



In reply please quote: *JM:cr*

29 October 2021

Mr Paul McKaysmith
A/Director Workforce Relations & Management
People and Culture
Transport for NSW

Dear Mr McKaysmith,

RE: Feedback - COVID – 19 Safety Control Measures

Thank you for the opportunity to consult on TfNSW's risk assessments. The PSA has been actively working with the various Departments and Agencies across the sector to encourage prioritisation of vaccines for critical workers to ensure the safety of employees at work and other improved controls to ensure the risk of infection are minimised at work. We have also advocated for greater access to vaccination for our regional members who have had limited supply during the vaccine rollout.

Despite organised criticism of this pro-safety stance from a minority, we remain willing to work with the TfNSW to ensure everyone's safety is ensured through the COVID-19 pandemic.

Direction for Vaccination – Reasonable and Lawful

Having said this, there are elements of the risk assessments as provided that may not meet the three of the elements of a vaccination direction as per the Fair Work Ombudsman recommendations ie. 1. Lawful, 2. Reasonable and b 3. Within the Scope or Subject Matter of the employee's employment

We believe that the risk assessment may come across the following problems depending on the individuals' circumstances.

Overreliance on vaccination- The Fair Work Ombudsman (FWO) and SafeWork Australia warn against over-reliance on immunisation control to make work safe. Further, the FWO states such overreliance may not be reasonable and lawful in all circumstances.

Lack of Health Order- We would like to acknowledge that it is difficult to make these judgements and assessments without the guidance of a specific health order or the knowledge of future health orders to be applied to your industry.

Risk Management Controls- The document list which controls will be applied to the various 'workgroups'. However, since the process commenced, TfNSW has amended its controls and no longer requires face masks. As such, the current risk assessment forming the basis of the TfNSW proposal to mandate vaccinations is outdated. Further, control mechanisms are not always specific such as 'ventilation mitigation where applicable.' What does this mean? We can only presume that it cannot be precise because the risk assessment does not look at the specific sites.

There has also been no mention of various controls such as meeting through electronic mechanisms, A and B shifts, permanently working from home, and redeployment, which can be utilised for non-operational activities. The other option which does not appear to be explored for those who do not wish to be vaccinated is Rapid Antigen Testing.

Additionally, the risk management controls do not appear to consider the high level of community vaccination rates reducing the potential risks. Nor can the risk assessment be said to consider the specific risks to TfNSW as they stand currently with TfNSW unaware of the rate of vaccination with their employees.

Risk Treatment bias- The risk treatment bias falls to the reliance on mandatory vaccination for all areas. Mandatory vaccination will only partially reduce the risk of infection (efficacy) and the effectiveness against COVID-19. There is a range of other controls mentioned above and in TfNSW risk assessment that can reduce the risk of infection. Despite control measures available, all workgroups require vaccination. The risk assessment offers no alternative to mandated vaccination, and it is unsettled what will occur for those seeking exemptions to the vaccination.

Further, it is unclear how TfNSW can justify implementing mandatory vaccinations for all workgroups. In fact, the risk profile for many workgroups has been deemed low, with minimal face-to-face interaction required, yet vaccinations have been considered mandatory.

It is unlikely to be lawful and/or reasonable that if a person has been permitted work from home since the beginning of the pandemic and without any material change to the operations of the TfNSW that the same person would have the relevant risk profile to warrant a mandatory vaccination. Changing their work arrangements to include a higher risk, thereby requiring mandatory vaccination, may also be challengeable under legality or reasonable tests or under victimisation and discrimination provisions under the IR and WHS Acts, respectively.

Dates and Uncertainty - There is uncertainty from the state government about what level of freedom there will be from 1 December, or before then.

Members in the regions have reported a level of anxiety due to cancellations of bookings. Along with difficulties in accessing the vaccination, members have reported driving over an hour and a half to access a vaccine clinic.

Additionally, there is uncertainty about the level of risk there is in the community and possible transmission. We are yet to see what community transmission will be like once unvaccinated individuals have the same freedom of movement as vaccinated individuals. Not only that, international travel has only recently recommenced. Until such a time, it is too early to be mandating vaccinations.

Suppose TfNSW continues to seek to mandate vaccinations. In that case, we put to TfNSW, similar to other Departments, they consider this at a later date when there is greater certainty around community transmission and the risk profile.

Extent of community transmission– the PSA puts to TfNSW per the FWO, the extent of community transmission is a factor to be considered. Such a factor is relevant to the risk profile of the employee's role. With community transmission rates lower, the PSA is uncertain that mandating vaccinations is a reasonable direction to all employees, particularly those who may work outside or in areas with even lower vaccination.

Vaccination rates – relevant to the risk profile of TfNSW employees are the vaccination rates of TfNSW employees and the community vaccination rates. Yet TfNSW is unaware of the TfNSW employee vaccination rates. To not factor these into the requirement for employees to be vaccinated, it is debatable whether the direction is lawful and/or reasonable.

Mental Health- The Risk Assessment does not consider workers' mental health, particularly the conflict of values posed by mandatory vaccinations. For example, some workers' religious

and political objections to having a COVID-19 vaccination and reporting the absence of adequate informed education are causing significant anxiety.

Education vs Mandate

TfNSW has proposed for the mandate on vaccinations to become effective from 1 December 2021. Whilst exemptions will be allowed; the mandate is effective from that date. The PSA has found agencies where there is no prior education that a percentage of workers have searched for information from elsewhere where they are led towards sources of vaccine misinformation. Where an educative process has been approached prior to vaccination, employees have been able to ask questions and test their doubts in a more informed environment.

Through surveys of our membership, we have identified that there has been a lack of education on vaccination and a lack of availability in the regions until very recently, which makes dating a mandate difficult and open to a case by case amendment if required reasonable.

If TfNSW is to proceed with mandatory vaccination - in that case, it is recommended before mandate dates that those employees who indicate that they are still unwilling or unable to acquire a vaccine should be provided with education sessions led by a reliable medical professional/s led by TfNSW.

External Co-locations

Several workers must attend work locations that will have an additional layer of requirements such as health orders and more restrictive WHS requirements. PSA submits the recommended controls should be that the employee should be required to meet and follow the relevant safety requirements of these organisations, including the same PPE and fit testing/checking.

Vaccination Notification Process and Confidentiality

TfNSW will not be storing the evidence of the employee's vaccination status but recording whether the individual is or is not vaccinated. The record is through the Manager undertaking a declaration. The process is absent from the policy. When discussing the process with members, they have expressed concern about whether the Manager is the best individual to undertake this? Some have also questioned if there could be an alternative?

The policy states evidence accepted is from a Government Source, issues raised have been:

1. If they are evidencing an appointment, this is not a government source.
2. Vaccination certificates can take a week to appear. What occurs to an individual in these circumstances?

There is a requirement under HRIPA legislation and the Premiers Circular to have a confidential process for notification of vaccination status or medical contra-indication as this is a medical record. Where TfNSW will record the employee's status as vaccinated or unvaccinated is also absent from the policy.

To the below issue of the booster shot, the policy does not address how TfNSW will monitor an employees' vaccination status.

Booster Shots

The policy does not address booster shots.

It only requires individuals to be fully vaccinated, which at this stage seems to mean a double. As we know, the efficacy of the double dose wears off. The policy does not clearly apply to booster shots; if it will apply – when will boosters be required? Will there be different requirements for different vaccinations? How will TfNSW know when an individual requires a booster?

Review Dates

The policy does not contain any review dates.

With the level of uncertainty we put to TfNSW, there should be a set review process for the risk assessments, therefore, the policy. The PSA suggests such a process can be incorporated into our COVID – 19 Task Force meetings and can discuss items such as:

1. The impacts of the policy;
2. Exemptions that have been sought;
3. Transmission risks;
4. How TfNSW is handling employees who are unvaccinated;
5. Updates in health advice.

Exceptions

Medical - We have seen that there may be a small percentage of people who end up being unvaccinated due to medical contra-indications or other concerns. This may be due to a recent experience of cancer, a history of severe reactions to vaccines, underlying co-morbidities, or even a recent COVID-19 infection, which clinical guidance for medical contra-indications is available on the NSW Health website.

Alternative vaccination – the PSA has received a report of members waiting for alternative vaccinations or receiving an existing vaccine with a negative reaction. Those members who had a negative reaction or are waiting for alternative vaccines will be able to become double vaccinated in time with the approval of other forms of vaccines that have a lower risk profile for their particular medical condition. The policy does not address these circumstances, nor does the flow chart for 'Proposed Evidence of Vaccination Status Framework' take these into account.

Miscellaneous exemptions – members have sought guidance as to what exemptions TfNSW will consider. In the alternative, what will be the decision making framework utilised?

Review Period & Outcomes - With all roles requiring vaccination, it is precarious that there will be any measures available to ensure that employees with any exemptions are supported, and it be safe to attend the workplace. As highlighted above, it may not be reasonable for TfNSW to require vaccinations when working from home. What safety controls will TfNSW provide to ensure that these people can continue to undertake their work safely?

Oversight - the policy nor the framework indicated who is responsible for managing the exemption process. Many members are wary as to who they will provide medical details to (contraindication), and many not be comfortable discussing their concerns about the vaccination with their manager.

Ready Willing and Able

TfNSW framework for those employees who seek an exemption is for the employee to utilise leave whilst TfNSW make a decision. If they aren't willing to take leave, TfNSW is proposing that the employee be placed essentially on LWOP as the employee is not ready, willing and able to complete their duties. TfNSW may have difficulties in this argument when an employee is ready, willing and able to undertake their work from home safely and have done so. The PSA is aware that other Departments might be reassessing their process and paying these individuals during this period and through their proposed review period.

Process of Evidence of Vaccination

The framework proposed (pg 17 & 18) appears to contradict, or at the least, not take into account, the exemption framework. Further, the frameworks relating to evidence of vaccination does not include any direction to comply, yet the worker is failing to comply – what is the failure to comply with? Will there be a direction to comply, and will this occur from 1 December 2021?

An employee is required within 48 hours to provide evidence of their vaccination booking date that is within 2 weeks. However, it may not always be possible to get a vaccination within 2 weeks.

It is uncertain from the policy who will manage the process for those employees who do not meet the vaccination requirement. This needs to be clear, and TfNSW need to ensure these employees are appropriately trained to have these conversations.

Written Policy

The proposed policy does not include a procedure that TfNSW will follow for exemptions or when a direction to be vaccinated is refused. However, the frameworks in the consultation pack outline the proposed process. Can we presume these frameworks would form part of a policy or procedure?

OTSI

OTSI is an independent statutory body. Is there a reason they are being included in the TfNSW policy? The PSA is advised the CEO of OTSI was not notified they were to be included, and as such, the employees were unaware.

Workforce Exposure Descriptors: Category 1 – 4

The risk assessment under Categorisation Assessments designates the workgroup as having minimal face to face interaction on an ongoing basis. Workgroups such as (but not limited to) - Corporate Services – office-based roles, Finance & Investment- Office based work – all roles, People and Culture – office-based roles, and Point to Point Transport Commission – office based roles.

Yet when utilising the Workforce Exposure Descriptors, these groups have been categorised as category 3. The more apt descriptor would be category 4, "where workers have minimal face – to – fact interaction as part of their normal duties".

Managing Entrants to the Premise

The PSA understands from meetings that entrants to TfNSW premises will have to be vaccinated. Such a measure should form part of TfNSW risk mitigation strategies.

Contractors/Labour Hire

TfNSW has advised the policy will apply to contractors and Labour hire. The PSA supports the application to such individuals but as these individuals are not employees we put to TfNSW to consider if this would be better managed under a separate policy.

Injuries from Vaccination

The policy does not address what should occur if an employee is directed as part of the policy to be vaccinated then suffers an injury/side effect from the vaccination i.e. do they report it.

Members want to understand what liability there is for TfNSW if they mandate vaccinations for employees resulting in the employee getting the vaccination at the employer's direction and they are injured as a result of the vaccination. We understand that the TGA has instituted a scheme. However, the workplace could be a significant contributing factor to the injury.

The process for an employee, if they are injured, should be outlined in the policy.

Employees Transitioning to NHVR

There is a portion of TfNSW who will be transitioning to NHVR around September 2022. NHVR notified the PSA they have not mandated vaccinations. Suppose TfNSW proceeds to mandate vaccinations as proposed. In that case, we believe TfNSW needs to consider these

circumstances and look to alternative arrangements for these employees if individuals do not wish to be vaccinated.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'J. Moore', written in a cursive style.

Jessica Moore
for **Stewart Little**
General Secretary



Stewart Little
General Secretary
Public Service Association of NSW
160 Clarence Street
SYDNEY NSW 2000

By email: jmoore@psa.asn.au

Dear Jessica

Transport COVID Safety Controls Review Feedback

Thank you for the letter of 29 October 2021 and for the Public Service Association of NSW's (PSA) ongoing feedback and discussion during the consultation period relating to the proposed Transport wide COVIDSafe Controls Policy (the **Proposed Policy**).

The matters raised in your letter have formed part of the feedback that has been reviewed and considered. In doing so, it was considered appropriate to provide a response to some of the matters raised by the PSA. Please see these responses below.

Direction for Vaccination – Reasonable and Lawful

The materials issued by the Fair Work Ombudsman and SafeWork Australia are guidance material only and not binding.

In Transport's view, the absence of a Health Order is not determinative of whether a requirement to be vaccinated is lawful and reasonable. Transport regularly implements lawful and reasonable directions, including but not limited to controls to manage risks to health and safety, in the absence of Health Orders.

Transport does not agree that current risk assessment forming the basis of the Proposed Policy is outdated. All risk assessments that are undertaken in relation to COVID-19 are taken at a point in time and subject to change as a result of review and the dynamic nature of the virus. Transport's acceptance that masks may not be required to be worn by some workers is not determinative of whether or not a high level control such as vaccination is lawful and reasonable. What is more relevant is that COVID-19 remains a very contagious and potentially fatal disease.

Transport considers that, while some roles may be able to be worked from home from time to time (even for extended periods), there are no roles for which it is reasonable to permanently work from home.

Transport has explored health surveillance measures such as Rapid Antigen Testing (**RAT**). However, while Polymerase Chain Reaction (**PCR**), RAT and Saliva Swab Testing (**SST**) are painless and non-invasive, they are not as effective a control as vaccination against COVID-19. In particular, PCR, RAT and SST testing do not reduce the likelihood or severity of COVID-19, but simply assist in identification of positive cases in order to assist in removing them from the workplace at the earliest opportunity. Further, PCR testing is usually slower than RAT, but RAT is not as accurate as a PCR test. Therefore, implementing PCR, RAT and SST testing, in the absence of vaccination, may not be sufficient to comply with the Work Health and Safety legislation to ensure safety.

As to vaccination rates, Transport acknowledges that it is not aware of precisely what proportion of its workers are vaccinated. However, Transport assumes that the proportion of its workforce that is vaccinated is roughly equivalent to the general population across NSW. If anything, the relatively high vaccination rates across the NSW population suggest that vaccination is broadly accepted and, therefore, reasonable.

Education vs Mandate

Transport acknowledges that education on vaccination is a useful tool to encourage high rates of vaccination. Transport will endeavour to provide vaccination sessions hosted by a reliable medical practitioner, such as Transport's Chief Health Officer, Dr Casolin, to address any concerns about vaccinations.

External Co-locations

Transport acknowledges that some workers must attend work locations that will have an additional layer of requirements such as health orders and more restrictive WHS requirements. Transport agrees that those workers should meet and follow the relevant safety requirements of those organisations they visit. However, they will also be required to satisfy Transport's requirements in relation to vaccination.

Exceptions

Transport acknowledges that in rare situations an employee may contend that there are exceptional circumstances, other than a medical contraindication, that justify non-compliance. Where an employee seeks to establish that exceptional circumstances justify non-compliance, they must provide evidence and reasons. Acceptance of non-compliance based on exceptional circumstances will only occur in rare individual cases after consideration of the offered justification and evidence, and in the context of public health and risk assessment requirements.

Transport acknowledges that there may be some individuals who are waiting to receive an alternative vaccination. There are at least three vaccinations currently approved for use in Australia by the Therapeutic Goods Administration (**TGA**). If an individual has a medical contraindication to all three vaccinations currently approved for use in Australia by the TGA, Transport will consider that individual's personal circumstances. Transport will not, however, consider a mere preference for a particular vaccine as a justification for non-compliance with the requirement to be vaccinated.

In the event that an employee is unable to be vaccinated, Transport will consider what alternate controls may be able to be implemented. Those controls will depend on the

worker's position but may include masks, health surveillance testing and isolation from other workers, customers and common areas. As the risks may remain unacceptable, Transport cannot guarantee that alternate controls will be able to be implemented in respect to every individual who cannot be vaccinated.

Ready Willing and Able

Transport acknowledges that many workers have successfully worked from home in recent times. However, while some roles may be able to be worked from home from time to time (even for extended periods), there are no roles for which it is reasonable to permanently work from home.

OTSI

The PSA's comments with respect to OTSI are noted and will be considered.

Workforce Exposure Descriptors

Transport's Categorisation Assessment only applies Category 4, minimal contact, to those workers for which it is reasonable to permanently work from home. As referred to above, no such roles have been identified.

Injuries from Vaccination

Transport expects that there will be very few, if any, individuals who have a serious adverse reaction to a vaccination. However, if a workers does suffer an injury as a result of a vaccination, it may be compensable under Transport's workers compensation scheme. Any claim for workers compensation as a result of vaccination will be considered in the usual way.

Employees Transitioning to NHVR

Transport acknowledge that there are a number of Transport workers will be transition to the NHVR in around September 2022. Until then, they continue to be employed within Transport and required to comply with Transport's policies and procedures regardless of NHVR's policies and procedures.

If you have any questions, please contact me to discuss further.

Yours sincerely



Paul McKaysmith
Director Workforce Relations & Management

5 November 2021