



Chief Ombudsman’s opinion under the Ombudsmen Act

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| Legislation | Ombudsmen Act 1975, ss 13, 22 COVID-19 Public Health Response (Air Border) Order (No 2) 2020 COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 |
| Agency | Ministry of Business, Innovation and Employment – Hīkina Whakatutuki |
| Complaint about Ombudsman | The administration of the Managed Isolation Allocation System Peter Boshier |
| Case number(s) | 561753 |
| Date | 9 December 2022 |

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Summary

The Ombudsman is an independent officer of Parliament warranted to investigate and form opinions on the actions and decisions of the government, and how these impact people. When Sir Guy Powles was appointed the first Ombudsman by Parliament 60 years ago, he stated:¹

The Ombudsman is Parliament's [person] – put there for the protection of the individual, and if you protect the individual you protect society [...] I shall look for reason, justice, sympathy and honour, and if I don't find them, then I shall report accordingly.

Sections 13 and 22 of the Ombudsmen Act 1975 (OA) provide the authority for an Ombudsman to do so, by investigating a complaint made to them or of their own motion, and reporting their opinion to the relevant agency.

I commenced this self-initiated investigation into the Ministry of Business, Innovation and Employment – Hīkina Whakatutuki (MBIE)'s role in the Managed Isolation Allocation System (MIAS) following receipt of a large number of similar complaints (over 270 altogether). A number of common themes arose from these which informed my investigation.

I acknowledge at the outset that a number of difficult decisions had to be made about the response by Aotearoa New Zealand (New Zealand) to the COVID-19 pandemic, including in relation to Managed Isolation and Quarantine (MIQ). I recognise the important aims of MIQ, and the vital role it played in preventing outbreaks of COVID-19 in the community.² Nothing similar to the border closure and subsequent restriction on the ability of New Zealanders to enter New Zealand has ever occurred before. The general work of MBIE and the wider public service in managing New Zealand's response to COVID-19 is commendable.

MBIE, as the lead agency for MIQ, was working in a novel and complex policy context, under time pressure, and in a high-stakes environment with limited access to reliable information and where there was necessarily a high degree of cross-agency collaboration and ministerial involvement and direction. I acknowledge, in particular, that Ministers made final decisions on the design of the system.

However, it is apparent that MIQ, and the operation of MIAS in particular, caused immense stress and frustration for tens of thousands of people seeking to enter New Zealand. I received

¹ Sir Guy Powles 'The New Zealand Ombudsman – the early days' (1982) 12 VUWLR 207, at page 207.

² MBIE has advised me that MIQ was responsible for stopping more than 4,600 cases of COVID-19 at the border.

hundreds of complaints from individuals impacted by this. I note the High Court found in the *Grounded Kiwis* judicial review proceedings³ that the MIQ allocation system operated in a way that meant New Zealanders' right to enter their country could have been unjustifiably infringed in some instances. MBIE has told me it has accepted this finding.

As Chief Ombudsman, my jurisdiction under the OA enables me to examine the actions, omissions, decisions and recommendations MBIE made in the design and administration of this system and the advice it provided to Ministers. I decided to do this. While my investigation was self-initiated, it has focused on considering the common concerns raised by the complainants who approached me. The Ombudsman's investigation of an agency is particularly important in an emergency where the Executive is acting rapidly and in a way that appears to limit individual rights, as was the case here. In investigating what occurred within an agency, an Ombudsman will look for '*reason, justice, sympathy and honour*'.⁴ They carry out this function for Parliament. An Ombudsman's expectation is that officials carefully assess the options available and the implications of these on people, and that they advise and provide recommendations to Ministers that include options that will ameliorate any unfairness on people.

In these respects the Ombudsman's role and inquisitorial method of investigation is broader than and quite different to that of a Court.

*The introduction of Ombudsmen has had a healthy effect on decision-making in the New Zealand Government. They provide the check of independent scrutiny with full access to the relevant information and the possibility of publicity about erroneous Government decisions that affect individuals.*⁵

It is the role of the Ombudsman to investigate and form their own opinion as to whether there have been unfair administrative actions or omissions of public sector agencies which impact on people. In my view, the Ombudsman's opinion will always be useful for policy advisors and makers.

In my opinion, on the basis of the information made available to me during this investigation, MBIE's advice on the design and administration of MIAS failed to give sufficient emphasis to the consideration of individual circumstances and prioritisation in the following areas:

- the assessment of the options for change of the online aspect of MIAS, and the recommendation of the virtual lobby, which did not enable the consideration of individual circumstances and prioritisation;

³ *Grounded Kiwis Group Inc v Minister of Health and Ors* [2022] NZHC 832.

⁴ Sir Guy Powles 'The New Zealand Ombudsman – the early days' (1982) 12 VUWLR 207, at page 207.

⁵ Geoffrey Palmer. *Unbridled Power? An Interpretation of New Zealand's Constitution and Government*. Oxford University Press, 1979, at page 18.

- the offline prioritisation of spaces in MIQ, which did not encompass the situations of many people with a genuine need to travel, or make provision for New Zealanders experiencing delay in returning to New Zealand; and
- the failure to fully ensure that there was an adequate way for users with disabilities to independently access the online allocation part of MIAS.

I accept that implementing a more individualised allocation system that considered individual circumstances and prioritised would have been difficult and costly, but my view is that careful consideration of how to do so was necessary given the profound impact the system was having on people. I note the High Court also found the same from a human rights perspective.

On the basis of all the information I have considered throughout this investigation,⁶ I am of the opinion that, collectively, the omissions by MBIE to give sufficient emphasis to the consideration of individual circumstances and the need for prioritisation were unreasonable.

I am further of the opinion that MBIE acted unreasonably by failing to undertake an analysis under the Treaty of Waitangi/Te Tiriti o Waitangi (Te Tiriti)⁷ when developing the online allocation part of MIAS, and by not consulting with Māori sooner.

However, in my opinion MBIE did not act unreasonably with respect to:

- its efforts to increase MIQ capacity, given the limitations imposed by public health settings and workforce constraints; and
- the use of available capacity in MIQ, with rooms being empty at times for unavoidable reasons.

I recommend that MBIE address the issues I have identified in the design of any future national quarantine system. In particular, any future system needs to include careful consideration and thorough advice on the ability to properly consider individual circumstances and prioritise.

Key decisions about the allocation system were made by Ministers. I do not have jurisdiction to investigate the actions and decisions of Ministers under the OA, and therefore I cannot recommend they make an apology. However, I have advised MBIE I will be following up with the individuals who made complaints that prompted this self-initiated investigation to identify whether they have been affected by acts, decisions, omissions or recommendations made by MBIE that may be flawed and where a personal apology from MBIE may be necessary.

⁶ MBIE has said I have placed undue emphasis on a small sample of written briefings in making my findings, but, despite clear notice of my likely findings, it has not provided me with material which shows it did give sufficient emphasis to the consideration of individual circumstances.

⁷ I acknowledge there are two different versions of the document, with different meanings.

Introduction

My investigation

Complaints received and commencement of my investigation

1. In mid-2021, I began receiving a large number of complaints from members of the public who were experiencing difficulties in trying to obtain a voucher for a place in MIQ. The complainants raised similar concerns about the operation of MIAS as a whole.
2. After reviewing all of these complaints, I decided to address them by commencing a self-initiated investigation using my powers under section 13(3) of the OA. My self-initiated investigation considers the issues that were raised by the complaints. While I could have considered each complaint individually, my aim was to minimise excessive burden on MBIE and to understand any underlying issues about the allocation system generally. I have continued to receive further complaints during the investigation. Over 270 complaints are associated with this investigation,⁸ and I will be following up with these complainants now that my self-initiated investigation has concluded.
3. I recognise that MBIE, the lead agency for MIQ, was dealing with an unprecedented situation that posed significant challenges. MIAS had to manage large numbers of people seeking to enter, or return to, New Zealand in the context of a constantly shifting global pandemic during which New Zealand closed its borders for the first time. The management of MIQ involved the interaction of a range of public health, economic and fiscal policies, with the competing interests of individuals seeking entry having to be balanced against the need to keep New Zealand safe.
4. Reflecting the complexity and high stakes nature of the environment, namely, the public health emergency and the potential for people in New Zealand to be exposed to a deadly virus, there was significant cross-agency collaboration and ministerial and Cabinet involvement in MIQ, with key decisions made at the ministerial level.
5. Under section 13(1) of the OA, I have the authority to investigate the administrative acts, decisions, omissions and recommendations of government agencies, including MBIE. Under section 13(2), this includes recommendations made to a Minister of the Crown. However, I do not have the authority to investigate the administrative conduct or decision-making of Ministers under the OA.
6. Therefore, my investigation concerns MBIE's administration of MIAS, including the advice and recommendations it made to Ministers and Cabinet. This enables me to consider the

⁸ This number represents complaints about the MIQ allocation system generally, and does not include complaints that I have considered on an individual basis, for example, about specific decisions on offline allocation applications. I acknowledge that a number of the complainants may not necessarily have been prioritised in any different system.

substance of the complainants' concerns through the lens of MBIE's actions and omissions, as well as the information that it provided to Ministers and Cabinet.

7. Throughout my investigation, I have been particularly vigilant to ensure that my understanding of MBIE's actions, advice, recommendations and decisions is confined to the circumstances as they were at the time they occurred. Further, I have been cognisant that opinions can legitimately differ on policy issues. As MBIE advised me, policy formulation must provide options for consideration as there is not typically a single right or wrong answer. I agree.
8. As Chief Ombudsman, my role is not to substitute the advice I would have given for that of MBIE's, but rather to assess whether, in all the circumstances, MBIE acted unreasonably in its provision of advice to Ministers. In doing so an Ombudsman will look for *'reason, justice, sympathy and honour'*. They carry out this function for Parliament. An Ombudsman's expectation is that officials carefully assess the options available and the implications of these on people, and that they advise and provide recommendations to Ministers that include options that will ameliorate any unfairness on people.
9. In these respects the Ombudsman's role and inquisitorial method of investigation is broader than and quite different to that of a Court. It is the role of the Ombudsman to investigate and form their own opinion as to whether there have been unfair administrative actions or omissions of public sector agencies which impact on people. In my view, the Ombudsman's opinion will always be useful for policy advisors and makers, and have a healthy effect on decision-making in the New Zealand Government.

My other roles

10. In addition to my investigative function under the OA, I have two other roles which are relevant in this context. First, one of my core functions is to monitor New Zealand's compliance with the United Nations Convention on the Rights of Persons with Disabilities (the Disability Convention), both in undertaking my investigations under the OA,⁹ and as part of an Independent Monitoring Mechanism (IMM).¹⁰ The IMM is designated to monitor the implementation of the Disability Convention and make sure government is meeting its obligations to disabled New Zealanders.
11. Secondly, as a 'place of detention', MIQ facilities were also subject to my oversight as a National Preventive Mechanism¹¹ under the Crimes of Torture Act 1989 (COTA). The purpose of the COTA is to enable New Zealand to meet its international obligations under

⁹ Which is the case here.

¹⁰ The Independent Monitoring Mechanism is made up of the Disabled People's Organisations' Coalition, the Human Rights Commission and the Ombudsman.

¹¹ The National Preventive Mechanisms include the Ombudsman, Independent Police Conduct Authority, Children's Commissioner and the Inspector of Service Penal Establishments. Their work is coordinated by the Human Rights Commission as the Central Preventive Mechanism, which also liaises with the United Nations.

the Optional Protocol to the Convention Against Torture (OPCAT). My OPCAT role requires that I examine places of detention where people are unable to leave at will. I form an independent opinion as to the conditions and treatment in these places, and, if necessary, make recommendations for improvement.

12. My OPCAT designation encompasses health and disability places of detention, which include MIQ facilities.¹² Therefore, in mid-2020, I began a programme to independently monitor and report on MIQ facilities. This was to reassure Parliament and the public that people being detained for health reasons were not being ill-treated and their basic human rights were being provided for. My views on these facilities are found in separate reports.¹³
13. These other roles have provided insight into the relevant context in which MIQ was operating.

Investigation process

14. I formally notified MBIE of my investigation on 6 October 2021, and publicly announced it on 20 October 2021.¹⁴ I requested a written report from MBIE addressing each of the issues identified, along with a copy of all relevant supporting documentation, by 5 November 2021.
15. Commencing from 19 October 2021, there were ongoing discussions between my office, MBIE, and the Solicitor-General about the impact of the Grounded Kiwis judicial review proceedings on my investigation, and the provision to me of relevant evidence prepared for the proceedings. I considered it important to continue with my investigation notwithstanding the judicial review, as an Ombudsman's jurisdiction and inquisitorial method of investigation is broader than and quite different to that of a Court.¹⁵
16. On 2 November 2021,¹⁶ MBIE requested an extension to the timeframe for responding to my information request from 5 to 12 November 2021. On 12 November 2021, MBIE provided me with five documents. On 18 November and 6 December 2021, MBIE provided me with two further documents.
17. On 20 December 2021, MBIE provided me with a report covering the issues not being considered in the judicial review (being those matters other than the right to enter New

¹² NPMs and their designations are notified in the New Zealand Gazette. The last update was on 2 July 2020.

¹³ See www.ombudsman.parliament.nz/resources/thematic-report-inspections-managed-isolation-and-quarantine-facilities-under-crimes.

¹⁴ In forming this provisional opinion, I have expanded the timeframe of the period under investigation to include events that occurred after I notified my investigation on 6 October 2021. This allows me to consider the operation of MIAS throughout its existence.

¹⁵ The inquisitorial process of an Ombudsman's investigation provides me with wide powers to consider a range of issues, hear or obtain information from anyone I think appropriate, and recommend any remedy I think fit.

¹⁶ Confirmed in writing on 4 November 2021.

Zealand). In regard to supporting documentation, it provided a spreadsheet listing over 1,000 documents, and asked me to advise if there were any particular documents I wished to examine. Some of the documents listed were publicly available. On 10 January 2022, I requested 75 documents from MBIE's spreadsheet. The majority of these were provided in batches between 20 and 27 January 2022.¹⁷

18. On 16 and 18 February 2022, MBIE provided me with the judicial review evidence, comprising over 300 documents. MBIE also provided further supporting information and documents between February and November 2022, as requested by my office.
19. I acknowledge the resource implications for MBIE from the concurrent judicial review, as well as other changes to MIQ that MBIE was implementing at end of 2021 and the beginning of 2022. In particular, MBIE was grappling with the Delta community outbreak, the arrival of Omicron and the phased border reopening. However, I note the time taken to provide me with information did impact my ability to complete my investigation in the timeframe intended.
20. On 21 September 2022, I provided MBIE with my provisional opinion and asked for its comments by 12 October 2022. MBIE requested an extension until 30 November 2022, and I granted it one until 28 October 2022. I also consulted with the former and current Ministers for COVID-19 Response, the Ministry of Health (MOH) and the Department of the Prime Minister and Cabinet (DPMC). I received DPMC's comments on 26 October 2022, and the other parties' comments (including MBIE) on 28 October 2022. I then received further comments from MBIE on 11 November 2022, and met with MBIE officials including Chief Executive Carolyn Tremain on 14 November 2022 to provide it with a further opportunity to comment. I provided MBIE with a revised provisional opinion on 22 November 2022, and received its additional comments on 29 November 2022.

My report

21. This report is set out in four parts. The first part sets out some relevant background to MIQ. The next three parts deal with the three key issues arising from my investigation:
 - a. the consideration of individual circumstances under MIAS;
 - b. Te Tiriti; and
 - c. MIQ capacity.
22. My initial terms of reference for the investigation were set out in terms of four grounds:
 - a. the allocation system is said to be unlawful;
 - b. the allocation system is said to be unfit for purpose;

¹⁷ MBIE did not provide the documents that were not 'MBIE material', or that were drafts, or a number of annexes to briefings. It also redacted a number of the documents it provided to me.

- c. the allocation system is said to be unfair; and
- d. the allocation system is said to be poorly managed.

However, in the course of my investigation, these have been refined, pursuant to section 13(3) of the OA, to the key issues listed above. In particular, during my investigation, the High Court heard and determined the Grounded Kiwis judicial review proceedings. The Court held that MIAS as a whole operated as an unjustified limit on the right of New Zealand citizens to return because (and to the extent that) the system did not sufficiently allow individual circumstances to be considered and prioritised where necessary. Accordingly, I did not think it necessary to form a view on the first ground in my terms of reference.¹⁸ Instead, I have focused on the role MBIE played in the design and administration of MIAS.

- 23. Throughout this report, I have included quotes from complainants to illustrate the issues raised.

Part 1: Background to MIQ

New Zealand's COVID-19 response – Elimination Strategy

- 24. In March 2020, the New Zealand Government decided to pursue an Elimination Strategy in response to the COVID-19 pandemic. This plan was based on the New Zealand Influenza Pandemic Plan, which the Government believed could reasonably be applied to COVID-19. The objective was to prevent cases of COVID-19, and to act quickly to eliminate any chains of transmission in the community. One of the pillars of the Elimination Strategy was Keep It Out, which involved strong border settings so as to delay as much as possible the arrival of the virus into New Zealand. MIQ was part of this pillar. The other pillars, Prepare for It, Stamp It Out, and Manage the Impact, were focused on testing, alert levels,¹⁹ contact tracing, other public health measures, health system preparedness, and vaccination.
- 25. New Zealand subsequently moved to a minimisation and protection strategy, the COVID-19 Protection Framework (colloquially known as the traffic light system), in December 2021, following vaccination rollout. The objective was to minimise the spread of COVID-19, and to protect people from it, as well as to protect the health system.
- 26. While New Zealand was pursuing an Elimination Strategy, and during the transition to a minimisation and protection approach, the border provided the first line of defence against outbreaks of COVID-19 in New Zealand. The aim of the Elimination Strategy was to protect the health system from being overwhelmed, protect vulnerable communities,

¹⁸ In any case, I note that MBIE's advice to Ministers cannot on its own breach the New Zealand Bill of Rights Act 1990, as it does not have direct legal effect.

¹⁹ Four alert levels were put in place, with an increasing extent of restrictions on people's ability to socialise and be out in public, culminating in alert level 4 lockdown.

and protect the health of New Zealanders overall, whilst also supporting the economy. These were important aims, particularly in the time before vaccines against COVID-19 were developed and made widely available in New Zealand.

Legal framework for MIQ

27. MIQ was initially established by Orders made under section 70 of the Health Act 1956.²⁰ Such Orders continued to be made in the response to COVID-19 to underscore the importance of compliance with public health requirements, such as testing and isolation in the community.
28. The COVID-19 Public Health Response Act 2020 (the COVID-19 Act) was passed in May 2020 to provide a specific legal basis for the public health response to COVID-19.²¹ A number of orders have been made under it, including:
 - a. The COVID-19 Public Health Response (Air Border) Order 2020 (the Air Border Order), which set out the requirements for people arriving in New Zealand by air.²² The requirement to have an MIQ voucher before flying to New Zealand was made under that Order.
 - b. The COVID-19 Public Health Response (Maritime Border) Order 2020 (the Maritime Border Order), which prohibited certain maritime arrivals, and set out the requirements for others, including in relation to crew changes.²³
 - c. The COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 (the Isolation and Quarantine Order), which set the requirements for people while they were in MIQ, including when they could leave.²⁴
29. These Orders were made by the Minister of Health, prior to the creation of the role of Minister for COVID-19 Response (the Minister). Both the COVID-19 Act and the associated Orders are administered by MOH.

Roles and responsibilities

30. MIQ was initially coordinated and resourced by a multi-agency team supporting the National Crisis Management Centre, with local coordination by Civil Defence and

²⁰ See www.legislation.govt.nz/act/public/1956/0065/latest/whole.html#DLM307083.

²¹ See www.legislation.govt.nz/act/public/2020/0012/latest/LMS344134.html.

²² See www.legislation.govt.nz/regulation/public/2020/0120/latest/LMS360123.html, and subsequent versions www.legislation.govt.nz/regulation/public/2020/0239/latest/whole.html, and www.legislation.govt.nz/regulation/public/2021/0427/latest/LMS577674.html.

²³ See www.legislation.govt.nz/regulation/public/2020/0134/latest/LMS363151.html and subsequent version www.legislation.govt.nz/regulation/public/2020/0240/latest/whole.html.

²⁴ See <https://www.legislation.govt.nz/regulation/public/2020/0241/latest/whole.html>.

Emergency Management Groups. MOH was the lead agency, with significant coordination by the New Zealand Defence Force (NZDF).

31. Since 1 July 2020, DPMC's COVID-19 Group has provided national level oversight and coordination of government agencies' responses to COVID-19. It led the work on the Reconnecting New Zealanders border reopening strategy (see [Individualised risk-based approach](#) below).
32. From 13 July 2020, MBIE was the lead agency for MIQ, with significant assistance from NZDF. MBIE had overall responsibility for the management of the MIQ system, with MIQ being a business unit within MBIE. It comprised a head office (including policy and operational teams), three Regional Isolation Quarantine Control Centres (RIQCCs) to oversee and coordinate local MIQ facilities, and the facilities themselves.
33. MBIE was responsible for MIQ operations and security, the transportation of arrivals to and from MIQ facilities, policy development (other than clinical governance), the allocation system (including offline allocations), exemptions (based on MOH's risk assessment framework), management of the fees regime, quality assurance, and complaints and external investigations.
34. The following organisations were also involved in the MIQ system:
 - a. MOH was responsible for clinical governance, and for providing public health and infection prevention and control (IPC) advice that informed policy and operational settings for MIQ. MOH also had oversight of the MIQ health response, which was delivered by District Health Boards (DHBs)²⁵ in accordance with service specifications set by MOH. It carried out IPC audits and ensured the availability of personal protective equipment (PPE).
 - b. DHBs provided frontline health staff who conducted COVID-19 testing, daily health checks, and arrival and exit health screening. They also provided arrivals with healthcare and wellbeing services, and onsite IPC support.
 - c. NZDF was significantly involved in MIQ, providing up to 990 full-time equivalent (FTE) staff across head office, RIQCCs and individual facilities. It initially provided a site manager, a site coordinator, two site assistants, and five security personnel per shift to each MIQ facility, in addition to broader coordination and operational support. Over time, NZDF gradually withdrew from MIQ work, with MBIE employing staff to undertake management and security roles, and continuing to contract with private security firms.

²⁵ DHBs were responsible for providing or funding the provision of health services in their district. From 1 July 2022, Te Whatu Ora – Health New Zealand has taken over responsibility for planning and commissioning hospital, primary and community health services.

- d. The Aviation Security Service (Avsec) provided around 155 staff to MIQ, largely in relation to securing and monitoring the transit of arrivals through air bridges, and security at MIQ facilities.
 - e. The New Zealand Police provided around 240 FTE staff for enforcement support, including in relation to non-compliance. The Police were the only agency able to detain and arrest people. At least one constable was onsite at each MIQ facility at all times.
 - f. The New Zealand Customs Service (Customs) provided advance passenger information to MBIE, and also assisted, when required, with the transfer of people disembarking a vessel to an MIQ facility or an airport. Customs also led the implementation of the Maritime Border Order, and so was responsible for maritime arrivals.
 - g. Hotels provided MIQ facilities and hotel services, including reception, and the provision of food, laundry services and cleaning.
 - h. Private security firms provided security personnel to supplement NZDF, Avsec and MBIE security staff.
35. Initially, the Minister of Health and the Minister of Housing were jointly responsible for MIQ. However, from November 2020, the Minister for COVID-19 Response took over in a newly created role.

High-level overview of MIQ

36. On 19 March 2020, New Zealand closed its borders for the first time in response to the global COVID-19 pandemic. MIQ was set up to enable people to enter New Zealand safely, whilst also protecting the population from exposure to the virus in accordance with the Keep it out pillar of the Government's Elimination Strategy. On 9 April 2020, the then Director-General of Health issued an order requiring all passengers arriving by air to undergo MIQ for 14 days.²⁶
37. On 5 October 2020, MBIE, on Cabinet's direction, introduced MIAS to handle the online and offline allocation of MIQ vouchers. To obtain an online voucher, a traveller had to put a hold on an available date in MIAS, book corresponding flights, and then return to MIAS to confirm their flights. To obtain an offline voucher, a traveller had to make an application to MBIE and meet the criteria set by the Minister. From 3 November 2020, travellers were legally required under the Air Border Order to have an MIQ voucher before flying to New Zealand (unless they were exempt).
38. There was sustained high demand for MIQ spaces between November 2020 and March 2021. However, following the introduction of quarantine-free travel (QFT) from Australia

²⁶ Under section 70 of the Health Act 1956. The legal basis for this requirement was subsequently changed to the Air Border Order on 22 June 2020.

in April 2021, supply exceeded demand. Demand began increasing again in June 2021, and by August 2021 MIQ capacity was under significant pressure due to managed returns from New South Wales (NSW),²⁷ evacuees from Afghanistan,²⁸ and a community Delta outbreak of COVID-19.

39. Access to online vouchers via MIAS was temporarily paused from 23 August 2021 due to the community outbreak. When it reopened on 20 September 2021, it was as a 'virtual lobby'. This meant that, in order to put a hold on an available date in MIAS to obtain an online voucher, a traveller had first to get to the front of a randomised queue whenever a virtual lobby was held.
40. When the virtual lobby was held for the first time in September 2021, there were over 30,000 people in the queue, vying for 3,000 rooms. Over time, the number of people in the queue in virtual lobbies trended downwards, significantly so in late November 2021 after the Government's border reopening announcement. Several lobbies ended with rooms untaken.
41. From 27 February 2022, New Zealand's borders reopened in phases, with certain travellers allowed to self-isolate, and, by 3 March 2022, not needing to isolate at all. This was widened over time to include further categories of travellers. New Zealand's border fully reopened on 1 August 2022. Over its lifetime, approximately 230,000 people went through MIQ.

Context of MIQ policy advice

42. The public policy-making process involves the elected Government (Ministers or Cabinet), taking decisions for the public good, based at least in part on advice and recommendations provided by an impartial public service. The usual process includes issue identification, information-gathering and research, policy formulation, inter-agency consultation, agencies tendering advice and recommendations to the Government, and Government decision-making at various stages. In addition to these steps, some form of public consultation or engagement may occur, at any stage, or multiple stages, of the process.
43. In the context of MIQ, there was an intermingling of formal ministerial policy direction being given at the same time as MBIE's provision of advice. A significant volume of advice was provided to Ministers and Cabinet over two years, in various diverse briefings and verbal discussions, on a range of complex issues.²⁹ The context of the COVID-19 pandemic meant that MBIE, as well as other agencies, were required to receive

²⁷ Due to the suspension of QFT.

²⁸ A large-scale evacuation of foreign citizens and some Afghan citizens took place after the Taliban took control of Afghanistan, and the United States military withdrew. Approximately 500 evacuees were placed in MIQ from contingency spaces (including NZDF personnel and government officials). A small number of returnees from Afghanistan subsequently entered MIQ through the emergency allocation process.

²⁹ MBIE states that over 45,000 emails were sent between MIQ Policy and Ministers.

Ministerial direction, advise Ministers, and consult with each other at pace in a constantly changing and novel environment, often based on emerging, limited and imperfect information. MBIE emphasised to me that the MIQ system was built at speed and required constant changes to meet the new challenges presented by COVID-19. MBIE was working in a high-stakes environment, with decisions about MIQ potentially presenting significant and grave public health risks to New Zealand.

44. Given these circumstances, the policy-making process was often truncated, as the need for urgent decisions did not allow for fulsome consideration of the issues. MBIE also advised me that this urgency resulted in an iterative policy process, where policy advice evolved through frequent and often daily meetings between Ministers and officials, and advice was often discussed in advance of a written briefing. MBIE advised me that these meetings often resulted in the commissioning of policy advice, which would then be undertaken and brought back to the next meeting for a decision to be made. MBIE considers that the quality of its advice cannot fairly be assessed solely on the basis of the written record in these circumstances, as it received directions verbally and decisions were made by Ministers at meetings. Further, advice was sometimes given through email. I have considered the relevant details MBIE has provided to me in respect of verbal briefings and emails in forming my opinion.
45. MBIE also considers that the Government understood the policy choices it was making with the design and implementation of MIAS, and the trade-offs in the decisions they made. It emphasised that the policy process was heavily influenced at all stages by ministerial direction and decisions. MBIE also noted that Ministers had a depth of knowledge about the COVID-19 pandemic, both as it affected New Zealand and globally.³⁰ However, in my view this does not obviate the need for officials to provide considered and relevant advice to Ministers.
46. MBIE also noted that Ministers received advice from across a number of agencies involved in the response to COVID-19. For example, it stated that Crown Law led the work on identifying issues with MIQ that could impact on New Zealanders' rights, and in

³⁰ At a media conference on 24 November 2021, Minister Hipkins noted *'the very difficult trade-offs that we've needed to make to keep our country as safe as possible over the last two years. We acknowledge that it has been very tough. Families have been separated, people have found themselves having to shelter in places they did not expect to stay, for prolonged periods of time, and we are acutely aware of the impact that these restrictions have had on individuals' lives and their livelihoods. As I've said standing here many times before, when it comes to COVID-19 there are often no easy decisions and we've often been faced with the task of making the least worst decision, because we know that whatever steps we've taken, there have been consequences and people's lives have been affected, and the border is clearly an example of that.'*

this capacity would often provide both verbal and written advice to MBIE or directly to Ministers.³¹

47. This unique context, including a high degree of ministerial involvement in policy development, is highly relevant to my assessment of the reasonableness or otherwise of MBIE's administration of MIAS and its advice and recommendations to Ministers. Nonetheless, it does not change my jurisdiction to consider MBIE's actions, nor MBIE's obligation to provide sound advice and recommendations, proactively where necessary,³² and to operate MIAS in a reasonable manner. While the key decisions were ultimately made by Ministers, and are therefore not within my jurisdiction to investigate and form an opinion on, section 13(2) of the OA is quite clear that I am expected to investigate recommendations made to Ministers. This includes those which were formed in policy development processes which affect people. In this case, MIAS involved a limit on a fundamental right,³³ and MBIE was obliged to give free and frank advice regardless of parameters set by Ministers. MBIE has not demonstrated to me that its verbal advice to Ministers was significantly different to its written advice, nor provided me with any relevant email advice to Ministers. While a number of agencies were involved in the response to COVID-19, MBIE had responsibility for the allocation system.

Part 2: The consideration of individual circumstances in MIAS

Grounded Kiwis judicial review proceedings

48. Many complainants questioned whether the way in which MIAS operated might have breached section 18(2) of the New Zealand Bill of Rights Act 1990 (NZBORA) by unjustifiably limiting a citizen's right to enter New Zealand.
49. Section 18(2) of NZBORA provides that '*Every New Zealand citizen has the right to enter New Zealand.*' However, NZBORA permits certain fundamental rights that it protects to be limited, provided the test set out in section 5 is met:

5 *Justified limitations*

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

³¹ This investigation does not concern or comment on advice, acts or omissions by other agencies. Nor does the Ombudsman have jurisdiction to investigate any decisions, recommendations, acts or omissions of any person acting as legal adviser to the Crown: see section 13(7)(c) of the OA.

³² These obligations are reflected in the Public Service Act 2020, sections 12(1)(b) and 52(1)(d) and (f).

³³ As well as had a significant impact on non-New Zealanders seeking to enter New Zealand.

50. The Supreme Court in *Hansen v R* set out the generally accepted methodology for determining whether this test is satisfied.³⁴ For a limitation to be justified, it must:
- a. be prescribed by law;
 - b. serve a purpose sufficiently important to justify curtailment of the right or freedom;
 - c. be rationally connected with its purpose;
 - d. impair the right or freedom no more than is reasonably necessary; and
 - e. be in due proportion to the importance of the objective of the limit.
51. While my investigation was in train, the group Grounded Kiwis, representing New Zealanders overseas trying to return to the country, sought a judicial review of the decisions of the Minister of Health, the Minister for COVID-19 Response and the Chief Executive of MBIE. The judicial review proceedings focused on the operation of the MIQ system between 1 September and 17 December 2021 when the virtual lobby was operating. Grounded Kiwis claimed that, during that time, the system operated as an unjustified limitation on New Zealand citizens' right to enter the country under section 18(2) of NZBORA. The proceedings also challenged the way decisions were made for groups entering MIQ and the approach taken to applications for places in MIQ under emergency allocations.
52. The High Court released its decision on 26 April 2022.³⁵ In addressing the question of whether the right to enter New Zealand was unjustifiably limited, the High Court looked at the entire system, recognising that there were different limiting measures identified by Grounded Kiwis, but that these must be considered against the system as a whole to ensure they were proportionate.
53. Mallon J found that the limits on the right to enter were prescribed by law, and were aimed at sufficiently important purposes to justify some curtailment of the right to enter. The limiting measures were also rationally connected to those purposes.
54. The Court was also mostly satisfied that other, less intrusive, means of addressing the objectives of MIQ put forward by Grounded Kiwis were not viable. Mallon J did not agree that a shorter time in MIQ, a different testing regime, or home isolation were appropriate alternatives during the relevant period. She accepted that the Government was entitled to adopt a precautionary approach to its COVID-19 response and not adopt policies that were higher risk.
55. However, the Court found that the manner in which spaces in MIQ were allocated using the virtual lobby was not appropriate when supply significantly outstripped demand, those seeking supply had a fundamental right to return to New Zealand that was

³⁴ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

³⁵ *Grounded Kiwis Group Inc v Minister of Health and Ors* [2022] NZHC 832.

potentially impacted to different degrees, and the emergency allocation criteria were so strict. Nor, in its view, had the Government demonstrated that there was no reasonable alternative to the virtual lobby system and offline allocation system that was less rights-impairing. Aside from the period in 2021 when the travel bubble with Australia was open, demand outstripped supply in the MIQ facilities. Those seeking supply in this case were people *'seeking to exercise a fundamental right and some had greater call than others'*.³⁶ The Court noted that the virtual lobby gave no weight to users who had experienced unreasonable delay over those who had not. Although the emergency allocation system was intended to ameliorate the hard edges of the lobby system, and accommodate those with the greatest need to return, the *'tightly prescribed criteria, interpreted strictly and requiring an inflexibly prescribed form of evidence, did not give sufficient effect to this purpose'*.³⁷

56. Overall, because, and to the extent that, the system did not sufficiently allow individual circumstances to be considered and prioritised where necessary, the Court found that it operated as an unjustified limit on the right of New Zealand citizens to return.
57. The High Court's decision answers the question of whether the allocation system as a whole breached section 18(2) of NZBORA.³⁸ I do not need to consider this aspect further.
58. Accordingly, my investigation examines the other concerns raised by complainants. In doing so, I have considered whether MBIE's acts, omissions and advice to Ministers, who ultimately made the decisions about the MIAS framework, sufficiently recognised individual circumstances and the need to prioritise.

The online allocation system

59. One of the complainants' key concerns about MIAS related to the difficulty and stress that they faced when trying to secure an online voucher. The complaints that I received alleged failures on MBIE's part to implement a fair queuing/wait-listing system. My investigation therefore considered MBIE's advice, actions/omissions and recommendations in developing and operating this online system that affected these people.

³⁶ At [343].

³⁷ At [404].

³⁸ Although the High Court only looked at the period between 1 September and 17 December 2021, when the virtual lobby was in use, the same issues of prioritisation arose throughout the life of MIAS. The 'first come, first served' approach also suffered from lack of prioritisation and consideration of individual circumstances. While the virtual lobby system improved some aspects of the online allocation part of MIAS, it still focused on treating everyone who entered the lobby in the same way. As Mallon J observed both the 'first come, first served' system and the virtual lobby "did not prioritise New Zealanders over non-New Zealanders. Nor did [they] prioritise those who had been waiting longer to return and nor did [they] distinguish on the basis of need": see *Grounded Kiwis* at [255].

Initial ‘first come, first served’ online system

60. When the online allocation aspect of MIAS was initially set up, MBIE implemented a ‘first come, first served’ information technology (IT) system for travellers who wished to book an MIQ room. The system was straightforward – the first person to find and book a room secured it. This system operated from the introduction of MIAS on 5 October 2020 until the pause on online voucher releases on 23 August 2021.
61. MBIE has emphasised to me that the online allocation system was a ‘*minimal viable product booking system*’, stood up ‘*under great urgency, during a time of national emergency*’. I do not have concerns with the initial rollout of the system, and indeed consider that MBIE deserves credit for standing the system up at speed.
62. However, while the system worked reasonably well when there were sufficient rooms to meet the needs of travellers, its ‘*level playing field*’ approach was less viable when demand exceeded supply. As set out above, and discussed in more detail [below](#), there was sustained high demand for five months from November 2020 until the introduction of QFT with Australia in April 2021 (although demand had been expected to abate in January 2021). Demand began increasing again in June 2021, and for three months from August 2021 to November 2021 MIQ capacity was under significant pressure.
63. A key issue with the ‘first come, first served’ system was its inability to further prioritise bookings. Indeed, I found this was appropriately acknowledged by MBIE very early on when, in an initial briefing paper to the Minister of Housing on 14 August 2020 advising on the set up of the system, officials noted that it ‘*does not provide built-in functionality to prioritise places in Managed Isolation Facilities (MIFs) or for contingency planning*’.
64. The briefing acknowledged that in not having that built-in functionality, there was a potential risk of allocating temporary visa-holders places ahead of New Zealanders, and of New Zealand citizens and residents having lengthy waiting periods.
65. It is clear that this risk came to pass. As discussed [below](#), the manual offline allocation system set up to prioritise urgent travellers was, in MBIE’s own words, ‘*necessarily narrow*’ and, in combination with a ‘first come, first served’ online system, meant that appropriate prioritisation was not achieved at a systemic level. When demand was greater than supply for a number of months, New Zealanders, many of whom had compelling reasons in my view to return (such as separated families, or the need to visit unwell family members), but who fell outside the emergency allocation criteria, were instead left waiting, often for lengthy periods.
66. While the difficulty in securing slots was driven in part by the largely unavoidable capacity issues discussed in [part 4](#), to the extent that rooms were available, they were allocated to the first person who secured them, irrespective of their need to travel, unless the person managed to meet the narrow criteria for offline allocation (see [below](#)).
67. As the number of people wishing to travel to New Zealand surged, and MIQ rooms became highly sought after, parties desperate to travel would endeavour to secure a booking by continually refreshing the website in the hope that a room would appear as a

result of an unannounced release, or through re-release due to cancellation. As time went on, some people resorted to using bots and scripts to identify rooms, and there were instances where third parties were employed to undertake the manual search on behalf of the traveller.³⁹

I spent around four weeks checking constantly, sometimes 30 times or more a day, at all hours of the day and night.

[W]e basically have to spend hours constantly refreshing a screen and as soon as a spot appears and we attempt to click and claim, we are crushed with an 'already taken' notice.

I had spent 10 hours the longest in a day checking the system continuously, refreshing the MIQ NZ website with no luck at all. I spent my lunch and tea breaks, time off and evenings after work checking the system with no luck. I stayed up late at night and woke up early in the morning to check the system. There was no luck at all. There were hardly any spaces and if so, it can be snapped [up] in second(s) which shows the system is not working fairly.

68. Moreover, when rooms were released, the system would become flooded with users, and at times crash, causing further frustration. MBIE stopped advertising room releases for fear of system failure. These issues were widely reported in the media⁴⁰ and pressure intensified to amend the system.

Updating of online allocation system

69. As 2021 progressed these issues with the 'first come, first served' system became more apparent. In March 2021, MBIE began considering a waitlist option. It held a series of workshops between March and May 2021 with members of its Operations, Policy, Engagement and Communications, and MIAS project teams, as well as the MIAS vendor. The main problems identified with the 'first come, first served' system were:
- a. a legal risk under NZBORA if New Zealanders faced significant delays in coming home;
 - b. a risk of reputational damage to MIQ from user complaints and negative media coverage;
 - c. potential inequities in access to vouchers;

³⁹ I note that MBIE did implement a number of security measures to address these issues.

⁴⁰ See, for example, www.stuff.co.nz/business/124446001/miq-website-crashes-as-people-try-to-snag-vouchers-to-come-home; www.rnz.co.nz/news/national/438854/miq-receiving-about-100-complaints-each-week-over-booking-system; and www.newsroom.co.nz/i-refreshed-the-miq-site-10000-times-and-still-couldnt-get-a-room.

- d. user experience - MBIE described people having to continually refresh the website to try to secure a spot as ‘*user frustration*’ and ‘*user dissatisfaction*’; and
 - e. a risk to system performance when rooms were released.
70. MBIE noted that a waitlist could be based on the date of registration in MIAS or the date of entry onto the waitlist, or there could be preferential entry criteria, such as the user having been waiting for a voucher for a considerable amount of time, and/or urgent or time-sensitive travel. However, MBIE considered that ‘*it would be incredibly difficult to verify why a person was not able to book a voucher, or when they made their first attempts to book a voucher, in order to prioritise access to spaces*’. MBIE noted that there could also be a list for last-minute places, which could appeal to fly in, fly out workers, or an automated random selection (a lottery system).
71. MBIE considered that a waitlist would have significant impacts on the MIQ Operations Team in terms of capacity and allocation planning, but noted that there were potential benefits in regard to forecasting demand and room optimisation. It also stated that changing the online allocation system to a waitlist would be a significant and complex undertaking, costing several million dollars and taking several months to implement.
72. In June 2021, MBIE officials completed a paper and memorandum to the MIQ Leadership Team within MBIE recommending against progressing with a waitlist option. It noted that there had been a significant reduction in demand due to QFT with Australia (as well as other factors, such as staggering room releases), and that this reduced the imminent need for a waitlist system. It acknowledged that future demand may fluctuate (and that demand was now increasing again), including as a result of future QFT arrangements. However, it considered that the benefits of a waitlist were outweighed by the potential issues, such as inequities, operational challenges and technical complexities. MBIE noted that:
- in any situation where demand for bookings exceeds supply (such as tickets for a popular event), consumers are required to be online and refresh the system in an effort to secure their spot. Because the stakes are so much higher in MIQ [...] the environment is clearly more fraught than obtaining concert tickets. However, the underlying technology is similar and an expected experience across the travel and entertainment industries. A person still needs to register and obtain their booking.*
73. In my view, this advice does not give sufficient recognition to the fundamental right being curtailed, the impact on people’s lives when they were unable to enter New Zealand, nor the stress imposed upon people desperately trying to secure a voucher.
74. The MIQ Leadership Team considered the memo on 7 July 2021 and agreed with the recommendations. Instead of implementing a waitlist system for online allocation, MBIE continued with improvements to the existing ‘first come, first served’ system. This was to include regular announced room releases to ensure people did not have to constantly check the website.

Five options for change

75. However, MBIE again began considering an alternative option to the ‘first come, first served’ online allocation system in July and August 2021, due to high demand in MIQ. MBIE provided me with an internal working table of options *‘being actively discussed through July and early August 2021’* in advance of the decision to move to a virtual lobby (see [Appendix 1](#)). The options, which included the virtual lobby, were *‘identified by internal specialists and industry experts as broad options to improve MIAS’*.
76. There were five options for change in the table in addition to the status quo. These were Virtual Lobby, (weighted) ballot, waitlist, airline quota, and full prioritisation. Each option was accompanied by a brief explanation. The options were assessed against four traveller criteria and three government criteria through a basic traffic light system, with red/stop as the lowest score and green/go as the highest. MBIE advised me that this table was a summary of the policy thinking that had been undertaken on various options. MBIE stated that it undertook a significant amount of work exploring improvements to the allocation system, and this document was the cumulative product of multiple workshops with private sector companies, the MIAS vendor, and government officials. MBIE also noted that this document was never finalised or presented to the Minister.
77. MBIE advised me that the advice of industry experts and government officials was to pilot the virtual lobby, which made improvements to the first come, first served system and was able to be implemented quickly. In the table, the virtual lobby that was ultimately recommended to the Minister (and which the Minister decided to implement) received the highest number of green lights (five out of seven), although it did receive a red light for ‘prioritise’. The government criteria against which each option was assessed were ‘cost’, ‘time’ and ‘prioritise’. The four categories selected as the key requirements for travellers were ‘intuitive’, ‘transparent’, ‘time neutral’, and ‘equitable’. ‘Prioritise’ was not considered a key requirement for travellers. Instead, options were assessed for traveller ‘equitability’, meaning that the people with the greatest need are given the greatest support. On that interpretation, it is unclear why the virtual lobby received a green light for ‘equitable’.
78. In explaining to me why it recommended the virtual lobby over other systems, MBIE stated that it *‘considered other approaches including waitlists, merit based systems, airline quotas or ballots’*. It dismissed the alternatives collectively on the grounds that *‘these systems were assessed to take significant cost and time to deliver, without delivering meaningful benefits to the users’*. There was, however, an intermediate option in the table that, on MBIE’s own assessment, would have benefited users as much as the virtual lobby, being the weighted ballot. It was described as enabling *‘multiple design options, including weighting chances to serve other policy priorities’*. It seems that this option could have been designed to include forms of prioritisation. The traveller score for this option was identical to that of the virtual lobby, attracting three green lights and a single amber light. To suggest that this system was not assessed as *‘deliver[ing] meaningful benefits to users’* is therefore incorrect. It is also notable that the weighted

ballot option received no red light score, unlike the virtual lobby system which was rated red for the government ability to prioritise.

79. MBIE subsequently advised me that a weighted ballot system could not be delivered in the requisite timeframe, and was not considered to solve equity or IT issues. It stated that such a system could not easily verify information, weigh up individual circumstances or assess the time someone had been waiting to return to New Zealand. Further, MBIE noted that there would still be an element of chance. MBIE urged me not to underestimate the complexities of building and implementing a new online allocation system, as well as the cost and time involved. It stated that it worked with industry experts, but there was not a workable solution readily available to replace the first come, first served system.
80. I acknowledge that a weighted ballot (or a waitlist or another type of system allowing greater prioritisation) would likely have been more complex, time-consuming and costly than the virtual lobby to implement. But I do not consider that these challenges provided sufficient rationale to not explore further the option of a weighted system that could have provided significant benefits. I note that the MIAS vendor identified a number of options (albeit not complete prioritisation) that it could implement in the short-medium term. Most importantly, consideration needed to be given to how the allocation system as a whole (both online and offline) could enable individual circumstances to be considered and prioritisation to be made. Potentially, the solution could have involved the expansion of the criteria for offline allocation, as discussed [below](#). The need for verification and comparison of circumstances are also discussed further [below](#) in relation to offline allocation. Delay could simply have been measured by the date of registration in MIAS or the date of first entry into the ballot or onto the waitlist.
81. It is notable that the virtual lobby was the only option (other than the status quo) that rated green for both government cost and government time. While I acknowledge the effort MBIE put into continuous improvement of MIAS, I would be concerned if lower cost and time weighed overly heavily in the assessment. MBIE has advised me that there was considerable uncertainty about the length of time MIQ would be needed (with work underway on the Reconnecting New Zealanders border reopening strategy), which was a factor against investing time and resource in significant system change. MBIE stated that its overall approach to improving the allocation system at this time was to make operational improvements, rather than system-wide change, given such change would not likely be able to be delivered until after the border began reopening. I appreciate this context, but note that this was not an ordinary policy process, but one that had a profound impact on people's lives and the fundamental right of New Zealanders to return to their country.

MBIE's recommendation of the virtual lobby

82. The virtual lobby system – which gave travellers a window to register for a lottery – to some extent fixed the technological issues that had arisen as a result of the increasing pool of applicants, including the need to constantly monitor the website. Indeed, MBIE

advised me that it was directed by the Minister to shift priorities from options to change MIAS to addressing the technological issues. However, not all of the issues were fixed. Nor did it create the level playing field it espoused – for the first six lobbies, group bookings had a significant advantage over single bookings as each person in the group had a chance in the lottery. MBIE noted this disadvantage of the virtual lobby system in early August 2021, but did not remedy it until after the first six lobbies. MBIE advised me that it worked quickly to monitor and address this issue once the lobby was implemented, as part of continuous improvement. It stated that the alternative would have been to delay the implementation of the lobby, which would have led to greater distress from people having to continue using the first come, first served system.

83. Additionally, while the frustration of needing to refresh the website was removed, a new alleged unfairness in the process arose, that is, everyone who did not obtain a voucher re-entered the general lottery, meaning that a person who came close to securing a place in one ballot could come last in the next ballot, and complainants were very distressed by that outcome.
84. However, once the technological issues with group bookings were fixed, the system could be viewed as akin to the initial ‘first come, first served’ system – a level playing field that was simple to book (albeit frustrating for some applicants). However, the ‘first come, first served’ system was described at the time of set up as a ‘*minimum viable system*’, and circumstances had changed with sustained high demand. MBIE itself recognised in early August 2021 that the lack of prioritisation was a disadvantage of the virtual lobby option.
85. The replacement of the ‘first come, first served’ online allocation system was, in my opinion, a significant missed opportunity to consider improving the system as a whole in a way that could have improved the lives of many and avoided so much of the harm that was instead caused (as demonstrated in the complaints I received below). This would have been a logical juncture to provide advice on options for replacing the rudimentary ‘*minimum viable system*’ set up at speed, with a robust and fair allocation system to help increasingly distressed and disempowered overseas New Zealanders exercise their right to enter New Zealand.
86. The solutions could potentially have involved an online allocation system such as a weighted ballot that provided for prioritisation, or greater prioritisation through offline allocation in conjunction with a simple waitlist for online allocation. Even within the virtual lobby system, enhancements could have been made, such as weighting for people who had been in previous lobbies, so that their chances of selection in subsequent lobbies were higher. Instead, a simple fix of the IT issues was recommended by MBIE to the Minister, which in effect replaced one ‘*minimum viable system*’ that did not prioritise travellers with a specific and verifiable need to return home, with another. While I appreciate that there was an immediate need to address the IT issues, and uncertainty over the length of time MIQ would be in operation, I do not consider that this precluded MBIE from recommending options for a solution that would have allowed for greater

consideration of individual circumstances and prioritisation (even if this was implemented later and/or involved greater offline prioritisation).

87. I am concerned that MBIE’s assessment of the options, advice and recommendations did not adequately reflect the impact of the system on people who were unable to enter New Zealand. I acknowledge that the Minister was aware of the difficulties people trying to return were facing, and their dissatisfaction with the allocation system. However, as I have mentioned above, this does not obviate the need for officials to provide considered and relevant advice to Ministers. I consider that MBIE’s advice, while mentioning capacity issues and NZBORA, did not adequately reflect the very real impact on people, as is expected of it in its role.

I am unable to plan, it seems like it will be nearly impossible to secure a spot to see relatives who are dying and attend family weddings based on last night's MIQ release. The stress of all of this is almost unbearable and has a real impact on one's mental health (I have even been diagnosed with anxiety & depression with a lot of this stemming from this issue).

I signed on for the release last night and was at position 20,126, with no hope of getting a spot.

On the 20th September I jumped in the lobby for the MIQ rooms. Was number 18,776 to start with... The experience was traumatic [and] inhuman. I'm following a few Facebook groups and while I was in the [que]ue people were saying how they got [spots] just to come home to 'visit' family they haven't seen in a while.[...] I was disheartened, distraught and my moral[e] was at an all-time low. [...] I am now planning my birth of our first child alone, not to have my partner there because the obstacles keep getting moved and [it has] made it impossible.

The new lobby system that has been put in place gave me a glimmer of hope, however while I waited to be a randomised number feeling quite literally sick to my stomach at the thought of what was riding on these next minutes, I found myself 23,674 in the queue. The thought of many people being lucky enough to return home for a summer holiday to be with friends and family [...] made me cry with rage. To be a number and have so many automated responses when trying to explain this horrible situation I find myself in is a kick in the gut and for the first time in my life I am completely and utterly embarrassed to call myself a kiwi. Time is passing and these are real people's lives... New Zealand people.

Conclusion on the online allocation system

88. The impact of the online allocation system on the people who needed to access it was profound. Complainants reported the significant stress, and mental and physical health impacts that it caused them. While I acknowledge that MIAS was set up at speed, I am

concerned that MBIE did not consider earlier or sufficiently the need to change the initial ‘first come, first served’ system, particularly when it was aware that it did *not provide the functionality to prioritise places*, in the context of limited offline allocation, the unfairness this would cause, and the significant stress for users from the need to constantly monitor the website. I acknowledge that, following the introduction of QFT with Australia, vouchers were generally available to book online, and that there was uncertainty about the evolution of the pandemic and how long MIQ would be needed. However, MBIE was also aware that demand would fluctuate, and that QFT arrangements could quickly change. If MBIE had continued to work on a waitlist solution, it would have been in a much better position to make significant system change when MIQ came under considerable capacity pressure in August 2021. It did not do this.

89. I also consider that MBIE’s assessment of the options for change in July and August 2021 and its advice to the Minister may have contributed to the selection of a suboptimal system, the virtual lobby. The assessments and advice focused on the difficulties in implementing a different system, and gave insufficient consideration to the consequences of the inability to recognise individual circumstances and prioritise, in the context of narrow criteria for offline allocation (as discussed below). The change in the online allocation system raised expectations, but in the event caused further frustration, unfairness and created a sense of powerlessness among users. While I acknowledge that the Minister ultimately made the decision to change to the virtual lobby system, MBIE’s advice and recommendation informed this decision. I have found that advice to be lacking.

The offline allocation system

90. Many of the complaints that I received raised issues about prioritisation, alleging:
- a. failures on MBIE’s part to prioritise people who complainants considered ‘warranted’ vouchers (identified groups included New Zealanders returning permanently, and New Zealanders who did not meet the emergency allocation criteria but who nevertheless had an identified and verifiable need to return – such as separated families, those travelling to visit or care for unwell family members, those who were pregnant, and those who were travelling to assist with the care of children); and
 - b. de facto prioritisation of those who complainants considered ‘did not warrant’ vouchers (identified groups included sports people, entertainers, and non-New Zealanders).

Offline allocation processes

91. Of the operational capacity for managed isolation of 4,500 rooms per fortnight from July 2020 (subsequently 4,000 following QFT with Australia in April 2021), a proportion was set aside for offline allocation based on urgency and need.

92. There were three main processes for offline allocations – emergency allocations (5 October 2020 – 25 March 2022), time-sensitive travel allocations (1 September 2021 – 25 March 2022), and group allocations (throughout the lifetime of MIQ). A small number of offline allocations took place outside of these processes.⁴¹ Further, as discussed below in the section on the [use of available capacity](#), a number of rooms were set aside (outside of operational capacity for managed isolation) for quarantine, air crew, maritime allocation, and deportees. These rooms were also manually allocated offline.
93. In addition, in July and August 2021, MBIE facilitated managed return flights from NSW due to the suspension of QFT. People on these flights were manually allocated spaces in MIQ offline. These rooms were largely taken from the QFT reserve and contingency (see the section on the [use of available capacity](#) below). In August and September 2021, MBIE also manually allocated rooms offline from contingency spaces to evacuees from Afghanistan.

Emergency allocations

94. The emergency allocation process was in place from the introduction of the voucher system on 5 October 2020 until 25 March 2022 when the voucher system was decommissioned.⁴² The criteria, set by the Minister, initially covered only an imminent threat to life or a serious risk to health, and were then broadened in late 2020 to include ensuring a child had care, critical care of a dependent person, the provision of critical public or health services, people unable to legally remain overseas, national security, national interest or law enforcement reasons, and visiting a dying close relative in New Zealand.
95. In April 2021, the criteria were further amended to include a serious risk to safety, those dying visiting a close relative in New Zealand or overseas, visiting a dying close relative overseas, and Pacific Islanders requiring time-critical medical treatment in New Zealand. In September 2021, the criteria were expanded again to cover travel for time-critical medical treatment in New Zealand or overseas, and for bereavement. In November 2021, the criteria were expanded to cover those visiting close relatives following a life-threatening medical event, including an accident, and people who had been overseas since before 3 November 2020 and whose visas were expiring. More detail on the criteria can be found in [Appendix 2](#).

⁴¹ MBIE had a discretionary delegation to grant allocations in exceptional cases not eligible under other criteria. Further, people who were exempt from the requirement to have a voucher and/or to undergo MIQ, such as diplomatic and consular officials, were also manually allocated vouchers offline.

⁴² MBIE has advised that from November 2020 to February 2022 over 10,000 emergency allocation requests were processed.

96. Following the delay in the first phase of the border reopening,⁴³ a temporary emergency allocation category was introduced in January 2022 for New Zealand citizens in Australia who faced significant and severe hardship if they did not return to New Zealand in the next two months. Applicants had to provide evidence that they had, between 24 November and 22 December 2021, booked travel for between 17 January and 28 February 2022, and that they had taken significant steps⁴⁴ between 24 November and 22 December 2021 that meant their travel to New Zealand could not be delayed beyond the end of February 2022. This was in addition to a bespoke process in January 2022 for people who had travelled to Australia between 24 November and 22 December 2021 without an MIQ voucher, or who subsequently cancelled their voucher, as they had expected to self-isolate on their return.
97. The number of rooms set aside for emergency allocations was determined by the Minister (or Cabinet) and was initially 150.⁴⁵ It was increased to 250, then to 350, and eventually to 400 per fortnight.⁴⁶ Between 3 November 2020 and 30 June 2022, MBIE approved 7,923 emergency allocation applications (some of which may have been for more than one traveller).

Time-sensitive travel allocations

98. In February 2021, MBIE began developing a process for time-sensitive travel allocations. The first travel period for these began on 1 September 2021.⁴⁷ The time-sensitive travel allocation process also ended on 25 March 2022, when the voucher system was decommissioned.
99. The purpose of this allocation was to facilitate the entry of individual workers needed for time-sensitive work which would have significant benefits to New Zealand. Further details on the criteria, set by the Minister, can be found in [Appendix 3](#).
100. The number of rooms set aside for time-sensitive travel allocations was determined by the Minister and was initially 100.⁴⁸ It was then increased to 200 per fortnight.⁴⁹ In addition, a further 150 spaces per fortnight were reserved for critical health and disability workers from 22 November 2021.

⁴³ On 24 November 2021, the Government announced a phased reopening of the border, starting with travellers from Australia on 16 January 2022. However, on 21 December 2021, due to the emergence of the Omicron variant overseas, the phased reopening of the border was delayed until the end of February 2022.

⁴⁴ Such as selling a house, terminating a lease, resigning from their job, or accepting employment in New Zealand.

⁴⁵ From November 2020.

⁴⁶ Increasing in January, April and November 2021 respectively.

⁴⁷ No applications were received for the first round of applications for July and August 2021, as vouchers were readily available on MIAS prior to that time.

⁴⁸ From September 2021.

⁴⁹ From January 2022.

Group allocations

101. In the early days of MIQ, prior to the voucher system,⁵⁰ MBIE would manually allocate MIQ spaces on an ad hoc basis to large groups, or groups with bespoke requirements, who did not require a new border exception.⁵¹ One of the exceptions to the border restrictions was for 'other critical workers', which included travellers or groups associated with specified major infrastructure projects, events, government-approved programmes and government-to-government agreements (the lists).⁵²
102. In September 2020, the Border Exceptions Ministerial Group (BEMG), led by the Minister of Immigration, was established to consider additions to the lists, and class exceptions to the border restrictions. Class exceptions were for groups who could benefit New Zealand, but who did not fit existing border exceptions. Large groups whose arrival could be staggered, as well as smaller groups (fewer than 100 people), were encouraged to book through the online part of MIAS. Large groups who needed to arrive at the same time, and those with bespoke requirements, were manually allocated MIQ spaces by MBIE, after first obtaining visas from Immigration New Zealand.
103. In February 2021, the group allocation process was established. This meant that, in addition to deciding additions to the lists and class exceptions, the BEMG was responsible for making offline allocation decisions for groups (regardless of visa status). While most groups would be directed to book online vouchers via MIAS, some groups' entry was a Government priority, their characteristics and time-criticality making offline allocation desirable.
104. The new process required a sponsoring government agency to submit a request. After assessment by MBIE and MOH against the group allocation criteria, and public health and operational risk, the BEMG would make final decisions on which groups to prioritise for MIQ spaces. Further details on the criteria, set by the Minister, can be found in [Appendix 4](#). Details of class exceptions and group allocations can be found in [Appendix 5](#).
105. The number of rooms set aside for group allocations was determined by the Minister and was initially 400,⁵³ but was increased at times of high group demand to 500 per fortnight.

Alleged failure to prioritise people who warranted vouchers

Original intention of special allocation

106. In July 2020, Cabinet agreed to introduce a flow management and voucher system, recognising the need to accommodate urgent or compassionate travel. However, due to

⁵⁰ From April – September 2020.

⁵¹ Such as people returning on charter flights, returning New Zealand sports teams, and other groups with existing border exceptions.

⁵² Initially: projects listed on the Infrastructure Commission's Infrastructure Pipeline with an estimated value above \$100m; current Major Event Fund portfolio events and those with investments agreed by Cabinet; Rocket Lab launches; and the Antarctic Programme.

⁵³ From September 2020.

the speed at which MIAS was developed, the online system did not have the functionality to differentiate between users on the basis of urgency or need.

107. On 24 September 2020, MBIE briefed the Minister of Housing, who was then responsible for MIQ, on the offline prioritisation function to complement MIAS. The objectives for offline prioritisation were that it was:

Timely and efficient: *People with a legitimate need are placed into managed isolation in a timely and efficient way.*

Fair and equitable: *Decisions on the allocation of offline places are made fairly and equitably, taking into account the legal right of New Zealand citizens and permanent residents to return and equitable access for Māori in line with the principles and obligations provided by Te Tiriti o Waitangi.*

Agile and flexible: *Places can be moved online or offline to respond to changing demand for managed isolation and to strike the balance between maximising utilisation and prioritising those most in need.*

Protect the health, wellbeing and safety of people entering New Zealand: *Decisions on the allocation of offline places also takes into account an individual traveller's circumstances, including whether they have any vulnerabilities (e.g. financial, a mental health condition or physical disability or injury).*

108. The idea was that travellers with a legitimate or urgent need to travel at a specific time would be able to request an offline allocation. Requests would be assessed taking into account citizenship/visa status, the reason for travel, the time-critical nature of the travel, and a person's vulnerability. Individuals (outside of emergency travel and unforeseen circumstances) would have to show that they had tried to book a space online through MIAS.
109. Suggested reasons in the advice from MBIE for prioritisation included urgent medical treatment, mental wellbeing, a risk to health, safety or wellbeing, illegal status overseas, support for family at the end of their life or though serious illness or accident, bereavement, commencement of employment or a long-term study programme by a certain date, and unpredictable travel options.
110. This offline prioritisation was initially called special allocation and was fairly broad. Ten percent of operational capacity (450 rooms per fortnight) was to be set aside for such allocations, as recommended by MBIE. However, due to the increase in demand for MIQ spaces from late-October 2020, MBIE severely tightened the criteria for offline prioritisation so that only emergency travel was included.⁵⁴ The allocation was subsequently renamed emergency allocation, and was limited to 150 rooms per

⁵⁴ New Zealand citizens and residents who had an imminent threat to their life or serious risk to their health, which required urgent travel home.

fortnight.⁵⁵ MBIE advised the Minister that processing emergency allocation applications was a time-consuming and resource-intensive task, and that in order to manage application volumes, the criteria needed to be as narrow as possible. I note that the administrative issues were one of the core drivers for this recommendation contained in its advice to the Minister, rather than also exploring what was needed to address the genuine need for urgent or compassionate travel that was the original intention of special allocation. MBIE advised me that cost, duration and achievability are critical considerations when deciding upon functional changes to systems, and I accept that.

111. MBIE also subsequently advised me that adjustments to the emergency allocation criteria over time demonstrate adaptation of the system for compassionate travel. It stated that changes were made at the fastest pace possible in collaboration with other agencies, vendors, and ministerial decision-makers. I note that, while the criteria were slowly widened over time, and the number of spaces increased accordingly, they remained narrower than the original intention for offline prioritisation.

Emergency allocation criteria too limited

112. As set out above, a number of complainants raised concerns that the emergency allocation criteria failed to give priority to categories of travellers who warranted vouchers, such as repatriating New Zealanders, separated families, people visiting unwell family members, pregnant women or people wanting to see pregnant family members, and people assisting with childcare (where travel was not needed to ensure a child had care, but rather to share the load with other carers). Similar issues were raised in the media throughout the operation of MIAS.

I am now unemployed and homeless in the UK as when I checked availability in March [2021] (when deciding to hand in my notice and sell our home to return to NZ) there was plenty of spaces available. Now there is nothing.

I am 66 years of age, with a chronic health condition, and an aging mother (94.5 years) who needs daily care in New Zealand. I have been trying to book a place in MIQ for several months, [...] At age 66, I should be able to retire from my job and return home.

I am currently employed as a full-time critical health worker who lives and works in NZ since November 2018. [...] My husband and four young children who are all living offshore in Tonga, a Covid-19 free country, were approved a Border exemption to be able to travel to NZ [...] I strongly believe that I have a very genuine reason for my family to travel and be reunited with me here in NZ whom we have been separated for 18 months.

I have a disabled husband and I am his carer. My husband also suffers from depression. I arranged respite care for him while I travelled to Scotland to

⁵⁵ In November 2020.

assist my elderly Aunt (88) who has been treated for lung cancer. I am her N.O.K. as she is childless and she lives alone. I am fortunate that the interim carer continues to assist my husband but that means MIQ can deny me an emergency slot i.e. not urgent enough.

[...] My mental health is suffering, I am usually a strong person but the absurdity and unfairness of the MIQ system makes it hard to cope. An extra difficulty is that I have no access to wi-fi unless I bus to the library [...] which of course does not keep NZ time making it difficult to communicate and engage in a timely fashion.

My husband and I are extremely concerned that we will not be able to return home before the birth of our first child [...] We feel abandoned and not wanted by our own country, exhausted at the stress of being pregnant and not feeling like we have any control over our desire to return to the country we have both proudly called home. The flawed MIQ system has caused us an incredible amount of immense stress, keeping us up at night worrying about what to do and continually feeling disheartened.

[M]y partner travelled as he did previously to [Western Australia] for work as he is a [fly in, fly out] worker. When we got notified of the bubble[']s closure he was 9hrs drive [from the airport] with no flights to get him off site in time. Our plan was for him to bunker down until the 8 week [ban] had been lifted and then he will return home for good. Within this time I found out we are pregnant with ou[r] first child [...] Unfortunately over the eight week [ban] my partner really started struggling with his mental health, not being home, not being here to support me while I wasn't well, not having any light at the end of the dark tunnel on when he will return or if he would be able to be home for the birth the list goes on.

As of July 2021 I became a first-time mother, living in a country where the culture and traditions are extremely different from my own and I do not speak the language. [...] I believe that I may be suffering from postpartum depression, or something similar. I have sought out medical advice here in South Korea, but Postpartum Depression isn't really acknowledged here, therefore finding support has been extremely hard since my doctors tell me I'll get over it. [...]

I explained [to MIQ] that I wish to come home so I can seek the correct medical advice I may need, be with family and friends in a supportive environment for both my son and myself. I believe this will help me to recover mentally. I'm a first time mum asking for help from her country for the health and safety of herself and her newborn baby, however the response I got by being denied any help with getting a placement has made me feel like New Zealand is turning their back on me, saying 'tough luck, deal with it yourself' and making me feel like I'm being treated like a foreigner.

I have been trying to get an MIQ spot [...] in order to get to help my daughter in [...] Spain; she had a baby [...] She and her partner have no family in Europe and [...] she is required to go back to work full time [...] The baby cannot go into full nursery care until he is 6 months old. She is desperate for me to come and help out for a few months.

I a[m] a 65 year old NZ citizen [...] The trip has not gone to plan due to the [COVID-19] cases in Vietnam, and some recent health issues which are starting to cost me money to address. My visa has expired during the lockdowns and I do have an application for a new visa being addressed, but the delays now are huge, and in a country like Vietnam, you cannot get answers. [...] This has to be one of the worst times of my life, I have absolutely no control over my future movements at the moment.

This entire situation has caused an extreme decline in my already unstable mental health and I am left unable to continue seeking professional help due to the recent financial position I find myself in. The New Zealand websites offered only one solution while everything was paused: apply for emergency allocation in MIQ. I have done this, with evidence to support that my health is at serious risk, however my application was denied.

113. It is apparent that, even at their widest, the emergency allocation criteria were too limited to capture large numbers of people with a genuine need to travel. It is clear from the information I have considered in my investigation from MBIE that this was known by it. I consider that MBIE should have recommended the Minister adopt the widened criteria (and consequently set aside more rooms for emergency allocation) from the outset. It was not until September 2021 that the criteria provided for overseas travel for time-critical medical treatment not available in New Zealand, and for bereavement, and it was not until November 2021 that they included people visiting a close family member who had recently suffered a life-threatening medical event. These situations were all identified in September 2020 as legitimate reasons for prioritisation.
114. While the criteria for emergency allocation and the number of rooms set aside were decided by the Minister or Cabinet, this was informed by MBIE's advice and recommendations. I have found that advice to be driven by administrative considerations for MBIE without sufficient emphasis on the very real and harmful impact this would continue to have on the people who were relying on and using the allocation system. I acknowledge that the Minister was aware of some of the difficult situations people trying to return were in. However, in my view this was a key consideration and should have been reiterated and emphasised in MBIE's written advice discussing allocation options. I also acknowledge that managing MIQ was difficult and that MBIE was constantly having to adapt to changing circumstances. But this does not detract from the importance of considering options to enable sufficient consideration of individual circumstances and prioritisation within the allocation system.

115. I identified a recurrent theme in MBIE's briefings to the Minister about emergency allocations – an apparent desire to prevent them from being used by people who, with forward planning, could have potentially secured a voucher online through MIAS. MBIE advised me that the online allocation system was the preferred first option to allocate spaces in MIQ, given its operational efficiency. MBIE advised me that, if the emergency allocation criteria were wide, everyone would make an application and it would defeat the purpose of it being for people in the greatest need. It advised that there were a limited number of rooms set aside, and those rooms needed to be available to those with the most need.
116. I consider that officials needed to identify options for a deliberately more nuanced and case specific allocation system, which provided for the consideration of individual circumstances and prioritisation, and which accommodated the fundamental right of citizens to enter New Zealand. MBIE's advice should have reflected this, rather than merely mentioning the possibility of NZBORA liability.
117. In my view, it is entirely natural and ought to have been expected that the vast majority of people would take the easiest and most effective means to secure a voucher, given the impact this was having. It was unlikely that people would make an emergency allocation application unless there was no other alternative (such as no online vouchers available on MIAS). The need for broad prioritisation was particularly acute when the lobby system was in effect as participants were not guaranteed to ever get a space if demand exceeded supply. Having broader prioritisation would not have defeated the purpose of providing for those with the greatest need, but rather could have catered for a larger group of those in need by making more rooms available for offline allocation to better recognise the realities of their particular circumstances.

Consideration of other allocation options

118. On 25 August 2021, MBIE briefed the Minister on allocation options for the upcoming period of very high demand. It noted public criticism of MIAS, due to the lack of prioritisation, but stated that around 25 percent of operational capacity was allocated manually, meaning it already prioritised a large proportion of travellers. However, I consider this advice to be somewhat misleading, as the majority of that manual allocation was for time-sensitive travel for critical workers, and group allocations.⁵⁶ Emergency allocations made up less than 10 percent of operational capacity.⁵⁷
119. MBIE's particular concern was New Zealanders who had been away from New Zealand for an extended period. Following advice from MBIE, category 4 of the emergency allocation criteria was added by the Minister on 22 November 2021 to address this concern for people whose visas allowing them to remain in other countries were

⁵⁶ While those travellers were prioritised over others, this was not compassionate prioritisation.

⁵⁷ At that time, 350 out of 4,000 rooms per fortnight. However, I acknowledge that, over the lifetime of MIQ, more travellers received emergency allocation vouchers than time-sensitive travel or group allocations.

expiring. The criteria were not amended to accommodate the needs of the majority of people seeking compassionate prioritisation.

120. MBIE suggested in the 25 August 2021 briefing to the Minister that an alternative option of a new, automatically verified, allocation for New Zealanders who had been overseas since MIQ began could be introduced. However, it noted that this would require a new system and additional staff. MBIE also noted that, while all voucher bookings could be manually prioritised, it recommended against this as it would be very resource-intensive, likely requiring hundreds of staff. It stated that it would also be challenging to compare very different applications and make judgement calls on appropriate prioritisation. MBIE considered that the situations where there was a very strong case to prioritise applications were mostly already accounted for in the existing offline allocation processes. MBIE subsequently advised me that the emergency allocation categories captured the reasons for travel that warranted priority, based on the need to ensure that the system could manage the volume of applications. It reiterated that a system that assessed each individual application without categories would not have been feasible.
121. I acknowledge the validity of MBIE's concerns about resource implications and the difficulties associated with comparing different scenarios, and I agree it was not practical to case-manage every person seeking an MIQ space, or to operate without categories. I accept this would have been difficult to implement and inefficient. However, the fact remains that I did not see clear consideration in MBIE's written advice as to the unfairness and consequent harmful impact the very limited expansion of the emergency allocation criteria would have on people affected by this option (and which MBIE was aware of). I accept MBIE's view that Ministers were aware of the difficulties people were facing, but I consider that other options to allow for more prioritisation should have been explored in the advice which would have addressed this – for instance, broader emergency allocation categories such as those discussed above (and which MBIE initially proposed in September 2020), or a self-declaration of the purpose of travel in the first instance, which then placed people in certain categories on a priority waitlist where their need to travel could be further assessed and verified. Further, as discussed [above](#), there were potentially methods for online allocation that would have allowed for greater prioritisation, such as a weighted ballot.

Evidential requirements

122. Another way in which MBIE could have managed the resources required to allow for greater prioritisation would have been to change the evidential requirements for emergency allocation applications that it had set. This would have made them easier and quicker to assess. Applicants had to prove their eligibility, including, for relevant categories, how long they or a close family member had left to live. On the other hand, applicants for urgent or exceptional spaces on managed return flights from NSW were

not required to provide evidence of their circumstances.⁵⁸ MBIE subsequently advised the Minister that this was a factor in enabling it to manually allocate vouchers for managed return flights. There was no indication that this resulted in a large number of fraudulent applications, or otherwise caused concern.

123. MBIE advised me that there was a need for at least some evidence to maintain the integrity of the system, but that it could have taken a more liberal approach in some cases. MBIE acknowledged to me that at times the people element of emergency allocation applications was forgotten. However, MBIE emphasised that it considered a general approach based on little or no evidence would be abused, and stated that it received a number of false and deceitful emergency allocation applications. MBIE advised me that the NSW managed return flights was a unique situation, where information could be verified by MIQ and Immigration New Zealand.
124. A number of complainants raised concerns with me that the evidential requirements prevented legitimate applications. Some complainants felt that it was cruel to force applicants or their family members to find out exactly how long they had left to live, and pointed to the difficulty in doing so in many situations.

Extremely painful /disturbing- meaning my mother found out her life expectancy in writing for the first time - courtesy of MIQ's demands.

My situation is that I need to see my terminally ill mother in the USA. I have been unable to acquire the necessary information to qualify me for emergency managed isolation. My mother[']s oncologist has confirmed her diagnosis is terminal, but has not specified the less than 6 month to live criteria. I struggle to ascertain this information as all communication with the oncologist is through my mother's patient portal. It is confronting to ask my mother to gather this information herself as hope is paramount in the fight against cancer. I have attempted to make contact with the oncologist on my own, but have been unsuccessful. [...] I face being "stuck" in America for an undetermined amount of time until I can get an MIQ spot through the "normal" means. [...] The alternative to this is that I say goodbye to my dying mother over the phone. [...] I am opting to take my two children due to the lack of clarity or hope around a timely return.

125. While I acknowledge the need to verify applications to some degree, the result of the narrowness of the emergency allocation criteria and the strict evidential requirements

⁵⁸ Rather, if Ministry of Foreign Affairs and Trade (MFAT) consular staff considered that a traveller's situation seemed to broadly fit within one of the urgent travel criteria, they provided them with an application form to send to MBIE. MBIE then checked that the application was complete, but did not assess whether the information was true or accurate. I note for completeness that the usual emergency allocation process was used for later travel from Australia, after QFT was suspended across the whole country. Further, MBIE advised me that most of criteria for managed return flights could be verified by information held by MIQ or Immigration New Zealand, which is why travellers were not requested to provide it, although they did have to provide some information.

was an allocation system that was not particularly compassionate and did not give due regard to the harm people would suffer as a result. It is clear from the information MBIE and complainants provided me that this caused immense stress and frustration for a large number of people in already distressing situations. MBIE was aware of this, but while the criteria were reviewed a number of times, its advice and recommendations were primarily focused on urgent situations and the resource implications of increased prioritisation (in the context of an already stretched workforce) rather than ensuring people were treated fairly and sympathetically.

Alleged de facto prioritisation of people who did not warrant vouchers

Group allocations

126. As set out [below](#), in mid-2020, MBIE initially considered that bespoke arrangements offered the best prospect to accommodate larger groups of foreign nationals without displacing New Zealanders seeking to return. Accordingly, it investigated the idea of a bespoke MIQ facility, particularly for sport, but this did not ultimately go ahead, with the Minister directing officials in February 2021 not to do further work on this. Groups were therefore accommodated in standard MIQ facilities, which precluded those rooms being utilised by other people seeking to enter New Zealand.
127. When Cabinet established the BEMG in September 2020, MIAS and the voucher system were not yet operational and MIQ capacity was under-utilised. Nonetheless, Cabinet agreed that the impact on MIQ capacity had to be manageable, and that any new class exceptions should *‘only be those that are of critical importance and should be scaled back to the minimum numbers possible to achieve the benefits proposed’*. MBIE officials were to provide regular advice on current and forecasted MIQ utilisation rates, as well as current waiting times for New Zealanders, to ensure new class exceptions did not unreasonably displace New Zealanders. The 21 September 2020 Cabinet paper, *Managing exceptions to border restrictions*, stated:⁵⁹

The key feature of the proposed process is that it will be dynamic, allowing Ministers to target optimal levels of MIQ utilisation by admitting new groups when there is MIQ space, or by declining some groups or requiring them to wait when there is not sufficient MIQ space.

128. It noted that MIQ utilisation was inherently difficult to predict, especially over longer timeframes, so decisions around border entry beyond one to two months required careful consideration and planning. There was also a 10-week lag time between ministerial approval of a new class exception, and people being granted a visa under the exception.
129. In September 2020, MBIE advised the Minister of Housing on options to accommodate large groups of non-New Zealanders in MIQ who had been granted a class exception. It

⁵⁹ www.mbie.govt.nz/dmsdocument/12284-covid-19-managing-exceptions-to-border-restrictions-proactiverelase-pdf at [46].

suggested an upper limit of 400 rooms per fortnight to ensure that class exception decisions did not unreasonably impinge on the rights of New Zealanders to enter. At times, this was higher, with 500 rooms set aside. MBIE advised Ministers on several occasions that increasing the group allocation to 500 rooms took spaces away from New Zealanders.

130. MBIE's initial briefings to the BEMG in September and October 2020 advised that, given the current underutilisation of MIQ, there was an opportunity at that time to bring in a small number of groups without the risk of displacing New Zealanders seeking to return home. However, MBIE also advised that there was strong demand for MIQ in December 2020, and no new large groups could be accommodated in that period. The high demand was expected to abate in January 2021, and MBIE advised that groups could therefore be accommodated in early 2021 due to forecasted under-utilisation.
131. When high demand continued in early 2021, MBIE advised Ministers that the allocation of group places had to be weighed up against the benefit of releasing more vouchers online to allow New Zealanders to return. However, QFT with Australia then resulted in an excess of MIQ supply, until June 2021. A number of groups were deferred in August and September 2021 when additional space was required for quarantine due to the Delta community outbreak.
132. While MBIE kept the Minister regularly informed of demand and capacity issues, the number of rooms allocated to groups was not lowered at times of high demand (except the deferral in August and September 2021). Lowering the number of rooms allocated to groups at pace would have been difficult because group allocations were often decided months in advance. Once the group allocation process was established in February 2021, the BEMG made decisions in 'packages' or groups of groups. While doing so was necessary to prioritise amongst groups, and groups desired this certainty to enable their planning, it meant that there was little ability for MBIE and the BEMG to be responsive to MIQ utilisation as originally intended, in conjunction with the difficulty in forecasting demand.

RSE Exemption

133. The Recognised Seasonal Employer (RSE) scheme allows businesses in the horticulture and viticulture industries to employ workers from the Pacific to meet seasonal demand. RSE workers come to New Zealand on a special visa.
134. RSE workers made up a significant portion of group allocations in January-February 2021, and again from July 2021. In addition to sport, they were a key group considered for bespoke arrangements to minimise the displacement of New Zealanders seeking to enter MIQ, particularly due to the low-risk status of most Pacific nations. While a bespoke facility did not go ahead (see [below](#)), RSE workers did room-share to minimise the MIQ spaces being taken up, and one-way QFT with Samoa, Tonga, and Vanuatu was pursued, beginning on 8 November 2021. In addition, RSE workers from those countries were granted an exemption from MIQ starting in October 2021, with a requirement to be vaccinated, self-isolate on arrival and undergo testing.

135. The exemption for RSE workers was a ministerial decision and reflected the low-risk status of the Pacific countries they were coming from, the upcoming wider QFT with those countries, their unique arrangements aimed at mitigating the risk of COVID-19 (travelling in a cohort on charter flights and staying together in employer-arranged accommodation), and the important economic benefits of the RSE scheme to both New Zealand and Pacific countries. It was also a pragmatic decision to free up MIQ capacity at a time of very high demand due to the Delta community outbreak.

Time-sensitive travel allocations

136. In January 2021, MBIE briefed the Minister on allocating MIQ places for economic and cultural purposes to The Wiggles and Summer of Cricket broadcasting staff to prevent disruption to large events. These rooms were taken from rooms set aside for contingency while a more sustainable process was being developed. MBIE recommended that these rooms be allocated offline, but noted:

[...] this decision is likely to reduce public trust in the MIQ voucher allocation process, as many New Zealanders and other eligible travellers have faced significant difficulties securing MIAS vouchers online for their preferred travel dates or when experiencing distressing circumstances not accounted for in the Emergency Allocation criteria.

137. In February 2021, when MBIE sought the Minister's agreement to establish a new allocation mechanism for time-sensitive travel, it advised that the current level of high demand was increasing the pressure to prioritise the entry of some travellers over others. It noted that a number of people who had been issued other critical worker visas to carry out work within a certain timeframe had been unable to secure a timely place in MIQ. MBIE considered that there was a strong case for prioritising critical workers for time-sensitive work that had a wider public benefit.

138. In February and March 2021, MBIE suggested that 50 rooms, and then 100 rooms, per fortnight be set aside, taken from the 400 rooms for group allocations. It stated:

While the rooms could alternatively be taken from the general pool made available on MIAS, this would risk displacing New Zealanders seeking to return home (given the likelihood that most eligible applicants will be temporary visa holders). The group allocation already takes up nearly 10% of total MIQ capacity, and is already challenging for MBIE to administer.

139. MBIE's view was that the time-sensitive travel allocation process would be more transparent and rigorous than the group allocation process. Despite this initial advice, MBIE then recommended in April 2021 that 100 rooms per fortnight for time-sensitive travel be taken from the general online pool. This was because upcoming QFT with Australia was expected to reduce demand for MIQ generally, and there was high demand for group allocations.

140. The first time-sensitive travel allocations were intended to be for July-August 2021, but no applications were received, as online vouchers were readily available during the

application period in April-May 2021. Instead, time-sensitive travel allocations commenced in September 2021. At that time, MIQ was under significant capacity pressure.

141. The number of spaces set aside for time-sensitive travel was then increased to 200 per fortnight from January 2022, with MBIE suggesting to the Minister in September 2021 that, if he wished to increase the size of the allocation, the rooms should be taken from the general online pool. MBIE noted that there was an ongoing trade-off between facilitating the right of New Zealanders to return home by maximising the number of online vouchers, and achieving wider social and economic benefits through offline allocation. In addition, a further 150 spaces per fortnight were reserved for critical health and disability workers from 22 November 2021.
142. MBIE advised me that only 626 spaces in MIQ were used for time-sensitive travel, which is a very small proportion of the total rooms allocated over the lifetime of MIQ. Unused rooms from the quota were released back into the general online pool. It also noted that 275 out of the 626 rooms used for time-sensitive travel were in fact used by New Zealanders.
143. I appreciate that there was a need to facilitate the entry of critical workers undertaking time-sensitive work that had a significant benefit to New Zealand (particularly health workers), and acknowledge that this was a form of prioritisation. The concern with this new offline allocation mechanism was that it would further prioritise non-New Zealanders over New Zealanders, given the rooms were not taken from the rooms already set aside for groups. Although MBIE's initial advice highlighted the risk of further delaying New Zealanders' return, my view is that it did not sufficiently emphasise this point when MIQ capacity came under pressure again from July 2021. I acknowledge that in the end only a fairly small number of rooms were used for time-sensitive travel, and of those 44 percent were in fact used by New Zealanders.

10 percent critical worker target

144. In the lead-up to the election on 17 October 2020, one of the Labour Party's manifesto commitments was to enable a 10 percent allocation for critical workers in MIQ. This was implemented by Cabinet as a target of 10 percent of operational capacity, overseen by the Minister for COVID-19 Response and the Minister of Immigration. While no rooms were specifically set aside for the target, the target influenced MIQ allocation policy and decision-making. Facilitating the arrival of critical workers was seen to support the response to and recovery from COVID-19, and meet the Government's social and economic objectives. In this regard, there was pressure from businesses for more foreign workers to be allowed into New Zealand.⁶⁰
145. When the 10 percent target was implemented, the 22 December 2020 Cabinet paper, *Improvements to the allocation of managed isolation rooms*, stated:

⁶⁰ See www.labour.org.nz/release-managing-safe-border-entry-to-boost-economic-recovery.

[...] a risk to the critical worker target will be that demand from New Zealanders increases significantly above previous levels, causing waiting times to increase to the point where their legal rights under NZBORA are unjustifiably limited. If this occurs travel by non-New Zealanders may need to be deferred, to reduce New Zealanders' waiting times, potentially impacting the ability to meet the 10 percent critical worker target. Officials will provide advice on options if this risk eventuates.

146. While MBIE regularly reported on statistics relevant to the critical worker target, it never suggested a reduction in the target, or other deferral of travel by non-New Zealanders, despite periods of very high demand. In the first quarter of 2021, critical workers averaged 15 percent of occupants, due to high numbers of group arrivals. This figure subsequently reduced, but remained over 10 percent in the second quarter of 2021. In July 2021, MBIE asked the Minister if he would like to progress work to ring-fence rooms for critical workers, to ensure the target was met, but he declined.

Ring-fencing for New Zealanders

147. As early as July 2020, MBIE was developing a prioritisation framework, proposing that 75 percent of total MIQ capacity (as opposed to operational capacity) be allocated to New Zealanders only. This would minimise delay for them, while still facilitating the entry of non-New Zealanders who could contribute to New Zealand's economic recovery or who sought to enter for social reasons. However, as above, due to the speed at which MIAS was developed, it did not initially have the functionality to prioritise New Zealanders over non-New Zealanders.

148. In August 2020, MBIE advised the Minister of Housing that, if wait times increased to unacceptable limits, New Zealanders facing delays and non-New Zealanders with time-critical travel would be encouraged to call to access offline rooms. In a briefing to the Minister in September 2020, MBIE stated that it was establishing an offline prioritisation function to mitigate any risk that non-New Zealanders would secure MIQ spaces ahead of, and unduly delay access by, New Zealanders. It was stated that a proportion of MIQ spaces would be allocated based on priority, such as to New Zealanders.

149. The 21 September 2020 Cabinet paper, *Managing exceptions to the border restrictions*, stated:

The primary purpose of this offline process is to act as a mechanism to ensure New Zealand citizens and permanent residents can access a place in managed isolation if they are facing unreasonable delays entering New Zealand.

150. On 24 September 2020, MBIE briefed the Minister of Housing on the offline prioritisation function to complement MIAS, and reiterated this primary purpose. However, as set out above, the resulting emergency allocation process was very narrow, and did not encompass New Zealanders experiencing delay.
151. Instead, in December 2020, Cabinet agreed to ring-fence 75 percent of operational capacity for New Zealanders. At that time, New Zealanders were making up 70-75

percent of arrivals. The authority to ring-fence was set out in the Isolation and Quarantine Order, and was available from April 2021 (as was the technical ability in MIAS). Ring-fencing was seen to mitigate the risk of immigration changes, group allocations, time-sensitive travel allocations and the 10 percent critical worker target displacing New Zealanders, as any additional temporary visa-holders granted entry would only displace other temporary visa-holders.

152. In April 2021, MBIE advised the Minister that it would continue to monitor the need for ring-fencing, but recommended that it not be established at that time as QFT with Australia was lowering demand for MIQ vouchers. New Zealanders had made up 71 percent of MIQ occupants from 1 October 2020 to 29 February 2021, and 65-70 percent since 22 January 2021 (with high numbers of non-New Zealander group arrivals in the first quarter of 2021 reducing the percentage).
153. In May 2021, when MBIE briefed the Minister for COVID-19 Response and the Minister of Immigration on potential immigration changes following QFT, it stated:

The MIQ allocation system is also now well-placed to respond to periods of excess demand, for example by 'ring-fencing' rooms for New Zealanders and 'queuing' non-New Zealanders to use MIQ capacity when it becomes available.

This advice was reiterated in June 2021, with MBIE stating that, in periods of high demand, MIQ prioritisation tools would kick in and migrants would have to wait.

154. In July 2021, MBIE recommended that the Minister activate ring-fencing in August because of changes to MIQ demand – specifically, upcoming immigration changes, upcoming seasonal demand, and generally increasing demand since mid-June 2021. It noted that New Zealanders had 79 percent of booked vouchers for July-October 2021, and 85 percent of rooms booked online via MIAS, but group arrivals could significantly change the proportions. The Minister agreed to MBIE's recommendation to ring-fence 70 percent of online allocations via MIAS for New Zealanders. MBIE advised that this level balanced giving New Zealanders preferential access while maintaining reasonable access for non-New Zealanders.
155. Seventy percent of online rooms comprised approximately 2,135 rooms per fortnight,⁶¹ which was significantly less than Cabinet's agreed 75 percent of operational capacity (3,375 rooms), which was again significantly less than MBIE's original proposal of 75

⁶¹ Based on operational capacity of 4,000 rooms, with 950 rooms set aside for offline allocation at that time (350 for emergency allocations, 100 for time-sensitive travel allocations, and 500 for group allocations).

percent of total capacity (around 4,650 rooms⁶²). The majority of offline allocations were used by non-New Zealanders.⁶³

156. In any event, ring-fencing was never implemented as MIQ capacity came under significant pressure because of managed returns from NSW following the suspension of QFT with Australia, an influx of evacuees from Afghanistan, and the community Delta outbreak in August 2021. It became apparent that ring-fencing was not a solution to periods of excess demand in these situations, although MBIE advised me that the proportion of spaces allocated to New Zealanders between September and December 2021 was over 80%. Furthermore, it was in general a blunt prioritisation tool, only allowing a set number of rooms to be reserved for New Zealanders, with no differentiation between them.
157. Despite the primary purpose of the offline prioritisation system being to ensure that New Zealanders did not face undue delay in returning to New Zealand,⁶⁴ this was never a criterion in any of the offline allocation processes;⁶⁵ nor was any other mechanism used to address this issue. Again, while the criteria for the offline allocation processes were set by the Minister, they were based on advice by MBIE, including prioritisation across MIAS.

Conclusion on the offline allocation system

158. MBIE initially proposed a compassionate offline prioritisation system that included a focus on New Zealanders experiencing delays in being able to return to New Zealand. However, the system that was implemented was significantly more curtailed than originally envisaged, based it seems on an unexpected spike in demand when vouchers became mandatory, and emergency allocation applications being more time-consuming to process than expected. The restricted criteria were only slightly widened over time, and failed to encompass the situations of many people (both New Zealanders and non-New Zealanders) who had a genuine need to travel.
159. I acknowledge that MBIE put considerable effort into optimising the use of available capacity in MIQ, and regularly advised the Minister on demand and capacity issues. However, it appears that MBIE focused its advice, resource and planning efforts on group allocations, implementing a time-sensitive travel allocation process, the critical worker target, and the proposed ring-fencing, to the detriment of broader compassionate prioritisation, or providing a solution for New Zealanders experiencing delay.

⁶² Based on 6,200 total rooms. More rooms than initially anticipated were excluded from operational capacity.

⁶³ While emergency allocations were mainly used by New Zealanders (4,844 out of 7,923), time-sensitive travel allocations and group allocations were mainly used by non-New Zealanders (6,421 out of 7,185), although at times the group allocation spaces were used for New Zealanders, such as those returning from the Olympics.

⁶⁴ As per the 21 September 2020 Cabinet paper *Managing exceptions to the border restrictions* and MBIE's 24 September 2020 briefing on the offline prioritisation function to complement MIAS.

⁶⁵ Except for category 4 of the emergency allocation criteria, from 22 November 2021, which was limited to New Zealand citizens whose visa to remain in another country was expiring.

160. I appreciate that the decisions on group allocations were made by Ministers, as well as the offline allocation criteria and number of spaces set aside, and that the critical worker target reflected Labour Party policy. These were political decisions and required trade-offs by Ministers which are outside my jurisdiction. MBIE emphasised to me that the Minister could have disagreed with its advice, and that if the Minister was not satisfied with its advice, it could have commissioned further advice. This misses the point that it was MBIE's role to provide the Minister with robust, objective and neutral advice including the need for broader prioritisation, and the consequences for New Zealanders of prioritising non-New Zealander groups and critical workers. When investigating the actions and recommendations of agencies giving advice to Ministers, this is what the Ombudsman expects to find. While I am satisfied MBIE was indeed aware of these issues, I found it omitted it from the advice it gave.

Flexibility

161. Complainants also raised concerns about an apparent lack of flexibility in MIAS to accommodate situations such as the following:
- a. an alternative means of isolation, such as home isolation, for those who were fully vaccinated, or returning from countries with low or no COVID-19 transmission rates;
 - b. a longer 'window' for applying for:
 - i. emergency allocation spaces – some complainants were concerned that being able to apply only within 14 days of travel did not allow those in New Zealand travelling overseas (for example, to see a terminally ill family member) to have any certainty about whether and when they would be able to return; and
 - ii. normal spaces – some complainants felt that bookings should be available further than three months in advance to give repatriating New Zealanders time to give notice to an employer, wind up a business, sell a house, arrange for items to be shipped home etc; and
 - c. difficulties with the certainty of flight schedules, such as a lack of flights from Australia, limited or no commercial flight options from some Pacific Island nations, and changing or uncertain travel dates.

Individualised risk-based approach

162. From its inception and throughout the lifetime of MIQ, the Government was cognisant of the need to readjust border settings to reflect changes in domestic and global circumstances. This included considering whether different border measures should apply to people arriving from different countries (as in the early days of the pandemic, before the border closed). In 2020 and early 2021, the focus was on pursuing QFT with

low-risk countries. As the global pandemic worsened, opportunities for QFT decreased (see [below](#)).

163. From mid-2021 onwards, significant work was undertaken by officials on a progressive border reopening through the DPMC-led Reconnecting New Zealanders strategy. The idea was that, as the vaccination programme rolled out, New Zealand would move away from its approach of QFT with specific countries towards an individualised risk-based approach for travellers based on a set of factors, including country of departure and vaccination status. Travellers in the low-risk entry pathway would not need to isolate; those in the medium-risk pathway would undergo self-isolation and/or a reduced stay in MIQ; and those in the high-risk pathway would complete a full MIQ stay. A testing regime would accompany each pathway.
164. This approach was supported by the Strategic COVID-19 Public Health Advisory Group which advised the Associate Minister of Health that significant reopening of the borders should not commence before early 2022, after the vaccination programme had been fully rolled out. The group reiterated the difficulty of specifying details in advance due to the emergence of new variants.
165. The work to prepare for an individualised risk-based approach included MOH developing a framework for assessing each country's COVID-19 risk, reviewing the testing regime, including consideration of rapid testing, strengthening public health measures and preparing the health system; MBIE running a self-isolation pilot, and considering the operational implications of reduced stays in MIQ; and Customs working on vaccine certification and traveller health declarations.
166. The Government's initial idea was to maintain the Elimination Strategy while gradually reopening the border. This changed with the sustained Delta community outbreak and there was a consequent move away from the Elimination Strategy to a minimisation and protection approach. As noted [below](#), MOH reviewed the public health rationale for MIQ at that time and considered that there still needed to be a risk-based transition from MIQ as the default setting for travellers. This was occurring through the Reconnecting New Zealanders strategy for a phased border reopening, in the context of the upcoming move to the COVID-19 Protection Framework.
167. On 24 November 2021, the Government announced the Reconnecting New Zealanders plan for a phased reopening of the border, starting with travellers from Australia on 16 January 2022. Travellers were required to have a negative pre-departure test, be fully vaccinated, complete a declaration about their travel history, test on arrival, undergo seven days of self-isolation, and have a final negative test before entering the community.
168. However, on 21 December 2021, due to the emergence of the Omicron variant overseas, the phased reopening of the border was delayed until the end of February 2022. From 27 February 2022, New Zealand's borders reopened in phases, with certain travellers allowed to self-isolate, and then, by 3 March 2022, not needing to isolate at all in conjunction with a testing regime. This was widened over time to further categories of

travellers. The border reopening was different than originally intended (with less reliance on MIQ) due to the scale of the community Omicron outbreak. New Zealand's border fully reopened on 1 August 2022.

169. In summary, the Reconnecting New Zealanders strategy envisaged an individualised risk-based approach being implemented following the vaccination roll out. Significant work was required to put systems in place to assess individual risk and introduce mitigations for the anticipated increase in public health risk. While MBIE was involved in some of this work, this was a cross-government work programme led by DPMC, with decisions made by Cabinet. I consider that MBIE did not act unreasonably in this context – it would not have been appropriate for MBIE to have introduced such flexibility into MIAS ahead of the carefully planned progressive reopening of the border, which was dependent on public health considerations. This is different to the question of individual prioritisation for MIQ spaces.

14-day window for emergency allocation travel

170. Originally, MBIE included a requirement that people applying for emergency allocations had to be willing to travel within seven days. On 1 March 2021, MBIE changed this time period and began accepting applications within 14 days of the intended travel date. MBIE noted in a briefing to the Minister that the increase would reduce stress and uncertainty for travellers by providing more time to secure flights, complete pre-departure tests and commence travel.
171. However, MBIE considered that a timeframe was necessary to limit applications to urgent travel only, reflecting the fact that this allocation process was for emergencies only. MBIE advised me that the emergency allocation criteria were firmly premised on the reason for travel being an unforeseen emergency and the need to travel being time critical. The process was not intended to encompass planned travel.
172. I do not consider that any such time limit was needed. The criteria for emergency allocation (see [above](#)) already ensured that applications were limited to people in particular situations, and a number of the categories referred to time-criticality or urgent travel. The time limit, even increased to 14 days, caused stress and resulted in some people with a genuine need to travel missing out. A number of complainants were affected by the 14-day window. Where applications were declined on this basis, applicants were told to apply closer to their date of travel. This hindered travel planning, and created stress and uncertainty.

I am a New Zealand citizen who has been living in the UK for many years. I had intended to return to New Zealand with my husband last year to care for my increasingly frail, elderly mother when I was diagnosed with breast cancer. [...] I have responded well to treatment and surgery and will now be able to travel home [...] when I will have completed antibody treatment. [...]

The [emergency allocations] outlined on the site state that I would need to travel within two weeks of making an application. I need to complete my

treatment before I can travel and now the toll that the anxiety we all have about whether this will be able to happen is overwhelming. My mother, having been so strong up until now, is distraught.

173. In particular, the 14-day window caused issues with those emergency allocation categories relating to travel overseas (for medical treatment, national security, national interest or law enforcement duties, to visit a close relative where the traveller or the relative was dying or had suffered a life-threatening event, or where a close relative had died) followed by a return to New Zealand. While MBIE allowed the applicant to depart New Zealand (rather than travel to New Zealand) within 14 days in such cases, not all applicants were aware that this was possible; nor was the practice consistently applied.
174. A number of complainants advised that they felt unable to travel overseas, despite their compelling reasons for doing so, without any guarantee of being able to return.

The 14-day rule for booking Emergency Allocations for persons needing to visit sick people abroad is not fit for purpose. People who need to go to visit terminally ill overseas cannot plan ahead and cannot risk booking with no certainty they will be allocated a place – we do not know WHEN we can return – the terminally ill do not die to schedule.

I applied through the Emergency Allocation Request portal for a MIQ voucher under category 2.e.iv in order to travel to [Canada] to care and support my Mother while in the final stages of her life (less than 2 [months]) and then to return to New Zealand to my family and full-time job. [...] I was unsuccessful. [...] I am concerned that if I travel to Canada as my Mother's primary care giver and after she passes away, I will be unable to return to New Zealand to my family and full-time employment.

175. Further, as discussed in the Grounded Kiwis judicial review proceedings,⁶⁶ there was a lack of clarity and consistency in the calculation of the 14-day window in terms of the date of departure, the date of arrival, and the applicable time zone.

Booking horizon

176. When MIAS was introduced on 5 October 2020, MBIE set a three-month booking horizon⁶⁷ to minimise the need for travellers to have to change their vouchers due to flight changes (which was resource-intensive for MBIE and stressful for travellers). MBIE advised the Minister in March 2021 that while airlines published six-monthly schedules, anything beyond three months was unreliable under pandemic conditions.
177. MBIE also advised the Minister in March 2021 that it had worked extensively with the airlines servicing New Zealand to obtain more realistic flight schedules, which recently allowed it to extend the booking horizon to four months. This was then extended to six

⁶⁶ At paras [370] – [385].

⁶⁷ With vouchers only available up to three months in advance, and not beyond.

months from April 2021. MBIE noted in its March 2021 briefing to the Minister that *'the clear advantage of this new approach is a reduction in stress for travellers who will be able to forward plan and obtain their vouchers early'*.

178. Moreover, from April 2021, MBIE staggered online voucher release, with 40 percent of vouchers released four to six months in advance, 20 percent two to three months in advance, 30 percent one to two months in advance, and the final 10 percent two weeks in advance.⁶⁸ MBIE considered that a graduated release over time would help to even out demand, and provide for some operational flexibility to reduce capacity if needed. The release levels were operational targets, and were adjusted by MBIE depending on various factors, including confirmation of airline flight schedules and other MIQ planning considerations.
179. When MIQ capacity came under significant pressure in July 2021, MBIE decided to withhold the release of some vouchers. The Minister then temporarily paused access to the online part of MIAS from 23 August 2021 until the commencement of the virtual lobby on 20 September 2021. This meant that no vouchers for December 2021 onwards were released until the end of September 2021. MBIE advised me that the booking horizon and timing of voucher releases were dependent on what was happening in the broader COVID-19 environment, and it was not always possible to release vouchers six months in advance.
180. I do not consider that MBIE acted unreasonably in this respect. As MIAS vouchers were linked to flights, it was not possible to have an open-ended booking horizon. It was not unreasonable for MBIE to take a cautious approach early on and limit bookings to three months out, given the unreliability of flight schedules. Wide-scale flight changes would have caused significant operational issues in terms of capacity.
181. Nonetheless, MBIE recognised the desirability of having a longer booking horizon to allow travellers sufficient time to arrange their affairs, and worked to implement this where possible. The situation changed when MIQ capacity came under significant pressure in the second half of 2021, largely due to the community Delta outbreak. This created uncertainty over the ongoing need for increased quarantine capacity, and MBIE was therefore cautious in its voucher releases. I do not consider that this was unreasonable.

Flight schedules

182. To obtain a voucher in MIAS, travellers had to have a confirmed flight. When Cabinet suspended QFT with Australia in July 2021, it gave travellers from Australia (other than NSW) a window to return. MBIE also arranged, on Cabinet's direction, a limited number of managed return flights from NSW in July and August 2021. It was intended that red

⁶⁸ MBIE initially proposed that the percentages would be 60 percent, 10 percent, 20 percent and 10 percent respectively.

flights⁶⁹ from Australia would operate during the QFT suspension. However, there was uncertainty about when the QFT suspension would end, and concern among airlines about the commercial viability of red flights. MBIE recommended linking September 2021 voucher releases to the particular red flight dates from Australia to support their viability. This would have provided an increased chance for travellers from Australia, who had no pathway to return during August 2021, to secure vouchers.

183. However, the Minister temporarily paused access to MIAS from 23 August 2021 because of a community outbreak of COVID-19, leading to the first scheduled red flight in September 2021 being deferred. While two red flights from Australia took place later that month, these were limited to people with offline allocations (largely emergency allocations) because of the severe demand on MIQ capacity at that time. MBIE subsequently worked with Air New Zealand to confirm generally available red flights from Australia starting in October 2021, and used part of the QFT room reserve to support these flights. Despite this, at times, the ability of travellers from Australia to secure a voucher in the virtual lobby was constrained by the lack of red flights.
184. Further, there were at times limited commercial flights from some Pacific countries (sometimes only twice-monthly repatriation flights) which made it difficult for some travellers to return to New Zealand as they needed to obtain a voucher for a specific date, or did not have a normal booking reference to confirm their flight in MIAS. MBIE could potentially have targeted vouchers to those flights so that people from the Pacific had a fair opportunity to return. However, this appeared to have been an issue only relatively early on in the pandemic, and MBIE did make attempts to assist individual travellers.
185. Complainants also raised a general concern about MIAS' lack of flexibility in terms of being able to accommodate people with changing or uncertain dates. It was apparent that online bookings through MIAS could not cater for short-notice bookings except when there was spare capacity (which was not usually the case). It was difficult for MBIE to mitigate this issue other than having a specific offline allocation for people in certain circumstances – I note, for instance, that MBIE did have a process for reissuing vouchers for flight changes.
186. I appreciate that it was immensely frustrating for people who were unable to obtain vouchers because of the lack of flights, but this was largely beyond MBIE's control, and work was undertaken to address some of the issues. Any further mitigation would have involved prioritisation, as discussed [above](#).

⁶⁹ QFT flights were referred to as green flights, and flights where travellers entered MIQ were referred to as red flights. There were resulting obligations on airlines and at airports in terms of COVID-19 risk mitigation procedures.

Conclusion on flexibility

187. As noted above, I consider that the 14-day window for emergency allocation travel was unnecessary and, in conjunction with narrow criteria and strict evidential requirements, further served to restrict eligibility unfairly.
188. However, I do not otherwise consider that MBIE acted unreasonably in respect of the lack of flexibility in MIAS. An individualised risk-based approach was being developed, cautiously, as vaccinations rolled out. This was not a simple undertaking as it was dependent on public health settings. MBIE contributed to the work to prepare for the approach. MBIE also undertook work to extend the booking horizon, recognising that it was desirable for travellers to be able to plan, as well as to mitigate issues caused by flight schedules to the extent possible. Some lack of flexibility in MIAS was, in my view, unavoidable.

Access to MIAS for disabled people

189. A number of complainants expressed concern that MIAS did not provide reasonable accommodation for users with disabilities.

190. The preamble to the Disability Convention recognises:

that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others (Preamble, point 5); and

the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices (Preamble, point 14).

191. As New Zealand is a signatory to the Disability Convention, public sector agencies are required to have in place mechanisms that allow disabled people to use services independently, and to provide a variety of reasonable accommodations to disabled people and their supporters. 'Reasonable accommodation' is defined in Article 2 of the Disability Convention as:

...necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms

192. In addition, Article 9(2)(a) of the Disability Convention requires states parties to take appropriate measures to implement minimum standards and guidelines for the accessibility of public services.

193. I became aware from the complaints I received that some in the disability community were finding the 'first come, first served' online allocation system problematic,

particularly due to the need to book at speed in order to secure a spot when vouchers were released.

I am partially sighted, not IT savvy, and cannot get a space in MIQ.

194. Accordingly, I asked MBIE how it ensured that it met its obligations under the Disability Convention and provided reasonable accommodation to disabled people who wished to book online MIQ spaces so they could access the system – for instance:
- a. whether they could use an online chat function, inquiry line, or special phone number to request assistance;
 - b. what process MBIE went through to assess and action requests by disabled people who disclosed their access needs, or requested reasonable accommodation; and
 - c. if, as it seemed, MBIE was of the view that disabled people could request assistance from family or friends to access MIAS, whether this was considered to be simply one option open to disabled people, or whether MBIE considered this accommodation satisfied the requirements of the Disability Convention.

MBIE's response

195. In response to this ground of complaint, MBIE first advised that MIAS had been designed in such a way as to allow third parties to book on a traveller's behalf. This could include situations where users have limited access to the internet, where English is not their first language, where they are not confident using technology, or where they have disabilities.
196. MBIE further explained that development and implementation of MIAS was undertaken and tested against the Web Usability Standard and was built based on the Web Accessibility Standard.⁷⁰ MBIE stated that, in the extremely short timeframe for the establishment of MIAS, it could not implement bespoke amendments. It noted that over 200 enhancements were made to MIAS over its lifetime, including to improve user experience.
197. Due to the rapid pace of continuous improvement since implementation, MBIE advised that a formal accessibility review of MIAS was not undertaken until July 2021, at which time an accessibility check was made with respect to some of the user interface elements. The only item in MIAS that did not pass was the absence of alt tags on four logos on the site. This was corrected so that people with visual impairments would know what all of the MIQ images were. MBIE advised that the review was conducted using Lighthouse – an open source, automated tool for improving the quality of web pages.
198. MBIE also advised that another accessibility review was undertaken in September 2021 across all public-facing MIQ sites, including MIAS. This review was conducted by MBIE's Digital Channels and Digital Information Tools teams. The review spanned various areas including keyboard accessibility, colour-contrast, screen reader testing, page design,

⁷⁰ See www.digital.govt.nz/standards-and-guidance/nz-government-web-standards/.

usability and readability. All the findings were addressed at a platform level. In terms of accessibility in relation to substantive content, the MIAS team would work with the accessibility team *'in due course'*. MBIE advised me that the issues identified were subsequently rectified.

199. Prior to the go-live date of the virtual lobby in September 2021, the Digital Information Tools team undertook platform testing of the new lobby. There were four items from those findings that had been raised with the MIAS vendor for improvement.⁷¹
200. MBIE also engaged with the Alternate Formats Forum – which includes representatives across the disability network – to discuss the feedback that had been received from the users of the system. This dialogue enabled the Digital Information Tools team to gain further insights into their system usage.
201. MBIE also advised that the Digital Information Tools team was involved with the Travel Documentation Verification feature,⁷² prior to it going live in December 2021. There were the same four outstanding items from their findings, which it intended to address imminently with a view to achieving compliance with the recently updated Web Content Accessibility Guidelines 2.1. MBIE advised me that all of the issues were resolved in December 2021. MBIE further advised that it intended to work with its accessibility team on future enhancements to the system to make it accessible to the widest range of travellers, including disabled people.
202. Lastly, MBIE advised me that there was a public phone line where users could ask queries and receive support with using the booking system. More generally, MBIE also emphasised to me that a number of people with disabilities stayed in MIQ, and it managed their needs while in MIQ with the utmost care.

Analysis

203. Article 9 of the Disability Convention relates to accessibility and requires governments to take appropriate measures to ensure that disabled people are able to live independently and participate fully in all aspects of life. This includes access, on an equal basis with others, to information, communication and other services. These measures include the identification and elimination of obstacles and barriers to accessibility.
204. Reasonable accommodation – meaning that agencies must take reasonable steps to, for example, enable a disabled person to access services – is a more general key principle underpinning the Disability Convention.
205. It is clear, based on the above, that MBIE has made efforts to design a system with accessibility needs in mind. The Web Accessibility standard, implemented pursuant to

⁷¹ Namely, a tab focus bounding box was missing, there was an issue with tab ordering, there was a screen reader issue with an accordion (a type of menu that stacks headers and when clicked on reveals or hides content) not following accessibility practices, and an issue with page changes without telling the user.

⁷² Through which travellers had to verify their passport and visa to be able to book a voucher in MIAS.

Article 9(2)(a) of the Disability Convention, ensures accessibility for a range of access needs. The ongoing reviews of compliance with the Web Accessibility standard were also encouraging.

206. However, the Article 9(2)(a) obligation to develop accessibility standards is only one of a number of obligations to ensure accessibility of services for disabled people. Under Article 9(2)(f), governments are also required to '*promote other forms of assistance and support to persons with disabilities*' and, under Article 9(2)(g), to '*promote access for persons with disabilities to new information and communications technologies and systems*'.
207. Given the import of the services at stake here, being the exercise of the constitutionally guaranteed right to enter New Zealand, I would expect the system to have a high level of accessibility consistent with the broader obligations under Article 9(2) of the Disability Convention. This is particularly so given that the people seeking to access the system were likely to be overseas and may not have access to the same supports as in New Zealand. In that context, I would expect all matters addressed in the accessibility reviews to have been implemented within a reasonable timeframe. It appears that this generally happened, although issues identified in September 2021 were not rectified until they were picked up again in December 2021.
208. Moreover, as recognised in Articles 9(2)(f) and (g), disabled people may have individualised needs that are not catered for in the generic web standard. In that context, it would, I believe, have been appropriate to have a platform/mechanism for disabled people to resolve any individual access needs on a case by case basis. This would have enabled MBIE to make reasonable accommodation to address their individual needs that could not be addressed in the system design. I understand from MBIE's response that there was no such platform. While there was a general phone line for people to seek additional support in using the booking system, there was no ability to request alternative access to a voucher or reasonable accommodation. Calling the phone line could not result in a voucher being issued.
209. MBIE emphasised in its response that the system was designed to enable disabled people to be assisted by third parties. This misses the point that a key principle in the Disability Convention is the importance to disabled people of their individual autonomy and independence. Disabled people have the right to a range of reasonable accommodations to remove barriers that hinder their equal participation and enable them to access services independently. In this regard, I note that in addition to the inherent tension between third party assistance and independence, third party assistance can raise privacy and logistical difficulties, including double handling. Facilitating third party assistance does not obviate the obligation on government agencies to provide reasonable accommodation.
210. Further, while it is commendable that MBIE made accommodations for disabled people during their stays in MIQ, this does not relate to the ability of users with disabilities to book a space in MIQ in the first place.

Conclusion on access to MIAS for disabled people

211. MBIE sought from the outset to ensure MIAS met web accessibility standards, and conducted accessibility reviews over the system's lifetime. However, MBIE appeared to believe that compliance with the Web Accessibility standard discharged its obligation to make the system accessible to all disabled persons, and it did not offer other mechanisms for users with individual disabilities to obtain an online voucher. Advising disabled people to engage a third party to assist is not reasonable accommodation nor a viable substitute to actively working to remove barriers. It is not an acceptable option to ensure the independence guaranteed to disabled people in the Disability Convention. In my view MBIE failed to fully meet its obligations under the Disability Convention for disabled people using the online allocation part of MIAS.

Overall conclusion on the consideration of individual circumstances in MIAS

212. I acknowledge the vital role MIQ played in preventing outbreaks of COVID-19 in the community, as well as the necessity of some form of allocation system to ensure that more people did not arrive in New Zealand than could be accommodated in MIQ. In my view, advice provided by MBIE to Ministers should have explored the need for a deliberately more nuanced and case specific allocation system which specifically provided for the consideration of individual circumstances as part of its prioritisation, and which accommodated the fundamental right of citizens to enter New Zealand. I note this is consistent with the High Court's findings in the Grounded Kiwi judicial review case about the system as a whole. Each individual seeking to enter New Zealand, both New Zealanders and non-New Zealanders, had different circumstances and a different need to do so. In my view, officials needed to identify options for an allocation system that was responsive to those needs and ensured that New Zealanders could enter New Zealand within a reasonable timeframe.

213. When viewed as a whole, MBIE's policy and operational advice to Ministers on both the online and offline aspects of the allocation system did not give enough emphasis to the importance of considering individual circumstances and prioritisation in the design of the system. MBIE recommended an online allocation system that had no ability to prioritise, in conjunction with a narrow offline allocation system, and a lack of full reasonable accommodation for users with disabilities.

214. I acknowledge the constraints MBIE was working under, including the ongoing uncertainty about the evolution of the pandemic and MIQ's role in the Government's response, and the significant ministerial involvement in the policy process. However, a fundamental human right was being limited and people's lives were being significantly impacted. It was MBIE's role to provide free and frank advice on the options, the likely impact and consequences of these, and to make objective recommendations that were not primarily driven by administrative considerations, but ensured due consideration was given to options for providing a system (in whatever form) which considered individual

circumstances and the impact these Government actions and decisions would have on people. I am therefore of the opinion that, collectively, MBIE's omissions in its advice were unreasonable.

Part 3: The Treaty of Waitangi/Te Tiriti o Waitangi

215. Some complainants alleged that MIAS prevented tangata whenua from accessing their marae and tūrangawaewae in a manner that breached the Government's responsibilities under the Treaty of Waitangi/Te Tiriti o Waitangi (Te Tiriti).
216. Te Tiriti is the founding document of New Zealand and is the basis for the Māori-Crown relationship. Although Te Tiriti is not generally considered to give rise to free-standing legal obligations, it is part of the '*fabric of New Zealand society*' and forms part of the context for interpreting legislation,⁷³ as well as being a mandatory consideration in administrative decision-making in certain contexts.⁷⁴ Aside from its legal obligations, the Crown also has a moral obligation to uphold Te Tiriti⁷⁵ and in this investigation my enquiries included examining whether the Crown's Te Tiriti obligations were properly considered as part of the advice from MBIE.
217. There are of course two versions of Te Tiriti – one in English and one in Māori – which both consist of a preamble and three articles. There are important differences between the two versions of Te Tiriti (and when I refer to Te Tiriti, I refer to both versions).
218. To manage the differences between the two texts, the courts and the Waitangi Tribunal have developed principles. These principles are commonly summarised as the principle of partnership, which requires partners to act reasonably, honourably and in good faith; the principle of active protection; and the principle of redress.
219. The issue identified by some complainants in this investigation – that MIAS prevented Māori from accessing their marae and tūrangawaewae – appears to relate to tikanga Māori, particularly the idea of reconnecting (hononga). In te ao Māori, it is important to maintain links to whānau and connectedness to one's tūrangawaewae (ahi kā – to keep the home fires burning).
220. The Waitangi Tribunal has found that article two of Te Tiriti protects Māori custom and cultural values.⁷⁶ Similarly, as well as forming part of the common law, the courts have recognised that '*tikanga Māori is an important aspect of the principles of the Treaty of*

⁷³ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210 per Chilwell J.

⁷⁴ *New Zealand Maori Council v Attorney-General* [1991] 2 NZLR 129 (CA) [Radio Frequencies]. See also *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [589] – [596].

⁷⁵ See [He Tirohanga o Kawa ki te Tiriti o Waitangi A Guide to the Principles of the Treaty as expressed by the Courts and the Waitangi Tribunal](#), Te Puni Kōkiri, Wellington, 2001 at 16.

⁷⁶ Ōrākei Report (1987) and Hauraki Overlapping Claims Report (2020).

Waitangi'.⁷⁷ Where Te Tiriti obligations legally bind the Crown, the Crown will have legal obligations in relation to tikanga, to act reasonably and in good faith, with mutual cooperation and trust, and to actively protect tikanga.⁷⁸ However, the context always dictates whether any obligations arise and if so, what they require.

221. The Crown's Te Tiriti obligations are reflected in the Chief Executive's introduction to MBIE's Statement of Intent 2018-2022, which noted *'that success – now and in the future – is built on partnership, including the Crown-Māori partnership that underpins our work'*.⁷⁹ MBIE's Strategic Intentions 2021 – 2025 are even clearer, stating, as part of its context and role, that *'[b]ased on the principles of Te Tiriti o Waitangi/the Treaty of Waitangi, we are committed to upholding authentic partnerships with Māori'* and they will *'fulfil [their] Te Tiriti o Waitangi/Treaty of Waitangi responsibilities'*.⁸⁰ In partnering with Māori, MBIE also identifies a measure of success will be that *'a Māori and Te Tiriti/Treaty lens is standard across policies and programmes'*.⁸¹
222. The Cabinet Office has also issued a circular, which provides guidance for policy advisers about how Te Tiriti should be considered in policy development and implementation.⁸² Rather than looking to the principles of Te Tiriti, this guidance makes the texts of Te Tiriti its focus and directs policy-makers to a series of questions relating to each Article to help them understand the influence Te Tiriti should have in the particular circumstances.

Te Tiriti and the implementation of the online MIAS

223. Based on the documentation provided to me, the Crown's Te Tiriti obligations were not referred to by MBIE at any stage of the development and later evolution of the online allocation of MIQ places using MIAS. Instead, MBIE appeared to take the approach that it was a simple administrative system, designed to provide equal opportunity for all who were eligible to travel to New Zealand.
224. I accept that this was the intent of the online allocation aspect of MIAS, both under the 'first come first served' model and the virtual lobby. In the context of a global pandemic, where demand outstripped the supply of rooms within MIQ, thereby impacting on the rights of all New Zealanders seeking to enter the country, MBIE may have considered that treatment of people seeking to return would be equal, in line with their obligations under Te Tiriti. However, as DPMC's Policy Methods Toolbox notes, undertaking a Te Tiriti analysis is even more important when a policy does not appear to have any immediately obvious Te Tiriti or Māori interests, to ensure less obvious implications are

⁷⁷ *Mercury NZ Ltd v The Waitangi Tribunal* [2021] NZHC 654 at [103] and [111].

⁷⁸ At [67].

⁷⁹ <https://www.mbie.govt.nz/assets/3e13b65fc1/statement-of-intent-2018-2022.pdf> at page 3.

⁸⁰ <https://www.mbie.govt.nz/assets/strategic-intentions-2021-2025.pdf> at page 9.

⁸¹ At page 28.

⁸² Cabinet Office Circular 'Te Tiriti o Waitangi Guidance' (22 October 2019) CO (19) 5.

not missed.⁸³ The implementation of the online allocation of MIQ places using MIAS was a major piece of operational policy. When developing such policy, I would expect agencies to consider the potential human rights and Te Tiriti impacts (if any) of various options as a critical and core inclusion in their advice. However, I was surprised to find that while MBIE did consider NZBORA rights, it failed to undertake a Te Tiriti analysis.

225. Although released after the initial implementation of the online aspect of MIAS, MBIE itself has recognised in its Strategic Intentions 2021 – 2025 that a Māori and Te Tiriti lens should be standard across policy. Although Te Tiriti does not confer greater rights on Māori than the government owes other citizens, it may justify different treatment of Māori interests or Māori involvement in certain circumstances. MBIE needed to do this analysis to determine whether this was the case for online allocation in MIAS. Failing to consider the system through a te ao Māori lens meant that MBIE may not have been alive to the ways in which the online allocation of MIQ places using MIAS may have impacted upon Māori cultural practices and whether these impacts were consistent with the principles of Te Tiriti.
226. MBIE has acknowledged to me that the lack of engagement and adequate consultation with Māori during this process was less than ideal. However, MBIE noted that it later made considerable efforts to engage with iwi/Māori and ensure the system responded appropriately to their concerns, some of which is detailed below. MBIE also informed me of positive comments it received from some iwi in support of this later work.

Te Tiriti and the wider MIQ system

227. In contrast, I note that MBIE did consider Te Tiriti and tikanga Māori as part of its advice and decision-making relating to the wider MIQ system. In the November 2020 'Briefing for Incoming Minister COVID-19 Response',⁸⁴ MBIE stated that it was planning to do further work and analysis on the broader Te Tiriti implications of MIQ.
228. To this end, MBIE established a Director Māori role to lead the development of its strategic partnerships with iwi/Māori across the MIQ system in early December 2020. In early 2021, MBIE commissioned Murray Jack and Katherine Corich to undertake a Rapid Assessment of MIQ.⁸⁵ Among other things, their report found that there was a '*significant omission during the MIQ set-up phase to consider Treaty obligations*'. The report writers made nine recommendations to remedy shortcomings in early engagement, including:

6. Update specific requirements into the Standard Operating Framework. This includes, but is not limited to, operational procedures handling decision making around sensitive handling of protocols for the handling of death in a

⁸³ <https://dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/treaty-waitangi-analysis>.

⁸⁴ <https://www.beehive.govt.nz/sites/default/files/2020-12/MIQ.pdf>.

⁸⁵ <https://www.miq.govt.nz/assets/MIQ-documents/rapid-assessment-miq-final-report.pdf>

MIQF, and any Iwi related considerations in the allocation of vouchers, and granting of emergency requests, fees, and waivers.

229. MBIE also formalised an MIQ-Iwi/Māori work programme aimed at resetting MIQ's relationship with Māori and better supporting MIQ in meeting its obligations under Te Tiriti. The work programme was divided into two streams: partnerships and relationships, and cultural responsiveness. From June 2021 onwards, MBIE held hui for representatives from local iwi in the areas where MIQ facilities were located. Initially, hui were held every eight weeks, but from August 2021, they were held fortnightly.
230. Finally, MBIE also sought to incorporate te ao Māori into policy development through the MIQ Policy team's participation in the fortnightly Iwi/MIQ hui to discuss policy issues with iwi representatives. A Principal Advisor Māori was appointed in November 2021, who also attended MIQ Policy meetings.
231. MBIE also recognised the need for consultation under Te Tiriti in July 2020 when it developed a policy to charge MIQ fees for those who were only temporarily in the country. When undertaking stakeholder consultation, MBIE received feedback from a small number of iwi leaders, with an interest in the COVID-19 response who participated in a hui about the proposed changes, that Māori may be returning to New Zealand for a variety of reasons, which would not always neatly fit into the grounds for fee waivers. Additionally, these iwi leaders noted that implementation of fee waivers could be problematic because:
- a. decision-makers exercising discretion could discriminate against Māori; and
 - b. the grounds for waivers did not explicitly take into account broader considerations, such as the need to keep home fires burning (ahi kā) or practices and obligations related to tangihanga.
232. To counter this, iwi leaders recommended that decision-makers be educated in tikanga, that tikanga Māori be incorporated into the waiver criteria and that the Government take a partnership approach, including by involving Māori in decision-making.
233. Ultimately, MBIE considered that it could address these concerns through operational policy including considering tikanga Māori when determining whether to waive fees for those experiencing hardship.
234. However, when MIQ fee regulations were reviewed between February and June 2021, MBIE recognised that it needed to assess how the fees system had worked for Māori and proposed to undertake targeted engagement with Māori on the Minister's preferred options for changes to the regime. This led to an expanded definition of 'family' for the purposes of fee exemptions and allowing exemptions to be applicable to a family travelling together, rather than just those sharing a room. These changes were intended to make the system more equitable and to avoid discriminating against larger families, which is more responsive to Māori needs. MIQ also offered a fee waiver for people travelling to attend funerals or tangihanga.

Te Tiriti and offline allocation

235. MBIE also recognised that the online allocation system needed to be supplemented by offline mechanisms to facilitate urgent or compassionate travel. The objectives for the offline prioritisation system, discussed in more detail [above](#), recognised that fairness and equity required *‘taking into account the legal right of New Zealand citizens and permanent residents to return and equitable access for Māori in line with the principles and obligations provided by Te Tiriti o Waitangi’*. MBIE’s internal Emergency Allocation Guidelines also noted that, where appropriate, MBIE would take account of tikanga Māori when considering applications for emergency allocations. If necessary, MBIE could also seek specific cultural advice to inform decision-makers.
236. Nevertheless, despite the objectives recognising tikanga and Te Tiriti, emergency allocation criteria that reflected tikanga were developed as the MIQ system matured, rather than being implemented from the outset. Indeed, MBIE acknowledged to me that initially it took quite a Western-centric approach to emergency allocation criteria – for instance, the meaning of *‘close relative’*. A broader definition was later recognised, including the concept of whāngai.⁸⁶ Over time, MBIE developed, and advised the Minister to implement, emergency allocation categories reflecting tikanga – for instance, to allow people to travel with a tūpāpaku (deceased person’s body) back to New Zealand before a tangihanga, consistent with tikanga Māori. However, this category was only added on 3 September 2021 – almost a year after the objectives for offline prioritisation were developed.
237. While I recognise that MIAS was developed at pace, so that robust consultation was not practicable early on, further consideration of Te Tiriti issues in policy development and earlier engagement with Te Tiriti partners could have seen cultural issues being addressed more promptly in offline allocation. However, I acknowledge that MBIE recognised that it needed to engage further with Māori about the MIQ system, and undertook a work programme to bring this into effect. This included considerable engagement with iwi in respect of MIQ facilities. I also recognise that MBIE was aware of its Te Tiriti obligations in relation to emergency allocations and amended the criteria over time to reflect this. I encourage MBIE to continue to develop its Māori capability so that it has people and processes in place that can be drawn upon quickly in times of emergency.

Conclusion on Te Tiriti

238. I accept that MIAS was first established in a fast-paced environment in which in-depth analysis of Te Tiriti issues and wider consultation was simply not viable at that time. Nevertheless, when the policy work to determine a system to replace the ‘first come, first served’ approach to online allocations was undertaken, MBIE’s MIQ-Iwi/Māori work

⁸⁶ A customary practice where a child is raised by someone other than their birth parents – usually a relative. For more information, see Te Ara The Encyclopedia of New Zealand: <https://teara.govt.nz/en/whangai-customary-fostering-and-adoption>.

programme was already underway. Despite MBIE's efforts to incorporate te ao Māori into policy development, no Te Tiriti analysis of the online system was undertaken. As was borne out by consultation with iwi leaders in relation to other aspects of the MIQ system, consultation with Māori was necessary to ensure that MBIE's systems did not breach the Crown's Te Tiriti obligations. In my view, MBIE ought to have, at the very least, recognised the need to undertake at least some analysis of the impact of Te Tiriti obligations on a major operational policy that had a significant effect on all New Zealanders, including Māori.

239. Therefore, while I commend MBIE's later efforts to engage with iwi leaders to better support MIQ in meeting its obligations under Te Tiriti, I consider that it should have undertaken an analysis when developing policy options for the online allocation system and that it was unreasonable not to do so. This analysis may have helped to secure the fairness of the system, and ensured that MBIE's commitment to its Te Tiriti obligations are embedded into its work and ethos. Additionally, I consider that MBIE ought to have consulted with Māori sooner in relation to offline allocation, in order to ensure that the blunt tool of MIAS did not impact upon Māori cultural practices in a way that could be inconsistent with the Crown's obligation to actively protect tikanga Māori. I encourage MBIE to further develop its Māori capability, such as it did with its MIQ-Iwi/Māori work programme.

Part 4: MIQ capacity

Efforts to increase or free up capacity

240. Given the inability to accommodate all New Zealanders wishing to return home in a timely manner, many complainants questioned why MBIE did not increase or free up capacity by building dedicated facilities, repurposing more hotels or allowing more people to self-isolate.

Number of MIQ facilities and demand

The early days

241. When the border closed on 19 March 2020, there were estimated to be around 80,000 New Zealanders temporarily overseas and around 800,000 New Zealanders living abroad. It was very difficult to predict how many of those would want to return to New Zealand, and over what period of time.
242. In the early days of MIQ, there was no requirement to book a space. Demand was simply driven by the number of arrivals, and supply had to be found to match. A number of hotels were rapidly commissioned to serve as MIQ facilities. In April and May 2020, the number of arrivals remained steady at around 2,600 per fortnight. This was projected to

continue or lower, with repatriation flights completed and limited availability of commercial flights.

243. However, by the end of May 2020, New Zealand's success in eliminating COVID-19 meant that arrivals were increasing. Demand continued to grow, with MOH estimates anticipating up to 8,000 arrivals per fortnight. As an interim measure, an airline quota system⁸⁷ was introduced to limit arrivals into New Zealand so that they did not exceed MIQ capacity.
244. Work also began on a booking system (subsequently introduced as MIAS) to better forecast and manage demand. When Cabinet agreed to introduce a flow management system and a requirement for booked vouchers, it recognised that there needed to be options for arrival within a reasonable time period, and that the emergence of a back-log would signal the need to commission new facilities.⁸⁸
245. In June and July 2020, new MIQ facilities were commissioned, bringing the total to 32:⁸⁹ 18 in Auckland,⁹⁰ three in Hamilton,⁹¹ three in Rotorua,⁹² two in Wellington⁹³ and six in Christchurch⁹⁴. Operational capacity for managed isolation was 6,261 people, later referred to as 4,500 rooms.⁹⁵ This was fewer than the actual number of rooms in the MIQ facilities, to allow for rooms to be deep-cleaned between guests or to await imminent arrivals, and for rooms to be set aside for quarantine, aircrew, maritime workers and deportees. Rooms were also set aside for administrative reasons and as a contingency.⁹⁶ Further details about the [use of available MIQ capacity](#) can be found below.

⁸⁷ With airlines assigned a certain number of passengers they were allowed to bring to New Zealand within a time period.

⁸⁸ 1 July 2020 Cabinet paper *Managing the flow of people across the border and into managed isolation and quarantine*.

⁸⁹ From 21 July 2020. The number of facilities reduced to 31 between 1 August 2020, when one facility in Auckland left the network (Haka Hotel Newmarket), and 18 August 2020, when another facility in Christchurch joined.

⁹⁰ Crowne Plaza, Four Points by Sheraton, Grand Mercure, Grand Millennium, Holiday Inn, Jet Park, M Social, Naumi, Novotel Airport, Novotel/Ibis Ellerslie, Pullman, Ramada, Rydges, Sebel Manukau, SO/, Stamford Plaza, Sudima Auckland Airport, and Waipuna.

⁹¹ Amohia (Jet Park), Distinction, and Ibis Tainui.

⁹² Ibis, Rydges, and Sudima.

⁹³ Bay Plaza and Grand Mercure.

⁹⁴ Chateau on the Park, Commodore, Crowne Plaza, Distinction, Novotel Christchurch Airport, and Sudima Christchurch Airport.

⁹⁵ On 4 December 2020, MBIE changed its daily reporting to refer to room capacity (4,500 rooms), rather than people. The number of people accommodated in those rooms can vary depending on the room occupancy rate.

⁹⁶ Prior to 21 October 2020, MBIE daily reporting referred to total available capacity (around 7,200-7,900 people), and effective capacity (around 6,700-7,300 people). The latter allowed for a 24 hour room turnaround time for cleaning, but not for rooms set aside.

246. In August 2020, the MIQ fees regime came into effect. While the primary objective was to ensure MIQ was more financially sustainable, a secondary objective of the fees policy was to lower demand for MIQ related to short-term travel. This appeared to be successful, with arrivals from August 2020 at around 5,000-5,500 people per fortnight (compared with nearly 6,000 in early July), meaning MIQ capacity was underutilised.

Introduction of MIAS and increase in demand

247. The underutilisation continued until late-October 2020, when immigration changes⁹⁷ and seasonal demand came into play, as well as group arrivals. MIAS was introduced on 5 October 2020, and MIQ vouchers became mandatory on 3 November 2020, which also caused a spike in demand. It was anticipated that demand would return to normal levels in January 2021, but this did not occur. Demand remained very high, with MIQ operating near or at operational capacity until the introduction of QFT with Australia in April 2021.

Reduction in demand

248. When QFT with Australia was established, MBIE reduced operational capacity from 4,500 to 4,000 rooms in order to increase the number of rooms set aside for contingency. Operational capacity was also further reduced by facilities operating at reduced levels or being temporarily unavailable at times,⁹⁸ as well as a general 15 percent reduction due to the implementation of a [cohorting system](#). One MIQ facility was decommissioned, which had been used for 501 deportees,⁹⁹ as it was no longer needed following the commencement of QFT with Australia.¹⁰⁰ This did not have an impact on operational capacity as the rooms set aside for deportees were not included in that total.

249. Despite the reduction in operational capacity, supply exceeded demand in the second quarter of 2021 largely due to QFT with Australia and the suspension of travel from very high risk countries.¹⁰¹ This was expected to continue until a seasonal peak in summer, although immigration changes¹⁰² and a large number of group allocations in July-

⁹⁷ Expanded border exceptions to include normally resident temporary work visa holders, Australian and visa waiver partners of New Zealanders, and offshore recipients of partnership visas, and an amended description of an 'other critical worker'.

⁹⁸ For scheduled maintenance and ventilation upgrades, and while investigations and remediation occurred in respect of facilities involved in transmission incidents.

⁹⁹ People deported from Australia for certain crimes.

¹⁰⁰ Ramada. It later rejoined the MIQ network after QFT with Australia was suspended, again for 501 deportees. It was not considered suitable for use as a general MIQ facility.

¹⁰¹ Entry into New Zealand was suspending for passengers from India from 11 April 2021, and then limited to citizens and their immediate family members from very high risk countries from 29 April 2021.

¹⁰² New border exceptions for families of migrant workers, re-entry for temporary visa holders, and class exceptions for 1,700 people over the remainder of 2021. The former border exception was subsequently not implemented due to capacity pressures.

September would create some demand. However, demand began increasing again in June 2021, with MIQ operating at full capacity from July 2021.

Significant increase in demand

250. MIQ capacity then came under significant pressure due to managed returns from NSW, evacuees from Afghanistan, and the community Delta outbreak in August 2021. Until the Delta outbreak, one facility in Auckland was a quarantine facility only, and four other facilities across Wellington and Christchurch had dedicated quarantine areas. Two further facilities in Auckland, and one in Waikato, were subsequently converted to quarantine facilities, and then later reverted back to managed isolation facilities, to address the quarantine demand caused by the community Delta outbreak.
251. When the virtual lobby was held for the first time in September 2021, there were over 30,000 people in the queue. In November 2021, one further hotel with 85 rooms was added to the MIQ network in Christchurch.¹⁰³ At around the same time, MIQ stays were reduced from 14 days to seven days, followed by a period of self-isolation at home for three days. However, in December 2021, one MIQ facility in Wellington was decommissioned because of ventilation issues and difficulties in transporting arrivals to Wellington.¹⁰⁴ Later that month, following the emergence of the Omicron variant, the duration of MIQ stays was increased to 10 days with no self-isolation period.

Winding up of MIQ

252. Over time, the number of people in the queue in virtual lobbies trended downwards, significantly so in late November and December 2021 after the Government's border re-opening announcement. Several lobbies ended with rooms untaken. After the border re-opening was delayed to February 2022, there was an increase in the number of people participating in the lobby again, but this dropped following confirmation that the first phase of the border re-opening would commence on 27 February 2022.
253. In March 2022, MBIE began decommissioning MIQ facilities. Over its lifetime, approximately 230,000 travellers have been through MIQ.

Site requirements for MIQ facilities

254. The first 32 MIQ facilities were commissioned under time pressure, based on criteria developed by MOH and the multi-agency team supporting the National Crisis Management Centre. In mid-2021, MBIE and MOH refined the criteria for MIQ facilities based on operational experience, increased scientific understanding of COVID-19, and the increased transmissibility of new variants, with particular focus on ventilation standards. MOH, as noted [earlier](#), was responsible for setting IPC, public health and other health-related MIQ facility requirements.

¹⁰³ The Elms.

¹⁰⁴ Bay Plaza.

255. The site requirements for MIQ facilities included:
- a. a secure site with physical boundaries that prevented undetected entry and exit;
 - b. separate rooms of a reasonable size for each traveller or bubble of travellers, with ensuite bathrooms;
 - c. ability to provide food and laundry services to travellers;
 - d. access to a designated outdoor area that allowed for physical distancing of travellers (preferably onsite);
 - e. a designated smoking area that allowed for physical distancing of travellers; and
 - f. appropriate IPC standards, including ventilation.
256. These requirements were in line with the World Health Organisation's guidance on appropriate quarantine arrangements.¹⁰⁵
257. In addition, facilities had to meet all applicable building standards, and be located reasonably close to a hospital (within a one hour drive), an airport and a quarantine facility.
258. As well as minimising the risk of transmission, the site requirements for facilities were designed to ensure the MIQ environment was comfortable and conducive to good health and wellbeing, and promoted compliance by arrivals.
259. Further, my OPCAT role was also relevant to the site requirements for facilities. I was pleased that facilities made changes in response to my inspections and recommendations. For example, one facility established a new, much larger exercise area following my inspection. Wi-Fi provision, communication with detainees, and complaints systems, among other things, were also improved.

MIQ workforce requirements

260. Each MIQ facility had a manager and an onsite team comprising staff from public sector agencies (MBIE, NZDF, Police, Avsec and DHBs), hotel staff and any third party providers such as a security firm. Around 4,500 people worked in MIQ at any one time.
261. MBIE was responsible for the management of non-health staff in MIQ. DHBs were responsible for the management of health staff. Health staff conducted testing, daily health checks, and arrival and exit health screening. They also provided travellers with healthcare and wellbeing services throughout their stay in MIQ, and supplied onsite IPC support. As with site requirements, this was in accordance with the World Health

¹⁰⁵ See https://apps.who.int/iris/bitstream/handle/10665/331497/WHO-2019-nCoV-IHR_Quarantine-2020.2-eng.pdf?sequence=1&isAllowed=y.

Organisation's guidance on appropriate quarantine arrangements,¹⁰⁶ and reflected the fact that MIQ facilities are health and disability places of detention.

Options to increase or free up MIQ capacity

262. In the early days of MIQ, a number of different types of MIQ facilities were canvassed and discounted by the National Crisis Management Centre in favour of the hotel model. In the second half of 2020, after it was designated the lead agency for MIQ, MBIE explored a number of options to increase MIQ capacity. While there were a limited number of facilities meeting site requirements, workforce availability – particularly in the health workforce – was the key constraint. The health sector was already struggling to staff existing MIQ facilities, and NZDF, the Police and Avsec were generally unable to increase the number of staff seconded to work in MIQ (largely in security and management roles).
263. In early 2021, COVID-19 variants with increased transmissibility began to emerge, and MBIE's focus shifted from increasing the supply of facilities to reviewing the suitability of existing facilities to prevent transmission. In mid-2021, when MIQ capacity came under pressure, MBIE considered short-term options to increase capacity, adding one hotel to the MIQ network. It also undertook strategic work on the future MIQ infrastructure in the second-half of 2021, considering longer-term options.
264. Throughout this time, work was underway on freeing up MIQ capacity by commencing QFT with low-risk countries, and on considering the longer-term model for MIQ, including a risk-based approach involving reduced duration of stays in MIQ and/or self-isolation for some travellers. MOH and DPMC, rather than MBIE, led the work in these areas as part of the broader response to COVID-19 and the Reconnecting New Zealanders border reopening strategy (see [above](#)).
265. Each option to increase or free up capacity is discussed below.

Building dedicated facilities or refurbishing existing buildings

266. Purpose-built facilities, either temporary or permanent, was one of the options initially canvassed by MBIE in 2020. A 'greenfield'¹⁰⁷ purpose build was considered again in mid-2021 as part of MBIE's strategic review of future MIQ infrastructure. However, it was estimated that a new build would take at least two to three years to construct, at a cost of \$400,000 per two-room unit in addition to land purchase costs. Labour and supply constraints in the construction sector could also lead to increased costs and delays.
267. As part of the consideration of future MIQ infrastructure, MBIE also contemplated refurbishing an existing building, such as a hotel or warehouse, to higher public health standards than the existing MIQ facilities. However, while being cheaper and quicker

¹⁰⁶ See https://apps.who.int/iris/bitstream/handle/10665/331497/WHO-2019-nCoV-IHR_Quarantine-2020.2-eng.pdf?sequence=1&isAllowed=y.

¹⁰⁷ Completely undeveloped site.

than a new build, this option would still have required significant investment and time (estimated at one to two years).

268. Given the uncertainty over how long MIQ facilities would be required, I do not consider it unreasonable that the option of building dedicated facilities or refurbishing existing buildings was not ultimately pursued further, due to the long lead-in time and significant cost, and the fact that it would not have made a difference to MIQ capacity at the time when increased capacity was needed.

Campervans/campgrounds

269. In February 2020, evacuees from Wuhan, China, were quarantined in campervans at a naval base in Whangaparaoa, Auckland. This was a one-off, temporary solution at the outset of the pandemic. One thousand four hundred campervans were also made available across New Zealand to use as facilities when the MIQ system was first established, but they were never used, based on the experience of the returnees from Wuhan.

270. The issues with campervans and/or camping grounds included:

- a. difficulties with security due to their large footprint;
- b. inadequate internal space;
- c. difficulties in providing catering and laundry services; and
- d. public health challenges with the safe disposal of sewerage and shared bathroom facilities, as well as ensuring separation between travellers generally.

271. They therefore did not meet the site requirements for MIQ facilities. In these circumstances, particularly given the transmission risk due to IPC issues, I do not consider it unreasonable that MBIE did not pursue the option of campervans/campgrounds to increase capacity.

Cruise ships

272. Cruise ships were one of the options initially considered by the National Crisis Management Centre. MBIE subsequently received several proposals from the private sector suggesting that cruise ships be used as MIQ facilities.

273. However, cruise ships posed a significant transmission risk due to their ventilation systems – there was concern that this contributed to the spread of COVID-19 on the Diamond Princess cruise ship while it was in quarantine.¹⁰⁸ Modification of cruise ships' ventilation systems was not considered feasible due to cost and time.

274. In these circumstances, it does not seem unreasonable for MBIE to have decided that cruise ships were not a viable option for MIQ facilities.

¹⁰⁸ See, for example, www.aagr.org/articles/aaqr-20-07-covid-0495.

Other communal-style accommodation

275. A number of other communal-style accommodation facilities, such as military bases, hostels, and student dormitories were also considered. In this last regard, MBIE received a number of proposals from the education sector with the purpose of facilitating the entry of international students.
276. The fundamental issue with this type of accommodation was the transmission risk posed by the use of communal or shared facilities. In addition, rooms were generally small and basic, and the remote location of some military bases was an issue.
277. Again, it does not seem unreasonable that MBIE did not pursue this type of accommodation to increase capacity.

Motels

278. An additional option considered by MBIE in the second half of 2020 was smaller or lower-specification hotels and motels. However, the following issues were identified:
- a. difficulties with security as the sites are easily accessible by the public;
 - b. lack of catering and laundry services;
 - c. small facilities required more workforce, which would mean fewer economy of scale benefits; and
 - d. this type of accommodation was already under pressure for emergency housing.
279. Given these circumstances, the overarching workforce constraints, and the fact that there were still some suitable hotels available (albeit a limited number), it does not seem unreasonable for MBIE to have focused its efforts on other options, such as repurposing more hotels.

Kaikoura village

280. In September 2020, Waka Kotahi was selling a temporary accommodation village used to house construction workers after the Kaikoura Earthquake, comprising 300 single, self-contained rooms. MBIE considered this for use as an MIQ facility, but determined that it was not suitable because of size, cost and logistical issues. The rooms would have had to be transported to another location (a large piece of land in a suitable location¹⁰⁹ would have had to be purchased) and the infrastructure for the village would have had to be built. Further, the facility would have been more difficult to operate than a hotel in terms of security and the provision of catering and laundry services.
281. I consider that it was not unreasonable for MBIE to reach this view, and to focus on growing capacity through the hotel model.

¹⁰⁹ Kaikoura was not considered a suitable location, due to its distance from a hospital.

Serviced apartments

282. MBIE initially considered that serviced apartments would best meet site requirements for MIQ facilities and were, together with hotels, the best option to expand MIQ capacity. However, when MBIE began investigating this option, it had concerns that the majority of serviced apartment buildings would not be suitable as they contained apartments with permanent residents.¹¹⁰ From a public health perspective, no residents could be located on the same floor as managed isolation guests, meaning that entire floors of apartments would need to be vacant. Furthermore, MBIE's work on serviced apartments was absorbed into the broader work on MIQ capacity, with workforce constraints being a key obstacle.
283. For these reasons, I consider that MBIE did not act unreasonably in not ultimately pursuing serviced apartments as MIQ facilities.

Repurposing more hotels

284. As set out [above](#), a number of hotels were commissioned rapidly when the MIQ system was implemented. Capacity was significantly increased in June and July 2020 in response to demand, with 32 hotels used as MIQ facilities. However, this capacity was under-utilised until late-October 2020, and the higher demand in December was forecast to return to normal in January 2021.
285. Nonetheless, MBIE did consider further increasing capacity in the second half of 2020, including repurposing more hotels. However, there were a limited number of hotels available that would meet the site requirements for MIQ facilities in locations within a one hour drive from a suitable hospital – areas such as Queenstown were ruled out on this basis. Furthermore, as noted earlier, the key constraint on expanding supply of MIQ facilities was workforce availability, especially health workforce.
286. In late 2020 and early 2021, when demand was high, MBIE's view was that the work underway on QFT was the most appropriate option to increase capacity as around 40 percent of spaces in MIQ were being used by returnees from Australia (see [below](#) for further discussion on QFT). Workforce constraints remained a significant issue, particularly in healthcare, with MOH, in collaboration with MBIE and DHBs, undertaking work to address this.
287. Following the establishment of QFT with Australia, MIQ capacity was underutilised again in April-June 2021, which led to concerns that this might cause some hotels to leave the MIQ network.
288. In mid-2021, when MIQ capacity came under significant pressure, MBIE again considered, but recommended against, repurposing more hotels because of workforce constraints, noting that:

¹¹⁰ While some hotels used as MIQ facilities also had permanent residents, they were on different floors and had different entrances and exits to managed isolation guests.

- a. the MIQ system was under significant pressure from the Delta community outbreak, facilitating managed returns from NSW, and accommodating Afghan evacuees;
 - b. NZDF was not in a position to provide any additional staff, given its other responsibilities;
 - c. any additional involvement from the Police would pull further officers from the frontline;
 - d. Avsec could free up a small number of staff only while QFT was suspended;
 - e. private security firms were facing challenges in recruiting and retaining a sufficient security workforce, and were already increasing their involvement in MIQ as NZDF gradually withdrew; and
 - f. the health workforce was under considerable strain, given its involvement in the vaccination rollout and managing the Delta community outbreak.
289. The Minister directed MBIE to proceed with commissioning new facilities, asking for a plan to relieve workforce pressure. Work was underway on an MIQ workforce strategy, including a transition away from reliance on NZDF. One of the challenges in recruitment and retention for the MIQ workforce, including the health workforce, was community stigma and discrimination.¹¹¹ Workloads were also high, and there was a risk of transmission from guests.
290. Adding an additional facility in Auckland was ruled out as health workforce pressure was particularly acute there. No further hotels meeting site requirements for MIQ facilities were identified in Hamilton. MBIE advised the Minister that Wellington was not considered a viable option because of significant logistical challenges with transporting arrivals there, due to Wellington Airport being closed to international flights and not allowing MIQ to use its passenger terminal or baggage-handling facilities for domestic transfers.¹¹² MBIE considered that expanding MIQ beyond the areas it was already in would take time and place significant pressure on the system as new transport routes and staffing structures would be required.
291. MBIE identified a suitable facility in Rotorua and one in Christchurch, and pursued those options. The Christchurch facility was added to the network. Adding an additional facility in Rotorua was strongly opposed by the local community and iwi,¹¹³ and there were health workforce concerns. This proposal therefore did not proceed.

¹¹¹ See, for example, www.rnz.co.nz/news/national/434431/confronted-in-supermarkets-flatmates-move-out-miq-staff-face-huge-stigma; and www.stuff.co.nz/national/health/coronavirus/125164522/covid19-discrimination-against-miq-workers--people-think-we-have-the-plague.

¹¹² Instead, MBIE had to use NZDF's Rongotai terminal, which meant that only 60 passengers could arrive at once. See, for example, www.nzherald.co.nz/nz/wellington-airport-happy-to-take-more-international-flights-as-capitals-miq-capacity-cut/YCZQSX7PUM2DWBGV3WPDZALOCM/.

¹¹³ See, for example, www.newsroom.co.nz/new-miq-in-christchurch-after-rotorua-says-no.

292. Furthermore, MBIE noted that the time required to commission new hotels would likely mean that they would not be brought online until 2022. By that time, progress on the individualised risk-based approach being considered as part of the DPMC-led Reconnecting New Zealanders border reopening strategy (see [above](#)) could mean that additional hotels were not required. The Minister therefore decided in late September 2021 that MBIE would not undertake any further work on adding more hotels to the MIQ network.
293. From 22 November 2021, 150 spaces per fortnight were reserved in MIQ for critical health and disability workers to address general health workforce shortages.
294. In summary, repurposing more hotels was an option considered by MBIE over the lifetime of MIQ, and one additional hotel was commissioned in the second half of 2021. However, site requirements limited the available options, and there were significant workforce constraints which were challenging to address. On top of this, it was difficult to predict demand over the longer term, with some periods of underutilisation, and substantive work being undertaken on alternative MIQ models.
295. On the basis of the information I have considered on this issue, I do not consider that it was unreasonable for MBIE not to have repurposed more hotels as MIQ facilities in the second half of 2020 when the existing capacity was not being fully utilised, and when seasonal demand was expected to abate in early 2021. I also do not consider it unreasonable for MBIE not to have commissioned new MIQ facilities in the first half of 2021 when it was focused on preventing transmission within the existing facilities, when QFT with Australia was imminent, and then when QFT resulted in underutilisation. MIQ facilities were costly for the government (despite some cost recovery from the fees regime), and a significant drain on public sector and health resources.
296. I also consider that MBIE did not act unreasonably in its assessment of repurposing more hotels in mid-2021. I can see the attractiveness of extending the MIQ network at that time, given the high demand and reduction in managed isolation operational capacity. However, the MIQ workforce was clearly stretched, especially the health workforce. There was little point in commissioning additional hotels in the absence of sufficient staff to run them. Furthermore, I do not see that it was unreasonable for MBIE to take a strategic view and consider the likely lifespan of MIQ facilities.

Bespoke facilities or arrangements for certain groups

297. MBIE initially considered that bespoke arrangements offered the best prospect of accommodating larger groups of foreign nationals without displacing New Zealanders seeking to return. In particular, MBIE investigated the idea of a bespoke MIQ facility for sport, which would allow teams to train while in managed isolation. Such a facility was proposed by several sports organisations seeking to host international games in New Zealand.
298. However, it was ultimately considered that such a facility would only result in a relatively modest increase in MIQ supply at a relatively high cost, and would likely be underutilised

most of the time. Workforce constraints were also an issue, as they were for commissioning new standard MIQ facilities. In these circumstances, I consider that MBIE did not act unreasonably in not establishing a bespoke MIQ facility for sport (or other specific groups).

299. MBIE also mooted the idea of bespoke facilities run by or in partnership with the private sector after receiving numerous proposals. However, this was considered to raise a range of complex policy and operational issues that would take significant time to resolve, including ensuring the prevention of transmission, the level of health workforce involvement required, security implications, and the development of a regulatory system.
300. Again, MBIE's view was that the work underway on QFT was the most appropriate option to increase capacity in the short-medium term, and that the DPMC-led Reconnecting New Zealanders border reopening strategy would consider longer-term options, including bespoke arrangements (for example, different requirements for low-risk travellers, including groups). This does not seem unreasonable. It is understandable that caution would need to be exercised at a time when the Elimination Strategy, with its low risk tolerance to COVID-19 incursions, was being pursued.

Quarantine-free travel

301. One of the major ways in which the Government sought to free up MIQ capacity was by reducing demand through the introduction of QFT with Australia and the Pacific. Australia is where most New Zealanders overseas live, accounting for around 600,000 of the estimated 800,000 New Zealanders living abroad. Prior to the introduction of QFT with Australia, arrivals from Australia made up around 40 percent of MIQ occupancy.
302. On 5 May 2020, New Zealand's Prime Minister and Australia's Prime Minister announced a commitment to introduce a trans-Tasman COVID-safe travel zone as soon as it was safe to do so. Formal talks began in June 2020, and bilateral QFT commenced on 19 April 2021. QFT from the Cook Islands had already begun on 21 January 2021, and from Niue on 24 March 2021. While MBIE was not directly involved in establishing QFT, this context influenced its policy advice and actions in respect of the need to increase MIQ capacity.
303. On 24 July 2021, QFT from Australia was suspended as the COVID-19 situation there worsened. Travellers from states other than NSW were given one week to return without needing to enter MIQ, with travellers from Victoria required to self-isolate and get tested. Managed return flights from NSW were arranged, but caused significant capacity pressure for MIQ.
304. Due to the escalating global pandemic situation, there were limited opportunities to establish QFT with other low-risk countries. QFT from Samoa, Tonga, Vanuatu and Tokelau began on 8 November 2021. QFT with Australia did not resume until the start of the border reopening in February 2022 (with self-isolation initially required).

305. In summary, QFT with Australia significantly reduced MIQ demand, but it took several months to implement and caused capacity pressure when it was suspended. The DPMC led-Reconnecting New Zealanders border reopening strategy, implemented in early 2022, gave effect to Cabinet's decision to move away from QFT with specific countries to an individualised risk-based approach (see [above](#)). MBIE was aware of this context when developing options to increase MIQ capacity.

Allowing more people to self-isolate and reduced duration of stays in MIQ

306. Another significant way in which the Government considered freeing up MIQ capacity was allowing people to self-isolate, and reducing the length of MIQ stays. While these decisions were made by Cabinet, and MBIE was not directly involved in this policy work (with MoH providing public health advice and DPMC leading the work on the Reconnecting New Zealanders strategy), again this context influenced MBIE's policy advice and actions in respect of the need to increase MIQ capacity.
307. In early 2020, New Zealand's border measures categorised overseas locations based on their risk, with travellers in each category either required, expected, or not expected unless symptomatic, to self-isolate for 14 days. Self-isolation was based on a trust, not a verification, basis, with support and guidance available through Healthline.
308. On 19 March 2020, the border was closed and all returnees were required to self-isolate. On 25 March 2020, the COVID-19 Ministerial Group agreed that any person who did not have a self-isolation plan would be put in MIQ, and that every person in self-isolation would be subject to Police checks within 72 hours of arrival.
309. On 9 April 2020, the then Director-General of Health issued an order requiring all passengers arriving by air to undergo MIQ for 14 days. This meant that self-isolation at home was no longer an option unless an exemption was granted. The proposed Police compliance check had proved difficult to operationalise, and there had been numerous reported instances of non-compliance, particularly from visitors to New Zealand. Essentially, the low risk tolerance for an incursion of COVID-19, based on the Elimination Strategy, meant that self-isolation was not immediately acceptable from a public health perspective.
310. However, self-isolation and shorter stays in MIQ, or a combination of the two, were seen as longer-term solutions, based on individuals' risk profiles and after vaccination had been rolled out. This was supported by the Strategic COVID-19 Public Health Advisory Group chaired by Sir David Skegg, and was part of the DPMC-led Reconnecting New Zealanders Strategy (see [above](#)).
311. MBIE ran a self-isolation pilot between October and December 2021 in order to prepare for more widespread self-isolation as an alternative to MIQ. Three options for compliance monitoring were considered:
- a. Electronic monitoring using a wrist or ankle bracelet with constant GPS monitoring. While this would provide a high level of assurance, it was considered that it would

- be resource-intensive to fit and remove the devices on a large scale beyond the pilot (as hands on management would be needed), and that wearing them may not be acceptable to some people. There were also potential privacy concerns.
- b. Electronic monitoring using a smartphone application with Global Positioning System (GPS) monitoring at the time of a ping¹¹⁴ and biometric facial recognition. This option provided a medium level of assurance as it would not be immediately known if a participant had left their location. It was considered to be the best option in terms of scalability. However, again there were potential privacy concerns.
 - c. Regular and random phone-based checks. This would provide a low level of assurance as there would be no certainty that a participant would be where they said they were. It would also be resource-intensive, and therefore potentially limited in its scalability.
312. None of these options were able to monitor for visitors to a place of self-isolation, and no options to do so were identified. A suitable smartphone application was unable to be procured in time for the pilot, so instead a technology providing for GPS verification at the time of a video call was used. While this was successfully used in the pilot, feedback from participants was that it would be easy to evade. It was also fairly resource-intensive.
313. In October 2021, the Government began transitioning away from an Elimination Strategy to a suppression strategy due to the difficulty in eliminating the Delta community outbreak and containing its spread from Auckland to the Waikato. At that point, elimination was still the aim outside the centres of the outbreak.
314. On 19 October 2021, some community cases of COVID-19 began self-isolating at home (or in alternative isolation accommodation¹¹⁵), rather than entering an MIQ quarantine facility. If this had not occurred, quarantine capacity in MIQ would have been exhausted (even after being rapidly increased in response to the community outbreak).
315. At that time, Auckland and Waikato were in alert level 3 (with some restrictions eased through the introduction of steps within alert level 3). This mitigated the risk of community transmission from people in self-isolation. It is self-evident that it would not have been proportionate to introduce lockdowns in order to justify the self-isolation of international arrivals, as opposed to managing the risk of transmission when COVID-19 was already in the community.
316. Nonetheless, MOH recognised that the community outbreak changed the public health risk profile of COVID-19 in New Zealand, and therefore it reviewed the public health rationale for MIQ, including seeking advice from two epidemiologists, Professor Phillip

¹¹⁴ Sending a signal to a phone and receiving an automatic response with location information.

¹¹⁵ While a broader range of accommodation than just hotels was used for alternative isolation accommodation for community cases of COVID-19, this reflects the different operational and security requirements of managed isolation compared with self-isolation, as well as availability, with some facilities not willing to be used as general MIQ facilities, only for their own communities.

Hill and Professor Antony Blakely. MOH ultimately considered that there still needed to be a risk-based transition from MIQ as the default setting for arrivals, which was occurring through the Reconnecting New Zealanders strategy for a phased border reopening, in the context of the upcoming move to the COVID-19 Protection Framework. This also mitigated the risk of seeding new cases in areas without community transmission. The Minister agreed with this approach, on 23 November 2021.

317. From 14 November 2021, MIQ stays were reduced from 14 days to seven days, followed by a period of self-isolation at home for three days. On 24 November 2021, the Government announced the Reconnecting New Zealanders plan for a phased reopening of the border, starting with travellers from Australia on 16 January 2022. Travellers were required to have a negative pre-departure test, be fully vaccinated, complete a declaration about their travel history, test on arrival, undergo seven days of self-isolation, and have a final negative test before entering the community.
318. However, on 21 December 2021, due to the emergence of the Omicron variant, the duration of MIQ stays was increased to 10 days with no self-isolation period. Furthermore, the start of the phased reopening of the border was delayed until the end of February 2022. From 27 February 2022, New Zealand's borders reopened in phases, with certain travellers allowed to self-isolate, and then, by 3 March 2022, not needing to isolate at all in conjunction with a testing regime. This was widened over time to further categories of travellers. New Zealand's border fully reopened on 1 August 2022.
319. This transition away from MIQ reflected high vaccination levels, the presence of COVID-19 in the community, and a move away from the Elimination Strategy to the COVID-19 Protection Framework. Self-isolation was a high-trust model, without active monitoring or enforcement of compliance. This reflected the changed public health risk, and the inability to implement monitored self-isolation on a large scale, due to the significant workforce that would be required, even utilising technological solutions. While MBIE was involved in implementing the changes to MIQ, it was not responsible for the advice that led to them.

Conclusion on efforts to increase or free up capacity

320. It is clear that, at times, it was very difficult for people to secure a space in MIQ due to high demand, and some people may have faced significant uncertainty and waiting times of several months to acquire a voucher (for example, in the period from November 2020-March 2021, and again from July-November 2021). This resulted in stress and frustration for complainants to my office as well as for tens of thousands of other people seeking to enter New Zealand.
321. My investigation has identified that MBIE was aware of capacity issues, kept the Minister informed via advice and briefings of these and the impact this was having on people, and considered ways to increase capacity, making some small increases through adding an additional hotel to the MIQ network, and running a self-isolation pilot. More significant work to ease capacity pressures was undertaken by DPMC and MOH, with QFT with

Australia reducing demand in the second quarter of 2021, and the phased border reopening in 2022 drastically changing the MIQ landscape.

322. I also accept that MBIE was limited in its ability to significantly increase or free up capacity within the Elimination Strategy public health settings, having regard both to the dearth of suitable accommodation and workforce constraints. In these circumstances, I do not consider that MBIE acted unreasonably in respect of capacity. Rather, I am satisfied that it was not a matter of simply commissioning new facilities, and it was not for MBIE to decide whether and when large-scale self-isolation (or no isolation) would be acceptable from a public health perspective. This was a Cabinet decision, based on MOH advice.
323. I am satisfied MBIE's actions in relation to efforts to increase or free up capacity were not unreasonable.

Use of available capacity

324. A number of complainants contended that MBIE should have made more efficient use of available capacity, pointing to empty rooms at times when MIQ demand outstripped supply.

How MIQ rooms were used and why some were empty

325. Across the 32 MIQ facilities established in July 2020, there were approximately 6,200 rooms. As set out [above](#), operational capacity for managed isolation was 4,500 rooms prior to the introduction of QFT with Australia in April 2021, and 4,000 afterwards.
326. The difference is approximately 1,700 rooms (subsequently 2,200). Some of these rooms were set aside for various purposes, as follows:¹¹⁶
- a. quarantine: 348 rooms (increased significantly during the community Delta outbreak), for positive cases of COVID-19 and close contacts;
 - b. air crew reserve: 62 rooms, for air crew to use for short stays while transiting through New Zealand;
 - c. maritime allocation: initially 60 rooms, increased to 80, for maritime arrivals and to facilitate crew changes;
 - d. deportees: 32 rooms (prior to QFT with Australia, and then again after it was suspended),¹¹⁷ for people who were deported to New Zealand (mainly 501 deportees from Australia);

¹¹⁶ Some of these numbers were not static and varied over time.

¹¹⁷ The MIQ facility used for 501 deportees was decommissioned when QFT with Australia commenced, as it was no longer needed. It later rejoined the MIQ network after QFT with Australia was suspended.

- e. administrative use: 266 rooms, used by onsite staff for operational reasons such as storing PPE, conducting testing and health checks, and staff rooms;¹¹⁸
 - f. contingency: around 400 rooms, to provide resilience to manage spikes in operational capacity (occasioned, for instance, by flight changes), as well as to respond to any unexpected events such as an emergency evacuation of a facility; and
 - g. QFT reserve: 500 rooms following the commencement of QFT with Australia, in case of suspension. This was decided by the Minister, on MBIE's recommendation.
327. In addition, at any particular point in time, a number of rooms (approximately 500 at a time) were empty to allow for deep cleaning between guests, and whilst awaiting imminent arrivals (due to variable flight schedules). MBIE undertook work to reduce the length of time rooms were empty awaiting cleaning.
328. Rooms would also be empty when returnees with booked vouchers did not show up.¹¹⁹ MBIE undertook work to minimise this occurring, including releasing more vouchers than the number of allocable rooms, removing double-bookings and bookings with no corresponding flights, cancelling vouchers for returnees from the Cook Islands and Australia when QFT commenced, cancelling vouchers for returnees from very high risk countries who were unable to travel, cancelling vouchers when an airline suspended an air route, sending reminders to travellers about their bookings, and restricting MIAS bookings to those with a legal right to enter New Zealand.
329. MBIE also advised me that operational capacity was the total number of rooms that could safely be provided at any time, taking into account workforce availability, IPC protocols and security considerations, as well as the number of rooms available.

Reduction in operational capacity

330. Operational capacity was reduced by facilities operating at reduced levels or being temporarily unavailable at times for scheduled maintenance and ventilation upgrades, and while investigations and remediation occurred in respect of facilities involved in transmission incidents. This was a particular issue in mid-2021 when there were sometimes hundreds of rooms unavailable. MBIE had brought forward maintenance scheduled for July-September 2021 to April-May 2021 to capitalise on spare capacity in MIQ following the commencement of QFT with Australia, and in anticipation of higher demand in July-September 2021 due to large numbers of group arrivals. Maintenance and ventilation remediation was then deferred from July 2021 when MIQ came under severe capacity pressure again.

¹¹⁸ A number of NZDF personnel were deployed on rotation and were onsite 24/7. They were therefore also accommodated in MIQ facilities, along with some Police and health staff.

¹¹⁹ The no-show rate was between four and seven percent. The reasons for this included people deciding not to (or unable to) travel, double-bookings, and flight cancellations.

Cohorting

331. In January 2021, a managed isolation guest tested positive for COVID-19 in the community after leaving MIQ. They had been infected late in their stay by another arrival who was at the start of their stay. There was also an increasing risk of travellers being infected while in MIQ due to the increased transmissibility of new COVID-19 variants.
332. A number of actions were taken in response, including consideration of cohorting, where MIQ facilities only held arrivals from within a 96 hour period to reduce the risk of transmission from new arrivals.¹²⁰ In April 2021, the Minister, on MBIE's advice,¹²¹ decided to implement cohorting when space became available in MIQ due to the commencement of QFT with Australia. MOH supported cohorting in principle as it reduced the risk of transmission within each facility, but noted that this had workforce implications, particularly for the health workforce, as testing requirements and entry and exit screening would no longer be spread out.
333. Cohorting initially reduced operational capacity by around 15 percent. However, MBIE employed strategies to reduce the impact of cohorting over time, such as applying some unoccupied rooms towards those set aside in contingency, and targeting vouchers to certain locations when this could increase utilisation of rooms that would otherwise be unoccupied due to cohorting.
334. Cohorting was suspended in October 2021 due to the pressure on capacity from the community Delta outbreak. From November 2021 onwards, MBIE's approach was to maintain cohorting across facilities where possible, taking into account capacity pressure.

Significant reduction in voucher availability in mid-2021

335. Beginning in July 2021, MIQ capacity came under significant pressure due to around 2,700 managed returns from NSW, Afghan evacuees, and the community Delta outbreak. In order to increase quarantine capacity, three managed isolation facilities were converted to quarantine facilities. This led to a pause in online MIAS voucher releases from 23 August to 20 September 2021. A number of group arrivals were also deferred, as well as scheduled maintenance.
336. The decisions to use MIQ capacity for managed returns from NSW, Afghan evacuees and increased quarantine capacity were Ministerial or Cabinet decisions, as was the decision to pause online voucher releases.

Conclusion on use of available capacity

337. Overall, I cannot see that MBIE acted unreasonably in its actions and decisions as to the use of available capacity. I am satisfied it needed to set aside rooms for quarantine, air crew, the maritime allocation, deportees, and use by staff in running MIQ facilities. It is also apparent to me that not all available rooms could be occupied at once because of

¹²⁰ A shorter timeframe was also considered, but it was decided the impact on capacity would be too severe.

¹²¹ In a briefing on the impact of QFT with Australia, dated 14 April 2021.

the need to clean rooms between guests, because arrivals were not always perfectly timed, and because of no-shows. MBIE took steps to minimise these occurrences.

338. I also do not consider it unreasonable for MBIE to have set aside rooms in contingency, including the QFT reserve, given the potential risk of COVID-19 spreading to the community if rooms were not available when urgently needed. This contingency was used at times, such as when MIQ was put under pressure by the transition from the quota system to MIQ vouchers being mandatory, and to facilitate managed returns from NSW.
339. In my view, it was also not unreasonable for MBIE to reduce operational capacity when this was needed in response to transmission incidents and for maintenance and ventilation upgrades. MBIE sought to minimise the impact of this work through scheduling. While cohorting resulted in further empty rooms, it was a public health measure decided by the Minister. Again, MBIE sought to minimise the impact.

Chief Ombudsman's opinion

340. I acknowledge the difficult challenges that MBIE faced in managing MIQ, and the vital role that MIQ played in the Government's response to the COVID-19 pandemic. MBIE provided a large volume of advice to Ministers at pace, in unprecedented circumstances, and in a high-stakes and constantly changing environment where the risk to public health was high. I accept that the design and administration of MIAS was characterised by a high degree of cross-agency collaboration and ministerial involvement and direction, including frequent meetings at which Ministers were involved in policy development, as well as significant collaboration between MBIE and other agencies, particularly MOH, NZDF and DPMC. MIQ was also a substantial undertaking requiring a large workforce.
341. Nevertheless, the operation of MIAS clearly had a significant harmful impact on a number of people seeking to enter New Zealand, including the complainants who contacted me. The High Court found in the Grounded Kiwis judicial review proceedings that it operated in a way that meant New Zealanders' right to enter New Zealand could have been unjustifiably infringed in some instances. MBIE has told me it has accepted this finding.
342. As Chief Ombudsman, I have investigated the actions, omissions, decisions and recommendations MBIE made in the design and administration of MIAS and the advice it provided to Ministers. In my opinion, on the basis of the information made available to me, there were unreasonable omissions in MBIE's advice to Ministers. In particular, I find that MBIE's advice on the design and administration of MIAS failed to give sufficient emphasis to the consideration of individual circumstances and prioritisation in the following areas:
- a. the assessment of the options for change of the online aspect of MIAS, and the recommendation of the virtual lobby, which did not enable the consideration of individual circumstances and prioritisation;

- b. the offline prioritisation of spaces in MIQ, which did not encompass the situations of many people with a genuine need to travel, or make provision for New Zealanders experiencing delay in returning to New Zealand; and
 - c. the failure to fully ensure that there was an adequate way for users with disabilities to independently access the online allocation part of MIAS.
343. I accept that implementing a more individualised allocation system that considered individual circumstances and prioritised would have been difficult and costly, but in my view careful consideration of doing so was necessary given the profound impact it was having on people. I note the High Court also found the same from a human rights perspective. I recognise that Ministers were accountable for the final decisions on the system to be deployed in New Zealand. I am not investigating those decisions and am therefore unable to form an opinion on them as I have no jurisdiction to do so under the OA. However, in investigating the actions and recommendations of MBIE when providing advice to Ministers, I expect it to provide free and frank, clear and sound advice on the options and their impacts on people. In the circumstances of this case, I consider MBIE should have recommended that Ministers consider adopting an overall system (online and offline) which could have better accommodated individual circumstances. This could have helped avoid the rights breach identified by the High Court and better enabled decisions to be made not just with reason but with sympathy and honour.
344. On the basis of all the information I have considered throughout this investigation, I am of the opinion that, collectively, the omissions by MBIE to give sufficient emphasis to the consideration of individual circumstances and the need for prioritisation were unreasonable.
345. I am further of the opinion that MBIE acted unreasonably by failing to undertake an analysis under Te Tiriti when developing the online allocation part of MIAS, and by not consulting with Māori sooner on the offline aspects.
346. However, in my opinion MBIE did not act unreasonably with respect to:
- a. its efforts to increase MIQ capacity, given the limitations imposed by public health settings and workforce constraints; and
 - b. the use of available capacity in MIQ, with rooms being empty at times for unavoidable reasons.

Recommendation

347. Pursuant to section 22(3) of the OA, I recommend that MBIE address the issues I have identified in the design of any future national quarantine system. In particular, any future system needs to include careful consideration and thorough advice on the ability to properly consider individual circumstances and prioritise. While significant changes have since been made to MIQ, I consider it important, for any potential future closure of the

borders, that the method of allocation that was used in MIAS be carefully reviewed and reassessed.

348. Key decisions about the allocation system were made by Ministers. I do not have jurisdiction to investigate the actions and decisions of Ministers under the OA, and therefore I cannot recommend they make an apology. However, I have advised MBIE I will be following up with the individuals who made complaints that prompted this self-initiated investigation to identify whether they have been affected by acts, decisions, omissions or recommendations made by MBIE that may be flawed and where a personal apology from MBIE may be necessary.









Peter Boshier
Chief Ombudsman

Appendix 1. Table on the options for MIAS change

MIAS options and assessments

MANAGED ISOLATION AND QUARANTINE

The six options below were identified by internal specialists and industry experts as broad options to improve MIAS. These were then assessed against their ability to deliver both Government and traveller needs.

| | | | |
|------|---|---|---|
| 3404 |  <p>Status Quo (pre-lobby)</p> <ul style="list-style-type: none"> Maintain current approach to MIAS, with no further improvements. Better communicate timing and volume of releases and to challenge misconceptions around booking system. | <p>Government</p> <ul style="list-style-type: none"> Cost: Green Time: Green Prioritise: Red | <p>Traveller</p> <ul style="list-style-type: none"> Intuitive: Yellow Transparent: Yellow Time Neutral: Red Equitable: Red |
| |  <p>Virtual Lobby</p> <ul style="list-style-type: none"> Amend MIAS to include virtual lobby, to gather demand prior to major room releases. Users waiting at the start of the room release are then randomly distributed into queue. Operated by international online queuing provider – familiar user experience to other ticketing events. Already piloted (to improve MIAS system stability and user experience). | <p>Government</p> <ul style="list-style-type: none"> Cost: Green Time: Green Prioritise: Red | <p>Traveller</p> <ul style="list-style-type: none"> Intuitive: Green Transparent: Green Time Neutral: Yellow Equitable: Green |
| |  <p>(Weighted) Ballot</p> <ul style="list-style-type: none"> Amend MIAS to distribute vouchers (either entirely or at times of peak demand) via a random ballot rather than First Come First Serve approach. Multiple design options: when ballots run; how frequently; how travellers apply to be in one (direct application or in advance via “waitlist” approach); weighting chances to serve other policy priorities. | <p>Government</p> <ul style="list-style-type: none"> Cost: Yellow Time: Yellow Prioritise: Green | <p>Traveller</p> <ul style="list-style-type: none"> Intuitive: Green Transparent: Green Time Neutral: Green Equitable: Yellow |
| |  <p>Waitlist</p> <ul style="list-style-type: none"> Captures demand for MIQ places in advance to inform or feed in to the allocation mechanism. Design settings around whether the waitlist covers demand for rooms generally, or specific lists for specific days. Could maintain current “First Come, First Serve” approach (direct allocation from waitlist), or complement other design changes. | <p>Government</p> <ul style="list-style-type: none"> Cost: Yellow Time: Yellow Prioritise: Red | <p>Traveller</p> <ul style="list-style-type: none"> Intuitive: Green Transparent: Yellow Time Neutral: Red Equitable: Red |
| |  <p>Airline Quota</p> <ul style="list-style-type: none"> Replace MIAS with an allocation to airlines of MIQ places, which travellers then secure with their flight. Effectively introduces price as a factor in traveller’s ability to secure a voucher. Includes design questions which could mitigate problems, eg price caps and publishing schedules. | <p>Government</p> <ul style="list-style-type: none"> Cost: Green Time: Yellow Prioritise: Red | <p>Traveller</p> <ul style="list-style-type: none"> Intuitive: Green Transparent: Red Time Neutral: Red Equitable: Red |
| |  <p>Full Prioritisation</p> <ul style="list-style-type: none"> Replace MIAS with a new “points-based” system to issue vouchers on the basis of need and merit of the applicant. This would be assessed against agreed criteria. Technology could assist but would likely still require significant manual intervention and subjective assessment. | <p>Government</p> <ul style="list-style-type: none"> Cost: Red Time: Red Prioritise: Green | <p>Traveller</p> <ul style="list-style-type: none"> Intuitive: Yellow Transparent: Red Time Neutral: Green Equitable: Red |

MBE.004.0077

MIAS options and assessments diagram alternative text version

General notes: This diagram sets out six options for MIAS in ‘boxed rows’, with information about each set across the page. From left to right: stylised image (these are not described in this document); Heading followed by bulleted information (hyphen used in place of bullet); At the end of each row is the set of three criteria for ‘Government’, and four criteria for ‘Traveller’.

There is no illustrative key on the diagram. The options were assessed against each criteria through a basic traffic light system, with red circles/stop as the lowest score and green circles/go as the highest, and amber circles/slow down in the middle.

There is a logo at the top right hand corner that reads 'Managed Isolation and Quarantine'. There is a number down the left hand side of the diagram (3404) and a number at the bottom right on the diagram (MBE.004.0077).

Title: MIAS options and assessments

The six options below were identified by internal specialists and industry experts as broad options to improve MIAS. These were then assessed against their ability to deliver both Government and traveller needs.

From top to bottom [Have numbered 1 to 6 but these are not numbered on the diagram]:

1. Status Quo (pre-lobby). - Maintain current approach to MIAS, with no further improvements; - Better communication timing and volume of releases and to challenge misconceptions around booking system. [Criteria] Government: Cost = Green, Time = Green, Prioritise = Red; Traveller: Intuitive = Amber, Transparent = Amber, Time Neutral = Red, Equitable = Red.
2. Virtual Lobby. - Amend MIAS to include virtual lobby, to gather demand prior to major room releases. - Users waiting at the start of the room release are then randomly distributed into queue. - Operated by internal online queuing provider – familiar user experience to other ticketing events. - Already piloted (to improve MIAS system usability and user experience). [Criteria] Government: Cost = Green, Time = Green, Prioritise = Red; Traveller: Intuitive = Green, Transparent = Green, Time Neutral = Amber, Equitable = Green.
3. (Weighted) Ballot. - Amend MIAS to distribute vouchers (either entirely or at times of peak demand) via a random ballot rather than First Come First Serve approach. - Multiple design options: when ballots run; how frequently; how travellers apply to be in one (direct application or in advance via “waitlist” approach); weighting chances to serve other policy priorities. [Criteria] Government: Cost = Amber, Time = Amber, Prioritise = Green; Traveller: Intuitive = Green, Transparent = Green, Time Neutral = Green, Equitable = Yellow.
4. Waitlist. - Captures demand for MIQ places in advance to inform or feed in to the allocation mechanism. - Design settings around whether the waitlist covers demand for rooms generally, or specific lists for specific days. - Could maintain current “First Come, First Serve” approach (direct allocation from waitlist), or complement other design changes. [Criteria] Government: Cost = Amber, Time = Amber, Prioritise = Red; Traveller: Intuitive = Green, Transparent = Amber, Time Neutral = Red, Equitable = Red.
5. Airline Quota. - Replace MIAS with an allocation to airlines of MIQ places, which travellers then secure with their flight. - Effectively introduces price as a factor in traveller’s ability to secure a voucher. - Includes design questions which could mitigate problems, eg price caps and publishing schedules. [Criteria] Government: Cost = Green, Time = Amber, Prioritise = Red; Traveller: Intuitive = Green, Transparent = Red, Time Neutral = Red, Equitable = Red.
6. Full Prioritisation. - Replace MIAS with a new “points-based” system to issue vouchers on the basis of need and merit of the applicant. - This would be assessed against agreed criteria. Technology could assist but would likely still require significant manual intervention and

subjective assessment. [Criteria] Government: Cost = Red, Time = Red, Prioritise = Green;
Traveller: Intuitive = Amber, Transparent = Red, Time Neutral = Green, Equitable = Red.

[Description ends]

Appendix 2. Emergency allocation criteria

Category 1:¹²²

- a. New Zealand citizens or residents:¹²³
 - i. requiring access to time-critical medical treatment for the applicant or their dependant, which has been scheduled in New Zealand and is unavailable or inaccessible in their current location; or
 - ii. requiring access to time-critical medical treatment for the applicant, or their dependent, which is scheduled overseas and has been confirmed by a New Zealand medical specialist as being unavailable in New Zealand, and where timely return travel is unlikely to be possible if the person books through MIAS; or
 - iii. who are in a location or situation where there is a serious risk to their safety and their only option is to return to New Zealand, taking into account advice from the Ministry of Foreign Affairs and Trade where relevant; or
- b. where urgent travel is required to ensure a child is provided with appropriate care and protection.

Category 2:

- a. New Zealand citizens or residents who are required to provide critical care for a dependent person in New Zealand and need to travel urgently to do so; or
- b. a person whose entry to New Zealand is time-critical for the purpose of delivering a critical public or health service, such as the provision of specialist health services required to prevent serious illness, injury or death; or the maintenance of essential infrastructure whose failure would result in significant harm or disruption to a large number of New Zealanders; or
- c. New Zealand citizens or residents:¹²⁴
 - i. whose visa to remain in their current location has expired and who have received notice from a local authority of detainment or deportation if they do not depart; or

¹²² Prior to December 2020, emergency allocations were only available to New Zealand citizens and residents who had an imminent threat to their life or serious risk to their health, which required urgent travel home.

¹²³ Prior to 1 April 2021, category 1(a) was: New Zealand citizens or residents where a serious risk to health exists for the applicant or their dependent, which requires urgent travel to New Zealand. Prior to 3 September 2021, category 1(a) was: New Zealand citizens or residents where a serious risk to health or safety exists for the applicant or their dependent, which requires urgent travel to New Zealand.

¹²⁴ Prior to 22 November 2021, category 2(c) was: New Zealand citizens or residents, who are unable to legally remain in their current location and have no other option but to return to NZ.

- ii. whose visa to remain in their current location has been unexpectedly revoked or shortened due to circumstances outside of their control; or
- d. New Zealand and non-New Zealand citizens, where national security, national interest or law enforcement reasons require urgent travel to New Zealand or return travel to New Zealand is required on the completion of national security, national interest or law enforcement duties overseas;¹²⁵ or
- e. New Zealand citizens or residents:¹²⁶
 - i. who are entering New Zealand to visit a close relative¹²⁷ who is living with a terminal illness or end-stage disease (with a life expectancy of 6 months or less) or has recently suffered a life-threatening medical event,¹²⁸ where timely travel is unlikely to be possible if the person books through MIAS;¹²⁹ or
 - ii. who are living with a terminal illness or end-stage disease (with a life expectancy of six months or less) entering New Zealand to visit a close relative or to reside in New Zealand, where timely travel is unlikely to be possible if the person books through MIAS; or
 - iii. who are living with a terminal illness or end-stage disease (with a life expectancy of less than six months) who have travelled or are travelling to visit a close relative who resides overseas, where timely return travel is unlikely to be possible if the person books through MIAS; or
 - iv. who have travelled or are travelling to visit a close relative who is living with a terminal illness or end-stage disease (with a life expectancy of six months or less) or has recently suffered a life-threatening medical event, and resides overseas, where timely return travel is unlikely to be possible if the person books through MIAS,¹³⁰ or

¹²⁵ Prior to July 2021, category 2(d) was: New Zealand and non-New Zealand citizens, where urgent travel to New Zealand is required for national security, national interest or law enforcement reasons.

¹²⁶ Prior to 1 April 2021, category 2(e) was: New Zealand citizens or residents entering New Zealand to visit a close relative who is dying, where timely travel is unlikely to be possible if the person books through MIAS.

¹²⁷ A close relative was defined as a spouse or partner, parent, child, brother or sister, grandparent, grandchild, spouse's or partner's parent.

¹²⁸ This included accidents.

¹²⁹ Prior to 22 November 2021, category 2(e)(i) was: who are entering New Zealand to visit a close relative who is living with a terminal illness or end-stage disease (with a life expectancy of six months or less), where timely travel is unlikely to be possible if the person books through MIAS.

¹³⁰ Prior to 22 November 2021, category 2(e)(iv) was: who have travelled or are travelling to visit a close relative who is living with a terminal illness or end-stage disease (with a life expectancy of six months or less) and resides overseas, where timely return travel is unlikely to be possible if the person books through MIAS.

- f. citizens or residents of Pacific countries requiring access to time-critical medical treatment which has been scheduled in New Zealand that is unavailable in their own country, and accompanying clinical personnel or essential caregivers.¹³¹

Category 3:¹³² New Zealand citizens or residents who have suffered the bereavement of a close relative within seven days of the date of application and urgently need to:

- a. return to New Zealand where the close relative died in New Zealand; or
- b. travel to another country, and return to New Zealand, where the close relative died in that other country, including for the purposes of accompanying the body of the deceased to New Zealand: where timely return travel is unlikely to be possible if the person books through MIAS.

Category 4:¹³³ New Zealand citizens who have been overseas since before 3 November 2020:

- a. who have been unsuccessful in their attempts to secure a MIAS voucher through the regular release process; and
- b. whose visa to remain in their current location has expired or will expire in the next 60 days.

Category one applicants had priority over category two, and so on.

¹³¹ This subcategory was introduced on 1 April 2021. Prior to July 2021, it was: citizens or residents of Pacific countries requiring access to time-critical medical treatment in New Zealand under an official medical treatment scheme that is unavailable in their own country, and accompanying clinical personnel or essential caregivers.

¹³² This category was added on 3 September 2021.

¹³³ This category was added on 22 November 2021.

Appendix 3. Time-sensitive travel allocation criteria

1. The individual's entry or return to New Zealand is required to enable work that is essential for:
 - a. the continued operation or construction of critical infrastructure or lifeline utilities, which are of regional or national significance, in New Zealand or specified Pacific Islands;¹³⁴ or
 - b. the continued operation of supply chains of regional or national significance for New Zealand or specified Pacific Islands; or
 - c. a critical health and disability service that is not, or soon will not be, practicably accessible for a local community or region in New Zealand or specified Pacific Islands; or
 - d. New Zealand's national security, obligations under international law or international relations, including on the completion of national security, national interest or law enforcement duties overseas;¹³⁵ or
 - e. preventing lasting damage to New Zealand's substantial economic interests;¹³⁶
 - f. preventing significant disruption to government-funded, or partially government-funded, research programmes;¹³⁷ and
2. there will be significant consequences, whether human, social, environmental, economic or for New Zealand's international relations, unless the individual is guaranteed entry or return to New Zealand within the next allocation window; and
3. no reasonable alternative is available to enable the work to take place.¹³⁸

¹³⁴ The Cook Islands, Niue, Tokelau, Samoa and Tonga.

¹³⁵ Prior to September 2021, category 1(d) was: New Zealand's national security, obligations under international law or international relations.

¹³⁶ This category was added in September 2021.

¹³⁷ This category was added in September 2021.

¹³⁸ Prior to September 2021, criteria 3 was: no reasonable alternative is available.

Appendix 4. Group allocation criteria

To be eligible, the group must:

- a. have a sponsoring Government agency;
- b. need more than 20 rooms;
- c. have a time-sensitive entry or the reason they need to leave New Zealand must be time-sensitive and they need certainty of return before departing;
- d. need to enter as a single unit or there is no reasonable alternative pathway for them; and
- e. be a Government priority.

To be considered a Government priority, groups must meet one of the following criteria:

- a. National interest:
 - i. The returnees are usually based in New Zealand and are returning from representing New Zealand at an international event or activity of national interest; or
 - ii. The persons who are visiting New Zealand are essential to holding an event or activity considered to be in the national interest.
- b. Economic impact:
 - i. The group is travelling to support delivery of a major investment (>\$100m) and/or a priority in the Government Major Events portfolio; or
 - ii. The purpose for which the group is travelling is expected to generate significant economic or employment activity.
- c. National security or obligations under international law or international relations:
 - i. The purpose for which the group is travelling is considered essential for New Zealand's national security or New Zealand has obligations under international law or international relations.

Appendix 5. Class exceptions and group allocations

On 14 September 2020, at its first meeting, the BEMG agreed in principle to class exceptions for up to 30 large animal and livestock veterinarians, up to 210 agricultural and horticultural mobile plant operators (rural contractors), and up to 570 deep-sea fishing crew. These were subsequently agreed by Cabinet on 21 September 2020, with only the deep-sea fishing crew requiring a group allocation in MIQ. Defence programmes were also added to the lists.

On 30 September 2020, the BEMG agreed in principle to class exceptions for up to 250 returning PhD and post-graduate international students and their families, and up to 100 essential travellers transiting New Zealand to and from the Pacific. These were subsequently agreed by Ministers with Power to Act. These groups did not receive a group allocation in MIQ.

On 16 November 2020, Cabinet confirmed the BEMG's decision to approve class exceptions for 2,000 RSE workers and up to 60 shearers. Both groups required a group allocation in MIQ.

On 9 December 2020, the BEMG agreed to add up to 20 Kāinga Ora build and urban development programme workers to the lists, and to amend immigration instructions for up to 200 cargo crew servicing the Pacific to enter MIQ. It also agreed in principle to approve a class exception for up to 1,000 international students and their families. Cabinet agreed to this on 16 December 2020. None of these groups required a group allocation in MIQ.

The table below sets out the group allocations in MIQ (prior to February 2021, there were also other group allocations on an ad hoc basis, such as sports teams):

| Group | Sponsoring agency | Number of people approved | Number of rooms used | Arrival date |
|---|--|---------------------------|----------------------|-----------------------------|
| US Antarctica Programme | Ministry of Foreign Affairs and Trade (MFAT) | 850 | 820 (850 people) | August 2020 – February 2021 |
| RSE workers | Ministry for Primary Industries (MPI) | 2,026 | 1,014 (2,012 people) | January – March 2021 |
| Summer of Cricket: Australia and Bangladesh | Sport NZ | 72 | 64 | February 2021 |
| Australia Diamonds | Sport NZ | 30 | 26 | February 2021 |
| Refugee Programme | MBIE (Refugee Quota Programme) | 70 every 8 weeks | 167 (310 people) | February – June 2021 |
| Southern Stars | Sport NZ | 29 | 28 | March 2021 |
| Olympics pre-travel | Sport NZ | 157 | 63 | March – July 2021 |

| Group | Sponsoring agency | Number of people approved | Number of rooms used | Arrival date |
|---|---------------------------------------|---------------------------|----------------------|---------------------------|
| Rocket Lab | MBIE (Labour, Science and Enterprise) | 14 | 1 | May 2021 |
| Fijian Rugby team | Sport NZ | 60 | 29 | June 2021 |
| Black Caps | Sport NZ | 26 | 26 | June 2021 |
| Refugee Programme | MBIE (Refugee Quota Programme) | 100 every 6 weeks | 149 (343 people) | June – December 2021 |
| NZDF programme of arrivals | NZDF | 387 | 212 (213 people) | June – December 2021 |
| International students | Ministry of Education | 400 | 46 (49 people) | June 2021 onwards |
| RSE workers | MPI | 150 every 16 days | 464 (598 people) | July – November 2021 |
| US, Korean and European Antarctica Programmes | MFAT | 1,516 | 1,179 (1,194 people) | July 2021 – February 2022 |
| English Roses | Sport NZ | 30 | 22 | August 2021 |
| Olympics post-travel | Sport NZ | 600 | 422 (430 people) | August 2021 |
| Construction Sector Accord | MBIE (Accord Transformation Unit) | 60 rooms per month | 137 (185 people) | August – December 2021 |
| Paralympics | Sport NZ | 100 | 2 | September 2021 |
| White Ferns | Sport NZ | 30 | 22 (24 people) | September 2021 |
| Mariners | MPI | 450 | 235 | September – December 2021 |
| Black Caps | Sport NZ | 77 | 73 (75 people) | September – December 2021 |
| Crankworx | MBIE (Major Events) | 70 | 40 (47 people) | October 2021 |
| Dubai Expo | MFAT | 401 | 94 (114 people) | October – November 2021 |
| Ministerial allocation | | 20 rooms per month | 8 | October – November 2021 |
| All Blacks | Sport NZ | 65 | 62 | November 2021 |
| Black Ferns | Sport NZ | 65 | 56 (59 people) | November 2021 |

| Group | Sponsoring agency | Number of people approved | Number of rooms used | Arrival date |
|---------------------------------|---|---------------------------|----------------------|------------------------------------|
| Exporters | NZ Trade and Enterprise | 25 rooms per month | 41 (45 people) | November – December 2021 |
| Summer of Cricket: Bangladesh | Sport NZ | 35 | 31 | December 2021 |
| Sport and Culture | Ministry of Culture and Heritage and Sport NZ | 40 | 11 (12 people) | December 2021 |
| English Women's Cricket | Sport NZ | 28 | 28 | January 2022 |
| Silver Ferns | Sport NZ | 24 | | January 2022 (intended) |
| Women's Cricket World Cup | MBIE – Major Events | 181 | | January – February 2022 (intended) |
| Summer of Cricket: South Africa | Sport NZ | 35 | | February 2022 (intended) |
| Winter Olympics | Sport NZ | 53 | | February 2022 (intended) |
| Australian Women's Cricket | Sport NZ | 29 | 28 | March 2022 |
| Summer of Cricket: Netherlands | Sport NZ | 35 | | March 2022 (intended) |
| Winter Paralympics | Sport NZ | 11 | | March 2022 (intended) |

The Toyota Motor Racing Series withdrew its application for rooms in February 2021, and its application for rooms in December 2021 – January 2022 was declined. The Rugby Championship withdrew its request for rooms in October 2021. SailGP's request for rooms in January 2022 was declined.