

Tackling Invasive Non-Native Species in the UK Overseas Territories

GENERIC BIOSECURITY BILL revised 2020

EXPLANATORY NOTES

CONTENTS

- 1.0 Background
- 2.0 Scope of the Bill
- 3.0 Structure of the Bill
- 4.0 Legislative scheme
- 5.0 Policy features of the Bill
- 6.0 Drafting features of the Bill
- 7.0 Variables
- 8.0 Definitions
- 9.0 Offences and penalties
- 10.0 Orders etc. that will be needed
- 11.0 Regulations
- 12.0 Specifications
- 13.0 Conclusion

1.0 Background

1.1 Biosecurity is the control of the movement of plants and animals and their products in order to prevent the establishment and spread of invasive species or animal and plant pests and diseases that can harm human health and the agricultural economy of a country. It involves the control of agricultural and food imports and exports, the establishment of a quarantine regime for animals and plants and the control of the movement of animals and plants within the country.

1.2 In many British Overseas Territories (also called United Kingdom Overseas Territories), a review of the plant and animal quarantine laws is long overdue, given the international trend towards freedom of trade and the movement of goods and people. It is also desirable that the laws on biosecurity of the OTs be harmonised as far as possible. This project therefore aims to modernise and harmonise biosecurity legislation among OTs and bring it into line with relevant international obligations of the UK that apply to the OTs.

1.3 To achieve this aim, a ‘generic’ Bill has been drafted which, if enacted, would be capable of dealing with biosecurity threats, including invasive species, in each of the British Overseas Territories. It has been drafted by Mr John Wilson of the UK, who has extensive experience in drafting laws for island jurisdictions in the Commonwealth and for Overseas Territories. He also drafted a model or ‘harmonised’ Biosecurity Bill for the Secretariat of the Pacific Community (as it now is) in 2004 – 2008. Mr Wilson was engaged by Public Administration International (PAI), UK, to undertake this drafting.

1.4 The SPC model Biosecurity Bill has been enacted substantially unchanged by 7 countries in the Pacific¹ and by Seychelles, and appears to achieve its main purpose, which is

¹ Fiji (Promulgation) 2008, Cook Islands 2008, Kiribati 2011, Solomon Islands 2013,

to facilitate trade in agricultural products and to protect the biodiversity of those countries. The model is effective to protect jurisdictions from invasive species, as well as from ‘home-grown’ pests and diseases.²

1.5 In the light of consultations with several OTs during 2018 and 2019, the generic Bill has been revised and these Notes relate to a revised version dated 17 March 2020. See www.nonnativespecies.org/index.cfm?pageid=639 under ‘simplified model text’.³

1.6 The main changes are:

- Some provisions have been moved to Schedules to make the main text shorter and simpler (Definitions, powers, arrival declarations, biosecurity register.)
- The requirement for designated biosecurity points of entry and departure has been removed, as the points of entry and departure will usually be those for immigration and customs purposes.
- The territorial scope of the Bill has been extended to include the Exclusive Economic Zone or equivalent, so that vessels entering the EEZ will come under the biosecurity control provisions.
- The inspection procedures have been made discretionary to reduce the burden on the administrative resources of the OT.
- Taking a bond for compliance with import controls is no longer in the Bill, though it could be an administrative requirement.
- The separate Emergency Powers Part has been removed, with shorter provisions in Part [BIC].
- Compliance agreements, authorising landowners and designation of approved premises are no longer in the Bill.
- The financial provisions and powers of delegation are removed from the Bill.
- Outsourcing and delegation of functions are removed as being administrative powers.
- No mention is made of local authorities having a role in biosecurity control.
- No mention is made of an advisory role for NGOs or international bodies, as this can be dealt with administratively.
- No functions are given to the Governor alone or a Secretary or a Council Committee or similar.

2.0 Scope of the Bill

2.1 The revised Bill if duly adapted and enacted would provide a legislative foundation for action to protect an OT from the introduction of invasive species and from animal and plant pests and diseases. It would replace existing laws of the OT governing animal and plant imports and quarantine. It would also enable the OT to comply with the UK’s obligations to ensure that animal and plant pests or diseases are not exported from the OT into neighbouring countries.

2.2 The Bill does not deal with environmental issues generally; it does not deal with CITES, Biosafety, Pesticides, Biodiversity or Environmental Management as such. It is not about Bioterrorism i.e. use of organic agents for killing, though it would catch illegal

Palau 2014, Niue 2016, Tuvalu, 2017. See www.paclii.org for the respective texts.

² SPREP uses it against invasive species in Tuvalu (Yellow Crazy Ant). See the Pacific Biosecurity website www.pacificbiosecurity.org.

³ The website also has a Legal Checklist, a Summary of the proposals and templates for a set of subsidiary instruments.

movement of e.g. anthrax spores. It does not deal with human health issues, which are governed internationally by the International Health Regulations of the WHO. It is not a trade promotion Bill as such, though it requires standards for biosecurity to be consistent with the GATT rules and the IPPC standards – see below.

3.0 Structure of the Bill

3.1 The draft generic Bill is in a form readily recognizable by legislators and administrators of the Overseas Territories. It begins with a Preliminary Part, which includes key definitions and sets out the biosecurity functions of the Government. There are then 6 Parts which provide powers to control the import and export and internal movement of agricultural produce and other articles that might be an invasive species or spread a pest or disease. The last 3 Parts deal with administrative and legal issues, including the repeal of existing laws, and will require more local decisions, as the local constitutional and legal arrangements will differ.

3.2 The Parts are given letters rather than numbers at this stage, so that they can be placed in any order, and clauses can be more easily added or removed or their sequence changed. The Part names and section headings are for local decision. Clauses are numbered in a sequence within each part, and the cross-references to other sections use the Part letters. Before the Bill is introduced, Parts and clauses will need to be numbered and cross-references numbered accordingly.

3.3 The Parts are:

- Part [Pre] – Preliminary
- Part [BBC] – Biosecurity Border Control
- Part [CVA] – Control of Vessels and Aircraft (Aircraft not relevant in some OTs)
- Part [BIP] – Biosecurity Import Procedures
- Part [BEP] – Biosecurity Export Procedures
- Part [BQ] – Biosecurity Quarantine
- Part [BIC] – Biosecurity Internal Control (including emergency powers)
- Part [Adm] – Administration of the Ordinance (or Act)
- Part [OP] – Offences and Penalties
- Part [MP] – Miscellaneous Provisions.

3.4 In the revised version of the Bill, there are 4 Schedules, removing some material from the main body of the Bill to make it easier to follow. Whether to do this is a matter for local decision. The Schedules are:

- Schedule 1 Defined Terms
- Schedule 2 Contents of a Biosecurity Vessel Arrival Declaration
- Schedule 3 Additional Powers of Biosecurity Officers
- Schedule 4 Contents of the Biosecurity Register.

There could also be a Schedule of maximum penalties and fixed penalties if that is the local preference, but the generic Bill does not include a Schedule 5.

3.5 Parts [BBC], [CVA], [BIP] and [BEP] establish a regime to control the movement of vessels and aircraft and their cargo passengers and crew and the import and export of regulated articles generally. Part [BIC] provides powers to control incursions of invasive species and infestations of pests and diseases within a Territory. Some powers are given to biosecurity officers in Parts [BBC], [BQ] and [BIC] and there is a general rule about the exercise of powers in Part [Adm.] Schedule 3 then amplifies those powers and adds to them.

3.6 Part [Adm] contemplates that responsibility for implementing the Ordinance or Act will be given to a single public officer (e.g. Director of Biosecurity), but if preferred, it can be given to an existing Department of government, or to a separate agency or statutory body or authority. Parts [Adm], [OP] and [MP] contain miscellaneous and legal provisions, including enforcement procedures.

4.0 Legislative scheme

4.1 The Bill aims to protect OTs from the introduction or spread of non-native animal or plant species which would harm the environment by uncontrolled spreading ('invasive species') and of pests and diseases of animals and plants which would harm local agriculture. It does this by linking the terms 'invasive species' to 'pest or disease' and making all animals and plants and their products 'regulated articles' the movement of which can be prohibited or restricted.

4.2 The Bill aims to implement international rules in respect of biosecurity in relation to trade in agricultural produce. It does this by making biosecurity risk the key test for decision-making, and by referring to the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the 'SPS Agreement'). It also refers to the standards set by the International Plant Protection Convention (IPPC) and the Organisation Internationale Epizoötique or World Organisation for Animal Health (OIE).

4.3 The Bill creates a category of goods known as 'regulated articles' (called 'risk goods' in some countries.) It enables the import and export of regulated articles to be prohibited or restricted. Restricted articles are subject to conditions, which are imposed by specifications issued by the biosecurity authority.

4.4 The Bill seeks to achieve transparency in the decision-making process and adopts principles of good governance, by including requirements for consultation and for appeals. It incorporates modern legislative language and techniques.

4.5 If enacted the revised draft Bill will:

- set out the biosecurity functions of the respective OT Government and impose obligations on it in relation to compliance with international obligations, reciprocity, mutual assistance etc.;
- give jurisdiction over the whole of the waters of the OT, without reference to any particular point of entry or departure;
- control the arrival and departure of ships, aircraft and people separately from the customs and human health and immigration regime;
- impose obligations on the masters of vessels in respect of disposal of garbage, ships' stores and bilge water, with equivalent obligations on the captains of aircraft;
- create a regime of import and export licences or permits, based on specifications for treatment of various species;-
- provide powers to control internal outbreaks of invasive species and of regulated pests and diseases within the OT;
- set standards for determining the rules based on the precautionary principle;
- provide for its administration by a Director of Biosecurity (or similar) and biosecurity officers;
- provide for emergency powers and enforcement procedures.

4.6 As most of the OTs are small with limited resources in personnel and finances, the Bill aims to create a system that does not require a lot of subsidiary instruments. It creates a quasi-legislative instrument called a ‘specification’ which can be made easily by the Director (or equivalent). It will however require consultation and publication.

4.7 The main administrative feature is the provision for the designation of a Director of Biosecurity and biosecurity officers for the Territory. It is anticipated that these will be existing public officers in the relevant Ministry or Department. The Director’s functions are set out in Part [Adm]. The officers can be drawn from any branch of the public service, if duly trained, and the forms etc. can be adapted from existing customs or health declarations.

4.8 The Bill will provide powers for the making of specifications in respect of treatment etc. for incoming and outgoing regulated articles. It does not cover the handling of containers, nor prescribe fees. These and some other minor matters will need to be dealt with by regulations – see clause [MP9].

4.9 The Bill in effect puts the existing quarantine operations manual or similar on a statutory footing, by enabling the Director to make specifications about treatment etc. of incoming and outgoing articles (clauses [BIP4] and [BEP4].) An operational manual will still be needed on day-to-day administrative functions. Note that specifications made by the Director under section [BIP4] or [BEP4] in respect of the import/export of regulated articles may be in the form of a ‘white book’ list and a ‘black book’ list; but no need to use those terms in the Bill.

5.0 Policy features of the Bill

5.1 The Bill if enacted will, among other things:

- enable the creation of a list of prohibited imports and exports and restricted imports and exports and create offences in respect of them (clauses BBC2 and 42);
- control the arrival and departure of vessels and aircraft (Part [CVA]);
- require control over ships’ garbage, ballast and stores (clause [CVA8]);
- make incoming regulated articles liable to biosecurity inspection;
- enable the Director to make specifications as to the requirements for biosecurity clearance (clauses [BIP4] and [BEP4]);
- make import permits or licences one of the possible control mechanisms (clauses [BIP5]);
- enable the Director to control outgoing articles if necessary (clauses [BEP1 and 2]);
- allow for the issue of sanitary and phytosanitary certificates (clause [BEP3]);
- provide for the declaration and control of infested and threat-free zones (clauses [BIC3 and 5]);
- enable control of movement between areas of the territory (clause [BIC6]).
- authorise the destruction of feral animals and birds (clause [BIC9]).
- provide for a declaration of notifiable invasive species and pests (clause [BIC10]).
- provide for the appointment of a Director their powers (clauses [Adm2]).
- set out the powers of biosecurity officers generally (clause Adm3 and Schedule 3);
- create offences of releasing etc. invasive species (clauses [OP1 and 2]);
- prescribe maximum penalties for offences (to be decided locally);
- provide for a Fixed Penalty system to allow for short-term importers of articles (clause [OP8]).

5.2 The revised version of the Bill does not require the establishment of a body to advise on biosecurity emergencies, as most OTs will have a National Disaster Committee or similar to deal with natural disasters generally. Nor does the Bill require the devising of a Biosecurity Emergency Response Plan, as such a plan could be established administratively. The Bill does not mention a Biosecurity Policy, but the Biosecurity Functions of the Government in clause [Pre5] would need to be aligned to any agreed policy.

6.0 Drafting features of the Bill

6.1 The revised version of the generic draft Bill refers to a Legislative Council and gives legislative powers (e.g. the making of orders) to the Governor in Council. These terms will need adapting to the Constitutional arrangements in each OT; in some, the legislative power can be given to a Minister or to an Administrator or equivalent.

6.2 The draft states monetary values in £ sterling, but in some OTs that should be \$, and their values will vary.

6.3 The draft refers to a ‘Director of Biosecurity’ but in some OTs there might be Biosecurity Service or Authority or Department. There might need to be roles for the agricultural and veterinary officers, by way of consultation or similar. It might also be appropriate to require consultation with other officers (see clause [Adm2(2)]).

6.4 The draft requires fees and charges to be ‘prescribed’ i.e. by regulations under clause [MP9], but enables forms to be ‘approved’ by the Director, which would not involve a legislative process.

6.5 The term ‘[Jurisdiction]’, shown in square brackets, will be the name of the respective OT. The term ‘Government’ is used to mean the government of the territory, as the definition clause will provide. (It is usually also in the Interpretation Act/Ordinance.) The term ‘Ordinance’ is used throughout, but some jurisdictions now have Acts and the draft will need adapting accordingly.

6.6 The Bill is drafted in what is known as a ‘plain English style’, similar to that adopted by the UK and most other Commonwealth countries. It uses ‘must’ instead of ‘shall’ as the word creating an obligation and avoids traditional legal jargon. It is gender-neutral and is laid out in a way that should be easy to read and understand.

6.7 Section headings are in bold at the margin. They can be moved and italicized as required. The formatting of the Bill is optional and will be a matter for the local drafting office.

7.0 Variables

7.1 The generic Bill is intended to be capable of being adapted to the circumstances of all the OTs. Given that most of the OTs have similar constitutional, legislative, judicial and administrative systems, this should not be difficult to achieve. The Bill is a ‘maximalist’ draft and provides all the powers needed to satisfy the biosecurity Legal Checklist that has been drawn up by the GB Non-native Species Secretariat and forms part of the legislative package provided to OTs.⁴ Not all of the provisions will be needed or wanted in all OTs and local decisions will be required as to what to include in the Bill and subsidiary legislation.

⁴ See www.nonnativespecies.org/index.cfm?pageid=639

7.2 There will need to be some nomenclature changes (name of territory, designation of legislature, titles of officials etc.). There will also need to be local policy decisions as to:

- Who will exercise the powers in the Bill i.e. a statutory body or a Director?
- How lists of prohibited and restricted invasive and pests will be made and published.
- How much public involvement to have in decision-making.
- What appeal process to have.
- How much internal control of movement is wanted between islands or areas.
- Whether to have a Fixed Penalty system (not a civil penalty system).

OTs will also need to consider some other substantive topics such as the use of import permits or licences, the level of fines and the repeal and consequential amendments clauses.

7.3 Other provisions that will require consideration by each territory include:

- Periods of time, age thresholds, etc. as indicated in the drafting Note.
- The term ‘Magistrate’ might be ‘Justice of the Peace’ in some jurisdictions, or ‘judge’ if that is the local preference.
- Publication in the Government Gazette is a standard way of authenticating decisions made under primary legislation, but local conditions might make other methods of publication desirable also.

7.4 Clause [MP10] of the Bill would repeal a number of Ordinances or Acts and items of subsidiary legislation made under them. These would be laws dealing with the control of movement of animals and plants and their produce, and might include import controls under Customs legislation, control of agriculture generally and some environmental laws. Each OT will need to look at all relevant local laws and decide what to include in the clause. OTs will also need to consider what savings are needed, whether any transitional provisions are needed, and what consequential amendments to other Ordinances or Acts might be needed.

8.0 Definitions

8.1 The Interpretation Clause and Schedule 1 define terms used in the Bill that have a special meaning. Technical terms reflect modern biosecurity practice. Terms that are not used in the Ordinance but only in regulations should not be defined in the Ordinance, but in the regulations. Similarly, terms defined in the Ordinance do not need to be defined in the regulations. The technical definitions in the draft are based on those used in the IPPC Glossary so far as possible.

9.0 Offences and penalties

9.1 The Bill expressly states when an offence is created and provides a penalty for each one (to be decided locally.) Some offences in Part [OP] involve offences committed by or against officials, or in relation to documents, etc. Some of these might already be in the local laws of the OT and do not need repeating in the Bill.

9.2 Penalties are placed at the end of the offence-creating provision (as probably provided by the Interpretation Ordinance.) The sums and periods will need to be decided locally. The main need is to achieve consistency of penalties within the Bill and consistency with other environmental legislation.

9.3 The fines and periods of imprisonment will be the maxima for individuals. If the offence is committed by a body corporate, the maximum fine is a multiple for an individual and there is no imprisonment – see clause [OP7].

9.4 It might be desired to have a double penalty for further offences; a fixed penalty system might also be wanted. It is for decision whether to list the penalties in a Schedule or state them after each provision that creates the offence.

10.0 Orders etc. that will be needed

10.1 If an OT enacts the Bill, it will need some implementing machinery before a commencement date is appointed. The items probably needed include:

- commencement notice under [Pre1];
- declaring prohibited and restricted regulated articles under clause [BBC2];*
- settling the form of passenger declaration under clause [CVA7];
- settling the form of biosecurity clearance under clause [BIP2];
- issuing import specifications under clause [BIP4];*
- deciding the form of an import licence or permit under clause [BIP7] (if wanted);
- settling the form of sanitary and phytosanitary certificate under clause [BEP3];
- issuing export specifications under clause [BEP4];*
- declaring any notifiable pests and diseases under clause [BIC10];*
- appointing an IPPC enquiry point under clause [Adm9];
- prescribing the fees payable (clause [MP9]);*
- drafting any other regulations needed.

10.2 The items starred in the above list are those for which skeleton drafts are provided, separately from the draft generic Biosecurity Bill, for the assistance of OTs. They are:

- A. Import & Export Categories Order showing how the prohibited and restricted categories of animals and plants contemplated by [BBC1] might be drafted. (The same list could be used as a basis for the Notifiable Invasive Species etc. Order.)
- B. Notifiable Invasive Species, Pests and Diseases Order
- C. Fees and Charges Regulations (see para.12.1 below)
- D. Specifications of Import & Export Conditions (see para. 12.0 below.)

11.0 Regulations

11.1 As contemplated by clause [MP9], regulations might be needed to implement the Ordinance. The Bill does not include a 'polluter pays' principle as such, but contemplates that fees and charges will be prescribed for the services provided by the Government. See item C in the drafts provided.

11.2 Other regulations that might be needed include regulations to:

- prescribe the method of taking and analysing samples, recording the results and disposing of the samples;
- prescribe the manner of disposal of abandoned goods under section [MP2];
- regulate the procedure on appeals under section [MP4] (other than appeals to the Supreme Court);
- regulate the disposal of waste and second-hand clothing and bedding so as to minimize any biosecurity risk;
- provide for the placing and use of amnesty bins or other containers for regulated articles at points of entry;
- authorise and regulate the use of force and firearms by biosecurity officers;
- authorise and regulate the use of traps and pesticides by biosecurity officers;
- prescribe the international codes of practice that are to be observed in respect of biosecurity control;

- prescribe any other matter which the Ordinance requires to be prescribed or which is necessary for carrying out or giving effect to it.
- See clause [MP9] of the Bill.

12.0 Specifications

12.1 The primary legislation will need to be supplemented by specifications (which are non-legislative) in relation to the treatment that is required for items that pose a biosecurity risk on entry or export (see clauses [BIP4] and [BEP4]). The term ‘specified’ is used in a variety of contexts, and it implies the procedure for issuing specifications.

12.2 Section [MP8] contemplates that specifications might also be appropriate in respect of:

- documents and forms, including those sent by electronic means;
- the procedures for applying for and issuing licences and other documents;
- the manner and language of markings on containers of incoming and outgoing regulated articles;
- the methods of handling, sealing, treating and disposing of containers of regulated articles;
- other matters provided for in or under the Ordinance.

Some of these can be covered by General Regulations if preferred.

12.3 Section [MP8] defines the status of specifications; they are not strictly legislative but must be entered in the biosecurity register and given due publicity. A specification is a new kind of quasi-legislative instrument; not as formal as a regulation made under [MP9], but not a mere notice or approval. A breach of a specification does not itself constitute an offence, but the contents of a specification will be relevant in a number of contexts.

12.4 The system of specifications is a key component of the legislative scheme. It simplifies the listing of requirements for treatment of incoming and outgoing articles and enables them to be changed speedily (subject to the requirements for consultation.) In some jurisdictions they are called ‘Import Health Standards’ and consideration can be given to using that term in the Ordinance.

13.0 Conclusion

13.1 As stated above, the revised or ‘simplified’ generic Biosecurity Bill is still a ‘maximalist’ draft and provides all possible needed powers and controls and protections for OTs. It will need to be adapted to the circumstances of each OT that adopts it, but it is hoped that it will achieve its intended result and bring a degree of harmonisation to the laws about invasive species and agricultural pests in the OTs.

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