

## In Confidence

Office of the Minister for COVID-19 Response

Cabinet Business Committee

# COVID-19 Public Health Response Amendment Bill: Further Policy Approvals and Approval for Introduction

## Proposal

- 1 The COVID-19 Public Health Response Amendment Bill (the Bill) makes amendments to the *COVID-19 Public Health Response Act 2020* (the Act) to better support the Government's response to the COVID-19 pandemic, continue delivery of the COVID-19 Elimination Strategy, and best support the Reconnecting New Zealanders to the World approach.
- 2 This paper seeks Cabinet's approval to:
  - 2.1 increase the previously agreed maximum penalties in the Bill; and
  - 2.2 to introduce the Bill to the House.

## Policy

- 3 In April 2020 when the Act was created, 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 (MIQ) Facilities, which had only been functioning for five weeks when the Act was created. MIQ has since evolved into a complex system of 31 facilities, with over 168,000 people to date who have passed through isolation or quarantine.
- 4 Through our experience with COVID-19, our understanding of the longer-term impacts and required response measures continues to evolve. I want to ensure that the Act reflects what we have learnt over the past year and is well placed to address ongoing and future challenges as we implement and move into new phases of the Government's COVID-19 Elimination Strategy and reconnecting New Zealanders with the world.
- 5 This is particularly pertinent in the current climate, given that New Zealand is managing an outbreak of COVID-19 in the community. The Delta strain of SARS-CoV-2 is proving to be highly infectious, and the number of cases grew rapidly after COVID-19 was detected in the community on 17 August 2021. The current outbreak reiterates the social and economic impacts that COVID-19 has on New Zealand, the strain that is placed on the health system, and reinforces the importance of 'stamping' COVID-19 out when we can.

- 6 The Act is time limited and is currently due to expire in May 2022. The Bill extends the life of the Act to May 2023. While the Act may not be enduring for a long time period, we have an opportunity now to ensure that at the point of repeal the Act presents a suitable legislative blueprint for responding to a future pandemic.
- 7 The Bill gives effect to decisions made by the Cabinet Social Wellbeing Committee on 12 May 2021 [SWC-21-MIN-0067 refers] and confirmed by Cabinet on 17 May 2021 [CAB-21-MIN-0167 refers], which:
  - 7.1 extend the term of the Act
  - 7.2 strengthen the enforcement provisions
  - 7.3 broaden and strengthen the provisions that empower the COVID-19 Orders
  - 7.4 introduce specific legislative provisions for the operation of MIQ.
- 8 The Bill also gives effect to the Cabinet decision on 12 July 2021 to extend the power to stop vehicles at roadblocks or checkpoints beyond New Zealand Police constables to named categories of enforcement officers under their supervision [SWC-21-MIN-0100.01 and CAB-21-MIN-0274 refer].

#### **Changes to policy made since Cabinet agreement**

- 9 Cabinet also authorised me to make any necessary policy decisions that may arise during the drafting process, consistent with the policy intentions agreed by Cabinet. I have made several such decisions:
  - 9.1 The Bill allows orders to be made for the purpose of requisitioning testing consumables held by laboratories for reallocation to the national public health response and requiring labs doing COVID-19 testing to do so for the national public health response.
  - 9.2 The provisions for allocating MIQ places to groups have been aligned with the existing process, and requirements around publication of eligibility criteria and approved group allocations inserted into the Bill.
  - 9.3 In order to allow for enforcement of MIQ rules, the Bill provides a power for the Chief Executive of the agency responsible for MIQ (relevant Chief Executive), currently the Ministry of Business, Innovation and Employment (MBIE), to withhold items that are in breach of the rules or that the Chief Executive reasonably believes are in breach of the rules. This is consistent with current standard operating practice.
  - 9.4 The exemption from MIQ charges for diplomats and their families has been removed from the Act and will be put into the COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020 (the MIQ Charges Regulations), so that all exemptions sit in the MIQ Charges Regulations.

- 10 I am also seeking Cabinet agreement, following Legislation Design and Advisory Committee (LDAC) advice, to rescind your decision to have the Bill enable repeal of the Act by Order in Council, as this duplicates the existing resolution process subject to Parliamentary scrutiny found in section 3 of the Act.
- 11 The nature of these changes is discussed below where this paper covers the content of the Bill.

**Further policy approval**

- 12 On 21 May 2021, the Social Wellbeing Cabinet Committee agreed to increased infringement penalties [SWC-21-MIN-0067 refers].
- 13 Following a number of breaches of quarantine-free travel (QFT) conditions over the past months, I asked officials to undertake further work related to the penalty settings in the Bill.
- 14 I am seeking Cabinet agreement to further increase the maximum fees and fines for individuals in this Bill and to increase the maximum criminal fee.
- 15 Higher penalties will send a clear message to those people who breach an order and put the community in danger of transmission of COVID-19, that this behaviour will not be tolerated.
- 16 Given the social and economic impacts of a single case of COVID-19 in the community, and the subsequent strain that is placed on the health system, I consider that the maximum penalties reflect the risk to New Zealand.
- 17 I therefore propose to increase the maximum criminal fine for individuals (upon conviction) to \$10,000, the maximum criminal fine for body corporates to \$15,000, the maximum infringement fee for individuals to \$4,000, and the maximum infringement fine for individuals to \$12,000, the maximum infringement fee for body corporates to \$12,000, the maximum infringement fine for body corporates to \$15,000, and as set out in the table below.

**Table One: proposed maximum penalties**

Offence	Current Act	Cabinet agreed change	Proposed further change
Maximum criminal fine for individuals (upon conviction)	\$4,000	N/A	\$10,000
Maximum criminal fine for body corporate (upon conviction)	\$4,000	N/A	\$15,000

Maximum infringement fee for individuals	\$300	\$1,000	\$4,000
Maximum infringement fine for individuals (imposed by a court)	\$1,000	\$3,000	\$12,000
Maximum infringement fee for body corporates	\$300	\$3,000	\$12,000
Maximum infringement fine for body corporates (imposed by a court)	\$1,000	\$9,000	\$15,000

**Process**

- 18 Cabinet has previously agreed to increasing the maximum infringement penalties but, as a consequence of repeated high-risk breaches of orders made under the Act, I have determined that higher penalties are required in the Bill.
- 19 Given this is a departure from the agreed policy settings, I am requesting further policy approvals. Given the significant social and economic consequences of a single case of COVID-19 in the community, I seek to expedite this process.
- 20 I am requesting, from this committee, further policy approval for this change. These changes have been incorporated in the attached Bill. I am also seeking approval for introduction of the Bill (including the increased maximum penalties) to the House in order to accelerate the process.

**Why is a Bill necessary?**

- 21 This Bill addresses some of the known limits of the Act to ensure that it is fit-for-purpose. Where in other cases secondary legislation, other regulatory tools or non-regulatory options might be able to address these issues, the scale and severity of the COVID-19 pandemic necessitate both specific regulation and high-quality enabling primary legislation.
- 22 In fact, a number of the policies included in this Bill, particularly those related to MIQ, exist already operationally or through the COVID-19 Orders. However, to ensure their effectiveness, transparency and the proportionality of any restrictions on peoples' rights, it is more suitable that they sit in primary legislation.

## Specific policies implemented by the Bill

### *Extend the term of the Act*

- 23 The Bill extends the maximum term of the Act to May 2023 (from May 2022).
- 24 Cabinet had also agreed to allow for the Act to be repealed (in whole or in part) through an Order in Council. LDAC advice has been sought about the Order in Council repeal power. LDAC recommended that consideration be given to the interaction of the Order in Council procedure for repeal with the existing provisions in section 3 of the Act (the requirement for the House to pass resolutions to continue the Act until that expiry date). LDAC considered that the Act should have one repeal approach, but not both, to avoid duplication and confusion.
- 25 Out of the two, I consider the resolution process preferable as this is accountable to Parliament as a whole, rather than just Cabinet. I am seeking your agreement to rescind your previous decision to include an Order in Council repeal mechanism.

### *Improved flexibility for the making of COVID-19 Orders*

- 26 The Bill amends the purpose and empowering provisions to ensure Orders can encompass a broader range of outcomes, to reflect the evolving nature of measures required to manage COVID-19 into the future. Orders will be able to incorporate material by reference and specify geographical boundaries for Alert Level restrictions based on the specific circumstances of each Alert Level change. Orders made by the Director-General of Health will not be limited to a single territorial authority boundary.
- 27 The Bill also amends the definition of the word 'things' in sections 11 and 12 of the Act to remove the circular definition, ensure clarity and provide a second mechanism by which Customs can enforce import prohibitions made under an Order.

### *Support the management of COVID-19 testing laboratories*

- 28 The Bill includes provisions to place requirements on testing laboratories including regulating quality control and minimum standards and requiring reporting of COVID-19 test results.
- 29 In accordance with the Cabinet delegation for further policy decisions to be made in alignment with those decisions, further policy work in this area has been undertaken to flesh out the detail of this recommendation. Accordingly, I have approved provisions in the Bill requiring labs doing COVID-19 testing to do so for the national public health response; and requisitioning testing consumables held by laboratories for reallocation to the national public health response. An appropriate compensation and disputes appeal process is provided for this (modelled after similar provisions in the *Health Act 1956*). Officials will examine the arrangements for disputes about compensation for requisitions in light of submissions received during Select Committee.

- 30 I do not propose that any COVID-19 Order be drafted to implement these provisions now, but this will provide a valuable tool in case there is a need in the future. It is important to note that these provisions are not anticipated to be needed but provide a mechanism to help ensure that New Zealand's testing capacity is not overwhelmed in any significant outbreak.

*Strengthening the infringement regime*

- 31 The Bill, as currently drafted, increases the maximum infringement fee and court-imposed fine for individuals, and introduces a fee/fine for body corporates. It also revises the maximum criminal conviction fine. The table below sets out these changes.

**Table Two: infringement and criminal offence penalties**

	Current Act	Proposed change
Maximum infringement fee for individuals	\$300	\$4,000
Maximum court-imposed fine for individuals (for an infringement offence)	\$1,000	\$12,000
Maximum infringement fee for body corporates	\$300	\$12,000
Maximum court-imposed fine for body corporates (for an infringement offence)	\$1,000	\$15,000
Maximum criminal offence fine for individuals upon conviction	\$4,000	\$10,000
Maximum imprisonment upon conviction for individual	6 months	No change proposed
Maximum criminal offence fine for body corporate	\$4,000	\$15,000

- 32 Officials have advised that an increase in infringement levels has the potential to be inequitable, as infringement fees and financial penalties are inherently inequitable, given they have a disproportionately larger impact on lower socio-economic households.
- 33 In order to address this inequity, the Bill also empowers new regulations to set out an appropriate infringement fee framework to allow for graduated

penalties. In order to progress the drafting of the infringement fee regulations, I am seeking the approval of Cabinet to:

- 33.1 provide within the regulations for different penalties for individuals and other persons, and for different penalties depending on the gravity of the infringement offence, but not exceeding the maximum amounts proposed by the Bill;
  - 33.2 delegate to myself as Minister for COVID-19 Response the authority to decide the amounts of the penalties for the infringement offences and for those amounts to be prescribed by the regulations; and
  - 33.3 invite drafting instructions to be issued to the Parliamentary Counsel Office to draft the regulations in accordance with these decisions.
- 34 A cross-agency group of officials is developing the infringement regulations. The working group includes officials from the Ministry of Health, MBIE, Ministry of Justice, Crown Law Office, New Zealand Customs Service, New Zealand Police, WorkSafe New Zealand and Ministry for Pacific Peoples. The Ministries for Women, Ethnic Communities, Social Development, Youth Development and Te Puni Kōkiri did not have capacity to participate and will be included in consultation.
- 35 I will report back to Cabinet on the penalty amounts in the regulations when they are presented to the Cabinet Legislation Committee for consideration later this year. This delegation is consistent with Cabinet's previous delegation to me, as Minister for COVID-19 Response, of the authority to make any necessary policy decisions that may arise during the Bill drafting process, consistent with the policy intentions approved by Cabinet.

*Improve delegated decision-making*

- 36 The Bill provides more flexibility for the sub-delegation to the Director-General of Health, or another person of specified ability. This provision allows for a delegate to determine exclusions and make specified changes. This will allow for responsive action to be taken where the need for a rapid decision precludes ministerial decision making.

*Managing demand for MIQ places*

- 37 The Bill shifts the powers relating to offline and online allocations from the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 to the Act. This includes the Minister's power to decide the apportionment of and basis for online MIQ allocations and the criteria for offline allocations.
- 38 In addition, in line with the delegation of decision making by Cabinet, I approved changes to the provisions relating to offline allocations so that they better reflect the current process for group allocations to MIQ. As Minister for COVID-19 Response, I will have the authority to set the eligibility criteria for the 'group' offline allocation and make decisions on the applications and will delegate the latter to the Border Exemption Ministerial Group. To ensure

transparency, the Bill will also require that the relevant Chief Executive publish the eligibility criteria for groups and the group allocations that are approved through this process. The relevant Chief Executive will retain decision-making for offline allocations that are not part of the 'group' process.

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

- 39 The Bill reverses the starting point for fee liability so that everyone who enters MIQ is liable, unless they are exempt.
- 40 I have also agreed, in line with my delegated authority from Cabinet, to shift the exemptions for diplomats and their families from the Act to the MIQ Charges Regulations. There is no policy rationale for having the exemption for diplomats and their families in primary legislation and all the others in secondary legislation. It was rather a consequence of the speed of development for the cost recovery provisions in the Act and MIQ Charges Regulations.
- 41 LDAC recommended that to support clarity and transparency of the law, exemptions from MIQ charges should all sit in one place. I consider it is most appropriate for exemptions to all sit in the MIQ Charges Regulations. This will ensure appropriate flexibility as border settings change, which is consistent with the policy intention of reversing default fee liability in the Bill.

*Managing people's movements to, from and within MIQ facilities*

- 42 The Bill expressly allows Orders to direct, impose conditions on, and restrict movement to, from and within MIQ facilities. It also provides a clearer basis for the requirement that people undertaking managed isolation or quarantine remain in their rooms except for specified circumstances.
- 43 The Bill also establishes grounds under which the relevant Chief Executive can decide not to authorise people to leave their room for fresh air. Any decision not to authorise people to leave their room on the grounds of public health, security or other health and safety reasons must be consistent with the New Zealand Bill of Rights Act 1990 (NZBORA).

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

- 44 The Bill enables the relevant Chief Executive to make rules for the day-to-day operation of MIQ facilities, such as restricting, prohibiting and imposing conditions on what things can be brought into facilities, including deliveries and alcohol. Non-compliance with a rule is an infringement offence.
- 45 It is useful to have a suite of enforcement mechanisms to support the rules and infringement offences may not always be the best tool. I have therefore also agreed to include a power for the relevant Chief Executive to withhold items that are in breach of the rules, or where there are reasonable grounds to believe they are in breach of the rules. Items may only be held until the end



of person's stay in MIQ and there is a duty to return the item at that point. There is no power to inspect personal items without the permission of the owner. These powers are consistent with current standard operating procedures. Reflecting them in the Act provides a clearer basis for people exercising this power and those affected by it.

*Requiring the agency responsible for MIQ to ensure there is an internal complaints process in place*

- 46 The Bill requires that the agency responsible for MIQ have an internal complaints process in place.

*Enabling the relevant Chief Executive to require that people in MIQ provide accurate and comprehensive contact information in order to support MIQ invoicing*

- 47 The Bill requires people undertaking managed isolation or quarantine to provide the relevant Chief Executive with their onwards contact details necessary to support MIQ invoicing. It also requires that those details remain up to date until they pay their MIQ charges.

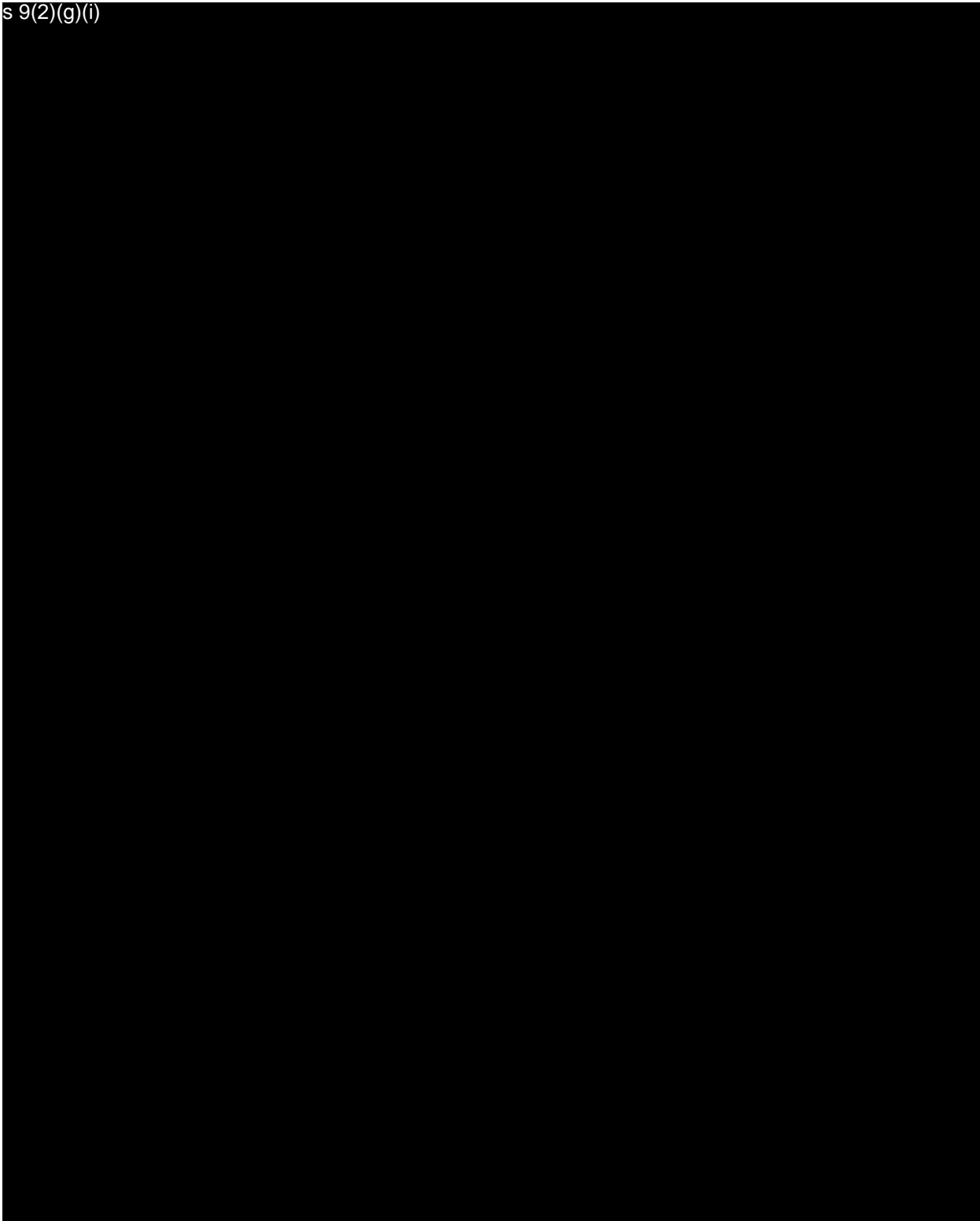
*Extending the power to stop vehicles to enforcement officers under supervision of the police*

- 48 The Act currently limits the power to stop vehicles at roadblocks or checkpoints to New Zealand Police constables.
- 49 In line with the SWC decision on 30 June 2021, confirmed by Cabinet on 12 July 2021 [SWC-21-MIN-0100.1, CAB-21-MIN-0274 refer], the Bill now extends that power to certain enforcement officers, acting under the supervision of a constable. These officers will now be able to stop vehicles at roadblocks or checkpoints established for the purpose of enforcing or monitoring compliance with Orders that restrict movement.
- 50 It was also agreed that, for the purposes of this proposed amendment, enforcement officers (who have the power to stop vehicles) may consist only of relevant New Zealand Defence Force personnel, Māori Wardens, Pasifika Wardens, nominated representatives of iwi organisations and Community Patrollers.

s 9(2)(g)(i)



s 9(2)(g)(i)



58 It is also of note that the maximum infringement fees and fines are significantly increased in the Bill. Stakeholders have not been consulted on the further increases, and this is likely to result in interest from the public at Select Committee.

## Impact analysis

### Regulatory Impact Statement

- 59 Three Regulatory Impact Statements have been prepared to support the Bill.
- 60 A joint Ministry of Health and MBIE 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:
- 60.1 The panel considers that the Impact Statements partially meet the quality assurance criteria.
- 60.2 The Impact Statements are clear, concise and complete. Both RIS have identified a range of feasible options in terms of the legislative proposals.
- 60.3 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.
- 61 Each Ministry will publish their Regulatory Impact Statements on their website providing a cross reference and link to the other.
- 62 A supplementary Impact Statement has been developed by the Department of Prime Minister and Cabinet to assess the impacts related to the further increases to the maximum penalties.
- 63 The Impact Statement titled “COVID-19 Orders: Increased Penalties for Non-compliance” was assessed by a panel comprising the Ministry of Health, Ministry of Justice and the Department of Prime Minister and Cabinet, who provided the following comments:
- 63.1 The panel considers that the Impact Statement partially meets the quality assurance criteria.
- 63.2 The Impact Statement is clear, concise and complete. It provides a good account of the policy problem and the rationale for intervention, noting the clearly articulated public health risks and economic impacts that increased fines are trying to address.
- 63.3 Due to the absence of sufficient cost/benefit assessment for the option to significantly increase infringement penalties and consultation on this proposal, the Impact Statement does not meet the quality assurance criteria for convincing and consultation.
- 63.4 The Panel notes that significant increases in penalties will have equity, proportionality and consistency implications.

64 This Impact Statement will also be published and cross-referenced.

### **Climate implications**

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

### **Compliance**

66 The Bill complies with each of the following:

- 66.1 the principles of the Treaty of Waitangi;
- 66.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
- 66.3 the disclosure statement requirements;
- 66.4 the principles and guidelines set out in the Privacy Act 2020;
- 66.5 relevant international standards and obligations;
- 66.6 the Legislation Guidelines (2018 edition) maintained by the Legislation Design and Advisory Committee.

### **The principles of the Treaty of Waitangi**

67 The Bill itself does not have any impact on the principles of the Treaty of Waitangi. However, subsequent decisions about allocation such as the setting of criteria, MIQ Charges Regulations and infringement regime will need to consider impacts on the Treaty of Waitangi as they could impede the access of Māori to travel to New Zealand, or in the case of the infringement regime, could disproportionately affect Māori. This is because Māori have been disproportionately affected by COVID-19 response measures to date when they are part of a cluster of community cases, leading to the potential for disproportionate affects from increased infringement fees.

68 Provisions proposed within the Bill, including the granting of powers to enforcement officers including Māori Wardens and nominated representatives of iwi organisations to stop vehicles, support the expression by iwi of rangatiratanga.

### **The rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993**

69 Regulatory changes around the COVID-19 response have potential NZBORA implications. This is inherent in a regime where limitations on individual rights are sometimes necessary to achieve public health objectives, but it is still imperative that any restrictions are proportionate and justified. Rights impacted by elements of COVID-19 legislation include:

- 69.1 freedom of assembly

- 69.2 freedom of movement including the right of New Zealanders to enter New Zealand
  - 69.3 unreasonable search and seizure
  - 69.4 freedom of expression
  - 69.5 freedom of religion
  - 69.6 the right to be treated with humanity and dignity in detention
  - 69.7 the right to be presumed innocent until proven guilty, and
  - 69.8 freedom from discrimination on prohibited grounds under the Human Rights Act 1993 such as ethnicity or national origin.
- 70 However, the majority of proposals in this Bill do not directly impact on these rights. Instead, any impacts will mostly occur as a result of secondary legislation (Orders, regulations, rules) and the exercise of decision-making powers enabled by this Bill.
- 71 The powers to make Orders, regulations, rules and make decisions must be exercised consistently with NZBORA. Further, the empowering provisions for the secondary legislation and many of the decision-making powers make it express that any restrictions they impose under NZBORA are justified. The full assessment of NZBORA implications will happen when the details of the secondary legislation are being developed or when decision-making powers are being exercised.
- 72 Policies in this Bill that could impact rights through secondary legislation or decision-making include:
- 72.1 the broadening of the empowering provisions of the Orders (including application to laboratories) could impact a range of these rights depending on the restrictions or directions that the Orders contain
  - 72.2 decisions by the Minister and the relevant Chief Executive under the MIQ allocation framework in the Bill could impact New Zealanders' right to enter New Zealand (noting that this framework is being shifted from Orders into the Act)
  - 72.3 decisions by the relevant Chief Executive not to authorise activities for which people in MIQ can leave their rooms could impact freedom of movement and the right to be treated with humanity and dignity in detention
  - 72.4 exemptions from MIQ fees in the MIQ Charges Regulations could also impact New Zealanders' right to enter New Zealand for people who are not exempt
  - 72.5 using the maximum penalty levels for infringement could limit the right to the presumption of innocence and have a disproportionate impact on

certain groups and therefore impact the right to be free from discrimination.

- 73 I also note that extending the Act's life could increase in the duration of existing or new impacts in both the primary and secondary legislation.
- 74 The parts of the Bill that have direct impacts on rights under NZBORA are discussed below.

*Managing people's movement to, from and within MIQ facilities*

- 75 Imposing restrictions on people's movement in MIQ engages the right to be treated with respect and humanity in detention under section 23 of NZBORA and freedom of movement under section 18. Largely, the rules and powers to manage, direct and restrict movement exist in the Orders and are being shifted into the Act. Provisions such as the requirement to stay in rooms except for authorised activities or specified standing reasons were justified on public health reasons at the time they were included in the Orders. These justifications continue to apply as the provisions are moved into the Act.
- 76 The Bill also more clearly recognises the ability to impose room restrictions by the relevant Chief Executive deciding not to authorise activities for which people can leave their rooms. This adds transparency and legal certainty about how this power is exercised and, as noted above, the direct impact on rights will come from the non-exercise of the Chief Executive's power. To ensure any room restrictions imposed are proportionate and a justified limitation on people's rights, they can only be used where it is necessary for public health, security or other health and safety reasons and will need to be justified under NZBORA.

*Information collection*

- 77 The proposal to require people in MIQ facilities to provide onwards contact information for invoicing engages the right to freedom of expression under section 14 of NZBORA as it requires the expression of certain information. However, I consider this requirement to be justified. The collection of contact information is necessary for invoicing and to achieve an economically sustainable public health response to COVID-19 that allows for the recovery of MIQ costs, as set out in the purposes of the Act. Inclusion of this power will provide a backstop in case voluntary collection is not sufficient, and the attachment of an infringement penalty to non-compliant behaviour will provide for enforceability. As the power is limited to the collection of information required for invoicing, it is no wider than is necessary to achieve that objective.

*Rules for the day-to-day operation of MIQ facilities*

- 78 The Bill will enable rules to be made about the day-to-day operations of MIQ facilities, including deliveries and alcohol policy, which could impact on rights, including the right to be treated with humanity and dignity in detention under section 23 NZBORA. The empowering provision for the rules requires that the

relevant Chief Executive must be satisfied that the rules do not limit or are a justified limit on rights under NZBORA. As noted above, a detailed assessment of impact on rights will be undertaken as the rules are developed.

- 79 The Bill also includes the following powers and duties for the relevant Chief Executive to:
- 79.1 withhold items that are in breach of rules until end of a person undertaking isolation or quarantine's stay
  - 79.2 require people undertaking isolation or quarantine to hand over items that are in breach of rules until the end of the person's stay
  - 79.3 hold items, where the relevant Chief Executive has reasonable grounds for believing they may not be permitted under the rules
  - 79.4 return items that have been held at the end of a person's stay
- 80 These powers only enable items to be held until the end of a person's stay and may only be exercised where the items are, or there are reasonable grounds to believe they are, in breach of the rules. These ensure that any withholding is proportionate and a justified limit on the right to be treated with humanity and dignity in detention. The rules will need to be consistent with NZBORA and will be based on existing operating procedures which are grounded in managing risk to health and safety of returnees and workers. The power to withhold is not a permanent seizure or exercised for law enforcement purposes (i.e. prosecution).

#### *Infringement fee*

- 81 The Bill enables Orders to be made which may have an infringement fee of up to \$4000 for individuals. This will be the default infringement fee unless otherwise specified. As discussed above, it is intended that regulations made under the Act will specify a range of infringement fees commensurate to the risk of offending. These are strict liability offences for which an immediate fee may be imposed on an individual in breach of the offence, without any judicial proceedings or a requirement to prove intention. The maximum infringement fee reflects the significant risks to the public health and economic recovery of New Zealand that a single case of COVID-19 in the community poses.
- 82 The use of the maximum infringement fee will need to be proportionate to the risk to ensure that it is a justified limitation on the right to be presumed innocent until proven guilty.

#### **Disclosure statement requirements**

- 83 A departmental disclosure statement has been prepared and attached to this paper.

## Principles and guidelines set out in the Privacy Act 2020

- 84 The Privacy Commissioner was consulted on the policy paper and provided comments on the following two areas:
- 84.1 **Collection of contact details for invoicing** – the Privacy Commissioner supported the intent of this policy but considered that statutory protections are appropriate. The existing Privacy Impact Statements have been updated and no concerns have been identified. I also note that the power to collect contact details is limited to those required to support invoicing which ensures it is limited in its application.
- 84.2 **Rules for the day-to-day operation of MIQ facilities** – the Privacy Commissioner had raised concerns that the rules would implicitly require an inspection regime to enforce them. As discussed above, the Bill includes a power for the relevant Chief Executive to withhold items that are, or there are reasonable grounds to believe are, in breach of the rules. Any inspection to determine whether an item is in breach of a rule can only be undertaken with the consent of the owner. There is no power to do this otherwise. I also note that the reasonable grounds element acts as a safeguard to ensure that there is a reasonable basis for withholding an item if a person does not agree to inspection.

## Consultation

### Government departments and public bodies

- 85 This paper was prepared by the Ministry of Health and MBIE, in consultation with the Department of Prime Minister and Cabinet; the Ministries of Foreign Affairs and Trade, Education, Justice and Transport; the Ministries for Women, Pacific Peoples 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 Kōkiri. The Crown Law Office reviewed the paper.
- 86 Agencies were not formally consulted on the further policy approval sought in this paper for increased maximum penalties (paragraphs 12 to 17).

### Public consultation

- 87 A small number of key stakeholders were identified as critical friends and consulted during the development of the Bill and this paper. Those critical friends were:
- 87.1 Public Health Unit representatives;
- 87.2 Medical Officers of Health;
- 87.3 Te Rōpū Whakakaupapa Urutā;



- 87.4 Pandemic Response Group (subgroup of the National Iwi Chairs Forum);
  - 87.5 Iwi with MIQ facilities in their rohe;
  - 87.6 NZCTU;
  - 87.7 Hotels operating as MIQ facilities.
- 88 Feedback from these stakeholders was largely positive, and detailed discussions focussed on the implementation of changes, rather than the policy rationale behind them.
- 89 These stakeholders were not consulted on the proposed increased maximum penalty settings.

**Political consultation**

- 90 No consultation has been taken with other parties represented in Parliament.

**Binding on the Crown**

- 91 The Act, and the proposals within the Bill, are binding on the Crown.

**Allocation of decision-making powers**

- 92 The Bill allocates decision making powers to the Minister for COVID-19 Response and the relevant Chief Executive. Some of these exist in Orders already, but are new to primary legislation:
- 92.1 Ministerial power to decide apportionment of offline and online MIQ allocations
  - 92.2 Ministerial power to decide basis of issue for online MIQ allocations
  - 92.3 Ministerial power to decide criteria for offline MIQ allocations
  - 92.4 Chief Executive's power to amend or cancel confirmed MIQ allocations
- 93 Others are entirely new:
- 93.1 Minister now decides group allocations to MIQ
  - 93.2 The Chief Executive has an express ability not to authorise activities for which people can leave their rooms in MIQ facilities
  - 93.3 The Chief Executive can make rules for the day-to-day operations of MIQ facilities
  - 93.4 The Chief Executive may withhold items that are, or there are reasonable grounds to believe are, in breach of the rules.

## Associated regulations

- 94 The Bill will require two sets of regulations to operate, both of which are expected to be ready at the end of the year:
- 94.1 The MIQ Charges Regulations will need to be amended to give effect to the change in default fee liability. These amendments are progressing separately to the Bill and the related provisions in this Bill are proposed to commence by Order in Council so they can commence together.
- 94.2 New regulations are also being developed to bring the provisions of the Bill relating to the sliding scale of infringement offences into operation. The infringement provisions will also commence by Order in Council so as to align with the new regulations.

## Other instruments

- 95 Consequential amendments to the Orders are required to support the changes in the Bill, such as for the removal of the allocation provisions that are being elevated to primary legislation through the Bill.
- 96 In addition, the Bill will enable the relevant Chief Executive to make rules to provide for the day-to-day operation of MIQ facilities. I am satisfied that this is consistent with the principles identified in the Deemed Regulations Report of the Regulations Review Committee.

## Definition of Minister/department

- 97 The Bill replaces references to the relevant Chief Executive with a more enduring definition so that in relation to MIQ, Chief Executive is defined as the Chief Executive of the department of the Public Service or agency or entity that, with the authority of the Prime Minister, is responsible for the administration of MIQ facilities. Any references that would otherwise refer to MBIE have likewise been framed as the "relevant agency". The Cabinet Office has been consulted on this change.
- 98 The Bill also removes the definition of "relevant Minister", merging this with the definition of "Minister". The distinction is a legacy of when the Ministers of Health and Housing were responsible for the Orders and MIQ respectively, but is no longer necessary and it would be more complex to retain in light of the greater role that MIQ will play in the amended Act.

## Commencement of legislation

- 99 The majority of the Bill will come into force on the day after the date of Royal assent, which at this stage is proposed for the last week of November. Appendix 1 includes the proposed timetable for the Bill, including parliamentary stages and commencement.

100 However, several provisions will be instead commenced by Order in Council because implementation of these provisions will require regulations to be in place. These provisions relate to:

100.1 the increased infringement penalties and ability to specify which category of infringement offence a breach of an Order is; and

100.2 reversing the default liability for MIQ charges and deleting the exemption from MIQ charges for diplomats and their families from the Act (this will be shifted to the regulations establishing MIQ charges).

101 Review and development of the sets of regulations is underway, separate to this Bill.

102 This is explained in the explanatory note to the Bill.

### **Parliamentary stages and next steps**

103 Subject to confirmation of the revised House sitting schedule, I propose that the Bill be introduced on 20 September 2021, and referred to the Health Select Committee from approximately 27 September to 18 November. I propose that the Bill pass through the House in the week of 22 November. Appendix 1 includes the proposed timetable for the Bill.

### **Proactive Release**

104 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 Cabinet:

1 **note** that the COVID-19 Public Health Response Amendment Bill holds a category 2 priority (must be passed by the end of the year) on the 2021 Legislation Programme;

#### *Contents of the Bill*

2 **note** that the Bill amends the COVID-19 Public Health Response Act 2020 to better support the Government's response to the COVID-19 pandemic based on what we have learnt over the past year working with the Act;

3 **note** that the Bill gives effect to decisions made by the Cabinet Social Wellbeing Committee on 12 May 2021 [SWC-21-MIN-0067 refers] and confirmed by Cabinet on 17 May 2021 [CAB-21-MIN-0167 refers] and subsequent decision on 12 July [SWC-21-MIN-0100.01 and CAB-21-MIN-0274 refer];

*Changes in policy and further decisions from Cabinet*

- 4 **note** that Cabinet authorised the Minister for COVID-19 Response to make any necessary policy decisions that may arise during the drafting process, consistent with the policy intentions agreed by Cabinet;
- 5 **note** that, in line with Cabinet’s authorisation, the Minister for COVID-19 Response has made the following policy decisions in the Bill:
- 5.1 The Bill empowers section 11 Orders to require labs doing COVID-19 testing to do so for the national public health response and requisition of testing consumables held by laboratories for reallocation to the national public health response, both subject to provision of compensation for materials and work;
- 5.2 The provisions for allocation of managed isolation and quarantine spaces to groups have been amended, so that the Minister for COVID-19 Response sets the eligibility criteria for, and decides, offline group allocations, and the Chief Executive of the Ministry of Business, Innovation and Employment publishes the eligibility criteria and approved group allocations;
- 5.3 In order to allow for enforcement of managed isolation and quarantine rules, the Bill provides a power for the Chief Executive of the Ministry of Business, Innovation and Employment to withhold items that are in breach of the rules or that the Chief Executive reasonably believes are in breach of the rules;
- 5.4 The exemption from managed isolation and quarantine charges for diplomats and their families has been removed from the Act and will be put into the COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations 2020, so that all exemptions sit in the one place;
- 6 **note** that enabling the Act to be repealed by an Order in Council would duplicate the existing resolution process which is subject to Parliament;
- 7 **rescind** your previous recommendation to “allow for [the COVID-19 Public Health Response Act 2020] to be repealed (in whole or in part) through an Order in Council”;

*Policy approval*

- 8 **agree** to increasing the maximum penalties for individual offences in the Bill as follows:
- 8.1 increase the maximum individual criminal fine (upon conviction) to \$10,000;
- 8.2 increase the maximum individual infringement fee to \$4,000;

- 8.3 increase the maximum individual infringement fine (imposed by a court) to \$12,000;
- 9 **agree** to include a new criminal offence penalty of up to \$15,000 for body corporates;
- 10 **agree** to increase the maximum penalties for body corporates in the Bill as follows:
- 10.1 increase the maximum infringement fee for body corporates to \$12,000;
- 10.2 increase the maximum infringement fine (imposed by a court) to \$15,000;

*Infringement regulations*

- 11 **note** that a cross-agency group of officials<sup>1</sup> are working on the infringement regulations at the same time as the development of the Bill;
- 12 **agree** that the infringement regulations will provide for different penalties for individuals and other persons, and for different penalties depending on the gravity of the infringement offence, but not exceeding the maximum amounts proposed by the Bill;
- 13 **agree** that the Minister for COVID-19 Response decide the amounts of the penalties for the infringement offences and for those amounts to be prescribed by the regulations, and that the Minister report on that decision to Cabinet;
- 14 **agree** that drafting instructions be prepared by the Ministry of Health and submitted to Parliamentary Counsel Office for the infringement regulations;
- 15 **authorise** the Minister for COVID-19 Response to make any necessary policy decisions that may arise during the drafting of the regulations that are consistent with the policy intentions in recommendations 11 and 12;

*Approval of the Bill*

- 16 **approve** the COVID-19 Public Health Response Amendment Bill for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives;
- 17 **agree** that the Bill be introduced on 20 September;
- 18 **agree** that the Government propose that the Bill be:

---

<sup>1</sup> including Ministry of Health, Ministry of Business, Innovation and Employment, Ministry of Justice, Crown Law Office, New Zealand Customs Service, New Zealand Police, WorkSafe New Zealand and Ministry for Pacific Peoples.

**IN CONFIDENCE**

18.1 referred to the Health Select Committee for consideration;

18.2 enacted by the end of November.

Authorised for lodgement

Hon Chris Hipkins

Minister for COVID-19 Response

PROACTIVELY RELEASED

## Appendix One

Stages	Date
Cabinet consideration and approval to introduce	15 September
Introduce Bill	20 September
First reading speech	23 September
Select Committee consideration	27 September to 18 November
Second reading	Week of 22 November
Committee of the Whole House	Week of 22 November
Third reading	Week of 22 November
Royal assent	Last week of November
Commencement	November 2021

PROACTIVELY RELEASED