



## BRIEFING

### Draft COVID-19 Public Health Response Amendment Bill: MIQ Fee Exemptions and Powers to Enforce MIQ Rules

<b>Date:</b>	14 July 2021	<b>Priority:</b>	High
<b>Security classification:</b>		<b>Tracking number:</b>	2122-0093

Action sought		
	Action sought	Deadline
Hon Chris Hipkins <b>Minister for COVID-19 Response</b>	<b>Agree</b> to shift the MIQ fee exemption for diplomats to Regulations.  <b>Agree</b> to include hold and seizure powers in the MIQ Rules provisions.	19 July 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	Principal Policy Advisor		
	Policy Advisor		

The following departments/agencies have been consulted
Ministry of Foreign Affairs and Trade, Ministry of Health, Legislation Design and Advisory Committee

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 Withdrawn           |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 seek your agreement to two proposals for inclusion in the draft COVID-19 Public Health Response Amendment Bill (the Bill):

1. shifting the exemption for diplomats and their families from the COVID-19 Public Health Response Act 2020 (the Act) to the COVID-19 Public Health Response (Managed Isolation and Quarantine Charges) Regulations (the Regulations)
2. new powers for the Chief Executive of MBIE to seize and hold items that are in breach of the Managed Isolation and Quarantine (MIQ) Rules.

#### Recommended action

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

- a **Note** that on 17 May Cabinet [SWC-21-MIN-0067, CAB-21-MIN-0167 refer] agreed to:
- i. amend the Act so that the starting point for MIQ charges is that everyone who enters MIQ is liable, unless they are exempted under the Act or the Regulations
  - ii. enable the Chief Executive of MBIE to make rules for the day-to-day operation of MIQFs, such as restricting, prohibiting and imposing conditions on what things can be brought into facilities, including deliveries and alcohol.

*Noted*

- b **Note** that Cabinet authorised you to make any necessary policy decisions that may arise during the drafting process, consistent with the policy intentions agreed by Cabinet.

*Noted*

#### *Diplomat Exemption*

- c **Note** that there is no policy rationale for having the diplomats exemption in primary legislation and all the others in secondary legislation and that the Legislation Design and Advisory Committee (LDAC) has recommended that all exemptions should sit in one place – either all in the Act or all in the Regulations.

*Noted*

- d **Agree** to move the current fees exemptions for diplomats from sections 32E(2)(a)-(e) of the Act to the Regulations, so that all fees exemptions sit in the Regulations.

Agree  disagree

#### *Seizure powers*

- e **Note** that it is useful to have a suite of enforcement tools to be able to respond appropriately to breaches, rather than just infringement offences.

*Noted*

- f **Agree** to include the following powers and duties for the Chief Executive of MBIE (CE) in the Bill:

- i. to hold items that are in breach of the Rules until the end of a person's isolation or quarantine stay
- ii. to require people undertaking isolation or quarantine to hand over items that are in breach of the Rules until the end of a person's stay
- iii. to hold items under the end of a person's stay, where the CE has reasonable grounds to believe the items may be in breach of the Rules.

Agree /  disagree

- g **Agree** that this briefing will be proactively released subject to necessary redactions under the *Official Information Act 1986* once the Bill has been introduced into the House.

Agree /  disagree



Kara Isaac  
General Manager  
MIQ Policy, MBIE

14 / 7 / 21



Hon Chris Hipkins  
Minister for COVID-19 Response

16 / 7 / 21

## Background

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3. In May 2021 Cabinet agreed to strengthen the legislative basis for MIQ as part of the COVID-19 Public Health Response Amendment Bill [SWC-21-MIN-0067 refers]. This included agreement to reverse default fee liability so that all people are liable for MIQ unless listed as exempt (rather than only prescribed classes of people being liable).
4. Cabinet also agreed that the Bill would “enable the CE to make rules for the day-to-day operation of MIQFs, such as restricting, prohibiting and imposing conditions on what things can be brought into facilities, including deliveries and alcohol”.
5. Officials have two further proposals to improve the Bill that relate to these policies. Cabinet authorised you to make any necessary policy decisions that arise during the drafting process, consistent with the policy intentions agreed by Cabinet. We consider that these changes are within the scope of that authority.

## Moving the fees exemptions for diplomats from the Act to the Regulations

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6. Currently nearly all groups exempted from paying MIQ fees are specified in regulation 8 of the Regulations. The only exemption sitting separately is the exemption for diplomats and their families, which is specified in section 32E(2)(a) to (e) of the Act.
7. 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 is rather a consequence of the speed of development for the cost recovery provisions in the Act and Regulations.
8. We have been engaging with LDAC as part of the development of the Bill. LDAC recommends that to support clarity and transparency of the law, the fees exemptions should all sit in one place – either all in the Act or all in the Regulations. Of the two, we consider the Regulations to be the more appropriate of the two. This is because this gives the greater flexibility as border settings change, which is consistent with the proposal to reverse default fee liability through the Bill.
9. We seek your agreement to repeal the exemptions listed in the Act and transfer these to the Regulations. This will require new provisions in both the Bill and the Regulations.

## New powers in the Bill to support the enforcement of Rules

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*It may be useful to have a range of possible enforcement tools, including but not limited to infringement offences*

10. The Bill creates the power for the CE of MBIE to make Rules for the day-to-day operation of MIQFs. Work is progressing in parallel to develop the Rules themselves based on standard operating procedures. We will brief you in more detail on how the Rules are progressing ahead of the Bill select committee process.
11. As currently drafted and in line with LDAC’s recommendations,<sup>1</sup> all Rules will be infringement offences. This does not mean that all breaches will result in issuing an offence. Enforcement officers have discretion and in practice will usually issue at least one warning before issuing an infringement notice. Furthermore, officials have identified that infringement offences alone may not always be the most appropriate mechanism to enforce the Rules. It is useful to have a suite of enforcement mechanisms so that responses are proportionate to the behaviour in question.

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<sup>1</sup> LDAC advised that the overarching offence for breach of a rule should be specified in the Act, with the Act also setting out where the infringement offences for breach will be specified (ie in the rules).

12. For example, if a delivery breaches the Rules (eg exceeding acceptable quantities of alcohol), we may wish to hold the delivery until the end of the person's stay in isolation or quarantine. This means that the behaviour that poses risk (eg overconsumption of alcohol, activities like cooking or smoking in rooms triggering a smoke alarm) will not be able to occur. This would constitute a "seizure", which would need to be considered against the right to be secure against unreasonable search or seizure under the New Zealand Bill of Rights Act 1990 (NZBORA). Because of these potential rights impacts, authorisation of these powers are best included in the Act.

*We propose two powers to support enforcement where the rules are breached*

13. The Rules themselves will need to be consistent with NZBORA in order to be made. This assessment will need to include any potential enforcement activity taken as a result of them. Where it is clear that the Rules have been breached, this means that it is unlikely that any seizure will be "unreasonable".
14. In order to allow for enforcement where the Rules are breached, we propose to include the following two powers in the Bill:
  - a. The CE has the power to hold items that are in breach of the Rules until the end of a person's stay
  - b. The CE has the power to require a person to hand over items that are in breach of the Rules and keep those until end of person's stay.

*We also propose a power to support enforcement where the rules may be breached*

15. Seizure for suspected breach of the rules is more complex. There are examples of legislation that authorise search of deliveries to confirm whether or not they need to be seized, but these tend to be prescriptive and include protections to ensure that mail is only be inspected when necessary. The Office of the Privacy Commissioner has indicated that they would be concerned if an inspection power were included without appropriate safeguards for people's privacy.
16. Current standard operating procedures, which were reviewed by Crown Law, allow for consensual inspection in the presence of (or undertaken by) the person to whom the items are being delivered only where the person has reason to believe that the item may pose a risk to health and safety. Instead of including an inspection power in the Bill, we propose to continue these processes, but include statutory protection to avoid perceptions that inspection by agreement could be used in a coercive manner.
17. We propose therefore to allow the CE to hold items, where the CE has reasonable grounds for believing the items may be in breach of the Rules (eg they pose a risk to health and safety). This will mean that there is a reasonable basis for withholding an item if a person does not agree to inspection and acts as a safeguard.
18. Operationally, MIQ staff will ask if a person will consent to inspect a delivery in the presence of the MIQ staff where this threshold is met. If the person agrees, the inspection will mean reasonable grounds no longer apply. Instead, it will be clear if the delivery is in breach of the Rules, or not.
19. If an inspection is requested, accepted and the items are not in breach of the Rules, the person will be permitted to receive them as we will no longer have reasonable grounds. However, if the items prove to be in breach of the Rules they can be withheld under the powers to hold items confirmed to be in breach of the Rules. If a person does not consent to inspection, then the item will be withheld until the end of stay because the reasonable grounds to believe it breaches the Rules still applies.

## **Next steps**

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20. Officials have already instructed the Parliamentary Counsel Office to draft provisions for these proposals in advance of, but subject to, your agreement. Your agreement to this briefing is required to finalise the draft.
21. We intend to provide you with a draft Cabinet paper on 22 July, which will seek Cabinet's agreement to introduce the Bill to the House.
22. If you agree to the recommendations in this paper, these proposals and provisions will be included in the draft Bill and the Cabinet paper.
23. If you do not agree, we will remove these provisions from the draft Bill and Cabinet paper.