

Briefing

COVID-19 Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021 for signing

Explanatory note from the Ministry for Business, Innovation and Employment:

While the power to ring-fence rooms for New Zealanders was created, it was never implemented. This is because New Zealand citizens continued to make up the majority of border arrivals (upwards of 75%) during the pandemic border closure.

Date due to MO: 26 March 2021 **Action required by:** 29 March 2021

Security level: IN CONFIDENCE **Health Report number:** 20210575

To: Hon Chris Hipkins, Minister for COVID-19 Response

Copy to: Hon Kris Faafoi, Minister of Immigration

Contact for telephone discussion

Name	Position	Telephone
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Steve Waldegrave	Group Manager COVID-19 Policy, System Strategy and Policy, Ministry of Health	s 9(2)(a)
s 9(2)(a)	Manager, Allocation and Supply, Managed Isolation and Quarantine Policy, Ministry of Business, Innovation and Employment	s 9(2)(a)

Minister's office to complete:

- | | | |
|---|------------------------------------|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Decline | <input type="checkbox"/> Noted |
| <input type="checkbox"/> Needs change | <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn | |

COVID-19 Public Health Response Order for signing: managed isolation allocations for New Zealanders and non-New Zealanders

Security level: IN CONFIDENCE **Date:** 26 March 2021

To: Hon Chris Hipkins, Minister for COVID-19 Response

Purpose of report

1. This report recommends that you sign the attached COVID-19 Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021 (the Amendment Order). The Amendment Order provides a framework for allocating managed isolation rooms and facilitating entry into New Zealand. It enables rooms to be reserved for New Zealanders and other people whose entry is critical to the COVID-19 recovery.

Summary

2. On 16 December 2020 the Cabinet Business Committee with power to act agreed to strengthen the legal basis for MIF room allocations and a system of ring-fencing MIF rooms [CBC-20-MIN-0137 refers]. The system balances the legal right of New Zealanders to return home and the need for critical workers and other non-New Zealanders to enter New Zealand by enabling the Government to:
 - a. reserve a proportion of MIF rooms for New Zealanders to protect New Zealand citizens' and Permanent Residents' rights to enter New Zealand under the New Zealand Bill of Rights Act and the Immigration Act
 - b. reserve the remaining proportion for non-New Zealanders (i.e. critical purpose arrivals).
3. To give effect to this direction, the Parliamentary Counsel Office (PCO) drafted the required amendment to the COVID-19 Public Health Response (Air Border and Isolation and Quarantine) Orders, which was provided to you for Ministerial consultation on 18 February 2021 [HR20210222 refers]. You have completed the required Ministerial consultation and no changes to the draft Amendment Order were requested.
4. The attached Amendment to the Air Border and Isolation and Quarantine Orders (the Amendment Order) strengthens the legal basis for allocations and clarifies decision-making responsibilities. It provides that the Chief Executive of MBIE may manage the allocation of places in the MIAS in accordance with Ministerial decisions including the online system and the offline system (e.g. group and emergency allocations). This power to manage allocations includes a power to ring-fence places within both the online and offline allocation systems. It applies to managed isolation facilities only, not managed quarantine facilities.

5. [REDACTED]
6. You will receive separate advice from the Ministry of Business, Innovation and Employment on the implementation of changes to MIF allocations enabled by the order, including proposed ring-fencing arrangements.
7. I consider that the Amendment Order maintains the public health basis of the Air Border and Isolation and Quarantine Orders, while taking into account economic and social factors, as recognised in s 4(ca) of the COVID-19 Public Health Response Act.

Recommendations

We recommend you:

- a) **Note** advice from the Director-General of Health that the Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021 is in line with the purpose of the COVID-19 Public Health Response Act 2020. Yes/No
- b) **Note** that following Ministerial consultation, the Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021 has been finalised for your approval. Yes/No
- c) **Note** that the final version includes a minor addition that authorises the Chief Executive of the Ministry for Business, Innovation and Employment to cancel and amend allocations and that this is aligned with the original policy intent. Yes/No
- d) **Note** that you will receive separate advice on options for ring-fence rooms for those with critical purpose reasons to enter New Zealand, as part of the report-back from MBIE. Yes/No
- e) **Agree** to sign the attached COVID-19 Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021. Yes/No



Dr Ashley Bloomfield

Director-General of Health

Date: 24/03/2021



Hon Chris Hipkins

Minister for COVID-19 Response

Date: 6/4/21

COVID-19 Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021

Background

1. Clause 8 (2A) of the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (the Air Border Order) requires persons arriving in New Zealand by air (unless they are an exempt person) to have a confirmed allocation in the Managed Isolation Allocation System (MIAS). The MIAS is an online system which allows persons intending to enter New Zealand to book a place in a Managed Isolation Facility (MIF). The Chief Executive of MBIE also holds a number of additional places within the system for offline allocation in emergency and time-critical situations in accordance with specified criteria.
2. Currently MIAS allocates most places in managed isolation on a first-come first-served basis. However, New Zealanders¹ have a right to enter New Zealand and the current system, while being efficient and consistent, could potentially allow non-New Zealanders to be allocated places at the expense of New Zealand citizens and residents. This could result in a breach of the New Zealand Bill of Rights Act 1990 (NZBORA).
3. On 16 December 2020 the Cabinet Business Committee with power to act agreed to:
 - a. establishing a transparent legal basis for prioritising and allocating rooms to people entitled to enter New Zealand
 - b. a system of ring-fencing a proportion of MIF rooms that that balances the legal right of New Zealanders to return home and the need for critical workers and other non-New Zealanders to enter New Zealand to support the social and economic recovery from COVID-19
 - c. set a 10% operational target from 1 January 2021 for critical workers' use of MIF rooms [CBC-20-MIN-0137 refers].
4. To give effect to this direction, PCO drafted the required amendment to the Air Border and Isolation and Quarantine Orders.
5. s 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] This means that the Government can establish more targeted and straightforward ring-fencing arrangements. You will receive separate advice on options for ring-fence rooms for those

¹ Includes New Zealand Citizens and Residence Class visa holders.

with critical purpose reasons to enter New Zealand, as part of the report-back from MBIE.

6. The amendment order was provided to you for Ministerial consultation on 18 February 2021 [HR20210222 refers]. You have completed the required Ministerial consultation and no changes to the draft Amendment Order were requested. Since Ministerial consultation was completed, MBIE Officials identified a minor addition to the Amendment Order to clarify that the Chief Executive of MBIE can cancel confirmed allocations. This is not common practice but required from time to time, for example when people cancel flights but not their MIQ booking or as a contingency for an unexpected reduction in MIF capacity.
7. Officials consider this addition to be consistent with the overall policy intent of the Amendment Order to improve the regulatory and operational tools for allocating managed isolation rooms and establish a transparent legal basis for allocations.

Amendment to the Air Border and Isolation and Quarantine Orders

8. The attached Amendment Order provides for the Chief Executive of MBIE to allocate places in MIQ in accordance with Ministerial decisions (including the online system and the offline system for emergency allocations). This power to manage allocations includes a power to ring-fence places within both the online and offline allocation systems. It applies to managed isolation facilities only, not managed quarantine facilities.
9. Online allocations may be issued on a basis that the Minister decides. In making a decision the Minister must take into account:
 - a. the right of New Zealanders to enter New Zealand
 - b. the need to mitigate, so far as possible, the social, economic, and other impacts of COVID-19.
10. The basis on which online allocations to low-risk MIQ facilities are issued may:
 - a. distinguish between different classes of persons entering New Zealand (for example, between New Zealanders and non-New Zealanders)
 - b. prioritise allocations as between different classes of persons
 - c. reserve for a particular class, or any classes of persons, a specific proportion of allocations.
11. The Minister may decide the criteria for issuing offline allocations. The criteria must be published on the MBIE website. The Chief Executive may determine if an application for an offline allocation meets the criteria. The specific criteria has not been included in the Order because this could require numerous regulatory changes as the approach to allocations becomes more sophisticated.

Process for amending a section 11 Order

12. Under the COVID-19 Act, an Order may be made if either:
 - a. a state of emergency has been declared (under the Civil Defence Emergency Management Act 2002)
 - b. an Epidemic Notice is in force (under the Epidemic Preparedness Act 2006)

- c. it has been authorised by the Prime Minister.
13. There is currently an Epidemic Notice in place, which allows Orders to be made under section 11 of the COVID-19 Act.
14. As the Minister for COVID-19 Response, you may make Orders under section 11 of the COVID-19 Act.
15. To make an Order under section 11 you must:
- a. have received advice from the Director-General about –
 - i. the risks of the outbreak or spread of COVID-19
 - ii. the nature and extent of measures that are appropriate to address those risks
 - b. be satisfied that the proposed Order does not limit or is a justified limit on the rights and freedoms in the New Zealand Bill of Rights Act 1990 (NZBORA)
 - c. consult with the Prime Minister, Ministers of Health and Justice, and any other Ministers you think necessary
 - d. be satisfied that the Order is appropriate to achieve the purposes of the Act.
16. I understand that you have consulted with the Prime Minister and Ministers of Health and Justice, and other relevant Ministers on the draft Order.
17. My advice about the risks of the outbreak or spread of COVID-19 and the nature and extent of measures that are appropriate to address those risks is set out below.

Public health rationale for amendments

18. Providing for the effective management of places within a Managed Isolation Facility (MIF) assists in upholding the integrity of the MIQ system and providing a frontline barrier to COVID-19 transmission in New Zealand. However, this amendment has not been proposed on the basis of an additional public health rationale beyond that already provided for the creation and use of MIQs and MIAS, and the use of Orders to manage the public health risk posed by those entering New Zealand by requiring them to use MIAS and enter MIQs as directed.
19. Rather than being required for a public health rationale, this amendment addresses the implementation of existing Orders with a public health basis, namely the Air Border Order and the Isolation and Quarantine Order.
20. s 9(2)(h)
[Redacted text]
21. The economic and social factors previously considered by Cabinet, and the below positive impact on New Zealander’s rights under NZBORA, provide the rationale for this amendment.

New Zealand Bill of Rights Act 1990

22. A matter for you to consider each time an Order is proposed under the COVID-19 Act is whether the exercise of such powers will be appropriate. The power to make an Order under section 11 of the COVID-19 Act must be exercised consistently with NZBORA.
23. As previously discussed, New Zealanders have a right to enter New Zealand and the current system could potentially allow non-New Zealanders to be allocated places at the expense of New Zealanders resulting in unreasonable delays on obtaining a place in MIQ and entering New Zealand. This could result in a breach of NZBORA or Immigration Act. However, the right to enter New Zealand is balanced with the need to allow some non-New Zealanders entry in order to mitigate the economic and social impacts which MIQ inherently entails.
24. As currently designed, the legislation and systems for administering MIQs does not provide the Government with levers to balance the demands for MIQ placements, or the legal authority to establish such levers. Under the current, largely first-come first-served system, there is an ongoing risk of either group "crowding out" the other. Due to this limitation immigration settings have been kept deliberately restrictive to reduce the risk of New Zealanders being effectively "crowded-out" of MIQ places by non-New Zealanders. This has meant MIQs have had periods of underutilisation, which could have otherwise been used to accommodate additional New Zealanders.
25. The changes proposed in the attached Amendment Order will assist in ensuring New Zealanders' ability to enter New Zealand is not unjustifiably further impacted by places in MIQ being allocated to other classes of arrivals. This Amendment Order therefore makes the Air Border and Isolation and Quarantine Orders more compliant with NZBORA overall.

Equity

26. To ensure that no classes of person are overly impacted in a negative way by the creation of this allocation power, the existing manual offline system for allocating MIQ places will be retained. This supports placements for time-critical travel by both New Zealanders and non-New Zealanders, and the provision of rooms to support the class exemptions process led by the group of Border Exceptions Ministers.
27. In all cases, where time-critical travel may displace a New Zealander from entering MIQ, this must be justified by economic or social purposes that are sufficiently clear, important and proportionate to the additional delay created for New Zealand citizens seeking to enter New Zealand.

Implementation

28. MBIE Officials are providing a separate report-back on the design of the ring-fencing system and implementation options.
29. There may be a lag, depending on how far in advance MIAS vouchers are booked, between when the IT changes are made and when the new system would start to determine voucher availability.

Next Steps

30. If you are satisfied that the grounds for making the order are met and it is appropriate to achieve the purpose of the COVID-19 Act, you may wish to sign the attached Order.

ENDS.

PROACTIVELY RELEASED

PROACTIVELY RELEASED

COVID-19 Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021

This order is made by the Minister for COVID-19 Response—

- (a) under sections 11 and 15(1) of the COVID-19 Public Health Response Act 2020; and
- (b) in accordance with section 9 of that Act.

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Part 2

Management of isolation and quarantine facilities

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Order

1 Title

This order is the COVID-19 Public Health Response (Air Border and Isolation and Quarantine) Amendment Order 2021.

2 Commencement

This order comes into force at 11.59 pm on 9 April 2021.

Part 1

Amendment to COVID-19 Public Health Response (Air Border) Order (No 2) 2020

3 Amendment to COVID-19 Public Health Response (Air Border) Order (No 2) 2020

This Part amends the COVID-19 Public Health Response (Air Border) Order (No 2) 2020.

4 Clause 4 amended (Interpretation)

- (1) In clause 4(1), replace the definition of **confirmed allocation** with:
confirmed allocation has the meaning given by clause 15H of the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020
- (2) In clause 4(1), replace the definition of **managed isolation allocation system** with:
managed isolation allocation system has the meaning given by clause 15H of the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020

Part 2

Amendments to COVID-19 Public Health Response (Isolation and Quarantine) Order 2020

5 Amendments to COVID-19 Public Health Response (Isolation and Quarantine) Order 2020

This Part amends the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020.

6 Part 2 heading replaced

Replace the Part 2 heading with:

Part 2
Management of isolation and quarantine facilities

Subpart 1—Management of MIQF allocations

15H Interpretation

In this subpart, unless the context otherwise requires,—

chief executive means the chief executive of MBIE

confirmed allocation means a confirmed allocation issued under the managed isolation allocation system to a low-risk MIQF

managed isolation allocation system means a managed isolation allocation system operated by or on behalf of the New Zealand Government

New Zealander means a person who—

- (a) is a New Zealand citizen; or
- (b) holds, or is deemed to hold, a permanent resident visa under the Immigration Act 2009.

15I Chief executive responsible for operation of managed isolation allocation system

- (1) The chief executive is responsible for the operation of the managed isolation allocation system.
- (2) The chief executive must ensure that the managed isolation allocation system does not at any time permit the issue of more confirmed allocations than the number of available allocations.

15J Issue of confirmed allocations

- (1) A person may obtain a confirmed allocation by—
 - (a) registering on the managed isolation allocation system online portal and obtaining a voucher (an **online allocation**); or
 - (b) applying to the chief executive in the form approved by the chief executive and submitting supporting evidence (an **offline allocation**).
- (2) The Minister must determine the apportionment between the issue of online allocations and offline allocations.

15K Online allocations

- (1) Online allocations to low-risk MIQFs may be issued on a basis that the Minister decides.

- (2) In making a decision under subclause (1), the Minister must take into account—
 - (a) the right of New Zealanders to enter New Zealand; and
 - (b) the need to mitigate, so far as possible, the social, economic, and other impacts of COVID-19.
- (3) The basis on which online allocations to low-risk MIQFs are issued may—
 - (a) distinguish between different classes of persons entering New Zealand (for example, between New Zealanders and non-New Zealanders); and
 - (b) prioritise allocations as between different classes of persons; and
 - (c) reserve for a particular class, or any classes, of persons a specific proportion of allocations.

15L Offline allocations

- (1) Offline allocations to low-risk MIQFs may be issued to persons meeting the criteria decided by the Minister and published from time to time by the chief executive on MBIE's Internet site.
- (2) A person may apply to the chief executive for an offline allocation and the chief executive must, as soon as is reasonably practicable, determine that application.
- (3) If the chief executive is satisfied that an application meets the criteria, the chief executive may issue to the applicant an offline allocation to a low-risk MIQF.

15M Amendment and cancellation of allocations

The chief executive of MBIE may at any time—

- (a) amend an online or offline allocation issued to any person (for example, if the starting date for isolation specified in an offline allocation issued to an individual is required to be changed because of a travel delay);
- (b) cancel an online or offline allocation issued to any person (for example, if the person no longer requires the allocation, or can no longer use the allocation because of a cancelled flight).

Subpart 2—Management of MIQF security

7 Clause 19 revoked (Revocation)

Revoke clause 19.

Dated at Wellington this 6th day of April 2021.



Hon Chris Hipkins,
Minister for COVID-19 Response.

Explanatory note

This note is not part of the order, but is intended to indicate its general effect.

This order, which comes into force at 11.59 pm on 9 April 2021, amends the following orders:

- the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (the **Air Border Order**);
- the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 (the **Isolation and Quarantine Order**).

Part 1 of this order amends the Air Border Order so that confirmed allocation and managed isolation allocation system have the meanings given in the Isolation and Quarantine Order.

Part 2 of this order amends the Isolation and Quarantine Order to provide that the chief executive of the Ministry of Business, Innovation, and Employment (the **chief executive**) is responsible for the operation of the managed isolation allocation system. Allocations to low-risk managed isolation or quarantine facilities may be issued online and offline. Online allocations are issued on the basis determined by the Minister for COVID-19 Response and that basis may prioritise between different classes of persons and reserve a specific proportion of allocations for a particular class of persons. Offline allocations may be issued by the chief executive to persons satisfying the application criteria decided by the Minister and published on MBIE's Internet site. The chief executive may at any time amend or cancel an allocation.

This order must be approved by a resolution of the House of Representatives before the end of the relevant period described in section 16(2) of the COVID-19 Public Health Response Act 2020. If that does not happen, the order is revoked at the end of that period.

Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

This order is administered by the Ministry of Health.