

Briefing

COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021: Final Order for Signature

Date due to MO:	26 April 2021	Action required by:	26 April 2021
Security level:	IN CONFIDENCE	Health Report number:	20211007
To:	Hon Chris Hipkins, Minister for COVID-19 Response		

Contact for telephone discussion

Name	Position	Telephone
Robyn Shearer	Acting Director General of Health	s 9(2)(a)
Maree Roberts	Deputy Director General, System Strategy and Policy	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 Withdrawn | |

Comment:

COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3): Final Order for Signature

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

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

Purpose of report

1. This report provides you with a final COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021 (the Amendment Order) for your signature.
2. The Amendment Order will introduce a new schedule of 'very high risk' countries and places limitations on travel to New Zealand from passengers arriving from the countries listed in that schedule from 11:59pm on 28 April 2021.

Summary

3. The purpose of the attached Amendment Order is to limit arrivals to New Zealand from countries that are assessed as being a 'very high risk', starting at 11:59pm on 28 April 2021.
4. The temporary suspension of travel from India continues to be justified from a public health perspective. The Amendment Order continues to limit arrivals from India and creates a new category of 'very high risk' countries to help manage the risk of positive COVID-19 cases presenting at the New Zealand border. You have agreed that a country would meet the threshold of 'very high risk' if the following criteria are met:
 - a. there have been more than 50 cases of COVID-19 per 1000 arrivals to New Zealand from the country in 2021; and
 - b. where there have been more than 15 travellers on average per month arriving in New Zealand from the country.
5. Currently Brazil, Pakistan, and Papua New Guinea meet these criteria.
6. The Amendment Order includes:
 - a. an obligation on air carriers to take all reasonable steps to stop anyone who has been in a very high risk country over the past 14 days from boarding a flight to New Zealand. This prohibition to boarding would apply at the point of origin (at check in) and be the same whether a person is checking in to a New Zealand-bound flight from an airport in a very high risk country or any other country; and

- b. an obligation on individuals that they must not arrive in New Zealand by air if they have been in a 'very high risk' country within the 14 days immediately before the date of their arrival.
7. Although all travellers not on QFT flights enter Managed Isolation and Quarantine (MIQ), cases arriving from 'very high risk' countries create a risk of in-flight transmission and infection for border workers. This, combined with the high numbers of inbound travellers, creates an elevated public health risk.
8. The Amendment Order maintains the 11 April 2021 decision to temporarily suspend travel from India for everyone who is not a New Zealand citizen in response to a spike in COVID-19 positive arrivals to New Zealand from India. By contrast, New Zealand citizens and other specified persons will be permitted to travel to New Zealand under the Amendment Order if they provide evidence of a negative nasopharyngeal RT-PCR (PCR) test from an accredited laboratory 72 hours prior to travel.
9. Using the risk assessment criteria outlined in paragraph 4, Brazil, Pakistan and Papua New Guinea are also classed as 'very high risk'. Preventing arrivals from these countries may produce some reduction in public health risk to New Zealand.
10. Under the Amendment Order, countries assessed as being 'very high risk' and subject to travel restrictions must be regularly reviewed in light of international circumstances, variants of concern, and number of potential arrivals.
11. To make an Order under section 11 of the COVID-19 Public Health Response Act 2020 (COVID-19 Act) you must:
- a) have received advice from the Director-General about:
 - i. the risks of the outbreak or spread of COVID-19; and
 - ii. the nature and extent of measures that are appropriate to address those risks; and
 - b) have regard to any decision by the Government on how to respond to those risks and avoid, mitigate or remedy the effects of the outbreak or spread of COVID-19 (including considering any social, economic or other factors); and
 - c) 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; and
 - d) have consulted the Prime Minister, the Ministers of Justice and Health and any other Ministers you think necessary; and
 - e) be satisfied that this Order is appropriate to achieve the purpose of the COVID-19 Act.
12. You provided a draft version of the Amendment Order to the Prime Minister, and the Ministers of Justice, Health and Immigration on 23 April 2021 which satisfies the consultation requirements under section 9(1)(c) of the COVID-19 Act. Feedback received from Ministerial consultation has been incorporated into the final Amendment Order.
13. This report attaches the final version of the Amendment Order for your signature. If you sign the Order, it will be gazetted by 11:59pm on 26 April 2021 and come into force at 11:59pm on Wednesday 28 April 2021.

Recommendations

We recommend you:

- a) **Note** that, on 11 April 2021, the Government temporarily suspended travel from India until 11:59pm on 28 April 2021 in response to a spike in COVID-19 positive arrivals to New Zealand from India. **Noted**
- b) **Note** that you have agreed that a country would meet the threshold of 'very high risk' if the following criteria are met: **Noted**
- a. there have been more than 50 cases of COVID-19 per 1000 arrivals to New Zealand from the country in 2021; and
 - b. where there have been more than 15 travellers on average per month arriving in New Zealand from the country.
- c) **Agree** to add Brazil, Pakistan and Papua New Guinea to the class of 'very high risk' countries. **Yes/No**
- d) **Note** that the Government's temporary suspension on travel from India remains justified at this time. **Noted**
- e) **Note** that, to give effect to the change above, a section 11 Order may be used. **Noted**
- f) **Note** my public health advice that the attached COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021 is in line with the purpose of the COVID-19 Public Health Act 2020, which is to prevent and limit the risk of, the outbreak or spread of COVID-19. **Noted**
- g) **Agree** to sign the attached COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021. **Yes/No**
- h) **Note** if you sign the attached Amendment Order, it will be gazetted by 11:59pm on 26 April and come into force at 11:59pm on Wednesday 28 April. **Noted**
- i) **Note** you will receive a briefing on the review of this Amendment Order by 7 May 2021, including advice on appropriate next steps and/or further measures to reduce the risk of COVID-19 entering the community from inbound travellers countries assessed as being 'very high risk'. **Noted**



Robyn Shearer

Acting Director-General of Health

Date: 26 April 2021

Hon Chris Hipkins

Minister for COVID-19 Response

COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021 for signing (risk mitigation measures for 'very high risk' countries)

Background

14. On 11 April 2021, the Government suspended travel from India temporarily, until 11:59pm on 28 April 2021. This suspension was intended to mitigate the risk associated with a recent sharp rise in numbers from people arriving in New Zealand from India who have COVID-19. This was intended to enable officials to further monitor the situation and provide advice on options to strengthen and enhance border controls.
15. On 22 April 2021, the Department of Prime Minister and Cabinet (DPMC) provided you advice on risk mitigation measures for 'very high risk' countries. This was in the context of the review of suspension of travel from India until 11:59pm on 28 April 2021 [DPMC 2020/21-883 refers].
16. Based on this advice, you agreed to create a new category of 'very high risk' countries to manage the risk of high numbers of positive COVID-19 cases arriving in New Zealand. The Amendment Order gives effect to this decision and will introduce a schedule of 'very high risk' countries. Travel to New Zealand from passengers arriving from countries listed in that schedule will be restricted from 11:59pm on 28 April 2021.
17. The Amendment Order continues to limit arrivals from India and is justified from a public health perspective as being 'very high risk'. You have agreed that a country would meet the threshold of 'very high risk' if the following criteria are met:
 - a. there have been more than 50 cases of COVID-19 per 1000 arrivals to New Zealand from the country in 2021; and
 - b. where there have been more than 15 travellers on average per month arriving in New Zealand from the country.
18. Currently, Brazil, Papua New Guinea and Pakistan meet these criteria. This Amendment Order will mean that travel to New Zealand from 'very high risk' countries is temporarily limited to:
 - a. New Zealand citizens, their partners and/or dependent children, and parent(s) of a dependent child (where the child is a New Zealand citizen);
 - b. residents and visa holders who have begun their journey in, or travelled through, India. Specifically, this should apply to travellers who have been in a 'very high risk' country at any point in the 14 days prior to their arrival; and
 - c. those granted a humanitarian exception, foreign diplomats and their dependents.

19. The permitted travellers above will also be required to provide evidence of a negative PCR test from an accredited laboratory 72 hours prior to travel. This will replace the usual pre-departure test requirement in place for high risk countries.
20. The specific type of test, and list of accredited laboratories in a given country, will be gazetted separately by the Director-General of Health to provide flexibility to adapt to changing risk profiles of different countries as required without needing to amend the Order each time a country needs to be re-classified as higher or lower risk.
21. There are available exemption mechanisms to apply to travellers who may have already departed from a 'very high risk' country before the legal framework is applied, which will be made on a case-by-case basis.
22. Note that despite introducing limitations on travel, it is still possible for passengers to arrive in New Zealand who have been a 'very high risk' country in the 14 days prior. For instance, airlines will not be able to identify travellers who are travelling from a 'very high risk' country on multiple flights with separate tickets and so will be reliant on these travellers declaring their recent travel history.

Amendment to the Air Border Order

23. The attached Amendment Order (**Appendix Two**) gives effect to the decision to temporarily limit arrivals to New Zealand from a 'very high risk' country, placing an obligation on air carriers to:
 - a. take all reasonable steps to warn people about the prohibition above; and
 - b. at check in, not allow people to board a flight to New Zealand unless they have given an oral declaration that they have not been in a 'very high risk' country in the last 14 days.
24. The Amendment Order is also clear that a person has 'been in a high risk country' even if they were in the country only for the purposes of transit. An overview of the specific provisions in the Amendment Order is provided at **Appendix One**.
25. The prohibition above will not apply for air crew, diplomats or defence staff. As with similar Orders, there is also a provision for the Director-General of Health to grant an exemption to the prohibition above based on humanitarian grounds.
26. s 9(2)(h)
[Redacted text block]
27. If you sign the Order, it will be gazetted by 11:59pm on 26 April and come into force at 11:59pm on Wednesday 28 April 2021. The two-day delay between gazetting and the Amendment Order coming into force provides a reasonable grace period for travellers who have already departed from a 'very high risk' country and are en route to New Zealand.
28. The Amendment Order does not include an expiry date. We will provide you with a further briefing following a review of the attached Order by 7 May 2021, including advice on appropriate next steps.

Process for amending a section 11 Order

29. Under the COVID-19 Public Health Response Act 2020 (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); or
 - c. it has been authorised by the Prime Minister.
30. There is currently an Epidemic Notice in place, which allows Orders to be made under section 11 of the COVID-19 Act.
31. As the Minister for COVID-19 Response, you may make an Order under section 11 of the COVID-19 Public Health Response Act 2020 (COVID-19 Act).
32. 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; and
 - ii. the nature and extent of measures that are appropriate to address those risks; and
 - b. have regard to any decision by the Government on how to respond to those risks and avoid, mitigate or remedy the effects of the outbreak or spread of COVID-19 (including considering any social, economic or other factors); and
 - c. 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; and
 - d. have consulted the Prime Minister, the Minister of Justice and Health and any other Ministers you think necessary; and
 - e. be satisfied that this Order is appropriate to achieve the purpose of the COVID-19 Act.
33. You provided a draft version of the Amendment Order to the Prime Minister, and the Ministers of Justice, Health and Immigration on 23 April 2021 which satisfies the consultation requirements under section 9(1)(c) of the COVID-19 Act.

Public health analysis rationale for the amendment

34. The earlier temporary suspension of travel from India continues to be justified from a public health perspective. The Amendment Order continues to limit arrivals from India and creates a new category of 'very high risk' countries, including India, to help manage the risk of positive COVID-19 cases presenting at the New Zealand border.
35. Using the criteria outlined paragraph 4, Brazil, Pakistan and Papua New Guinea can all be classified as 'very high risk'. Preventing arrivals from these countries may produce some reduction in public health risk to New Zealand.

36. Any model must clearly distinguish countries where action is required based on several qualitative and quantitative variables. We are not confident that the data underpinning the classification 'very high risk' classification model do this at this time. Therefore, countries assessed as being 'very high risk' and subject to travel restrictions must be regularly reviewed in light of international circumstances, variants of concern, and numbers arriving.

Feedback from Ministerial consultation

37. There was no substantive feedback received from Ministerial consultation.

Minor drafting changes

38. The final Amendment Order includes some minor amendments for consistency and clarification.

New Zealand Bill of Rights Act 1990

39. A matter for you to consider each time an Order is proposed under the COVID-19 Public Health Response Act 2020 is whether the exercise of such powers will be appropriate. The power to make an Order under section 11 of the Act must be exercised consistently with the New Zealand Bill of Rights Act 1990 (NZBORA).
40. Any COVID-19 Order giving effect to a travel suspension requires a NZBORA assessment for proportionality, particularly due to the impact that any suspension will have for returning New Zealanders.

41. s 9(2)(h)

42. s 9(2)(h)

Legal risk

43. s 9(2)(h)

Equity

44. There is potential for the impact of these restrictions to be more significantly experienced by New Zealanders who originate from India, Brazil, Pakistan and Papua New Guinea at this time since all these countries are currently classed as 'very high risk' under the risk classification model.
45. Given that the limitations on travel to New Zealand is only intended to be a temporary measure, we do not consider the equity concerns in paragraph 44 above to be sufficient to prohibit making this Amendment Order.

Next steps

46. If you are satisfied that the grounds for making an Order are met and it is appropriate to achieve the purposes of the COVID-19 Act, you may sign the final Amendment Order.
47. If you sign the Amendment Order, it will be gazetted by 11:59pm on 26 April and come into force at 11:59pm on 28 April 2021.
48. Officials will provide you with advice on the review of this Order by 7 May 2021.

ENDS.

PROACTIVELY RELEASED

Appendix One: Overview of COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) measures

Matter	Clause reference
Very high risk countries (VHRC) are: Brazil India Pakistan Papua New Guinea	Definition inserted by clause 5 New Schedule 3
Air carriers must: 1. not board non-exempt persons departing from VHRC; and 2. warn non-exempt persons departing from other places of the travel restrictions from VHRC and get confirmation from the passenger that they have not been in a VHRC within the last 14 days	New clause 7C
Persons must not arrive if they have been in a VHRC within the last 14 days	New clause 8A
The following people are exempt from the restrictions:	
New Zealand citizens Partners of New Zealand citizens Dependent children of New Zealand citizens Parents of dependent children who are New Zealand citizens (This exemption does not currently apply to the restrictions on travel from India)	New clause 18A
People who transit through a VHRC (and remain airside) (This exemption does not currently apply to the restrictions on travel from India)	New clause 18B
Aircrew	New clause 18C
Diplomatic and consular officials, and New Zealand Defence Force personnel	New clause 18D
People on aircraft landing for non-traffic purposes	New clause 18E

The draft also amends clause 7B of the Air Border Order. The amendment is needed to clarify that the requirement on air carriers in relation to pre-departure testing does not apply outside of New Zealand (which is not permitted by the COVID-19 Public Health Response Act 2020).

The draft does not deal with any changes to the type of test that must be used for pre-departure testing or the laboratories from which evidence of a result will be accepted. These changes will need to be specified by the Director-General of Health in a notice under clause 8(5) of the Air Border Order.

Appendix Two: COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021 for signing

PROACTIVELY RELEASED

COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021

This order is made by the Minister for COVID-19 Response under sections 11 and 15(1) of the COVID-19 Public Health Response Act 2020 in accordance with section 9 of that Act.

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Order

1 Title

This order is the COVID-19 Public Health Response (Air Border) Order (No 2) Amendment Order (No 3) 2021.

2 Commencement

This order comes into force at 11.59 pm on 28 April 2021.

3 Principal order

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

4 Clause 3 amended (Purpose)

In clause 3, replace “requirements on persons” with “requirements in relation to persons”.

5 Clause 4 amended (Interpretation)

In clause 4(1), insert in its appropriate alphabetical order:

very high risk country means a country listed in Schedule 3

6 Part 1A heading amended

In the Part 1A heading, replace “**Obligation**” with “**Obligations**”.

7 Clause 7B amended (Certain air carriers to comply with requirements relating to pre-departure testing)

After clause 7B(1), insert:

- (1A) The air carrier must not cause an aircraft to arrive in New Zealand unless it has taken the steps set out in subclause (2).

8 Clause 7C replaced (Certain air carriers to comply with requirements relating to travel from India)

Replace clause 7C with:

7C Certain air carriers to comply with requirements relating to travel from very high risk countries

- (1) This clause applies to any air carrier that is responsible for, or has a commercial obligation in, the transporting of a person (other than an exempt person) on a flight or a multi-leg flight from another country to New Zealand.
- (2) The air carrier must not cause an aircraft to arrive in New Zealand unless it has taken the steps set out in subclause (3) or (4).

Flights departing from very high risk countries

- (3) If the flight departs from a very high risk country, the air carrier must take reasonable steps to ensure that the person does not board the flight.

Flights departing from other countries

- (4) If the flight departs from a country other than a very high risk country, the air carrier must take reasonable steps to ensure that the person,—
- (a) when checking in for the flight or initially checking in for the multi-leg flight, is informed that the person is prohibited from arriving in New Zealand under clause 8A if they have been in a very high risk country within the 14 days immediately before the date of their arrival in New Zealand; and
 - (b) does not board the flight unless the person has stated that they have not been in a very high risk country within that period.
- (5) The statement required by subclause (4)(b) must be given verbally or by other means of communication (including a statement made on behalf of the person) if verbal communication is not possible.
- (6) In this clause, **exempt person** means a person who is exempt from clause 8A by or under this order.

9 Clause 8A replaced (Obligations on persons arriving in New Zealand by air having been in India)

Replace clause 8A with:

8A Obligations on persons who have been in very high risk countries

- (1) A person must not arrive in New Zealand by air if they have been in a very high risk country within the 14 days immediately before the date of their arrival.
- (2) To avoid doubt, a person must still comply with clause 8 if the person arrives in New Zealand—
- (a) in reliance on an exemption from this clause that is provided by or under this order; or
 - (b) in breach of subclause (1).

10 Clause 18A replaced (Exemptions relating to persons arriving in New Zealand by air having been in India)

Replace clause 18A with:

18A New Zealand citizens and certain related persons

- (1) The following persons arriving by air in New Zealand are exempt from clause 8A:
- (a) a New Zealand citizen:

- (b) a spouse, civil union partner, or de facto partner of a New Zealand citizen:
- (c) a dependent child of a New Zealand citizen:
- (d) a parent of a dependent child who is a New Zealand citizen.

(2) In this clause,—

dependent child has the meaning given by section 4 of the Immigration Act 2009

New Zealand citizen has the meaning given by section 4 of the Immigration Act 2009

parent, in relation to a dependent child, means a person on whom the child is dependent.

18B Arrivals who remain airside while transiting through very high risk countries

A person arriving by air in New Zealand is exempt from clause 8A if they—

- (a) were in a very high risk country within the 14 days immediately before the date of their arrival in New Zealand; but
- (b) were airside of an airport the entire time that they were in the very high risk country.

18C Aircrew members

An aircrew member is exempt from clause 8A.

18D Diplomatic and consular officials, and New Zealand Defence Force

The following persons arriving by air in New Zealand are exempt from clause 8A:

- (a) a person who is entitled to any immunity from jurisdiction by or under—
 - (i) the Diplomatic Privileges and Immunities Act 1968 (other than a person referred to in section 10D(2)(d) of that Act) or the Consular Privileges and Immunities Act 1971; or
 - (ii) any order under either of those Acts:
- (b) a person who is a member of the New Zealand Defence Force and returning from service outside New Zealand.

18E Persons on aircraft landing for non-traffic purposes

A person arriving by air in New Zealand is exempt from clause 8A if they are on an aircraft that is required to land in New Zealand for a purpose other than taking on or discharging passengers, cargo, or mail.

11 New Schedule 3 inserted

After Schedule 2, insert the Schedule 3 set out in the Schedule of this order.

Schedule
New Schedule 3 inserted

cl 11

Schedule 3
Very high risk countries

cl 14

Brazil
India
Pakistan
Papua New Guinea

Dated at Wellington this day of 2021.

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 amends the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 (the **principal order**). It comes into force at 11.59 pm on 28 April 2021.

Clauses 1 to 3 are the Title, commencement, and principal order clauses.

Clause 4 amends clause 3 of the principal order to clarify that the purpose of the principal order involves imposing requirements in relation to persons arriving in New Zealand (rather than imposing requirements only on those persons).

*Clause 5 amends clause 4 of the principal order to insert a definition of very high risk country. A very high risk country is defined as one that is listed in *new Schedule 3*. That schedule lists the following as very high risk countries:*

- Brazil:
- India:
- Pakistan:
- Papua New Guinea.

Clause 6 makes a minor amendment to the heading of Part 1A of the principal order.

Clause 7 amends clause 7B of the principal order so that the requirements in that clause apply in relation to causing an aircraft to arrive in New Zealand.

Clause 8 replaces clause 7C of the principal order. *New clause 7C* prohibits an air carrier from causing an aircraft to arrive in New Zealand unless the air carrier has,—

- if the flight departs from a very high risk country, taken reasonable steps to ensure that only persons with exemptions from *new clause 8A* board the flight; or
- if the flight departs from another country, taken reasonable steps to ensure that—
 - a person (other than an exempt person) checking in for the flight is informed that they are prohibited from entering New Zealand if they have been in a very high risk country within the 14 days immediately before the date of their arrival in New Zealand; and
 - the person does not board the flight unless they have stated that they have not been in a very high risk country within that period.

Clause 9 replaces clause 8A of the principal order. *New clause 8A* prohibits a person from arriving in New Zealand by air if they have been in a very high risk country within the 14 days immediately before the date of their arrival.

Clause 10 provides for exemptions from the prohibition under *new clause 8A* by replacing clause 18A of the principal order with the following:

- *new clause 18A*, which exempts New Zealand citizens, the partners and dependent children of New Zealand citizens, and the parents of dependent children who are New Zealand citizens;
- *new clause 18B*, which exempts people who transit through a very high risk country and remain airside while doing so;
- *new clause 18C*, which exempts aircrew members;
- *new clause 18D*, which exempts diplomatic and consular officials, and members of the New Zealand Defence Force returning from service outside New Zealand;
- *new clause 18E*, which exempts people on aircraft that are required to land in New Zealand for a purpose other than taking on or discharging passengers, cargo, or mail.

Clause 11 inserts *new Schedule 3* into the principal order. *New Schedule 3* lists the very high risk countries.

Issued under the authority of the Legislation Act 2012.
Date of notification in *Gazette*:
This order is administered by the Ministry of Health.