

Biosecurity (Information for Incoming Passengers) Amendment Bill

Member's Bill

As reported from the Primary Production Committee

Commentary

Recommendation

The Primary Production Committee has examined the Biosecurity (Information for Incoming Passengers) Amendment Bill and recommends that it be passed. We recommend all amendments unanimously.

About the bill as introduced

This is a Member's bill in the name of Steph Lewis MP. It would amend the Biosecurity Act 1993 to require any craft entering New Zealand to provide biosecurity information to people on board, in both written and audiovisual form.¹

The bill would create a new strict liability offence if operators did not provide this information.

Biosecurity information is already provided to passengers when they enter New Zealand through a communications system run by the Ministry for Primary Industries. However, this bill seeks to provide further protection against biosecurity threats by making the provision of such information a requirement.

¹ The information might cover such things as what items are biosecurity risks, how they can damage New Zealand's industries and environment, how people can dispose of them, and potential penalties.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to an issue relating to clause 5 of the bill, which we discuss in more detail later in this commentary.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Commencement date

We recommend amending clause 2, relating to the bill's commencement. As introduced, clause 2 states that the bill would come into force on the day after it receives Royal assent. We recommend instead providing for it to come into force on a date specified by Order in Council, or 12 months after the bill receives Royal assent, whichever comes first. We consider that this would give stakeholders and officials more time to prepare for the changes this bill proposes.

We are aware that having a set date for commencement might give the ministry and industry representatives less flexibility to respond to issues that could arise, such as COVID-19 disruptions to implementation. To mitigate this, our amendments would allow the commencement date to be linked to the making of regulations. We were advised that the ministry would work with airline and cruise line representatives to ensure that their information systems could appropriately deliver the biosecurity information required by the bill.

A general duty to provide biosecurity information

As introduced, clause 4 would insert new section 17AA into the Biosecurity Act. Proposed subsections (2)(a) and (2)(b) would create a duty on the person in charge of a craft to provide biosecurity information to people on board, in written and audiovisual form.

We think these proposed subsections contain too much detail about how these provisions would be implemented. We believe this level of detail would be more appropriate in secondary legislation. We consider that the bill should instead establish a general duty for the biosecurity information to be presented.

Therefore, we recommend amending clause 4, proposed new section 17AA(2)(a) and (2)(b). Our amendments would remove reference to how the biosecurity information should be presented. They would stipulate that, before a craft arrives in New Zealand, the person in charge of the craft must provide biosecurity information to passengers as set out in the regulations. They must also inform the Director-General that the information has been provided, as set out in the regulations (if required by the regulations).

We consider that the advantage of having more detailed information in secondary legislation is that the details could be changed relatively quickly. This is especially

important in the biosecurity operating environment, where high-risk threats can create the need for rapid change to the implementation details of legislation.

Moving detailed duties from primary legislation to secondary legislation

We recommend inserting clause 8 into the bill, which would amend section 165 of the Act. This would enable regulations to be made in relation to section 17AA(2) and (3).

In clause 4, we also recommend replacing subsection (3) of proposed section 17AA. This would include some of the bill's implementation details in regulations rather than in primary legislation, for the reasons outlined above. Paragraphs (a) to (g) of new subsection (3) would set out what the regulations may do.

Powers of the Director-General

As introduced, subsection (3) of new section 17AA would require the Director-General of the ministry to approve written and audiovisual biosecurity information shown to passengers, and notify it in the Gazette. It is our view that this is an administrative matter, which does not need to be set out in primary legislation. We consider that all of the Director-General's powers should be set out in regulations. Our proposed paragraphs (d) and (e) of subsection (3) would specify what the Director-General may be authorised to do through regulations.

Changing the duty to provide information to “passengers” rather than all people on board

As introduced, the bill has a requirement for each person on board to receive biosecurity information, which would also apply to the crew on board. We consider it unnecessary to include crew, and recommend excluding them from this requirement.

We therefore recommend replacing references to “persons on board” with “passengers” in clause 4. This would ensure that the requirement to receive biosecurity information would only apply to passengers, and not to all persons on board.

Applying the duty to provide biosecurity information to “commercial craft”

We consider that the duty to provide biosecurity information should be narrowed to include only commercial passenger craft with 20 or more passengers (excluding crew) on board.

As introduced, clause 4 requires all craft coming into New Zealand to provide biosecurity information. This includes private planes, air ambulances, fishing vessels, cargo ships, defence force aircraft and ships, private yachts, and donor organ retrieval flights. We understand that these craft already have a high level of compliance with biosecurity measures. We have also been advised that existing biosecurity controls already apply to all arriving craft.

Our amendment would replace the term “craft” with “large commercial craft” in proposed new section 17AA(1). The term “large commercial craft” would be defined in subsection (4). The “commercial craft” part of the definition would have the same meaning as “commercial craft” in the Immigration Act 2009.

Our proposed subsection (4)(b) would limit the duty to present biosecurity information based on the number of passengers the craft was carrying. The duty to provide biosecurity information would be limited to people in charge of commercial craft with 20 or more passengers (excluding crew) on board. This amendment would target craft carrying a relatively higher number of passengers, where the biosecurity risks are higher. Biosecurity risks are lower on craft carrying 20 or fewer passengers because they have more interaction with ministry inspectors on arrival.

We were advised that the move currently under way toward a digital border system would help to protect against biosecurity risks from passengers on smaller craft. A digital border system would use apps and webpages for passenger declarations, rather than paper arrival cards. We were advised the system would also provide an opportunity to inform passengers about New Zealand's biosecurity requirements at various points of their journey. Eventually, it should be possible for biosecurity information to be provided through a single digital portal.

Removing pecuniary penalties

As part of our consideration, we have examined the bill's consistency with principles of legislative quality. As a result, we recommend removing clause 5.

As introduced, clause 5 would make failing to present biosecurity information to incoming passengers punishable by a pecuniary penalty under section 154H of the Act.

Pecuniary penalties are non-criminal monetary penalties that aim to deter serious regulatory breaches without criminalising the offender. Under the Act, penalty amounts can reach \$500,000 for an individual and \$10 million for a body corporate. Alternatively, they can be three times the value of the commercial gain resulting from non-compliance, or 10 percent of the turnover of the body corporate if the commercial gain cannot be readily quantified.

We consider that these monetary penalties would be too high for the offence of not presenting biosecurity information to passengers. It is our view that a failure to comply with proposed section 17AA involves a lower level of harm compared to other offences punishable by pecuniary penalty orders under section 154H of the Act. It would also be inconsistent with the kind of conduct and harm already targeted by pecuniary penalties under the Act.

We also note that pecuniary penalties are intended to target the commercial gain that could be made by breaching the Act. We believe there is little financial gain to be had by a body corporate or an individual not providing biosecurity information to incoming passengers.

Enforcement options for breach of proposed section 17AA

As introduced, clause 6 provides for the enforcement option of a strict liability offence. Strict liability offences are criminal offences that can be established without the need to prove the intention of committing the offence.

For the same reasons we outlined above for pecuniary penalty orders, we consider that the penalty of a strict liability offence is too high and not proportionate to the offence of failing to provide biosecurity information to passengers. As introduced, the penalty for a strict liability offence would be up to \$5,000 for an individual and up to \$15,000 for a body corporate.

We consider that an infringement notice would be a more appropriate punishment for a breach of proposed new section 17AA.

Infringement offences usually involve low-level infringement fees (less than \$1,000) and are often imposed by issuing an infringement notice. Infringement offences do not result in criminal convictions. The purpose of infringement offences is to deter conduct that is of relatively low seriousness and does not justify the full imposition of the criminal law.

However, to enable the creation of an infringement offence in the bill, an offence for a breach of proposed section 17AA needs to be created. Therefore, we recommend retaining the strict liability offence in the bill, but reducing the penalty to the lowest under the Act: up to \$1,000 for an individual and up to \$5,000 for a body corporate.

We are advised that the Ministry for Primary Industries would create an infringement offence by amending the Biosecurity (Infringement Offences) Regulations 2010. The ability to create and implement regulations for the bill is discussed earlier in our report.

Therefore, we recommend amending clause 6 to insert new section 154N(20A) in the Act. This amendment would make it an offence under the Act for failing to comply with proposed section 17AA or the related regulations under section 165(1AA).

We also recommend replacing clause 7 of the bill to insert new section 157(6A) in the Act. This change would impose the following penalties on anyone who commits an offence under proposed section 154N(20A): a fine of up to \$1,000 for an individual and up to \$5,000 for a body corporate.

Compliance orders

We note that if proposed section 17AA is inserted into the Act the ability to issue a compliance order would also be available.

Compliance orders can be issued by an authorised person or inspector to require a person to stop or start doing something. Such a direction is legally enforceable. Failing to comply with a compliance order is an offence under the Act. For breaching a compliance order, the penalty for an individual could be imprisonment for up to three months, a fine of up to \$50,000, or both. The penalty for a corporation is a fine of up to \$100,000.

Given the conduct and harm that would be involved in a breach of proposed section 17AA, we believe that a compliance order is likely to be the most appropriate enforcement tool to ensure compliance. Compliance orders hold offenders accountable for their actions while also giving them the opportunity to comply with a direction, without immediately resorting to prosecution.

Our proposed amendments to the bill would give the ministry a range of options to address breaches of proposed section 17AA in the Act.

Exclusive economic zone

We recommend removing clause 7, which would apply the requirement to provide biosecurity information to passengers on craft inside New Zealand's exclusive economic zone (EEZ). This zone is the area of the sea in which New Zealand has special rights regarding the exploration and use of marine resources.

Section 162AA(2) of the Act sets out how clause 7 of the bill would apply. The requirement to provide biosecurity information to passengers would only apply if the craft was arriving in New Zealand to explore or exploit resources in the EEZ. We understand that this recommendation would not compromise the ability for passengers to be made aware of New Zealand's biosecurity requirements. For example, cruise lines provide biosecurity information shortly before, or during, disembarkation, while for airline passengers it is current practice for a biosecurity video to be played just before landing. We believe that this is the most effective time to provide biosecurity information because it allows passengers to retain and act on the information at the appropriate time.

Appendix

Committee process

The Biosecurity (Information for Incoming Passengers) Amendment Bill was referred to the committee on 30 June 2021. We invited the bill's sponsor, Steph Lewis, to provide an initial briefing on the bill. She did so on 9 September 2021.

The closing date for submissions on the bill was 16 August 2021. We received and considered 11 submissions from interested groups and individuals. We heard oral evidence from 5 submitters.

We received advice on the bill from the Ministry for Primary Industries. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Jo Luxton (Chairperson)

Hon David Bennett (until 31 August 2021)

Mark Cameron

Barbara Kuriger (from 31 August 2021)

Steph Lewis

Anna Lorck

Ian McKelvie

**Biosecurity (Information for Incoming Passengers)
Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Steph Lewis

Biosecurity (Information for Incoming Passengers) Amendment Bill

Member's Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Biosecurity (Information for Incoming Passengers) Amendment Act **2021**.

cl 2	Biosecurity (Information for Incoming Passengers) Amendment Bill	
2	Commencement	
	This Act comes into force on the day after the date on which it receives the Royal assent.	
(1)	<u>This Act comes into force on a single date set by Order in Council.</u>	
(2)	<u>If the Act has not come into force by the first anniversary of Royal assent, it comes into force then.</u>	5
(3)	<u>An Order in Council made under this section is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).</u>	
3	Principal Act	
	This Act amends the Biosecurity Act 1993 (the principal Act).	10
4	New section 17AA inserted (Information about biosecurity requirements for persons on board law for passengers on certain incoming craft)	
	After section 17, insert:	
	17AA Information about biosecurity requirements for persons on board law for passengers on certain incoming craft	15
(1)	This section applies to a <u>craft</u>—large commercial craft that is en route to New Zealand territory from a point outside New Zealand territory on a flight or voyage that is intended to include arrival in New Zealand.	
(2)	Before the craft arrives in New Zealand, the person in charge of the craft must—	20
	(a) give each person on board the craft a copy of approved written information about New Zealand’s biosecurity requirements; and	
	(b) play a copy of approved audiovisual information about New Zealand’s biosecurity requirements in a prominent location that is able to be seen and heard by each person on board the craft.	25
	(a) <u>provide information to the craft’s passengers about the biosecurity law relevant to arrival in New Zealand, as required by regulations made under this Act; and</u>	
	(b) <u>give the Director-General notice that the information has been provided, as required by the regulations (if at all).</u>	30
(3)	The Director-General must approve audiovisual and written material that summarises New Zealand’s biosecurity requirements for the purposes of this section, and give notice of the approval in the <i>Gazette</i>.	
(3)	<u>Regulations may do any of the following:</u>	
	(a) <u>require the information to include specified content or details:</u>	35
	(b) <u>require the information to be provided in a specified—</u>	
	(i) <u>form or manner (for example, with translations); or</u>	

	(ii) <u>medium (for example, written, audiovisual, or electronic):</u>	
	(c) <u>specify criteria that a record of the information in any particular medium (for example, an audiovisual recording) must satisfy:</u>	
	(d) <u>authorise the Director-General to provide a record of the information in any particular medium for use by any person under subsection (2)(a):</u>	5
	(e) <u>authorise the Director-General to approve a person's record of the information in any particular medium for use by the person under subsection (2)(a), or to revoke an approval:</u>	
	(f) <u>specify how long before a craft's arrival in New Zealand the information must be provided:</u>	10
	(g) <u>require notice to be given under subsection (2)(b), and specify its content, the form or manner in which it must be given, and when it must be given.</u>	
(4)	<u>In this section, large commercial craft means a craft that—</u>	
	(a) <u>is a commercial craft as defined by section 4 of the Immigration Act 2009; and</u>	15
	(b) <u>has 20 or more passengers (which excludes crew) on board.</u>	
	Compare: Biosecurity Act 2015 s 220 (Aust)	
5	Section 154H amended (Pecuniary penalty order)	
	After section 154H(2)(e), insert:	20
	(ea) section 17AA(2):	
6	Section 154N amended (Section 154N offences)	
	In section 154N(12)(a), after “17,”, insert “17AA(2),”.	
	After section 154N(20), insert:	
	<i>Penalty: section 157(6A)</i>	25
(20A)	<u>A person commits an offence against this Act who fails to comply with—</u>	
	(a) section 17AA ; or	
	(b) <u>regulations made under section 165(1AA).</u>	
7	Section 157 amended (Penalties)	
	After section 157(6), insert:	30
(6A)	<u>Every person who commits an offence against section 154N(20A) is liable on conviction,—</u>	
	(a) <u>in the case of an individual person, to a fine not exceeding \$1,000:</u>	
	(b) <u>in the case of a corporation, to a fine not exceeding \$5,000.</u>	

7 ~~New section 162AFA inserted (Information about biosecurity requirements for persons on board craft coming to EEZ)~~

After section 162AF, insert:

~~162AFA Information about biosecurity requirements for persons on board craft coming to EEZ~~

5

- (1) ~~Section 17AA(1) applies as if “New Zealand” and “New Zealand territory” read “the EEZ”.~~
- (2) ~~Section 17AA(2) applies as if “arrives in New Zealand” read “arrives in the EEZ”.~~

8 Section 165 amended (Regulations)

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After section 165(1), insert:

(1AA) The Governor-General may from time to time, by Order in Council, make regulations for the purposes of **section 17AA(2) and (3).**

Legislative history

25 March 2021
30 June 2021

Introduction (Bill 22–1)
First reading and referral to Primary Production Committee