Tackling Invasive Non-Native Species in the UK Overseas Territories

GENERIC BIOSECURITY BILL revised 2020
SIMPLIFIED VERSION

EXPLANATORY NOTES

Taking of a bond; payment of a fee
If a jurisdiction has Ministries instead of Council Committees, the draft will need adapting accordingly.

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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 includes controlling the landing of ships and aircraft and their cargo, passengers and crew, inspection and if necessary treatment 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 freer movement of goods and people. It is also desirable that the laws on biosecurity of the OTs be harmonised as far as possible so as to facilitate training and interchangeability of technical officers and legal advisers. 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 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

2.0 Scope of the Bill
2.1 The 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 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 does require standards for biosecurity to be consistent with the GATT rules and the IPPC standards – see below.

2.3 The original version of the generic Biosecurity Bill was placed on the website of the Non-Native Species Secretariat in June 2019. In the light of consultations that Mr Wilson has since had with several OTs, it has been revised and these notes relate to the simplified version of the generic Biosecurity Bill, dated March 2020; see www.nonnativespecies.org/index.cfm?pageid=639.³

2.4 The revised version of the Biosecurity Bill:
- removes the requirement for the designation of points of entry and departure, port holding areas and quarantine stations;
- extends the territorial scope of the legislation to the whole of the Exclusive Economic Zone;
- defines ‘landing’ to include allowing persons off a ship anywhere in the waters of a territory;
- replaces the duty to inspect etc. by a power to inspect, so as to allow more flexibility and discretion;
- reduces the number of legislative orders that have to be made, replacing them by directions, etc.


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.
removes any reference to local authorities, or NGOs;
deletes a number of provisions that can be dealt with administratively action, such as
derelation of functions, outsourcing, coordination and consultation, facilities at
biosecurity holding areas, compliance agreements, agreements with landowners and
biosecurity approved premises.

2.5 The revised version of the Bill adds some provisions which are included in model
biosecurity legislation recommended to members of the Organization of Eastern Caribbean
States (OECS) and CARICOM (the Caribbean Community) of which some OTs are members.
They are:
- Authorised laboratories and analysts
- International transport facilities
- Audit and trace-back system
- Duty to assist and co-operate.

2.6 In order to shorten and simplify the main text, the revised Bill removes to Schedules
the definitions, the contents of an arrival declaration, the powers of biosecurity officers and
the contents of the biosecurity register.

2.7 In order to shorten these Explanatory Notes, the following Annexes have been
deleted:
Annex 1: Glossary of terms not defined in Schedule 1
Annex 2: List of offences created by the Ordinance
Annex 3: List of forms and notices that might be needed
Annex 4: List of powers and functions contained in the Ordinance.
These will be different for each version of the Bill as adapted to each OT and can be re-
created locally if needed.

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
Part [BIP] – Biosecurity Import Procedures
3.4 Parts [BBC], [CVA], [BIP] and [BEP] establish a regime to control the movement of invasive species and pests and the import and export of regulated articles generally. Part [BIC] provides powers to control incursions of invasive species and infestations of pests within a Territory. Powers are given to biosecurity officers in Parts [BBC], [BQ] and [BIC] and they are amplified and added to in Schedule 3.

3.5 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 invasive species which would harm the environment and of pests and diseases which would harm human health or the agricultural economy. It does this by creating a category of ‘regulated articles’ (called ‘risk goods’ in some countries) and enabling the import and export of such articles to be prohibited or restricted. Restricted articles are subject to conditions about biosecurity measures that need to be applied, which are imposed by specifications issued by the biosecurity authority.

4.2 ‘Regulated articles’ are defined as all animals and plants and their products and things which regularly come into contact with them. Extensive powers are given to control the landing in, and departure from the territory of such articles and their movement within the territory. They include power to inspect, test, treat, reconsign or destroy regulated articles. There therefore need to be appropriate checks and balances, with transparency of decision-making and full accountability. This is what makes the proposed legislation quite lengthy and apparently complex.

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

4.4 The Bill also aims to implement international rules relating to 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
4.5 If enacted the Bill will:
- set out the biosecurity functions of the respective OT Government and imposes obligations on it in relation to compliance with international obligations, reciprocity, mutual assistance etc.
- control the arrival and landing of ships, aircraft and people;
- create a regime of import and export licences or permits, based on specifications for treatment of various species;
- impose obligations on the masters of vessels respect of disposal of garbage, ships’ stores and bilge water, with equivalent obligations on the captains of aircraft;
- 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 can be adapted from existing customs and immigration forms.

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 might need to be dealt with by regulations – see clause [MP9].

4.9 The Bill in effect puts the existing animal and plant 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 would not require the designation of biosecurity points of entry etc. as they will be those already in use under customs or immigration legislation. It would however control the ‘landing’ of a vessel anywhere in the waters of the territory, including the EEZ, by requiring landing clearance (clause [BBC1]).

5.2 The Bill would also:
- Control the entry of passengers or crew by requiring entry declaration and clearance (clause [BBC1]).
- Enable the creation of a list of prohibited imports and exports and restricted imports and exports and creates offences in respect of them (clauses BBC2).
- Control the arrival and departure of vessels and aircraft (Part [CVA]).
- Impose environmental obligations on masters of ships and captains of aircraft (clause [CVA6]).
- Make all incoming goods liable to discretionary biosecurity inspection, to ascertain whether they require biosecurity clearance (clause [BIP1]).
- 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 [BIP4 and 5]).
- Enables the Director to control outgoing articles if necessary (clauses [BEP1 and 2]).
- Allow for the issue of sanitary and phytosanitary certificates if required by a receiving country (clause [BEP3]).
- Provide for the declaration and control of threat-free and infested zones (clauses [BIC2 and 4]).
- Enable control of movement between areas of the territory (clause [BIC6]).
- Authorise the destruction of feral animals and birds (clause [BIC9]).
- Enable the declaration of notifiable invasive species and pests and require compliance (clause [BIC10]).
- Provide for the appointment of a Director and biosecurity officers (clauses [Adm1 and 2]).
- Set out the powers of biosecurity officers generally (Schedule 3).
- Create offences and prescribe maximum penalties.
- Create offences of releasing etc. invasive species (clauses [OP1 and 2]).
- Provide for a Fixed Penalty system to allow for short-term importers of articles (clause [OP8]).

5.3 The Bill does not require the establishment of a body to deal with biosecurity emergencies, but that might well be one of the functions of a National Disaster Committee/Advisory Committee. If there is no such body, a body to deal with biosecurity emergencies might need to be established. Clause [Adm2(2)(a)] gives the Director power to devise an Emergency Response Plan, which can respond to biosecurity emergencies. That is a matter for local decision, however.

6.0 Drafting features of the Bill
6.1 The generic Biosecurity Bill is not modelled on any particular OT and will need adapting by each OT that adopts it. For drafting purposes, the draft Bill:
- uses the word ‘Ordinance’ rather than ‘Act’;
- gives legislative powers to the Governor in Council;
- uses ‘Legislative Council’ for the legislature;
- does not mention the term ‘Minister’ or ‘Administrator’;
- refers to a Director (of Biosecurity) rather than a Service or Authority or similar;
- does not give any specific role to the veterinary service or to technical section heads;
- uses ‘specifications’ to include import standards and licence conditions;
- It uses ‘import licence’ rather than ‘import permit’;
- requires fees and charges to be ‘prescribed’ i.e. by regulations under clause [MP9];
- but enables forms to be ‘approved’ rather than ‘prescribed’ or ‘specified’;
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 DEFRA 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.

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.

Other terms that will require consideration by each territory include:
- Monetary values, which might be in £ or $, according to the local currency.

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\(^4\) See www.nonnativespecies.org/index.cfm?pageid=639
- Periods of time, age thresholds, etc.
- The ‘Governor’ or ‘Governor in Council’ will in some jurisdictions be a Minister (or possibly the Cabinet if a legislative power is involved.) It might also be the Director if executive powers are given to that officer.
- The ‘Department’ might be a Ministry in some jurisdictions; or the Government if that is the local preference.
- The ‘Director of Biosecurity’ will be the CEO of the relevant Department. (Some OTs might wish to establish, or might already have, a Biosecurity Department or similar, in which case the draft will need to reflect its role.
- OTs with Ministries might wish to give a role to the Secretary of the relevant Ministry, or to the Cabinet.
- 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 publicising decisions made under a statute, 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.

7.5 There are also a number of more minor issues that will need to be decided locally and the generic Bill indicates these in the parallel Notes. An example is the level at which a biosecurity officer needs approval before destroying an article; see para. 9 in Schedule 3].

8.0 Offences and penalties
8.1 The Bill creates a number of offences and states the maximum penalty at the end of the section that creates the offences. The local Interpretation Ordinance/Act probably provides for this.) They could be by reference to a scale of fines if the OT has such a scale. The penalties could be listed in a Schedule if preferred, for ease of comparison and amendment. (A Schedule can be amended by order, if wanted, but otherwise, penalties need an amendment Ordinance.)

8.2 The penalties are maxima, as provided by the Interpretation Ordinance of most OTs. The level of penalty is a matter for local decision, but should be comparable with other environmental offences. It is possible to vary penalties according to the value and nature of the goods sought to be imported i.e. the severity of the threat posed, and the frequency of the offence. But the Ordinance confines itself to specifying higher maxima for corporate bodies (see [OP9].)

8.3 The generic draft Bill suggests a double penalty for the masters of vessels and captains of aircraft, and a multiplier of 5 for corporations. It does not prescribe a daily penalty for repeat offences, as importing etc. is usually a one-off event.
8.4 It might be useful to have a fixed penalty system as many of the offences are administrative in nature (failure to make a declaration, etc.) and some might be committed by people about to leave the territory.

9.0 Orders etc. that will be needed

9.1 If an OT enacts the Bill, it will need some implementing machinery before a commencement date is appointed. The Bill is drafted so as to keep to a minimum the subsidiary instruments that are needed, to avoid the risk of the ordinance being a ‘toothless tiger’. However, the following items will probably be needed:
- commencement notice under [Pre1]
- declaration of prohibited and restricted regulated articles under clause [BBC1]*
- 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 [BIP4] (if wanted)
- 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.

9.2 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 and Pests Order
C. Fees and Charges Regulations (see para.12.1 below)
D. Specifications of Import & Export Conditions (see para. 13.0 below.)

10.0 Regulations

10.1 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.

10.2 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.

11.0 Specifications
11.1 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]). Clause [Adm1(4)] calls for a specification in respect of an officer’s identification. The term ‘specified’ does not itself create a ‘specification’ – only something specified by the Director in writing; see the definition in Schedule 1.

11.2 Section [MP8] contemplates that written 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.

11.3 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.

11.4 Section [MP8] defines their status; 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.

12.0 Conclusion
12.1 As stated above, the generic Biosecurity Bill is 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.

John F. Wilson
Consultant Law Drafter
30 May 2019, rev 20 March 2020