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Biosecurity System Policy Team
Ministry for Primary Industries

By email: BiosecurityBill@mpi.govt.nz

Tēnā koutou

Proposed amendments to the Biosecurity Act

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback to the Ministry for Primary Industries (**MPI**) on proposals to review and modernise the Biosecurity Act 1993.

2. The Law Society's feedback has been prepared with the assistance of the Law Society's Environmental Law, Criminal Law, Human Rights and Privacy, and Public Law Committees.[1] The submission follows the sequence of issues and questions set out in discussion papers 1–7 (**discussion papers**) published by MPI. It covers only selected issues.

General comment

3. The Law Society supports the proposal to refresh the Biosecurity Act 1993 to achieve a modern, principled and effective biosecurity law and ensure the Act's ongoing fitness for purpose. Broadly, the Law Society's responses to the proposals and areas of potential concern that are identified have two themes:

    3.1. For a number of the proposals, which engage privacy, human rights and public law concerns, there is a need to further justify the extended or altered powers that are proposed. It is not always clear in the discussion papers the extent to which this analysis has occurred.

    3.2. Proposals to streamline and clarify the law are generally supported by the Law Society, with some comments on preferred approaches, drafting and workability.

4. The final section of the submission addresses one matter not covered in the discussion papers: a suggested review of the operation of section 100T of the Biosecurity Act. There could be value in undertaking such a review while MPI is considering reforms to the Act.

New purpose provisions

Proposals 1 and 2: Purposes

5. Proposals 1 and 2 consider amending or adding new purposes clauses in the Biosecurity Act. Proposal 1 asks whether there could be benefits in introducing an overarching purposes

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1 For more information on the Law Society's sections and committees, please visit our website: www.lawsociety.org.nz/branches-sections-and-groups/.

clause for the Act. Proposal 2 suggests amending purposes clauses where needed in certain parts of the Act and notes a preference for this option. The discussion papers ask:

Do you agree with our preferred approach to progress proposal 2? Why, or why not? (Q8)

6. The preliminary stage of the purposes clause proposals means it is difficult to comment constructively. In the Law Society's view, further analysis is needed for these proposals, particularly proposal 1 (a new overarching purposes clause). It is not explicit, for example, whether any amendments to the purposes clauses could be taken as an opportunity to expand purposes (either for the Act as a whole or some parts of it), which would be an important discussion. However, on the analysis presently available:

   6.1. It is not evident that there is a problem which having an overarching purposes provision would resolve.

   6.2. In the Law Society's view, it would be difficult to draft a satisfactory single purposes clause for an Act as complex as the Biosecurity Act is (and will need to be). The suggested list of elements indicates how complex (and therefore unhelpful) any overarching clause is likely to be.

   6.3. The list of suggestions shows that the Bill is trying to reconcile several competing objectives. For example: safeguarding NZ's biosecurity is best done by limiting to the maximum extent possible the chances of a biosecurity hazard causing damage in New Zealand; but facilitating trade may increase the risk of such a hazard entering New Zealand. Situating protection and preservation of New Zealand's biosecurity as one of several competing considerations is a very different policy to prioritising it above all other objectives; both policy options could be validly discussed.

   6.4. As the discussion paper notes, "retrofitting a purpose clause into an existing Biosecurity Act could have unintended consequences".[2]

7. It seems likely that, on balance, proposal 2 (as suggested by MPI) may offer the best way forward. Separate purpose clauses for different parts of the Bill may be the most optimal way of making Parliament's intentions clear in respect of each part.

System-wide issues

Proposal 3: Vesting a Minister with call-in powers

8. Proposal 3 would enable a Minister, in two specific situations satisfying statutory 'significance' criteria, to make a decision that would normally sit with a chief technical officer. MPI's preferred option 3A is to vest this power in the Minister responsible for the Biosecurity Act. The Law Society agrees with this approach (in preference to option 3B).

9. In addition to asking which Minister/s should be able, in some limited circumstances, to exercise a call-in power, the discussion papers ask:

   What factors suggest that a power is better exercised by an elected official? What factors suggest a power is better exercised by a non-elected official? (Q13)

10. In the Law Society's view, the decisions described in the discussion papers are appropriate for Ministers, given their significance. One factor which may weigh in favour of a power exercised — in the biosecurity context — by a non-elected official (or, in other contexts, an

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2 Discussion paper 2 at 4.

independent expert body) is concerns regarding politicisation. As noted in the discussion papers, it is chief technical officers' role to focus on risk and science/technical evidence.

11. However, the proposed powers of Ministers to intervene in this instance are narrowly confined. They address circumstances (controlled areas affecting movement of persons or livestock, application of substances from aircraft) that could be highly politicised and in which there will likely be social and financial considerations. Accountabilities for such significant decisions lie properly with Ministers, based on the best advice they can be given. While there is the risk that decisions made by a Minister may not follow advice given, the Minister is responsible to Parliament and, ultimately, the public. Judicial review provides further accountability.

Proposal 4: Local knowledge in decision making

12. Proposal 4 considers whether to provide for local knowledge to inform or guide decision-making in parts of the Biosecurity Act.[3]

13. The Law Society acknowledges the benefits of enabling account to be taken of knowledge derived from local conditions and experience and supports this proposal in principle. If local knowledge would inform good decision-making, one would expect it to be used.

14. As noted in the discussion paper, one category of relevant knowledge intended to be captured by the proposal may include mātauranga and tikanga Māori (or what may, in the local context, be termed mātauranga ā-iwi, mātauranga ā-hapū, tikanga ā-iwi and tikanga ā-hapū). These are terms the Law Commission has identified as referring to "the localised expressions and application of [mātauranga and] tikanga by any Māori kinship group".[4] Allowing decision-makers to consider mātauranga and tikanga is a positive move. The Law Society supports legislative change to enable this approach.

15. More generally: when it comes to thinking about future statutory language, the Law Society has some concerns that the phrase "local knowledge" is likely to be too imprecise. For example, care is needed that "failure to take into account local knowledge" does not become a ground of public or legal challenge to decisions where the local "knowledge" has not been established as valid but is rather misguided "local opinion" or "local prejudice" (as seen recently, for example, with COVID-19 vaccine mis- and dis-information). There is a risk that the broad phrase "local knowledge" could be counter-productive in such a scenario. There is also the possibility that the proposal could result in a de facto consultation obligation. To address these issues, if the proposal proceeds, the Law Society recommends slight redrafting to confine and clarify its scope, for example by:

    15.1. making clear that what is required is "knowledge derived from local conditions and experience in the local area"; and/or

    15.2. referring specifically to mātauranga and/or tikanga Māori, if that is what is intended; and

    15.3. providing that this does not require any decision-maker to consult prior to making a decision.

16. A further matter legislation could clarify is that it should not be assumed, necessarily, that local knowledge and scientific understanding are inevitably discrete categories. The idea that local knowledge gives extra information suggests there will be times when it

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3 Ministry for Primary Industries "Biosecurity Act 1993 proposed amendments: discussion document 2 – system-wide issues" (September 2024) at 10.

4 New Zealand Law Commission *He Poutama* (NZLC SP24, 2023) at 1.22.

supplements rather than contradicts scientific understanding. As such there is no inevitable conflict.

17. It may, however, be desirable for the Act to be clear on how decision-makers should address a scenario in which "local knowledge" on the issue does contradict the scientific perspective. The Bill could provide, for example, that while the local perspective must be taken into account, the science is decisive in the event of a conflict between them. It is likely, in any event, that any process where the science is not followed would be open to challenge by judicial review or otherwise as being irrational. However, expressly addressing such a scenario may help address the concern raised in the discussion papers, which ask about ways to mitigate the potential delays in the decision-making process where there are differences between local and scientific knowledge (Q15).[5]

Proposal 5: Biometric information

18. Proposal 5 would clarify that the collection, use, or storage of information (including personal information) includes biometric information. The discussion papers ask:

    18.1. Do you agree with proposal 5? (Q16)

    18.2. Are there any additional legislative safeguards that should be included for MPI's use of biometric information? (Q17)

    Do you agree with proposal 5? Why, or why not? (Q16)

19. The Biosecurity Act currently provides for the collection of biometric information but does not explicitly include it when it specifies the collection or use of information (including personal information).[6] The Law Society agrees that, if MPI is to use and store biometric information, the Act should say so expressly. It is better to have express provisions to guide collection, retention and use of such information than to leave it to implied or uncertain powers. Making it clear that biometric information is personal information would then mean it is clearly subject to the Privacy Act and the provisions in biosecurity legislation dealing with personal information. This is a positive step but, in the context of biometric information, would be insufficient. For biometric information, the safeguards in the Privacy Act are recognised as being inadequate.

    Are there any additional legislative safeguards that should be included for MPI's use of biometric information? (Q17)

20. The New Zealand Privacy Commissioner is working to develop a new Biometric Processing Privacy Code (**Code**).[7] This proposes to introduce more stringent rules on processing biometric information than are presently contained in the Information Privacy Principles (**IPP**) of the Privacy Act. As the discussion papers recognise, people are concerned about biometrics being used by the government. This was affirmed in the Privacy Commissioner's recent consultation on an exposure draft of the Code.

21. The draft Code proposes, as its starting point, a mandatory proportionality assessment, which agencies must conduct before commencing to collect and use biometric information.

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5 Discussion paper 2 at 10.

6 Discussion paper 2 at 11.

7 The exposure draft of the proposed Code was released for public consultation April 2024: see 2024-04-10-Exposure-draft-of-Biometrics-Code.docx and see further Office of the Privacy Commissioner | Biometrics report-back. The Commissioner will soon announce his decision on whether to proceed with a code of practice for biometrics and next steps for consultation: Office of the Privacy Commissioner "Privacy news" (November 2024).

The assessment would need to confirm that doing so is not disproportionate in the particular circumstances.

22. Agencies will also be required to implement privacy safeguards that are relevant and reasonably practicable to reduce privacy risk to individuals by biometric processing. The exposure draft of the Code lists, non-exhaustively, eight potential safeguards.[8]

23. Providing properly and systematically for the use of biometric information is a significant step. Potentially, it could be disproportionate in the biosecurity context to the threat posed by biosecurity risks. It is fundamental that such amendments should not be made without appropriate safeguards being put in place to use and store such information safely.

24. Because the Code has not been confirmed or adopted yet, for the time being New Zealand is lacking a clear legal framework for safeguarding biometric information. However, considering the requirements of the draft Code and the relevant safeguards it suggests may assist. Consulting with the Privacy Commissioner would also be advisable, given that the exposure draft of the Code continues to be developed.

Proposal 6: Powers of inspectors during searches

25. Proposal 6 is to introduce an arrest power for obstruction during searches. A new section in the Biosecurity Act would enable a biosecurity inspector to arrest a person who has threatened, assaulted, or intentionally obstructed an official (an offence under the Biosecurity Act). The discussion papers ask:

    What legislative safeguards should the Biosecurity Act have regarding any future powers of arrest for biosecurity inspectors? (Q18)

26. Before addressing the question of legislative safeguards, the Law Society has concerns, also expressed in the RIS, regarding the justification for these future proposed powers.[9] It is important that a Bill of Rights analysis is undertaken if this proposal progresses past consultation, providing fuller justification. The suggested legislative safeguards seem like a reasonable suite of safeguards for conducting the analysis. However, for the following reasons, the Law Society considers it may be preferable in this context that arrest powers remain with Police.

27. The discussion papers set out some proposed limitations and safeguards on the proposed power of arrest (including that the powers would be available to a very limited number of compliance investigators, being those who undertake searches under section 111 of the Biosecurity Act and who have completed appropriate training; and that MPI could still, where deemed necessary, request Police to attend a search).[10] The reduction that could follow in administrative, operational and financial burdens on Police is also noted. Further, under the Fisheries Act 1996 fisheries officers do have arrest powers.[11]

28. However, the Fisheries Act example is of questionable value as an analogy with the biosecurity context. In the Law Society's view, the context may differ from the fisheries context in at least two key ways. The intrusion presented by biosecurity inspections is certainly higher (involving private property, potentially land and homes). Biosecurity inspectors will also, presumably, know in advance that they intend to conduct the search. By

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8 For proposed privacy safeguards see "Biometric Processing Privacy Code: exposure draft", cl 3(3).
9 "Regulatory Impact Statement Biosecurity Act Amendment Bill Paper 2: System-wide issues" at 27.
10 Discussion paper 2 at 16.
11 Fisheries Act 1996, s 203.

contrast, the Fisheries Act powers recognise the reality that fisheries enforcement officers may more regularly encounter offending without prior warning. They may need to act on the spot to apprehend a person, in situations where, for example, they may be in a remote or coastal area.

29. There will also be cost-benefit trade-offs in safely and appropriately extending the power, rather than involving police who are more routinely equipped to handle crisis situations. For instance, significant health and safety risks and, perhaps, liabilities could arise in transporting the arrested person to Police as the proposals envisage: will biosecurity inspectors have vehicles suitable to ensure the safety of both officers and the arrested person, or will there be a need to invest in upgrades or retrofits of their vehicles?

30. Proposed safeguards the Law Society would support if the powers of arrest proposals are judged necessary include a requirement to, following arrest, promptly deliver the person to Police; and limitation of any new powers to inspectors who undertake searches under section 111 of the Biosecurity Act. However, further analysis and justification are needed before proceeding with this proposal.

Offence and penalty provisions

Proposal 7: Border fines for travellers with high-risk goods

31. Proposal 7 is to create an additional infringement penalty for higher risk goods. The Law Society commends the engagement that MPI has undertaken with the Ministry of Justice on this proposal, and consideration and design of the proposal consistent with the Legislation Design and Advisory Committee (**LDAC**) legislation guidelines.[12] There seems a clear case for differentiating conduct which creates a high biosecurity risk from conduct that creates a low risk. A single standard fine risks being too low for serious breaches and disproportionately severe for low-risk ones. The proposed reset seems reasonable, provided there is a logical rationale for and clarity about what goods fall in which category. The RIS indicates that a person bringing in more than one kind of risk goods would have all goods covered in one infringement notice, which the Law Society considers to be an important protection to include in the drafting if this proposal progresses.

Proposals 8–11: Compliance options

Proposal 8

32. Proposal 8 would introduce the ability for regional councils to establish infringement offences in regional pest management plans. In response to questions 21–25, which ask about details of this proposal, the Law Society notes that the criteria proposed for inclusion in the National Policy Direction for Pest Management are consistent with LDAC guidelines for when infringement penalties may be appropriate. These safeguards seem appropriate.[13] It could be desirable to also provide in section 56 of the Act that the National Policy Direction may include such criteria.

33. To assess the proposal any further, more information about the proposed regime would be helpful. In particular: is it intended that multiple minor offence breaches of a plan by a single landowner could result in multiple infringement notices and fines? In such a scenario, the cumulative effect could be very severe.

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12 Legislation Design and Advisory Committee *Legislation Guidelines 2021 edition* (September 2021) <www.ldac.org.nz> (**LDAC guidelines**).

13 Paper 2 RIS at 38.

34. The use of infringement notices and fines can also be a rather blunt "one size fits all" tool, and other options might be developed. For example, there seems to be no consideration of an alternative which would allow recovery of the costs of remedial work in the wake of a conviction in the courts.

Proposal 9

35. Proposal 9 would make changes to offence provisions for breaching a Controlled Area Notice (**CAN**). In the Law Society's view, considering lower penalty offence and infringement provisions is appropriate given the existing offence provisions in the Act. The Law Society agrees that:

    35.1. The discussion papers make a sufficient argument for a more diversified "toolbox" for CAN enforcement.

    35.2. Compliance officers enforcing Controlled Area Notices should be able to issue an infringement against an individual breaching a rule in a Notice (Q27).

    35.3. While the infringement fee in this proposal (Q28) is perhaps a little low given the potential consequences, it is in the right order of magnitude.

36. However, it is not clear if engagement occurred with the Ministry of Justice on this proposal. We recommend that it does occur, including the Bill of Rights analysis alluded to in the RIS.[14]

37. The following further comments relate to the different proposed categories in proposal 9:

    37.1. *For serious offending* (from strict liability to requiring mens rea), while there is no argument in principle against using "intention" to breach a CAN as the criterion justifying a more severe sentence, it may be worth considering whether proving "intention" would be too onerous a standard. There is an argument that both intention to breach a CAN and recklessness as to whether a CAN would be breached both reflect a state of mind where the alleged offender has put their interests ahead of the national biosecurity interest. As such, both could be an appropriate criterion for the more severe offence.

    37.2. *For medium-level offending* (strict liability offence), in principle the proposed modification is appropriate given the other two aspects of this proposal. For the following reasons, however, this proposal may need further consideration. It appears to be designed to operate where there was an unwitting breach of a CAN which results in some harmful biosecurity outcome.[15] That would imply the need for a prosecutor to show that it was the conduct of the defendant that was the cause of the negative outcome — not merely that there was conduct which created a risk of the outcome. If a defendant could establish that there were several other persons who had behaved similarly and also created a risk of that outcome, that defendant (and any other persons similarly charged) might well escape liability. There would also be the real possibility that the harm caused would not be revealed until after any time limitation for bringing a charge had elapsed, in which case a result-based offence would not be useful. A strict liability offence based on breach of a CAN that created a risk of a negative biosecurity outcome, with the defendant having a defence of due diligence/lack of fault to avoid the breach occurring would appear to be more appropriate. Possibly there could be a parallel strict liability offence of breach of a CAN

14 Paper 2 RIS at 44.
15 Paper 2 RIS at 42.

where causation of a negative outcome could be established, with an appropriately more serious penalty.

37.3. *For low-level offending* (infringement), the proposal is that this power could be used in situations where a person may have unknowingly or unintentionally broken the rules of a CAN, or the impact of them breaking the rules has been minor. The first part — unknowingly or unintentionally breaking the rules — is consistent with LDAC guidelines. However, it is not clear that the second part is consistent with the guidelines. One of the LDAC guidelines is that "the conduct involves straightforward issues of fact that can be easily identified by an enforcement officer". Here again there may be problems with using the consequences of the offending conduct as the criterion for whether to use this option rather than a higher-level offence. On the information available, in the context of a possible infringement for breach of a CAN, the Law Society is unsure whether a compliance officer could assess on the spot that the impact of breach has been minor. It seems possible that there will be cases where the consequences of a breach are not established for some considerable time after the breach of a CAN. If an offender has been dealt with through the infringement process before any serious consequences manifest themselves, a fresh prosecution for a more serious offence will be barred by the rules against double jeopardy. It may be that this is a risk which must be run, but the point needs some thought.

Proposals 10 and 11

38. Proposals 10 and 11 relate to compliance at places of first arrival (**PFA**). The information provided (and question 30) highlight that further policy development work is required to assess if these penalties are the best tools and, if so, to develop the tools. Further consideration will need to be given to defences that are available, referring to paragraph 26.4 of the LDAC guidelines.

39. For proposal 10 (relating to pecuniary penalties), it is not clear if there has been prior consultation with the Ministry of Justice in relation to the very high maximum penalty in this proposal, as the LDAC guidelines recommend. At this stage, there is not enough information to assess whether the penalty amounts are justified, but the Law Society has concerns that the proposal is essentially objectionable, in entailing the possibility of very significant penalties being imposed without any of the safeguards of a criminal prosecution. To justify the proposal, significantly more analysis will be needed.

40. In relation to proposal 11 (creating a new offence for breaching PFA conditions of approval with a fine of up to $200,000 and a continuing penalty of $10,000 each day), this seems preferable in principle. However, again, there is not presently enough information to fully assess this proposal.

Proposal 12: Clarify arrest powers

41. The Law Society supports the arrest powers of police officers being made explicit in the Biosecurity Act. Clarity as to the bases on which an arrest can be made is highly desirable, both for the courts and for the persons who may have to exercise the arrest powers.

42. The Law Society's feedback on the proposal to confer powers of arrest on biosecurity officers is addressed in proposal 6.

Proposal 13: Introduce sentencing guidance to the Biosecurity Act

43. Proposal 13 is to introduce Biosecurity Act sentencing guidance. The Law Society considers this could be positive in the biosecurity context. This is a specialist area well removed from

the ambit of most offences where punishment is dealt with under the Sentencing Act 2002. Advantages in including sentencing guidelines in the Biosecurity Act (Q32) may include:

43.1. Sentencing guidance provides greater clarity for judges, lawyers and prosecutors.

43.2. It may have an educational effect; and possibly a deterrent effect on potential offenders.

44. The discussion papers suggest that guidance could be modelled from guidance in other Acts such as the Food Act 2014 and Fisheries Act 1996. Section 274 of the Food Act 2014 seems an appropriate general model, that defers to well-recognised sentencing principle and would adapt readily to the biosecurity context.

45. If something more specific is intended, the Law Society notes the importance of the guidance foremost being shaped by the body of case law that has developed under the Biosecurity Act, in addition to the legislative examples mentioned.

Funding and compensation

Proposal 20: Compensation – scope of losses that are compensable

46. Proposal 20 considers preventing or placing limitations on compensation for consequential loss arising from the exercise of biosecurity powers (for example, destroying crops).

47. The Law Society considers that, in general, persons affected by the exercise of biosecurity powers should be compensated for their loss; and that this should generally include consequential loss because of the significant impact that, for example, loss of future profits from a business can have. However, the case is acknowledged for setting some limitations so that recompense is not open-ended and to place some incentives on individuals to take steps to mitigate loss and take appropriate risk-management actions.

48. The Law Society acknowledges that MPI will need to balance these considerations. Taking one of the options that place a time limit on how long the consequential loss can run for (proposal 20B or 20C) may be an acceptable way to balance these concerns.

Border and imports proposals

Proposals 22–25: Development of import health standards

49. Proposals 22–25 are aimed at speeding up the process of making import health standards. Generally, the proposals involve dispensing in different situations with the requirement of consultation.

50. In the Law Society's view, for a range of reasons, consultation on proposed regulatory measures is typically a useful and sound regulatory practice. It assists to:

50.1. achieve better quality regulation through feedback;

50.2. identify the costs of impacts of regulation, which may otherwise have been unknown;

50.3. promote fairness; and

50.4. obtain community and industry buy-in.

51. While exceptions to that general position could be made, caution is needed. For example, one situation in which an exception could be justified would be to deal with matters requiring an urgent fix where there are clear benefits in moving swiftly and/or negative effects that

would arise from a normal consultative process. Generally, though, the Law Society takes the view that a conservative approach to exceptions is warranted.

52. Accordingly, on the specific proposals:

    52.1. *For technical amendments:* the Law Society recommends supplementing this with the requirement that the amendment also be non-controversial (an example is section 39(3)(a) of the Electricity Industry Act 2010).

    52.2. *For amendments in the first year of trade:* if this proposal proceeds, it would be desirable to include a requirement to subsequently consult on the amendment or else it will lapse (an example is the urgent Code amendment process under the Electricity Industry Act).

    52.3. *For one-off permits:* because controls would not have wide application or effect, the proposal may be appropriate.

    52.4. *For consultation on a risk management plan and not the standard:* the Law Society queries what justification there is for this proposal.

Proposal 27: Independent review panels

53. Proposal 27 notes challenges arising from the present process of enabling stakeholders to request the establishment of an independent review panel to review concerns about consultation. This can be a time- and resource-intensive process. A preferred option is indicated of removing section 24, which provides for the process. A review by a senior public official is another alternative.

54. The Law Society notes that independent review panels provide a pathway for a review that is wider than judicial review. This can have some benefits. However, on balance, there could be good reason to remove it provided the other processes remain, as identified in option 27D.

Proposal 28: Border clearances for cruise craft passengers

55. Proposal 28 is to create additional powers and duties in the Biosecurity Act enabling biosecurity inspectors to process passengers disembarking a vessel (such as a cruise ship) who have already arrived in New Zealand. The discussion papers ask:

    Do you agree with our preferred approach to progress proposal 28? (Q59)

56. The aim of the proposal is supported. However, in the Law Society's view, this proposal needs more clarity regarding the source and extent of the risk, leading to a need to continually search and/or inspect passengers who are travelling domestically within or around New Zealand. The discussion papers do not address how the risk identified arises, saying only that: "[b]order inspectors are unable to fully process passengers and inspect risk goods at all points in the cruise ship's itinerary where a passenger may have access to new risk goods". It is unclear whether (perhaps) the risk arises because passengers are moving on and off the vessel where there may be prohibited goods, such as in their rooms (assuming that the alternative, that the whole vessel has to be searched and cleared, is in all likelihood unworkable).

57. It would be desirable to more fully analyse the justification and level of risk involved if wishing to proceed with this proposal. The additional, potentially intrusive powers involve privacy and human rights concerns that should have proper justification. Examples could be

useful to assist in giving more clarity about the grounds for seeking a power that could risk overreaching or being unduly intrusive if not clear about its rationale.

Readiness and response

Proposal 39: Faster emergency declarations

58. Proposal 39 is to change the decision-maker for a biosecurity emergency from the Governor-General to the Minister for Biosecurity.

59. In principle, the Law Society supports this proposal.

Proposal 40: Biosecurity duty

60. Proposal 40 is to add a general biosecurity duty in the Biosecurity Act. The Law Society suggests a need for further policy work to be done on this if the proposal progresses. The analysis in the RIS appears light in the context of a new duty (even if at this stage the duty is not directly enforceable).[16] As it presently stands, the Law Society finds the analysis unpersuasive.

Long-term management

Proposal 44: Pest and pathway management

61. Proposal 44 considers simplifying the process to create national or regional pest and pathway management plans. Consultation would occur on a draft plan, rather than a proposal for a plan. There would be other changes, such as to the number of required elements needed to complete a plan proposal, and the matters of which the Minister must be satisfied.[17]

62. The Law Society supports in principle the proposed change in process to shift consultation from feeding into development of a draft pest management plan, to commenting on a draft plan. A process involving consultation on a draft is, for example, consistent with the process for the preparation of conservation management strategies and conservation management plans.[18]

63. As a practical matter, to enable more meaningful and early engagement, it could still be desirable to incorporate a provision in the process enabling early feedback to be sought while the content of the plan is still being formulated. There could be a requirement, for example, to publicly notify that the process of developing a new national or regional plan is underway.

Proposals 54A–54C: Section 55

64. Proposal 54 would amend the powers of the Minister for Biosecurity to assign responsibility for decision-making on the appropriate response to a harmful organism or pathway that is not already being managed under a response or management plan. Options are discussed on the basis that these powers have not been used since coming into force. They could be amended, or they could be removed.

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16 "Regulatory Impact Statement Biosecurity Act Amendment Bill Paper 5: Readiness and response" at 24.

17 Ministry for Primary Industries "Biosecurity Act 1993 proposed amendments: discussion document 6 – long-term management" at 8–9.

18 Conservation Act 1987, ss 17F and 17G(1).

65. The Law Society has concerns regarding proposal 54A. In the Law Society's view, further consideration is needed if this proposal is to be progressed. It is not clear there is a problem to be addressed. The policy analysis does not justify the proposal, nor does the proposal make it clear what an assigned party must do. No information is provided to suggest the "lack of teeth" is the reason the section 55 power has not been used to date.

66. The further analysis, when done, might in fact suggest that option 54C (to repeal section 55 and revoke its associated regulations) is the best overall. If section 55 and regulations remain, the Law Society could also support proposal 54B, which is a streamlining change that still preserves a consultation element.

Proposals 55–59: Management of unwanted organisms.

Proposal 55

67. Proposal 55 is to amend section 52 to define "communicate" in relation to a pest or unwanted organism. The Law Society supports the intent of this change to clarify the law. However, it may be better to use a plain English expression rather than a technical term.

Proposal 59

68. Proposal 59 is to include a new transitional provision, providing that all current unwanted organisms would cease to be unwanted organisms five years after the Royal Assent of the amendment. The transitional provision is intended to assist in reducing the number of unwanted organisms in the Official New Zealand Pest Register, some of which may no longer require unwanted organism status.[19] The discussion papers ask whether this is an appropriate mechanism to refine the unwanted organism register (Q96).

69. Others will be better placed than the Law Society to comment on the predominantly policy issues raised by this question. However, with over 14,500 organisms presently listed as unwanted on the Pest Register, the magnitude of what is proposed is significant and the instrument chosen is blunt. The proposal appears to be concerned with setting in place a timebound obligation creating an urgent imperative on technical officers to prioritise their review and consideration of what must remain registered as unwanted.[20] However, it seems doubtful how compatible the proposed process of, potentially, a mass de facto deletion is with those outcomes MPI is striving for, according to the discussion papers, to "provide a transparent and consistent process for the removal of unwanted organism status".[21] A specific, time-bound obligation for MPI to undertake a review of the register may be a less risky approach.

Surveillance and interfaces with DOC-administered legislation

Proposal 64: Interaction with the Freshwater Fisheries Regulations 1983

70. Proposal 64 is to enable the Biosecurity Act to take precedence over sports fishing provisions in the Conservation Act and its Freshwater Fisheries Regulations, in instances where biosecurity objectives and sports fishing priorities do not align. The Biosecurity Act would require certain conditions to be met for the provisions to take effect.

71. Whether it is appropriate for biosecurity outcomes to take priority over sports fishing benefits raises primarily a policy question beyond the Law Society's remit. The Law Society

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19 Discussion paper 6 at 26.
20 See "possible actions", discussion paper 6 at 27.
21 Discussion paper 6 at 26.

supports the intent behind the proposals to make the law clear, if biosecurity outcomes are to take precedence.

72. There is one query about a drafting detail in regard to proposal 64. If the proposal proceeds, the first proposed condition, that it cannot be shown that the fish was legally introduced, is workable provided that the conditions are independent of each other (not cumulative). This appears to be what is intended by the "or"; however, it may be that this could be clarified.[22] There may be circumstances in which, even if there was no restriction when it was introduced, an organism might still be a pest. There could also be value in clarifying, in this condition, whether "introduction" is intended to refer to New Zealand, or to the regional locality where it is causing a problem (as in some of the examples discussed).

Proposals 68 and 69: Surveillance and interaction with the Marine Mammals Protection Act 1978

73. Proposals 68 and 69 relate to MPI's mandate for surveillance, clarifying powers to undertake surveillance for diseases, and the interface of the Biosecurity Act with the Marine Mammals Protection Act.

74. While it is not suggested that these enhanced surveillance powers relate to surveillance of persons, if the proposals proceed, MPI will need to remain vigilant that surveillance of persons is not an unintended change.

Proposals 70 and 71: Interaction with the Wild Animal Control Act 1977

75. Proposals 70 and 71 would clarify that regional councils can enter private land to control wild animals; and make a technical amendment to section 7(5) of the Biosecurity Act.

76. The Law Society supports the technical amendment proposed to section 7(5), to replace the phrase "other than land administered under the Acts listed in Schedule 1 of the Conservation Act 1987" with the more technically correct phrase "other than land held or managed under the Conservation Act 1987 or the Acts listed in Schedule 1 of that Act" (proposal 71).

77. Proposal 70 is put forward as "clarifying". However, it does propose the power of entry onto private land. In the Law Society's view, the significance of this is not adequately reflected in the RIS and the assessment does not include proportionality considerations.

78. As with other enhanced powers proposed above, MPI should satisfy itself that it can justify this proposal. In principle, however — noting the potential importance that such a power could have in a biosecurity breach or emergency scenario — the Law Society could support the proposal subject to this further analysis. The present lack of clarity in the powers is undesirable. The gap which exists appears to be due to a legislative oversight when the Biosecurity Act was enacted in 1993. While the power to control private land is invasive and does have privacy implications, the Law Society agrees that any such power should be explicitly provided for.

Reviewing section 100T of the Biosecurity Act

79. The Law Society has one suggestion not presently within the scope of the consultation. MPI could consider a review of whether the insertion of section 100T into the Biosecurity Act has had the desired effect. Section 100T sets out funding considerations for regional councils in relation to funding the implementation of regional pest management plans or regional

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22 Discussion paper 7 at 5–7.

pathway plans from general or targeted rates set under the Local Government (Rating Act) 2002.

80. Other overarching local government funding considerations for activities, including implementation of biosecurity plans, are set out in section 101 of the Local Government Act 2002. Analysis in accordance with section 101(3) must be set out in a council's revenue and financing policy (**RFP**).[23] The RFP also has other requirements for describing how activities are funded, from funding sources including, but not exclusively, rates.[24] Section 102(1) states that policies, including the RFP, must be adopted to provide predictability and certainty about sources and levels of funding. However, the analysis under section 100T, which bears a close relationship to section 101(3), is not required to be set out in the RFP.

81. In short, the existing legislative regime effectively contains duplicate sets of considerations for that part of the biosecurity activity that is implementing plans. Experience indicates that regional councils are very familiar with the requirements of sections 101, 102 and 103 of the Local Government Act, but less familiar (or even aware of) section 100T. Compliance with section 100T is often achieved at a late stage when councils are setting their budgets for the coming financial year, and not well integrated into their policies for prudent financial management.

82. A review might indicate that section 100T is not necessary, or aspects to remain should be built into the Local Government Act 2002.

Nāku noa, nā

Jesse Savage
Vice President

23 Local Government Act 2002, s 103(3).
24 Local Government Act 2002, s 103.