both purposes, public health recommends mask use is strongly encouraged (where practicable) through guidance, along with other key public health measures (e.g. washing your hands, staying home if unwell), instead. On this basis, officials propose that the face mask requirement for delivery drivers be removed from the Order.

Crown Law advice on impact of the following additional exemptions [legally privileged]

s9(2)(h)



Amendments for noting

Requiring face masks at events

34. Despite Cabinet agreeing to require masks to be worn by all people at events on 25 January 2022 [CAB-22-MIN-0001], there is currently no requirement for attendees to wear masks at events in the Order. This was a drafting error, and we plan to resolve this by including events as a setting where the requirement applies in the next amendment to the order. As noted above, the exemption from wearing face masks at an outdoor gathering will not be extended

to events, however the 'exercise and playing sport' exception will apply to outdoor events (e.g. marathons).

Exemption for tertiary education providers from wearing medical grade face masks

35. On 25 January 2022 Cabinet agreed that people carrying out vaccine-mandated work for tertiary education providers would be exempt from being required to wear medical grade face masks [CAB-22-MIN-0001]. In practice this exemption already applied to tertiary teaching staff presenting to students because of a general exemption from the face covering rule when presenting a lecture (provided they are complying with the 2-metre physical distancing rule. However, it has not been extended (as intended) to other public facing tertiary education workers in non-teaching positions such as support and administrative staff. To correct this, officials will include a change to COVID-19 Public Health Response (Protection Framework) Amendment (No 4) Order 2022.

Exemption for Health workers from wearing medical grade face masks

36. The Order currently captures workers providing health services in the requirement to wear medical grade face masks. There is also a general exemption in the Order for health workers. However, due to the speed at which the mask changes were drafted into the order, the requirement to wear medical grade masks was inadvertently applied to health workers in the order as they are captured by the vaccination mandate in the COVID-19 Public Health Response (Vaccinations) Order 2021. It was never the intent to capture these workers as DHB's regulate requirements on the Health Sector, so officials will include a change to the Order during this amendment process.

Treaty of Waitangi considerations

37. When considering changes to the Framework settings, the impact of any shift on Māori health and wellbeing needs to be taken into account, as do the views of Māori communities.
38. The Waitangi Tribunal's December 2021 'Haumarū' report into the government's COVID-19 response reaffirmed the Treaty principles from its 'Hauora' stage one health inquiry report – partnership, active protection, equity, and the principle of options – and found that the Crown's Treaty obligations are heightened due to the threat posed by the virus to the welfare and safety of Māori.
39. The reduction of public health measures proposed in this paper (reducing face mask requirements) are designed to align with the way face mask requirements are being implemented in practice and align the Order with the underlying public health rationale.
40. These changes are expected to have little impact on the transmission of COVID-19, do not have equity implications, and work overall towards a robust mask-wearing policy. No engagement with Māori has occurred on the specific changes sought through this paper.

Next steps

41. Following consultation with your Ministerial colleagues and your decisions, officials will finalise outstanding instructions with the Parliamentary Counsel Office to amend the COVID-19 Public Health Response (Protection Framework) Order 2021 (and other orders, as required) and bring these changes into force from 11.59pm Saturday 26 February 2022.
42. As noted previously [DPMC-2021/22-1285 refers], officials recommend that any changes required to update or amend settings at Orange and Green levels of the framework will be considered and progressed prior to any move, as part of the ongoing Government response to COVID-19.

Financial implications

43. There are no further financial implications with the proposals in this paper, beyond what was discussed and considered at Cabinet on Tuesday 25 January 2022.

Consultation

44. The following agencies were consulted on this briefing: Crown Law Office, Ministry of Education, Ministry for Ethnic Communities, Oranga Tamariki, Ministry for Culture and Heritage, Parliamentary Counsel Office, Ministry of Business, Innovation and Employment (MBIE), Ministry for Primary Industries, Te Arawhiti, Ministry of Transport, The Treasury, New Zealand Police, Ministry of Health, Ministry for Pacific Peoples, Ministry of Social Development, the Office for Seniors, the Office for Disability Issues, and the Ministry of Justice.
45. Agencies are broadly supportive of these amendments as they will bring the Order in line with the public's understanding of when they are required to wear a face mask.
46. Police note that from an enforcement perspective, the changes may help reduce the risk of inadvertent non-compliance/confusion around requirements (especially in outdoor settings) and the expectation that Police will undertake enforcement activity in certain situations where it either unnecessary, inappropriate, or unfeasible. It is also noted regarding enforcement that Police are not able to respond in person to every report of non-compliance with face mask requirements and it is necessary to balance responses to breaches with other Police priorities and resource requirements.
47. MBIE have raised concerns that the application of the face mask settings to events means that all events are captured. With each event having a different risk profile dependant on a number of factors (e.g. size, activity taking place, ability to physically distance) there could be perceived to be an unequal application of the setting. For example, small tour groups and extracurricular lessons such as drama or maths would have a different risk profile to large music festivals (up to 100 people at the red setting). Officials consider this to be outside the scope of the proposed amendments and will consider these concerns as part of a wider review of the COVID-19 Protection Framework settings over the coming months.

Communications

48. Decisions on this briefing will be help finalise public communications and guidance to the public and key stakeholders via official Unite Against COVID-19 channels.

Attachments:

Attachment A:	Face mask requirements over time – Feb 2022
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Attachment A: Face mask requirements over time – Feb 2022

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Table: Face Mask Requirements over time – Feb 2022

Settings		Face covering requirements		Face Mask Requirements Red		Notes
		Alert Level 2 as at 2 December 2021	Alert Level 3 Settings as at 2 December 2021	Current Settings at 17 February 2022	Proposed Settings	
Settings where people are generally <u>known</u> to one another						
Private residences		X	X	X	X	People more likely to belong to same bubble and/or know or have recorded all visitors.
Gatherings (including weddings, tangihanga, community sport)	Staff	X	X	✓	✓	*Face masks are required when the gathering does not have exclusive use of a defined space. ♦ – Exercise exemption applied depending on the activity
	Attendees	X	X	Some (Indoors and Outdoors)*	Some (Indoors)* ♦ X (Outdoors)	
Delivery Drivers to residential addresses		X	✓	✓	X	
In-home services		X	✓	X	X	
Controlled access businesses (office workplaces, factories)		X	NA	X	X	
Settings where people generally are <u>unknown</u> to one another						
Close proximity businesses (Massage parlours, beauticians, barbers, hairdressers) (as far as reasonably practicable)	Staff	✓	NA	✓ ♦	✓ ♦	♦ – Medical grade face masks required
	Customers	X	NA	✓	✓	
Food and drink businesses (including soup kitchens)	Staff	✓	NA	✓ ♦	✓ ♦	♦ – Medical grade face masks required
	Customers	X	NA	✓*	✓*	*When not eating or drinking
Retail businesses (supermarkets, shopping malls, indoor marketplaces, takeaway food stores, hardware stores)	Staff	✓	✓*	✓	✓	*Click and Collect only
	Customers	✓	✓*	✓	✓	*Click and Collect only
Gyms	Staff and residents	X	NA	✓* ♦	✓* ♦	♦ – Medical grade face masks required *Staff are able to remove their face coverings when presenting group exercise classes if they are able to maintain 2m physical distancing.
	Visitors	X	NA	X	X	
Events and event facilities (cinemas, theatres, concert venues, casinos)		X	NA	✓* ♦	✓* ♦ ♦	*Staff are able to remove their face coverings when presenting, provided 2m distancing is observed. ♦ – Medical grade face masks required ♦ – Exercise exemption could apply (e.g. at marathons)

Settings		Face covering requirements		Face Mask Requirements Red		Notes
		Alert Level 2 as at 2 December 2021	Alert Level 3 Settings as at 2 December 2021	Current Settings at 17 February 2022	Proposed Settings	
Community or Social Services						
Public transport		✓	✓	✓*	✓*	* For those over the age of 8 or who are in years 4 to 13
Public transport departure points (airports, train stations, bus stops)		✓	✓	✓	✓	
Flights		✓	✓	✓*	✓*	* For those over the age of 8 or who are in years 4 to 13
Taxi/ride share vehicles	Staff	✓	✓	✓	✓	
	Customers	✓	✓	✓*	✓*	* For those over the age of 8 or who are in years 4 to 13
Schools and ECE	Staff	✗	✓*	✓* ♦	✓* ♦	*Indoors only for those teaching or working with Year 4 to 13 students ♦ – Medical grade face masks required ♦ – Exercise exemption could apply
	Students	✗	✓*	✓*	✓* ♦	*Indoors only for those in Year 4 to 13 ♦ – Exercise exemption could apply
Tertiary Education		✗	✓*	✓*	✓* ♦	*The next Order amendment will include a medical grade face mask exemption for non-teaching staff at tertiary education providers; in addition to the current exemption for teaching staff. ♦ – Exercise exemption could apply
Healthcare and aged care facilities	Staff and patients	✗	✗	✓ ♦*	✗	* An error in drafting the previous Order amendment has meant that vaccine mandated health workers were inadvertently captured by the requirement to wear medical grade face masks. As there are existing healthcare practices for PPE this requirement is not needed and will be remedied through the next Amendment. ♦ – Medical grade face masks required
	Visitors	✓	✓	✓	✓	
Indoor public facilities (libraries, museums, swimming pools*)	Staff	✓	NA	✓	✓* ♦	*An exception for face coverings at swimming pools (even for spectators) is recommended due to public health advice on the efficacy of face coverings in moist environments. ♦ – Exercise exemption could apply

Settings		Face covering requirements		Face Mask Requirements Red		Notes
		Alert Level 2 as at 2 December 2021	Alert Level 3 Settings as at 2 December 2021	Current Settings at 17 February 2022	Proposed Settings	
	Visitors	✓	NA	✓	✓	
Foodbanks and self-service laundries	Staff	✗	✓	✓	✓	
	Customers	✗	✓	✓	✓	
Staff and visitors* in public areas within courts and tribunals (although in a courtroom judicial officers could exercise discretion regarding the use of face coverings, given the importance of effective communication in court), local and central Government agencies, and social service providers with customer service counters;	Staff	✓	✓	✓	✓	
	Visitors	✓	✓	✓	✓	
Primary industries (including food and beverage production for both domestic consumption or export, plus the relevant support services) and veterinary and animal health and welfare services	Staff	✗	✓*	✓*	✓*	*Veterinary services
	Customers	✗	✓*	✓*	✓*	*Veterinary services
Indoors at social and community-based services provided to support persons to maintain critical well-being or as crisis support for people who are unsafe or homeless	Staff	✗	✓	✓	✓	
	Customers	✗	✓	✓	✓	

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