A Mandatory COVID-19 Vaccination Policy – Is There a Place in New Zealand?

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Abstract

It has been nearly a year and a half since COVID-19 emerged in New Zealand. Although New Zealand has been fortunate enough to have little to no active community cases, it is still enduring the effects of COVID-19. The COVID-19 lockdown measures and continued strict border closures has caused the New Zealand economy as well as the New Zealand population's mental health to deteriorate. Current COVID-19 management strategies are too costly and are detrimental to New Zealand. Therefore, to minimise the damage caused by COVID-19, it is crucial that New Zealand achieves herd immunity against COVID-19 through vaccinations. However, New Zealand may struggle to reach herd immunity due to the presence of vaccine hesitancy. Accordingly, the New Zealand Government may need to introduce a mandatory COVID-19 vaccination policy to achieve herd immunity.

A mandatory COVID-19 vaccination policy would engage and limit the right to refuse medical treatment which is affirmed under s 11 of the New Zealand Bill of Rights Act. The New Zealand Government would need to ensure that a mandatory COVID-19 vaccination policy is a justified limitation placed upon the s 11 right. To do this, the New Zealand Government must balance the public health interests with the right to personal autonomy. Although New Zealand places a high value on personal autonomy, the New Zealand Government has previously overridden personal autonomy to protect the nation's health and well-being from public health crises (including COVID-19). Because New Zealand has a precedent of prioritising the population's well-being over individuals' rights, it is possible for the New Zealand Government to implement a mandatory COVID-19 vaccination policy. However, to introduce such policy, the New Zealand Government must observe the rule of law to uphold the foundation of a liberal democracy. If the New Zealand Government fails to consider the rule of law, a mandatory COVID-19 vaccination policy can be deemed ultra vires and is likely that public trust and confidence in vaccinations and governments will decline.

In summary, this paper argues that if New Zealand struggles to achieve herd immunity, people who can receive COVID-19 vaccinations should be subject to a mandatory COVID-19 vaccination policy. This is because the right to exercise personal autonomy turns into a privilege from a right if it causes harm upon others. If COVID-19 vaccinations are not mandated, people who actively

chose to not be vaccinated will increase the spread of COVID-19 and create significant health risks. One may argue that being vaccinated against COVID-19 comes with the risk of experiencing adverse reactions. However, such risks are small compared to the risk of contracting COVID-19 and are outweighed by the benefits associated with COVID-19 vaccinations.

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I Introduction

With no cure or treatment, the COVID-19 coronavirus ("COVID-19") rapidly spread around the world, creating significant risks to our health as well as the global economy. The COVID-19 pandemic started in December 2019 in Wuhan China. Since then, COVID-19 has infected more than 180 million people in just over a year and has killed nearly 4 million people.[1] The absence of cure or treatment has forced many countries, including New Zealand, to implement non-pharmaceutical control measures such as lockdowns and border restrictions. So far, these measures have successfully reduced the burden of COVID-19 on the New Zealand population; however, these measures have been costly and have had a significant impact on the New Zealand economy and the population's psychological well-being.

Fortunately, COVID-19 vaccines have now been developed and completed clinical trials. It has been confirmed that New Zealand will receive and start delivering COVID-19 vaccines in the second quarter of 2021.[2] New Zealand has secured 10 million Pfizer/BioNTech vaccines. This is enough to vaccinate the entire population of New Zealand. New Zealand intends to provide COVID-19 vaccinations for free to all people living in New Zealand regardless of citizenship or visa status.[3] New Zealand already has an established programme of immunisation. Nonetheless, this is the largest and the most complex vaccination roll-out in its history.

It can be said that vaccinations are one of the most successful health interventions in human history. Vaccinations have considerably reduced or eliminated infectious diseases and have drastically improved our quality of life. [4] Currently, there are vaccines available for more than 20 life-threatening diseases.[5] This includes diseases such as hepatitis B, diphtheria, tetanus, whooping cough, rotavirus, measles, mumps, and rubella. The World Health Organisation ("WHO")

[1] Worldometer "COVID-19 CoronaVirus Pandemic" (3 July 2021) <worldometers.info>.
[2] Ministry of Health "COVID-19: Vaccine Planning" (December 2020) <https://www.health.govt.nz>.
[3] Ministry of Health "COVID-19: Getting a vaccine" (1 March 2021) <www.health.govt.nz>.
[4] Ian J Amanna and Mark K Slifka "Successful Vaccines" (2020) 428 Current topics in microbiology and immunology 1 at 1.
[5] World Health Organisation "Vaccines and immunization" <who.int>.

estimates that vaccines prevent 2 - 3 million deaths from infectious diseases globally each year.[6] As well as preventing death, vaccines reduce illnesses and disabilities resulting from infectious diseases and decrease the treatment burden on health systems.

Despite the successes and benefits associated with vaccines, some people do not get vaccinated. This may be because they are medically compromised, meaning that the vaccine could cause medical complications that would outweigh the benefits of vaccination. There are also people outside the medical system or living in highly impoverished circumstances who may not be reached by vaccination programmes. Aside from these people, there are people who actively choose not to receive vaccines. They have been described as vaccine hesitant. The basis behind vaccine hesitancy is generally founded upon two grounds: philosophical or religious. People who refuse vaccines on philosophical grounds often lack confidence in the medical efficacy of vaccines, or the science of immunisation, or in the overall medical system. People who refuse vaccinations on religious grounds generally rely on the grounds that getting vaccinated goes against their faith and teachings. Church of Christ, Scientist and the Dutch Reformed Church are examples of major religious groups that openly oppose vaccinations. Additionally, there are people who are misinformed about the safety of vaccines and become vaccine hesitant.

Due to the prevalence of vaccine hesitancy, vaccination programmes are not as effective as they should be. WHO has calculated that 1.5 million deaths resulting from infectious diseases could be prevented if everyone (excluding the medically compromised) receives vaccinations.[7] Vaccination relies on individuals to be immunised in order to protect the larger community, especially the ones that are medically compromised. If a sufficient proportion of a given population becomes vaccinated, the transmission of an infectious disease from person to person becomes unlikely. This can repress the spread of infectious diseases or eliminate it completely from that population. This phenomenon is referred to as achieving herd immunity. Because of this, some argue that individuals have an ethical obligation and social responsibility to become immunised and protect those around them.[8]

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[6] World Health Organization “Immunization” (December 2020) <who.int>.
[7] World Health Organization “Immunization” (December 2020) <who.int>.
[8] Alberto Giubilini *The Ethics of Vaccination* (Palgrave Pivot, London, 2018) at 30.

The COVID-19 vaccination programmes are now being rolled out in many nations across the globe. The aim of these vaccination programmes is to lower the transmission rate of COVID-19 to levels sufficient to significantly reduce or eliminate the need for control mechanisms such as lockdowns and border closures and the high health and economic costs associated with the uncontrolled spread of the virus. As discussed, the success of vaccination programmes depends upon a sufficient proportion of a population to be vaccinated in order for transmission to be controlled or eliminated. This raises concerns about whether enough members of the population will voluntarily receive a COVID-19 vaccine. In a population with high levels of medically compromised and vaccine hesitant members of the public, governments may be forced to confront the issue of whether to require mandatory vaccination.

The New Zealand Government has announced that the COVID-19 vaccination will not be mandatory for the general population.[9] However, mere encouragement may not be adequate to convince a sufficient proportion of the New Zealand population to receive the COVID-19 vaccine. Recent survey has shown that around 70% of the respondents would receive a well-tested and approved COVID-19 vaccine.[10] Approximately 20% of the respondents indicated that it would be unlikely that they would receive the COVID-19 vaccine if it was offered and 9% of the respondents stated that they will not accept the COVID-19 vaccine at all.[11] If as many as 30% of the New Zealand population refuses voluntary vaccination, the New Zealand Government may have to consider ways to require the vaccination of vaccine hesitant but not medically compromised members of the public. However, mandatory vaccination is not easily legislated and exacerbates an existing tension between public health policy and individual rights to personal autonomy. It would be extremely difficult to physically force citizens to be vaccinated and highly likely to undermine the democratic mandate of the New Zealand Government. Thus, mandatory vaccination is a public health policy that obliges the population to receive vaccination through the use of non-compliance penalties. A system of compulsion through penalty still limits an individual's right to personal autonomy. This is because a person's choice may be influenced by non-compliance penalties (for example, where vaccines are required to enrol children into school or receive welfare payments) or a person is penalised for exercising their right to personal autonomy.

[9] Ministry of Health "COVID-19: Getting a vaccine" (1 March 2021) <www.health.govt.nz>.
[10] Ministry of Health "COVID-19: Vaccine research insights" (17 February 2021) <www.health.org.nz>.
[11] Ministry of Health "COVID-19: Vaccine research insights" (17 February 2021) <www.health.org.nz>.

Since the emergence of the COVID-19 pandemic, there has been a surge of public interest in public health laws, policies, and regulations. This is because these consider how to implement vaccination policies for COVID-19. Before introducing a mandatory COVID-19 vaccination, the New Zealand Government must ensure that it properly balances the public interests and the rights of individuals to personal autonomy. Accordingly, a mandatory COVID -19 vaccination policy must be based on ethical justifications. Further, the New Zealand Government must ensure that they follow the correct procedure to implement a mandatory COVID-19 vaccination policy so that such policies are legitimate and lawful.

The ultimate aim of this paper is to explore the tension between public health and personal autonomy in order to determine whether it is justifiable to impose a mandatory COVID-19 vaccination policy in New Zealand. It will also consider the process which the New Zealand Government would need to follow in order to introduce a legitimate mandatory COVID-19 vaccination policy.

A Breakdown of Sections

This thesis is organised in five sections. Firstly, this thesis will explain what COVID-19 is and discuss its implication on the New Zealand population. The purpose of this section is to portray the significant risks COVID-19 imposes on people's health as well as the global and domestic economy and financial markets. Secondly, this thesis will explore the practice of public health in the context of vaccinations. This section will explain what vaccines are and include arguments for and against vaccinations. New Zealand's current vaccination policies and legislation will also be examined. The aim of this section is to demonstrate what vaccinations are to the readers and to depict New Zealand's position on vaccination policies. Thirdly, this thesis will analyse the tension between public health policies and the right to personal autonomy. This section will showcase the right to personal autonomy and the principle of paternalism and discuss why these two concepts conflict each other. How liberal democracies balance public health policies and the right to personal autonomy will also be explored by using New Zealand, United States ("US") and England and Wales and European Court of Human Rights as an example. Further, New Zealand's international law obligations will be explained. The purpose of this section is to determine whether a mandatory COVID-19 vaccination policy can be implemented on justified grounds in New

Zealand. Fourthly, the importance of legitimacy will be discussed by exploring case law relating to COVID-19 reduction or elimination measures implemented by the New Zealand Government. In particular, the significance of rule of law and separation of powers will be portrayed. The purpose of this section is to emphasise that a mandatory COVID-19 vaccination policy must be imposed by following a legitimate and correct procedure. Lastly, this thesis will consider the strategies that governments can use to increase adherence to a mandatory COVID-19 vaccination policy.

II Coronavirus Disease 2019 (COVID-19)

A What is COVID-19?

In December 2019, in Wuhan City, an unknown case of pneumonia emerged in the community. The illness resembled the severe acute respiratory syndrome (SARS) and caused panic and turmoil in the Chinese community. By the end of the month, the mysterious disease was reported to the WHO. On 11 February 2020, the WHO named the disease COVID-19, an abbreviation for coronavirus disease 2019.[12] The origins of COVID-19 are still unknown, but it is suspected that the virus was transmitted from animals to humans. Since its introduction, COVID-19 has rapidly spread around the globe, creating significant risks to human health and wellbeing. Currently, as of July 2021, there have been a total of 183,825,701 cases and 3,979,135 deaths worldwide.[13]

COVID-19 is a strain of coronavirus that can cause upper respiratory tract diseases, similar to the common cold and flu.[14] This means it can be hard to distinguish at the early stages of infection. However, unlike the common cold, COVID-19 is a disease with increased severity due to its greater potential to cause debilitating symptoms and transmissibility.

[12] World Health Organisation "Listing of WHO's response to COVID-19" (29 June 2020) <who.int>.
[13] World Health Organisation "WHO Coronavirus (COVID-19) Dashboard" (3 July 2021) <who.int>.
[14] National Institute of Allergy and Infectious Diseases "Coronaviruses" <www.niaid.nih.gov>.

According to the WHO, COVID-19 has the following symptoms:[15]

Most Common Symptoms	**Less Common Symptoms**	**Serious Symptoms requiring urgent medical care**
Fever	Sore throat	Shortness of breath / difficulty breathing
Cough	Headache	Loss of speech or mobility
Tiredness	Aches and pains	Confusion
Loss of taste or smell	Diarrhea	Chest pain
	A rash on the skin or discoloration of fingers or toes	
	Red or irritated eyes	

The severity of symptoms caused by COVID-19 varies depending on the individual; however, the following group of people has a higher risk of developing serious and life-threatening symptoms:[16]

- People with underlying medication conditions;
- People who are immunocompromised;
- People over the age of 70;
- People living in aged care facilities;
- Ethnic minorities;
- Smokers; and
- Pregnant women.

These people are strongly advised by governments and medical experts to take extra caution to reduce the chances of contracting COVID-19.

[15] World Health Organisation "COVID-19 Coronavirus Symptoms" (12 November 2020) <who.int>.
[16] Unite against COVID-19 "People at risk of COVID-19" (28 July 2020) <www.covid19.govt.nz>.

In addition to the above symptoms, people who contract COVID-19 can develop long-term medical complications. The most common long-term medical complications are shortness of breath, chronic fatigue, coughs, joint pain and chest pain.[17] Less common long-term medical complications include headaches, muscle pain, intermittent fever, health palpitations, and difficulty thinking and concentrating. [18] Severe medical complications are rare; however, they have been reported and include inflammation of the heart muscle, lung function abnormalities and damage to the kidneys.[19]

COVID-19 is a highly contagious virus and can transmit from person to person easily. COVID-19 is thought to spread mainly via close contact from person to person through exposure to liquid particles ranging from respiratory droplets to aerosols.[20] Both symptomatic and asymptomatic individuals can spread the virus to other people.[21] Because of its transmissibility, close-contact settings such as crowded places, have been identified as high-risk areas of contracting COVID-19.

Overall, COVID-19 can cause debilitating symptoms and with its significant transmissibility, urgent action is required to prevent the spread. With increasing death tolls globally, being immunised against COVID-19 ensures self-protection as well as herd immunity.

B New Zealand's Response to COVID-19

Despite New Zealand's isolated geographical position on the globe, COVID-19 arrived on its shores. New Zealand was the 48th country to have a confirmed case of COVID-19.[22] With no vaccines or effective treatments for COVID-19, New Zealand adopted a range of non-pharmaceutical interventions to flatten the curve. New Zealand's COVID-19 elimination strategy was to implement what is called "COVID-19 Alert Levels". The COVID-19 Alert Levels sets out a list of rules and restrictions which everyone in New Zealand must follow. The COVID-19 Alert

[17] Centers for Disease Control and Prevention "Long-Term Effects of COVID-19" (13 November 2020) <cdc.gov>.
[18] Centers for Disease Control and Prevention "Long-Term Effects of COVID-19" (13 November 2020) <cdc.gov>.
[19] Centers for Disease Control and Prevention "Long-Term Effects of COVID-19" (13 November 2020) <cdc.gov>.
[20] Centres for Disease Control and Prevention "How COVID-19 Spreads" (28 October 2020) <cdc.gov>.
[21] Centres for Disease Control and Prevention "How COVID-19 Spreads" (28 October 2020) <cdc.gov>.
[22] Ministry of Health "Single case of COVID-19 confirmed in New Zealand" (28 February 2020) <health.govt.nz>.

Levels were introduced by the New Zealand Government on 21 March 2020 and have been utilised since.[23] Following is the summary of COVID-19 Alert Levels which New Zealand has adopted:[24]

Alert Level	**Restrictions imposed**
Level 4 - Lockdown (Likely the disease is not contained)	● Everyone must stay at home in their bubbles other than for essential personal movement; ● Recreational activity is only allowed in local areas; ● Travelling is severely restricted; ● All gatherings are prohibited; ● All public venues must close; ● All businesses must close except for essential services, such as supermarkets and pharmacies; and ● All educational facilities must close.
Level 3 - Restrict (High risk the disease is not contained	● Everyone must stay at home in their bubbles other than for essential personal movement; ● Everyone must stay within their immediate bubble, but can expand the bubble to include close family members or isolated individuals; ● Social distancing of 2 meters must be maintained outside of home, or 1 meter in controlled environments such as schools; ● Early Childhood Education centres and schools (from year 1 to year 10) may reopen but must have limited capacity. If possible, distance learning must be implemented; ● Everyone must work from home unless that is not possible; ● Businesses must not offer services that involve close contact unless it is an essential service, or it is an emergency or critical situation; ● Non-essential businesses may open their premises, but must not

[23] Unite against Covid-19 "History of the COVID-19 Alert System" (28 October 2020) <covid19.govt.nz>.
[24] Unite against Covid-19 "About the Alert System" (15 December 2020) <covid19.govt.nz>.

Alert Level	Restrictions imposed
	physically interact with customers; ● Low risk local recreational activities are permitted; ● Public venues such as libraries and gyms must close; ● Gatherings of up to 10 people are permitted but only for weddings, funerals and tangihanga; ● Healthcare services must use virtual, non-contact consultations if it is possible; ● Inter-regional travel is highly restricted; and ● People at higher risk of developing serious COVID-19 symptoms are strongly encouraged to stay home.
Level 2 - Reduce (The disease is contained but the risk of community transmission remains)	● All gatherings are limited to 100 people; ● Social distancing of 2 meters must be maintained in public, or 1 meter in controlled environments such as workplaces; ● All businesses and public venues can open but must follow the public health guidance such as physical distancing and contact tracing; ● Hospitality businesses must keep groups of customers separated, seated, and served by a single server; ● Face-covering are legally required on public transport; and ● People at higher risk of developing severe illness from COVID-19 are advised to take additional precautions when leaving home.
Level 1 - Prepare The disease is contained in New Zealand	● Border entry into New Zealand is strongly restricted; ● Self-isolation and quarantine is required upon entry into New Zealand; ● Intensive testing for COVID-19 is conducted; ● No restrictions on personal movement or gatherings, but contact tracing is strongly encouraged;

Alert Level	Restrictions imposed
	● People are encouraged to stay home if they are sick; and ● Businesses, public facilities and public transport must display QR codes issued by the New Zealand Government for the New Zealand COVID Tracer app for contact tracing.

On 23 March 2020, the New Zealand Government announced that New Zealand would immediately move into Alert Level 3 and shift to Alert Level 4 in 48 hours.[25] A State of National Emergency was declared on 25 March 2020.[26] New Zealand remained in Alert Level 4 until 27 April 2020.[27] Unlike many other countries, the level of public compliance with the COVID-19 lockdown was high. Because of the widespread adherence by the population, after just two months, New Zealand had no more active cases in the community.[28]

The Second COVID-19 wave hit New Zealand on 12 August 2020.[29] Because of the New Zealand Government's fast and effective action, the outbreak was mostly contained in the Auckland region. On 7 October 2020, New Zealand was able to move back into Alert Level 1.[30] Since then, New Zealand, in particular the Auckland region, has entered Alert Level 3 multiple times to prevent the spread of community cases of COVID-19. The other regions of New Zealand were simultaneously in Alert level 2.

Overall, the COVID-19 Alert Levels has been greatly supported in New Zealand with high compliance rates. To reflect this, New Zealand has had no major protests or demonstrations against the nationwide or regional lockdown. The biggest anti-lockdown protest in New Zealand involved approximately 150 people, while countries such as the US have had countless protests across multiple states with hundreds and thousands gathering to express their complaints.[31]

[25] Unite against Covid-19 "History of the COVID-19 Alert System" (28 October 2020) <covid19.govt.nz>.
[26] Unite against Covid-19, above n 25.
[27] Unite against Covid-19, above n 25.
[28] Unite against Covid-19, above n 25.
[29] Unite against Covid-19, above n 25.
[30] Unite against Covid-19, above n 25.
[31] Anna Whyte "About 150 anti-lockdown protestors, some bearing Trump flags, gather at Parliament" 1news (14 January 2021) <www.tvnz.co.nz>.

New Zealand now enjoys a COVID-19 free life because of the high compliance rates of the COVID-19 Alert Levels; however, we cannot continue to live in the current state of crisis and distress. If a new case of COVID-19 emerges in the community, the New Zealand Government will increase the COVID-19 Alert Levels up to Level 3 or 4. Although this would protect the health of the population, it can incur great consequences that are not easily remedial.

C Consequences Arising from the Use of COVID-19 Alert Levels

COVID-19 Alert Levels are implemented by the New Zealand Government to mitigate the health risks of COVID-19. COVID-19 Alert Levels has successfully eradicated the community cases of COVID-19. However, it has had a significant impact on New Zealand's economy and population's mental health. This section explores the consequences arising from the use of COVID-19 Alert Levels and explains how alternative methods should be considered for COVID-19 management and control.

1 Border restrictions

To prevent the importation of COVID-19 cases from other countries, New Zealand has adopted a strict criteria as to who can enter the country. The border restrictions started on 14 March 2020. This was just a few weeks after the first case of COVID-19 in New Zealand was found. The New Zealand Government required anyone travelling to New Zealand from overseas to self-isolate for at least 14 days at a managed isolation facility.[32] Subsequently, on 19 March 2020, the New Zealand borders closed to all but New Zealand citizens and permanent residents.[33] Entry into New Zealand is severely limited and strictly controlled by the New Zealand Government and its agents. The border restrictions are not affected by the change of COVID-19 Alert Levels.

Currently, the New Zealand Government allows people to enter the country if there is a critical purpose to the travel.[34] All travellers except for the following must file a request to travel to Immigration New Zealand:[35]

[32] Unite against Covid-19 "Travel to New Zealand" (19 January 2021) <covid19.govt.nz>.
[33] Unite against COVID-19, above n 25.
[34] New Zealand Immigration "Reasons you can travel to New Zealand" <www.immigration.govt.nz>.
[35] New Zealand Immigration "New Zealand border entry requirements" <www.immigration.govt.nz>.

- New Zealand citizens and permanent resident holders;
- The partner or dependent child of a New Zealand citizen or permanent resident, and their visa is based on this relationship;
- A diplomat who holds a post in New Zealand;
- Eligible travellers from a quarantine-free travel zone; and
- Australian citizens and permanent residents who ordinarily reside in New Zealand.

To file a request to travel, travellers must submit an expression of interest to Immigration New Zealand through an online request.[36] After the expression of interest has been approved by Immigration New Zealand, travellers are invited to apply for a critical purposes visa. On top of these requirements, all visitors (except for the visitors travelling from exempt locations) must have a COVID-19 test and return a negative result within 72 hours of their scheduled flight.[37] Further, on arrival in New Zealand, all visitors must be transferred into a managed isolation facility and must self-isolate for at least 14 days.

As a result of New Zealand's strict border restrictions, the New Zealand's economy, especially the tourism and the hospitality sector, has experienced a significant loss in revenue. Due to declining numbers of international tourists visiting New Zealand, many local businesses have been forced to close or reduce their operational sizes. Before the pandemic, 20% of the New Zealand export income was generated from tourism, making it one of New Zealand's biggest export earners.[38] However, according to Statistics New Zealand, around 30,500 people in the tourism industry have lost their jobs due to COVID-19.[39] The absence of international tourists means that New Zealand's tourism industry is solely relying on domestic tourists for revenue. The longer the borders remain closed, the longer the tourism industry will financially suffer. The New Zealand Government has announced a $200 million tourism package to assist struggling operators, but this is a costly expense for the New Zealand Government and is also unlikely to prevent further losses of businesses and jobs.[40]

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[36] New Zealand Immigration "How to request to travel" <www.immigration.govt.nz>.
[37] Managed Isolation and Quarantine "Pre-departure testing" (1 July 2021) <www.mig.govt.nz>.
[38] Tourism New Zealand "Briefing for the Incoming Minister - November 2020" (3 November 2020) <www.tourismnewzealand.com>.
[39] Amanda Cropp "Where have thousands of redundant tourism workers gone?" Stuff (8 November 2020) <www.stuff.co.nz>.
[40] Jason Walls "Government unveils $200m tourism package to help struggling operators" NZ Herald (6 May 2021) <www.nzherald.co.nz>.

New Zealand's horticulture sector has also struggled due to COVID-19 related border restrictions. Most of New Zealand's seasonal workers who work in the horticulture sector are migrants with Supplementary Seasonal Employment visas. With a reduced number of seasonal workers, crops have rotted on the fields and in orchards.[41] During the summer of 2020/21, it was estimated that around $9.5 billion worth of fruit and vegetables went unpicked.[42] This is a huge financial loss to individual farmers and growers. The shortage of labour has also led the domestic prices of vegetables and fruits to increase.[43] Overall, the strict border restrictions have been detrimental to the New Zealand's economy and continued periods of border closure will continue to burden the New Zealand's economy. Although the border closure may be the best solution to prevent the importation of COVID-19, alternatives should be considered where New Zealand can open its borders and keep its citizens safe from COVID-19.

2 The effects of COVID-19 Alert Level 4 lockdown

(a) Financial consequences

COVID-19 Alert Level 4, also referred to as COVID-19 lockdown, can effectively reduce the risk of infection of COVID-19 but has severely impacted the New Zealand economy and its financial markets. Approximately 90% of the global economy, including New Zealand, has attempted to mitigate the health risk of COVID-19 by implementing some form of lockdown. This has resulted in disruption in the supply chain, drops in consumer demand, and a rise in unemployment rates.[44]

Because of the COVID-19 lockdown imposed in early 2020, New Zealand's gross domestic product (GDP) fell by 12.2 percent in the July 2020 quarter, which is the largest drop in GDP on

[41] 1 news "As MIQ spots open up, Otago mayor pleads to Govt for fruit pickers to be prioritised" (31 March 2021) <www.tvnz.co.nz>.
[42] Swati Nagar "NZ needs a plan to help migrant workers pick fruit and veg, or prices will soar and farms go bust" The Conversation (25 November 2020) <theconversation.com>.
[43] Debrin Foxcroft "NZ's tomato shortage: Covid-19 uncertainty pushes up the price" Stuff (11 September 2020) <www.stuff.co.nz>.
[44] United Nations "COVID-19 to slash global economic output by $8.5 trillion over next two years" <www.un.org>.

record.[45] In August 2020, ASB economists estimated a range of COVID-19 lockdown costs based on different COVID-19 Alert Levels:[46]

Weekly GDP cost of lockdown in Q3 2020	**$000's**	**% of weekly GDP**	**% of annual GDP**
Countrywide level 2	166,018	3%	0.06%
Countrywide level 3	885,428	16%	0.30%
Countrywide level 4	1,604,838	29%	0.54%

Weekly GDP cost of lockdown in Q3 2020	**$000's**	**% of weekly GDP**	**% of annual GDP**
Auckland level 3, New Zealand level 2	439,393	8%	0.15%
Auckland level 4, New Zealand level 2	712,769	13%	0.24%

Based on the above calculations, 1 week of COVID-19 lockdown can cost between $166 million to $1.6 billion. Although COVID-19 lockdowns can save lives, it is an enormous economic burden on New Zealand. Further, in the September 2020 quarter, the unemployment rate reached 5.3 percent due to the impacts of COVID-19 on the labour market.[47] There were approximately 151,000 people in New Zealand that were out of jobs, which is the highest number which New Zealand has reported in over 8 years.[48] One in 10 people reported are to have lost their main source of income due to COVID-19, and approximately 3 in 10 people reported are to have experienced a reduction in income.[49]

[45] Stats NZ "COVID-19 sees record 12.2 percent fall in New Zealand's economy" (17 September 2020) <www.stats.govt.nz>.
[46] ASB *Economic Note COVID-19 Economic Impacts* (12 August 2020) at 3.
[47] Stats NZ "Unemployment rate hits 5.3 percent due to COVID-19" (4 November 2020) <www.stats.govt.nz>.
[48] Stats NZ "Unemployment rate hits 5.3 percent due to COVID-19" (4 November 2020) <www.stats.govt.nz>.
[49] Meisa N Nicolson and Jayde A M Flett "The mental wellbeing of New Zealanders during and post-lockdown" (2020) 133 N. Z. Med. J.110 at 111.

To ease the financial impact caused by COVID-19, the New Zealand Government introduced multiple financial support schemes for individuals and businesses. In March 2021, the New Zealand Government introduced the COVID-19 Wage Subsidy.[50] The COVID-19 Wage Subsidy was available for New Zealand businesses, including the self-employed, who had or expected to have at least 40% reduction in revenue for 14 consecutive days while in COVID-19 Alert Level 3 or 4.[51] The COVID-19 Wage Subsidy aimed to avoid preventable employee dismissals by ensuring that employers can continue to employ employees during and after the COVID-19 lockdown. The COVID-19 Wage Subsidy also prevented employees from having to use up their annual or sick leave to receive payments from employers. The New Zealand Government also introduced the COVID-19 Resurgence Support Payment, which is a similar financial assistance available for businesses, but for businesses that have been affected by COVID-19 Alert Level 2 or higher for 1 week or more.[52] There is further financial assistance available if employees cannot work due to the effects of COVID-19. The COVID-19 Short-term Absence Payment is available for businesses to pay their employee's wages while employees self-isolate and wait for a COVID-19 test result.[53] COVID-19 Leave Support Scheme is available for workers who are required to isolate and cannot work from home.[54] Although these financial support schemes may have minimised the impact on the population's livelihood, it was a costly expenditure for the New Zealand Government. The New Zealand Government has reported that the COVID-19 related financial support schemes have cost approximately $5 billion, along with other COVID-19 related costs.[55]

New Zealand's economy was experiencing a sustained period of growth before the COVID-19 pandemic, with the 2019 annual growth running at 2.3%.[56] However, the nation is now experiencing a down-turn in economic activity. The COVID-19 lockdown has caused many people to lose their livelihood and has incurred a lot of costs for the New Zealand Government. To rebuild and protect the prosperity of the economy, the New Zealand Government must take proactive

[50] Employment New Zealand "Previous financial support schemes" (13 April 2021) <employment.govt.nz>.
[51] Employment New Zealand, above n 50.
[52] Unite against COVID-19 "Financial support for businesses" (13 April 2021) <covid.govt.nz>.
[53] Unite against COVID-19, above n 52.
[54] Unite against COVID-19, above n 52.
[55] The Treasury "COVID-19 Economic Package Updated" (23 March 2020) <www.treasury.govt.nz>.
[56] PricewaterhouseCoopers "Rebuild New Zealand: a reset and where next?" (10 December 2020) <www.pwc.co.nz> .

actions.[57] New Zealand needs to devise a long-term plan to improve the nation's economy to ease the financial burden that is a consequence of COVID-19.

(b) Psychological health of the population

During the early stages of the COVID-19 pandemic, WHO expressed concerns regarding the effects COVID-19 may have on the global population's mental health.[58] As WHO predicted, the unprecedented global health crisis stirred up many people's fear and anxiety.[59] The devastating consequences of the COVID-19 pandemic such as the increasing death tolls and the financial crisis have had a severe impact on the global population's psychological well-being.

The COVID-19 lockdown was utilised by governments across the globe in order to halt or reduce the spread of COVID-19; however, confinement and isolation from society have led to psychological distress for many. The absence of interpersonal relationships and lack of freedom become intolerable for some. A recent study conducted by the University of Otago revealed that approximately one-third of the participants experienced moderate to high psychological distress during COVID-19 lockdowns.[60] Increased rates of mental instability were mostly seen in vulnerable groups such as:[61]

- people living in low socio-economic conditions;
- victims of family violence;
- people who had lost their job due to the COVID-19 outbreak;
- people with vulnerabilities to COVID-19 (e.g. such as being immunocompromised); and
- people with pre-existing mental illnesses.

[57] Pak Anton and others "Economic Consequences of the COVID-19 Outbreak: the Need for Epidemic Preparedness" (2020) 8 Frontiers in Public Health 241.
[58] The World Health Organisation "Mental health and psychosocial considerations during the COVID-19 outbreak" (18 March 2020) <www.who.int>.
[59] Kimberly Drake "What is COVID-19 anxiety syndrome: A pandemic phenomenon?" (7 May 2021) <medicalnewstoday.com>; Nirmita Panchal, Rabah Kamal, Cynthia Cox and Rachel Garfield "The Implications of COVID-19 for Mental Health and Substance Use" (10 February 2021) <www.kkf.org>.
[60] Susanna Every-Palmer and others "Psychological distress, anxiety, family violence, suicidality, and wellbeing in New Zealand during the COVID-19 lockdown: A cross-sectional study" (2020) 15(11) PLOS ONE at 11.
[61] M Aragona and others "Negative impacts of COVID-19 lockdown on mental health service access and follow-up adherence for immigrants and individuals in socio-economic difficulties" (2020) 186 Public Health 52 at 52; Susanna Every-Palmer and others, above n 60 at 6.

Overall, depression and anxiety symptoms worsened, and levels of stress became higher during the COVID-19 lockdown.[62]

Young adults were also severely affected, with approximately 60% of young adults suffering from depression or anxiety post-lockdown.[63] For some students, the absence of a school environment resulted in boredom and a lack of motivation. Cancellation of various academic, sporting, cultural, and social activities caused high levels of anxiety.[64] Many schools have set up online learning for students; however, this was not an easy alternative for unprivileged children with limited access to technological devices, gadgets, and resources.

Ultimately, the COVID-19 lockdown as well as other range of mitigation controls, jeopardizes people's psychological well-being. Due to the decreased quality of life, individuals are more prone to suffering from mental strain and distress. Many governmental and international organisations have provided platforms and resources to support the population's mental health during the COVID-19 lockdown; however, the cause of the state of poor mental health should instead be resolved as soon as possible.

D Alternative Methods

The New Zealand Government's management of the COVID-19 outbreak has resulted in success by eliminating the transmission of the virus in the community. The Prime Minister, Jacinda Ardern and Director-General of Health, Ashely Bloomfield's approach to COVID-19 has received positive remarks from across the globe and was praised by many.[65] For now, New Zealand can say that they have beaten the virus; however, they may need to reflect on their COVID-19 elimination strategy if not enough people choose to receive the COVID-19 vaccine. Although the COVID-19

[62] Christoph Pieh, Sanja Budimir and Thomas Probst "The effect of age, gender, income, work, and physical activity on mental health during coronavirus disease (COVID-19) lockdown in Austria" (2020) 136 J Psychosom Res; Maria Rosaria Gualano and others "Effects of Covid-19 Lockdown on Mental Health and Sleep Disturbances in Italy" 2020 17(13) Int. J. Environ. Res. Public Health; Qualtrics "The other COVID-19 crisis: Mental health" (14 April 2020) <www.qualtrics.com>.
[63] Meisa N Nicolson and Jayde A M Flett above n 49, at 111.
[64] J Lee "Mental health effects on school closures during COVID-19" (2020) 4(6) Lancet Child Adolesc. Health 421.
[65] Lynda Gilby "New Zealand beat Covid-19 without a vaccine: this is how they did it" The Loop <theloop.ecpr.eu>.

lockdown protects the population, it has too many negative side effects on the economy and people's mental health. Accordingly, repeated use of COVID-19 lockdowns to control the transmission of the virus can be damaging to the population.

So, what would be the best alternative to lockdowns? Alberto Giubilini, who is an expert in collective responsibility in infectious diseases, has argued that "it is inconsistent to accept mandatory lockdown, but reject mandatory vaccination" as "the latter achieves a much greater good at a much smaller cost".[66] Compared to COVID-19 lockdowns, mandatory vaccination is much more cost-effective and efficient in reducing the risk of COVID-19 transmission. Without collective immunity to COVID-19, COVID-19 lockdowns may be repeated to prevent its spread. In contrast, mandatory vaccination would reduce the risk of COVID-19 transmission to the point that COVID-19 lockdowns are no longer necessary. To reflect this, on 13 May 2021, the Centres for Disease Control and Preventions issued interim guidance for fully vaccinated people, stating that fully vaccinated people in the US can:[67]

- Participate in activities without wearing face coverings or physically distancing unless required by law, rules and regulations (including local business and workplace guidelines);
- Travel domestically and can refrain from testing for COVID-19 before or after travel or self-quarantine after travel;
- Refrain from testing for COVID-19 before leaving the US for international travel (unless required by the destination country) and refrain from self-quarantine after arriving back in the US;
- Refrain from testing for COVID-19 following a known exposure if asymptomatic (with some exceptions);
- Refrain from self-quarantine following a known COVID-19 exposure if asymptomatic; and
- Refrain from routine screen testing if feasible.

Ultimately, the costs and trade-offs involved in COVID-19 lockdowns are too significant and have caused detrimental damage to the economy and people's psychological well-being. The COVID-

[66] Alberto Giubilini and Vageesh Jain "Should COVID-19 vaccines be mandatory? Two experts discuss" The Conversation (26 November 2020) <theconversation.com>.
[67] Centers for Disease Control and Preventions "Interim Public Health Recommendations for Fully Vaccinated People" (13 May 2021) <www.cdc.gov>.

19 lockdown has great repercussions and as a result, repeated or long-lasting COVID-19 lockdowns can cause increased non-compliance.[68] This is why alternative approaches to reducing or eradicating COVID-19, such as a mandatory COVID-19 vaccination policy, should be seriously considered by the New Zealand Government.

III Public Health

To understand the tension between public health and the right to personal autonomy, public health must first be discussed. In this section, how and why public health is practised will be explored to understand its underlying purpose. Further, arguments for and against vaccination will be analysed to showcase why people receive vaccines while others do not. New Zealand's vaccination programmes will also be examined to demonstrate New Zealand's position on public health policies.

A What is Public Health?

Public health can be understood as "the science and art of promoting health, preventing disease and prolonging life through the organised efforts of society".[69] Some of the most well-known public health policies include smoke reduction, cancer screening programmes and condom use for the prevention of STIs. While traditional medicine often focuses on the patient's wellbeing, the primary objective of public health is to enhance the well-being of the population as a whole.[70] Generally, public health interventions are only successful with collective action and effort.[71] Very few public health outcomes can be accomplished by targeting given individuals. One of the core values of public health is to prevent diseases and to minimise their effects; therefore, the practice of public health is currently more crucial than ever, with the COVID-19 pandemic threatening the well-being of the global population.

[68] Alexis Robert "Lessons from New Zealand's COVID-19 outbreak response" (2020) 5(11) The Lancet e569 at e 570.
[69] Charles-Edward Winslow "The untilled fields of public health" (1920) 51 Science 20 at 20.
[70] L O Gostin and K G Gostin "A broader liberty: J.S. Mill, paternalism and the public's health" (2009) 123 (3) Public Health 214.
[71] Institute of Medicine *The Future of Public Health* (National Academies Press, Washington DC, 1988) at 19.

Public health can be practised by both public and private institutions, such as the governments and its agencies, charities, academia and community-based organisations. The most predominant practitioners of public health are governments and its agents.. Governments uses law and policy as a primary tool to implement public health measures. The legislature creates public health laws and policies, and delegates powers to the officials in the administration. These officials, often known as health officials, are assigned with functions and jurisdiction.[72] The health officials are often entrusted by the legislature to assign powers to local bodies and governmental public health agencies such as the district health boards to practice public health. This allows the government to implement public health laws and policies at every level - district, regional and national level. Through delegation of powers, the government can indirectly monitor and affect the population's wellbeing across the whole nation.

As the world combats with COVID-19, many governments have introduced coercive public health measures that heavily restrict personal autonomy. However, if governments intervene excessively with the population's health, they can be accused by the public that they are "overreaching and invading a sphere reserved for politics, not science".[73] In contrast, if governments tackle little to no health issues, they can be accused of "lacking vision" and fail to resolve the underlying cause of ill health.[74] Because of this, the practice of public health can be challenging for governments. Governments must ensure that they consider the effects that public health policies may have on public confidence and trust.

B Public Health in New Zealand

The cornerstone of public health in New Zealand is the Health Act 1956 ("Health Act"). The long title of the Health Act states its purpose is to "consolidate and amend the law relating to public health".[75] The Health Act incorporates a broad range of public health matters including drinking water standard, infectious and notifiable diseases, and national cervical screening programme. The performance of public health functions under the Health Act is entrusted to the Medical Officers

[72] Lawrence O Gostin (ed) *Public Health Law and Ethics* (2nd ed, University of California Press, California, 2010) at 8.
[73] At 6.
[74] At 6.
[75] Health Act 1956.

of Health. Medical Officers of Health must be an experienced medical practitioner and are appointed by the Director-General of Health.[76] The powers, duties and functions of the Medical Officers of Health is outlined in the Health Act. The Director-General of Health holds all the powers of the Medical Officers of Health which he or she may exercise in any parts of New Zealand.[77]

During a public health crisis, the Director-General of Health and Medical Officer may be granted special powers for the purpose of protecting the health of the New Zealand population. In particular, the powers contained under s 70 of the Health Act is the centrepiece for control and prevention of infectious diseases. The powers under s 70 can only be exercised by the Director-General of Health or Medical Officer of Health if one of the three "conditions have been activated. These are ministerial authorisation, declaration of a State of National Emergency or issuing of an Epidemic Notice.[78]

With the powers granted under s 70, the Director-General of Health or Medical Officer of Health may enforce any orders listed in s 70 for the purpose of preventing the outbreak or spread of any infectious disease. Under s 70 of the Health Act, the Director-General of Health or Medical Officers of Health can:[79]

- require persons to be isolated and/or quarantined;
- require persons to undergo medical testing for an infectious disease;
- require premises to be closed; and
- forbid people from congregating.

The COVID-19 lockdown was implemented using s 70 powers. The New Zealand Government triggered the powers of s 70 by relying on two Acts. These were the Epidemic Preparedness Act 2006 ("Epidemic Preparedness Act") and the Civil Emergency Management Act 2002 ("Civil Emergency Management Act"). Firstly, on 23 March 2020, an Epidemic Notice was issued under

[76] Sections 3B and 7A.
[77] Section 22(1).
[78] Section 70.
[79] Section 70.

s 5 of the Epidemic Preparedness Act.[80] This Epidemic Notice was renewed on 17 March 2021 pursuant to s 7 of the Epidemic Preparedness Act.[81] The Epidemic Notice gives special powers to the Prime Minister, Director-General of Health, Medical Officer of Health and other Ministers. Subsequently, on 25 March 2020, a State of National Emergency was declared under the Civil Defence Emergency Management Act 2002.[82] New Zealand remained under a State of National Emergency until 13 May 2020.

Both the Epidemic Notice and State of National Emergency granted the s 70 powers to the Director-General of Health and Medical Officer of Health so that they can apply strict public health measures to reduce and prevent the spread of COVID-19. During the COVID-19 lockdown, the Director-General of Health made the three health orders under s 70(1)(m) and (f) of the Health Act.

Additionally, the Health Act confers powers to the Governor-General to make public health regulations by Order in Council.[83] According to s 117 of the Health Act, public health regulations may be made for "the improvement, promotion, and protection of public health", the "vaccination of persons for the prevention of quarantinable diseases and other diseases" and "the adoption of any other measures for the prevention and mitigation of disease".[84]

In theory, the New Zealand Government has the jurisdiction to override personal autonomy in an event of a public health crisis provided that certain conditions have been satisfied. Although the s 70 powers impose great curtailment of rights, their ultimate purpose is benevolent. The powers vested under s 70 are intended for an "immediate and urgent response" to a public health emergency.[85] Therefore, to address an ongoing crisis, a long-term framework needs to be introduced by way of passing legislation.

[80] Epidemic Preparedness Act 2006, s 5; Ministry of Health "COVID-19: Epidemic notice and Orders" (10 May 2021).
[81] Ministry of Health "COVID-19: Epidemic notice and Orders" (10 May 2021).
[82] Civil Defence Emergency Management Act 2002.
[83] Health Act 1956, s 117.
[84] Section 117(1)(d).
[85] *Borrowdale v Director-General of Health* [2020] NZHC 2090 at 102.

C Vaccinations

A vaccine is a substance which stimulates the human body to produce immunity against a specific transmissible disease. Thus, vaccination is the act of administering a vaccine with the goal of producing immunity for an individual. Vaccination is a form of public health and is an upstream health intervention that prevents diseases from being contracted by individuals. Vaccines have been studied and developed for over 200 years and its effects have been verified by the WHO. Every country has different vaccine schedules which lists out a series of recommended or mandatory vaccines. The content of vaccine schedules varies depending on the country as each country has their own common infectious diseases. The vaccination schedule is often organised by age group from infants, young children, adolescents, to adults. Vaccines are also administered according to a person's location, career, and health conditions.

To avoid doubt, the term "vaccination" and "immunisation" are often used interchangeably but hold different meanings. "Vaccination" refers to the process of administering vaccines, while "immunisation" refers to becoming immune to diseases.

1 Arguments supporting vaccines

The invention of vaccines is recognised as one of the most exceptional medical advancements in human history. Vaccines are considered as the most cost-effective and efficient method to prevent and reduce the spread of infectious diseases in the community. Vaccines have saved millions of lives around the globe since it was first introduced in the late 18th century. Currently, there are vaccines available for more than 20 life-threatening diseases ranging from the common flu, measles, HPV and more.[86] No vaccines can be said to be entirely risk-free; however, the benefits associated with most vaccines significantly outweighs the risk of adverse or serious reactions. Individuals often receive vaccines for their own benefit, but vaccinations also have a secondary benefit to the community. Vaccines provide protection to the wider community by herd immunity. Therefore, in many countries, vaccine policies are introduced by the government with the aim to increase immunity against diseases in individuals and in the wider community.

[86] World Health Organisation, above n 5.

(a) Individual immunity

When a pathogen first infects the human body, the immune system is triggered to fight it off by producing what is called antibodies. The human body also produces memory cells which learn the pathogen. If any future infections occur, the immune system will recognise that specific pathogen and respond more efficiently and effectively without causing significant damage to the body.[87] Vaccines work by using live attenuated, inactivated or dead, subunits of the original pathogen or mRNA to trick the human body into activating the immune system.[88] The difference between the real disease and vaccines is that vaccines contain pathogens that cannot cause significant damage while still resulting in the human body developing the memory cells. If the human body is later infected by the real disease, the immune system and response will be primed and ready to eradicate the disease without significant damage being done. For many people, individual immunity is the primary consideration when deciding whether to receive a vaccine.

(b) Herd immunity

Not only do vaccines protect individuals, they also indirectly shield the wider community from viruses. Herd immunity is operative where a significant portion of the population becomes immune to an infectious disease through vaccines or previous infection. [89] Individuals with immunity are less likely to contribute towards disease transmission;[90] Therefore, with more immune individuals, the spread of disease is slowed or entirely stopped. With herd immunity, the whole community is protected, including the non-immune individuals. Herd immunity is especially beneficial to the vulnerable members of the population, such as newborns and infants and the medically compromised individuals who cannot receive vaccines. Herd immunity is a collective good but is also a public good as it is non-exclusive in a sense that it is impossible to exclude an individual from gaining benefits of herd immunity.[91] Herd immunity has been proven to be the most effective way to reduce and eradicate contagious diseases. For example, smallpox, which killed over 500

[87] G Ada and D Isaacs *Vaccination: The Facts, the Fears, the Future* (Allen and Unwin, Auckland, 2001) at 45.
[88] Center for Disease Control and Prevention "Understanding How Vaccines Work" (July 2018) <cdc.gov>.
[89] Andrzej Grzybowski, Rafal K Patryn, Jaroslaw Sak, and Anna Zagaja "Vaccination refusal. Autonomy and permitted coercion." (2017) 111(4) Pathog Glob Health 200 at 17.
[90] RM Merrill *Introduction to Epidemiology* (Jones & Bartlett Publishers, Massachusetts, 2013) at 68 - 71.
[91] Alberto Giubilini, Thomas Douglas, and Julian Savulescu "The moral obligation to be vaccinated: utilitarianism, contractualism, and collective easy rescue" (2018) 21(4) Med Health Care Philos 547 at 548.

million people in the last 100 years of existence, was successfully eradicated by 1980 because of herd immunity.[92] Further, since 1988, wild polio cases have reduced globally by 99.9%.[93]

There are many harms in the community that can only be prevented with the combined efforts of individuals called "collective harm".[94] Achieving herd immunity against infectious diseases is one of them. Individuals are collectively responsible for the outcome, and depending on their actions, collective harm can be prevented. People often make excuses like "even if I do X, it will not make any difference, so I don't have a reason to do it".[95] However, it is crucial that everyone gets vaccinated for herd immunity to be achieved.

Every disease has varying levels of immunisation rates for herd immunity to be achieved due to differing virulence. For example, seasonal influenza only requires approximately 40% of the population to be vaccinated to reach herd immunity, while measles requires around 83-94% of the population to be immunised to result in herd immunity.[96] Te Pūnaha Matatini has estimated that achieving herd immunity against COVID-19 in New Zealand will require at least 83% of the New Zealand population to be vaccinated against COVID-19.[97]

(c) Safe development and manufacturing

When vaccines are developed, strict procedures are followed to ensure that vaccines are both safe and effective. Vaccines undergo many stages of clinical trial and safety monitoring before they can be licensed and marketed to the public. Even after vaccines are introduced to the public, vaccines and its effects are monitored closely. Clinical trials are usually broken into three phases.[98] In phase 1, vaccines are tested on a small number of healthy immunocompetent people (usually around 20 to 80 people) to assess and evaluate the safety and immune response. In phase 2, vaccines are tested on a larger number of people (usually around hundreds to thousands) to

[92] D A Henderson "Smallpox: the Death of a Disease" (Prometheus Books, New York, United States, 2009) at 12.
[93] The Immunisation Advisory Centre "Polio" (April 2017) <www.immune.org.nz>.
[94] Frank Hindriks "The Duty to Join Forces:When Individuals Lack Control" (2019) 102(2) *The Monist* 204 at 207.
[95] Julia Nefsky "The morality of collective harm" (Doctoral dissertation, UC Berkeley, 2012) at 1.
[96] P G Smith "Herd Immunity Threshold" (2010) 2 Procedia in Vaccinology 134 at 136.
[97] Toby Manhire "Herd immunity for Covid-19 requires 83% vaccination, new NZ modelling shows" The Spinoff (30 June 2021) <thespingoff.nz>.
[98] World Health Organisation "How are vaccines developed? (8 December 2020) <who.int>; Ministry of Health New Zealand "Vaccine Safety" (16 April 2021) <www.health.govt.nz>; K Singh and S Mehta "The clinical development process for a novel preventive vaccine: An overview" (2016) 62(1) J Postgrad Med 4.

continue to assess and evaluate the safety and immune response. In this phase vaccines are compared with placebos. Lastly in phase 3, vaccines are tested on thousands of people to assess and evaluate the efficacy.

After clinical trials, vaccine developers must submit what is called a "Biologics License Application" to a licensing body. In New Zealand, the licensing body is the New Zealand Medicines and Medical Devices Safety Authority, more commonly known as MedSafe.[99] Before vaccines can be approved for supply to New Zealand, MedSafe must be satisfied that the vaccine is both effective and is safe for use.[100] MedSafe has one of the strictest standards for vaccine safety and efficacy which ensures that the New Zealand population receives only the best vaccines.

2 Arguments against vaccines

(a) Side effects

Just like all other medications, vaccines can cause side effects. Side effects from vaccinations is an argument against vaccination because the chance of developing adverse reactions is not zero. The existence of side effects can act as a deterrence which stops people from receiving vaccinations. Having said that, the side effects from most vaccines are mild. The common side effects are the swelling and pain near the injected areas and many patients do not have to seek additional medical care for treatment. [101] Most adverse reactions to vaccines are identified during clinical trials or safety monitoring. If any adverse reactions are found, vaccines are altered to reduce or eliminate the unfavourable side effects.[102] It is very rare for patients to have adverse reactions; therefore, the risk of adverse reactions is generally outweighed by the benefits gained from vaccinating.

(i) Side effects of the COVID-19 vaccine

Many renowned pharmaceutical giants, such as Pfizer, Moderna and Johnson & Johnson have successfully developed COVID-19 vaccines. New Zealand has secured 10 million doses of the

[99] The Immunisation Advisory Centre "Safety Monitoring" (September 2020) <www.immune.org.nz>.
[100] Ministry of Health New Zealand, above n 98.
[101] John R Su, Jonathan Duffy, and Tom T Shimabukuro "Vaccine Safety" in Gregory Poland (ed) *Vaccinations* (Elesevier, Missouri, 2018) at 2.
[102] At 2.

Pfizer/BioNTech vaccine, which is more than enough to vaccinate the entire population. Compared to other vaccines, one of the downsides of COVID-19 vaccines is that they are prone to cause a range of side effects. These side effects are generally mild or moderate and disappear after a few days. The reported side effects from COVID-19 vaccine are:[103]

Most common	Uncommon	Rare
• Pain and/or swelling at the area of injection • A headache • Fatigue • Muscle aches • Feeling generally unwell • Fever and chills • Nausea • Joint pain.	• Enlarged lymph nodes • Pain in limb • Insomnia; and • Itching at the injection site	• Temporary one-sided drooping on the face

With the Pfizer/BioNTech vaccine, a total of 2 shots (given 21 days apart) are required to be 95% protected against COVID-19.[104] This means that 95% of the people who receive both shots of the Pfizer/BioNTech vaccine are protected from developing symptomatic COVID-19.[105] It has been reported that the second dose of the Pfizer/BioNTech is likely to cause more and stronger side effects, most commonly fevers, body and joint aches and headaches.[106] Patients are more likely to experience side effects after the second dose of the COVID-19 vaccine because of how the COVID-19 vaccine works. When a patient receives their first dose of the COVID-19 vaccine, the patient's body slowly develops an immune response against the antigen. When the second dose is given, the patient's body recognises the antigen from the first dose and launches a faster and

[103] Ministry of Health "COVID-19: Pfizer/BioNTech (Comirnaty) vaccine" (8 March 2021) <www.health.govt.nz>.
[104] Ministry of Health "COVID-19: Vaccine effectiveness and protection" (31 May 2021) <www.health.govt.nz>.
[105] Piero Olliaro "What does 95% COVID-19 vaccine efficacy really mean?" (2021) 21(6) The Lancet 769.
[106] Bob Curley "Here's Why Your Second Dose of COVID-19 Vaccine Will Likely to Have Stronger Side Effects" healthline (15 February 2021) <www.healthline.com>; DeeDee Stiepan "Understanding COVID-19 vaccine effects, why second dose could feel worse" Mayo Clinic (24 March 2021) <newsnetwork.mayoclinic.org>.

stronger immune response and releases antibodies. The immune response can cause inflammation in patients which can lead to flu-like symptoms.[107] Having these side effects is in fact a good sign, as it shows that the body remembers the antigen and is ready to attack it. It indicates that the body is well prepared to fight off the virus.

However, due to the common side effects of COVID-19 vaccines, many are discouraged from being vaccinated. On top of this, the short manufacturing period of COVID-19 vaccines have created doubts in some people as to whether the vaccines were created safely.

(b) Vaccine hesitancy

Even though vaccines are considered as one of the major medical achievements in the 20th century, there are many people who refuse to be vaccinated. Vaccine hesitancy, also often referred to as being "anti-vax", is not a new concept. The anti-vaccination movement has existed as long as vaccines have. When the first vaccine against smallpox was created, it was originally viewed as a "miraculous solution" to a disease.[108] However, overtime, people became hesitant and opposed to vaccines. The anti-vaccination movement has imperilled public health. With declining vaccine rates, the WHO has identified vaccine hesitancy as one of top 10 threats to global health.[109]

Vaccine hesitancy increased significantly in numbers in the late 1990's after Andrew Wakefield, along with other academics, published a paper in the *Lancet* called "Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children".[110] The paper suggested that there was a causal link between the MMR (measles, mumps, and rubella) vaccine and autism in children.[111] However, the paper was very poorly written and was not backed up with any credible scientific evidence.[112] The paper was statistically invalid with a small sample size

[107] Kelly Elterman "Why Are COVID-19 Vaccine Side Effects Worse After the Second Shot?" GoodRx (5 April 2021) <www.goodrx.com>.
[108] Anne McMillan "Mandatory vaccination: legal, justified, effective?" International Bar Association (19 March 2021) <https://www.ibanet.org>
[109] World Health Organisation "Ten threats to global health in 2019" <who.int>.
[110] Andrew Wakefield and others "Ileal-lymphoid-nodular hyperplasia, non-specific colitis, and pervasive developmental disorder in children" (1998) 351(9103) The Lancet 637.
[111] T S Sathyanarayana Rao and Chittaranjan Andrade "The MMR vaccine and autism" (2011) 53(2) Indian Journal of Psychiatry 95 at 95.
[112] At 95.

and no control groups, and relied on parental recalls and beliefs for its findings.[113] Despite its speculative nature, the paper caught the public's attention and Wakefield et al's findings were widely reported by the media. Parents became concerned about the risks of autism and as a result, MMR vaccine rates started to decline.[114] In 2010, *The Lancet* retracted the paper stating that several elements of the paper were incorrect.[115] However, many still believe in Wakefield et al's findings. Some are so invested in Wakefield's finding that they believe the government is hiding the truth about the link between the MMR vaccine and autism.[116]

Misinformation about vaccines and vaccinations is jeopardising public health as it steers people away from being vaccinated. In the age of social media, false and misleading information easily circulates the internet, leading many to believe that vaccines are unsafe and harmful. Currently, there are approximately 31 million people following anti-vaccination groups on Facebook and 17 million people subscribing to similar channels on YouTube.[117] Because social media platforms use algorithms to decide what posts users see, anti-vaccination supporters tend to be more exposed to anti-vaccination related content.[118]

There are also significant amounts of conspiracy theories and speculations regarding COVID-19 and the COVID-19 vaccine. False information about COVID-19 is all over the internet, such as that COVID-19 is a biological weapon leaked from a Wuhan science laboratory, that COVID-19 and 5G are related, and that many COVID-19 vaccination trial patients have died during clinical trials.[119] With many individuals already feeling worried and anxious about COVID-19 and the COVID-19 vaccine, such misinformation creates more fear and doubt.

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[113] F Godlee, J Smith and H Marcovitch "Wakefield's article linking MMR vaccine and autism was fraudulent" (2011) BMJ 342.
[114] At 95.
[115] L Eggerston "Lancet retracts 12-year-old article linking autism to MMR vaccines" (2010) 182(4) Can. Med. Assoc. J. 199.
[116] L Eggerston, above n 115.
[117] Talha Burki "The online anti-vaccine movement in the age of COVID-19" (2020) 2 The Lancet 504 at 504.
[118] Stefania Maria Maci "Discourse Strategies of Fake New in the Anti-vax Campaign" (2019) 6(1) Lingue Culture Mediazioni - Language Cultures Mediation (LCM journal) 15 at 15.
[119] Sahil Loomba and others "Measuring the impact of COVID-19 vaccine misinformation on vaccination intent in the UK and USA" (2021) Nat Hum Behav 1; Gordon Pennycook and others "Fighting COVID-19 Misinformation on Social Media: Experimental Evidence for a Scalable Accuracy-Nudge Intervention" (2020) 31(7) Psychological Science 770 at 770.

Anti-vaccination movement is present all around the globe, including New Zealand. Just as the COVID-19 vaccines were being delivered in New Zealand, anti-vaccination magazines were left in people's homes and claimed to tell the truth about COVID-19 and COVID-19 vaccines.[120] Subsequently, during April and May 2021, 2 million anti-vaccination leaflets were issued and circulated nationwide.[121] These leaflets were introduced during the same period as the New Zealand Government's COVID-19 vaccination campaign. The anti-vaccination movement is already infringing on herd immunity goals and circulation of COVID-19 related misinformation imperils the COVID-19 vaccination promotion by the New Zealand Government and discourages people from receiving the COVID-19 vaccine.

Public trust in governments has been declining rapidly especially in countries like the United States. As vaccinations are a public health intervention by the state, trust in governments is vital for compliance. Research has found that individuals with lower levels of trust in government and its medical experts are less likely to be pro-vaccine.[122] Conspiracy theories such as vaccines contain microchips or software for governments to track people, and COVID-19 was invented to decrease population, creating more doubt in people.

In summary, COVID-19 vaccinations are the best way for individuals to be protected against COVID-19 and to build herd immunity in populations. Although COVID-19 vaccinations can cause side effects, they are generally mild. COVID-19 vaccines have been safely manufactured by pharmaceutical experts and their quality and efficacy have been approved by MedSafe. Because of this, the chances of developing adverse reactions to the COVID-19 vaccine is extremely low. Being vaccinated to COVID-19 significantly reduces the chance of contracting the virus with minimal risk. Accordingly, there is a strong argument that everyone who can receive the COVID-19 vaccine should be vaccinated to protect themselves and to contribute to herd immunity. In addition, the cost of COVID-19 vaccine is much lower for the government compared to the cost of caring for people with COVID-19.

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[120] Katie Doyle "Covid-19: Calls to dump 'dangerous' anti-vaccine magazine" Radio New Zealand <www.rnz.co.nz>.
[121] Geraden Cann "Anti-vax leaflet campaign being investigated by Advertising Standards Authority" (5 May 2021) <www.stuff.co.nz>.
[122] Bert Baumgaetner, Juliet E Carlisle and Florian Justwan "The influence of political ideology and trust on willingness to vaccinate" (2018) 13(1) PloS one.

However, as stated above, there is a lot of misinformation about the COVID-19 vaccine. In the age of social media, misinformation spreads at rapid speeds. The presence of vaccine hesitancy and anti-vaccination movement prevents vaccines from attaining their full protection as an effective protection against COVID-19. Reduced public confidence in vaccines leads to a lower chance of achieving herd immunity, which would put the vulnerable members of the community at risk of contracting COVID-19. If the anti-vaccination movement continues or increases, herd immunity may not be possible by simply relying on individual's to be proactive about receiving the COVID-19 vaccine. In such circumstances, it may be necessary for governments to impose mandatory COVID-19 vaccination policies to achieve individual and herd immunity against COVID-19.

D New Zealand's Current Vaccination Policies and Legislation

1 New Zealand's health policy on vaccination

New Zealand does not currently have any comprehensive vaccine laws. There is only a few legislations and case laws which discusses vaccines and vaccinations. Therefore, New Zealand's vaccination history is simple. The only vaccine which was considered mandatory in New Zealand was the smallpox vaccine in 1863 till 1920.[123] When the smallpox vaccine was introduced, it was mandatory for all infants; however, the immunisation coverage was significantly low.[124] A trend of low immunisation rates has been a consistent issue for New Zealand. For example, in the early 1990s, less than 60% of children received all the recommended vaccinations by the age of 2.[125] The low immunisation coverage rate is said to be caused by New Zealand's poor execution of its vaccination programmes.[126]

Currently, New Zealand does not have any vaccines that are mandatory for the general population. Historically, the New Zealand Government has accorded high value to the right to personal

[123] Public Health Act 1872, s 18.

[124] Te Ara The Encyclopedia of New Zealand "Healthy bodies" <www.teara.govt.nz>

[125] Nikki Turner "A measles epidemic in New Zealand: why did this occur and how can we prevent it occurring again?" (2019) 132 (1504) N. Z. Med. J. <www.nzma.org.nz>.

[126] Nikki Turner "The challenge of improving immunization coverage: the New Zealand example" (2012) 11(1) Expert Rev. Vaccines 9.

autonomy, and everyone has the right to choose whether to receive vaccinations. The right to refuse vaccinations are recognised under s 11 of the New Zealand Bill of Rights Act 1990 ("New Zealand Bill of Rights Act"), and under right 7(7) of the Code of Health and Disability Services Consumers' Rights 1996.[127]

Instead of a mandatory vaccination policy, New Zealand has what is called the National Immunisation Schedule, which is a list of publicly funded vaccines that are offered for free to newborns, children, adolescents, adults, and pregnant women.[128] Everyone is strongly encouraged by the New Zealand Government to receive all recommended vaccines on the National Immunisation Schedule. The Ministry of Health oversees the National Immunisation Programme which "aims to prevent disease through vaccination and to achieve coverage that prevents outbreaks and epidemics".[129] The National Immunisation Schedule works as an incentive for people to receive vaccines as the vaccines in it are administered at free of charge. The National Immunisation Schedule is updated regularly to meet the population requirements.

Rather than using coercive methods, New Zealand focuses on educating the public with vaccine-related information. New Zealand has a passive approach to promoting vaccines and struggles to meet the immunisation coverage of 95%.[130] Immunisation coverage refers to the percentage of children who have received all of the recommended vaccines in the National Immunisation Schedule for their age.[131] Although the immunisation coverage rate has improved from the past, only few District Health Boards achieve above 95% at every review.[132] This may be because choosing whether to be vaccinated is not solely based on knowledge and information about associated benefits and risks.[133] Decision-making, especially one with risk, is not straightforward and is complex. Decisions regarding vaccinations are also based on religion, culture, philosophical views, and socio-political context.[134]

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[127] New Zealand Bill of Rights Act 1990, s 11; Code of Health and Disability Services Consumers' Rights, right 7(7).
[128] Ministry of Health *Immunisation Handbook 2020* (Ministry of Health, Wellington, 2020) at 4
[129] At 2.
[130] At 19.
[131] Ministry of Health "Immunisation coverage" (5 July 2018) <health.govt.nz>.
[132] Ministry of Health "How is my DHB performing?" (December 2020) <health.govt.nz>.
[133] Bert Baumgaetner, Juliet E Carlisle and Florian Justwan, above n 122.
[134] Bert Baumgaetner, Juliet E Carlisle and Florian Justwan, above n 122.

In 2011, the Welfare Working Group recommended to the New Zealand Government that New Zealand should also implement Australia's "No Jab, No Pay" policy to improve the immunisation coverage rate in children. The Welfare Working Group proposed that all "parents receiving their main income from the welfare system should be required to complete the 12 Plunket/Tamariki Ora Wellchild check as a condition of receiving Jobseeker Support".[135] The 12 Plunket/Tamariki Ora Wellchild check included scheduled immunisations. The proposal of implementing the "No Jab, No Pay" policy was rejected by the New Zealand Government. The Social Development Minister at the time, Paula Bennett explained that:[136]

> This decision should remain with parents because immunisation is a medical treatment. Removing the right to refuse medical treatment would be an unjustifiable breach of the New Zealand Bill of Rights Act.

Petitions regarding the implementation of mandatory vaccination policies have been submitted in the past but were rejected by the New Zealand Government. For example, in June 2019, a petition was presented to the House of Representatives to make the vaccines listed in the National Immunisation Schedule compulsory for all children living in New Zealand.[137] However, in September 2019, the Prime Minister, Jacinda Ardern announced that New Zealand will not be introducing any mandatory vaccine policies nor adopting vaccine policies similar to Australia's "No Jab, No Pay" policy.[138] Ardern stated that the declining immunisation coverage rate was not due to scepticism, but was caused by the lack of access to healthcare[139] Ardern stated that New Zealand has "an inequality and equity issue with people accessing the health services that they not only deserve, but that are made available to them, and for free".[140]

2 New Zealand's policy on the COVID-19 Vaccine

Despite COVID-19's dangers and implications, the New Zealand Ministry of Health has announced that the COVID-19 vaccination will not be mandatory for the general public. Currently,

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[135] Welfare Working Group Reducing Long-Term Benefit Dependency: Recommendations (February 2011) at 120.
[136] Nicholas Jones "Key Rules Out 'No Jab, No Pay'" Policy" New Zealand Herald (14 April 2015) <www.nzherald.co.nz>.
[137] New Zealand Parliament "Petition of Louisa Gommans: Compulsory vaccination for all New Zealand children" (13 June 2019) <www.parliament.nz>.
[138] Zane Small "PM Jacinda Ardern rules out 'no jab, no pay' policy adopted in Australia" Newshub (3 Septeber 2019) <www.newshub.co.nz>.
[139] Zane Small, above n 138.
[140] Zane Small, above n 138.

New Zealand has initiated a COVID-19 vaccination programme and is vaccinating people in stages. According to New Zealand's COVID-19 vaccination programme, the New Zealand population is divided into four groups:[141]

1. Group 1 - Boarder and managed isolation and quarantine facility workers, and the people who live with them;
2. Group 2 - High-risk frontline workers and people living in high-risk areas;
3. Group 3 - People who are at risk of developing serious symptoms from COVID-19; and
4. Group 4 - the general population.

It is estimated that Group 1 will receive the COVID-19 vaccine from February 2021, Group 2 from March 2021, Group 3 from May 2021, and Group 4 from July 2021.[142] The aim of the COVID-19 vaccination programme is to ensure that people who are at most risk of contracting COVID-19 or developing serious symptoms from COVID-19 are vaccinated first.

As stated previously, the New Zealand Government announced that COVID-19 vaccinations will not be mandatory. However, it has made an exception. On 1 May 2021, the New Zealand Government introduced the COVID-19 Public Health Response (Vaccinations) Order 2021 ("COVID-19 Public Health Response (Vaccinations) Order") with the aim to "prevent, and limit the risk of, the outbreak or spread of COVID-19" in the high-risk areas.[143] The Covid-19 Public Health Response (Vaccinations) Order mandates the following people to receive COVID-19 vaccines:[144]

Place of work	Roles
Managed quarantine and isolation facilities	● Workers at managed quarantine facilities; ● Workers who transport to or from managed quarantine facilities persons required to be in isolation or quarantine under the COVID-19 order; ● Workers at managed isolation facilities; and

[141] Ministry of Health "COVID-19: When you can get a vaccine" (6 May 2021) <www.health.govt.nz>.
[142] Ministry of Health, above n 141.
[143] COVID-19 Public Health Response (Vaccinations) Order 2021, explanatory note.
[144] Schedule 2.

Place of work	Roles
	● Workers who transport to or from managed isolation facilities persons required to be in isolation or quarantine under the COVID-19 order
Affected airports	● Airside government officials; and ● Government officials who interact with international arriving or transiting passengers (other than QFT flights)
Affected ports	● Government officials who spend more than 15 minutes in an enclosed space on board affected ships; ● Government officials who board, or who have boarded, affected ships; ● Government officials who transport people to or from affected ships; and ● Government officials who work at an affected port who interact with persons required to be in isolation or quarantine under a COVID-19 order
Aircraft	● Cabin crew who travel on domestic flights within NZ that carry international arriving or transiting passengers (other than OFT persons) who have not yet completed isolation or quarantine at managed isolation or quarantine facilities

The above group of workers cannot work at borders or managed isolation and quarantine facilities unless they are fully vaccinated against COVID-19.[145] Under s 26(3) of the COVID-19 Public Health Response Act 2020 ("COVID-19 Public Health Responses Act"), it is an offence to not

[145] Clause 7.

comply with the COVID-19 Public Health Response (Vaccinations) Order.[146] The employers or workers can be liable to an infringement fee of $300 or a fine imposed by a court not exceeding $1,000.[147]

The COVID-19 Public Health Response (Vaccinations) Order was executed by the Minister for COVID-19 Response under section 11 of the COVID-19 Public Health Responses Act. According to s 11 of the COVID-19 Public Health Responses Act, the Minister for COVID-19 or Director-General of Health may make an order for purposes such as "to require specific persons to take any specific actions, or comply with or comply with any specified measures, that contribute or are likely to contribute to preventing the risk of the outbreak or spread of COVID-19".[148]

Since the enforcement of the COVID-19 Public Health Response (Vaccinations) Order, 9 Customs staff and 13 managed isolation workers have lost their jobs because they refused to be vaccinated against COVID-19.[149] Because of this, the COVID-19 Public Health Response (Vaccinations) Orders has been criticized by the general population. The effects of the COVID-19 Public Health Response (Vaccinations) Order has been widely reported by the media. It has been described by the media that the redundant workers "felt pressured" into being vaccinated, although their jobs did not require PPE gear or regular COVID-19 testing.[150] From an ethical perspective, the New Zealand Government did not leave a great impression on the public. This is because on several occasions, the New Zealand Government has reassured the public that they would not be introducing a mandatory COVID-19 vaccination policy. The COVID-19 Public Health Response (Vaccinations) Order has contradicted this and required the front-line staff to receive the COVID-19 vaccine. Further, Ardern had previously stated that the frontline staff who do not get vaccinated will be redeployed.[151] This has not been followed. However, the New Zealand Government implemented the COVID-19 Public Health Response (Vaccinations) Order with the aim to reduce

[146] COVID-19 Public Health Response Act 2020, s26(3); COVID-19 Public Health Response (Vaccinations) Order 2021, cl 13.
[147] COVID-19 Public Health Response Act 2020, ss 26(4)(a) and (b).
[148] Section 11(1)(a).
[149] Harry Lock "COVID-19 Coronavirus: Customs worker fuming after losing her job over vaccination policy" NZ Herald (5 May 2021) <www.rnz.co.nz>.
[150] Harry Lock "More border workers could lose jobs for not getting vaccinated" RNZ (4 May 2021) <ww.rnz.co.nz>.
[151] 1 News "In wake of latest Covid-19 case, PM announces cut-off date for border workers to get jab" (12 April 2021) <www.tvnz.co.nz>.

the chances of COVID-19 transmission at the New Zealand borders. Since New Zealand does not have any active COVID-19 cases in the community, it makes sense for the New Zealand Government to only mandate COVID-19 vaccines for the front workers for now.

In summary, New Zealand did not have any coercive vaccine laws and policies up until 2021. The enforcement of COVID-19 Public Health Response (Vaccinations) Order emphasises that the New Zealand Government can override personal autonomy for the benefit of public health. This also sets a precedent for New Zealand as New Zealand has not mandated any vaccines in recent years. However, while mandatory vaccine policies can be beneficial to the community, it must be applied with care as it can backfire and be subject to strong criticism, resulting in public confidence and trust to decline. Vaccine hesitancy is not something that can be solved by simply enforcing a mandatory COVID-19 vaccination policy. For a mandatory COVID-19 vaccination policy to be implemented, the New Zealand Government must first manage the tension between public health and personal autonomy. Accordingly, if the New Zealand Government wishes to mandate the COVID-19 vaccine, such enforcement should be based on justifiable grounds and reviewed with careful consideration.[152]

IV The Tension between Public Health and Personal Autonomy

There exists a genuine tension between public health policy and the right to personal autonomy. Public health interventions by governments can be considered paternalistic because of the limits they place upon personal autonomy. Public health policies are implemented for the purpose of advancing the health of the population as a whole and often subsumes individuals' personal preferences and beliefs. As a result, public health policies can be contentious and create heated debates. Accordingly, governments must acknowledge that a sound and ethical justification is required before they can introduce public health policies. Without a sound and ethical justification, paternalistic public health policies result in the public trust and confidence to decline. Governments can be perceived by their population as authoritarian and tyrannical which undermines the core values of liberal democracy.

[152] D Salmon and others "Making mandatory vaccination truly compulsory: well intentioned but ill conceived" (2015) 15 The Lancet 872.

A What is the Right to Personal Autonomy?

Personal autonomy is a concept where an individual has the right to self-determine its own life according to its core values and morals.[153] Alternatively, personal autonomy can be described as "one's capacity to be one's own person".[154] Joel Feinberg has explained the idea of personal autonomy as:[155]

> "The right to make choices and decisions - what to put in my body, what contacts with my body to permit, where and how to move my body through public space, how to use my chattels and personal property, what personal information to disclose to others, what information to conceal, and more"

Personal autonomy can be distinguished from freedom despite the fact that there are overlapping principles between the two concepts.[156] Personal autonomy is the individual's independence or authenticity of its core values and morals, whereas freedom is the ability to act on those core values and morals without internal or external restraints.[157] Freedom can maximise one's ability to exercise personal autonomy because freedom allows individuals to plan their own life that is suited to their own character.[158]

The concept of personal autonomy is respected by most governments because it enhances self-determination.[159] Proponents of personal autonomy place a high value on self-determination because controlling one's own life is what gives humans a sense of living.[160] Personal autonomy allows individuals to give meaning, purpose and uniqueness to their own life. It also enables individuals to freely express who they are.[161] Therefore, disrespecting an individual's personal autonomy disregards who he or she is as a person.

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[153] Andrzej Grzybowski, Rafal K Patryn, Jaroslaw Sak, and Anna Zagaja, above n 89 at 202.
[154] John Christman "Autonomy in Moral and Political Philosophy" Stanford Encyclopedia of Philosophy (29 June 2020) <plato.stanford.edu>.
[155] Joel Feinberg *Harm to Self: The Moral Limits of the Criminal Law* (Oxford University Press, Oxford, 1986) at 54.
[156] John Christman, above n 154.
[157] John Christman, above n 154.
[158] Charles W Eliot (ed) *The Harvard Classics: John Stuart Mill - Autobiography, Essay on Liberty; Thomas Carlyle - Characteristics, Inaugural Address, Essay on Scott* (P F Collier & Son Company, New York, 1937) at 215.
[159] Desmonda Lawrence "Vaccination Abstention and the Principle of Autonomy" The Prindle Post (15 July 2019) <www.prindlepost.org>.
[160] Jukka Varelius "The value of autonomy in medical ethics" (2006) 9(3) Med Health Care Philos. 377 at 379.
[161] At 379 - 380.

Although personal autonomy is a modern development in philosophy, it is considered as one of the fundamental foundations of human rights. Accordingly, situations where personal autonomy can be overridden are limited. However, the unrestrained exercise of personal autonomy can cause harm to self and others. That is why in some cases, exercise of personal autonomy is limited by governments.

The philosophy of personal autonomy includes one's own right to make decisions about one's health and body. The concept of "consent" is what protects personal autonomy from being ignored in healthcare. In healthcare, it is well adopted that medical practitioners must always obtain valid consent from patients before performing any medical treatment. For a consent to be valid, it must be given voluntarily by a patient. Further, a patient must be well-informed, meaning that that patient is aware of all the risks and benefits of the medical treatment and the available alternatives.

Following the principle of personal autonomy, many people believe that no one, including governments, can coerce individuals to receive medical treatment without consent. Although personal autonomy should be valued, such beliefs can cause implications when it comes to public health. For example, a key aim of vaccination policies is to achieve herd immunity. Herd immunity can only be achieved if a sufficient proportion of a given population becomes vaccinated.[162] The challenge with vaccination policies is that personal autonomy does not enhance or promote vaccines because it allows people to freely opt out from being immunised. Exercise of personal autonomy is a human right, but it can compromise the health of the population.

B Personal Autonomy in Medicine vs Public Health

How personal autonomy is treated in healthcare can vary according to the degree of harm it imposes on others. Usually in a private medical practice, the patient's personal autonomy is paramount; however, in public health, this is not the case. In public health, the population's health and wellbeing are often prioritised over an individual's personal autonomy.

[162] Peter G Smith "Concepts of herd protection and immunity" (2010) 2(2) Procedia in Vaccinology 134 at 136.

1 Personal autonomy in medicine

In a private medical setting, the patient as an individual, is the primary focus. The personal autonomy of patients is well respected, and all medical practitioners must act in the best interest of the patient. One of the roles of medical practitioners is to educate patients on the relevant medical treatment so that patients can make informed decisions. When patients are offered options, it is up to them to choose what they want to do. Medical practitioners are never allowed to coerce patients into changing their choice.

Respect for personal autonomy should not be disregarded even if the patient's best interest does not attain the best outcome for their health. For example, Jehovah's Witness's patients often refuse blood transfusions because such procedures go against their beliefs by violating teachings of God. Even if this decision may lead to deterioration of a patient's health, a medical practitioner is taught to always prioritise the patient's autonomous choice. However, a patient's personal autonomy is not necessarily absolute in nature. If a patient's decision may harm others, it may be justifiable to place restrictions on personal autonomy. For example, if a patient is diagnosed with HIV, the medical practitioner must disclose the diagnosis to the medical officer of health.[163] Furthermore, after the diagnosis, the HIV patient must take reasonable precautions to prevent the transmission of HIV. Failure to take reasonable precaution or intentionally spreading HIV can lead to criminal prosecution.

2 Personal autonomy in public health

In contrast, the paramount consideration of public health is the aggregate well-being of the population. Public health promotes the health and welfare of the population as a whole by implementing policies that target health issues on both local and international level. Generally, public health policies aim to accomplish public health outcomes by influencing individual choices, thus, to promote better health in the entire community. To reflect this, many of the existing public health policies override personal autonomy for the sake of improving the population's health and wellbeing. For instance, mandatory vaccination is a public health policy that obliges the population to be vaccinated through the use of non-compliance penalties. Mandatory vaccination policies are not exactly mandatory as governments cannot physically force the population to receive the

[163] Health Act 1956, s 74(1)(b).

vaccine. However, mandatory vaccination policies undermine voluntariness because a person's choice may be influenced by non-compliance penalties (for example, where vaccines are required to enrol children into school or receive welfare payments) or a person is penalised for exercising their right to personal autonomy.

C New Zealand's Position on Personal Autonomy

New Zealand is considered as one of the most liberal and progressive countries in the world. New Zealand has a strong legislative and judicial history which upholds personal autonomy. This has been reflected in New Zealand's legislation and case law. Especially in recent years, the New Zealand Government has shown its strong support for the right to personal autonomy.

In 2020, a referendum was held to determine whether euthanasia should be legalised in New Zealand. The morality of euthanasia has been disputed because it is inconsistent with the right not to be deprived of life. Supporters of euthanasia often argue that humans should have the freedom to decide when and how they die; therefore, legalising euthanasia affirms personal autonomy. The result of the referendum showed that more than 65% of the voters were in favour of euthanasia. Accordingly, the New Zealand Parliament passed the End of Life choice Act.[164] The referendum verdict may be said to reflect that the majority of New Zealand places a high value on self-determination. Seeking assistance to die may undermine the right to not be deprived of life; however, this right has been outweighed in New Zealand by the right to personal autonomy.

New Zealand's approach to personal autonomy is also displayed through its support for abortion and the pro-choice movement. The right to abortion has growing an international recognition, but still faces a moral dilemma. Advocates for pro-choice argue that the embryo or fetus does not hold any rights and women's personal autonomy should be prioritised. Women should be entitled to decide what she can do and cannot do to her own body. In contrast, advocates for pro-life strongly support fetal rights. Until 2020, abortion was classified as a criminal act in New Zealand. In 2020, the New Zealand Parliament removed abortion from the Crimes Act 1961 and subsequently passed the Abortion Legislation Act 2020. Although abortion has been available in New Zealand for many years, the decriminalisation of abortion symbolised the increased acknowledgement and support for personal autonomy.

[164] Electoral Commission "Official referendum results released" (6 November 2020) <elections.nz>.

From the recent legislative developments in New Zealand, it is clear that the New Zealand Government values personal autonomy. This is also evident in New Zealand's vaccination policy. New Zealand's vaccination policy respects personal autonomy as it is an "opt-in" scheme with no mandatory vaccines. If the New Zealand Government were to impose mandatory COVID-19 vaccinations, it may not necessarily align with New Zealand's values and ideology. However, New Zealand already has existing public health measures that can be enforced in the event of a public health crisis such as the s 70 powers under the Health Act and the mandatory COVID-19 vaccination for the front-line workers under the COVID-19 Public Health Response (Vaccinations) Order. Therefore, a mandatory COVID-19 vaccination policy for the general public would not be an irregular approach to protect the health of the New Zealand population. The New Zealand Government has limited the right to personal autonomy in instances where it believe it is necessary to safeguard the nation from health risks of COVID-19. The precedence has already been set in New Zealand which is that overriding the right to personal autonomy can be justified if the New Zealand population's well-being is at stake and should be prioritised over individual interests.

E Paternalism - Government's Method to Override the Right to Personal Autonomy

1 Definition of paternalism

Public health laws and policies are implemented by governments through paternalism. Paternalism, as explained by Gerald Dworkin, is "the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interest or values of the person being coerced".[165] Governmental bodies have a long history of practising paternalism through introducing laws and policies to regulate the community's welfare. Every government, whether it is a liberal democracy or communism, is paternalistic to some degree. "Government as by a benign parent" is a quote that is often used to define paternalism, and the benevolent nature of the interference with personal autonomy.[166] Paternalistic government cares for an individual's interest, either by use of force or by necessity.[167] An example of paternalism are laws regulating

[165] Gerald Dworkin "Paternalism" in Joel Feinberg and Jules Coleman (eds) *Philosophy of Law* (6th ed, Wadsworth, California, 2000) at 271.
[166] S Blackburn *The Oxford Dictionary of Philosophy* (Oxford University Press, Oxford, 2008) at 270.
[167] Mark S Komrad "A defence of medical paternalism: maximising patients' autonomy" (1983) 9 J. Med. Ethics 38 at 39.

the sale of alcohol, tobacco and drug, seat-belt laws, and compulsory contribution to superannuation funds. Paternalistic policies are usually ubiquitous, and many are supported by the community; however, they also face criticisms and provoke heated and controversial debates. This is because of the association of paternalism with dogmatism and authoritarianism, although paternalism can be exercised through means other than use of threat and coercion.[168]

To simplify the notion of paternalism, Dworkin has stated that paternalism possesses the following elements[169]

(1) Limitation, interference or restriction of individual's liberty or personal autonomy;
(2) Without individual's consent;
(3) For the purpose of improving or promoting welfare, interest, values or goods.

Public health interventions, in particular a mandatory COVID-19 vaccination policy, is paternalistic in nature. This is because a mandatory COVID-19 vaccination policy:

(1) Limits, interferes and restricts individual's personal autonomy by requiring them to be vaccinated;
(2) Without consent;
(3) For the purpose of improving and promoting public health through reducing and preventing the spread of COVID-19.

2 Critiques of paternalism

The principal objection to paternalism derives from the notion of personal autonomy. Although paternalism is benevolent in nature, it has continuously received criticism because it interferes with people's ability to freely exercise personal autonomy. Some academics have argued that paternalistic interventions can negatively affect individuals to the point that it outweighs the benefits gained from such intervention.[170] Critics of paternalism have referred to a paternalistic government as a "nanny state" or "benign parent".[171] A paternalistic government infantilizes the population by restricting or taking away their decision-making powers. As a result, the population

[168] At 39.
[169] Gerald Dworkin "Defining Paternalism" in Thomas Schramme (ed) *New Perspectives on Paternalism and Health Care* (Springer, Switzerland, 2015) 17 at 21.
[170] Sarah Conly *Against Autonomy: Justifying Coercive Paternalism* (Cambridge University Press, Cambridge, 2012) at 47.
[171] Julian Le Grand and Bill New *Government Paternalism - Nanny State or Helpful Friend?* (Princeton University Press, Princeton, 2015) at 105.

loses its capability to freely exercise personal autonomy and must be told what to do.[172] Therefore, critics of paternalism often contend that paternalism is only justifiable with young children or the mentally challenged. In addition, critics of paternalism have claimed that paternalistic interventions can reduce people's motivations to change their behaviour.[173] As a result, the effectiveness of paternalistic intervention decreases.

John Stuart Mill, a renowned English Philosopher, was one of the most influential opponents of paternalism. Mill expressed his view towards paternalistic government by stating that people's "own good, either physical or moral, is not a sufficient warrant" to introduce paternalistic laws and policies.[174] Mill claimed that individuals are their own sovereign and has stated that "he, himself, is the final judge" in decision-making.[175] He argued that:[176]

> the individual is the person most interested in his own well-being … while with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else.

Therefore, Mill asserted that interfering with people's choices cannot bring about any benefit because no one else has more self-interest than themselves.

From Mill's perspective, individuals should not be coerced by paternalism because it is better for them to do so.[177] Mill valued the ability to choose our own destiny. Further, he argued that when the right to personal autonomy is interfered, the odds are that it interferes wrongly and in the wrong place.[178] He argued that "all errors which an individual is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good".[179] Accordingly, Mill believed that the freedom to make mistakes and to fail should be respected, and should not be taken away from individuals.

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[172] At 105.
[173] At 123.
[174] Charles W Eliot (ed), above n 158 at 26.
[175] Conly, above n 170, At 283.
[176] Charles W Eliot (ed), above n 158 at 283.
[177] At 282.
[178] At 290.
[179] At 283.

Mill also argued that paternalism impedes individual growth. Mill highly valued individuality and stated "a person whose desires and impulses are his own - are the expression of his own nature, as it has been modified and developed by his own culture - is said to have a character".[180] Personal autonomy cultivates intrinsic and moral values of individuals, and taking this away infringes the ability to develop into a better citizen. By freely exercising personal autonomy to think and express, Mill believed that individuals "become a noble and beautiful object of contemplation".[181] Thus, restricting the exercise of personal autonomy will limit the individual's chance of personal and social flourishing.

Immanuel Kant, one of the key Enlightenment philosophers shared a similar view to Mill. Like Mill, Kant claimed that paternalism fails to respect personal autonomy. Kant stated that paternalistic governments treat their citizens as immature children which deprived them from their own independence.[182] Kant also believed that paternalistic government is tyrannical in nature and stated that:[183]

> "If a government were founded on the principle of benevolence toward the people, as a *father's* toward his children - in other words, if it were a *paternalistic government* with the subjects, as minors, unable to tell what is truly beneficial or detrimental to them, obliged to wait for the head of state to judge what should constitute their happiness and be kind enough to desire it also - such a government would be the worst conceivable despotism"

Kant holds such an approach towards paternalism because paternalism constrains people's behaviour. Kant and his proponents provide a nonconsequentialist argument to most paternalistic measures by stating that the good done through paternalism would not outweigh the harm done to personal autonomy. [184]

Some anti-paternalism academics have claimed that the only form of paternalism that should be justified is soft paternalism.[185] Paternalism can be classified as "soft" or "hard". Soft paternalism

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[180] At 189.
[181] At 268.
[182] Edward Demenchonok "The Universal Concept of Human Rightsas a Regulative Principle Freedom versus Paternalism" (2009) 68(1) Am J Econ Sociol 273 at 283.
[183] Immanuel Kant *On the old saw: That may be right in theory but it won't work in practice* (E B Ashton (Translator) University of Pennsylvania Press, Philadelphia, 1974).
[184] Danny Scoccia "In defense of hard paternalism" (2008) 27(4) Law and Philosophy 351 at 354.
[185] Joel Feinberg, above n 155.

is a type of paternalism where only involuntary actions are restricted.[186] The underlying principle of soft paternalism is that only autonomous decisions that are "free from cognitive and volitional defects" should be valued.[187] In other words, soft paternalism only interferes with people's decisions to engage in a certain conduct that was not fully informed or adequately understood.[188] Soft paternalism is justified on the grounds that paternalistic interventions are there to protect people from non-consensual harm.[189] If an individual is fully informed and has an adequate understanding of his or her decision, then soft paternalism cannot override such decision. Thus, it can be said that soft paternalism respects personal autonomy to a degree. In a way, soft paternalism enhances an individual's decision-making by ensuring that an individual's decisions accurately reflect his or her intention.[190] On the contrary, hard paternalism can entirely restrict the exercise of personal autonomy. With hard paternalism, people's decisions can be overridden even if that decision was autonomous. Even if an individual is fully informed and adequately understands his or her decision, hard paternalism can interfere.[191] Critics of paternalism have noted that hard paternalism does not allow any personal autonomy to be exercised, therefore should never be justified at all.

Overall, the main objection to paternalism derives from the right to personal autonomy. As stated above, most critics of paternalism reject paternalism based on the grounds that free exercise of personal autonomy is one of the fundamental rights of humans. As stated by Mill, personal autonomy is often argued as an essential factor for personal growth and development. Most people are capable of making decisions for themselves and should not be infantilised by their government. In summary, paternalism undermines the right to personal autonomy because it restricts one's decision-making powers. Nevertheless, if exercise of personal autonomy is not controlled by governments, it would cause chaos in the community. Our community is builded upon the notion of society. Therefore, there are circumstances in which limitation imposed by paternalism on the right to personal autonomy is justified.

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[186] Thaddeus Mason Pope "Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg" (2005) 30(1) Okla. City. U.L. Rev. 121 at 122.
[187] Thaddeus Mason Pope, above n 186, at 123.
[188] At 122.
[189] At 123.
[190] At 123.
[191] At 123.

3 Justification for Paternalism - in the context of mandatory vaccine policies

Paternalistic laws and policies, such as a mandatory COVID-19 vaccination policy, restrict people's right to freely exercise its personal autonomy; therefore, it requires a sound ethical justification for governments to introduce them. When introducing paternalistic laws and policies, governments should be asking themselves the following question:[192]

> What are the appropriate limits of the state in a liberial society in regulating, restricting or prohibiting behaviours that lead to premature morbidity and mortality; [or] in shaping, molding or influencing the preferences and desires of its citizens?

In the context of mandatory vaccination policies, many academics and medical experts believe that people who can be vaccinated have a moral and ethical obligation to contribute to herd immunity. Vaccine advocates have asserted that protection of the population's health is a sound ethical justification for governments to restrict the right to personal autonomy. Their reasoning can be elaborating by exploring the following concepts:

1. The Harm Principle;
2. Paternalism as a result of democratic society;
3. The notion of broad autonomy;
4. The duty of easy rescue; and
5. The issue of "free riders".

(a) Harm principle

Governments and its agents often rely on the harm principle to justify mandatory vaccination policies. The harm principle was set forth by John Stuart Mill. Although Mill rejected the idea of paternalism, he stated that coercive actions by governments may be justifiable if people's choices placed harm on others[193]

> that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

[192] R Bayer "Ethics of health promotion and disease prevention" in B Jennings, J Kahn, A Mastroianni, and LS Parker (eds) *Ethics and Public Health: Model Curriculum* (Association of Schools of Public Health, Washington DC, 2003) 147 at 147.
[193] John Stuart Mill *On Liberty* (Andrews UK, 2011) at 26.

Mill explains that personal autonomy can only be restricted if exercising that personal autonomy would harm others in the community. Similar to Mill, Kant also believed that paternalism was justified if it was practised to prevent harm to others who are unaware of impending danger.[194] Kant stated that:[195]

> As soon as any part of a person's conduct prejudicially affects the interest of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion.

Accordingly, mandatory vaccination policies are implemented on the basis that vaccines protect both individuals and others in the community. Unvaccinated people indirectly impose health risks to the wider community by increasing the risk of transmission and impeding the realisation of herd immunity. Although the direct source of harm is the virus, unvaccinated people are the "essential link in the chain of causation" between the virus and an infection.[196] Douglas Diekema, an expert in bioethics, refers to the law of negligence to emphasise this "essential link in the chain of causation". He states that the law of negligence "recognises that persons should be accountable for their decisions and actions when those decisions and actions unreasonably place others in harm's way".[197] By following the law of negligence, if a vulnerable member of the community who cannot be vaccinated becomes ill as a result of contracting an infectious disease from an unvaccinated person who is vaccine hesitant, that vulnerable person in the community has been harmed unfairly.[198] Therefore, people who refuse to receive vaccines based on their own personal beliefs are negligently harming others in the community.

The challenge with Mill's harm principle is determining what constitutes "harm". Many academics have had difficulties deciphering what harm means. Mill himself defined harm as an action that is injurious or sets back other's interests. For example, he has stated:[199]

> As soon as any part of a person's conduct prejudicially affects the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion.

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[194] Lindsay J Thompson "Paternalism" Encyclopedia Britannia (23 December 2013) <www.britannia.com>.
[195] John Stuart Mill, above n 193 at 281 - 282.
[196] Douglas Diekema "Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability" (2009) 107 Mich. L. Rev. 90 at 93.
[197] At 94.
[198] At 94.
[199] John Stuart Mill, above n 193, at 282.

In the context of COVID-19, the threat of harm is substantial. The fatality rate of COVID-19 ranges from 1 to 3% depending on the country.[200] Compared to the fatality rate of seasonal flu, which is 0.1 to 0.2 %, the chances of death from contracting COVID-19 is too high to risk not getting the vaccine. It is impossible to accurately depict the amount of harm imposed on others by not vaccinating. However, we can use the indirect consequence of increased cases, and the current known mortality rate of COVID-19 as a close reference point to understand the possible negatives of not vaccinating. Harm caused by not vaccinating against COVID-19 therefore constitutes a harm.

(b) Paternalism as a result of democracy

Paternalism can also be justified on the basis that it reflects the results of an institutionalised democratic system.[201] A nation governed under a system of democracy is formed by the population voting for and against representatives for its nation. Democracy respects personal autonomy in a way that people are given opportunities to vote for and against representatives that are delegated powers to formulate and introduce the laws and policies.[202] In a liberal democracy, people can "shape the content of the rules and regulations that they consider legitimate" by participating in elections.[203] The right to personal autonomy has been respected by participating in a democratic process; therefore, paternalistic measures implemented by liberal democracies should be justified provided that such measures do not undermine the core values of a democratic society.[204] Nevertheless, It is important to acknowledge that everyone's demands cannot be met in a democratic process because everyone has differing opinions and preferences and will not vote for and against the same representative.

(c) The notion of broad autonomy

It can be argued that although paternalism may interfere with people's choices, it does not actually limit or restrict their personal autonomy. David Archard argued that personal autonomy should be

[200] Hannah Ritchie and others "Mortality Risk of COVID-19" Our World in Data (24 May 2021) <ourworldindata.org>.
[201] Stephen Holland "Public Health Paternalism - A Response to Nys" (2009) 2(3) Public Health Ethics 285 at 288.
[202] At 288.
[203] Thomas R. V. Nys "Paternalism in Public Health Care" (2008) 1(1) Public Health Ethics 64 at 69.
[204] At 288.

assessed in "the context of major life-affecting choices".[205] He claims that autonomy should not be evaluated based on a one-off choice.[206] Thomas Nys also puts forward a similar argument in his work "*Paternalism in Public Health Care*". He explained that the "conceptual waters surrounding autonomy may well be even deeper, darker, and colder than the ones surrounding paternalism'.[207] To clarify, Ny believes that paternalistic intervention by governments do not undermine the core values that formulate people's personal autonomy. To explain this notion, Ny describes the concept of broad autonomy. Broad autonomy is a way of thinking that autonomy is reflected in one's way of life.[208] To perceive one's autonomy, its lifestyle should be appraised as a whole.[209] Ny claimed that autonomy should be assessed over a long period of time, rather than a one-off event.[210] To illustrate the idea of broad autonomy, Ny uses an example of getting a cotton-swab in his writing:[211]

> a simple mouth swab … does not prevent you from making important life choices. Having a cotton-tip in your mouth for a only few seconds, even if this happens without your approval, does not prevent you from being a father/Muslim/lawyer/adventurer.

Ny further explains that paternalism is motivated by respect for personal autonomy and is benevolent in nature; therefore, it is justified. He argues that governments implement paternalistic measures because they care about their citizen's autonomy. In Nys' eyes, being healthy is a precondition of exercising personal autonomy to its fullest.[212] He states that "to fail to respect your health in such a basic way, is to fail to respect this human ability, the gift of autonomy"'.[213] Therefore, Ny states that public health measures implemented by governments are justified because it promotes personal autonomy.

Following the arguments put forward by Archard and Ny, it is arguable that receiving a COVID-19 vaccination will not change who you are as a person. A mandatory COVID-19 vaccination

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[205] D Archard, Thomas R.V. Nys and others "Informed Consent and the Grounds of Autonomy" in Y Denier, Thomas R.V. Nys and T Vandevelde (eds) *Autonomy and Paternalism, Reflections of the Theory and Practice of Health Care* (Peeters Publishers, Leuven, 2007) 113.
[206] D Archard, Thomas R. V. Nys, above n 205.
[207] Thomas R. V. Nys, above n 203, at 66.
[208] At 67.
[209] At 67.
[210] At 67.
[211] At 67.
[212] Stephen Holland, above n 201, at 287.
[213] Thomas R. V. Nys, above n 203, at 68.

policy may restrict the population's choices but does not in fact damage the core value of personal autonomy.[214] As stated previously, being vaccinated does not prevent you from becoming who you want to become. In fact, mandatory COVID-19 vaccination policies preserve personal autonomy in a way that shields people from contracting COVID-19. The consequences arising from contracting COVID-19 is a significant risk to health; therefore, the COVID-19 vaccination would act as a shield so that individuals can stay healthy and exercise personal autonomy to its potential.

(d) Duty of easy rescue

Further, vaccination advocates argue that people should be vaccinated because everyone is subject to the moral duty of easy rescue. According to the moral duty of easy rescue, if a person can prevent a serious harm or danger to another with minimal cost, then that person has an obligation to do so.[215] A famous example of the moral duty of easy rescue is provided by Peter Singer.[216] Singer wrote in his work, *Famine, Affluence, and Morality* that if he walked past a shallow pond and saw a child drowning in it, he would jump in to pull the child out.[217] His clothes may get muddy and dirty, but this is insignificant while the death of a child would not be.[218]

Being vaccinated against an infectious disease is comparable to getting one's clothes muddy and dirty from trying to save a drowning child. By getting vaccinated, herd immunity can be achieved, and the spread of COVID-19 can be reduced or potentially eradicated. If everyone makes a sacrifice and gets vaccinated against COVID-19, the benefit gained is significant. However, there are people who have experienced adverse reactions from receiving the COVID-19 vaccination. This means that COVID-19 vaccinations cannot be considered as a minimal cost to reduce or eradicate the virus. The on-going issue with vaccinations is that individuals must take a risk of experiencing adverse reactions. Nevertheless, the risk of serious harm or death from vaccinations are extremely small. In countries where there are active COVID-19 cases, the risk of contracting COVID-19 and developing debilitating symptoms is much higher than the risk associated with receiving a COVID-19 vaccination. For example, the Australian Government estimated that for

[214] Thomas R. V. Nys, above n 203, at 67.
[215] Tina Rulli and Joseph Millum *Rescuing the duty to rescue* (2016) 42 Med Ethics 260 at 260.
[216] Peter Singer *Famine, Affluence, and Morality* (1972) 1(3) Philos. Public Aff. 229 at 231.
[217] At 231.
[218] At 231.

every 100,000 COVID-19 vaccines received in the age band 80+, there would be approximately 2 patients with blood clots but would prevent 6 deaths, 1 ICU admissions and 11 hospitalisations during the low COVID-19 exposure period (i.e. 29 infections per 100,000 people during the course of 16 weeks).[219] During the medium exposure period (i.e. 275 infections per 100,000 people during the course of 16 weeks), the number of patients experiencing blood clots stayed consistent but it was estimated that the COVID-19 vaccination would prevent 183 deaths, 5 ICU admissions and 260 hospitalisations.[220] This shows that the benefits gained from receiving COVID-19 vaccinations greatly outweigh the risk of adverse reactions and side effects (such as developing blood clots). On top of this, if COVID-19 vaccines were administered to a sufficient portion of a given population, governments would no longer have to impose restrictive measures such as lockdowns to mitigate the health risks of COVID-19. This would also reduce the respective nation's financial burden. Overall, when the benefits and risks of COVID-19 vaccination are weighed against each other, the cost of receiving COVID-19 vaccine is relatively small to avoid the potential consequences arising from the virus such as death.

(e) The issue of free riders

Herd immunity faces an issue of free riders. In economic theory, free riders refer to people who enjoy the benefits of a public good without contributing their share of the cost.[221] For example, students who do not contribute to a group project but still receive marks are considered free riders, as they are benefiting from other student's efforts. Free riders are generally seen as morally wrong because it is unfair. H.L.A. Hart explains his arguments against free riders below:[222]

> When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.

Herd immunity is a public good because it is both non-exclusive and non-rivalrous, indicating that it is available for everyone equally, without diminishing the quality of another's protection.[223] This

[219] Australian Government *Weighing up the potential benefits against risk of harm from COVID-19 Vaccine AstraZeneca* (18 June 2021) at 4.
[220] At 5.
[221] R Hardin "The Free Rider Problem" Stanford Encyclopedia of Philosophy (13 October 2020) <plato.stanford.edu>.
[222] H. L. A. Hart "Are There any Natural Rights?" (1955) 64 Philos. Rev. 175 at 185.
[223] Yoko Ibuka and others "Free-Riding Behaviour in Vaccination Decisions: An Experimental Study" (2014) 9(1) PLoS One 1 at 1.

means that vaccine hesitant people can choose not to contribute to herd immunity while enjoying the benefit of being protected from infectious diseases. At the same time, vaccine hesitant people cause harm to others in the community by having a higher chance of contracting infectious diseases and increasing the likelihood of disease transmission. Therefore, vaccine hesitant people are worse compared to an ordinary free rider because they benefit from what they have not contributed towards, while simultaneously inducing harm upon the community.

4 Discussion

Governments often seek to resolve public health crises by introducing public health policies. Public health policies can be coercive to influence people to make decisions that are beneficial to the community's overall well-being. The implications of imposing a mandatory COVID-19 vaccination policy are that it is a public health intervention that requires people to inject chemical substances into their body. A mandatory COVID-19 vaccination policy is a form of paternalism and conflicts with the right to personal autonomy. Decisions regarding whether to be vaccinated are highly personal and many people believe that governments should not be allowed to coerce individuals to undergo such medical treatment. However, it is arguable that receiving a COVID-19 vaccination does not undermine personal autonomy. As Ny stated, a simple one-off event should not be used to dictate a person's life. A mandatory COVID-19 vaccination policy may restrict people's choices but does not damage people's core value of personal autonomy.

The issue with public health policies, such as a mandatory COVID-19 vaccination, is that it is paternalistic in nature. There is a conflict between promoting public health and the right to personal autonomy. However, drawing conclusions from the above presented theories, it is arguable that the right to personal autonomy should not be absolute. Instead, the right to personal autonomy should be thought of as a gradient. Usually, exercise of personal autonomy is a right that everybody is entitled to. However, if exercise of personal autonomy creates risk of harm or causes harm to others, the right to personal autonomy turns into a privilege from a right. As the risk of harm or degree of harm increases, exercise of personal autonomy slowly turns from a right to a privilege. Accordingly, personal autonomy should not be exercised at the cost of harming others.

As discussed previously, COVID-19 is a virus that can cause debilitating symptoms and even lead to death. People who are not vaccinated against COVID-19 will have an increased chance of contracting and spreading the virus to others around them. Unvaccinated individuals create harm to themselves and their surrounding community, especially to the vulnerable members of the population by potentially being a part of chain of infection. Following the harm principle, it is therefore arguable that everyone who can receive the COVID-19 vaccination should be subject to a mandatory COVID-19 vaccination policy in order to shield the population from health risks arising from COVID-19. Although one may argue that COVID-19 vaccinations come with the risk of developing adverse reactions, such risk is smaller when compared with the risk of contracting COVID-19 (which can cause debilitating symptoms and potentially lead to death).

Nevertheless, governments cannot simply impose a mandatory COVID-19 vaccination by passing legislation. In liberal democracies, governments must balance public health with the right to personal autonomy. Governments must have a justifiable ground before they can limit their population's right to personal autonomy.

V Balancing Public Health and Personal Autonomy in Liberal Democracies

All liberal democracies must find a way to balance public health and the right to personal autonomy. This balancing test is what sets liberal democracies apart from communist states such as China where the government decides on what is best for the people as a whole and implement that through force if need be. It is the respect for individual rights that liberal democracies are founded upon. However, complete freedom of individual rights undermines the notion of society. Nonetheless it is not easy to balance, and each country has their own methods of weighing interests of public health against the right to personal autonomy. In the context of vaccinations, governments implement different vaccination programmes to meet the social needs of their country. Therefore, there exists a spectrum of vaccination policies around the globe.

A New Zealand

In New Zealand, the balancing of two conflicting rights is conducted through the provisions of the New Zealand Bill of Rights Act. Therefore, if the New Zealand Government wishes to introduce

any public health laws and policies that interfere with the right to personal autonomy, it must first refer to the New Zealand Bill of Rights Act.

1 Right to refuse treatment

The New Zealand Bill of Rights Act protects and affirms the New Zealand population's civil and political rights. Personal autonomy is not explicitly protected by the New Zealand Bill of Rights Act, but is indirectly promoted through rights and freedoms such as the:

- Freedom of thought, conscience, and religion;
- Freedom of expression;
- Manifestation of religion and belief;
- Freedom of peaceful assembly;
- Freedom of association; and
- Freedom of movement.

The most relevant provision in the New Zealand Bill of Rights Act in relation to public health is the right to refuse medical treatment. In New Zealand, it is well recognised that medical treatment requires a patient's informed consent. This is affirmed under s 11 of the New Zealand Bill of Rights Act whereby everyone has the right to refuse to undergo any medical treatment.[224] The s 11 right protects bodily integrity, but also promotes personal autonomy through the enjoyment of the right of consent and refusal.

The origins of the s 11 right derive from atrocities conducted in the German Reich.[225] The right to refuse medical treatment safeguards citizens from being subject to any cruelty or violence from governmental bodies. Today, most relationships with medical professions are private, where patients are free to make informed decisions about their bodies and health. Such decisions are a person's free choice. It is therefore important to understand that the application of s 11 is limited to state-order medical treatments, such as mandatory vaccinations. This is also emphasised in s 3 of the New Zealand Bill of Rights Act, where it states that the New Zealand Bill of Rights Act only applies to acts done by "the legislative, executive, or judicial branches of the Government of

[224] New Zealand Bill of Rights Act 1990, s 11.

[225] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [11.6.1].

New Zealand" or "any person or body in the performance of any public function, power, or duty" imposed by the law".[226]

Section 11 of the New Zealand Bill of Rights is unique in a sense that it protects people from receiving unwanted medical treatment. The right to refuse medical treatment is a right that is generally not included in most jurisdictions' laws.[227] Instead, the right to health is often affirmed. The only other countries which explicitly protect the right to refuse medical treatment in their constitution are Fiji, Turkey, and South Africa.[228] The right to refuse medical treatment creates implications when governments want to implement public health policies. When introducing new public health policies, governments must ensure that they do not breach the right to refuse medical treatment or have a justified ground for derogating from such right. Likewise, for a mandatory COVID-19 vaccination policy to be enforced, the New Zealand Government must assure that they do not contravene with the s 11 right or have justified grounds to do so.

2 Meaning of medical treatment

The meaning of the terms "medical" and "treatment" are broad. The White Paper commentary to the draft New Zealand Bill of Rights stated that the term "medical" should be used in a comprehensive sense and includes surgical, psychiatric, dental, psychological, and other similar types of treatment.[229] In the *Concise Oxford English Dictionary,* "Medical" is defined as "relating to the science or practice of medicine".[230] Likewise, the term "treatment" is defined as "the action or way of treating a patient or a condition" and "management and care to prevent, cure, ameliorate or slow progression of a medical condition".[231]

As discussed above, vaccination involves injecting substances into the human body to create antibodies for infectious diseases. Although vaccines do not necessarily 'treat', it improves our health and wellbeing by decreasing the risk of contracting infectious diseases. Vaccinations fall

[226] New Zealand Bill of Rights Act 1990, s 3.
[227] Andrew Butler and Petra Butler, above n 225, at [11.3.1].
[228] At [11.3.1].
[229] Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984 - 1985] I AJHR A6 at [10.167].
[230] Judy Pearsall (ed) *Concise Oxford English Dictionary* (10th ed rev, Oxford University Press, Oxford, 2002) at 1527.
[231] Merriam-Webster "Treatment" <www.merriam-webster.com>.

under the scope of medical treatment; therefore, section 11 of the New Zealand Bill of Rights Act may prevent the New Zealand Government from enacting mandatory vaccination laws.

3 Justified limitations

It is crucial to understand that not all rights and freedoms affirmed in the New Zealand Bill of Rights Act are always absolute. It has been stressed by the New Zealand courts that "individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of the community." [232] Therefore, if the New Zealand Government wishes to introduce any paternalistic laws and policies, they may be permitted to do so by following the s 5 provision.

Section 5 of the New Zealand Bill of Rights Act reads:[233]

> Justified limitations - subject to section 4 of this Bill of Rights, 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.

The purpose of s 5 is to create a culture of justification and to establish a standard of justification.[234] To put simply, limitations placed upon rights must be "reasonable". To be a reasonable limitation, it must be capable of being "demonstrably justified" in a "free and democratic society".

The importance of s 5 is emphasised by s 7 of the New Zealand Bill of Rights Act. Section 7 provides that the Attorney-General has the duty to inform the Parliament of any apparent inconsistencies between the New Zealand Bill of Rights Act and the proposed legislation. As the Parliament is the sovereign and can enact any legislation as it sees fit, the s 7 report acts as a check on power. The s 7 report places significant focus on the Bill of Rights inconsistencies and encourages the lawmakers to consider whether the proposed legislation can avoid any inconsistencies.[235] The s 7 report communicates any Bill of Rights inconsistencies to the Parliament and ensures that it is properly addressed.

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[232] *R v B* [1995] 2 NZLR 172 (CA) at 182 per Richardson J; *Police v Curran* [1992] 3 NZLR 260 (CA) at 277 per Richardson J, at 286 per Hardie Boys J; updated in *West v Official Assignee* [2007] NZCA 523 at [40].

[233] New Zealand Bill of Rights Act 1990, s 5.

[234] Andrew Butler and Petra Butler, above n 225 at [6.4.1].

[235] *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at 63.

4 Determining what is justified limitation

The determination of what constitutes a justified limitation requires a complex analysis by the courts. The justified limitation is not clearly defined in the New Zealand Bill of Rights Act but is required to be:

1. Reasonable; and
2. Demonstrably justified in a free and democratic society.

Hansen v R is the leading case which contains a test to determine what may constitute a justified limitation under s 5 of the New Zealand Bill of Rights Act. Tipping J considered all the fundamental elements of s 5 and summarised the application of s 5:[236]

> Step 1. Ascertain Parliament's intended meaning
>
> Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right of freedom
>
> Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit term of s 5.
>
> Step 4. If the inconsistency is a justified limit, the apparent inconsistency is legitimised, and Parliament's intended meaning prevails.
>
> Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
>
> Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates the Parliament's intended meaning be adopted.

Alongside the summarised application of s 5, Tipping J also outlined a methodology application of s 5, also commonly known as the Oakes Test.[237] The Oakes test is derived from the decision of the Supreme Court of Canada in *R v Oakes* which was first adopted in the case of *Ministry of Transport v Noort*.[238] The application of *Oakes* summarised in *Hansen v R is* as follows:[239]

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[236] *Hansen v R* [2007] 3 NZLR1, [2007] NZSC 7 At [92].
[237] at [103].
[238] *R v Oakes* [1986] 1 SCR 103; *Ministry of Transport v Noort* (1992) 8 CRNZ 114.
[239] *Hansen v R,* above n 236, at [104].

(a) Does the limiting measure serve a purpose sufficiently important to justify the curtailment of the right or freedom?

(b)

(i) Is the limiting measure rationally connected with its purpose?

(ii) Does the limiting measure impair the right or freedom no more than that is reasonably necessary for sufficient achievement of its purpose?

(iii) Is the limit in due proportion to the importance of the objective?

Furthermore, for a limitation to be justified, the limitation must be prescribed by law. McGrath J in *Hansen v R* elaborates this and states:[240]

> To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation, or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

5 New Health New Zealand Incorporated v South Taranaki District Council

The right to refuse medical treatment is explored in *New Health New Zealand Incorporated v South Taranaki District Council*. In this case, the New Zealand Supreme Court considered whether the fluoridation of public drinking water supply engages s 11 of the New Zealand Bill of Rights Act. If s 11 of the New Zealand Bill of Rights Act was engaged, the Court was to determine whether the fluoridation of public drinking water supply was a limitation that is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society, as per s 5 of the New Zealand Bill of Rights Act.[241]

(a) Was fluoridation of public water supply medical treatment?

The purpose of the public health intervention by the South Taranaki District Council ("the Council") was to reduce tooth decay through promoting the mineralisation of tooth enamel.[242] New Health New Zealand Incorporated ("New Health") argued that the fluoridation of water amounts to medical treatment as it adds pharmacologically active substances into drinking water.[243] New

[240] At [180].
[241] *New Health New Zealand Inc v South Taranaki District Council* [2018] 1 NZLR 948, [2018] NZSC 60 at [9]..
[242] At [10].
[243] At [60].

Health contended that the residents in the affected area did not have any reasonable or practical alternative sources of drinking water; therefore could not refuse to undergo this form of medical treatment.[244] On such grounds, New Health claimed that the Council breached the right to refuse to undergo medical treatment under s 11.

The Court agreed with New Health, finding that fluoridation of public drinking water supply is a medical treatment because it involves addition of pharmacologically active substances for the purpose of reducing or treating tooth decay .[245] In the Court's view, s 11 of the New Zealand Bill of Rights Act applied to any compulsory treatment, whether that was "provided in the course of a practitioner/patient relationship or as a public health measure".[246] The Courts also noted that it cannot determine issues of scientific or technical opinion, but has the power to acknowledge the benefits associated with fluoridation which is recognised by major health organisations such as the WHO and the Ministry of Health.[247]

(b) Is fluoridation of drinking water a justified limitation on the s 11 right?

To determine whether the fluoridation of drinking water by the Council is a justified limitation under s 5, the Court utilised the *Oakes* adopted by Tipping J in *R v Hansen* which is:[248]

(a) Does the limiting measure serve a purpose sufficiently important to justify the curtailment of the right or freedom?

(b)

(i) Is the limiting measure rationally connected with its purpose?

(ii) Does the limiting measure impair the right or freedom no more than that is reasonably necessary for sufficient achievement of its purpose?

(iii) Is the limit in due proportion to the importance of the objective?

After analysing the facts with the *Oakes test*, the Court found that the public health intervention implemented by the South Taranaki District Council was not constrained by s 11 of the New Zealand Bill of Rights Act.[249]

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[244] At [99].
[245] At [99].
[246] At [97].
[247] At [121].
[248] *Hansen v R,* above n 236, at [104].
[249] *New Health New Zealand Inc*, above n 241, at [145].

(c) Is the purpose sufficiently important?

New Health's arguments were that both the High Court and the Court of Appeal failed to acknowledge the importance of personal autonomy and bodily integrity affirmed by s 11 of the New Zealand Bill of Rights Act.[250] It was their view that s 11 right should be limited only where "the failure to treat put others at risk", and tooth decay does not meet such that threshold.[251] Despite New Health's arguments, the Court provided that preventing and reducing dental decay is sufficiently important to justify a limitation on the s 11 right.[252] The Court stated that fluoridation is a minor limitation of the s 11 right, and the conclusion drawn by the lower court was not inadequate recognition of the values of individual autonomy.[253]

(d) Does the limiting measure rationally connect with its purpose?

Both the High Court and the Court of Appeal found that there was a rational connection between fluoridation of water and prevention of tooth decay.[254] New Health argued against these findings, claiming that the evidence which these courts relied upon was weak and exaggerated the significance of reduction of tooth decay from fluoride. Nevertheless, the Court agreed with the Court of Appeal and concluded that there is a rational connection between fluoridation of public drinking water supply and the prevention of tooth decay. [255]

(e) Does the limiting measure impair the rights or freedom no more than is reasonably necessary?

Generally, when deciding whether the limitation is no more than reasonably necessary, the New Zealand courts will assess "whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness".[256] Although alternative methods of preventing tooth decay were available (such as good dental hygiene practices, fluoridation of toothpaste, food and drinks) the Court held it to have limited efficacy as it would depend on the individual's willingness to accept these measures and participate in them.[257]

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[250] At [125].
[251] At [125].
[252] At [126].
[253] At [126].
[254] At [127].
[255] At [131].
[256] *Hansen v R*, above n 236, at [217].
[257] *New Health New Zealand Inc*, above n 247, at [134].

Accordingly, the Court held that fluoridation of public drinking water supply impaired the s 11 right no more than reasonably necessary.

(f) Is the limit in due proportion to the importance of the objective?

In New Zealand, fluoride is naturally present in public drinking water supply at approximately around the levels of 0.3 ppm.[258] The addition of fluoride by the Council was therefore not an introduction of foreign substances, but rather a simple addition of what was already present in public drinking water supply. The fluoride level, after the fluoridation by the Council, was approximately 0.7 ppm to 1 ppm, which is considerably lower than the maximum acceptable level of 1.5 ppm.[259] From this, the Court concluded that the fluoridation by the Council was a minimal intrusion on the s 11 right.[260] The Court stated that this can be compared with hypothetical situations where antibiotics, tranquilizer or contraceptives are added to drinking water, which would amount to a serious breach of s 11 right.[261]

6 Key learnings from New Health New Zealand Incorporated v South Taranaki District Council

In *New Health New Zealand Incorporated v South Taranaki District Council*, the Court ruled that fluoridation of public drinking water supply is a justified limitation on the s 11 right affirmed in the New Zealand Bill of Rights. The Court held that preventing dental decay is sufficiently important to justify such limitation. However, the Court does not discuss in detail or provide any analysis as to why preventing dental decays are sufficiently important. The Court recognised prevention of dental decay as sufficiently important despite the fact that they are easily preventable by practising good oral health. Dental decay is not a condition that can only be treated through fluoride. Further, dental decay is not generally transmissible from person to person and dental treatment is offered for free in New Zealand for children under 18. Therefore, it is interesting as to why the Court allowed limitation of rights for a condition that is easily preventable, generally non-transmittable and treatable. Since dental decay does not create immediate threat to public health, the Court could have favoured the approach of New Health and advanced free exercise of personal autonomy. Instead, improvement of oral health in the population of South Taranaki was

[258] At [135].
[259] At [135].
[260] At [135].
[261] At [135].

prioritised. It can be presumed that the Court took this approach because the slight increases in fluoride levels in public drinking water supply do not cause significant side effects compared to other chemical or pharmaceutical substances. Accordingly, the decision of *New Health New Zealand Incorporated* showcased that the right to personal autonomy can be restricted for the sake of improving public health, even if the threat to public health is not imminent or significant.

In terms of evidence, the Court considered two factors. Firstly, the Court considered alternative methods to fluoridation of drinking water to determine whether there were any other ways of reducing dental decay. In doing so, the Court reviewed the efficacy of each alternative method including use of fluoridated toothpaste, reduction in consumption of sugary foods and practice of good oral health.[262] Instead of supporting these alternatives (which does not interfere with s 11 right), the Court favoured fluoridation of public drinking water supply. In the Court's view, efficacy was of more importance than placing less limitation on the right to personal autonomy. Secondly, to determine whether the fluoridation of drinking water should be justified, the Court relied heavily on medical evidence. This highlights the importance of medical evidence in cases regarding public health policy. Accordingly, if the New Zealand Government wishes to introduce a mandatory COVID-19 vaccination policy, they should consider the efficacy of alternative methods and reliable medical evidence.

Ultimately, the fluoridation of public drinking water supply by the Council was recognised as a limit that is demonstrably justified in a free and democratic society for the purposes of s 5 of the New Zealand Bill of Rights Act.[263] The appeal by New Health was dismissed. In summary, the case of *New Health New Zealand Incorporated v South Taranaki District Council* displayed that personal autonomy can be restricted by public health laws and policies in New Zealand as long as it is a justified limitation as per s 5 of the New Zealand Bill of Rights Act. The case sets a precedent and emphasises the fact that the right to personal autonomy can be limited for the benefit of public health. Therefore, in theory, the New Zealand Government may introduce a mandatory COVID-19 vaccination policy. If the New Zealand Government wishes to introduce a mandatory COVID-19 vaccination policy, it is recommended that it follows the decision of *New Health New Zealand*

[262] At [134].
[263] At [144].

Incorporated for guidance. Accordingly, the New Zealand Government must ensure that a mandatory COVID-19 vaccination policy in New Zealand:

1. Serve a purpose sufficiently important to justify the curtailment of the right or freedom;
2. Be rationally connected with its purpose;
3. Impair the right or freedom no more than that is reasonably necessary for sufficient achievement of its purpose; and
4. Be in due proportion to the importance of the objective.

7 Discussion

This paper argues that the Oakes test can be satisfied in the context of a mandatory COVID-19 vaccination policy, thus, is a justified limitation of the New Zealand population's rights.

(a) Does a mandatory COVID-19 vaccination policy that serves a purpose sufficiently important to justify the curtailment of the right or freedom?

As this paper has discussed earlier, the consequences arising from the COVID-19 pandemic are significant and detrimental on a domestic and international level. The purpose of a mandatory COVID-19 vaccination policy is to achieve herd immunity against COVID-19 to mitigate the risks and harms and costs arising from the virus. If herd immunity is achieved within a community, COVID-19 is reduced to the point that no other control or containment measures will be required to prevent the spread. Accordingly, the purpose of achieving herd immunity is sufficiently important because it protects the New Zealand population as well as the New Zealand economy from COVID-19 and its negative effects.

(b) Is a mandatory COVID-19 vaccination connected with its purpose of achieving herd immunity?

It has been clinically proven that COVID-19 vaccinations can prevent the spread of the virus, thus a mandatory COVID-19 vaccination policy is connected with the purpose of achieving herd immunity. Further, a certain proportion (approximately 84%) of a given population needs to be immunised for herd immunity to be reached. Therefore, mandating the COVID-19 vaccination through use of non-compliance measures to increase vaccination coverage rates is connected with the purpose of achieving herd immunity.

(c) Does a mandatory COVID-19 vaccination policy impair the right or freedom no more than that is reasonably necessary for sufficient achievement of its purpose

Because a mandatory COVID-19 vaccination policy cannot physically force people to receive vaccines, it is arguable that it does not impair individuals' right or freedom more than it is reasonably necessary. Further, there are other alternative methods to prevent the spread of COVID-19 (such as lockdowns and border closures) but they are not as efficient or effective as vaccinations.

(d) Is a mandatory COVID-19 vaccination policy in due proportion to the importance of the objective, which is to achieve herd immunity?

Following the harm principle established by Mill, a mandatory COVID-19 vaccination policy should be considered as a limitation that is in due proportion to the purpose of achieving herd immunity. As this paper has discussed previously, the right to exercise personal autonomy turns into a privilege from a right if it causes harm upon others. The right to personal autonomy should not be considered as absolute if it is exercised at the cost of harming others. If COVID-19 vaccinations are not made mandatory in New Zealand, people who actively choose not to be vaccinated will increase the chances of COVID-19 transmission and create significant health risks (such as developing serious symptoms from COVID-19 and death) to everyone in their community. Limiting people's ability to choose whether to receive COVID-19 vaccines is therefore in due proportion to the purpose of achieving herd immunity. Accordingly, this paper argues that everyone who can receive vaccines (except for the medically compromised members of the community) should be subject to a mandatory COVID-19 vaccination in New Zealand.

B United States

In the US, the tension between public health and personal autonomy has existed for over two decades. The development of mandatory vaccination policies in the US began during the early 20th century. In 1901, a smallpox pandemic threatened the Massachusetts population's health. That year, 773 cases and 97 deaths were reported, and in 1902, 2,314 cases and 284 deaths were reported.[264] In response to the deadly epidemic, the Board of Health of the City of Cambridge in

[264] Wendy E Parmet, Richard A Goodman, and Amy Farber "Individual rights versus the public's health - 100 years after *Jacobson v Massachusetts*" (2005) 352 NEJM 652 at 653.

Massachusetts adopted a mandatory smallpox vaccination policy with the power invested by the Massachusetts law. Under the mandatory smallpox vaccination policy, all Massachusetts citizens were required to receive the smallpox vaccine. Although it was mandatory, people were never physically forced to receive the smallpox vaccine. People who refused to be vaccinated were subject to a non-compliance fine of $5, which is equivalent to $150 today.[265] Many saw the mandatory smallpox vaccination policy as a violation of the right to personal autonomy. In particular, a man named Henning Jacobson took his anti-vaccination and anti-State compulsion to court. This is how the landmark case of *Jacobson v Massachusetts* ("*Jacobson*") was established.[266]

Jacobson had always been vaccine hesitant. At the age of 6, Jacobson was vaccinated against smallpox, which he claims had resulted in great and extreme suffering.[267] After suffering a bad reaction, Jacobson concluded that he must be particularly sensitive to substances in vaccines. Jacobson believed that he and his family had a hereditary condition that caused their bodies to reject and respond badly to vaccinations. When the mandatory smallpox vaccination policy was introduced in Massachusetts, Jacobson refused to receive the smallpox vaccine and did not pay the non-compliance fine. Jacobson took the State of Massachusetts to court, claiming that imposing mandatory vaccinations is an invasion of his right to personal autonomy. In his view, the mandatory smallpox vaccination policy was oppressive and unreasonable in nature.[268] Jacobson argued that the mandatory smallpox vaccination policy introduced in Massachusetts was a violation of the 14th Amendment rights which prohibits the US Government from depriving any person of "life, liberty or property, without due process of law".[269] Jacobson's claim reached the US Supreme Court after being rejected by all the lower courts.

The decision of the US Supreme Court was delivered by Justice John Marshall Harlan. Ultimately, the Court found that the Massachusetts law did not violate the 14th Amendment rights and upheld

[265] Rene F. Najera "What the Supreme Court Has Said About Mandating Vaccines for School: *Jacobson v. Massachusetts*" The History of Vaccines (5 March 2019) <www.historyofvaccines.org>.
[266] *Jacobson v Massachusetts* 197 U.S. 11 (1905).
[267] Dave Roos "When the Supreme Court Ruled a Vaccine Could Be Mandatory" History (6 January 2021) <www.history.com> .
[268] *Jacobson*, above n 266, att 17.
[269] United States Constitution, amend XIV, § 2.

the exercise of police power to protect public health. The Court stated that the US Government has an authority to enforce mandatory vaccinations if mandatory vaccinations are necessary for the public health or the public safety.[270] Justice Harlan stated that:[271]

> There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subject to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Justice Harlan highlights that public health policies can be enforced when it is required for the safety of the population. However, Justice Harlan emphasises later in his judgment that police powers should be assessed and exercised according to "the necessity of the case" and should not go "beyond what was reasonably required for the safety of the public".[272]

Further, the Court held that the mandatory smallpox vaccination policy was not unreasonable or arbitrary as it did not "go beyond what was reasonably required for the safety of the public" .[273] Following the principles of self-defence, the Court commented that the "community has the right to protect itself against an epidemic of disease which threatens the safety of its members".[274] In addition, the Court found that the rights affirmed in the constitution is not absolute by stating the following:[275]

> The liberty secured by the constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.

Nevertheless, the Court accepted that they would interfere to "prevent wrong and oppression", if the mandatory smallpox vaccination policy was forced upon individuals with pre-existing health

[270] *Jacobson*, above n 266, at 27.
[271] At 29.
[272] At 28.
[273] At 28.
[274] At 27.
[275] At 26.

conditions which can cause adverse reactions.[276] This indicates that the US Government cannot exercise its powers in a way that unnecessarily and unreasonably restricts individual autonomy.[277] Justice Harlan emphasised that interference by the US Government cannot be "a plain, palpable invasion of rights".[278] The Court ruled that Jacobson was subject to the vaccination policy as he did not provide the Court with sound evidence of his condition.

Three years after the ruling of *Jacobson*, the Anti-Vaccination League of America was founded. As a result, the US experienced a surge in vaccine hesitancy.[279] However, the decision of *Jacobson* was reaffirmed in *Zucht v King*.[280] *Zucht v King* upheld that US schools can reject student's enrolment who have not received required vaccinations on the grounds that the US Government has the police power to enforce mandatory vaccination. Moreover, in *Prince v Massachusetts*, the Supreme Court of the United States relied on *Jacobson* and held that an individual cannot be exempt from mandatory vaccination policies from religious grounds.[281] The ruling of *Prince v Massachusetts* explicitly stated that the right to freely exercise religion "does not include the liberty to expose the community … to communicable disease or the latter to ill health or death".[282] Similarly, in *Brown v Stone*, the Supreme Court of Mississippi considered whether a child could be exempt from mandatory vaccination policies on the grounds based on religion.[283] In the Court's view, there was a legitimate public health interest in reducing and preventing infectious diseases and held that the risk of outbreak would become too high if religious exemptions were permitted.[284] To reflect this, all states in the US require children to be vaccinated before enrolling into a public school.

Overall, the US has not hesitated to override the population's personal autonomy for the sake of public health. The ruling of *Jacobson* has been affirmed repeatedly and is recognised as a "settled"

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[276] At 38 - 39.
[277] Lawrence O Gostin "*Jacobson v Massachusetts* at 100 Years: Police Power and Civil Liberties in Tension" (2005) 95(4) AJPH 576 at 579.
[278] *Jacobson*, above n 266, at 31.
[279] Karie Youngdahl "The Anti-Vaccination Society of America: Correspondence" The History of Vaccines (8 March 2012) <www.historyofvaccines.org>.
[280] *Zucht v King* 260 U.S. 174 (1922).
[281] *Prince v Massachusetts* 321 U.S. 158 (1944) at 166.
[282] At 166.
[283] *Brown v Stone* 378 So. 2d 218 (1979).
[284] At 223.

doctrine by the US courts.[285] Ultimately, the US courts have acknowledged that mandatory vaccination policies are within police powers and continue to stand by with that approach.

C England and Wales

The Vaccination Act 1853 ("Vaccination Act") required all children born after 1 August 1853 to receive the smallpox vaccination.[286] If parents failed to meet this requirement, fines were imposed for non-compliance. By the 1860s, around two-thirds of children born after 1 August 1853 were vaccinated against smallpox; however, the Vaccination Act was subject to a major anti-vaccination movement.[287] The legislation attracted a considerable amount of public opposition for interfering and intruding on personal autonomy, and subsequently sparked a large-scale demonstration. Politics were hugely influenced by the Vaccination Act because candidates were often selected according to their views on mandatory vaccination policies. [288]

The Vaccination Act received a significant amount of criticism. As a result, the Royal Commission on Vaccination decided that mandatory vaccination policies should include exception clauses for conscientious opposers.[289] The exemption clause only applied to "honestly opposed" objectors who must be distinguished from individuals who are merely lazy or indifferent to get their children vaccinated.[290] After the exemption clause was introduced, approximately 200,000 children were exempt from the smallpox vaccine. Surprisingly, the overall coverage rate increased.[291] Over the years, more and more exemptions were granted in England and Wales. As the smallpox disease died out, the smallpox vaccine became optional. Currently, there are no mandatory vaccinations in England and Wales. A number of politicians have voiced their support towards mandatory vaccinations, but there are no plans for such policies or regulations to be introduced in the near future.[292]

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[285] *Zucht,* above n 280, at 176.
[286] The Vaccination Act 1853 (UK).
[287] Daniel A Salmon and Others "Compulsory vaccination and conscientious or philosophical exemptions: past, present and future" (2006) 367 (9508) The Lancet (British edition) 436 at 436.
[288] At 438.
[289] At 437.
[290] At 437.
[291] At 437 - 438.
[292] Elizabeth Rough *UK Vaccination Policy* Briefing (House of Commons Library, Paper Number CBP 9076 21 January 2021) at 37.

One of the key public health legislations in England and Wales is the Public Health (Control of Disease) Act 1984 ("Public Health (Control of Disease) Act"). Section 45C(1) of the Public Health (Control of Disease) Act states:[293]

> The appropriate Minister may by regulation make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).

The Public Health (Control of Disease) Act explicitly prohibits inclusion of any provision in legislation that requires a person to undergo medical treatment.[294] With the introduction of the CoronaVirus Act 2020 in March 2020, this prohibition has now been extended to Scotland and Northern Ireland.[295] In May 2020, the Secretary of State for Health and Social Care, Matt Hancock, commented that there is no need for the COVID-19 vaccination to be mandatory in the UK. Hancock believes that even without a mandatory COVID-19 vaccination policy, the UK will have a very high coverage level because of the "obvious benefits to individuals and their families and their communities and indeed the whole nation".[296]

Ultimately, England and Wales have a very passive approach to achieving herd immunity. This may be because England and Wales have always prioritised personal autonomy after experiencing significant opposition towards mandatory vaccinations. A survey conducted by the Office for National Statistics showed that 91% of the adults have a positive response towards COVID-19 vaccines and only 9% of the adults answered as being vaccine hesitant.[297] Because England and Wales currently do not have high rates of vaccine hesitancy, the government have decided that it is not necessary to introduce a mandatory COVID-19 vaccination policy to achieve herd immunity. The government believes that the population of England and Wales do not need to be coerced by paternalism to receive the COVID-19 vaccine. On top of this, the government has placed high value on the right to personal autonomy by prohibiting any mandatory vaccination policy being

[293] Public Health (Control of Disease) Act 1984 (UK), s 45C(1).
[294] Section 45E (2).
[295] CoronaVirus Act 2020 (Scotland), s (3)(1).
[296] Alan McGuinness "Coronavirus: Health secretary doesn't think future COVID-19 vaccine will need to be made compulsory" Skynews (4 May 2020) <news.sky.com>.
[297]Office for National Statistics "Coronavirus and vaccine hesitancy, Great Britain: 13 January to 7 February 2021" (8 March 2021) <www.ons.gov.uk>.

introduced. Accordingly, England and Wales aim to reach herd immunity against COVID-19 by through voluntary vaccinations.

D European Court of Human Rights

The European Court of Human Rights has considered and balanced public health and the right to personal autonomy on a number of occasions. For example, In the case of *Solomakhin v Ukraine* ("*Solomakhin*"), the Court considered whether the mandatory vaccination policy in the Ukraine interferes with article 8 of the European Convention on Human Rights ("ECHR"), which protects the right to respect for private and family life.[298] The Court held that Ukraine's mandatory vaccination policy does interfere with private life but is necessary for the protection of public health.[299] The Court concluded that mandatory vaccinations are justified by the "public health considerations and necessity to control the spreading of infectious diseases".[300]

A more recent case regarding mandatory vaccination policies is the case of *Vavřička and Others v the Czech Republic* ("*Vavřička*") where the Court has provided a more in-depth analysis regarding the implication of ECHR on mandatory vaccine policies.[301] In Czech Republic, all children must be vaccinated against nine diseases. Children who are not vaccinated cannot be enrolled into a kindergarten and parents can be fined (with an exception for those who cannot be vaccinated for medical reasons). In *Vavřička*, the applicant contested that Czech Republic's mandatory vaccination policy violates article 8 of the ECHR because such public health intervention interferes with the right to respect for private life.[302]

Like *Solomakhin*, The Court acknowledged that the mandatory vaccination policy did interfere with the applicant's right to respect to private life. The Court assessed whether the interference should be considered as "necessary in a democratic society".[303] The Court stated that an interference will be considered as "necessary in a democratic society" if:[304]

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[298] *Solomakhin v Ukraine [2012] ECHR 451.*
[299] At 34 and 35.
[300] At 36.
[301] *Vavřička and Others v the Czech Republic* [2021] ECHR 116.
[302] At 160.
[303] At 273.
[304] At 273.

1. It answers a "pressing society need";
2. The reasons adduced by the national authorities to justify it are "relevant and sufficient"; and
3. It is proportionate to the legitimate aim pursued.

In the Court's view, a mandatory vaccination policy was implemented by the Czech Republic to answer a pressing societal need. Many medical authorities and experts have submitted to the Czech Republic Government that children's mandatory vaccination policy was essential and if vaccinations were to become voluntary, it is very plausible that the rate of vaccinations would decline significantly.[305] Therefore, the Czech Republic Government was following guidance issued by the medical authorities and experts to answer a pressing societal need to protect and promote public health.

In the Court's eyes, the Czech Republic Government's reasoning to mandate vaccinations was relevant and sufficient. This is because the underlying reason of Czech Republic's mandatory vaccination policy is to safeguard children from infectious diseases by achieving individual and herd immunity. The mandatory vaccination policy was based on the consideration that vaccines, for the most part, are effective and safe, and that there is a general consensus that every country should attain the highest possible rate of vaccine coverage.[306] Such reasoning was enough to satisfy the Court that Czech Republic's decision to impose mandatory vaccination was relevant and sufficient.

The Court was also satisfied that the Czech republic's mandatory vaccination policy was proportionate to the legitimate aim pursued. This was because although Czech Republic has a mandatory vaccination policy, there were no provisions that allowed vaccines to be forcibly administered.[307] Compliance with the mandatory vaccination policy could not be physically imposed; therefore, there was no absolute duty that the citizens of Czech Republic must be vaccinated.[308] Further, the Court pointed out that non-admission into kindergartens was a measure to protect the children from diseases and was not punitive in nature.[309]

[305] At 283.
[306] At 284.
[307] At 293.
[308] At 291.
[309] At 294.

In summary, the Court found that the mandatory vaccination policy did not violate article 8 of the ECHR. The Judgment of *Vavřička* has highlighted that a mandatory vaccination policy may be necessary in a democratic society. In essence, the European Court of Human Rights has continued to favour public health over personal autonomy. Governments should turn to the decisions of the European Court of Human Rights for guidance if they wish to enforce mandatory vaccination policies.

E Discussion

Each jurisdiction has their own approach of balancing interests of public health with the rights to personal autonomy. The consideration given to public health and personal autonomy by each jurisdiction reflect their stance on paternalism. When compared with other jurisdictions, New Zealand currently sits in the middle of the spectrum. While the New Zealand Government only tends to intervene with the rights to personal autonomy during a public health crisis, countries such as the US have always had policies such as the mandatory vaccination policies to prevent and reduce the spread of infectious diseases. In contrast to the United States, England and Wales have expressly prohibited the government from introducing any mandatory vaccination policies. Every nation places value on public health and personal autonomy differently. From the standpoint of the US and European Court of Human Rights, we can conclude that a mandatory COVID-19 vaccination policy is something that can be implemented over the whole nation's population. Especially in the times of necessity, many nations around the world have imposed mandatory vaccinations to protect the health of its citizens. Protection against infectious diseases have generally been accepted as a justified ground to limit personal autonomy for the sake of the well-being of the community. Mandatory vaccination policies already exist globally, and it is plausible for COVID-19 vaccines to be added to the list. In summary, if the New Zealand Government wishes to introduce a mandatory COVID-19 vaccination policy, it should turn to judicial decisions from other jurisdictions for guidance on how to appropriately weigh the interest of public health and interest of personal autonomy.

VI New Zealand's International Law Obligations

New Zealand must ensure that the proposed mandatory COVID-19 vaccination policy meets its domestic and international law obligations. Interestingly, none of the major international human rights treaties and instruments explicitly address the right to refuse medical treatment. Nevertheless, consent to medical procedure is considered as one of the fundamental basic human rights through other affirmed rights and freedoms.

New Zealand is a signatory to multiple major human rights instruments and a member of various human rights organisations. These include, but not limited to:

- The World Health Organisation;
- The Universal Declaration of Human Rights;
- The International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights; and
- The International Health Regulations.

For a mandatory COVID-19 vaccination policy to be passed in New Zealand, the New Zealand Government must ensure that such policy does not conflict with its international obligations. Therefore, it is important to explore how public health is balanced with personal autonomy in the international law domain.

A World Health Organisation

The WHO is a part of the United Nations which specialises in the practice of international public health. The WHO consists of 194 member states including New Zealand. The member states together share the goal of improving domestic and international public health.[310] The preamble of the WHO Constitution highlights the importance of health, in particular, public health. The preamble of the WHO Constitution states that:[311]

> The States parties to this Constitution declare, in conformity with the Charter of the United Nations, that the following principles are basic to the happiness, harmonious relations and security of all peoples:

[310] World Health Organisation "About WHO" <www.who.int>.
[311] Constitution of the World Health Organisation, preamble.

> Health is a state of complete physician, mental and social well-being and not merely the absence of disease or infirmity.
>
> The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.
>
> The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest cooperation of individuals and States.
>
> The achievement of any State in the promotion and protection of health is of value to all.
>
> Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.
>
> Governments have a responsibility for the health of their peoples which can be fulfilled only by the provision of adequate health and social measures.

From observing the preamble of the WHO constitution, it is evident that the WHO places a high value on promoting and protecting public health.

1 WHO Policy Brief

On 13 April 2021, the WHO issued a policy brief regarding COVID-19 and mandatory COVID-19 vaccination.[312] The policy brief announced that the following ethical considerations and caveats should be taken into account by governments which wishes to mandate the COVID-19 vaccination:[313]

1. Necessity and proportionality;
2. Sufficient evidence of vaccine safety;
3. Sufficient evidence of vaccine efficacy and effectiveness;
4. Sufficient supply;
5. Public trust; and
6. Ethical processes of decision-making.

[312] The World Health Organisation "COVID-19 and mandatory vaccination: Ethical considerations and caveats Policy brief" (13 April 2021) <www.who.int>.
[313] At 1 -3.

(a) Necessity and proportionality

A mandatory COVID-19 vaccination policy should only be introduced by governments and its agents if it is necessary for and proportionate to achieving a public health objective, such as herd immunity.[314] The WHO stated less coercive measures should always be prioritised if such public health objectives can be achieved through alternative methods.[315]

(b) Sufficient evidence of vaccine safety

Sufficient and reliable evidence showing the safety of the COVID-19 vaccine must be available to the population.[316] If there is no evidence of vaccine safety, mandatory COVID-19 vaccination policy would not be ethically justified and should not be implemented.[317]

(c) Sufficient evidence of vaccine efficacy and effectiveness

Sufficient and reliable evidence showing the efficacy and effectiveness of the COVID-19 vaccine must be available to the population.[318] If there is no evidence of vaccine efficacy and effectiveness, mandatory COVID-19 vaccination policy would not be ethically justified and should not be implemented.[319]

(d) Sufficient supply

Mandatory COVID-19 vaccination policies should only be considered when there is a sufficient supply of the COVID-19 vaccine.[320] The COVID-19 vaccine should be offered for free to the population and everyone should have equitable access without any type of discrimination.[321]

[314] At 1-2.
[315] At 1-2.
[316] At 2.
[317] At 2.
[318] At 2.
[319] At 2.
[320] At 2.
[321] At 2.

(e) Public trust

Governments must take into account the effect that mandatory COVID-19 vaccination policy can have on public confidence and trust.[322] If mandatory COVID-19 vaccination policy excessively undermines the population's personal autonomy, it may negatively affect the level of vaccine uptake and adherence of other public health policies.[323]

(f) Ethical processes of decision-making

Governments must use transparent and deliberative procedures to consider the ethical considerations outlined above.[324]

Further, the WHO has pointed out that governments should first encourage voluntary COVID-19 vaccination before considering mandatory COVID-19 vaccination policy.[325] Further, the WHO emphasises that mandatory COVID-19 vaccination policy should be backed up by best supporting evidence and should be enforced by public health authorities in a manner that is "transparent, fair, non-discriminatory".[326]

Overall, the WHO recognises health as one of the fundamental legal rights and is supportive of mandatory COVID-19 vaccination policies, as long as the member states properly consider ethical considerations and caveats as proposed in the policy brief.

B International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights ("ICCPR") recognises personal autonomy as one of the fundamental human rights. The ICCPR declares that "all people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".[327] The right affirms that individuals should have control over their choices and such choices should be respected.

[322] At 2-3.
[323] At 2-3.
[324] At 3.
[325] At 4.
[326] At 4.
[327] The International Covenant on Civil and Political Rights, art 1(1).

Although the right to personal autonomy is established in the ICCPR, it can be subject to limitations. The ICCPR contains explicit derogation provisions under art 4(1).

Article 4(1) of the ICCPR states:[328]

> In time of public emergency which threatens the life of the nation 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, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The following rights and freedoms each have their own limitation provisions which can be exercised if it is necessary to protect public safety, order, health or morals or fundamental rights and freedom of others:[329]

- The right to freedom of movement (art 12);
- The right to be free to manifest religion or belief (art 18); and
- The right to freedom of association (art 22).

On 30 April 2020, the United Nations Human Rights Committee ("UNHRC") released a "statement on derogations from the ICCPR in connection with the COVID-19 pandemic" ("Statement"). In the Statement, the UNHRC acknowledged that State parties must implement emergency measures to mitigate the risk to life and health of all individual's by reducing or preventing the spread of COVID-19.[330] The UNHRC accepted in the Statement that such emergency measures may result in State parties derogating from the obligations under the ICCPR, and State parties are permitted to do so under article 4 provided that it is essential to protect the life of the nation.[331] However, the UNHRC reiterated to the State parties that there are requirements and conditions that must be satisfied in order to derogate from the ICCPR.[332] In particular, the

[328] Art (4)(1).
[329] Article 18(2).
[330] United Nations Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* CCPR/C/128/2 (24 April 2020) at [2]
[331] At [2].
[332] At [2].

UNHRC stated that State parties should aim to achieve public health objectives by restricting rights rather than derogating from rights:[333]

> "States parties should not derogate from Covenant rights or rely on a derogation made when they are able to attain their public health or other public policy objectives by invoking the possibility to restrict certain rights ... or by invoking the possibility of introducing reasonable limitations on certain rights …"

Much like the New Zealand Bill of Rights, the rights and freedoms contained in the ICCPR are not absolute. The ICCPR and the UNHRC's Statement highlights that human rights may be restricted or even derogated (except particular human rights) by governments if it is necessary to protect the nation during a time of public health crisis.

C International Covenant on Economic, Social, and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESC) shares the same provision as the ICCPR with regards to the right to self-determination. [334]

The Committee on ICESC recognizes that "health is a fundamental human right indispensable for the exercise of other human rights".[335] The ICESC affirms that the State parties must recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[336] Unlike other international law instruments, the ICESC clearly outlines the steps which the State parties can take to achieve this right. These include but not limited to:[337]

1. The prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
2. The creation of conditions which would assure all medical services and medical attention in the event of sickness.

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[333] At [2][c].
[334] The International Covenant on Economic, Social and Cultural Rights, article 1(1).
[335] The Committee on Economic, Social and Cultural Rights *General Comment No.14 on the highest attainable standard of health* E/C.12/2000/4 (1 August 2000) at 1.
[336] The International Covenant on Economic, Social and Cultural Rights, art 12(1).
[337] Article 12(2)(c) and (d).

The Committee on ICESC has stated that the core obligations of State Parties include the duty to "provide vaccinations for major infectious diseases", and "take measures to prevent, treat, and control epidemic and endemic diseases".[338]

The Committee on ICESC acknowledges that public health issues are often used by State parties to limit individual's rights.[339] An example of this relevant to the COVID-19 outbreak is social distancing, isolation and quarantine enforced by governments. The Committee on ICESC highlights that the limitation clause present in the ICESC intends to protect individual's rights, rather than supporting the imposition of limitation by State parties.[340]

D International Health Regulations

The International Health Regulations (IHR) was introduced to combat global disease outbreaks and other international public risks.[341] The IHR acts as a legal framework that provides State Parties with rights and obligations associated with handling public health emergencies. The purpose of the IHR is as follows:[342]

> To prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.

New Zealand is bound by the IHR without reservation.

The IHR requires all State Parties to fulfil the following tasks:[343]

1. surveillance: each State Party must develop, strengthen and maintain, the capacity to detect, assess, notify and report public health events;
2. notification: each State Party must assess public events and report to WHO of all events that may constitute a public health emergency of international concern; and
3. public health response: each State Party must develop, strengthen and maintain the capacity to respond to public health risks and emergencies of international concern.

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[338] The Committee on Economic, Social and Cultural Rights, above n 335, at 44.
[339] At 28.
[340] At 28.
[341] World Health Organisation "International health regulations" <www.who.int>.
[342] International Health Regulations (2005) Third Edition, art 2.
[343] Articles 5, 6 and 13.

The importance of human rights during times of public health emergencies is highlighted under article 3(1) of the IHR which states that implementation of IHR must be "with full respect for the dignity, human rights, and fundamental freedoms of persons".[344] That being said, the implementation of IHR must be guided "by the goal of their universal application for the protection of all people of the world from the international spread of disease".[345] Therefore, the State Parties must conduct a balancing test. The State Parties must weigh the human rights interests against public health interests to determine how to handle public health emergencies.

E Discussion

From an international law standpoint, enjoyment of the highest attainable standard of health is considered as a fundamental legal right. Accordingly, public health measures to protect the nation from health risks are often encouraged in the international law domain. However, the right to self-determination is also highly respected. As a result, balancing of public health and individual rights to personal autonomy is required to place limitations on one or another. This is similar to approaches seen in domestic law such as in New Zealand. Ultimately, international law does not hinder the New Zealand Government from passing a mandatory COVID-19 vaccination policy provided that proper consideration is given to all relevant factors (such as alternative methods to reduce the spread of COVID-19) and correct procedure is followed. As advised by WHO, the New Zealand Government must ensure that a mandatory COVID-19 vaccination policy is justified on the grounds of necessity and proportionality along with ethical processes of decision making with credible scientific evidence.

VII Imposing a Mandatory COVID-19 vaccination Policy - The Importance of Legitimacy?

Liberal democracies must always ensure that the rule of law is followed when passing a new legislation. Rule of law is one of the underlying foundations of a liberal democracy and should always be observed. Accordingly, if the New Zealand Government decides to introduce a mandatory COVID-19 vaccination policy, it must respect the rule of law. However, the New Zealand Government has previously failed to adhere to the rule of law when implementing

[344] Article 3(1).
[345] Article 3(3).

COVID-19 containment and control measures. Although the New Zealand Government has suffered little to no consequences for their actions, public trust and confidence in the New Zealand Government may decline if such actions are repeated. If a mandatory COVID-19 vaccination policy is enacted without following the rule of law, it can be considered illegitimate and ultra vires. In order to understand the technicalities of passing a mandatory COVID-19 vaccination policy, it is first important to understand New Zealand's legal system and past judicial decisions regarding rule of law.

A New Zealand's Legal System

The New Zealand legal system is founded upon the concept of Parliamentary supremacy. In theory, Parliamentary supremacy is a concept where the Parliament is entrusted with unlimited powers to enact legislations.[346] Legislation passed by the Parliament is considered as the highest source of law and can override the opinions of the judiciary.[347] Therefore, the judiciary cannot prevent the Parliament from introducing new legislation. The function of the courts is to interpret the law as given by the Parliament and cannot test the validity of it.[348] Accordingly, the Parliament is considered to have absolute sovereignty in New Zealand.

Although Parliamentary supremacy exists in New Zealand, the New Zealand Parliament seldom passes legislation that may be extreme or controversial. The New Zealand Parliament rarely ignores the fundamentals of constitutional law, despite not having a written constitution. This is because New Zealand has a strong respect for the rule of law, which is one of the foundations of our unwritten constitution. The New Zealand Government's compliance to rule of law has been recognised by the World Justice Project (WJP). The WJP produces the Rule of Law Index which measures 128 countries and jurisdictions' commitment to the rule of law. The Rule of Law Index is generated based on the experiences and perceptions of the public, legal practitioners, and experts.[349] Currently, New Zealand is ranked 7th out of 128 countries and jurisdictions.[350]

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[346] Grant Morris *Law Alive* (4th ed, 2019, Thomson Reuters, New Zealand) at 108.
[347] At 108.
[348] *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC) at 330 quoted in *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA) at 157.
[349] World Justice Project "World Justice Project Rule of Law Index 2020" (World Justice Project, Washington, 2020) at 5.
[350] At 7.

In theory, the rule of law acts as a safeguard against autocratic governments. The rule of law is essential for all civilised societies. Without it, there would be no organised government and the population would be subject to tyranny by whoever is in power.[351] Phillip Joseph has suggested that the rule of law requires the use of these key principles:[352]

- Everyone is subject to the law, including the government;
- The law should be clear, intelligible, clear and predictable; and
- There should be an impartial and independent judiciary.

The rule of law ensures that governmental powers are allocated appropriately to sustain a democratic society. The rule of law requires the government to exercise its powers only according to written and publicly disclosed law so that their powers are not abused.

In addition, the concept of separation of powers ensures that Parliamentary Sovereignty cannot be abused. Separation of powers divides the functions of the government into three bodies - the executive (the government), legislature (the Parliament), and judiciary (the courts).[353] As explained by Phillip Joseph, "the rule of law and separation of powers are kindred concepts committed to the principle of limited government".[354] The three branches of the government must not exercise functions of the other branches - the legislature enacts new laws, the executive executes the laws and the judiciary interprets the laws.

Ultimately, a mandatory COVID-19 vaccination policy must be considered with care by the New Zealand Government because it needs to be introduced in accordance with the rule of law and separation of powers. Without such solid legal basis or procedure, a mandatory COVID-19 vaccination policy cannot be deemed as legitimate. Even during unprecedented times, the rule of law must always be followed and the separation of powers must always be observed.

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[351] Bruce Harris *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters New Zealand Ltd, Wellington, 2018) at 20

[352] Phillip Joseph *Constitutional & Administrative Law in New Zealand* (4th ed, Thomson Reuters New Zealand, Wellington, 2014) at 1; Legislation Design and Advisory Committee "Fundamental constitutional principles and values of New Zealand Law" (28 May 2018) <www.ldac.org.nz>.

[353] Phillip Joseph, above n 352 at 199.

[354] At 199.

B Borrowdale v Director-General of Health

The importance of rule of law in New Zealand is highlighted in the High Court decision of *Borrowdale v Director-General of Health* ("*Borrowdale*"). *Borrowdale* is a judicial review proceeding which was commenced by Andrew Borrowdale, a former government lawyer. Mr Borrowdale challenged the legality of the COVID-19 restrictions imposed by the New Zealand Government from 11:59 pm on Wednesday 25 March 2020 until 11:59pm on Wednesday 13 May 2020.[355] Mr Borrowdale presented three causes of action in his statement of claim. These were:[356]

1. The first 9 days of the COVID-19 lockdown, commencing from 26 March 2020 were not prescribed by law; therefore, was a unlawful curtailment to the rights affirmed in the New Zealand Bill of Rights Act;
2. The orders made by the Director-General of Health enacting the COVID-19 Alert Level 3 and Level 4 lockdown was unlawful on the grounds that it exceeded the powers provided under s 70(1)(f) and (m) of the Health Act. The orders given by the Director-General of Health engaged a number of rights affirmed in the New Zealand Bill of Rights Act such as the right to freedom of expression, association and movement; and
3. The Director-General of Health unlawfully delegated s 70(1)(m) power to determine what businesses were "essential services".

The Court dealt with the second cause of action first rather than the first cause of action. This was because if Mr Borrowdale succeeded on the second cause of action, it would mean that all of the restrictions imposed upon the New Zealand population during Alert Level 3 and 4 were unlawfully implemented by the New Zealand Government.[357] Likewise, this discussion will start by analysing the second cause of action.

1 Second cause of action

The second cause of action submitted by Mr Borrowdale concerned the legality of three orders made by the Director-General of Health. The orders were made under s 70(1)(m) and s 70(1)(f) of the Health Act and ultimately commenced the COVID-19 Alert Level 3 and 4 lockdowns. The orders made by Director-General of Health was:[358]

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[355] *Borrowdale v Director-General of Health* [2020] NZHC 2090.
[356] At [5] - [7].
[357] At [9].
[358] At [75], [78], and [80].

- Order 1 (made under s 70(1)(m) of the Health Act)
    - Closure of all premises within all districts of New Zealand, except those listed in the Appendix to the Order, until further notice; and
    - Prohibition of gatherings in outdoor places of amusement or recreation of any kind or description in all districts of New Zealand until further notice.
- Order 2
    - All persons within districts of New Zealand to be isolated or quarantined by -
        - Staying at their current residence, except for essential personal movement; and
        - Keeping a physical distance, except from
            - Fellow residents; or
            - To the extent necessary to access or provide essential services; and
        - For persons with mobile residences, by maintaining their residence in the same general location, except to the extent they would be permitted to leave the residence as essential personal movement.

- Order 3 (made under s 70(1)(m) and (f) of the Health Act) revoked Orders 1 and 2 but ultimately stimulated a similar requirement with more detailed and extensive instances of essential personal movement.

With respect to these three orders, Mr Borrowdale claimed that it exceeded the Director-General of Health's power under s 70(1)(f) and (m) of the Health Act; therefore, was ultra vires and unlawful. [359] Specifically, Mr Borrowdale gave the following reasonings to support his claim:[360]

(a) Section 70 cannot be exercised by the Director-General of Health as s 22 only confers the Director-General of Health with only the functions of a Medical Officer of Health, not the powers;
(b) Powers provided under s 70 cannot be exercised on a national level;
(c) Section 70(1)(f)'s powers to require quarantine and isolation can only be exercised in relation to individuals, and not to the whole population;

[359] At [84].
[360] At [84].

(d) Section 70(1)(m)'s powers to close premises does not permit all premises to be closed, subject to exceptions; and
(e) The power to prohibit "congregation" under s 70(1)(m) does not allow exceptions for "social distancing".

Further, Mr Borrowdale argued that the orders made under s 70(f) and (m) engaged in the following rights affirmed in the New Zealand Bill of Rights Act:[361]

(a) Section 14 - right to freedom of expression;
(b) Section 15 - right to manifest religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private;
(c) Section 16 - right to freedom of peaceful assembly;
(d) Section 17 - right to freedom of association;
(e) Section 18 - right to freedom of movement; and
(f) Section 22 - right not to be arbitrarily detained.

Mr Borrowdale stated that s 70(f) and (m) of the Health Act should have been interpreted in a way that was least consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act.[362]

2 The Court's response to second cause of action

(a) Could the powers under s 70 be exercised by the Director-General of Health?

The Court recognised that the words "functions" and "powers" are referred to separately in the Health Act; however stated that there is no clear policy that indicates that the Director-General of Health's ability to act as a Medical Officer of Health should be confined only to functions.[363] Looking at the issue from a practical perspective, it would be pointless to only confer the Director-General of Health the functions of a Medical Officer of Health without conferring him the powers necessary to carry out those functions.[364] Therefore, from a logical perspective, the Director-General of Health had the authority to exercise the powers under s 70 of Health Act.

[361] At [89].
[362] At [90].
[363] At [111].
[364] At [111].

(b) Could the s 70 power be exercised on a national level?

When the Health Act is read comprehensively, the Court stated that the powers under s 70 cannot be seen as applicable only to regional responses.[365] Throughout the Health Act, there are clear signposts which indicate that powers under the Health Act can be exercised on a national level. For instance, s 3A of the Health Act provides the Ministry the functions of improving, protecting, and promoting public health which is defined as "the health of all of the people of New Zealand or community or section of such people".[366] The Court therefore found that powers under s 70 can be exercised on a national level.

(c) Could s 70(1)(f) be used to quarantine or isolate the whole population of New Zealand?

The Court found that s 70(1)(f) can be exercised to quarantine or isolate the whole nation.[367] The Court provided two reasons for its findings. Firstly, the Court acknowledged that in the context of the COVID-19 outbreak, it is not always possible to distinguish who is infected and who is not. This means that it is necessary for everyone to be quarantined or isolated to prevent the spread of COVID-19, which in fact, is the purpose of s 70(1).[368] Secondly, the Court identified that the predecessors to s 70 were used to quarantine or isolate large portions of New Zealand.[369] In the past, similar powers were exercised by the New Zealand Government to prevent the spread of influenza and polio. Likewise, s 70 powers may be used to cover the whole nation if it is necessary to prevent outbreaks or spread of infectious diseases.[370]

(d) Did Order 1 fail to properly close premises of a stated kind or description?

The legality of Order 1 was challenged by Mr Borrowdale, on the grounds that Order 1 failed to state or refer to premises, outdoor places of amusement or recreation, of any "stated kind or description". The Court explained that one of the purposes of the s 70(1)(m) order is to take "urgent and decisive action".[371] If the s 70(1)(m) order required the Director-General of Health to list out of every specific premises to be closed, it would defeat this purpose. The Court stated that because

[365] At [114].
[366] Health Act 1956, s 2(1).
[367] *Borrowdale*, above n 355, at [130].
[368] At [128].
[369] At [129].
[370] At [129].
[371] At [134].

of the nature of the public health risk, the starting point should be that all premises must be closed to prevent the spread of COVID-19. Instead of having a list of premises to be closed, it is more reasonable and practical to have a list of exceptions (i.e., list of premises that can open and operate). The Court concluded that the legality of Order 1 is affirmed.

(e) Does the power to prohibit "congregation" under s 70(1)(m) include social distancing?

Mr Borrowdale argued that the term "congregation" used under s 70(1)(m) does not include social distancing; therefore, the order to maintain social distancing is invalid. If we turn to the Health Act, the term "congregation" is not defined and does not appear in any other section except for s 70(1)(m). The Court took the ordinary meaning of "congregation" and stated that the term should be interpreted to include "gatherings".

(f) Engagement with New Zealand Bill of Rights Act

In response to Mr Borrowdale's claim, the Court stated that if the Director-General of Health was to interpret s 70(m) and (f) of the Health Act in a way that was least inconsistent with the New Zealand Bill of Rights Act, it would have resulted in a restriction of powers exercisable under s 70(m) and (f).[372] In order to understand the context of the powers under s 70, the Court explained that the s 70 powers are by all means special.[373] s 70 powers are intended to be exercised only as an immediate and urgent response to a public health emergency.[374] It should not be understood as a long-term solution to public health crises. If the public health emergency continues, the New Zealand Government must adapt a long-term legal framework by way of passing legislation, rather than relying on the s 70 powers.[375] The Court found that because s 70 powers can only be exercised during a time of a public health emergency, and with New Zealand's international obligation to protect the health of the population, the limitation which s 70 imposes on human rights is generally justifiable.[376] Further, the restrictions placed upon s 70 powers before it can be exercised acts as a safeguard to ensure that such powers cannot be abused. Therefore, the Court ruled that s 70 of the Health Act does not have to be interpreted in a way that is least inconsistent with the New Zealand

[372] At [90].
[373] At [100].
[374] At [102].
[375] At [102].
[376] At [103].

Bill of Rights. With s 70, the concept established under s 6 of the New Zealand Bill of Rights suits the best - "an enactment applies to circumstances as they arise".[377]

3 First Cause of Action

The first cause of action presented by Mr Borrowdale concerned the legality of the first 9 days of the COVID-19 lockdown, from 26 March 2020 and concluding on 3 April. His reasoning was that the restrictions imposed by the New Zealand Government had no legal basis and were not prescribed by law; therefore was contrary to s 5 of the New Zealand Bill of Rights Act.[378] Further, Borrowdale submitted that the first 9 days of the COVID-19 lockdown breached s 1 of the Bill of Rights 1688(**BOR 1688**) because it was not prescribed by law.[379] Section 1 of Bill of Rights 1688 states:[380]

> **1 No dispensing power**
>
> That the pretended power of suspending laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal:
>
> **Late dispensing illegal**
>
> That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it has been assumed and exercised of late, is illegal.

Mr Borrowdale also relied on the principle of Parliamentary sovereignty, stating that the first 9 days of the COVID-19 lockdown was announced without consent of Parliament.[381] Subsequently, he stated that s 1 of Bill of Rights 1688 ("Bill of Rights Act") was breached since the first 9 days of the COVID-19 Lockdown was not prescribed by law and it constituted either:[382]

(a) an unlawful suspending of the law, namely rights affirmed in the New Zealand Bill of RIghts, which may be subject to limits that are "prescribed by law"; or

(b) an unlawful execution of law by way of public announcement, of the kind impugned in *Fitzgerald v Muldoon*.

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[377] At [104]; New Zealand Bill of Rights Act 1990, s 6.
[378] At [240].
[379] At [230].
[380] Bill of Rights 1688, s1.
[381] *Borrowdale*, above n 355 at [229].
[382] At [230].

4 Court's response to the first cause of action

(a) First 9 days of the COVID-19 lockdown was not prescribed by law

The Court deemed the first 9 days of the COVID-10 Lockdown as unlawful because it was not prescribed by law. There was no lawful order to that effect given under the Health Act. Accordingly, the Court found that the orders which initially commenced the COVID-19 lockdown unlawfully limited rights and freedoms affirmed in the New Zealand Bill of Rights Act, in particular, the freedom of movement, assembly and association, was not prescribed by law as required under s 5. The orders had no legal basis and did not impose any legal obligation on New Zealanders to obey the Alert level 4 rules.

(b) No unlawful suspension of the law

The Court further stated that although the first 9 days of the COVID-19 Lockdown was not prescribed by law, it did not constitute a suspension on the law. The Court also analysed whether the current case was of similar kind to *Fitzgerald v Muldoon* and found that such analogy was unsuitable.[383] This was because in *Fitzgerald*, the Prime Minister claimed to suspend legislation that could only be changed by Parliament. In contrast, the Director-General of Health had the jurisdiction to exercise the power under s 70(1)(f) of the Health Act to impose the COVID-19 Lockdown.[384] The only issue with the current case was the orders relating to the first 9 days COVID-19 Lockdown was not prescribed by law. All other requirements to exercise the s 70 powers were met.[385]

(c) No unlawful execution of the law

Mr Borrowdale claimed that the term "execution of laws" found in s 1 of the Bill of Rights Act should be interpreted to mean "promulgation of laws".[386] Mr Borrowdale argued that the first 9 days of the COVID-19 lockdown was promulgated without legislative authority.[387] The Court disagreed with Mr Borrowdale's claim and ruled that there was no unlawful execution of the law.

[383] At [236].
[384] At [236].
[385] At [237].
[386] At [238].
[387] At [238].

Despite the unlawful nature of the COVID-19 Lockdown, the court held that the limits on the New Zealand Bill of Rights Act were nevertheless "reasonable, necessary, and proportionate".[388] The lockdown was deemed "reasonable, necessary, and proportionate" because:[389]

1) The unlawful COVID-19 lockdown lasted 9 days;
2) New Zealand was in a State of National Emergency; and
3) it would have been a lawfully imposed limit on the New Zealand Bill of Rights, if only the Director-General of Health issued an appropriate order at the time.

However, the Court did clarify the importance of upholding the rule of law stating that "the rule of law requires that the law is accessible and so far, as possible, intelligible, clear, and predictable…. The required clarity was lacking here".[390] As a relief, the Court issued a formal declaration to emphasise the significance of the rule of law.

5 Third cause of action

The focus of the third cause of action was unlawful delegation by the Director-General of Health's power to define what is "essential business" to the Ministry of Business, Innovation, and Employment.[391]

6 Court's response to the third cause of action

The Court stated that the definition of "essential business" was fixed and clear by the orders given by the Director-General of Health. The meaning of "essential business" did not change from time to time, and there was no unlawful delegation; hence no breach of rule of law.[392]

C Nga Kaitiaki Tuku Iho Medical Action Society Incorporated v Ministry of Health

Another example where the New Zealand Government failed to respect the rule of law is *The Nga Kaitiaki Tuku Iho Medical Action Society Incorporated v Ministry of Health* ("*The Nga Kaitiaki Tuku Iho Medical Action Society Incorporated*"). On 3 February 2021, the Minister of Health gave provisional consent under s 23 of the Medicines Act 1981 ("Medicines Act") to the sale, supply and use of Pfizer/BioNTech COVID-19 vaccine. Section 23 of the Medicines Act permits the

[388] At [290].
[389] At [290].
[390] At [291].
[391] At [242].
[392] At [279].

Minister of Health give his or her provisional consent to the sale, supply, or use of a new medicine, where he or she is of the opinion that it is desirable that the medicine be sold, supplied, or used on a restricted basis for the treatment of a limited number of patients.[393]

The COVID-19 vaccines to the public were introduced to the public and is now available to people above the age of 16. In April 2021, the Nga Kaitiaki Tuku Iho Medical Action Society Incorporated ("KTI") voiced their concern regarding the COVID-19 vaccine roll-out by filing a judicial review.[394] KTI challenged the legality of the exercise of s 23 powers by the Minister of Health, stating that New Zealanders over the age of 16 should not be considered as "a limited number of patients". Accordingly, KTI applied for two interim orders.[395] They were:[396]

1. the approval of the COVID-19 vaccine, pursuant to s 23(1) of the Medicines Act, without identifying what constitutes as "limited number of patients", may be an error of law, and that further order of the Court, the Crown must not take any further action that is or would be consequential on the exercise of the statutory power; and
2. the COVID-19 vaccine roll out, pursuant to s 23(1) of the Medicines Act, to everyone in New Zealand aged 16 years and above may be unlawful, and that until further order of the Court, the Crown must not take any further action that is or would be consequential on the exercise of the statutory power.

The Court found that the provisional consent given to deliver the COVID-19 vaccines for the vast majority of New Zealand was problematic.[397] This is because the provisional consent of the COVID-19 vaccine did not refer to any specific class or groups of patients.[398] The Court stated:[399]

> While I acknowledge that this is a more "limited class" of persons than "all New Zealanders", a class of that size seems well beyond what is contemplated by a straightforward, purposive, reading of the section.

Accordingly, the Court held that it is reasonably arguable that the provisional consent granted to the COVID-19 vaccine was ultra vires s 23 of the Medicines Act, and urged the Crown to consider

[393] Medicines Act 1981, s 23(1).
[394] *Nga Kaitiaki Tuku Iho Medical Action Society Incorporated v The Minister of Health* [2021] NZHC 1107.
[395] At [48].
[396] At [48].
[397] At [66].
[398] At [65].
[399] At [66].

that question carefully.[400] In terms of the interim orders, the Director-General of Health argued that if the orders were granted it would cause significant risks to the public health of New Zealand as it would delay New Zealand's recovery from COVID-19.[401] He further stated that the orders would interfere with the logistics of the COVID-19 vaccination programme and cause the COVID-19 vaccines to expire.[402] In addition, the Director-General of Health claimed that the orders would also reduce the public trust and confidence in COVID-19 vaccinations.[403] The Court acknowledged these consequences and did not exercise its discretion to grant the interim orders. [404]

The New Zealand Government has now amended the Medicines Act by passing a Medicines Amendment Act 2021.[405] Now, s 23(1) of reads:[406]

> Notwithstanding sections 20 to 22, the Minister may, by notice in the Gazette, in accordance with this section, give provisional consent to the sale or supply or use of a new medicine if the Minister is of the opinion that it is desirable that the medicine be sold, supplied, or used.

D Key learnings from Borrowdale v Director-General of Health and Nga Kaitiaki Tuku Iho Medical Action Society Incorporated v Ministry of Health

1 Borrowdale v Director-General of Health

According to the decision of *Borrowdale*, the first 9 days of the nation-wide COVID-19 lockdown was a justifiable restriction of the New Zealand Bill of Rights Act, even though it was unlawfully imposed by the New Zealand Government. In reaching this conclusion, the Court adopted a purposive approach to the interpretation of the Health Act. Rather than interpreting the Health Act in a way that is least inconsistent with the New Zealand Bill of Rights Act, the Court interpreted the Health Act in a way that advanced New Zealand's public health. This is because the Court believed that the New Zealand population's health as a whole during a global pandemic is of more importance compared to upholding all of the rights affirmed in the New Zealand Bill of Rights Act. The decision of *Borrowdale* follows the precedent of *New Health New Zealand Incorporated*

[400] At [75].
[401] At [71].
[402] At [71].
[403] At [71].
[404] At [75].
[405] Medicines Amendment Act 2021.
[406] Section 4(1).

where the Supreme Court favoured the improvement of public health over individual interests.[407] During a time of public health emergency, the Court is more likely to favour the protection of population rather than the individual's rights if the restriction posed was "reasonable, necessary, and proportionate". However, *Borrowdale* emphasised that the New Zealand Government must adhere to the rule of law to exercise its powers. It is also important to note that *Borrowdale* is currently before the Court of Appeal, so the law may be re-formulated.

2 Nga Kaitiaki Tuku Iho Medical Action Society Incorporated v Ministry of Health

The High Court of New Zealand found that the provisional consent granted to the COVID-19 vaccines were ultra vires of the s 23 of the Medicines Act.[408] Nevertheless, the Court did not grant any interim orders. Like the decision of *Borrowdale,* the Court acknowledged that the rule of law was ignored by the New Zealand Government however little to no consequences were imposed. This is because New Zealand is in the midst of a public health crisis and pausing the COVID-19 vaccination of the New Zealand population will create risks to the public health. Once again, the New Zealand Government failed to adhere to the rule of law but the Court ultimately prioritised public health instead of the right to personal autonomy. Further, rather than favouring the sceptic views on vaccinations and the COVID-19 pandemic held by New Health, the Court presumed that COVID-19 vaccination brings public health benefit and the nature and scale of the health risks arising from the COVID-19 pandemic is to be assessed by those in charge of administering New Zealand's public health system.[409] Ultimately the ruling of *Ngati Kaitiaki Tuku Iho Medical Action Society Incorporated* showed that public policy is a key consideration when the New Zealand courts determine whether to exercise its powers to grant an interim order. Even when the applicant has an arguable case, the New Zealand courts may not grant an interim order on the grounds that such order would cause significant risk to the public health.

3 Overall learnings from Borrowdale v Director-General of Health and Nga Kaitiaki Tuku Iho Medical Action Society Incorporated v Ministry of Health

As we can see from *Borrowdale* and *Nga Kaitiaki Tuku Iho Medical Action Society Incorporated* the New Zealand Government has not been great at adhering to the rule of law. Although the New

[407] *New Health New Zealand,* above n 247.
[408] *Nga Kaitiaki Tuku Iho Medical Action Society Incorporated,* above n 394 at [75].
[409] at [8].

Zealand courts have ruled the actions of the New Zealand Governments as unlawful, there were little to no consequences. There were formal declarations issued which asserted the unlawfulness of the New Zealand Government's actions, the COVID-19 lockdown and COVID-19 vaccination programme is still greatly supported by the population. However, the New Zealand Government must understand that the rule of law must be always abided. If the New Zealand Government continues to act this way, its laws and policies can be deemed as illegitimate by the courts. Even in times of urgency, the rule of law must be always respected. *Borrowdale* highlighted the importance of the rule of law - "even in times of emergency, however, and even when the merits of the Government response are not widely contested, the rule of law matters".[410] The COVID-19 outbreak does not allow the government to ignore the rule of law and exercise its powers blindly. Even if the consequences are insignificant, the New Zealand Government must always follow and respect the rule of law to uphold the core value of liberal democracies along with public trust. Accordingly, if the New Zealand Government wishes to introduce a mandatory COVID-19 vaccination policy, they must ensure to follow the correct procedure as prescribed by existing law.

VIII Strategies to Consider if a Mandatory COVID-19 Vaccination Policy was Implemented

Governments use different strategies and methods to maximise the effectiveness and compliance levels of mandatory vaccination policies. Each government has varying societal needs to respond to; therefore, mandatory vaccination policies exist on a spectrum. The most common ways of varying the intensity of mandatory vaccination policies are through implementing non-compliance penalties and exemptions. The levels of restrictions placed on the population's personal autonomy is dependent on the penalties and exemptions associated with a mandatory vaccination policy. For example, a country with severe non-compliance penalty and allows no exemptions, is practising hard paternalism where personal autonomy is not considered at all. On the contrary, a country can have a mandatory vaccination policy and still respect personal autonomy by imposing mild or no penalties and permitting exemptions. Governments need to carefully consider whether to introduce the penalties and exemptions to their mandatory vaccination policy. This is because public health policy that threatens the population's personal autonomy can backfire and have dire consequences on public confidence and trust. If the government

[410] At [2].

excessively undermines the population's personal autonomy, it may negatively affect the level of vaccine uptake and adherence to other public health policies. [411]

A Penalties

Even if a mandatory COVID-19 vaccination policy was imposed by the New Zealand government, vaccine hesitant people can refuse to be vaccinated. Governments cannot physically force individuals to receive vaccines; therefore, many governments choose to impose penalties for non-compliance and to increase the level of adherence. In fact, governments are increasingly introducing non-compliance penalties due to declining numbers of vaccination coverage and rising anti-vax movements and activities. Currently, there are 105 countries that have enacted mandatory vaccination policies, and 62 of these countries have imposed some form of penalty for non-compliance. [412] When introducing any mandatory vaccination policy, it is important to think about whether penalties are necessary, and if so, what type of level of penalties would be appropriate, reasonable, and justifiable.

The most common penalty imposed by governments are educational penalties, where enrolment of children into public schooling are refused or children are forced to take days off during an outbreak of an infectious disease.[413] As this paper has stated previously, all states in the US require children to be vaccinated before they can be enrolled into school. Children are more vulnerable to infectious diseases compared to adults; therefore, educational penalties are thought of as a protective measure rather than a punitive sanction. Accordingly, mandatory vaccination in children tends to be easily justifiable compared to mandatory vaccination in adults.

The second most common penalties imposed by governments are financial penalties, where individuals are fined for non-compliance.[414] The fines may be one-off or repeated. Implementing financial penalties has been suggested to increase vaccination rates in Europe and the United States.[415] Another type of financial penalty which may be enforced is withholding state payments.

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[411] The World Health Organisation, above n 312.
[412] Katie Gravagna and others "Global assessment of national mandatory vaccination policies and consequences of non-compliance" (2020) 38(49) Vaccine 7865 at 7865.
[413] At 7868.
[414] At 7868.
[415] S.B. Omer, C. Betsch and J Leask "Mandate vaccination with care" (2019) 571 Nature 469; O.M. Vaz and Others "Mandatory vaccinations in Europe" (2020) 145 (2) Pediatrics; S.B. Omer and Others "Nonmedical exemptions to

In Australia, a policy called "No Jab, No Pay" was initiated in 2015 to encourage parents to vaccinate their children. The "No Jab, No Pay" policy withholds three major state payments, namely Child Care Benefit, the Childcare Rebate and the Family Tax Benefit Part A end of year supplement, if parents do not vaccinate their children. The policy is incorporated into the A New Tax System (Family Assistance) Act 1999. Section 85BA of the Act outlines the eligibility for child care subsidy, and states an individual is only eligible if their child meets the immunisation requirements set out in s 6.[416] The policy was predominantly aimed at conscientious objectors as it does not allow non-medical reasons as a ground for exemptions.[417] Since the introduction of the "No Jab, No Pay" policy, there has been an increase in the childhood vaccination rates, as more children were receiving catch-up vaccination. It was estimated that approximately 1 in 5 children who were not fully immunised against measles received the MMR vaccine during the first 2 years of the "No Jab, No Pay" policy.[418]

The least common penalty is liberty penalties, where individuals are required to serve jail time or physically forced to receive vaccines.[419] This is extremely rare as such coercive methods can never be justified in a liberal democracy. Liberty penalties would undermine many fundamental concepts of liberal democracy such as human rights.

Overall, imposing penalties for non-compliance incentivises people to receive COVID-19 vaccinations; however, New Zealand Governments must ensure that such a penalty can be justified. As stated above, imposing severely harsh penalties for non-compliance such as liberty penalties will undermine New Zealand's status of liberal democracy. Penalties may assist the New Zealand Government to reach herd immunity but may portray the New Zealand Government as tyrannical and authoritarian.

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school immunization requirements: secular trends and association of state policies with pertussis incidence" (2006) 296 JAMA 1757.

[416] A New Tax System (Family Assistance) Act 1999 (AUS) at s 85BA.

[417] Michael Klapdor and Alex Grove ""No Jab No Pay" and other immunisation measures" Parliament of Australia (May 2015) <www.aph.gov.au>.

[418] Brynley P Hull and Others ""No jab, no pay": catch-up vaccination activity during its first two years" (2020) 213 (8) MJA 364.

[419] Katie Gravagna and others, above n 412, at 7868.

B Exemptions

Generally, mandatory vaccination policies allow exemptions based on medical, religious, and philosophical grounds. The exemptions to mandatory vaccine policies depend on the jurisdiction. While some countries have a relaxed approach, others have no exemptions at all. Determining who should be exempt from vaccinations and drawing a line between who must receive the vaccine and who is exempt is an issue that must be addressed if a mandatory COVID-19 vaccination policy was to be implemented.

1 Medical exemptions

Medical exemptions are exemptions available from mandatory vaccine policies based on medical reasons. People can ask for a medical exemption if:[420]

- they are immunocompromised;
- They have had a serious allergic reaction to a vaccine in the past; and
- They have had an allergy to an ingredient present in a vaccine.

Medical exemptions are always obtainable because benefits gained from vaccinations are outweighed by the risk of adverse reactions. To be granted a medical exemption, a medical certificate may be required in some countries.

2 Religious exemptions

Conscientious objection to vaccines may be based on religious grounds. Religious exemptions from mandatory vaccine policies are generally reliant on the following two reasons:[421]

1. The usage of human cells to develop vaccines
2. The belief that the human body is sacred and should only be healed by God or natural means.

Due to excessive reporting by the media, many in the community hold a misconception that religion and the anti-vax movement are strongly connected. However, contrary to popular belief, no major religious teaching explicitly objects to vaccines. In fact, some religions, such as the

[420] WebMD "What Are the Rules on Vaccine Exemptions?" (21 April 2021) <www.webmd.com>.
[421] The History of Vaccines "Cultural Perspective on Vaccination" <www.historyofvaccines.org>.

Catholic Church, support vaccinations.[422] That being said, there has been an increase of a number of religious exemptions granted over time.[423]

3 Philosophical exemptions

Philosophical exemptions, also known as personal exemptions, are exemptions available from mandatory vaccine policies based on philosophical or personal beliefs. Many philosophical exemptions are founded on concerns for safety, side effects or mistrust in vaccines. Some of the most common reasons are as follows:[424]

- Vaccines may cause illnesses or severe side effects;
- Vaccines are ineffective;
- Vaccines are not safe;
- Building natural immunity is better than vaccines
- Vaccines are part of a large conspiracy

Philosophical exceptions enable vaccine hesitant individuals to opt out of vaccines. Although this may not maximise the effectiveness of mandatory vaccination policies, it may deviate the government from receiving backlash from the public.

C Discussion

Allowing exemptions based on religious and philosophical grounds may defeat the purpose of introducing a mandatory COVID-19 vaccination policy. This is because such exemptions permit people to freely opt-out from a mandatory COVID-19 vaccination. Accepting religious and philosophical exemptions may cause a mandatory COVID-19 vaccination policy to be less effective or even pointless. However, a mandatory COVID-19 vaccination policy with no religious or philosophical exemptions may not be justified in some jurisdictions. If no exemptions (except for medical exemptions) were permitted, a mandatory COVID-19 vaccination policy would severely restrict exercise of personal autonomy. This may be permissible in countries such as the US where the courts have previously ruled that such vaccination policy is within police power. If

[422] New Zealand Catholic Bishops Conference "NZ Catholic bishops urge everyone to have a COVID-19 Vaccine" (15 January 2021) <www.catholic.org.nz>.
[423] Gordana Pelčić and others "Religious exemption for vaccination or religious excuses for avoiding vaccination" (2016) 57(5) Croat Med J 516.
[424] Aaron Kandola "What is an anti-vaxxer?" Medical News Today (4 November 2020) <www.medicalnewstoday.com>.

the New Zealand Government wishes to introduce a mandatory COVID-19 vaccination policy without religious and philosophical grounds, the New Zealand Government will need to think about whether such policy infringes the rights in the New Zealand Bill of Rights Act other than the s 11 right. For instance, if there are no religious exemptions, the New Zealand Government will be undermining the right to freely exercise religion under s 13. Accordingly, the New Zealand Government will need to consider how the exemptions change the severity of limitation placed upon the exercise of personal autonomy. To avoid doubt, medical exemptions should always be available because the benefits received from vaccinations will not outweigh the risk of adverse reactions. A mandatory COVID-19 vaccination with no medical exemptions can never be justified in a liberal democracy.

IX Conclusion

It has been nearly a year and a half since COVID-19 emerged in New Zealand. Although New Zealand has been fortunate enough to have little to no active community cases, it is still enduring the effects of COVID-19. The lockdown measures and continued strict border closures has caused the New Zealand economy as well as the New Zealand population's mental health to deteriorate. Current COVID-19 management strategies are too costly and are detrimental to New Zealand. Therefore, to minimise the damage caused by COVID-19, it is crucial that New Zealand achieves herd immunity against COVID-19 through vaccinations. However, New Zealand may struggle to reach herd immunity due to the presence of vaccine hesitancy. Today, misinformation concerning vaccinations spread on the internet at rapid speeds. As a result, many people become doubtful regarding the safety and effectiveness of vaccinations. If more and more people grow hesitant towards vaccinations, the New Zealand Government may need to introduce a mandatory COVID-19 vaccination policy to achieve herd immunity.

As this paper has discussed previously, the benefits associated with vaccinations generally outweigh the risks of developing side effects or adverse reactions. Although COVID-19 vaccinations cause more side effects compared to other vaccinations, they are generally mild and do not require medical attention. On a rare occasion, COVID-19 vaccines can cause adverse reactions, but the risk of developing this is much lower than contracting COVID-19 and experiencing potentially life-threatening symptoms and even death. Further, vaccines (including

COVID-19 vaccines) undergo many stages of clinical trial and safety monitoring before they can be licensed and marketed to the public. Even after they are introduced to the public, vaccines and its effects are monitored closely. Overall, COVID-19 vaccinations are safe and the most effective and efficient way to prevent the spread of the virus. Accordingly, COVID-19 vaccinations should be considered as the primary method to reduce and eradicate COVID-19.

In general, the right to exercise personal autonomy is highly respected. This is because free exercise of personal autonomy enhances many of the fundamental human rights. New Zealand places a high value of the right to exercise personal autonomy, which is reflected in New Zealand's legislations and case laws. However, the right to exercise personal autonomy may be overridden by public health policies to advance, promote and improve the health of the population as a whole. For example, the concept of harm principle or duty of easy rescue is often relied upon by governments around the world to justify the implementation of public health policies. Some academics have argued that paternalism is justified because it is a result of a democratic society. There are also arguments that public health policies only restrict people's choices and do not undermine their personal autonomy.

The New Zealand Government has a history of limiting the right to exercise personal autonomy during a public health crisis. Especially during the COVID-19 pandemic, the New Zealand Government has restricted the New Zealand population's personal autonomy through implementing struct public health measures such as nation-wide lockdowns. This paper has also explored many other jurisdictions' public health policies in the context of vaccinations and has found that mandatory vaccination programmes are common in other jurisdictions. Other nations have frequently found that mandatory vaccination policies are justified for the purpose of safeguarding its population from infectious diseases. Further, in the international law domain, ensuring the highest attainable standard of health by placing limitations on certain rights is permitted.

As this paper has discussed above, the New Zealand Government can mandate the COVID-19 vaccination. The right to refuse medical treatment under the New Zealand Bill of Rights Act is not absolute because it is subject to s 5 of the Bill of Rights Act. Section 5 of the New Zealand Bill of

Rights Act permits the New Zealand Government from introducing paternalistic public health policies as long as it is a justified limitation. For a limitation to be justified, it must be reasonable. For a limitation to be reasonable, it must be capable of being demonstrably justified in a free and democratic society. The interpretation of justified limitation is explored more deeply in case law. Following the Oakes test adopted in *R v Hansen,* a mandatory COVID-19 vaccination policy is likely to be justified if:

(a) it serves a purpose sufficiently important to justify the curtailment of the right or freedom;
(b) It is rationally connected with its purpose;
(c) It impairs the right or freedom no more than that is reasonably necessary for sufficient achievement of its purpose; and
(d) The limit is in due proportion to the importance of the objective.

This paper concludes that the Oakes test is satisfied in the context of a mandatory COVID-19 vaccination policy, thus, is a justified limitation on New Zealand population's rights. As this paper has discussed above, consequences arising from the COVID-19 pandemic are significant and detrimental on a domestic and international level. The purpose of a mandatory COVID-19 vaccination policy is to create herd immunity against COVID-19 to mitigate the risks and harms caused by the virus. Accordingly, the purpose of achieving herd immunity is sufficiently important because it protects the New Zealand population as well as the New Zealand economy from COVID-19. It has been clinically proven that COVID-19 vaccinations can prevent the spread of the virus, thus a mandatory COVID-19 vaccination policy is connected with the purpose of achieving herd immunity. Because a mandatory COVID-19 vaccination policy cannot physically force people to receive vaccines, it is arguable that it does not impair individuals' right or freedom no more than it is reasonably necessary. Further, there are other alternative methods to prevent the spread of COVID-19, such as lockdowns and border closures, but they are not as efficient or effective as vaccinations. Following the harm principle established by Mill, a mandatory COVID-19 vaccination policy should be considered as a limitation that is in due proportion to the purpose of achieving herd immunity. As this paper has discussed previously, the right to exercise personal autonomy turns into a privilege from a right if it causes harm upon others. The right to personal autonomy should not be considered as absolute if it is exercised at the cost of harming others. If COVID-19 vaccinations are not made mandatory in New Zealand, people who actively choose not

to be vaccinated will increase the chances of COVID-19 transmission and create significant health risks (such as developing serious symptoms from COVID-19 and death) to everyone in their community. Limiting people's ability to choose whether to receive COVID-19 vaccines is therefore in due proportion to the purpose of achieving herd immunity. Accordingly, this paper argues that everyone who can receive vaccines (except for the medically compromised members of the community) should be subject to a mandatory COVID-19 vaccination in New Zealand.

However, before introducing a mandatory COVID-19 vaccination policy, the New Zealand Government must consider two factors. First, the New Zealand Government must ensure that the rule of law is respected. The New Zealand Government has frequently overlooked the rule of law principles while implementing public health measures to combat COVID-19. If the New Zealand Government continues to overlook the rule of law, its public health policies can be deemed as illegitimate and ultra vires. Public trust and confidence will decline and may result in the New Zealand population not adhering to future public health policies. The New Zealand Government needs to understand that ignoring the rule of law will undermine the core values of liberal democracy. Secondly, the New Zealand Government will need to think about what exemptions to allow and what penalties to impose on a mandatory COVID-19 vaccination policy. This is important to consider because exemptions and penalties related to mandatory vaccination policies vary the degree of strictness and severity of limitation placed upon the right to personal autonomy.

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