



BRIEFING

Legislative framework for managed isolation and quarantine

Date:	22 February 2021	Priority:	High
Security classification:		Tracking number:	2021-2216

Action sought		
	Action sought	Deadline
Hon Chris Hipkins Minister for COVID-19 Response	Agree to include a legislative framework for managed isolation and quarantine in the proposed content for a COVID-19 Public Health Response Amendment Bill	26 February 2021

Contact for telephone discussion (if required)			
Name	Position	Telephone	1st contact
Kara Isaac	General Manager, MIQ Policy	Privacy of natural persons	✓
Privacy of natural persons	Manager, MIQ Policy		
	Senior Policy Advisor, MIQ Policy		

The following departments/agencies have been consulted
Ministry of Health, Crown Law Office, Parliamentary Counsel Office, New Zealand Customs Service

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <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 Withdrawn |

Comments



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Purpose

To provide you further advice on the proposal to create a legislative framework for managed isolation and quarantine as noted in the Ministry of Health's Health Report *COVID-19 Public Health Response Act 2020 Amendment Bill (No 2): proposed content and timeline* [Health Report 20210266 refers].

Executive summary

At the time the COVID-19 Public Health Response Act 2020 was created, managed isolation and quarantine (MIQ) had only been operating for 5 weeks. It was not known then how critical MIQ would continue to be to the COVID-19 response, how long it would be required and how complex the system would become.

MIQ has now been operating for almost a year and has evolved into a complex system that is critical to New Zealand's successful COVID-19 response. It is operating in a dynamic global pandemic environment and continual improvement has been key to its success. We expect it will be integral to the response for some time.

The Ministry of Business, Innovation and Employment (MBIE) considers that the Act should include a new bespoke part for MIQ so that there is an enduring and clear legislative basis for MIQ for the remainder of the COVID-19 response. Now is the right time to develop a more comprehensive framework that reflects what we now know is required to support the effective and orderly operation of MIQ, and to ensure there is appropriate parliamentary scrutiny of this significant part of the COVID-19 response.

MIQ is first and foremost a public health response. But as the system has developed, it has become clear that the effective functioning of MIQ would sometimes benefit from other considerations being given greater weight in the day-to-day delivery of isolation and quarantine services.

For example, the operation of MIQ involves managing demand for, and allocating, MIQ places. It also involves ensuring the health and safety of workers and residents in MIQ facilities. These are complex considerations, where MIQ's public health objectives need to be balanced better alongside economic and other impacts, health and safety of our workforce, and people's rights.

The COVID-19 Public Health Response Act 2020 does not provide a clear framework in primary legislation for these kinds of decisions to be made for the orderly operation of MIQ. Legal professional privilege

Legal professional privilege

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Agree** to include a legislative framework for managed isolation and quarantine in the proposed content for a COVID-19 Public Health Response amendment bill

Agree Disagree/Discuss

- b **Note** that Ministry of Business, Innovation and Employment officials will further develop the proposal, working closely with the Ministry of Health, Crown Law Office and Parliamentary Counsel Office, in preparing a draft Cabinet paper and drafting an amendment bill

Agree Disagree/Discuss

I do think there is merit in drafting the framework in such a way that it stands apart from the rest of the Act. If we are in a position to repeal the Act (or let it expire) but still need the MIQ framework available, we want that to be easy to achieve.



Kara Isaac
General Manager, MIQ Policy
MBIE

22 / 2 / 21
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Hon Chris Hipkins
Minister for COVID-19 Response

5 / 3 / 21
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Background

1. The COVID-19 Public Health Response Act 2020 (the Act) was amended in late 2020. At the time it was noted that a second amendment bill would be progressed in the first quarter of 2021.
2. On 17 February, officials provided you with advice on proposed content and a draft timeline for an amendment bill [Health Report 20210266 refers]. That Report included a proposal to create a legislative framework for MIQ and noted that MBIE would provide further advice.
3. MBIE considers that the Act should include a new bespoke part for MIQ so that there is an enduring and clear legislative basis for MIQ for the remainder of the COVID-19 response. Now is the right time to develop a more comprehensive framework that reflects what we now know is required to support the effective and orderly operation of MIQ, and ensure there is appropriate parliamentary scrutiny of this significant part of the COVID-19 response.
4. This briefing sets out why a legislative framework for MIQ is necessary and the key elements of a regime. We seek your agreement to include this proposal in the content for the amendment bill, which MBIE and Ministry of Health Officials will progress together.

MIQ has evolved into a complex and critical part of the COVID-19 response

5. The purpose of MIQ is to protect the health of people in New Zealand by preventing COVID-19 from entering the community across the border. It plays a central role in New Zealand's elimination strategy.
6. The operational arrangements for MIQ were stood up urgently as part of the emergency all-of-government response to COVID-19 in April 2020. Initially the facilities were operationalised at very short notice and with basic standard operating practices.
7. The Act came into force in May 2020. At that time, MIQ had only been operating for 5 weeks. It was not known at that time how critical MIQ would continue to be to the COVID-19 response, how long it would be required and how complex the system would become. The system has faced significant and sustained pressure and growing demand since its initial establishment.
8. MIQ has now been operating for almost a year and has evolved into a complex system of 32 facilities operating in a dynamic global pandemic environment. It has accommodated over 100,000 people arriving in New Zealand.
9. Over half a dozen government agencies work closely together and with private commercial accommodation and other service providers to deliver MIQ. There are also significant interdependencies with the Defence, Immigration, Transport, Customs, Police, Foreign Affairs and Economic Development systems.
10. MIQ has taken a continuous improvement approach. Its operations have evolved over the last year as we learn more about the virus and how to manage it. This has included operational frameworks and guidance to support consistency, and ongoing processes to review the effectiveness and compliance of its operations.
11. As the global situation continues on an unpredictable path – the rolling out of vaccines throughout the world and the emergence of new, more transmissible variants – it is likely that MIQ will continue to play a role in New Zealand's successful response for some time.

There are additional factors relevant for MIQ to achieve its objective

12. MIQ is first and foremost a public health response. But as the system has developed, it has become clear that the effective functioning of MIQ would sometimes benefit from other considerations being given greater weight in the day-to-day delivery of isolation and quarantine services.
13. Other key considerations for the operation of MIQ include managing the sustained demand for MIQ places from people seeking to enter New Zealand, ensuring the health and safety of workers and residents in our facilities, and operating with a high degree of assurance around operational processes (including charging of fees). These are broader than the immediate public health considerations.

There is no clear framework in the Act for MIQ

14. The Act does not include express provisions in primary legislation for the orderly operation of MIQ (other than for cost recovery) and has limited empowering provisions for delegated legislation to be made to achieve this. The orders under the Act are primarily concerned with public health and transmission of COVID-19, rather than the broader considerations relevant to the operation of MIQ.
15. This means MIQ is governed by a mixture of orders made under the Act, operational decisions and reliance on the general law, such as the New Zealand Bill of Rights Act 1990, the Health and Safety at Work Act 2015 and common law principles such as natural justice.
16. Leaving the broader MIQ considerations to operational decisions and the general law means the legal basis for MIQ is fragmented. In particular, it means there is:
 - a. legal risk given that decisions and processes often impact on rights under the New Zealand Bill of Rights Act
 - b. insufficient ability to enforce rules and requirements
 - c. opportunity to build stronger transparency and accountability.
17. Strengthening these aspects of MIQ will ensure users of facilities have a clear legislative framework setting out their obligations and protecting their rights; decision-makers have clear powers, criteria and principles guiding their decision-making; and there is a clear legislative basis for those administering facilities to operate by and enforce.
18. It is important that the MIQ system operates with a high level of assurance. This has shaped MIQ's operational developments and continuous improvement approach to date. Managing risk and strengthening the legislative basis for MIQ is consistent with this approach.

Legal risk

19. Given the nature of MIQ, decisions are made that require the balancing of individual rights and other considerations in highly complex situations. While the general law provides a frame for these decisions, it does not reflect the complexities and nuances involved in the bespoke MIQ regime.
20. For example, MBIE has been relying on its obligations under the Health and Safety at Work Act to develop and implement mail and deliveries, and alcohol policies in facilities. Determining what is reasonably practicable to ensure the health and safety of workers and residents in facilities in an MIQ context involves complex considerations about transmission risk, ensuring people in facilities are treated with dignity and respect, managing substance addictions, and managing hotels' concerns about property damage.

21. The consequences of getting decisions wrong are high for individuals whose rights are impacted, the public who are being protected from COVID-19, and the Crown who incur legal risk.
22. Given the limitations on rights and freedoms that are necessary in a MIQ setting, it is preferable for the authority to impose such limitations to be clear in primary legislation and subject to parliamentary scrutiny. Legal professional privilege
Legal professional privilege

Supporting compliance and enforceability

23. MIQ operates in a unique environment where voluntary compliance plays a key role in what is essentially a compulsory detention regime.
24. Encouraging voluntary compliance is necessary to create an MIQ environment where people in facilities are supported to play their part in keeping themselves and New Zealand safe from COVID-19. For the most part, people in MIQ voluntarily comply with operating rules and processes. This remains the first and best way of running MIQ facilities.
25. However, voluntary compliance is enhanced when there are clear legal powers underpinning these, and when we have the ability to deal with serious or persistent non-compliance. Legal professional privilege
Legal professional privilege

Strengthening transparency and accountability

26. Transparency and accountability are key principles in good law making and the rule of law. It should be clear what the law is, and when, how and to whom it applies.
27. People in facilities and others impacted by decisions should be able to access and understand their obligations and the safeguards that are in place to protect their rights. For example, MBIE currently operates an administrative internal complaints and review process. This is an important safeguard for addressing issues and concerns in facilities. Elevating this process to primary legislation would provide greater transparency for returnees.
28. Legislation also provides a basis for powers to be assigned to, and exercised by, appropriate people. Decision-makers should have the appropriate expertise, the right level of accountability and clear powers and principles guiding their decision-making.
29. Parliamentary scrutiny of primary legislation adds another layer of oversight and transparency that is appropriate given the significance of MIQ to the COVID-19 response.

Proposal – a bespoke legislative regime for MIQ

30. To strengthen the areas identified above, MBIE considers that the Act should include a new part for MIQ so that there is an enduring legislative basis for the remainder of the COVID-19 response.
31. A clear legislative framework would enable the effective and orderly operation of MIQ and set out the powers, obligations and rights to achieve this and ensure:
 - a. MIQ fulfils its purpose of limiting the risk of, spread or outbreak of COVID-19 in facilities and entering the New Zealand community through the border
 - b. social, economic and other factors relevant to the operation of MIQ are transparent and taken into account
 - c. workers and people staying in facilities are kept healthy and safe

- d. rights of people staying in facilities are considered and protected.
32. Set out below are the kinds of powers, obligations and rights that officials consider would be included in an MIQ legislative regime.
33. Where MIQ operations are governed by orders made under the Act, the extent these should be elevated to primary legislation is still being assessed. It will be important to retain flexibility so that MIQ can continue to respond to the dynamic pandemic environment. MBIE is working with agencies and Crown Law on how to best design provisions and safeguards, and ensure we strike the right balance across the Act, regulations, orders and rules to preserve flexibility.

Enabling allocation and prioritisation of MIQ places

34. Managing supply and demand is one of the key parts of MIQ's operations. Including a power in primary legislation for the Chief Executive of MBIE to allocate and prioritise MIQ places, subject to appropriate decision-making criteria and safeguards would provide a sound legal footing for this process.
35. An amendment to the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 is being progressed to come into force in early March 2021. The amendment will allow a proportion of allocable places in MIQ to be ring-fenced for New Zealanders with the remainder accessed on a first-come-first-serve basis.¹
36. However, given that allocation decisions will affect the rights of New Zealand citizens and permanent residents (for example, to support entry by certain people needed for economic and social reasons), it is preferable that this be in primary legislation.

Providing for movement restrictions with appropriate safeguards

37. Managing people's movements to, from and within facilities is a key part of ensuring the health and safety of returnees and workers in MIQ.
38. Any restrictions on peoples' movement must be proportionate and justified. Access to exercise/fresh air are fundamental to returnees' wellbeing and respecting their right to be treated with dignity and respect under the New Zealand Bill of Rights Act. However, there are often practical constraints to operationalising these rights in facilities.
39. Movement restrictions are currently governed by the Isolation and Quarantine Order, but it provides little guidance on how decisions are made. It would be preferable for there to be a clear framework to guide decision-makers as to the relevant factors and to provide explicit statutory authority for such restrictions to be imposed in a reasonable way where appropriate.

Enabling appropriate information sharing and gathering

40. Efficient information sharing is necessary for MIQ to fulfil its functions and respond flexibly to changing situations affecting multiple agencies and portfolios. Legislative authority will ensure there is a clear purpose and framework for information sharing between agencies involved in delivering MIQ, including MBIE MIQ, Immigration New Zealand and the New Zealand Customs service.
41. We note that you were provided substantive advice on this proposal and options to consider in Health Report 20210266.

¹ Cabinet Business Committee, with power to act, agreed to create this power in an order under the Act so that a proportion allocable places in MIQ could be ring-fenced for New Zealanders with the remainder accessed on a first-come-first-serve basis and to provide; and to provide a firm basis for allocations to be made to applicants who meet criteria [CBC-20-MIN-0137 refers].

42. Primary legislation is also required to allow MIQ to require returnees to provide their onwards contact details for invoicing purposes. This was noted in the proposals in Health Report 20210266 for inclusion in the amendment bill.

Recognising the complaints and review process

43. MBIE currently operates an administrative internal complaints and review process. This is an important safeguard for addressing issues and concerns in facilities. Recognising this process in primary legislation would provide greater transparency for returnees.

Empowering operational detail and process to be set in secondary legislation

44. Secondary legislation setting out the administrative and operational detail required to support MIQ's functions would improve the transparency and enforceability of processes currently set out in MIQ's Operating Framework and internal policies. This would provide certainty for returnees and those administering MIQ on the ground.
45. Examples of matters suitable for secondary legislation include rules around mail and deliveries, alcohol policy, forms and notices.

Consequential changes to the Act would also be required

46. Various consequential changes to the Act would be required to ensure the MIQ function is recognised, including amending:
- a. the purpose statement or creating a new purpose in a MIQ part of the Act
 - b. offence and infringement offence provisions so enforcement powers attach to new powers in the Act and obligations and rules set in secondary legislation.

This would not set up MIQ for any future pandemic response

47. The proposal above is limited to the COVID-19 response. MBIE proposes it is included as a new part in the COVID-19 Public Health Response Act, which is a time limited statute.
48. A general piece of managed isolation and quarantine legislation could be designed for future pandemics. However, this would involve substantive work and would best sit with the Ministry of Health or the Department of Prime Minister and Cabinet (AOG).

Agency views

Ministry of Health

49. The Ministry of Health is supportive of there being specific legislative provision for the operation of MIQ, but urges that consideration is given to a standalone piece of legislation.
50. This is because the COVID-19 Public Health Response Act may be unnecessary from a public health and prevention perspective while MIQ facilities may still be required to manage ongoing border control measures. Health, Customs and Immigration NZ can rely upon powers in their own bespoke legislation to provide legal authority for further COVID-19 actions once the Act is repealed, however, MBIE does not already have such powers provided through other enduring legislation.

Crown Law Office and Parliamentary Counsel Office

51. The Crown Law Office and Parliamentary Counsel Office support creating a legislative framework for MIQ. Progressing these proposals will require MBIE working closely with both agencies on the design of the legislation.

Next steps

52. If you agree to the above, MBIE will develop the proposal for inclusion in a draft Cabinet paper.
53. The proposal would progress together with the other content in Health Report 20210266. We note that the Report included an option for an urgent bill to be progressed on a shorter timeframe. Given the substantive nature of this proposal, we do not consider it is appropriate for inclusion in an urgent bill and should progress on the longer timeframe proposed in that Report (commencement August 2021).