In-Confidence

Office of the Minister for COVID-19 Response

Cabinet Social Wellbeing Committee

Proposed COVID-19 Public Health Response Amendment Bill

Proposal

1 This paper seeks Cabinet policy approval to amend the COVID-19 Public Health Response Act 2020 (the Act) and to issue drafting instructions to the Parliamentary Counsel Office (PCO).

Relation to government priorities

2 The proposals in this paper support the Government's response to the COVID-19 pandemic and delivery of the COVID-19 Elimination Strategy.

Background

3 The Act provides the primary legal framework for addressing the COVID-19 pandemic and delivering the Government's COVID-19 Elimination Strategy. The Act allows the Minister for COVID-19 Response (or the Director-General of Health in specified circumstances) to make orders to give effect to the public health response to COVID-19.

4 The Act was amended as follows:

4.1 August 2020: to enable social, economic, and other factors to be considered where relevant and provide for cost recovery of Managed Isolation and Quarantine (MIQ) costs; and

4.2 December 2020: to provide for pragmatic Ministerial administration and quicker removal of Alert Levels.

5 At the time the Act was drafted, we did not know how long the COVID-19 response would need to last or how complex and comprehensive the system would become. This is particularly evident in the case of Managed Isolation and Quarantine Facilities (MIQFs), which had only been functioning for five weeks when the Act was created. Almost a year later, MIQ has evolved into a complex system of 32 facilities, with over 125,000 people passing through isolation or quarantine.

6 Now we understand that despite the roll-out of vaccines, COVID-19 will continue to impact New Zealander's lives for some time to come. Therefore, I am concerned to see the Act future-proofed to ensure the systems have a robust and enduring legal platform. Officials in multiple agencies have identified a range of amendments as a result of experience using the Act and secondary legislation empowered by it over the past ten months.

7 These proposals offer improvements that have the objective of strengthening and broadening empowerment provisions and making some legal technical fixes. The proposed changes aim to ensure the Act is fit-for-purpose for 2021 and beyond, and that it facilitates the Government's COVID-19 Elimination Strategy.

8 Additionally, while the Act may not be enduring for a long time period, it is important to ensure that at the point of repeal the Act reflects New Zealand's best legislative framework for responding to a pandemic. The Act can then be used as a template or blueprint as a starting point for future legislation to address other pandemics, should it be needed.

Overview of proposed amendments

9 The proposed amendments will ensure the legislation is future-proofed by giving greater flexibility and strength to the provisions empowering the COVID-19 response. The recommendations are informed by the experience of working with the Act since its commencement in May 2020. This includes the changes in Alert Levels as a response to community cases in Auckland, the implementation of pre-departure testing, the vaccine roll-out, and the continual improvement in the management and operation of MIQFs.

10 The proposals fall into two distinct groupings based on agency responsibility and the outcome sought. The following table provides the primary objective for each of these areas, which is expanded in the executive summary of the proposals below. In-depth analysis of the proposed amendments, including financial implications, equity impacts and human rights analysis can be found in the relevant appendix for each of the two areas.

Area of proposed change	Agency lead	Primary objective	Appendix
1. Improvements to support the public health response to COVID-19	Ministry of Health	To improve and future-proof the Act by providing a suite of technical fixes ensuring flexibility and clarity of application.	Appendix 1
2. Supporting the effective management and operation of MIQ	Ministry of Business, Innovation and Employment (MBIE)	To improve transparency, accountability and enforceability of the MIQ function.	Appendix 2

11 The relationship between the Act and the proposed amendments is represented in the following diagram:

COVID-19 Act Amendment Bill components

The COVID-19 Public Health Response Act 2020 supports a public health response to COVID 19 which prevents and limits risk of COVID-19 transmission, as well as mitigating the adverse impacts of the disease.

The Act provides:

- Authority for the making of COVID-19 Public Health Orders to prevent the risk of COVID-19 transmission;
- Enforcement powers for issuing infringement fees/fines or prosecuting for breaches of the requirements in Orders; and
- A mechanism for MBIE to recover costs from Managed Isolation and Quarantine Facilities (MIQF) stays.

Technical amendments to deliver on Elimination Strategy now and in the future

Extending the term of the Act

Enable the Act to be repealed via Order in Council

Strengthening the infringement regime (e.g., increasing maximum fines and providing for body corporates)

Refining the powers of COVID-19 Orders to improve flexibility

These involve changes to Section 11 of the Act – the purpose for which Orders (the main empowerment tools) can be made.

Revisit the term 'things' and expand the definition of 'things' to include goods

Expand the purpose for which Orders can be made

Incorporate material by reference

Allow for more pragmatic setting of Alert Level boundaries

Regulate quality control standards for COVID-19 laboratory testing and manage the supply of testing consumables

Improved delegated decision making

New regulatory system for the management of MIQFs

This involves making some of the powers that establish and govern MIQFs explicit in primary legislation and establishing regulatory powers for the management and operations of MIQFs to support the COVID-19 response.

Power to manage movements in MIQFs

Power to allocate and prioritise places

Recognise the complaints and review process

Power to make rules for the operation of facilities (e.g., alcohol and deliveries)

Make a general rule for charging that everyone is liable unless exempt

Requiring provision of onward details for invoicing purposes

Executive Summary of the proposed amendments

Area One: Improvements to support the public health response to COVID-19 – Ministry of Health lead (Appendix One)

Extend the term of the Act

12 It is now clear that we will be dealing with COVID-19 well beyond 2021. I am therefore seeking agreement to extend the Act's current expiry date by one year, from May 2022 to May 2023. If there is a COVID-19 resurgence in the future, having extended the term of the Act in advance means a response can be quickly operationalised without the need to extend the term of the Act at that point. This also ensures Parliamentary time is best used in managing the response and not in making administrative changes to the Act. Note that provision would still be subject to the requirement for periodic renewal by Parliament.

13 The executive powers in the Act are significant with respect to the imposition on the rights of freedoms of New Zealanders, so should not be in place longer than is necessary. I therefore recommend that provision be made for the Act to be able to be repealed, in whole or in part, by Order in Council.

Improved flexibility for the making of COVID-19 Orders

14 I propose several amendments to improve the flexibility and workability of COVID-19 Orders (Orders). These are to:

14.1 fix the repetitious and confusing use of the word 'things' in sections 11 and 12 of the Act;

14.2 extend the definition of 'things' to include 'goods' and other terms to ensure a clear scope for COVID-19 is provided;

14.3 expand the purpose of what Orders can cover;

14.4 enable material to be incorporated by reference so that the Orders remain up-to-date as the material incorporated in this manner can always refer to the latest edition; and

14.5 remove the limitation that urgent Orders apply only to a single territorial authority's boundary, and to allow for an Alert Level boundary to be defined in the most pragmatic way to allow for sensible location and enforcement of restrictions across boundaries.

Support the management of COVID-19 testing laboratories

15 There is currently nothing preventing privately-run laboratories from testing New Zealanders for COVID-19. This raises:

15.1 potential issues with the quality of the testing in the absence of IANZ accreditation against the international standard for testing people for

COVID-19 (ISO15189), which poses risks relating to potential false positive or negative tests;

15.2 concerns about the lack of integration with the national network of laboratories, which means they are not currently required to notify all test results and input into the national testing repository; and

15.3 concern about competition over access to laboratory consumables, which are in short supply globally.

16 To address this, I recommend the provision of laboratory services to the COVID-19 response be improved by:

16.1 regulating quality control and minimum standards in relation to COVID-19 laboratory testing;

16.2 requiring integration of COVID-19 test results into the public health surveillance system (i.e. require reporting of results and input into the national testing repository); and

16.3 managing the supply of testing consumables.

Strengthening the infringement regime

17 The current approach to compliance with Orders and requirements within them is to educate and support individuals to meet the requirements, rather than punish them for not complying. This approach is largely working. However, I have concerns that the disparity between the serious nature of breaches and the available fee (currently $300) does not deter more serious breaches as effectively as it could. For example, an individual bringing an apple into New Zealand through the air border in breach of bio-security legislation may be subject to an infringement fee of $400. Yet if they breach the pre-departure testing requirement and risk bringing COVID-19 into the country, that fee is only $300.

18 To ensure we are able to set appropriate infringement penalties to deter non-compliance with Orders, I am proposing to amend the Act to increase the maximum infringement fee to $1,000 for an individual (currently $300), and to increase the court imposed infringement fine to a maximum of $3,000 for an individual (currently $1,000).

19 Currently there is no distinction between an individual and a body corporate in the infringement regime. I propose to introduce an infringement fee of $3,000 and a court-imposed infringement fine of up to $9,000 for a body corporate.

20 I am also proposing the Act includes an empowering provision to provide authority for secondary legislation to be drafted providing details of an infringement offence regime. Officials will continue to work on the infringement fee regime before finalising the secondary legislation.

Improve delegated decision-making

21 Officials have reviewed how the sub-delegation of decisions from the Minister for COVID-19 Response to the Director-General of Health is working in the making of COVID-19 Orders. A potential improvement has been identified to strengthen the legal basis for the empowerment provision in section 12 of the Act for the delegation of decisions to the Director-General of Health. This amendment would enable agility of response for decisions that need to be made at short notice, while reducing the potential for legal challenge.

22 Further information about these proposals can be found in **Appendix One**.

Area Two: Supporting the effective management and operation of MIQ - MBIE lead (Appendix Two)

23 MIQ is first and foremost a public health response and a critical part of the Keep It Out pillar of the Elimination Strategy. However, as the MIQ system has developed, it has become clear that the effective functioning of MIQ would sometimes benefit from additional considerations being taken into account.

24 These additional considerations are necessary in order for MIQ to achieve its overarching public health objective. Additional considerations include:

24.1 managing the sustained demand for MIQ places from people seeking to enter New Zealand;

24.2 ensuring the health and safety of workers and residents in facilities; and

24.3 operating with a high degree of assurance around operational processes (including charging of fees).

25 The Act does not expressly include provisions for the effective operation of MIQ (other than for cost recovery) and has limited empowering provisions for delegated legislation to be made to achieve this. This means MIQ is governed by a mixture of Orders made under the Act, operational decisions and reliance on the general law and common law principles such as natural justice.

26 Leaving the broader MIQ considerations to operational decisions and the general law means the legal basis for MIQ is fragmented. In particular, it means there is:

26.1 increased legal risk;

26.2 insufficient ability to enforce rules and requirements; and

26.3 opportunity to build stronger transparency and accountability.

27 A clear legislative framework would support the effective and orderly operation of MIQ and provide the powers, obligations and rights to achieve this and ensure there are appropriate safeguards. It will be important to retain

flexibility so that MIQ can continue to respond to the dynamic global pandemic environment.

28 I propose the Act should:

28.1 recognise, as appropriate, broader considerations relevant to the effective operation of MIQF in addition to public health objectives;

28.2 include the Minister's power to determine the basis for issuing managed isolation allocations and the Chief Executive of MBIE's power to manage the allocation of managed isolation places in accordance with Ministerial decisions, shifting the existing powers from the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 into the Act;

28.3 reverse fee liability, so that by default all people are liable to pay fees for their stay in MIQFs unless they are exempted by the Act or the COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020 (whereas currently only prescribed classes of people in the Regulations are liable);

28.4 recognise the ability to direct, impose conditions on and restrict movement to, from and within MIQFs, and expressly allow for room restrictions to be imposed. This would be subject to public health and decision-making criteria, as appropriate, and apply to people undertaking isolation and quarantine and other people onsite who enter MIQFs (e.g. people authorised to enter, people joining a person in a MIQF, or an unauthorised person attempting to enter);

28.5 enable the Chief Executive of MBIE to make rules for the day to day operation of MIQFs, including restricting, prohibiting and imposing conditions on what things can be brought into facilities, including mail, deliveries and alcohol;

28.6 require MBIE to ensure there is an internal complaints review process in place for MIQF decisions that impact on individuals; and

28.7 require that people undertaking isolation and quarantine provide accurate and comprehensive information in order to support MIQ invoicing.

29 Excluding the reversal of fee liability and the information collection power, these powers are already in place, either through the Orders, or operationally relying on Health and Safety at Work Act 2015. However, recognising them in the Act would improve transparency of the system and provide legal certainty.

30 I note that there are legislative design choices to be made about whether the powers to manage movement would be included in the Act itself or whether the Act would simply enable this to be done through Orders. I will note the outcome of this further design work in the paper I bring to Cabinet Legislation Committee.

31 Further information about these proposals can be found in **Appendix Two**.

Proposed process and timeline for Amendment Bill

32 I am proposing that the Committee agree drafting instructions be prepared on the basis of the recommendations in this paper by the Ministry of Health and submitted to Parliamentary Counsel Office for the drafting of this amendment Bill.

33 I will be proposing a shortened timeline and a 6-week Select Committee process due to the need to realise the benefits of the proposed changes sooner rather than later, given how quickly the COVID-19 pandemic and the associated policy and operational environment is developing. A proposed timeline is provided in **Appendix Four**. This provides for a six week Select Committee process. It is also dependent on House time being available and approval being granted to progress with a shortened Select Committee period.

34 To facilitate good drafting and ongoing clarification of policy and operational matters, I am recommending that officials from the Department of the Prime Minister and Cabinet, the Ministries of Health, Justice and Business, Innovation and Employment may continue consultation with selected stakeholders on drafting of the relevant amendments.

35 I am also requesting authorisation for me, as Minister for COVID-19 Response, to make any necessary policy decisions that may arise during the drafting process, that are consistent with the policy intentions agreed by the Cabinet Social Wellbeing Committee.

Financial Implications

36 Refer to the Appendices.

Population Implications/equity

37 Refer to the Appendices.

Human Rights

38 Refer to the Appendices.

Legislative Implications

39 The Ministry of Health has submitted a bid for a drafting priority on the 2021 Legislative Programme for a Bill to amend the Act. The proposed priority is Category 2 (must be passed in the year).

Impact Analysis

Regulatory Impact Statement

40 Two Regulatory Impact Assessments have been prepared to support the COVID-19 Public Health Response Act Amendment Bill 2021.

41 A joint Ministry of Health and Ministry of Business, Innovation and Employment panel has reviewed both Impact Statements titled "Legislative improvements to support the public health response to COVID-19" and "Legislative Framework for Managed Isolation and Quarantine", produced by Health and MBIE respectively, dated May 2021, and has provided the following comments:

41.1 The panel considers that the Impact Statements partially meet the quality assurance criteria.

41.2 The Impact Statements are clear, concise and complete. Both RIS have identified a range of feasible options in terms of the legislative proposals.

41.3 Due to the short timeframes allowed for the development of the regulatory proposals, there was limited consultation outside of government. Thus, both RIS only partially meet requirements in this area.

42 Each Ministry will publish their Regulatory Impact Statements on their website providing a cross reference and link to the other.

Climate implications

43 This proposal is exempt from the requirement to provide a Climate Implications of Policy Assessment (CIPA).

Consultation

44 This paper was prepared by the Ministry of Health in conjunction with the Ministry of Business, Innovation and Employment, in consultation with the Department of Prime Minister and Cabinet; the Ministries of Foreign Affairs and Trade, Education, Justice, Pacific Peoples and Transport; the Ministries for Women and Primary Industries; New Zealand Customs Service, Parliamentary Counsel Office, the Offices of the Privacy Commissioner and Ethnic Communities, the New Zealand Police, and Te Puni Kokiri. The Crown Law Office reviewed the paper.

45 Specific comments from these agencies have been incorporated into the appendices as appropriate.

Communications

46 If the proposals in this paper are agreed, appropriate communication channels will be used to communicate the changes to those affected, including the general public.

Proactive Release

47 I intend to proactively release this Cabinet paper, excluding legally privileged material and subject to any redactions consistent with the Official Information Act 1982 and Cabinet Office agreement, no later than 5 working days following Introduction of the Amendment Bill to the House.

Recommendations

The Minister for COVID-19 Response recommends that the Committee:

Improvements to support the public health response to COVID-19

1 **note** that the policy objective of the proposed COVID-19 Health Response Act Amendment Bill 2021 is to ensure that the COVID-19 Public Health Response Act 2020 (the Act) is future-proofed by giving greater flexibility and strength to the provisions empowering the COVID-19 response;

Extend the term of the Act

2 **agree** to extend the term of the Act to May 2023 and allow for it to be repealed (in whole or in part) through Order in Council;

Improved flexibility for the making of COVID-19 Orders

3 **agree** to technical amendments in relation to the use of the word 'things' in sections 11 and 12 of the Act to remove the circular nature of the definition;

4 **agree** to extend that definition of ‘things’ to encompass ‘goods’ and other terms to ensure a clearer scope for the application of COVID-19 Orders;

5 **agree** to insert a deeming provision which ensures any goods prohibited under an Order are treated as “prohibited imports” for the purposes of the Customs and Excise Act 2018;

6 **note** that including “goods” in the definition of “things” and cross-referencing the application of the Customs and Excise Act 2018 will provide greater certainty for Customs’ in enforcing import prohibitions made under an Order;

7 **agree** to amend section 11 of the Act 2020 (and possibly other sections) to ensure Orders can encompass a broader range of outcomes embracing the evolving nature of actions required to manage COVID-19 into the future;

8 **agree** to allow the incorporation of material by reference in Orders so that the material always refers to the latest edition without amending the reference;

9 **agree** that Orders can specify Alert Level boundaries based on the specific circumstances of each Alert Level change, and that Orders made pursuant to section 10 not be limited to a single territorial authority boundary;

Effective management of laboratory testing

10 **agree** to include a provision to place requirements on testing laboratories including:

10.1 regulating quality control and minimum standards;

10.2 requiring reporting of COVID-19 test results into the public health national testing repository; and

10.3 managing the supply of testing consumables;

Strengthening the infringement regime

11 **agree** that the Act be amended to increase the court-imposed infringement fee to $1,000 and the fine of up to $3,000 for individuals;

12 **agree** to amend the Act to introduce an infringement fee of $3,000 and a fine of up to $9,000 for body corporates;

13 **agree** to amend the Act to provide authority for secondary legislation to set out an appropriate infringement fee framework;

14 **agree** that the maximum criminal conviction fine in section 26 be revised to remain consistent with the increase in infringement offence fees/fines;

Improved delegated decision-making

15 **agree** to provide more flexibility for the sub-delegation to the Director-General of Health or another person of the ability to:

15.1 specify or determine when, how, and for whom any provision of an order is excluded from applying; and

15.2 designate, define, determine, or specify certain matters required for the operation of a provision of an order, including matters that affect or determine the application, operation, or scope of a provision;

16 **note** that this amendment would also address legal/technical issues recently identified by the Regulations Review Committee;

Supporting the effective operation of managed isolation and quarantine (MIQ)

17 **agree** to amend the Act to provide a legislative basis for the orderly and effective operation of managed isolation and quarantine;

18 **note** that public health is the primary purpose of MIQ;

19 **agree** to recognise, as appropriate, broader considerations relevant to the effective operation of MIQ in addition to public health objectives, such as:

19.1 ensuring workers and people staying in facilities are kept healthy and safe in line with obligations under the Health and Safety at Work Act 2015;

19.2 the impact on rights under the New Zealand Bill of Rights Act 1990 of people staying in facilities and workers; and

19.3 operational and resourcing implications for MIQ;

Managing demand for places in MIQ

20 **agree** to include a power in the Act for the Minister for COVID-19 Response to determine the apportionment of and basis for online MIQ allocations;

21 **agree** that offline allocations can either be made by the Minister for COVID-19 Response or by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) in accordance with criteria decided by the Minister for COVID-19 Response;

22 **note** that these powers are expected to mirror the recent changes to the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020;

Reversing fee liability

23 **agree** to amend the Act so that the starting point for MIQ charges is that everyone who enters MIQ is liable, unless they are exempted under the Act or the COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020;

Managing movement

24 **agree** to recognise the ability to direct, impose conditions on and restrict movement to, from and within managed isolation and quarantine facilities (MIQFs), including imposing room restrictions for:

24.1 people undertaking managed isolation or quarantine; and

24.2 other people onsite who enter MIQFs (e.g. people authorised to enter, people joining a person in a MIQF, or an unauthorised person attempting to enter);

25 **note** that whether this is provided for in the Act itself or the Act enables this to be done through Orders will be confirmed during drafting;

Managing items

26 **agree** to enable the Chief Executive of MBIE to make rules for the day-to-day operation of MIQFs, such as restricting, prohibiting and imposing conditions on what things can be brought into facilities, including deliveries and alcohol;

Dealing with complaints

27 **agree** to require an internal complaints review process to be in place for MIQ decisions that impact on individuals;

Information collection for invoicing purposes

28 **agree** to require people undertaking managed isolation or quarantine to provide MBIE with their onwards contact details necessary to support MIQ invoicing;

Other amendments

29 **agree** the above proposals will be knitted into the existing offences regime in the Act (including creating new offences where necessary e.g. to provide enforcement for paragraph 28 above) in line with the changes proposed in paragraphs 11 to 14;

30 **agree** to make consequential changes to the Act to support the changes in the recommendations above and ensure the MIQ functions are recognised (for example, creating a new, part-specific purpose);

General, process and timing

31 **agree** that officials from the Department of the Prime Minister and Cabinet, the Ministries of Health, Justice and Business, Innovation and Employment 2022 may continue consultation with selected stakeholders on drafting of the relevant amendments;

32 **agree** that drafting instructions be prepared by the Ministry of Health and submitted to Parliamentary Counsel Office;

33 **authorise** the Minister for COVID-19 Response to make any necessary policy decisions that may arise during the drafting process, that are consistent with the policy intentions agreed by the Cabinet Social Wellbeing Committee; and

34 **note** that the Ministry of Health will place this paper on its website subject to any redactions consistent with the Official Information Act 1982 and Cabinet Office agreement.

Authorised for lodgement

Hon Chris Hipkins

Minister for COVID-19 Response

Appendix One: Improvements to support the public health response to COVID-19 (Ministry of Health lead)

Extend the term of the Act

1 The Act was made with a built-in repeal date of May 2022. While it was important at the time that the Act was first drafted to ensure its wide-ranging powers were time-bound, it is now important to recognise the evolving nature of the COVID-19 pandemic which will see risks extend through 2022 and potentially beyond.

2 If there is a COVID-19 resurgence in the future (for example, in early-2022), having extended the term of the Act in advance means a response can be quickly operationalised without the need to extend the term of the Act at that point. This also ensures Parliamentary time is best used in managing the response and not in making administrative changes to the Act.

3 Should the Act be allowed to expire, agencies would have to revert to relying on the generic provisions of the Health Act 1956 and other provisions in empowering legislation such as the Epidemic Preparedness Act 2006, Civil Defence Emergency Management Act 2002, Immigration Act 2009 and Customs and Excise Act 2018 to legislate for COVID-19 response activities. These Acts have limitations in application to the demands of the COVID-19 response.

4 Providing clarity about the endurance of the Act and its subordinate framework is vital for the strategic approach and response planning necessary for New Zealand to manage forward its COVID-19 response. This includes the ongoing changes that will be necessary for effective border management.

5 I am therefore proposing that two amendments are made to section 3 of the Act:

5.1 extend the repeal date for one year, from May 2022 to May 2023; and

5.2 allow for the Act to be repealed, in whole or in part, via Order in Council.

6 There are existing safeguards to ensure that the Act is in effect only for as long as it is needed. Section 3 of the Act provides that its ongoing continuance requires a resolution to be passed by the House of Representatives within a 90-day period, or some other longer period that is resolved. I am not proposing any changes to this ongoing confirmation process. The Act also relies on a pandemic notice being in effect for the "teeth" of the Act (the COVID-19 Public Health Orders made under section 11) to be in effect. Should the pandemic notice be lifted, the Orders will cease to be of effect.

7 I consider this to be the appropriate approach as it avoids the need for further extensions of the repeal date until May 2023, but also allows for it to be quickly repealed when it is no longer necessary through Order in Council,

rather than rely on defaulting the confirmation process or further legislative amendment.

Changes to COVID-19 Public Health Orders (Orders) made under the Act

8 There are several amendments proposed for Orders made pursuant to section 11 of the Act. This section sets out the purpose, actions able to be taken and scope for Orders made by either me as Minister for COVID-19 Response or by the Director-General of Health.

Clarify the term 'things'

9 There is a technical fix required in relation to the use of the word 'things' in section 11 as it relates to the potential scope of an Order. To provide an understanding of the breadth of the term 'things', an inclusive definition is contained in section 11(3). This clarifies that 'things' covers places, premises, ports, crafts, vehicles, and animals. The definition also applies to section 12 'General provisions relating to COVID-19 Orders'.

10 The issue is that within the context of section 11, the definition is repetitive, circular and confusing. I propose that the wording of the sections involved be refined to fix this issue.

Extending the definition of 'things' and actions allowing for a broader application

11 Customs recommends that the definition of 'things' be expanded to include the word 'goods'. It is not clear that the term 'things' as currently used in the Act includes 'goods' and/or 'products'. As such, there is a legal risk around using an Order as the hook to regulate/prohibit the importation of goods or products such as point-of-care tests (POC tests)[1] as it could be considered an unexpected use of such an order.

12 This uncertainty in the Act has flow-on consequences for Customs and its ability to enforce any Order relating to an import prohibition. The Ministry of Health also notes that the inclusion of 'goods' would enable an Order to cover setting out any requirements needed for the regulation of laboratory consumables in New Zealand.

13 Along with this consideration, the context of section 11 of the Act would suggest that the definition of 'things' should also expressly cover 'businesses', 'records', 'equipment', and 'supplies' as well as 'goods'.

14 To address this uncertainty and consequent legal risk, I am recommending that the definition of 'things' be amended to include 'goods' and other terms to

[1] A COVID-19 Public Health Order is currently being prepared to prohibit a person from importing, manufacturing, supplying, selling, packing, or using a point-of-care test unless the Director-General of Health has authorised the person's activity or exempted the point-of-case test from the prohibition. This is to replace the current Notice under section 37 of the Medicines Act 1981 which expires on 21 April 2021.

ensure the workability and appropriate application of an Order. This approach would give a clear basis in the Act to make Orders that:

14.1 regulate the use of 'things' in New Zealand; and

14.2 allow for the prohibition of importation and entry of goods or products into New Zealand where the use or prohibition of entry supports 'preventing the risk of the outbreak or spread of COVID-19'.

15 Customs also recommends that the Act be amended to include a deeming provision to link any import prohibition made by Order to Customs' enforcement powers under its own legislation. This deeming provision would expressly reference the application of the Customs and Excise Act 2018 and deem any goods prohibited from entry into New Zealand by an Order as "prohibited imports" under section 96 of the Customs and Excise Act 2018.[2] This would give Customs its full range of enforcement and penalty powers to take actions in relation to prohibited imports.

Expand the purpose for which Orders can be made

16 The Act has a statement of purpose (section 4) reflected in the criteria used for making of Orders by myself as the Minister for COVID-19 Response (section 9). The key phrase in these sections is that Orders can be made to 'avoid, mitigate or remedy' the effects of the outbreak or spread of COVID-19. In contrast section 11 refers to 'preventing the risk' of the outbreak or spread of COVID-19.

17 I am anticipating that in the future Orders may be used more for the ongoing management of COVID-19 rather than its prevention. I want to be confident that we have sufficient breadth in the scope to make new types of Orders to progress the COVID-19 Elimination Strategy, particularly in support of building health system readiness and resilience and responding to new global norms regarding vaccination and travel.

18 I am therefore recommending that the words 'contain', 'reduce', 'control', 'manage' and 'eliminate' be included as additional purposes for which COVID-19 orders may be made. I expect that Parliamentary Counsel Office (PCO) will advise officials on the appropriate terms to ensure the appropriate application of an Order.

Incorporate material by reference

19 Another matter that would improve the making of Orders and Gazetting of information is to allow material to be incorporated by way of reference. There is legislation in New Zealand that provides a model for doing this. An example of this is the Animal Products Act 1999 sections 168 and 168A.

[2] Similar deeming provisions exist in section 121 of the Hazardous Substances and New Organisms Act 1996, section 26 of the Fair Trading Act 1986 and section 36 of the Misuse of Drugs Act 1975. The benefit of these deeming provisions is to allow Customs to use its enforcement powers as if the prohibition was made under the Customs and Excise Act 2018.

20 This approach enables the referenced material to always refer to the latest edition of that work available without amending the reference. Material incorporated by reference is usually of a technical nature and published by a reputable organisation. For example, if New Zealand gets a "travel passport" or any other cross-country standards or App solutions, the orders can refer to the latest version of them. This creates flexibility so that when the passport or App is updated, that update is automatically part of the Order.

21 This is a technical amendment that would reduce the administrative burden of Order updates and allow for improved effectiveness and future-proofing. It is proposed that the enabling provision will require the Director-General of Health to assess the reference work and determine that it is acceptable internationally or by the expertise of the New Zealand medical profession on the relevant subject matter.

Changes to Alert Level management

22 I propose removing the limitation that Orders made pursuant to section 10 of the Act be limited to a single territorial authority boundary. For the two Auckland clusters to date, boundaries that were pragmatic did not align with territorial authority boundaries and crossed over more than one. While there have been no section 10 Orders made thus far, there is no public health rationale for limiting an urgent Order to a single territorial authority boundary.

23 I am keen for the Alert Level boundaries to have the flexibility to be expressed in the best way possible to enable workable implementation. This may include using roads, geographical features such as rivers or ranges, or other practical means to define the boundaries. My objective is to reduce the confusion about whether some smaller towns or areas are included or not and enable the Police to establish lockdown checkpoints in the best location on the road network.

Effective management of laboratory testing

24 The Ministry of Health has received requests from several companies to establish their own private testing arrangements outside of the current arrangements to test workers on a regular basis as a risk mitigation strategy.

25 To date the Ministry has not supported private market testing, primarily as the Ministry's Testing Strategy prioritises testing for 'at-risk' and symptomatic people, and did not support widespread asymptomatic testing of communities because of concerns over the supply of testing consumables and because such testing does not align with the New Zealand context where there have not been prolonged periods of community spread. While there is nothing preventing privately-run laboratories from testing New Zealanders for COVID-19 the matter raises:

25.1 potential issues with the quality of the testing in the absence of IANZ accreditation against to the international standard for testing people for

COVID-19 (ISO15189), which poses risks relating to potential false positive or negative tests;

25.2 concerns about the lack of integration with the national network laboratories, which means they are not currently required to notify all test results and input into the national testing repository; and

25.3 concerns about competition over access to laboratory consumables, which are in short supply globally.

26 The Crown Law Office has indicated that an Order made under section 11 of the COVID-19 Public Health Response Act 2020 has scope to implement measures that contribute to the prevention of an outbreak or spread of COVID-19 by:

26.1 regulating quality control and minimum standards in relation to testing;

26.2 requiring integration of COVID-19 test results into the public health surveillance system (i.e. require reporting of results and input into the national testing repository); and

26.3 managing the supply of testing consumables.

27 However, using section 11 to provide different levels of regulation for the national and non-national network laboratories would not be permissible. For example, it would only be permissible to enable non-network laboratories to undertake private testing if network laboratories were similarly enabled.

28 The Crown Law Office has also indicated that it is unlikely that the use of section 11 to regulate laboratories was envisaged when the Act was passed. Any change that enables regulation of COVID-19 testing should be clearly justified in terms of its contribution to preventing an outbreak or spread of COVID-19.

29 In the meantime, work has commenced on the development of a section 11 Order to prohibit laboratories from performing tests for COVID-19 in humans except where exempt or authorised by the Director-General of Health.

Improvement to the infringement regime

30 The purpose of the Act's infringement regime is to ensure New Zealanders meet the requirements set out in the Act and Orders to help New Zealand respond to the global COVID-19 pandemic. Therefore, the infringement regime empowered by the Act needs to provide an appropriate deterrent effect for breaches of orders.

31 Most people and businesses are compliant and try to meet their obligations. However, voluntary compliance is enhanced when there are clear legal powers underpinning these including the ability to deal with serious or persistent non-compliance.

32 Infringements will only be applicable when education and encouragement options have failed, but will provide an important first level of enforcement action before escalation to court proceedings. For example, the results of the pre-departure testing regime show that people are trying to comply, with over 14,000 people subject to the regime arriving since the scheme was introduced until 26 March 2021, and only 32 warnings and 4 infringements being issued (for lacking documentation).

33 An offence and penalty regime with limited options could undermine New Zealand's response, and risks failing to achieve the Government's COVID-19 Elimination Strategy.

34 I am proposing to enhance the infringement regime so that a meaningful disincentive for non-compliant behaviours is in place that reflects New Zealand's national interest and public health imperatives. I also want to provide for ongoing flexibility of the regime so that it will not require any further changes to support the COVID-19 response over the life of the Act.

Increased infringement penalties and introduction of fees/fines for body corporates

35 The current approach to compliance with Orders and requirements within them is to educate and support individuals to meet the requirements, rather than punish them for not complying. This approach is largely working, however, I have concerns that the disparity between the serious nature of breaches and the available fee (currently $300) does not deter more serious breaches as effectively as it could. For example, an individual bringing an apple into New Zealand through the air border in breach of bio-security legislation may be subject to an infringement fee of $500. Yet if they breach the pre-departure testing requirement and risk bringing COVID-19 into the country, that fee is only $300.

36 The low penalties for infringements are arguably not an effective deterrent for requirements like pre-departure testing where the test alone can cost more than $300.

37 Different penalties for individuals and body corporates may be appropriate for breaches of some Orders. For example, where non-compliance by a person conducting a business or undertaking (PCBU) may warrant a higher fee than an individual. This is a similar approach to that of the Health and Safety at Work Act 2015, where flexibility in infringement approach is appropriate to make sure the infringement fees are proportionate both to the risk posed by non-compliance and the resources available to an individual versus a body corporate to meet infringement penalties.

38 The amounts proposed are set out in the following table:

Table One: proposed infringement fee/ fine for individual/body corporate

Application	*Infringement Fee*	*Maximum Court fine*
Individual person	Up to $1,000	$3,000
Body Corporate	Up to $3,000	$9,000

39 We have consulted the Ministry of Justice who consider these amounts to be appropriate as they are proportionate to the conduct subject to infringement offences under the Act and its COVID-19 orders.

40 When changing the maximum levels for infringement offences, the maximum fine for a criminal conviction found in section 26 will also need to be revised to remain consistent.

Empowering provisions in the Act will provide for a framework to be made for infringements

41 I am proposing secondary legislation is used to define the fee/fine to be applied in different circumstances within those parameters. It is proposed that this include the potential for different penalties for individuals and body corporates, and for different fees depending on the gravity of the infringement offence while still under the maximum amount allowed.

42 To enable this, I am also proposing that the Act include an empowering provision to provide authority for secondary legislation to be drafted. The empowering provision should provide for the regime to differentiate based on the harm and gravity of the offence and whether there is repeat offending. Officials will continue to work on developing an appropriate infringement fee framework before finalising the secondary legislation.

Consultation

43 The New Zealand Police have been consulted on this paper and have advised that they are supportive of the proposal for an empowering provision to allow for future work on the infringement regime. Police agree that it may be beneficial to include different penalties for individuals and body corporates, and for different fees depending on the harm or seriousness associated with the offence. However, they recognise that infringement fees have a greater impact on lower socio-economic groups, and that financial penalties are inherently inequitable given they have a proportionately larger impact on lower socio-economic households. Therefore, the impacts need to be considered carefully.

44 The Ministries for Women's Affairs and Pacific Peoples agree with this concern and would like to emphasise that the infringement regime established through regulations should clearly set out that an approach of educating and encouraging compliance should be pursued before infringement fees are issued. They also raise concerns that employers need to be enabling workers

subject to Orders to meet the requirements, i.e. by making it clear that workers can and should remain at home when they are sick or awaiting a negative COVID-19 test.

45 The Ministry of Justice has been consulted on this proposal and have advised that they do not support the use of different fees for repeat offending. An infringement notice is intended to be handed out at each separate instance of offending at the time of offending. Further, they consider that repeat breaches may already be dealt with by way of the existing process for infringement offences. Finally, in instances of repeat breaches they consider the individual or body corporate will be knowingly breaching a requirement. They therefore consider it appropriate that the full criminal offence for intentionally breaching an Order is applied.

46 The Ministry of Justice's comments highlight that there is a balance to be struck between improving deterrence mechanisms and not creating a complex system that is difficult to use. Officials will continue to work with the Ministry of Justice to further refine this proposal and reach the right balance.

47 Other agencies have provided feedback that more work is required to identify exactly how this regime would work and what the best secondary legislative vehicle would be. Officials will therefore continue to work on developing the appropriate infringement fee regime before finalising the secondary legislation later, working closely with Ministry of Justice and Parliamentary Counsel Office colleagues.

Improve delegated decision-making

48 Ministry of Health officials have reviewed how the sub-delegation of decisions from the Minister for COVID-19 Response to the Director-General of Health are working.

49 An issue has been identified regarding the empowerment provision in section 12(1)(d) of the Act. That section provides a power for a COVID-19 order to sub-delegate to any person or class of persons (including the Director-General of Health). It also confirms that the sub-delegated power is a power to grant an exemption or authorise a specified activity that would otherwise be prohibited by the Order.

50 This is not ideal as, in instances like the establishment of pre-departure testing requirements, it is prudent to have decisions made quickly – which isn't always possible when ministerial decision-making is required. Similarly, some decisions may need to be changed at short notice. To provide for this they would ideally be delegated to the Director-General of Health rather than the Minister for COVID-19 Response, to enable this agility of response.

51 PCO have advised that this issue can be addressed by amending section 12 of the Act to provide more flexibility for the sub-delegation to:

51.1 specify or determine when, how, and for whom any provision of an order is excluded from applying; and

51.2 designate, define, determine, or specify certain matters required for the operation of a provision of an order, including matters that affect or determine the application, operation, or scope of a provision.

52 This amendment would also address sub-delegation issues recently identified by the Regulations Review Committee.

Financial Implications

53 There are no budgetary implications associated directly with the proposed amendments. This is because they are either empowering and enabling in nature, or are necessary technical legal fixes. Implementation can be met from existing departmental budgets.

Population Implications/equity

54 Any resurgence of COVID-19 and the settings in response to it, is likely to have a disproportionate impact across population groups. The economic and health impacts are known to be disproportionately felt by the Māori and Pasifika populations, women, and those experiencing financial hardship or experiencing other forms of disadvantage.

55 Proposed changes to the infringement regime and increased fee and fine amounts will impact on particular population groups. I note that certain ethnic groups within New Zealand (including Māori and Pasifika) have been disproportionately affected by COVID-19 response measures when they are part of a cluster of community cases. Those groups subject to higher Alert Level requirements so may also be disproportionately affected by increased infringement fees.

56 The Ministry and other agencies are working to take a communications and public engagement approach to ensuring the information about requirements is accessible to a wider range of ethnic groups, and that compliance is better supported.

57 In June 2020, Cabinet also agreed to $20 million funding to enable DHBs to provide managed community options including the provision of wrap-around services to support cases and eligible contacts to successfully isolate/quarantine [CAB-20-MIN-0261 refers]. The contracting process between the Ministry of Health and DHBs to disburse this funding is expected to be completed in April 2021.

Human Rights

58 Any regulatory changes around the COVID-19 response have the potential for significant New Zealand Bill of Rights Act 1990 (BORA) implications. Rights engaged include freedom of assembly, movement including the right of a citizen to enter New Zealand, search and seizure, and expression. The following paragraphs discuss the impacts proposed changes may have on human rights.

Extending the term of the Act

59 Extending the Act's life does not introduce new human right impacts, rather it causes a continuance of current impacts.

Changes to COVID-19 Public Health Orders (Orders) made under the Act

60 Each time an Order, regulation or Director-General notice is proposed its implementation is tested for consistency with the New Zealand Bill of Rights Act 1990. All these legislative instruments potentially contain requirements that could limit the rights and freedoms of individuals.

61 The rights that are potentially affected by changes to the Alert Level management (to provide for more effective setting of Alert Level boundaries) are the freedoms to assemble and of movement within New Zealand. The intention of the changes is to improve the application of Alert Levels for New Zealanders making the boundaries more targeted and workable. This means that human right impacts are likely to be reduced as a result of this amendment rather than exacerbated.

62 For the broadening of purposes of which section 11 Orders can be made, the Government's plan for responding to COVID-19 cases in the community provides for a precautionary approach. In particular, rapid and decisive action, empowered by primary legislation, is seen as our best chance to avoid needing to further escalate the Alert Level framework (with corresponding greater limitations on rights and freedoms) on a nationwide basis.

63 I consider that the human right impacts imposed by the legislation (its extension and amendments) are, in a free and democratic society such as New Zealand, demonstrably justified on the following basis:

63.1 the Epidemic Preparedness (COVID-19) Notice 2020 remains in force providing a clear statement of Government's concern of high rates of COVID-19 related illness, permanent disability and death;

63.2 progressively allowing international travel to resume and tourism to return, as well as enabling Alert Level management to be kept at levels (or resume levels quickly) that enable normal New Zealand commerce;

63.3 avoiding COVID-19 specific health inequities for Māori and Pasifika peoples, the elderly and other high-risk people, and those living in socioeconomic deprivation;

63.4 applying control measures that are more flexible and able to provide tailored/targeted responses; and

63.5 learning from this global pandemic and international responses how best to respond to this and other pandemics or significant global events of the future.

64 The common practice with any COVID-19 subordinate legislation is to put it in place with publicity ahead of commencement. Notwithstanding the need for

rapid COVID-19 responses to manage the risk of community spread, advance publicity allows for some period of time for people to prepare and adjust to mitigate against the impact on their rights and freedoms. A further mitigation is provided by putting the COVID-19 subordinate legislation in place for a specified time period and also providing for review.

Other matters specified in this appendix:

65 No human rights implications have been identified for the following matters:

65.1 effective management of laboratory testing;

65.2 improvements to the infringement regime; and

65.3 improved delegated decision-making.

Appendix Two: Supporting the effective operation of managed isolation and quarantine (Ministry of Business, Innovation and Employment lead)

Background

1 Government first established managed isolation and quarantine (MIQ) in March 2020 in response to the outbreak of the COVID-19 pandemic. The COVID-19 Public Health Response Act 2020 (the Act) came into force five weeks later, in April 2020. It did not initially make any specific provision for MIQ, although an amendment in August 2020 introduced provision for cost recovery.

2 At the time, it was not known how critical MIQ would continue to be to the COVID-19 response, how long it would be required and how complex the system would become. MIQ has now been operating for over a year and has evolved into a complex system of 32 Managed Isolation and Quarantine Facilities (MIQFs) operating in a dynamic global pandemic environment, facing significant and sustained pressure and growing demand.

MIQ lacks a clear legislative framework

3 MIQ remains first and foremost a public health response and a key part of the 'Keep It Out' pillar of the Elimination Strategy. However, as the system has developed, it has become clear that the effective functioning of MIQ would sometimes benefit from additional considerations being taken into account in the day-to-day delivery of isolation and quarantine services.

4 Other key considerations for the operation of MIQ include managing the sustained demand for MIQ places from people seeking to enter New Zealand, ensuring the health and safety of workers and residents in facilities, and operating with a high degree of assurance around operational processes (including charging of fees). These are broader than the immediate public health considerations, although it is only by considering these that the public health goals of MIQ can be achieved.

5 The Act does not provide provisions in primary legislation for the orderly operation of MIQ (other than for cost recovery) and has limited empowering provisions for delegated legislation to be made to achieve this. The Orders under the Act are primarily concerned with public health and transmission of COVID-19.

6 This means MIQ is governed by a mixture of orders made under the Act, operational decisions and reliance on the general law, such as the New Zealand Bill of Rights Act 1990 (NZBORA), the Health and Safety at Work Act 2015 (HSWA) and common law principles such as natural justice.

7 Leaving the broader MIQ considerations to operational decisions and the general law means the legal basis for MIQ is fragmented. In particular, it means there is:

7.1 **increased legal risk** – Given the nature of MIQ, decisions are made that require the balancing of individual rights and other considerations in highly complex situations. While the general law provides a frame for these decisions, it does not reflect the complexities and nuances involved in the MIQ context. In places, there is an absence of clear legal authority to limit individual rights and freedoms;

7.2 **insufficient ability to enforce rules and requirements** - Encouraging voluntary compliance is necessary to create an environment where people in facilities are supported to play their part in keeping themselves and New Zealand safe from COVID-19. For the most part, people in MIQ voluntarily comply with operating rules and processes. This remains the first and best way of running MIQ. However, voluntary compliance is enhanced when there are clear legal powers underpinning these, and when we have the ability to deal with serious or persistent non-compliance.

7.3 **opportunity to build stronger transparency and accountability** – MIQ's operations have evolved over the last year as we learn more about the virus and how to manage it. This has included developing operational frameworks to support consistency, transparency and accountability. Recognising decisions and processes in, or elevating them to, primary legislation strengthens transparency for those impacted by decisions, and provides certainty and guidance for decision-makers. Parliamentary scrutiny adds a further layer of oversight that is appropriate given the significance of MIQ to the COVID-19 response.

8 Strengthening these aspects of MIQ will ensure users of facilities have a clear legislative framework setting out their obligations and protecting their rights; decision-makers have clear powers, criteria and principles guiding their decision-making; and there is a certain legislative basis for those administering facilities to operate by and enforce.

I propose creating a framework for MIQ in the Act

9 To address the issues identified above, I propose that the Act should include new provisions for MIQ so that there is an enduring legislative basis for the remainder of the COVID-19 response.

10 A clear legislative basis would enable the effective and orderly operation of MIQ and provide for the powers, obligations and rights to achieve this and ensure there are appropriate safeguards. It will also be important to retain flexibility so that MIQ can continue to respond to the dynamic global pandemic environment.

11 I propose the Act should:

11.1 include the Minister's power to determine the basis for issuing managed isolation allocations and the Chief Executive of the Ministry of Business, Innovation and Employment's (MBIE) power to manage the

allocation of managed isolation places in accordance with Ministerial decisions, shifting the existing powers from the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 (the Isolation and Quarantine Order) into the Act;

11.2 reverse fee liability, so that by default all people are liable to pay fees for their stay in MIQ unless they are exempted by the Act or the COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020 (the Regulations) (whereas currently only prescribed classes of people in the Regulations are liable);

11.3 recognise the ability to direct, impose conditions on and restrict movement to, from and within MIQFs, and expressly allow for room restrictions to be imposed. This would be subject to appropriate public health and decision-making criteria and apply to people undertaking isolation and quarantine and other people onsite who enter MIQFs (e.g. people authorised to enter, people joining a person a MIQF, or an unauthorised person attempting to enter). See **Appendix Three** for examples of how this power might be applied in practice;

11.4 enable the Chief Executive of MBIE to make rules for the day-to-day operation of MIQFs, including restricting, prohibiting and imposing conditions on what things can be brought into facilities, including mail, deliveries and alcohol;

11.5 require MBIE to ensure there is an internal complaints review process in place for MIQ decisions that impact on individuals;

11.6 require that people undertaking managed isolation or quarantine provide accurate and comprehensive information in order to support MIQ invoicing.

12 Excluding the reversal of fee liability and the data collection power, these powers are already in place, either through the orders, or operationally relying on HSWA. However, recognising them in the Act would improve transparency of the system

13 Other changes to the Act to support these new measures and ensure the MIQ function is recognised will likely be required, such as creating a new purpose for MIQ provisions; and amending offence and infringement offence provisions so enforcement powers attach to new powers and obligations set in the Act and secondary legislation.

Managing demand for MIQ places

14 Managing supply and demand is one of the key parts of MIQ's operations. Including the ability to allocate and prioritise MIQ places in primary legislation, subject to appropriate decision-making criteria and safeguards would provide a sound legal footing for this process.

15 The Isolation and Quarantine Order was recently amended to create a power for the Minister to determine the basis for issuing managed isolation allocations and empower the Chief Executive of MBIE to manage the allocation of managed isolation places in accordance with Ministerial decisions. The amendment allows a proportion of allocable places in MIQ to be ring-fenced for New Zealanders with the remainder accessed on a first-come-first-serve basis. It also recognises the online and offline allocation systems and the basis for decision making.

16 Allocation decisions can impact the right of New Zealand citizens to enter New Zealand under NZBORA,[3] either by restricting the total number of people who can enter, or by ring-fencing MIQF spaces for certain people needed for economic and social reasons. Allocating places for non-New Zealanders can impact citizens' right to enter because they cannot use those spaces. In light of this and associated legal risk, I consider it is prudent to shift the powers recently added to the Isolation and Quarantine Order into primary legislation.

17 I note that in shifting these powers up into the Act I propose to adjust the provisions to better reflect the group allocation process and that Border Exception Ministers make these decisions, rather than the Chief Executive of MBIE.

Reversing fee liability, so that by default all people in MIQ are liable for fees unless they are exempt

18 At the time the cost recovery provisions of the Act and Regulations were made, New Zealand's border restrictions were very tight. The majority of people arriving were New Zealanders returning home, and otherwise only a few critical purpose visa holders (e.g. critical workers) were being permitted entry. It was also uncertain at that time how long MIQ would be required and what the ongoing cost to government would be.

19 This context meant that the Act and the Regulations were designed so that groups of people must be specified in the Regulations for charges to apply. The Act sets out exemptions for diplomats and the Regulations provide further exemptions.

20 This means the general rule is that charges do not apply unless they are a specified person in the Regulations. Every time a new border exception is proposed, the Regulations have to be reviewed and in many cases amended to ensure the new group is liable for MIQ charges (where that is the intention). To date, the Regulations have already been revised twice since they were first introduced in August 2020.

21 I propose to amend the Act to make the starting point that everyone who enters MIQ is liable for charges as prescribed in the regulations, unless they are exempt by the Act or Regulations.

[3] Permanent residents also have a right to return to New Zealand under the Immigration Act 2009.

22 The change is necessary to ensure that the public health response to COVID-19 continues to be economically sustainable and the fees regime is administered efficiently and equitably. After a year of delivering the MIQ system, I consider it is appropriate that the starting position reflects the expectation that everyone coming through MIQ will contribute to the ongoing costs to government.

23 MBIE officials are simultaneously undertaking a review of the Regulations, including exemptions for New Zealanders and others. I expect this will result in further changes to the Regulations and the exemption settings to align with this change to the default position in the Act.

Managing people's movements to, from and within MIQFs

Recognising the ability to manage movements in the Act

24 Managing people's movements to, from and within MIQFs is a key part of ensuring the health and safety of those undertaking managed isolation or quarantine and workers.

25 The Chief Executive of MBIE has powers to manage people's movement to facilities from their point of arrival, from facilities (for early departures) and within facilities (authorisation to leave rooms, which can also include temporarily leaving the facility for reasons such as exercise). These are set in the Orders made under section 11 of the Act. **Appendix Three** provides a visual summary of these settings.

26 The Orders do not generally provide express criteria for the Chief Executive to take into account when making these decisions. In a few places the advice of a Medical Officer of Health must be sought.

27 In the absence of express decision-making criteria, the Chief Executive takes into account the risk of spread or outbreak of COVID-19 which is the purpose of the Act and Orders, and any other relevant purposes of the Act such as ensuring an orderly, coordinated and proportionate response.

28 The Chief Executive also has obligations under HSWA to ensure, so far as is reasonably practicable, the health and safety of its workers and other workers onsite, and that the health and safety of other persons is not put at risk from work carried out by MBIE MIQ. These obligations are broader than COVID-19 transmission risk.

29 The Chief Executive also has obligations under NZBORA. Any restrictions on peoples' movement must be proportionate and justified. Access to exercise and fresh air are fundamental to people's wellbeing and respecting their right to be treated with dignity and respect under NZBORA. However, there are sometimes practical constraints to operationalising these rights in facilities that, if not well managed, can impact MIQ's ability to achieve its overall public health objective.

30 While the general law provides a basis for these additional factors to be considered alongside public health, it does not reflect the complexities and nuances involved in the MIQ regime. Currently the Orders are limited in their ability to reflect these broader considerations because the empowering provision is so tightly linked to COVID-19 transmission risk.

Providing a clearer basis for room restrictions to be imposed

31 The ability to keep people in their rooms where it is necessary should be made clearer. Room restrictions should be used as a last resort tool in the MIQ tool-box to respond to uncertain or emerging situations such as new variants or incident response (e.g. to the Pullman case). Under the Orders, people undertaking isolation or quarantine are required to stay in their rooms except in specified circumstances or for activities authorised by the Chief Executive, for example access to fresh air and smoking breaks. Room restrictions have been imposed by the Chief Executive not authorising, or suspending authorisation of, activities. However, given the impact on people's rights and wellbeing, it is preferable for this power to have a clearer basis in primary legislation and subject to express safeguards and decision-making criteria.

Proposed change

32 To address these two issues, I propose that the Act should recognise the ability to manage and restrict the movement of people when they travel from their point of arrival to facilities, within facilities (including the ability to room restrict), and from facilities (where appropriate). This would apply to people undertaking isolation or quarantine and others who are onsite at facilities (e.g. authorised services, people joining a person in a MIQF, or an unauthorised person attempting to enter). This will be subject, where appropriate, to public health and decision-making criteria and provide transparency and clear safeguards for people in facilities.

33 I note that there are legislative design choices to be made about whether the powers to manage movement would be included in the Act itself or whether the Act would simply enable this to be done through Orders. This will be confirmed during drafting and I will note the outcome of this further design work in the paper I bring to Cabinet Legislation Committee.

Managing what things can be brought into facilities, including mail, deliveries and prohibited items

34 Managing what and when deliveries can be received within facilities is a key part of ensuring the health and safety of people undertaking managed isolation or quarantine and workers in MIQ.

35 Dangerous or illegal items and excessive amounts of alcohol can put workers and others at risk. More generally deliveries need to be managed so they do not affect the effective functioning of MIQ or increase risk of transmission. MIQFs are in a unique situation to manage unwanted items because people

undertaking isolation or quarantine are required to be there by law; MIQ is not a normal accommodation facility where it could adopt a policy and if a person refused to comply, it could ask a person to leave. Further as MIQ is a public function, restrictions on people's access to things also have to be consistent with NZBORA.

36 MBIE has developed and implemented a policy to manage deliveries and items, including an alcohol policy, based on its obligations under the HSWA. This is generally operating well through Standard Operating Procedures and most people comply with the policy. Any behavioural incidents that arise are dealt with through MIQ's incident and escalation process, and Police are involved where appropriate. However, there is limited ability to enforce the mail, delivery and alcohol policy pre-emptively, and the offences under HSWA are significant and unlikely to be charged for this level of non-compliance.

37 To support the transparency of these policies and their enforceability, I propose to include a power for the Chief Executive of MBIE to make rules for the effective day-to-day management of facilities, such as deliveries and alcohol policies. These will be based on existing Standard Operating Procedures.

38 Officials have consulted with the Office of the Privacy Commissioner who has raised a concern about inspection that would be involved in enforcing any rules for deliveries. The Standard Operating Procedure MBIE has developed for deliveries does not involve routine opening or inspection. Receiving staff consider whether a package or mail may pose a risk to health and safety. If there are reasonable grounds to believe there is a risk, the staff take the package to the addressee and ask them to open it in the staff member's presence. If a person refuses to open the package, it is held until the end of the person's stay and returned to them on their departure. The policy is based on advice from MBIE legal that was peer reviewed by the Crown Law Office.

39 I have asked officials to work with the Office of the Privacy Commissioner when rules are developed later. MBIE will work with the Parliamentary Counsel Office and relevant agencies to ensure the rule-making power in the Act is subject to appropriate decision-making criteria and safeguards.

Requiring MBIE to ensure there is an internal complaints review process in place for decisions that impact on individuals

40 MBIE currently operates an administrative internal complaints and review process. This is available to people undertaking managed isolation or quarantine when they raise a complaint with a facility manager or wellbeing coordinator, or through a complaints form on the MIQ website. MBIE MIQ's resolution team reviews complaints and decisions, and refers complaints where they are more appropriately handled by other organisations involved in the MIQ system such as the Ministry of Health, New Zealand Defence Force or District Health Boards.

41 The internal complaints and review process helps ensure quality and consistency of decisions made across the MIQ system, particularly because many of the decision-making powers that rest with the Chief Executive of MBIE are delegated.

42 People may also escalate their complaint to external bodies such as the Office of the Ombudsman or the Privacy Commissioner. These external review bodies and their powers exist independently of the Act and Orders and play an important role in the oversight of the system.

43 The internal complaints and review process is operating well. However, given the impact MIQ decisions can potentially have on people's rights, I consider it is appropriate to make it clear in the Act that MBIE must have an internal complaints and review process in place. This would add transparency for people impacted by decisions and provide a statutory check within the Act itself. I am not proposing that the Act set out the detail of the internal review process as this would be too inflexible in the COVID-19 environment.

44 The ability to make complaints to, and have decisions reviewed by, external bodies such as the Ombudsman and the Privacy Commissioner will still be available and will not be restricted by the legislation.

Enabling MBIE to require that people in MIQ provide accurate and comprehensive information in order to support MIQ invoicing

45 Currently MIQ has no ability to compel people staying in MIQ to provide accurate contact information (e.g. an onwards address) to support invoicing for MIQ costs. The information required for MIQ fees collection is collected at MIQFs through a health survey. In many cases the information provided by people who have undertaken isolation or quarantine is inaccurate or insufficient to establish liability for fees or send invoices.

46 This contributes to a backlog of people that have not been issued an invoice for their MIQ stay, as they are pending contact and other details. This has the potential to result in a significant cost being borne by the government for those persons' stays in MIQ.

47 I propose to introduce a requirement that people who enter an MIQF provide MBIE with contact information such as where they are staying after they leave and how to contact them, for invoicing purposes. This will not resolve the existing backlog, but will reduce future issues.

Other changes

48 MIQ's overarching objective is public health, and it will remain the primary consideration. However, a number of other considerations are important to the day-to-day management of the facilities and contribute to the public health objective, but have limited weighting by themselves.

49 I propose that the legislation recognise the broader considerations relevant to the effective operation of MIQ in addition to public health, such as:

49.1 ensuring workers and people staying in facilities are kept healthy and safe, consistent with obligations under HSWA;

49.2 ensuring peoples' rights under NZBORA; and

49.3 operational and resourcing implications.

50 These considerations are already part of operational decision making. Recognising them in legislation will provide transparency and give clear legal footing to how these decisions are made. Officials are working through how best to recognise this across the across the Act and Orders.

51 The powers and rules described in the sections above will also need to be knitted in to the offence and infringement offence provisions in the Act, subject to the amendments I am proposing in Appendix One. The regime in the Act currently provides:

51.1 $4,000 fine or up to six months imprisonment for intentional breaches of a requirement in the orders or offences in relation to exercise of enforcement powers; and

51.2 $300 fee and up to $1,000 court imposed fine for infringement offences specified in Orders.

52 I have proposed to increase infringement offence penalties in the Act to a maximum of $1,000 fee and $3,000 fine for individuals, and $3,000 fee and $9,000 fine for body corporates, with the ability to set levels of fees within those maximums in secondary legislation. I am also proposing that the penalties for criminal offences will need to be adjusted accordingly.

Financial Implications

53 The proposed reversal of MIQ fee liability (so that by default all people are liable to pay fees after a stay in MIQ unless they are exempted) is intended to address fiscal costs to the Crown. As a starting point, it should increase the recovery of MIQ fees to the Crown. However, the full impact of the change will not be known until the changes to who is exempt are made via regulations.

Population Implications

54 These proposals are not expected to have significant new impacts on any population group. They predominantly provide stronger legal footing for existing policy. The health impact of COVID-19 on priority groups such as the elderly, Māori, Pasifika, and ethnic communities is clear. We know that some groups are more at risk of severe illness from COVID-19 due to age or underlying health conditions. The ongoing border restrictions (and associated managed isolation requirements) support the ability of our healthcare systems

to meet the ongoing health and disability needs of priority communities, especially in Māori and rural communities.

56 The majority of managed isolation and quarantine facilities are located in Auckland, as have been most of the incursions of COVID-19 into the community. Those living in Auckland, particularly in areas close to managed isolation and quarantine facilities, including Māori, Pasifika and other ethnic groups, are more likely to be affected by a failure at the border or in a facility. Women and people from priority ethnic groups are also represented in the workforce in and around (for example, nurses, Defence and security staff, and third party contractors). The proposals to strengthen the operation of facilities by ensuring there is a clear and enforceable legislative basis will help support and protect those groups from the risks from working within facilities and from any incursion into the community.

57 Reversing the starting position for fees will not have any impacts by itself. However, any future changes to exemption settings, which could be facilitated by the change to default liability, could impact priority population groups of New Zealanders living overseas or those experiencing financial hardship or other disadvantages.

58 In relation to the Treaty of Waitangi, there may be an argument that given the significant number of Māori living in Australia, the proposal and any future changes to exemption settings could impede the access of Māori to New Zealand and therefore does not comply with the Treaty of Waitangi. Inhibited or delayed access of Māori to New Zealand may negatively impact the ability of Māori to exercise tino rangatiratanga and kaitiakitanga rights and responsibilities.

59 The current fees Regulations include a number of provisions to ensure that the charges do not create a significant barrier to Māori returning to New Zealand, and provide for situations where people are experiencing undue financial hardship and other special circumstances. These include not requiring payment ahead of travel, and the proposed ability to apply to pay through instalments or to have fees waived in cases of undue financial hardship and other special circumstances.

60 Any future policy changes to liability settings in the Regulations for New Zealanders, including Māori, would be subject to the existing safeguards in the Act.

Human Rights

Managing demand for MIQ places

61 This power already exists in the Isolation and Quarantine Order and will be elevated into the Act. The power engages the right of New Zealand citizens to enter New Zealand under section 18 of NZBORA.[4] Under the Act, I am required to be satisfied that an Order does not limit or is a justified limit on the

[4] Permanent residents also have a right to return to New Zealand under the Immigration Act 2009.

rights and freedoms in NZBORA. At the time of making the Order, I was satisfied that any limit on the right to enter was justified.

62 The power provides a lever to balance the demands for MIQ placements from New Zealanders and non-New Zealanders, recognising that the right to enter has to be balanced with the need to allow some non-New Zealanders entry in order to mitigate the economic and social impacts which MIQ inherently entails. The power enables places in MIQ to be ring-fenced for New Zealanders and so will assist in ensuring their ability to enter New Zealand is not unjustifiably impacted further by places in MIQ being allocated to other classes of arrivals.

Reversing fee liability so the default is people are liable unless they are exempt

63 Imposing fees for stays in MIQ can limit New Zealanders' right to enter New Zealand by creating a financial barrier for those seeking to enter. At the moment, the starting point in the Act is that people are only liable for fees if they are specified in the Regulations. New Zealanders are prescribed in the regulations as liable for the lower fee bracket if they left New Zealand after 11 August 2020 or are returning home for less than 90 days (this will become 180 days from 1 June 2021).

64 The proposal will amend the starting position so that everyone is liable for fees unless they are exempt (either in the Act or under the Regulations). I consider this is a justified limitation on New Zealanders' right to enter. The change is necessary to ensure that the public health response to COVID-19 continues to be economically sustainable and the fees regime is administered efficiently and equitably. After a year of delivering the MIQ system, I consider it is appropriate that the starting position reflects the expectation that everyone coming through MIQ will contribute to the ongoing costs to government. Officials are simultaneously reviewing the Regulation settings to determine the exemptions from this new starting position, including exemptions for New Zealanders.

65 The new starting position and any future policy changes to exemption settings for New Zealanders will be subject to the existing safeguards in the Act. The Act provides that the regulations cannot recover more than an estimate of the actual and reasonable MIQF costs incurred, that there must be appropriate provision to grant relief where payment would cause undue financial hardship, and that the prescribed charges do not limit or are a justified limit on NZBORA rights. The Regulations can also provide for waivers and refunds.

Managing people's movement to, from and within MIQFs

66 Imposing restrictions on people's movement in the MIQ context engages the right to be treated with respect and humanity in detention under section 23 of NZBORA. Largely, the powers to manage direct and restrict movement already exist in the Orders under the Act, although some of them are not expressed in direct terms. The proposal is for the Act to more clearly recognise the ability to manage these movements, adding transparency and legal certainty.

67 The proposal also includes expressly recognising the ability to impose room restrictions. Room restrictions are an important back stop in the MIQ tool box to manage the risk of spread of COVID-19 in facilities and out into the community. It can be necessary to deal with emerging situations and where public health advice supports the measures to contain transmission risk. The public health basis for room restrictions is an important safeguard to ensure any room restrictions imposed are a justified limitation on people's rights.

Other proposals

68 The proposal to require people in MIQFs to provide onwards contact information for invoicing engages the right to be free from unreasonable search and seizure. Compelling information is a type of search, however I do not consider it is unreasonable and in any event is justified by the existing financial objectives of the Act.

69 The proposal to enable rules to be made about the day-to-day operations of MIQFs, including deliveries and alcohol policy could impact on various rights. I note that any limitations are already occurring and are justified under existing operating procedures and frameworks. The proposal would see these procedures be made into enforceable rules where appropriate.

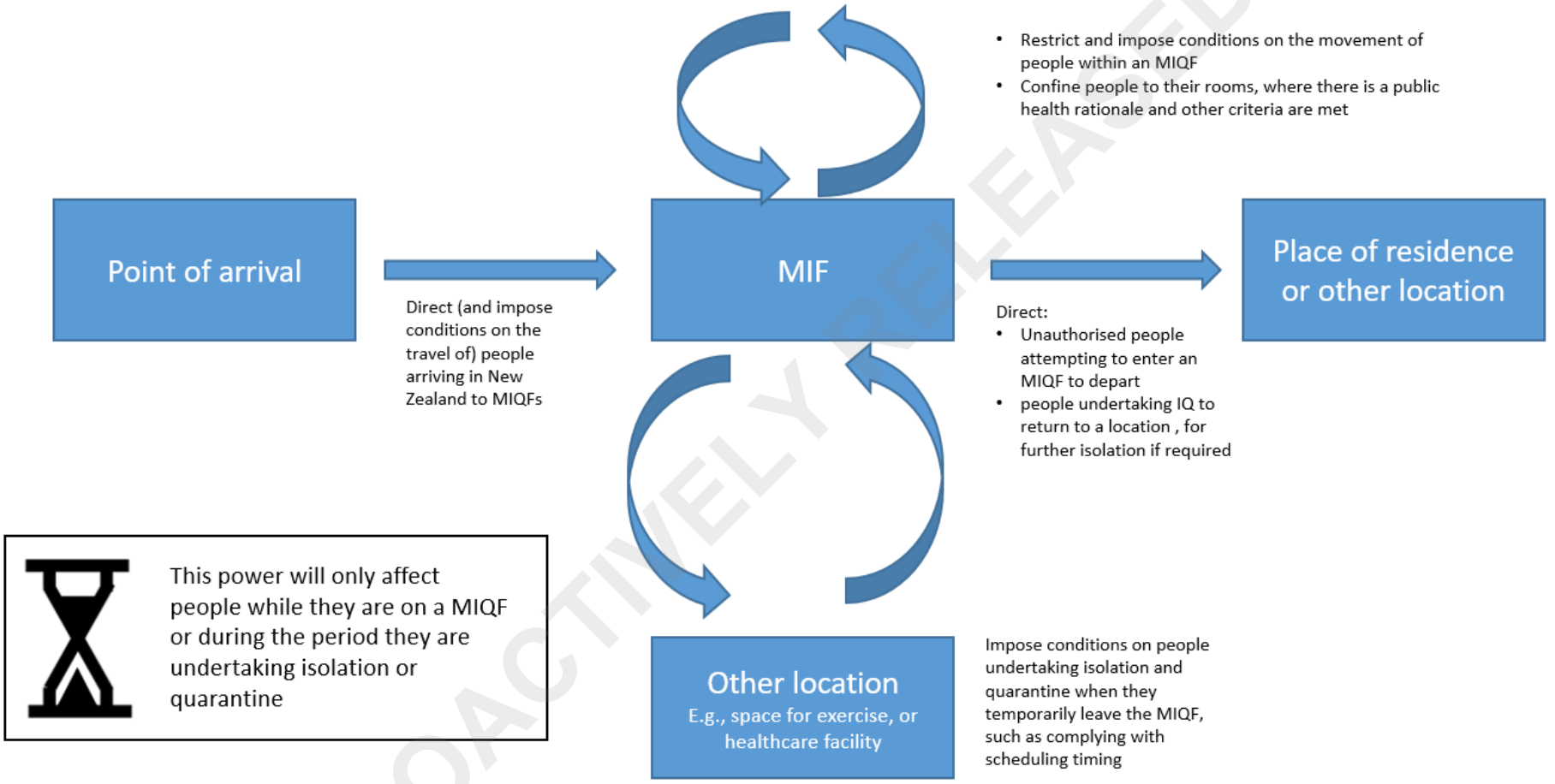
Consultation

Office of the Privacy Commissioner

70 The Privacy Commissioner has concerns about the proposal for the Chief Executive of MBIE to restrict and impose conditions on what can be brought into MIQFs. While he notes the Cabinet paper does not deal expressly with the enforcement of such a proposal, effective enforcement would require an inspection regime which he does not support. Other legislation which deals with restricted access to mail, such as the Corrections Act 2004 and the Mental Health (Compulsory Assessment and Treatment) Act 1992 both include significant protections which reflects that mail should only be inspected where strictly necessary.

71 The Privacy Commissioner supports the intent to collect more accurate information from returnees to ensure that fee collection and contact tracing where necessary can occur. However where information is being compelled from individuals for the pandemic response, the Privacy Commissioner considers that statutory protections are appropriate to ensure that public confidence in the response is maintained. He recommends that officials are directed to work with his office to ensure that the information collected for this purpose is only re-used in appropriate circumstances, such as the administration of MIQF and recovery of debt owed to the Crown.

Appendix Three: Examples of the Managing Movement power in the MIQ legislative framework



Appendix Four: Proposed timeline for the amendment bill

Milestone	Deadline
Cab paper considered	SWC 12 May, CAB 17 May
Drafting instructions sent to PCO	12 May
First draft of Bill prepared	7 June
BORA vet	14 June
Bill drafting and refining	23 June
Briefing to Minister with LEG paper, Bill and Departmental Disclosure Statement to approve introduction	24 June
Lodging of LEG paper and DDS for consideration	1 July
LEG consideration and approval to introduce	7 July [CBC 12 July]
First reading speech and key messages provided to Minister	*[NB: House does not sit week of 12, 19 or 26 July]* Week of 2-6 August
Introduction	
First Reading and referral to Select Committee	
Select Committee process	9 August to 20 September [*NB: House does not sit weeks of 16 August or 13 September*]
Departmental Report and RT version of Bill presented to Select Committee	21 September
Select Committee reports Bill back to the House	Week of 21-23 September
Second Reading and Committee of the Whole House speeches and support packages provided to the Minister	Week of 21-23 September
Second reading (under urgency)	Week of 21-23 September
Third Reading (under urgency)	Week of 21-23 September
Committee of the Whole (under urgency)	Week of 21-23 September
Royal Assent	28 September
Commencement	29 September