

# Ethical and legal considerations COVID-19 vaccination

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## Executive summary

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Health Council of the Netherlands



The Minister of Health, Welfare and Sport has asked the Committee of Ethics and Law of the Health Council of the Netherlands to outline a framework to address the ethical dilemmas and legal issues that can arise with COVID-19 vaccination. This refers in particular to the question to what extent the government is allowed to encourage people to get vaccinated. In this advisory report, the Committee has described the spectrum of policy interventions in public health, ranging from the lowest degree of intrusion to coercion in people's private lives and choices. The Committee has also addressed the question to what extent the government is allowed or compelled to prevent private entities (such as employers, healthcare institutions, schools or social event organisers) from requiring proof of COVID-19 vaccination for access to particular environments or services.

### **Reasons for vaccine refusal vary**

Currently three COVID-19 vaccines have been approved for the EU market and various others are expected to follow. Despite COVID-19 vaccine acceptance being on the rise in the Netherlands, still approximately a quarter of the population express vaccine hesitancy. This may be due to concerns about the vaccine's safety or because of principled life choices and beliefs. To achieve herd immunity (the level at which people who are not immune are also protected against infection), the percentage of immune people in the population needs to reach a certain threshold.

### **Coercion requires justification**

The government has a spectrum of interventions at its disposal for stimulating COVID-19 vaccine uptake. These interventions can be categorised according to the degree to which they are intrusive to people's freedom of choice.

In Dutch, the term 'dwang' refers to the most coercive and restrictive type of measures. In the case of COVID-19 vaccination, it implies that treatment is inevitable and force may be used. This degree of coercion is extremely rare in infectious diseases control. The Public Health Act of the Netherlands does not allow for forcibly vaccinating people. Lesser degrees of restrictive measures are referred to in Dutch as 'drang'. This term means that a person's behaviour is influenced by restricting freedom of choice. There are numerous different ways in which people can be influenced, for example, by manipulating options. Mandatory or compulsory vaccination is categorised as drang, as is restoring freedom of individuals who have been vaccinated. Interventions that restrict personal choice are not necessarily unacceptable, but do require justification.



### **Nudging, persuasion and advice do not restrict personal choice**

There are also policy interventions that influence individual decision-making without restricting freedom of choice, namely, nudging, persuasion and advice. Nudging is a motivational technique in which people are subtly encouraged to demonstrate the desired behaviour. Persuasion is about influencing behaviour by providing reasonable arguments. Advising comprises provision of reliable and substantiated information with the aim of enabling people to make informed decisions. In practice, the distinction between mildly restrictive interventions and ‘hard’ nudges can be a grey area.

### **Private entities may require proof of vaccination under certain conditions**

Based on the applicable laws and regulations, private entities are allowed to require proof of vaccination for access to their services or facilities as long as they comply with the relevant regulatory framework, including the Equal Treatment Act, the principle of

non-discrimination and data protection laws. The Committee notes that such a requirement will always need to be preceded by reopening of these facilities by the government. Private entities must weigh up the different interests at stake, and must be able to demonstrate that the requirement serves a legitimate aim, is necessary for achieving that aim and complies with the principles of subsidiarity and proportionality. The Committee has outlined a framework that can be used to perform this assessment.

### **Government tasked with supervision**

According to the Committee, the government has the responsibility to maintain supervision of the responsible use of vaccination requirements by private entities. This follows from the government’s role in protecting fundamental rights also in horizontal relations, meaning between private citizens and other private entities. The government may choose to exert its responsibility through legislation or, for example, by encouraging professional

organisations to establish a code of conduct for vaccination requirements.

#### **Framework for private entities regarding the use of vaccination requirements**

- Vaccination requirements must be an effective and necessary measure to achieve the intended aim.
- Vaccination requirements must be proportional and the least intrusive measure to achieve the intended aim.
- Private entities must minimise potential harmful consequences.
- Vaccination requirements must not result in unfair exclusion or discrimination.
- Private entities must comply with privacy legislation.
- Private entities must periodically evaluate whether the vaccination requirements still meet the above stated conditions.



The Health Council of the Netherlands, established in 1902, is an independent scientific advisory body. Its remit is “to advise the government and Parliament on the current level of knowledge with respect to public health issues and health (services) research...” (Section 22, Health Act).

The Health Council receives most requests for advice from the Ministers of Health, Welfare and Sport, Infrastructure and Water Management, Social Affairs and Employment, and Agriculture, Nature and Food Quality. The Council can publish advisory reports on its own initiative. It usually does this in order to ask attention for developments or trends that are thought to be relevant to government policy.

Most Health Council reports are prepared by multidisciplinary committees of Dutch or, sometimes, foreign experts, appointed in a personal capacity. The reports are available to the public.

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