



Parliamentary Commissioner for the Environment

Te Kaitiaki Taiao a Te Whare Pāremata

Submission on proposed amendments to the Biosecurity Act 1993

To the Ministry for Primary Industries

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Submitter details

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Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner has broad powers to investigate environmental concerns and is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

Key points

- This is an opportunity to consider the overall design of the statute, to simplify components and improve coherence. In particular, the terminology used across the 'layers' of the Act, effective purpose statements, and the scope of national policy direction need further consideration than is currently proposed in the consultation documents.
- I recommend that a first principles review of the terminology used throughout the Act is undertaken, to ensure consistency across the entire biosecurity system and to understand how the current terms fit together.
- I support the addition of a succinct purpose clause for the Act. I have proposed one that is more focused than what has been proposed in the consultation document.
- I strongly support Proposal 52, to enable multiple National Policy Directions for Pest Management to be made. National direction would provide utility for other aspects of the Act, and I have suggested that this is expanded to include Part 4 matters.
- Improving leadership is critical to the effective management of pests. I suggest that the Act is amended to give effect to the recommendations from my 2021 report: *Space Invaders: A review of how New Zealand manages weeds that threaten native ecosystems* regarding the leadership responsibilities for conservation and biosecurity.
- For clear decision making and accountability, it is preferable for decisions to be taken by one Minister. Ensuring those decisions are informed by the necessary information can be achieved by consultation or advice requirements. As a minimum, conservation expertise should be provided to the Minister for Biosecurity, where biosecurity decisions involve biodiversity risk.
- Everybody contributes to the prevention and management of biosecurity risks. I support the addition of a general duty to the Act, similar to section 17 of the Resource Management Act.
- The long-term management of pests already present in New Zealand will benefit from improvement. I largely support the proposals that aim to achieve this, including 44-51, 53, 54 and 56.

Introduction

Thank you for the opportunity to provide feedback on proposed amendments to the Biosecurity Act 1993. It is encouraging to finally see some gathering momentum from a review that started over five years ago.

While the purpose of the proposed changes is to improve the Act, some of them may perpetuate the Act's complexity. For that reason, the opportunity should be taken to consider the overall legislative design of the statute with a view to simplifying components and improving coherence, particularly with regard to terminology, purpose statements, and national policy direction.

In particular, I would encourage a review of the terminology used throughout the Act. Terms used in the Act to distinguish between the status of organisms should be able to be arranged into a hierarchy that clearly shows how each term relates to others within the architecture of the Act, from pre-border risk assessments, through to ongoing surveillance and management in New Zealand.

I also offer my views on several proposals made in the discussion documents. I have gathered these together under the following themes:

- Long-term management of pests that are already in New Zealand
- Border and imports
- The interface with Department of Conservation-administered legislation
- Offences and infringements

My submission does not pretend to be comprehensive and does not address industry-focused proposals (proposals that relate to funding, compensation, and the Government Industry Agreement) and some of the border-related proposals.

Legislative design

Purpose of the Act

My 2021 *Space Invaders* report observed: “Surprisingly given its complexity, the Biosecurity Act lacks an overall purpose clause. However, as with any statute, a clear articulation of the purpose is important because the purpose statement is used to interpret the Act, and all powers and functions that exist under the Act must be exercised in accordance with their statutory purpose.”¹

The discussion document (Proposal 1) contains a long list of statements that an overarching purpose clause *could* include, but this approach will result in a clause that reads more like a contents page rather than a statement of purpose. A well-crafted purpose clause reflects the underlying reason for the contents of an Act.

The discussion document discusses the challenges of retrofitting a purpose clause to existing legislation. However, where an overall objective of the legislation can be discerned, the benefits of expressly stating this as a purpose clause outweighs these challenges.

To summarise the function of biosecurity, as set out in the overview discussion document, the Biosecurity Act is protective legislation which empowers the exclusion, eradication or management of biosecurity threats which pose risks to New Zealand’s economy, environment and cultural and recreational values. The biosecurity system responds to risks that emanate from offshore and may arrive at the border, as well as those that have been introduced or exist in New Zealand already. To that end, the overall aim of the Act is to protect New Zealand from, and respond to, biosecurity risk.

This clearly describes the overall objective of the Act, and its purpose.

I support the inclusion of a focused purpose clause, which clearly and succinctly describes the reason for the Act’s existence. Drawing from the functions of biosecurity, I suggest the following simple statement as a purpose clause:

The purpose of this Act is to protect from, and respond to, biosecurity risks to New Zealand’s economy and environment, and its cultural and recreational values.

Purpose of the Parts

Proposal 2 seeks to amend or include purpose clauses for various parts of the Act. I do not support the proposed amendments to the purposes of Parts 3 (Importation of risk goods) and 4 (Surveillance and prevention), but I have suggested an alternative for dealing with how information is considered

¹ PCE 2021, *Space Invaders: A review of how New Zealand manages weeds that threaten native ecosystems*, p.118.

in decision making. I also offer comment on how policy directions can usefully expand on the purpose of Part 5 (Pest management).

I agree with the consultation document that adding purpose clauses to many other parts of the Act is likely to have minimal benefit given that the substantive provisions of these Parts are straightforward and clear about how they should be interpreted.

Part 3 (Importation of risk goods)

As I have already discussed, a purpose clause should state the overall objective of the Part, which the current purpose provision for Part 3 does adequately. The proposed addition, regarding evidence to be considered in decision making, is a matter that would be better suited to a clause which sets out information principles to be applied across the Act.

It is not unusual for legislation to contain overarching clauses for how information is to be treated. See, for example, section 10 of the Fisheries Act 1996. Such a clause would remove the need for text to be added to various purpose clauses for different parts of the Act, as currently proposed. This approach also addresses the intent of Proposal 4 and may provide an opportunity to ensure consistency with other provisions in the Act relating to consultation, and consideration of any consultation material (Part 5 Pest management).

In my view, adding a reference to operational efficiency is inappropriate for primary legislation. It is an operational matter that would be better suited to an instrument which sets out requirements or guidelines for the conduct of biosecurity risk management operations.

Part 4 (Surveillance and prevention)

The proposed amendment to the purpose of Part 4 seeks to broaden the reference to pests and unwanted organisms to enable monitoring and surveillance of all organisms (including endemic diseases). It is important to note that a purpose clause does not create operative empowering provisions but states an overall objective that can be used to assist the interpretation of that part. If broadening monitoring and surveillance to all organisms is necessary, and not otherwise empowered by the Act, provisions other than the purpose may require amendment to ensure that the policy intent of this proposal is given effect to. I also note that whether the purpose of Part 4 (and any other parts) needs amending depends also on whether the definitions of 'pests' and 'unwanted organisms' are changed or not. I address terminology later in this submission.

I support the ability to use multiple sources of evidence (including matauranga Māori, local knowledge, and observations) as part of ongoing surveillance and monitoring. However, as explained above, an overarching information principles clause would be better suited to covering evidence to be considered in decision making, and a change to the purpose of Part 4 is unnecessary.

Part 5 (Pest management)

The discussion document states that the purpose clause of Part 5 is sufficiently clear for the effective operation of that Part.

However, as I noted in my *Space Invaders* report,

“The stated purpose of Part 5 – the eradication or effective management of harmful organisms – is premised on avoiding harm to a wide range of outcomes, including the environment and enjoyment of the natural environment. Importantly, however, the purpose clause provides no direction on how these outcomes, which can often be in conflict, are

prioritised... Significantly, the stated purpose focuses as much on instruments and measures – in other words, delivery – as it does on the goals.”²

This lack of direction can pose problems especially when the outcomes are in conflict. While the purpose clause might be one place to spell out the prioritisation, including it in the (revised) national policy directions for pest management may be more appropriate. (see the response to proposal 52, below). In short, the current purpose clause is sufficient provided that the need for prioritisation is addressed elsewhere.

Framework

Proposal 52: National Policy Directions

I strongly support proposal 52, to enable multiple National Policy Directions for Pest Management to be made. This addresses the problem identified in my 2021 *Space Invaders* report, that section 56(1) of the Act currently requires that only a single direction is to be prepared. This means it has to cover everything, making its preparation both exhaustive and exhausting. However, the management of four-legged animals is different from the management of plants or invisible pathogens. Amending the Act to enable a plurality of national policy directions to be developed to address discrete classes of pests, such as insects, plants, mammals and pathogens, that all present diverse challenges and need to be managed differently should enable more targeted and effective direction. The current provision encourages the use of vague generalities to cover all the bases in one document.

In addition to enabling multiple national policy directions, section 56 should be amended to specify minimum content for a national policy direction. As identified in my report, while section 56 includes examples of the matters on which direction may be given, there is no legislated minimum content for a national policy direction – for example, there is no requirement to include priority pests that need to be nationally managed.³ The current national policy direction, prepared in 2015, failed to set national priorities for pest management and require national coordination. For this reason, it ended up as an instrument directed at managing resources within a procedural framework.

Section 56 should be amended to spell out minimum content, including priority pests.

More broadly, Ministers need to be able to make national policy directions on matters that are broader than pest management, such as surveillance and prevention (see Part 4) as this is key to enabling preparedness and the proactive management of pests. The power to make national directions should be extended to Part 4 matters.

Effective national leadership

As recommended in my *Space Invaders* report, New Zealand needs more effective leadership when it comes to managing pests that are already here.

This is why I recommended that the Minister for Biosecurity and the Minister of Conservation should provide clearer direction; and the Director-General of the Ministry for Primary Industries (Biosecurity New Zealand) and the Director-General of the Department of Conservation should jointly provide leadership for managing native ecosystem weeds that are already present in New Zealand.

After examining New Zealand’s weeds management system, I observed that the leadership for managing weeds harming native ecosystems is fragmented. The Department of Conservation (DOC) has a leadership role in protecting biodiversity but does not have a leadership role in biosecurity. Sixteen regional councils provide leadership in their regions. While the Biosecurity Act states that

² PCE 2021, *Space Invaders: A review of how New Zealand manages weeds that threaten native ecosystems*, p.118.

³ PCE 2021, *Space Invaders: A review of how New Zealand manages weeds that threaten native ecosystems*, p.124.

the Director-General of the Ministry for Primary Industries (MPI) provides “overall leadership in activities that prevent, reduce, or eliminate adverse effects from harmful organisms that are present in New Zealand”, there is little visibility of this leadership being exercised with respect to the management of native ecosystem weeds.

While MPI responds to plant incursions that are new to New Zealand, when it comes to plants that are already present in the country, the ministry largely leaves their management to others, including DOC, regional councils and landowners and provides only limited oversight.

While these observations and recommendations were made in the context of New Zealand’s weeds management system, the need for more effective national leadership extends beyond weeds to all pests that are already present.

Specifically, section 12A of the Act says that the Director-General provides overall leadership in activities that prevent, reduce, or eliminate adverse effects from harmful organisms that are present in New Zealand by:

- promoting alignment of pest management within the whole biosecurity system,
- overseeing New Zealand’s systems for pest management and measuring overall system performance,
- facilitating the development and alignment of national pest management plans and national pathway management plans,
- promoting public support for pest management, and
- facilitating communication, co-operation, and co-ordination among those involved in pest management to enhance effectiveness, efficiency, and equity of programmes.

I support Proposal 53 as this will contribute to increased national leadership, particularly section 12A(2)(c). However, by itself it does not address other aspects of section 12A and is unlikely to fill the gap in system leadership.

Without more effective leadership, the oversight of New Zealand’s systems for pest management and the measurement of overall system performance (s12A(2)(b)) will likely remain suboptimal. As revealed in the *Space Invaders* report, MPI currently lacks a comprehensive and up-to-date picture of exactly how all exotic plant and animal pests are being managed around the country. From 2007 to 2018, MPI maintained a website called Biosecurity Performance, where the public could find which exotic plants and animals were managed, across all the regional pest management strategies. This database was decommissioned several years ago due to an outdated IT platform. More recent internal efforts to aggregate this information have not progressed beyond the pilot stage.

MPI has also been unsuccessful in developing an outcome-based performance measurement framework for the pest management system, covering both plant and animal pests, despite efforts in the early 2010s. With a few exceptions, it remains difficult to say whether costly efforts to manage exotic plants around the country are having an effect. More broadly, an opportunity to learn from our actions, or lack thereof, is being lost.

I understand options to clarify and better resource MPI’s national leadership and oversight (the section 12A functions) by expanding MPI’s powers and functions for nationally significant pests and pathways were considered, but these proposals have not been included in the current consultation. That is disappointing. Effective pest management requires coordination across regions and MPI is best placed to do that. If the failure to include these proposals stems from concern about their resource implications, it is in my view a false economy as it could lead to even bigger costs being imposed on ratepayers and landowners in the future.

Beyond that, biosecurity affects biodiversity as biosecurity incursions pose a biodiversity risk. While it would be nice to imagine that the Minister of Biosecurity could manage biosecurity risks to

biodiversity equally with risks to primary production and the economy, my observation is that the lion's share of the attention goes to economic risks. To rebalance that, biodiversity and conservation expertise need to be an active part of biosecurity decision making, with the provision of advice from the Minister of Conservation informing any decisions of the Minister for Biosecurity. To ensure risks to biodiversity are not 'out of sight, out of mind', the role of conservation expertise should be explicitly incorporated into the Act. I make some suggestion to that effect later in this submission.

Consolidate amendments

Part 8A was inserted by the Biosecurity Law Reform Act 2012, to extend the application of the Act in the marine environment in a manner that is consistent with the United Nations Convention on the Law of the Sea. Officials might consider how the content of this can now be incorporated throughout the scheme of the Act, rather than remaining as a standalone Part.

Terminology and definitions

Perhaps one of the most confusing aspects of the Biosecurity Act is the multitude of terms used without any readily apparent logic or hierarchy. The review of the Act should be an opportunity to bring coherence to the terms used. Unfortunately, the proposals to alter definitions seem *ad hoc* rather than an attempt to develop a clear and logical structure to the terminology.

The Biosecurity Act is an umbrella Act designed to provide the statutory basis for a single overarching biosecurity system. It functions to manage organisms that pose a biological risk whether they are offshore, arriving at the border, or already present within New Zealand, regardless of the type of organism they are. While these 'layers of biosecurity' (i.e. offshore, at the border and within the country) are linked, they are dealt with separately under the Act. Clarity in the terminology applied to each layer is necessary to avoid confusion as organisms transition from one layer to another. Prior to progressing any amendments to the Act, I recommend that a first principles review of the terminology used throughout the Act is undertaken, to ensure consistency across the entire biosecurity system and to understand how the current terms fit together.

By way of example, an organism that has arrived in New Zealand can be categorised in multiple ways. It can be –

- 'unwanted' (if a chief technical officer believes it is capable or potentially capable of causing unwanted harm);
- 'notifiable' (if it has been declared to be so by the Governor-General);
- a 'pest' (if it is specified as a pest in a pest management plan);
- a 'pest agent' (if it is an organism capable of helping the pest replicate, or spread, or survive; or interfering with the management of the pest).

In addition, the Act (Part 5) also uses the term 'harmful organism', though this is undefined.

There is no apparent relationship between these designations, or logic to how they ensure the effective management of the associated biosecurity risk. The terms should be able to be assembled into a hierarchy that clearly shows how each term relates to the others and how they flow through the architecture of the Act from pre-border risk assessments, through to ongoing surveillance and management in New Zealand. That exercise may highlight issues with the proposals for definitions and address the current inconsistency in their application.

To illustrate this, take the case of Manchurian wild rice (*Zizania latifolia*). This is a 'pest' under a progressive containment management programme in Northland and has been declared 'unwanted'. But common reed (*Phragmites australis*), despite being listed as an exclusion 'pest' in the Horizons, Northland and Tasman-Nelson regional pest management plans, and an eradication 'pest' in Canterbury and Hawke's Bay, has not been declared 'unwanted'.

The discussion document contains three proposals (touched on below) that suggest changes to terminology. In addition, question 100 asks if there are any other terms in the Biosecurity Act that are problematic. Given the illustration above, the many terms create confusion, and it is not clear how they apply when organisms transition across biosecurity layers. Simplifying and reducing the number of terms would help.

With this in mind, I comment below on the three proposals in the discussion document which suggest changes to terminology and illustrate the value of a holistic review of terminology rather than fiddling further with the current menu.

Proposal 60: Improve the management of ‘notifiable organisms’

The first part of this proposal requires supporting analysis that has not been provided in the discussion document. There may be good reasons for retaining the concept of ‘notifiable organisms’ but they need to be spelt out. Setting out this analysis is necessary to provide clarity about the intended relationship between the designations, and the criteria for determining that an organism is ‘notifiable’.

I support the second part of the proposal which would improve operational efficiency. It would result in the process for the designation of ‘notifiable organisms’ being aligned with the designation of ‘unwanted organisms’, with both designations being determined by chief technical officers.

Proposal 61: ‘Unwanted Organism’ and ‘Controlled Organism’

The rationale for this proposal is not entirely clear, as the discussion document simply states: “The proposed name change is to avoid confusion where an organism may not be formally designated as ‘unwanted’, but where local communities feel strongly that they do not want it to remain in their community.”⁴

It is unclear what renaming this category of organisms seeks to achieve and whether the powers associated with the current designation of an organism being ‘unwanted’ will instead be applied to one that is ‘controlled’, or if the intention is to create yet another category of organisms which requires a different response (and corresponding powers to manage them).

Regardless of whether this is a name change, or the addition of a substantive category, it should be properly considered as part of the first principles overall review that I have recommended.

Proposal 62: Definitions related to ‘unauthorised goods’

The discussion document states that the definition of ‘unauthorised goods’ in the Biosecurity Act does not include the New Zealand-born progeny (i.e. descendants) of those unauthorised goods. Again, this would benefit from a rationalisation of all terms that are defined in the Act which relate to organisms and goods, how they interact, and how they are managed across the legislative framework. That exercise would provide an opportunity for thorough consideration of how the proposed changes would relate, or impact on, the application of ‘unwanted organisms’.

Role of the Minister

Proposal 3: Ministerial involvement in significant decisions

I understand that as part of the Ministry’s contingency planning and preparedness, the review of the Act has provided an opportunity to consider what powers may be necessary in response to a serious biosecurity event e.g. the arrival and outbreak of foot-and-mouth disease. Efficient and informed

⁴ MPI 2024, Biosecurity Act 1993 Proposed amendments: Discussion Document 6 – Long-term management, p.29.

decision making, and the level at which this occurs, will be a critical element of an effective response.

Ministers may be best placed to take decisions involving matters with national, or significant, implications. Including a power to refer or call-in specified biosecurity decisions, ordinarily made by chief technical officers, would ensure that impacts are assessed and determined by a decision maker who is best placed to accept the consequent risks. However, elevating decisions to ministerial level risks introducing political judgments to what would ordinarily be a technical decision. For that reason, it is important that the scope of any call-in power is limited by clear criteria.

As it is currently proposed, call-in powers would only apply to sections 114A and 131(2) of the Act. I support giving the Minister the power to take these decisions, triggered by a referral to the Minister by a chief technical officer, as it is reasonably foreseeable that the aerial application of substances, or the imposition of controlled areas, may have consequences beyond just the management of technical biosecurity risks, e.g. economic loss, reduced public access to life-line services, environmental harm, or concerns about public health. The referral of decisions is not a new statutory feature. Provisions already exist in section 105A of the Act, and section 142 of the Resource Management Act, which provide an analogous power. These sections provide useful examples of the sort of criteria that can be used to prescribe the circumstances which provide the basis for ministerial intervention. The discussion document sets out a substantial list of matters that could be applied as the criteria which are comparable to other legislative examples. It is unclear what the intended difference is between “likely to have significant risk” and “likely to pose significant risk”. I suggest amending the language of the decision-making criteria to, if the decision is likely to:

- have significant environmental, national security, economic, social or cultural effects.
- involve increased risk to, or complexity for, the liability of the Crown.
- involve issues that may seriously affect the Crown’s reputation.

Vesting decisions with a single minister (in this case the Minister for Biosecurity, proposal 3A) is sensible as this creates clear lines of decision making and accountability. From the wording of the proposals, it is unclear how likely it would be that a Minister for Biosecurity would use their call-in powers if a biosecurity incursion posed a biodiversity risk. Managing risk to biodiversity should include conservation expertise. This could be achieved by adding a requirement:

- to consult with the Minister for Conservation, or
- that advice on the biodiversity risk is provided by the Director-General of Conservation.

Officials might consider whether other Ministers should be consulted, or other advice sought, in addition to conservation.

I don’t support the alternative proposal 3B. It is likely to lead to fragmented decision making. Further, as the discussion document notes, this could significantly increase the complexity of the biosecurity system.

Proposal 39: Faster emergency declarations

This proposal aims to change the decision maker in a biosecurity emergency from the Governor-General to the Minister for Biosecurity.

The proposal seems sensible. It matches the process used in Part 4 of the Civil Defence and Emergency Management Act 2022 to declare a state of national emergency.

More broadly, while the discussion document presents this proposal in the context of readiness for the arrival of foot and mouth disease, the negative consequences of biosecurity incursions are not limited to economic risks. Incursions of harmful organisms also pose threats to New Zealand’s

unique biodiversity. With that in mind, I encourage improved readiness to respond to various incursions.

To ensure appropriate consideration of conservation expertise, I again suggest (as I did for proposal 3) adding a requirement:

- to consult with the Minister for Conservation, or
- that advice on the biodiversity risk is provided by the Director-General of Conservation.

This requirement could be modelled on the COVID-19 Public Health Response Act 2020, where the Minister of Health/COVID-19 Response could not make a decision unless they had received advice from the Director-General of Health. This model could work well here, where rapid decisions need to be made.

Proposal 58: Clarify in the Biosecurity Act how ‘unwanted organism’ status can be removed

This proposal raises a range of risks, and I do not support it. The subjective opinion of a chief technical officer that ‘unwanted organism’ status should be lifted without any further guidance is unacceptable. It would permit the removal of ‘unwanted organism’ status for any reason including, perhaps, an unwillingness to find any funding to address it.

I acknowledge that there will be a point where reviewing the designation of an organism as ‘unwanted’ will be sensible. But there needs to be a robust process for removing the designation, and it needs to be one that is accessible to a variety of participants in the biosecurity system. The initiation of a review should engage a wider audience than chief technical officers.

I suggest that anyone should be able to apply for status removal, but their application must be accompanied by information which establishes that the harm associated with the organism is no longer considered sufficient to maintain ‘unwanted organism’ status and outline the implications of its removal. At the very least there should be a transparent cost-benefit analysis to support the removal.

Applications could be assessed by chief technical officers. I suggest that if a chief technical officer determines that the ‘unwanted’ status should **not** be removed from the organism, the application would be declined. If they assess that it should be removed, their advice and recommendation should then be referred to the Minister for Biosecurity for decision. It is appropriate for the Minister to determine whether organisms are no longer designated as ‘unwanted’ as they have the political accountability to assess and accept any consequent biosecurity risk to New Zealand.

Proposal 59: Include a new transitional provision for all ‘unwanted organisms’ to expire after five years

While an automatic removal of the ‘unwanted organism’ designation after five years may quickly reduce the number of ‘unwanted organisms’ on the register, this could leave New Zealand in a worse position from the perspective of having the tools to manage declassified organisms. There is a high chance that some of the declassified organisms will still pose a risk, perhaps a significant one, to either New Zealand’s economy or environment. The intent to increase the register’s effectiveness and use is understandable, but the solution should not resort to the opposite extreme of simply removing the organisms from the register.

I strongly oppose this proposal in its current form. As an alternative, I have suggested amendments to proposal 58 that would provide a more robust process for removing ‘unwanted organism’ status.

General duties

Proposals 40-41: Biosecurity practices

I support proposal 40, which aims to add a general biosecurity duty in the Biosecurity Act. This emphasises that everybody has a part to play in preventing and managing biosecurity risks. The rationale for proposal 41 also relies on this concept, and I also support this proposal.

A general biosecurity duty can draw inspiration from section 17 of the RMA, which provides that every person has a duty to avoid, remedy, or mitigate adverse effects on the environment.

Long-term pest management

Proposal 44: Simplify the process to create national or regional pest and pathway management plans

I support this proposal as a simplified process should reduce the time and costs associated with developing national or regional pest and pathway management plans. While preparing the *Space Invaders* report, my team heard concerns that plans are time and resource intensive for councils to prepare. The fact that only six national management plans – five national pest management plans and one national pathway management plan – have been developed to date is perhaps a good indicator of the need for change.

The 2012 amendments to the Act, which introduced national or regional pest and pathway management plans, were intended to streamline various plans including their preparation. However, the Biosecurity Act contains no fewer than 39 sections which specify the process and requirements for national and regional pest and pathway management plans.⁵ Pruning these where appropriate, particularly those that relate to the initiation of a proposal and the number of requirements that the Minister or council needs to be satisfied of during the plan preparation process, is sensible. There also may be merit in considering whether various sections can be merged to outline the process that is applicable to both national and regional plans.

Proposal 45: Enable (but not require) integrated pest and pathway management plans

The Act contains 11 sections outlining the process and requirements for preparing regional pest management plans; and a further 11 sections outlining the process and requirements for preparing regional pathway management plans. These sections make the plan preparation process and plan contents unduly rigid.

I understand that only the Northland Regional Council has prepared Regional Pest and Marine Pathway Management Plan, which addresses both pests and marine pathways to be managed in the region. Environment Southland has a regional pest management plan for the region and a separate Fiordland Marine Regional Pathway Management Plan for Fiordland. The remaining regional councils have only prepared regional pest management plans. At the national level, as mentioned above, the six existing national pest and pathway management plans address either pests or pathways in separate documents.

Enabling integrated pest and pathway management plans to be prepared should result in a more comprehensive overview of biosecurity needs. Having a combined plan should also reduce the administrative and operational costs associated with having separate pest and pathway management plans. I support this proposal.

⁵ See sections 59 to 98 of the Biosecurity Act 1993.

Proposal 46: Enable (but not require) the ability to have consolidated levies for national pest and pathway management plans

The ability to have consolidated levies for national pest and pathway management plans should reflect the integrated pest and pathway management plans proposed earlier. This combination of proposals is sensible, and I support this.

Proposal 47: Make it easier for regional councils to create small-scale management programmes

I support this proposal in principle, as it will provide councils with more flexible tools to deal with new incursions.

However, small-scale management programmes as a tool under the Act can only be used by regional councils. Given that pests don't recognise boundaries, other land managers (including DOC, Land Information New Zealand, the Defence Force and iwi) are likely to benefit from being able to set up (and be part of) small-scale programmes. However, as currently worded, the proposal does not extend to other land managers.

Allowing small-scale management programmes to be applied to any organisms (rather than the ones that have already been declared 'unwanted organisms') is a positive change. However, at the conclusion of a programme the organism needs to be assessed to determine if it requires designation (e.g. as 'unwanted', or a 'pest') to access any necessary powers for it to continue to be managed appropriately. It is important to ensure that a management gap is not created, particularly in situations where an organism has evaded management and remains present at the expiry of a small-scale programme.

Finally, the cap of \$1 million for the life of the programme might not be sufficiently high. While increasing the duration by two years and doubling the cap might seem generous (with the annual cap increasing from \$167,000 to \$200,000), costs have inflated a lot since the original cap was set at \$500,000 via an amendment order in 2009.⁶ Regional councils will be better placed to indicate how far \$1 million would go when dealing with incursions.

Proposal 48: Enable management agencies to provide exemptions from rules in national pest or pathway management plans

Currently, the Act only allows the Minister to exempt a person from a rule. The rationale for this is that the entity that is authorised to create a rule (in case of national management plans, the Minister), should be the same entity that authorises any departure from it. However, it may be more practical to enable management agencies, who are responsible for their respective national management plans, to be able to provide exemptions from certain rules.

I can see the practicalities of this proposal, provided existing criteria for granting exemptions (in sections 67(2) and 87(4) are retained. On that basis, I support this proposal.

Proposal 49: Enable more than one legal entity to share management agency responsibilities

I support this proposal in principle. Enabling more than one legal entity to share management agency responsibilities is a practical change, provided there is coordination and an adequate disputes mechanism. While the consultation document mentions the need to amend the Act to include a provision for a dispute resolution mechanism, it is silent on the need for adequate

⁶ The Reserve Bank's inflation calculator estimates that what would have cost \$1 in 2009 costs \$1.43 in 2024, i.e. 43.3% change in 15 years. <https://www.rbnz.govt.nz/monetary-policy/about-monetary-policy/inflation-calculator>

coordination. This can be achieved through having a single coordinating agency to ensure there is no leadership vacuum with fragmented and entangled accountability and decision making.

Proposal 50: Enable management agencies and regional councils the function of issuing permits for pests in national and regional pest and pathway management plans

Shifting this function from chief technical officers to management agencies and regional councils empowers those agencies to make decisions, improves accountability for their respective plans, and increases administrative efficiency.

I support this proposal, but it will only work if there are clear criteria for management agencies and regional councils to make the decision with an appropriate risk lens. Chief technical officers who are currently assessing and granting permissions would presumably have the best expertise in that regard, and their advice should be sought to develop the criteria. I suggest that one criterion should be that the exemption must be consistent with higher-order plans or restrictions, to ensure that regional councils do not circumvent national control.

Proposal 51: Enable regional councils to remove exemptions from a regional pest or pathway management plan rule before the end of the original time frame

I support the proposal. If a person is repeatedly breaching exemption conditions, a regional council should be able to terminate their exemption.

Proposal 53: Enable new regulations to be made to create nationally consistent baseline objectives, policies or rules for pest management

I support this proposal as it addresses some of the challenges identified as part of the National Wilding Conifer Management Programme, including the challenge of securing the gains made. Obviously, the specific content of the regulations (i.e. the exact wording of objectives, policies and rules) will need to be consulted on in due course, so that any nuances can be ironed out at that stage.

The discussion document notes that this proposal could assist in “enhancing visible national leadership”. While this is true, progressing new regulations is not enough to fulfil the overall leadership role of the Director-General of MPI, as per section 12A of the Biosecurity Act. The need for greater national leadership was discussed earlier in the submission.

Proposal 54: Finetuning or repealing section 55 of the Act and associated regulations Options 54 A and 54B are sensible (and not mutually exclusive) and I support both. I do not support option 54C (to repeal section 55 and associated regulations).

One important point to note is that no funding would be provided when the responsibility is assigned, so the responsible person, agency or regional council would face costs. Officials should consider how those assigned responsibility might be supported by the Crown to implement those responsibilities.

Notwithstanding this lack of funding, a requirement to act on a pest is reasonable if we are trying to control or eradicate it, especially if speed is of the essence.

Proposal 56: Enable a chief technical officer to tailor the application of sections 52 and 53 when declaring an unwanted organism

Enabling chief technical officers to decouple the designation of unwanted organisms from all the duties and restrictions, and to be able to tailor the application of sections 52 and 53 powers to

enable quicker and more adaptable responses to biosecurity incursions makes sense, especially when speed is of the essence. I support this proposal.

Border and imports

Proposals 22-27: Import health standards

An import health standard (IHS) sets out the rules and procedures that must be met for risk goods to be imported into New Zealand. Any risk goods imported into New Zealand must have an appropriate IHS in place. The discussion document puts it simply: if there isn't a standard in place, the goods cannot be given biosecurity clearance to come into New Zealand.

Given that import health standards are New Zealand's principal line of defence when it comes to biosecurity risks, it is important to ensure that any amendments or tweaks to the process (as suggested in the discussion document in proposals 22-26) **do not weaken the existing level of protection from biosecurity risks**. Robust risk assessment and risk-based measures need to continue to underpin all requirements.

Section 24 was added to the Act in 2008 (as section 22A) in response to significant submissions to the Primary Production Select Committee from stakeholders seeking transparency about the way import standards are issued. The options proposed include:

- a cost recovery mechanism (Option 27A),
- having the review conducted by a senior public official (Option 27B),
- confining any review to new evidence (Option 27C), and
- removing the ability to request a review (Option 27D).

The consultation document notes a preference for Option 27D. I do not support that. The review process was added by Parliament with the clear intention of ensuring a transparent and robust process. Removing access to a review is entirely contrary to that intent. Option 27B (which is the discussion document's second preference) seems to me to provide a more reasonable solution that balances practicality with accessibility of review.

Proposal 29: Better management of biofouling removal in the Exclusive Economic Zone

While the Craft Risk Management Standard (CRMS) for Vessels 2023, administered by MPI, applies to all vessels that enter New Zealand's territorial waters (12nm limit), it does not apply beyond that limit. There is evidence that some vessels choose to clean their hulls just outside New Zealand's territorial waters potentially depositing risky organisms in our marine zone and increasing their proximity to New Zealand's coast.⁷ The proposal aims to address this deliberate activity by extending the biosecurity regime to all vessels arriving in the Exclusive Economic Zone with the clearly stated intention of arriving in New Zealand.

To achieve this, amending the Biosecurity Act (proposal 29A) is tidier than amending the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (proposal 29B), as it maintains all biosecurity requirements in the same piece of legislation with a single regulator (MPI). I support proposal 29A.

More broadly, treatment of biofouling on domestic ships remains a gap that is not addressed by the current proposal. The CRMS does not apply to the movement of vessels within New Zealand waters.

⁷ For example, see Gourley, E., 2022. Cruise ship too dirty for Milford Sound after sea snails found. Stuff, 22 December 2022. <https://www.stuff.co.nz/travel/news/130847298/cruise-ship-too-dirty-for-milford-sound-after-sea-snails-found> [accessed 29 November 2024].

Boats travelling between New Zealand ports and harbours act as effective vectors for the spread of marine pests around the country, necessitating better biofouling management for domestic vessels.

Proposal 34: Providing biosecurity information to incoming passengers on commercial craft

The requirement for a person in charge of a commercial craft (such as an aircraft or cruise ship) with 20 or more passengers (excluding crew) to provide incoming passengers with information on New Zealand's biosecurity laws has been in place since 2023. Prior to this time, information was generally provided by carriers to passengers voluntarily.

General duties (discussed earlier in this submission, see proposal 40) are a good way to set a clear expectation for individuals and sectors to 'do the right thing' and outline that everyone has a part to play when it comes to biosecurity.

For that reason, I do not support proposal 34A to remove the general duty under section 17AA of the Biosecurity Act and its supporting regulations. Further, MPI's analysis in the associated regulatory impact statement notes that the general duty was introduced relatively recently (October 2023), and it "could be considered premature to revoke section 17AA and the regulations before enough time has passed to assess the impacts...".⁸

Proposal 34B aims to amend the general duty to include an additional requirement for carriers of a commercial craft to provide notice to the Director-General of MPI. I support this addition, as it would improve MPI's ability to verify compliance and ensure that incoming passengers are familiar with the biosecurity rules.

Interfaces with DOC-administered legislation

Interaction with the Freshwater Fisheries Regulations 1983

Proposals 64 – 67: Interaction with the Freshwater Fisheries Regulations 1983

Proposals 64 – 67 aim to provide direction when different values are in conflict. The specific issue that these proposals address is what happens when the same fish species is considered a pest fish and a sports fish.

The four proposals presented in the discussion document address the issue in slightly different ways:

- Proposal 64 aims to enable the Biosecurity Act to take precedence over sports fishing benefits.
- Proposal 65 aims to enable the Biosecurity Act to take precedence over sports fishing benefits following agreement from a chief technical officer.
- Proposal 66 aims to enable biosecurity powers, functions or duties to take precedence over other provisions where a fish is also an unwanted organism.
- Proposal 67 aims to amend the Biosecurity Act to require Ministerial decision making if a regional council and Fish and Game Council do not agree.

Of the four proposals, I consider Proposal 64 to be the most sensible and I support it. While the recreational value of sports fishing is important, biosecurity must take precedence. I also support this only having effect if the specified criteria or conditions are met, and the impact on sports fishing is no more than is necessary to achieve biosecurity objectives. This proposal also allows regional councils to manage their regional pest management plans without adding bureaucratic layers to the

⁸ MPI 2024, Regulatory Impact Statement: Biosecurity Act Amendment Bill. Paper 4: Border and Imports, p.54.

process. Proposal 65 is, in my view, the second-best option should proposal 64 not receive sufficient support during the consultation.

Surveillance and interaction with the Marine Mammals Protection Act 1978

Proposal 68: Change the purpose of Part 4 by enabling monitoring for pests, notifiable organisms, unwanted organisms, and other organisms that may cause infections, diseases, or unwanted harm

I support this proposal, which expands the application of section 42 so that it captures a broader range of organisms. Biosecurity surveillance will be of most value where it is monitoring a broad range of organisms that can cause harm to New Zealand's economic and environmental interests, including potential diseases that might decimate indigenous biodiversity. (As I noted earlier, greater clarification is needed for the terminology used in the proposals, but that does not detract from the need to broaden MPI's mandate for surveillance.)

Proposal 69: Include a reference to the Marine Mammals Protection Act in the Biosecurity Act

The discussion document notes that delays in MPI applying for and receiving permits under the Marine Mammals Protection Act 1978 could delay its ability to identify and act on pests and diseases that could threaten biodiversity.

While I agree there is likely to be a need to act quickly, I do not support the proposed solution for surveillance activities to prevail over the Marine Mammals Protection Act, as it is both broad and vague.

The consultation document notes that the Biosecurity Act is also subject to the permitting requirements of the Wildlife Act but also contains an exemption (section 7(6) for surveillance of unwanted organisms from requiring a Wildlife Act permit. Provided DOC agrees, a similar 'exemption' approach seems appropriate for Marine Mammals Protection Act permits.

Offences and infringements

Proposal 8: Regional council access to infringement offences for pest and pathway management plans

I support this proposal as it would enable regional councils to establish infringement offences in their regional pest management plans. As the discussion document notes, not all offending under regional pest management plans meets the threshold for councils to pursue a prosecution, but it does not mean that no compliance action is warranted.

Under this proposal, before a regional council could specify that breaching a rule in a pest management plan is an infringement offence, it would need to meet specific criteria. The proposal envisages including these criteria in an amended National Policy Direction for Pest Management. I question whether the National Policy Direction is the appropriate instrument for specifying matters related to offences and suggest that officials consider if this would be a robust basis for enforcement.

Officials might consider sections 343A – 343D of the Resource Management Act and associated Resource Management (Infringement Offences) Regulations 1999 as useful comparison for an infringement regime, which provides for the offences and specifies fees. It is a little hard to assess the appropriateness of the penalty (\$300 is proposed) without further information about what sort of rules might attract these penalties and how they would be set out in regional plans. It seems low. While \$300 might deter some members of the general public it is unlikely to deter commercial enterprises.

Proposal 9: Enhancing compliance options for breach of a Controlled Area Notice

I support this proposal as it addresses a gap in the enforcement tools available to compliance officers to enforce breaches of Controlled Area Notices. The tools available under the Act are designed to deal with either serious behaviour (i.e. behaviour serious enough to attract prosecution such as moving an 'unwanted organism' outside of the controlled area) or one-off minor contraventions (i.e. behaviour minor enough to be dealt with through education, compliance orders or assisted direction).

Having a robust compliance monitoring and enforcement regime to enforce any breaches of Controlled Area Notice is appropriate. It is important to have the right tools to ensure desired outcomes are achieved when managing pests in areas with Controlled Area Notices.



Rt Hon Simon Upton

Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata