Regulatory Impact Statement

Biosecurity Act Amendment Bill

Paper 2: System-wide issues

Contents

1. Introduction

1. The Biosecurity Act Amendment Bill (the Bill) impact statement has been split into a series of impact statements as follows:

   - Paper 1: Overview impact statement;
   - Paper 2: System-wide issues;
   - Paper 3: Funding and compensation;
   - Paper 4: Border and imports;
   - Paper 5: Readiness and response;
   - Paper 6: Long-term management; and
   - Paper 7: Surveillance and interfaces with Department of Conservation-administered legislation.

2. The overview impact statement sets up the background for the Bill, the overarching regulatory stewardship "problem definition", and the objective and criteria for the Bill as a whole. The remaining impact statements detail specific issues and proposals, which relate to the overarching opportunity and objectives. The topic-based impact statements should be read together with the overview impact statement.

3. This impact statement is Paper 2: System-wide issues. It addresses areas of the Biosecurity Act 1993 (the Act) which affect the biosecurity system as whole:

   - purpose clause in the Biosecurity Act;
   - Ministerial involvement in significant decisions;
   - local knowledge in decision-making;
   - biometric information;
   - enforcement; and
   - sentencing.

4. Each topic is structured in the same way:

   - background to the topic;
   - problem / opportunity;
   - options;
   - assessment of the options;
   - cost benefit analysis; and
   - preferred option.

2. Purpose clause in the Biosecurity Act

2.1. Background

Overview of purpose clauses

5. The Legislation Act 2019 states that legislation must be understood from its text and in light of its purpose and its context. It also states that the principle of interpretation applies regardless of whether the legislation's purpose is stated in the legislation.

6. The Legislation Design and Advisory Committee[1] (LDAC) has guidance on the functions of purpose clauses and when they are appropriate. Purpose clauses could be overarching (where the clause sets out the purpose of the Act as a whole) or limited to Parts (where the clause sets out the purpose of one specific Part).

7. Purpose clauses fall into three main categories:

   - Descriptive purpose clause – this clause is like an 'overview' or 'outline'. It gives a high-level description of the contents of the Act. It generally does not explain the policy for those contents or the policy objectives the Act is designed to achieve.
   - Policy purpose clause - at the other end of the spectrum is the policy purpose clause. These clauses identify the explicit intent of the law. By clearly expressing the intention of Parliament, they connect the policy purpose and law.
   - Mixed purpose clauses - many purpose clauses sit somewhere on the spectrum between descriptive purpose clauses and policy purpose clauses or use elements of both.

8. In considering when and what type of purpose clause to include in legislation, LDAC's guidance cautions policymakers to remain mindful of the following:

   - Overarching purpose clauses need to cover the ambit of the whole Act (at least at a high level). It is important to be clear about the link to the decisions made under the Act, and the extent to which purpose provisions are intended to influence the outcome of those decisions.
   - Where both an overarching purpose clause and Part-specific purpose clauses are present in legislation, it is important that the purposes work consistently to avoid over-complicated legislation. This can cause difficulties in operationalising the law.
   - Multiple similar versions of purpose clauses throughout the legislation should be avoided as they are likely to confuse decision-makers.
   - A purpose clause (whether applying to the whole Act or only to one Part) should avoid being comprised of a long list of potentially conflicting ideas. A purpose statement becomes more complex (and risky) when it contains a miscellany of ideas, where it is unclear where the "weight" to each idea is to be attributed.
   - Retrofitting a purpose clause to legislation can be complex and difficult as it must fully capture the purpose of the substantive provisions.

[1] LDAC's mandate is to promote quality legislation. LDAC provides advice to officials developing policy and legislation to resolve problems in the design of legislation and to identify public law issues. LDAC also publishes the Legislation Guidelines (endorsed by Cabinet) and scrutinises Government Bills that come before Parliament.

Purpose clauses in the Biosecurity Act

9. The Act does not have an overarching purpose clause but has purpose clauses for specific Parts. These are outlined in Table 1:

Table 1 - Purpose clause for Parts of the Act

Part of the Biosecurity Act	Type of purpose clause
Part 3 – Importation of risk goods	Descriptive purpose clause.
Part 4 - Surveillance and prevention	Policy purpose clause
Part 5 – Pest management	Policy purpose clause
Part 5A - Government/industry agreement for readiness or response	Policy purpose clause
Part 7 – Exigency actions	Descriptive purpose clause.

2.2. Problem or opportunity

10. Those who use the Act must balance multiple objectives when they make decisions. An example of this is how decision-makers balance the benefits of enabling trade and travel with necessary biosecurity protections which might restrict trade and travel.

11. Balancing multiple objectives is difficult. A clear purpose statement can provide direction and assist decision-makers on how they consider competing objectives. The Bill provides an opportunity to assess whether including a purpose statement will lead to better biosecurity outcomes.

12. There is also an opportunity to expand on issues within scope of a purpose clause, including the following:

- The exports system – one of the functions of the biosecurity system is to facilitate sustainable trade. While trade includes both the imports and exports systems, the Act is largely (not exclusively) focussed on risks from imports.
- A focus on operational improvements – an operationally efficient system enables early detection and mitigation of threats and incursions. A purpose clause could make it clearer that operational efficiency is an important consideration within the biosecurity system.
- Strengthened decision-making – science underpins decision-making in biosecurity. While this should remain the default position, current settings may mean there are missed opportunities for other information sources to complement this, such as local community knowledge. Enabling access to a wide variety of information would provide a richer pool of evidence to support decision-making.

2.3. Options

13. **Option 1** is the **status quo**. The Biosecurity Act would not have an overarching purpose clause, though some Parts of the Act have Part-specific purpose clauses.

14. **Option 2** would **insert an overarching purpose clause in the Act**.

15. Based on LDAC guidance on the drivers and types of purpose clauses, we have suggested elements which could be included in a purpose clause. Option 2 proposes a policy purpose clause that explicitly identifies the intent of the Act.

16. The elements are:

- A statement about protection.
- A statement about giving effect to international agreements.
- Clarification that trade (both imports and exports) is facilitated.
- Clarification that travel is facilitated.
- Reference to the system being operationally efficient in delivering biosecurity outcomes.
- Reference to environmental, economic, social and cultural values so there is a legislative mandate to consider them in decision-making.
- Clarification that the Act is about effective management of biosecurity risk.

17. This purpose clause envisages that trade and travel are a given. However, we need to ensure that trade and travel occurs in a way that protects human, animal, and/or plant life, and looks after our economic, environmental, and socio-cultural wellbeing.

18. **Option 3** would **include new purpose clauses, as well as revise existing purpose clauses, for selected Parts of the Act**. The Act has a range of Part-specific purpose clauses.

19. Part 3 of the Act deals with the importation of goods. The purpose clause in this section could be amended to also reference the need for operational efficiency when managing biosecurity risks from imports and enable the ability to consider local knowledge as an additional avenue of evidence to support strengthened decision-making (refer to *Section 4 – Local knowledge in decision-making* later in this paper).

20. Part 4 of the Act sets out provisions relating to surveillance and prevention measures to manage biosecurity risks. It references meeting international obligations and trading requirements as one of the purposes for the continuous monitoring of New Zealand's status in regard to pests and unwanted organisms. The purpose clause of this part could be amended to enable monitoring and surveillance of all endemic diseases and not just unwanted organisms (refer to paragraph 62 of *Paper 7: Surveillance and interfaces with Department of Conservation-administered legislation*). It could also include the ability to consider local knowledge as an additional avenue of evidence to support strengthened decision-making (refer to *Section 4 – Local knowledge in decision-making* later in this paper).

21. Parts 5 (Pest management) and Part 5A (Government/industry agreement for readiness or response) have policy purpose clauses that are sufficiently clear for the effective operation of those Parts. Part 6 covers administrative provisions. The substantive provisions in Part 6 are straightforward and a purpose clause would not serve any useful legislative purpose.

22. The purpose clause in Part 7 (Exigency Actions) currently refers to unwanted organisms in relation to managing biosecurity emergencies. This clause could be amended to remove references to 'unwanted' to align with any corresponding changes to Part 4 purpose clause. Any amendment to Part 7 is dependent on the purpose clause of Part 4 being amended.

23. Part 9 (Miscellaneous Provisions) contains compensation provisions. Sections relating to compensation could arguably be better served by either:

- a policy purpose clause that clearly sets out the policy intent of compensation; or
- a 'mixed' purpose clause would set out the policy intent as well as the criteria and process for decision-making on this issue.

24. While we could add purpose clauses for Part 2 (Functions and Duties), Part 8 (Enforcement and Compliance) and Part 8A (Exclusive Economic Zone) this is likely to have minimal benefit given the substantive provisions of these Parts are straightforward and clear about how they should be interpreted.

2.4. Assessment

25. The options are assessed against the following criteria:

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy?
Adaptable	Does the option deliver a modern legislation that is future-proof and enabling?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties? How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?

26. The lack of an express overarching purpose provision in legislation is not necessarily a barrier to interpreting it or making decisions under it. The purpose of a statute can be ascertained from other "indications" such as preambles, headings to Parts, examples, or explanatory material. Courts will also look at the legislative history of the statute including select committee reports and Parliamentary debates of the Bill (in Hansard).

27. In the Act, courts have often referred to the long title of the Act ("An Act to restate and reform the law relating to the exclusion, eradication and effective management of pests and unwanted organisms"). A large body of case law has been built up around purposive interpretation. This means that lawyers advising decision makers and courts deciding issues are not hampered by the lack of an express purpose provision. As noted earlier, specific Parts of the Biosecurity Act do Part-specific purpose provisions (for example, Parts 3, 4, 5, 5A and 7).

28. Option 1 (the status quo) avoids the unintended consequences of retrofitting an overarching purpose statement onto the Act. However, it does not realise opportunities for improving accessibility or the efficient use of the Act. The absence of an overarching purpose clause in the Act could result in the Act having multiple interpretations. It could also result in ambiguity as it does not provide guidance for decision-makers who use the Act. There are few clear and consistent parameters for decision-making in the Act.

29. Option 2 (overarching purpose clause) could support greater consistency in decision-making and could enhance our ability to meet international obligations. Providing a purpose clause could make the Act more accessible to users and could provide a clearer line of sight to those impacted by decisions made under the Act. This approach is:

    - consistent with the World Trade Organization Agreement on Sanitary and Phytosanitary Measures; and
    - enables the biosecurity system to be protective without pushing us towards zero risk (which is undesirable and not achievable).

30. However, it risks unintended consequences and uncertainty in the short term and could constrain discretion and flexibility in decision-making. An overarching purpose clause would need to be retrofitted into the Act. The Act is technically complex which heightens the risk of unintended consequences. In addition, depending upon what elements were included within an overarching purpose clause, it could risk a miscellany of concepts that could confuse decision-makers on how they should be weighted in different circumstances.

31. Like Option 2, Option 3 (Part-specific purpose clauses) has varying degrees of impact on the criteria. Critically, however, it mitigates some of the risk with an overarching purpose statement as any new or amended Part-specific provisions would, by definition, relate only to one aspect of the Act.

32. Options 2 and 3 are not mutually exclusive and could be implemented as a package.

2.5. Cost benefit analysis

33. This set of proposals is not expected to have cost or impacts with fiscal measures. Their consideration and implementation are a part of the regular work of government.

34. We analysed the options using multi-criteria analysis.

2.6. Preferred option

35. Our preferred option is Option 3. Option 3 provides us with greater legal certainty for decision-makers and those impacted by decisions. The relevant Parts that could benefit from a purpose clause are sufficiently distinct in the aspects of biosecurity regulation they cover that the risk of overlap or uncertainty from conflicting purposes is minimal.

2.7. Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – overarching purpose clause	Option 3 – purpose clause for selected Parts
Effective	0	0 Unclear Option 2 would lead to better biosecurity risk management outcomes.	+ More targeted certainty about the legal effect of Parts could deliver more effective biosecurity decisions.
Adaptable	0	- Providing an explicit purpose clause puts in parameters which may constrain discretion and flexibility in decision-making.	0 Would clarify the “legal effect” of the Parts and provide greater certainty to decision-makers relying on those Parts, but otherwise has no effect how fit-for-purpose the toolbox is.
Efficient	0	- - Could be significantly complex to implement and could have unintended consequences.	+ Would clarify the “legal effect” of the Parts and provide greater certainty to decision-makers relying on those Parts. Would provide legislative certainty to operational practice.
Clarity	0	+ Would provide a clear indicator what the purpose of the Act is both to decision-makers and to those who have an interest in the biosecurity system and its overarching purpose.	0 Clauses would be focused on “legal effect” clauses rather than clarifying the overall purpose of the Act.
Overall rating	0	- Aligns with contemporary practice of legislation including a purpose clause but likely to be a complex policy exercise and result in unintended consequences from retrofitting into the Act.	+ Aligns with contemporary practice of legislation, could support more efficient decisions, and involves less complexity to implement.

3. Ministerial involvement in significant decisions

3.1. Background

36. The Act sets out the duties and functions of Ministers and the Director-General in Part 2 and the role of Chief Technical Officers (CTO) in other sections.

37. The Act establishes the role of CTOs as distinct from the Minister and Director-General. This is to ensure that the use of powers is based on risk and science/technical evidence and in recognition of the technical complexity of some biosecurity decisions.

38. CTOs have important decision-making roles in the day-to-day operations of the biosecurity system. The roles, functions, powers, and duties are prescribed in the Act. Statutory CTO appointments ensure the authority to make decisions on risk management is retained by an appropriately qualitied technical expert, who has an oversight of the area involved and has independence from political decision-making process. The functions of CTOs include:

- determining whether an organism is an 'unwanted organism';[2]
- making recommendations to the Director-General of MPI on import standards to manage risks associated with the importation of risk goods (see Paper 4: Border and imports for further discussion about this power);
- having the power to require information relating to organisms;
- intervening in the management or operation of transitional or containment facilities to ensure compliance with conditions;[3]
- giving directions as to the disposal or treatment of seized goods and the destruction of imported goods;
- declaring 'controlled areas' and placing restrictions on movement into, within or out of those areas;[4]
- appointing inspectors and authorised persons to administer and enforce the provisions of the Act, giving them directions and guidance on their roles;
- "calling-in" certain inspector powers for significant matters related to ten specific duties and functions of inspectors in accordance with section 105A (the effect of a call in is that a CTO exercises or performs the power instead of an inspector); and
- appointing authorised persons for the purposes of a national pest management strategy.

[2] An unwanted organism is defined in the Act as any organism that a CTO believes is capable or potentially capable of causing unwanted harm to any natural and physical resources or human health.

[3] A transitional facility is a place approved by MPI to receive containers and goods that may pose a biosecurity risk and which may need to be inspected or treated before entering New Zealand. A containment facility is a place approved for holding organisms that should not become established in New Zealand.

[4] A controlled area is an area declared as such under the Act, and where controls are put in place to limit the spread of pests and unwanted organisms.

3.2. Problem or opportunity

39. Some technical decisions could have large consequences beyond biosecurity. For example, a national livestock standstill in the event of foot and mouth disease would have significant social, economic, and fiscal consequences. It is unclear whether decisions that are made on technical grounds can appropriately balance the needs of the biosecurity system with these broader matters. The Government is accountable for these consequences – such as risks to our international and trade reputation, and fiscal shock through compensation liabilities.

3.3. Options

40. **Option 1** is the **status quo**. Under the status quo, CTOs continue to be empowered to make independent, technically driven decisions. Under the status quo, in practice significant biosecurity decisions are likely to be brought by the Minister for Biosecurity to Cabinet. Cabinet also makes decisions on paying for the costs of significant incursions that cannot be funded from MPI's ordinary funds.

41. Options 2 and 3 below intend to provide Ministers with greater involvement in significant decisions. Where the consequences may be large, the accountability for decision-making within the Act may be misaligned within a democratic system of government. There is an opportunity to address this by empowering an elected official to weigh in on certain biosecurity decisions where they would impact significantly on New Zealand's broader interests. This provides the opportunity to align decision-making with democratic processes (via elected officials), without negating the importance of technical processes (via appointed officials, such as the CTO).

Option 2 – vest the Minister responsible for the Biosecurity Act with a 'call-in' power

42. **Option 2** would **vest the Minister responsible for the Act (i.e. the Minister for Biosecurity) with a 'call-in' power**. The call-in power would enable the Minister to make specific decisions that would normally sit with a CTO.

43. We have based Option 2 on section 105A. Section 105A vests CTOs with a call-in power for ten specific duties and functions of a biosecurity inspector. Section 105A requires a CTO to undertake a 'significance test' by considering several criteria to determine whether a decision is significant enough to call-in. The call-in power serves as a check on the potential consequences of duties and functions carried out under the Act. It is not a 'right of review', so it must be used to give a new direction or to carry out a duty not yet performed. The power may not be delegated and can only be used by the CTO.

44. Option 2 has been designed similarly. It involves two key aspects: a significance test, and limiting which powers the Minister could call-in. The policy intent is to set a high bar for use of the power.

Significance test under Option 2

45. We reviewed the significance test under section 105A and taken the most relevant considerations for an elected official. We propose that the significance test under Option 2 is whether a decision is likely to:

    - have significant national environmental risk, national security implications, fiscal risk, trade risk, risk to property rights;

- pose significant risk to New Zealand's social and cultural values;
- involve issues that increase risk to, or complexity for, the liability of the Crown; or
- involve issues that have the potential to seriously affect the Crown's reputation.

46. These are the sorts of matters that an elected official may be balancing when making decisions that affect New Zealanders. Under Option 2, the Minister for Biosecurity would need to consider how significant a decision is using these criteria before calling-in a power.

Which CTO powers can be called-in under Option 2

47. The underlying idea for Option 2 is to strengthen the biosecurity system by enabling an elected official to make certain biosecurity decisions where they would impact significantly on New Zealand.

48. We have identified two decisions usually made by a CTO which meet the threshold for significant impact based on the significance test above. These are:

Section	Description
114A	CTO may make decision on application of articles or substances from aircraft.
131(2)	CTOs may declare a "controlled area" in order to institute movement or other controls.

49. Option 2 would therefore vest the Minister responsible for the Act with the ability to call-in decisions under 114A and 131(2). These meet the criteria because the use of these powers can lead to significant societal consequences. While CTOs do consider these factors in their decisions, the impact of these two powers can be so wide-ranging that we consider they are more closely aligned with the sort of high public policy decision-making that is ordinarily within the remit of elected officials.

50. Regarding the power to declare a controlled area, this is not a rare decision for a CTO. Controlled areas have been used in many responses. Option 2 would require the Minister to consider the significance criteria before they call-in a decision. Where a controlled area starts having significant national implications, it becomes more appropriate for an elected official to consider that specific decision. For instance, a Minister may decide to call-in decisions to do with controlled areas when it relates to a significant organism such as foot and mouth disease, rather than necessarily calling-in all controlled area decisions.

Option 3 - vest the Minister of the portfolio the CTO works in with a 'call-in' power

51. CTOs are appointed by Department Chief Executives and must be employed under the Public Service Act 2020. This means CTOs may be in a department other than MPI (for example, in Health New Zealand).

52. It may be appropriate to enable the Minister directly responsible for the agency the CTO is employed within to have the call-in power for decisions the CTO would otherwise have made (i.e. in the above example, a CTO working in Health New Zealand is accountable to the Chief Executive, who is accountable to the Minister of Health). Option 3 proposes to vest any such Minister with the call-in power. Option 3 is for the same powers as Option 2 and requires the same significance test as Option 2.

53. Other Ministers, other than the Minister for Biosecurity, already have certain functions under the Biosecurity Act. For example, section 10 states that any Minister may carry out the functions of the Minister for Biosecurity under Part 5 (which is the part to do with pest management) including recommend that a national pest or pathway management plan is made.

3.4. Assessment

54. The options are assessed against the following criteria:

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy?
Adaptable	Does the option deliver a modern legislation that is future-proof and enabling?
Efficient	How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?

55. Under Option 1 there is a rare risk that technical decisions, made in the best interest of the biosecurity system, by technical experts, will have disproportionate consequences beyond biosecurity. The Government is accountable for these consequences such as risks to our international and trade reputation and fiscal shock through compensation liabilities.

56. Option 2 (vest the Minister for Biosecurity with a call-in power) meets some of the criteria. There are benefits and risks to vesting an elected official with the ability to call in certain duties and functions of a CTO. An elected official is best placed to consider the full ramifications of significant actions both based on advice from their officials and the mandate they received from the people that elected them. Option 2 is therefore effective as it adds strength to the Act to ensure that decisions that have high public impact, such as movement controls, are subject to scrutiny by an elected official. An elected official rather than a non-elected official is appropriate because the person needs weigh up different elements of the public interest.

57. Option 2 supports the adaptable criterion by enabling the Minister for Biosecurity, best placed with both advice and democratic authority, the ability to mitigate the rare risk of a decision having large consequences beyond biosecurity. It also ensures Option 2 is enduring by implementing safeguards to the call-in power by implementing the significance test and only enabling the calling-in of powers in sections 114A and 131(2)). The policy intent is to set a high bar, and that the power is for rare and specific events. The call-in power is to serve as a check on the potential consequences of duties and functions carried out under the Act when there may be significant non-technical consequences to society.

58. Option 2 is less efficient and less clear than the status quo. Option 2 is less efficient as it proposes a change in the scope of the duties and functions of an elected official and introduces possible delays in the exercise of technical decisions. While it is the Minister for Biosecurity who is vested with the power, a decision to call-in a power could require the Minister to take a decision to Cabinet which can take time.[5] Clarity is lost when more than one decision-maker is enabled to perform the same duties and functions. Option 2 will result in CTOs and the Minister for Biosecurity sharing the ability to perform some duties and functions.

59. Option 3 (vest the Minister of the portfolio the CTO works in with a call-in power) meets the criteria in the same way as Option 2, except for the clarity criteria. Option 3 supports the effective, adaptable and efficiency criteria equally to Option 2. Option 3 strengthens the Act to ensure that decisions that have high public impact are enabled to be subject to scrutiny by an elected official representing New Zealand's public interests.

60. Option 3 is less clear than Option 2 and significantly less clear than the status quo. The biosecurity system becomes more complex when the call-in power is vested in a Minister that is not the Minister for Biosecurity. This is because the other Minister may not be aware of the impact of the decision on the biosecurity system as whole. It muddies the power structure within the Act and places the power with a Minister that may not be familiar with the biosecurity system.

3.5. Cost benefit analysis

61. This set of proposals is not expected to have cost or impacts with fiscal measures. Their consideration and implementation are a part of the regular work of government.

62. We analysed the options using multi-criteria analysis.

3.6. Preferred option

63. On balance, with either Option 2 or Option 3, a CTO will maintain their ability to make independent, technically driven decisions, and the amendment would provide space for an elected official to consider the greater social, economic, or environmental impacts of decisions.

64. We prefer Option 2 as this vests the Minister responsible for the Biosecurity Act with the call-in power that directly impacts the function of the biosecurity system and results in clearest power structure.

[5] In accordance with the Cabinet Manual paragraphs 5.11 and 5.12, Ministers are expected to put before their colleagues the sorts of issues which they themselves would wish to be consulted on. Ministers should keep their colleagues informed about matters of public interest, importance, or controversy.

3.7. Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – vest the Minister responsible for the Biosecurity Act with a 'call-in' power	Option 3 - vest the Minister responsible for the portfolio the CTO works in with a call-in power
Effective	0	+ + Would enable the Minister for Biosecurity, best placed with advice and knowledge, the ability to mitigate the rare risk of a technical decision having large consequences beyond biosecurity.	+ + Similar to Option 2.
Adaptable	0	+ Increases adaptability by adding to the scope of decision making of an elected official. More enduring that the Minister responsible for biosecurity is vested with a power that directly impacts the function of the biosecurity system.	+ Similar to Option 2.
Efficient	0	- Adds complexity by proposing a change in the scope of the duties and functions of an elected official.	- Similar to Option 2.
Clarity	0	- Clarity is lost when more than one decision-maker is enabled to perform the same duties/functions. This proposal will result in two decision-makers (CTO and the Minister responsible for the Act) sharing the ability to perform some duties and functions.	- - Results in less clarity than Option 2 because it results in a more complex and confusing structure and allocation of powers.
Overall rating	0	+ Most appropriate that the responsible Minister is vested with a power that directly impacts the function of the biosecurity system.	0 Still improves on the status quo but results in a more complex power structure and places the power with a Minister that may not be best placed to understand the biosecurity system.

4. Local knowledge in decision-making

4.1. Background

Science underpins the biosecurity system

65. Scientific evidence and risk assessments inform our decision-making in the biosecurity system. Science is the product of systematic methodologies that involve observing, testing, and analysing to understand the natural and social world.

66. As a member of the World Trade Organization, we harmonise our standards with those developed under the Agreement on the Application of Sanitary and Phytosanitary Measures. We need to ensure that our international standards are sound, science-based, and meets the critical requirements of biosecurity and health protection, while not unnecessarily restricting trade.

67. The Act also explicitly references scientific knowledge. For example, we review whether scientific evidence received sufficient regard during the development of an import health standard if this is requested (section 24). We also require an expert in biological sciences to provide information about the incidence, prevalence, or distribution of a specified organism for purposes of surveillance (section 48).

Local and community knowledge

68. Information essential for making sound biosecurity decisions could come from different sources. It could be from local knowledge, or knowledge that has developed, been used, and been communicated over time, including by indigenous people.[6] It is place-based and dynamic, and constitutes experiences, practices, and skills.[7] One example is the knowledge that farmers and growers have inherited from previous generations and have used according to their own local contexts. Local knowledge includes indigenous knowledge such as mātauranga Māori.[8]

69. Currently, the Act does not make any explicit reference to local knowledge.

4.2. Problem or opportunity

70. There is an opportunity for the Act to consider local knowledge more explicitly in biosecurity decision-making given its potential value within the biosecurity system.

4.3. Options

71. **Option 1** is the **status quo**.

72. **Option 2** would **enable local knowledge to inform or guide decision-making in specific parts of the Act**, as follows:

    - Part 3: Importation of risk goods – the Act could explicitly enable a Chief Technical Officer to consider local knowledge in an import health standard (i.e. requirements

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[6] www.fao.org/4/y5610e/y5610e01.htm#bm1

[7] www.tandfonline.com/doi/full/10.1080/21683565.2023.2270451

[8] Mātauranga Māori refers to indigenous knowledge, including traditions, philosophies, values, and worldviews, and could differ across regions, iwi, and hapu - www.takai.nz/find-resources/articles/matauranga-maori/

that an importer must meet before imported goods can be cleared for entry into New Zealand.) An example could be an amendment to section 23(4). This section lists the things that a Chief Technical Officer must, and may, take into account when making recommendations to the Director General. Local knowledge may give extra information on the possible effects on human health and the environment of organisms that the goods may import.

- Part 4: Surveillance and prevention – the Act could explicitly enable a Chief Technical Officer to seek local knowledge regarding the incidence, prevalence, or distribution of specified organisms. For example, section 48(1) could be amended to add a provision indicating that a Chief Technical Officer may require an expert to supply relevant local knowledge of the incidence, prevalence, or distribution of a specified organism.

73. For other parts of the Act, we consider that there is sufficient accommodation of local knowledge input in decision-making, as appropriate. For example, Part 5 (Pest management) already includes provisions for significant community input into issues relating to pest management. Part 5A (Government/industry agreement for readiness or response) focuses on the partnership arrangement between industry organisations and the Crown. There is no appropriate role for local knowledge in Part 5A as consideration of local knowledge does not contribute to the operation of the partnership process.

74. Part 7 (Exigency Actions) relates to the declaration of biosecurity emergencies, with a focus on ensuring action can be taken as soon as possible while ensuring appropriate checks and balances in decision-making. Under section 144, the Minister has broad powers to consult, as appropriate and practical in the circumstances, such persons as the Minister believes on reasonable grounds are representative of interests involved in the emergency, before recommending that the Governor-General declare a biosecurity emergency. This provides the Minister with the ability to seek local knowledge input where necessary, within the overarching objective of speedily declaring an emergency.

75. There would be no benefit served from including provisions relating to local knowledge in Parts 2 (Functions and Duties), Part 6 (Administrative Provisions), Parts 8 (Enforcement and Compliance) and Part 8A (Exclusive Economic Zone).

4.4. Assessment

76. The options are assessed against the following criteria:

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy? Does the option lead to effective partnership and coordination between government and other players of the biosecurity system?
Adaptable	Does the option deliver a modern legislation that is future-proof and enabling?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?

77. Under Option 1 (the status quo), the factors to consider in decision-making in different areas of the Biosecurity Act would remain. The Act does not prevent a decision-maker to seek any relevant information (e.g. local knowledge) from the community, such as in section 23(4)(g). However, there is a missed opportunity to consider and take advantage of the potential added value of local knowledge in improving biosecurity.

78. Option 2 (enable local knowledge to inform or guide decision-making) enables the potential contributions of local knowledge in developing import health standards and surveillance of specified organisms. Considering local knowledge may enrich science and provide for holistic decision-making, which in turn, could benefit biosecurity risk management.

79. Option 2 can also enhance effective partnership and promote participatory biosecurity practices. This is consistent with our strategy to involve the public in protecting New Zealand from pests and other harmful organisms.

80. A primary issue under Option 2 is the potential clash between local knowledge and scientific knowledge. In this case, a Chief Technical Officer would use their expertise and discretion in objectively analysing and assessing information provided.

81. Option 2 may involve expanding the consultation process that a Chief Technical Officer undergoes should they consider local knowledge. If they decide to seek local knowledge, this may delay the process and be perceived as administrative and compliance burden. This is particularly true for import health standards, where the time and resource commitment required to review, develop, and implement import health standards is substantial (see Paper 4: Border and imports for a discussion about the development of import health standards).

4.5. Cost benefit analysis

82. This set of proposals is not expected to have cost or impacts with fiscal measures. Their consideration and implementation are a part of the regular work of government.

83. We analysed the options using multi-criteria analysis.

4.6. Preferred option

84. While we recognise the potential value of local knowledge in decision-making, we currently do not have a preferred option. We would like to use the public consultation process to test:

- our assumption that local knowledge could enhance effective partnership and promote participatory biosecurity practices;
- whether considering local knowledge in decision-making effectively implements our strategy to involve the public in biosecurity; and
- if considering local knowledge in decision-making can delay time-sensitive processes in surveillance and import health standards.

4.7. Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – enable local knowledge in decision-making
Effective	0	+ Local knowledge could inform holistic decision-making in import health standards and surveillance and prevention, two areas that are relevant and may have significant impact on public and local biodiversity and economy. This, in turn, may benefit managing biosecurity risks. Additionally, it promotes effective partnership with providers of local knowledge, including Treaty partners.
Adaptable	0	+ Considering local knowledge in relevant situations allows for more adaptive decision-making.
Efficient	0	- The impact on this criterion is dependent on decision-maker's discretion. However, we note that considering local knowledge may delay processes (e.g., developing import health standards).
Clarity	0	- This option could add a layer of complexity in decision-making when scientific and local knowledge clashes. There is also the risk of diluting scientific rigour.
Overall rating	0	0 We cannot confidently say this option is better or worse than the status quo given our multi-criteria analysis and we do not yet have enough evidence to support a preferred option.

5. Biometric information

5.1. Background

85. In New Zealand, the protection of personal information is underpinned by cultural norms and legal frameworks (such as the Privacy Act 2020) that place a strong emphasis on protecting privacy. New Zealanders maintain a strong interest in how their personal information is collected, stored, and used. Robust rules around privacy instil trust in individuals to share their information with confidence that it will be managed safely and securely.

86. MPI must act in a way that preserves trust by ensuring personal information is handled lawfully, securely, and appropriately. Preserving privacy helps us maintain public confidence and allows us to have licence to operate. We must ensure that the changes and options we are proposing continue to do so, and do not undermine any rules or practices aimed at protecting privacy and personal information.

87. Biometric information, as a form of personal information, is highly sensitive information. There are a number of risks associated with the use of biometric information.

88. The Immigration Act 2009 and Customs and Excise Act 2018 (the Customs Act) both expressly empower the collection and use of biometric information. Section 32 of the Immigration Act 2009 enables the collection and storage of biometric information using an automated system or otherwise. Sections 52, 203 and 318(3) of the Customs Act enable the collection and use of biometric information from persons as they arrive in, or depart, New Zealand, for the purposes of passenger and crew processing, monitoring the movement of craft and persons, and for border security. Under the Customs Act, New Zealand Customs Service (Customs) is only able to use the biometric information it collects at the border, and not during any investigations undertaken outside of that designated space.

89. Although the Biosecurity Act does not explicitly specify biometric information, MPI can collect biometric information from individuals as 'border information' under section 41G and information more generally under section 43 of the Biosecurity Act. At present, biometric information is collected by Customs through the Joint Border Management System[9], and shared with MPI for the purposes of identifying passengers as they pass through the air passenger pathway.

90. MPI can then share that information for intelligence and law enforcement purposes under sections 142I, 142J, and 142K. More broadly, any provision in the Act that enables the collection, use and storage of personal information can also be used to collect, use and store biometric information as a subset of personal information.

[9] The Joint Border Management System is a set of integrated technology products designed to facilitate MPI and Customs to collect and share information.

5.2. Problem or opportunity

91. In our view, the Act currently enables the collection of biometric information, but this is not explicit. This may lead to an interpretation that biometric information is not, or cannot be, collected under the Biosecurity Act. The Bill provides an opportunity to clarify the role of highly sensitive biometric information in the Biosecurity Act.

5.3. Options

92. **Option 1** is the **status quo**. The Biosecurity Act would continue to not explicitly reference biometric information as a type of information that can be collected, used, and stored. MPI is still enabled to collect, use and store biometric information under multiple sections.

93. **Option 2** would amend the Biosecurity Act to **clarify that the collection, use or storage of information (including personal information) includes biometric information.** Any amendments would be worded in a way to not limit the information to personal information (including biometric information) only.

5.4. Assessment

94. The options are assessed against the following criteria:

Effective	Does the option lead to effective partnership and coordination between government and other players of the biosecurity system?
Adaptable	Does the option deliver a modern legislation that is future-proof and enabling?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?

95. Under Option 1 (the status quo), the Act will remain silent on the collection, use, and storage of biometric information. MPI will continue to collect, use, and store biometric information under provisions that allow for the broad gathering of information. There may continue to be ambiguity as to whether MPI can collect, use and store biometric information.

96. Option 2 (clarify that the collection, use or storage of information (including personal information) includes biometric information) meets some of the criteria. This will remove any ambiguity that exists or could exist around whether biometric information can be collected by, used by, or shared with MPI. The explicit reference to biometric information will help align the Biosecurity Act with the legislation of other border agencies that use the Joint Border Management System. This in turn enables stronger coordination between Joint Border Management System agencies and delivers on the effective criterion.

97. The collection, use and storage of biometric information is something of high public interest. It is important that the Act is as clear as it can be about whether biometric information is being dealt with.

98. Neither Option 1 or 2 will make the administration of the Biosecurity Act with respect to biometric information more or less efficient. Some efficiencies may be gained under option 2. Clarifying MPI's ability to collect, use or store biometric information should provide certainty in the statutory interpretation of the intended scope of information collection, use and storage under the Act. This may prevent future arguments or litigation if someone was to question whether MPI had the authority to collect, use or store biometric information.

5.5. Cost benefit analysis

99. This set of proposals is not expected to have cost or impacts with fiscal measures. Their consideration and implementation are a part of the regular work of government.

100. We analysed the options using multi-criteria analysis.

5.6. Preferred option

101. On balance, our analysis shows that Option 2 would provide greater clarity than the status quo.

5.7. Multi-criteria analysis

++ Significantly better than the status quo

\+ Better than the status quo

0 No better or worse than the status quo

\- Worse than the status quo

\- - Significantly worse than the status quo

	Option 1 - status quo	Option 2 – clearly enable the collection of biometric information
Effective	0	+ MPI would be better coordinated with other agencies that make up the Joint Border Management System. This will reduce ambiguity around whether data sharing of biometric information can take place between agencies and better support border protection measures.
Adaptable	0	+ The Act is enabling for modern technologies. This option does not change that but does provide better clarity of MPI's powers to collect, use and store biometric information. Additional certainty around MPI's ability to collect, use and store biometric information should make interagency cooperation and policy development more efficient and effective. Clarity will also enhance public awareness and assurance of MPI's ability to deal with biometric information.
Efficient	0	+ There may be efficiency gains from the removal of ambiguity in the Act such as less time seeking advice as to whether MPI can collect, use, share or store biometric information under the Act. Clarity on MPI's ability to deal with biometric information should provide more certainty to MPI's interagency activities with border agencies.
Clarity	0	+ + The Act is currently silent on biometric information. Including biometric information throughout the Act will reduce ambiguity in the Act on whether MPI can collect, use, and store biometric information. This should prevent future arguments or litigation on MPI's ability to deal with biometric information.
Overall rating	0	+ This option would help clarify MPI's abilities under the Biosecurity Act to collect, use and store biometric information. This option will also help modernise the Act and align with other border agencies with respect to biometric information.

6. Enforcement

6.1. Background

102. MPI has tools to encourage voluntary and assisted compliance with biosecurity law to support the biosecurity system. When these are not enough, enforcement and compliance tools are available under the Act to enable the regulator to penalise those who do not follow biosecurity law. These tools can help drive behaviour change where incentives alone are not sufficient.

103. Part 8 of the Act sets out the enforcement, offences, and penalties provisions. This section of the impact statement focuses on some specific areas of enforcement to do with:

- searches on property to investigate possible breaches of law;
- passengers failing to declare animal products, plants and other risk items at the border;
- regional councils' ability to enforce its regional pest management plans; and
- the compliance of 'places of first arrivals' (explained more below).

104. Biosecurity law must remain fit-for-purpose and provide a modern toolbox that is effective and future-proof. We have the opportunity to strengthen the Act to ensure we have the tools we need for enforcement. We can also promote greater personality responsibility and ensure all New Zealanders are incentivised to play their part to manage biosecurity risk across New Zealand. Opportunities for better compliance and enforcement are discussed in turn below.

6.2. Powers of inspectors during searches

Background

105. Under section 111, biosecurity inspectors can apply for a warrant to authorise the entry and search of any place where:

- there has been or may have been an offence committed against the Act that is punishable by imprisonment;
- there is or may be evidence of the commission of an offence against the Act that is punishable by imprisonment; or
- there is any thing that is intended to be used for the commission of an offence against the Act that is punishable by imprisonment.

106. The Act requires the New Zealand Police (Police) to attend any search under section 111.[10]

[10] There is a proposal in clause 99 of the Regulatory Systems (Primary Industries) Amendment Bill to remove the requirement for Police to attend a search under section 111. That Bill is currently at Select Committee.

107. Sometimes, people obstruct a search by attempting to remove or destroy evidence, or by fleeing the scene. It is an offence to obstruct an official in section 154O(2). Enforcing section 154O(2) requires prosecution in the Courts. Other than prosecution, MPI has no power available in the Act to stop the obstruction immediately which can impede the outcomes of the search.

108. Police have general powers to arrest for obstruction through the Crimes Act 1961. MPI therefore relies on Police to support its searches, as constables have a power to arrest for obstruction. When MPI undertakes a search, it coordinates with Police to ensure a constable is present to attend the search and assist MPI. Since 2019 there have been 17 searches undertaken by MPI under section 111. All these searches have been attended by a constable. We understand that none have resulted in an arrest. This is because the warning that arrest would be the result of ongoing obstruction generally incentivises individuals to comply and stop obstructing.

109. In comparison with the Biosecurity Act, the Fisheries Act 1996 provides Fishery Officers with a power of arrest. Section 203 of the Fisheries Act sets out the parameters of a power of arrest. The power of arrest centres around continued offending behaviour and refusal to desist from offending, with arrest being the last resort. Fishery Officers who have a power of arrest find that it is beneficial in encouraging compliance and to stop obstruction.

Problem

110. While the scale of the problem may not be large, MPI's need to rely on Police is an unnecessary burden in various ways for both Police and MPI. It is a financial burden as it requires Police to attend a search where they may have a very minor role to play. It is an administrative and operational burden as time and resources are expended to plan a search under section 111 for a particular day and time, including organising a constable's attendance. This can also sometimes require flying staff from other parts of the country. For a variety of reasons, Police may need to cancel their attendance which can result in delays and an unnecessary expenditure of time and resources.

111. Searches need to be able to proceed efficiently, and inspectors need prompt access to the tools they need to do their job.

Options

112. **Option 1** would maintain the **status quo**. That means reliance on Police for arrest powers to support a search warrant.

113. **Option 2** would be to **introduce a power of arrest for obstruction during searches**. Under this option, a new section would be created in the Act to empower a biosecurity inspector to arrest a person who has committed an offence against section 154O(2). There would not need to be any new criminal offences to proceed with the power of arrest.

114. There would be safeguards on this new power of arrest:

- The power would be limited to obstruction during a search under section 111 of the Act. Therefore, the power would not be available for obstruction experienced by inspectors in any other scenario.

- The power would be limited to inspectors who undertake searches pursuant to section 111. This means that of the almost 900 inspectors, the power of arrest would be available to fewer than 50 MPI compliance investigators who undertake searches and who are appointed as biosecurity inspectors. Inspectors must be authorised with the power of arrest as part of their appointment to be able to use the power.
- MPI compliance investigators are already required to complete mandatory safety defensive tactics training before they can be appointed as an inspector. This is how fisheries officers are authorised, as they must take safety defensive tactics training.
- Arrest would be the last resort where the use of all other field tactics have failed to work such as strong tactical communications and warnings.
- Where an arrest was made, MPI would promptly deliver the individual to Police.
- Where the risk assessment prior to the operation found the operation would be assessed as being of heightened risk, MPI could still request the Police attend.

115. These constraints means that the number of arrests (if any) would likely be low.

Assessment

116. The options are assessed against the following criteria. Note that the issue of non-compliance during a search has an additional criterion on proportionality. Proportionality is a key factor to consider in the design of compliance tools. It is a long-standing principle of the criminal justice system that penalties should be proportionate in their severity to the gravity of the individual's criminal conduct. This is particularly relevant to the issue of non-compliance during searches.

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy?
Adaptable	Does the option provide a modern toolbox to users of the Act?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties? How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?
Proportionate	Is the option proportionate in its severity to the gravity of the individual's offending?

117. Under the status quo, MPI would continue to rely on Police to ensure searches are successful. This is not efficient for either MPI or Police.

118. Option 2 (introduce power of arrest) meets some of the criteria. Option 2 would likely not have a significant impact on whether investigations are successful. The counterfactual to Option 2 (where inspectors have a power of arrest) is the status quo, where Police attend a search and who have a power of arrest. In either scenario, there is an official that is present at the search with a power of arrest to ensure the success of the operation. The difference under Option 2 is that the official with the arrest power is an MPI investigator (warranted as a biosecurity inspector), rather than a constable. For this reason, Option 2 is neutral on the effective criterion.

119. Option 2 meets the adaptable and efficiency criteria as it gives biosecurity inspectors an effective power to address obstruction during a search. This means searches can be conducted without relying on Police. This reduces administrative, operational, and financial burdens for both MPI and Police as resources are freed up and MPI can schedule its activities without having to coordinate with Police availability.

120. Option 2 would require training to ensure that the power of arrest would be used as intended by biosecurity inspectors. As noted earlier, MPI investigators (warranted as biosecurity inspectors) already go through safety defensive tactics training. Some equipment would be needed if biosecurity inspectors had a power of arrest, for example handcuffs and other health and safety equipment such as stab-resistant vests. There will be financial implications associated with this equipment. However, MPI could use the existing training and equipment that is used to train and operationalise the power of arrest for fisheries officers to manage costs.

121. It is unclear how Option 2 meets the proportionate criterion. On one hand, arrest powers are tightly held by specific enforcement agencies. However, MPI is one of those enforcement agencies, as the fisheries regulatory system currently has a power of arrest. Further, obstruction is one of the most serious offences in the biosecurity system. Fishery Officers tell us that the power of arrest is only used a handful of times a year.[11] There are also situations where someone is arrested, but Fishery Officers do not need to proceed with the formalities of the arrest (e.g. did not require handcuffing the individual and delivering them to Police). The initiation of the arrest process achieves the purpose of getting the person of interest to comply. If fishery officers proceed with an arrest, they are required to deliver the person to a constable.

122. However, there are factors that suggest Option 2 may not be proportionate. There are Bill of Rights and justice issues to consider. Arrest is an intrusive and rights-infringing power. The Bill of Rights Act 1990 protects the right of freedom of movement (section 18), the right to be secure against unreasonable search and seizure (section 21), and the right against arbitrary arrest and detention (section 22). The Crimes Act 1961 carves out justified limitations on those rights for Police when it comes to arresting and detaining people. It is not yet clear, without further engagement and consultation, if arrest under Option 2 is a justified limitation on these rights.

[11] Based on best available information, in the five-year period to November 2022, there were at least 11 arrests made under the Fisheries Act.

123. Further, while the status quo does lead to inefficient operations, since 2019 there have only been 17 search warrants under section 111 undertaken by MPI. It could be argued that the relative infrequency of searches does not create a compelling case for change to the status quo. Equally, we note that MPI investigators are only involved in the most serious biosecurity cases. It only takes one unwanted organism to be released into New Zealand to create a biosecurity incursion.

Cost benefit analysis

124. This set of proposals is not expected to have cost or impacts with fiscal measures. Their consideration and implementation are a part of the regular work of government.

125. We analysed the options using multi-criteria analysis.

Preferred option

126. We do not have a preferred option. Our initial assessment suggests Option 2 improves on the status quo. However, arrest powers are highly intrusive and so are tightly held by specific enforcement agencies such as Police. We would like to better understand through public consultation whether we have demonstrated a clear, justifiable limitation on key rights in the Bill of Rights Act.

Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – introduce power of arrest for obstruction during a search
Effective	0	0 May not have any significant impact on whether investigations are successful. The improves on the counterfactual (where an official is still present with a power of arrest, but that official is now a biosecurity inspector rather than a constable) and ensures cooperation during a search. This assists investigations to be successful.
Adaptable	0	+ Provides biosecurity inspectors with an effective power to address obstruction when carrying out a search.
Efficient	0	+ Addresses regulatory burden on central government by ensuring Police resources are not unnecessarily used. Will require delivering training and equipment to ensure officials are well equipped to use the power, but existing officer safety defensive tactics training for fisheries officers could be used.
Clarity	0	0 Do not anticipate there to be any impacts on the simplicity, certainty, and transparency of the law.
Proportionate	0	- Arrest powers are tightly held by specific enforcement agencies. However, MPI is one of those as the fisheries system has a power of arrest. Further, obstruction is one of the most serious offences in the Act. On the other hand, arrest is a highly intrusive and rights-infringing power. The Bill of Rights Act protects the right of freedom of movement and the right to be secure against unreasonable search and seizure. It is unclear if arrest under Option 2 is a justified limitation on these rights.
Overall rating	0	0 There may rationale to proceed with a power of arrest for searches. However, we need clarity on Option 2's effect on fundamental rights through public consultation before we can fully assess this option further.

6.3. Border fines for travellers with high-risk goods

Background

127. Infringement penalties are instant fines that are targeted towards minor offending that is high-volume and easy to identify, with a corresponding low financial penalty. They recognise that for some offending, particularly where there is no demonstrated intent to break the law, a fine is appropriate.

128. Under the Act, passengers arriving in New Zealand are required to declare all food, animal products, plants, and other items to a biosecurity officer. This is part of a multi-layered biosecurity system used to manage and assess biosecurity risk. MPI's interest in screening all foods is to find particularly high-risk goods including plants, seeds, meat and meat products, fresh fruit and vegetables.

129. These risk goods may carry harmful pests and diseases that pose a significant risk to New Zealand's primary industries, environment, and way of life. Managing the entry of risk gods at the border reduces the chance of pests and diseases getting into New Zealand in the first instance.

130. Passengers who erroneously fail to declare these biosecurity risk goods upon entry (section 154N(21)) can receive one of the following:

- a $400 infringement fee, an 'instant fine' which does not result in a criminal conviction (Biosecurity (Infringement Offences) Regulations 2010); or
- a fine of up to $1000 following a successful prosecution in a Court (section 157(7)).

131. The infringement offence applies to a person who erroneously does not declare that they, for instance, have food, whether they are in possession of one or multiple items of food. It is the erroneous declaration that constitutes the offence, and there is no regard for the volume or severity of risk of the goods related to the erroneous declaration.

132. Erroneous declarations, in most cases, capture offending that is unintentional. For more serious offending, such as smuggling, the Biosecurity Act provides much more significant penalties. Under sections 154O(9) and 154O(15) of the Act, for knowingly bringing, or attempting to bring, unauthorised goods into New Zealand, the maximum penalty for an individual is up to five years imprisonment, a $100,000 fine, or both.

133. Most passengers want to, and do, comply with biosecurity requirements. The most recent (pre-COVID-19) monitoring data shows that 99 percent of cruise passengers and 98.5 percent of air passengers were compliant with biosecurity rules. Air passengers are slightly less compliant, as the shorter travel time means passengers may wish to bring risk goods such as home-grown fruit or vegetables with them.

134. Prior to the 2020 border closure, MPI issued around 10,000 infringements per year. With more than seven million passengers coming across the border at that time, this means that around 0.15 percent of arrivals were issued with an infringement notice. This is consistent with MPI's research showing that most passengers want to, and already do, comply with biosecurity requirements. MPI's 2019 border research work demonstrates that the current education-based approach is highly effective at reminding passengers of their biosecurity obligations.

Problem

135. The current approach to infringements in the passenger pathway does not have regard to the volume of goods not declared or the risk profile of the goods not declared. This approach could be perceived as unfair and not proportionate with the level of biosecurity risk that different goods pose. For instance, there is greater biosecurity risk involved with an erroneous declaration of fresh fruit which can harbour harmful pests, compared with the erroneous declaration of a bar of chocolate.

Options

136. **Option 1** would retain the **status quo**. That means the key infringement fees that may be issued to passengers at the border are for making an erroneous declaration ($400 fee).

137. **Option 2** would **create an additional infringement penalty for higher risk goods**. Option 2 would be delivered by:

    - defining 'high risk goods' under the Act through regulations. Examples of what may be considered "high risk goods" include fresh fruit and meat or meat products. The Act would need to build in flexibility to change the determination of "high risk goods" based on new information. Setting this definition in regulations may be on way to achieve that flexibility;
    - amending the maximum penalty for the strict liability offence of erroneous declaration from $1000 to $2000;[12] and
    - creating a corresponding infringement offence for erroneous declaration of 'high risk goods,' with an infringement fee of $800.

138. We have based the new infringement fee at $800 based on Legislation Design and Advisory Committee's (LDAC) guidelines, and consultation with the Ministry of Justice. This figure is based on several factors including:

    - the increased level of harm that could arise from higher risk biosecurity risk goods;
    - the pests high risk biosecurity risk goods may carry; and
    - the increased potential for damage to New Zealand's primary production sector.

139. We have based the new maximum penalty of $2000 on the convention that the maximum penalty for an offence is generally three times the corresponding infringement fee. The current maximum penalty for making an erroneous declaration is $1,000. This is two and a half times the corresponding infringement fee of $400. The maximum financial penalty for the new offence in the Act for failing to declare high-risk goods would be set at $2,000. This is two and a half times the proposed corresponding infringement fee of $800.

[12] A strict liability offence is an offence that requires the prosecution to prove only the physical element of the offence (e.g. speeding). Compare this with a full offence that requires both the physical element (e.g. smuggling goods into New Zealand) and the mental element (knowing a good is illegal in New Zealand and intentionally concealing and bringing it into New Zealand) of an offence to be proven.

140. The new $2000 maximum penalty would no longer be two and a half times the infringement fee for the existing $400 infringement. This would expose individuals who receive a $400 infringement fee to a higher maximum penalty than they currently do should they wish to appeal the fee. Currently, individuals that receive a $400 infringement fee can receive a penalty up to $1000 imposed by the courts if they appeal the infringement. Under this option, these individuals could receive a penalty of up to $2000 on appeal. However, the volume of individuals that appeal a $400 infringement fee is low. Further, individuals who do appeal their $400 infringement are rarely exposed to a fine close to the maximum penalty. When an appeal takes place, courts usually impose a fine of $400 plus court costs. This option should not impact this practice by the courts.

141. The existing infringement penalty for an erroneous declaration would then be amended to apply to any passenger who has erroneously declared that they are not in possession of a biosecurity risk good, other than those categorised as "high risk goods." The infringement fee for this would remain at $400.

142. We also propose that if this tiered approach is favoured, then the infringement offence be drafted in a manner that prevents passengers from receiving multiple infringements in one instance. For example, if a passenger erroneously declares two items, one falls within the definition of a 'high-risk good' and another which falls outside the definition, then they only receive an infringement for high-risk good. Under this proposal, this would be $800.

143. The effect of all of this is that the infringement penalty for a passenger who has made an erroneous declaration would depend on the biosecurity risk posed by the item(s) that they are carrying (e.g. if 'high risk goods' is defined as meat products, their infringement fee depends on whether their erroneous declaration involves meat products).

Assessment

144. The options are assessed against the following criteria:

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy?
Adaptable	Does the option provide a modern toolbox to users of the Act?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties? How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?

145. Under Option 1 (the status quo), there would continue to be a single penalty for an erroneous declaration.

146. Option 2 (create an additional infringement penalty for higher risk goods) is somewhat neutral on all the criteria, though it is finely balanced.

147. Option 2 may not have a substantive impact on the effectiveness criterion, but this is uncertain. We are unclear if a larger infringement fee would have a greater deterrent effect than the status quo to incentivise compliance based on evidence available to us:

- MPI-commissioned research in 2019 found that financial penalties are only the seventh-highest motivation for declaring or disposing of risk goods. The top three motivations were understanding why items are considered a biosecurity risk, greater understanding on what must be declared on arrival, and understanding how to pass through New Zealand's border more quickly.
- In May 2010, legislative changes increased the border declaration infringement fee from $200 to $400. Despite the higher penalty, MPI data showed no significant change in the issuing rate of infringement fees. From the period of May 2009 to April 2010, 0.11 percent of arrivals were issued with an infringement notice. During the period of May 2010 to April 2011, 0.10 percent of arrivals were issued with an infringement notice. This data needs to be interpreted carefully. For example, other unrelated events may have occurred around the same time as the fee change that may have impacted on seizure rates and traveller behaviour. However, these rate changes suggest that increasing the infringement fee did not appear to have a significant deterrent effect.

148. On the other hand, Australia's legislative changes suggest that an increase in penalties may be necessary to strengthen biosecurity protection at the border. In January 2021, Australia's Biosecurity Amendment (Traveller Declarations and Other Measures) Act 2020 came into effect. This enabled the setting of different fines for erroneous declarations for different goods or classes according to their relative biosecurity risk via regulations. Before this point all infringement notices for declarations were for AUS$444. Now, Australia's infringement regime for border declarations looks like the following:

- Category 1 goods – A$3,754 infringement fee – live plants, whole unprocessed seeds, meat and meat products (except retorted meat), prawns that are raw or partially raw, live animals and the remains of animals that have died in transit), eggs of a bird or reptile that are intended for hatching, veterinary vaccines;
- Category 2 goods – A$1,878 infringement fee – fresh fruit, fresh vegetables, fresh fungi, fresh leaves, fresh herbs; or
- For any other goods – A$626 infringement fee.

149. Australia's introduction of the tiered infringement model suggests that there may be a case for increased fines reducing the rate of erroneous declarations at the border. This challenges MPI's understanding of passengers' motivations for declaring goods. We need further evidence from public consultation about how people view the impact of a higher infringement fee and whether it may create stronger incentives to ensure border declarations are correct.

150. Option 2 supports the adaptable criterion by providing MPI with more flexibility into how the biosecurity system treats goods, some of which are higher risk than others. This modernises the biosecurity system as it recognises that some items are more likely to lead to costly biosecurity responses.

151. Option 2 may also be less efficient than the status quo. Under Option 2, biosecurity officers would have to assess which items were not properly declared, match that with the goods in scope of the definition of 'high risk goods', and therefore which fee would apply. Whereas previously, any declaration resulted in the same enforcement action. This could create a longer process for biosecurity officers. In addition, standard operating procedures, guidance and training would be necessary so that the new infringement is applied correctly and consistently.

152. Option 2 is likely to be neutral on how clear the law is. Having two tiers of infringement offences for erroneous declarations does introduce complexity into the law, and passengers may find it difficult to understand what a 'high-risk good' is. However, MPI should be able to mitigate these risks through its education and communications approaches.

Cost benefit analysis

153. Option 2 would create a new infringement offence for higher risk goods. From retrospective analysis, we expect that 0.15 percent of arrivals receive infringements annually. This amounts to approximately 10,000 infringements. We do not have the data to predict what proportion of these would fall under the high-risk goods infringement offence.

154. If the number of infringement notices issued is much higher than the status quo, the costs imposed on targeted people rises. However, this is not expected to be an issue because the number of infringements issued annually (as a proportion of the number of travellers) is very low.

Table 2 - Cost benefit impact table for Option 2

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the option compared to taking no action			
Lower risk offenders at the border	No change – the current infringement fee already applies.	None	High
Higher risk offenders at the border	Individual cost of infringement.	$800 infringement fee, multiplied with the proportion of the 0.15% of arriving passengers that are infringed and would be subject to the higher fee.	Medium
Government	No additional marginal costs.[13]	Low	High
Total monetised costs		Unknown	Medium
Non-monetised costs		None	High

[13] While expected to be minimal, any additional training needs during implementation and updates to procedures may raise internal costs in the short-term.

Additional benefits of the option compared to taking no action			
Lower risk offenders at the border	No change – the current infringement fee already applies.	None	High
Higher risk offenders at the border	No benefits – the option is not intended to deliver benefits to non-compliant parties.	None	High
Government	May incentivise compliance with biosecurity requirements. Deliver benefits over time through less instances of offending.	Low	High
Total monetised benefits		None	High
Non-monetised benefits		Low	High

Preferred option

155. Based on our best available evidence, we do not have a preferred option as the overall impacts between the status quo and a new higher-tier infringement offence are similar. If through public consultation we get a better sense of the impact of a higher infringement fee on passengers, this may suggest that Option 2 contributes greater to the effective criterion than we have currently assessed.

Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – additional infringement for higher risk goods
Effective	0	0 Option 2 may be no better or worse than the status quo. Based on best available evidence, we are unclear if increased penalties will reduce the rate of erroneous declarations at the border.
Adaptable	0	+ Introduces more flexibility into how the biosecurity system treats goods, some of which are higher risk than others. This futureproofs the biosecurity system as it recognises that some goods are higher risk and are more likely to lead to costly biosecurity responses and should be afforded greater scrutiny.
Efficient	0	- Biosecurity officers would now have to assess which items were not properly declared and therefore which fee would apply (whereas previously any declaration resulted in the same enforcement action). This could create a longer process for biosecurity officers. Standard operating procedures, guidance and training would be necessary so that the new infringement is applied correctly and consistently. However, this may not be overly onerous given declarations are already part of border processing.
Clarity	0	0 Option 2 is likely to be neutral on how clear the law is. Option 2 introduces some complexity into the law, however, MPI should be able to mitigate this risk through its education and communications approaches.
Overall rating	0	0 Unlikely that Option Two delivers on the outcomes for the Bill as it would not provide better biosecurity protection and would impose administrative burden on government. However, it makes MPI's approach to key goods clearer and more transparent.

6.4. Regional council access to infringement offences for pest and pathway management plans

Background

156. Part 5 of Act provides for the management of harmful organisms through national and regional pest and pathway management plans. The purpose of these plans is to eradicate or effectively manage harmful organisms present in New Zealand. Section 154N(19) establishes that it is an offence to fail to comply with a rule in a regional pest or pathway management plan, if that plan specifies that a contravention of that rule is an offence against the Act. The penalty for this following a successful prosecution is a fine up to $5,000 for an individual, or a fine up to $15,000 for a corporation.

157. Not all offending under regional pest management plans meets the threshold for councils to pursue a prosecution. During engagement with regional councils, councils advised us that contravention of rules within pest management plans is frequently occurring. These rules often address simple behaviours. For example, an individual may fail to remove a pest plant growing on their property. This pest becomes difficult to manage and spreads, negatively impacting native planting regeneration areas.

158. In instances where minor offending is occurring frequently, but a prosecution may not be in the best interest of their ratepayers, council staff often undertake the pest management work themselves. This may not be an effective use of limited local government resources and time. Moreover, this approach has no deterrence value.

159. An alternative to prosecutions is an infringement penalty. Infringement penalties are instant fines that are targeted towards minor offending that is high-volume and easy to identify, with a corresponding low financial penalty and no criminal conviction. They recognise that for some offending, particularly where there is no demonstrated intent to break the law, a low fine is appropriate.

160. There are 17 regional councils and unitary authorities within New Zealand,[14] all of whom create separate regional pest management plans that are individualised to the biosecurity risks their regions face. The process for creating infringement offences for regional pest management plans already exists in the Act through the following steps:

- Where councils have identified rules within their regional pest management plan that are appropriate for an infringement offence, they can notify MPI.
- MPI can then undertake the policy process to amend the Biosecurity (Infringement Offences) Regulations 2010 to create an infringement offence for non-compliance under section 154N(19) in relation to a rule within the relevant regional pest management plan. This needs to be done on case-by-case basis for every rule, and for every regional pest management plan.

161. This means if regional councils wish to make a rule in a pest management plan an offence, MPI would need to make changes on a case-by-case basis for each offence required by regional councils.

[14] There are 16 regional councils and unitary authorities on the mainland plus Chatham Islands councils which is a unitary authority. This means that there are 16 regional pest management plans in total (as Nelson/Tasman have a joint one).

Problem

162. Regional councils need more efficient access to proportionate tools to address instances of minor offending. More proportionate tools ensure councils have an effective and proportionate approach to deter minor instances of non-compliance.

Options

163. **Option 1** is the **status quo**. This means if regional councils wish to make a rule in a pest management plan an offence, MPI would need to make changes on a case-by-case basis for each and every offence required by each regional council.

164. **Option 2** would **introduce the ability for regional councils to establish infringement offences in regional pest management plans**. There are risks with fully delegating the ability to create infringement offences to regional councils. It is important for there to continue to central government oversight of the justice system. Therefore, we are proposing that Option 2 can be enabled through the following steps to ensure there are adequate safeguards:

    - MPI would amend the National Policy Direction for Pest Management[15] to include criteria that regional councils must meet before a pest management plan can specify that contravention of a rule is an infringement offence. Such criteria could include:
        - the conduct the rule addresses is a minor contravention of the law;
        - contravention of the rule is straightforward and easily identifiable;
        - contravention of the rule is likely to occur in high volumes; and
        - an infringement is likely to have a deterrent effect from future contravention.
    - When developing pest management plans, regional councils would need to determine which rules would be appropriate for an infringement offence, using the criteria specified in the National Policy Direction for Pest Management.
    - The Act would be amended require regional councils to consult MPI (who in turn would consult the Ministry of Justice) on any rules within its pest management plans where contravention of that rule would result in an infringement offence.

165. We are proposing that the infringement fee for non-compliance with a specified infringement offence rule in a regional pest management plan be set at $300.

Assessment

166. The options are assessed against the following criteria:

[15] The Minister for Biosecurity provides leadership for long-term management through a national policy direction. The purpose a national policy direction is to ensure that pest management activities under the Act provide the best use of available resources for New Zealand's best interest and align with one another where necessary.

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy? Does the option lead to effective partnership and coordination between government and other players of the biosecurity system?
Adaptable	Does the option provide a modern toolbox to users of the Act?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties? How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty? Are roles and responsibilities assigned appropriately and clearly between central government, local government, industry, and local communities?

167. Under Option 1 (the status quo), regional councils would continue to either not enforce minor instances of non-compliance or would be reliant on MPI to make case-by-case amendments to enable an infringement offence for a specific rule.

168. Option 2 (enable regional councils to designate an infringement offence) strongly meets all the criteria. Option 2 reduces regulatory burden on central and local government by providing regional councils flexibility to create infringement offences without two separate regulatory processes (the Council reviewing a regional pest management plan and central government amending the regulations). Pest management plans can work more effectively and be better enforced by regional councils.

169. The safeguards we have considered (the setting of National Policy Direction by MPI to guide councils, and the requirement for MPI to approve the proposed infringement) addresses the risks in terms of central government oversight of the justice system.

170. Option 2 better protects New Zealand. Non-compliance that regional councils would previously not have enforced, would now be enforced under Option 2. This could incentivise compliance with biosecurity rules.

171. Option 2 does involve some up-front implementation complexity as there are a range of primary and secondary legislation changes that are required to set up the system, but we expect that the long-term benefits would significantly outweigh this up-front cost.

Cost benefit analysis

172. This set of proposals is not expected to have cost or impacts with fiscal measures. Their consideration and implementation are a part of the regular work of government.

173. We analysed the options using multi-criteria analysis.

Preferred option

174. Our preferred option is Option 2 because it meets all the criteria and delivers on the objectives of the Bill.

Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – introduce ability for regional councils to designate infringement offences
Effective	0	+ Non-compliance that regional councils would not have enforced would now be dealt with. This better incentivises compliance with rules that protect biosecurity.
Adaptable	0	+ + Pest management plans can work more effectively and be better enforced by regional councils. It safely enables councils the ability to set their compliance strategy but retains central government oversight for overall regulatory stewardship.
Efficient	0	+ + Reduces regulatory burden on central and local government by providing regional councils flexibility to create infringement offences without two separate regulatory processes. Some up-front implementation complexity as there are a range of primary and secondary legislation changes that are required to set up the system, but expect there would be long-term benefits.
Clarity	0	+ Makes it clear what regional councils must consider and follow before they can designate infringement offences.
Overall rating	0	+ + This option gives regional councils the flexibility to create infringement offences, reduces regulatory burden, and promotes better biosecurity.

6.5. Enhancing compliance options for breach of a Controlled Area Notice

Background

175. A Controlled Area Notice (CAN) can be used to restrict specific kinds of behaviour or movement of individuals and things in a specific area.

176. Chief Technical Officers (CTO) have the power to issue CANs under section 131 of the Act. CANs are issued to limit the spread and potential damage caused by unwanted organisms, monitor the risk associated with their movement, and protect against further incursions. CANs can cover the whole or any specified part of New Zealand. CANs must be announced via newspaper, radio, television or in a way deemed effective and appropriate by the management agency or Chief Technical Officer.

177. The Act provides limitations on the use of CANs. The use of CANs is limited to two functions. The first is to specify what organisms or goods can move into, within, or out of a controlled area (e.g., shellfish collected outside a controlled area must not be returned to sea inside a controlled area). The second is to specify how organisms, organic material, risk goods or other goods within a specific area must be treated (e.g., a requirement to clean boat hulls within a controlled area).

178. The Act contains three provisions that make it an offence to breach a CAN:

- section 134(1)(a) creates an offence to obstruct, resist or fail to comply with the direction of a constable performing duties under section 132;
- section 134(1)(b) creates an offence to move or arrange to move an organism, risk good or other good in contravention of a CAN under section 131(3) without permission from an authorised person; and
- section 134(1A) creates an offence where someone who owns or controls an organism, risk good, or other good with specified requirements under section 131(3), fails to carry out the treatment and procedures required by the CAN.

179. The offence type and maximum penalties for breaching a CAN are outlined below:

- Section 134(1)(a) is an offence requiring *mens rea* under section 154O(1). The offence has a maximum penalty of 5 years imprisonment or a fine of $100,000 for individuals, and a fine or $200,000 for corporations.
- Sections 134(1)(b) and 134(1A) are strict liability offences under section 154N(8). The offence has a maximum penalty of 3 months imprisonment and/or a fine of $50,000 for individuals, and a fine of $100,000 for corporations.

180. Where non-compliance is detected, compliance officers rely on the VADE model. Our experience with CANs is that most individuals, once informed, correct their behaviour and comply.

Problem

181. There is a gap in the enforcement tools available to compliance officers to enforce breaches of CANs. The tools available under the Act are designed to deal with serious-behaviour (i.e., behaviour serious enough to be dealt with through prosecution such as moving an unwanted organism outside of the controlled area) or one-off minor contraventions (i.e., behaviour minor enough to be dealt with through education,

compliance orders, assisted direction). The Act does not contain an offence or compliance tools to deal with medium to low levels of breaches of CANs (such coming into a harbour to anchor where there is a CAN). This gap makes it difficult to deal with non-compliance unless that is so low-level that a warning suffices or so serious that prosecution is required. The Biosecurity Act Amendment Bill provides a vehicle to introduce new tools to the Act and fill this gap.

Options

182. **Option 1** is the **status quo**. There would continue to be a gap in the compliance tools available under the Act to deal with medium to low level offending.

183. **Option 2** would **amend an existing offence, establish a new offence and corresponding infringement** to enhance the compliance tools available under the Act to enforce CANs. These changes would create tools to deal with medium to low level offending. This would be delivered by:

- enabling a tool to deal with serious offending by increasing the standard of liability for two current offences for breach of a CAN (sections 134(1)(b) and 134(1A)) from an offence of strict liability to one requiring *mens rea*. The mental element for this amended offence is about intention. This means an offence is only committed where someone intended to breach the rules of a CAN;
- enabling a tool to deal with medium level offending by introducing a new strict liability offence for breaching a rule or procedure set out in a CAN. This would carry a maximum penalty of a $5000 fine for an individual and a $15,000 fine for a corporation; and
- enabling a tool to deal with low level offending by creating an infringement (corresponding to the new strict liability offence) for breaching a rule or procedure set out in a CAN with an infringement fee of $400 for individuals and $800 for corporations.

184. Adding a *mens rea* requirement to the two existing offences would preserve a tool for MPI to prosecute against serious breaches of a CAN. These are breaches where an individual or corporation has knowingly or intentionally breached a rule in a CAN. The maximum penalty for these offences would remain the same (i.e. up to 3 months imprisonment and/or a fine of $50,000 for individuals, and a fine of $100,000 for corporations).

185. The new strict liability offence could be relied on for medium-level offending. These would be situations where an individual may not have necessarily intended to breach a rule or procedure in a CAN but the breach led to an adverse biosecurity outcome. This would be behaviour serious enough for MPI to pursue prosecution. For example, where an individual has moved an unwanted organism outside of a controlled area without realising a CAN is in place.

186. The new infringement could be relied on for low-level offending. For example, where an individual has anchored in breach of a CAN but has not moved an unwanted organism. These would be situations where compliance officers have informed a low-level offender they are in breach of a CAN, assisted them to become compliant, but continued to commit the act of low-level offending.

187. A fee of $400 for individuals and $800 for corporations has been selected for several reasons:

- consistency with other infringement fees issued under the Biosecurity Act. Most infringements under the Act carry a fee of $400 for individuals and $800 for corporations;
- alignment with LDAC guidelines that state an infringement fee should not be set above $1000; and
- proportionality of the fee with the seriousness of offending. Infringements will be used against minor contraventions of rules in a CAN. It would be disproportionate to the seriousness of offending to issue an infringement higher than $400 for individuals and $800 for corporations.

188. The maximum penalty for the new strict liability offence has been set at $5000 for individuals and $15,000 for corporations to align with other similar offences in the Act with infringement attached to them. Most infringement offences are attached to offences in the Act with maximum penalties of a $5000 fine for individuals and a fine of $15,000 for corporations. This maximum penalty is also proportionate for dealing with offending that is medium-level. This maximum penalty creates a tool for MPI to appropriately enforce against medium level breaches of a CAN.

Assessment

189. The options are assessed against the following criteria. Note that this issue has an additional criterion on proportionality. Proportionality is a key factor to consider in the design of compliance tools. It is a long-standing principle of the criminal justice system that penalties should be proportionate in their severity to the gravity of the individual's criminal conduct.

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy?
Adaptable	Does the option provide a modern toolbox to users of the Act?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties? How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?
Proportionate	Is the option proportionate in its severity to the gravity of the individual's offending?

190. Under Option 1, the tools in the Act for dealing with non-compliance with CANs would continue to be limited. The gap in compliance tools available to deal with medium to low-level offending would remain.

191. Option 2 (amend an existing offence, establish a new offence and corresponding infringement) is unclear on the effective criterion. Enhancing the compliance tools available to deal with non-compliance with CANs could better protect New Zealand from biosecurity risk. These tools should enable better enforcement of the rules contained in CANs, preventing adverse biosecurity events that result from breaches of CANs (e.g., spread of an unwanted organism beyond a controlled area). However, we do not have evidence to help us make this assessment.

192. Option 2 meets the adaptable criterion of the Bill by providing MPI with a full suite of graduated enforcement tools to enforce CANs (a key regulatory tool used during incursions). Changes under Option 2 will provide MPI additional levers to deal with non-compliance with CANs such as a new strict liability offence and infringements.

193. Option 2 makes enforcement for medium to low-level breaches of CANs more efficient with the availability of infringement fees. There may be inefficiencies where additional infringements MPI issue are appealed. However, we have found the volume of individuals who appeal infringements of $400 is low for the Biosecurity Act in general.

194. Option 2 could make the Act clearer on how MPI enforces against non-compliance with CANs. For example, there would be a clear distinction between the penalty available for intentional non-compliance compared to non-compliance as a result of ignorance. However, the proposal may blur the distinction between the behaviours captured by each offence type. This creates uncertainty for enforcement officers and those captured by the regime. This lack of distinction might also lead to inconsistent application within a certain region or across regions.

195. Option 2 is finely balanced on the proportionate criterion. The previously strict liability offence (with a penalty of up to 3 months imprisonment, a fine of $100,000 for individuals, a fine or $200,000 for corporations) will be amended to be a mens rea offence. We consider this is better for the proportionate criterion than the status quo, because it removes the penalty of imprisonment for a strict liability offence. Strict liability offences limit the right to be presumed innocent until proven guilty, affirmed in s 25(c) New Zealand Bill of Rights Act.

196. The new strict liability offence captures any offending that is not intentional but is still so serious for biosecurity that prosecution is necessary. Accordingly, this has a relatively large fine attached to it. As noted in the previous paragraph, a strict liability offence triggers the right to be presumed innocent under section 25 of the New Zealand Bill of Rights Act 1990. We will need to show that this limitation is justified.

197. Our initial assessment of the new strict liability offence is that it is proportionate given the seriousness of breaching a CAN (even if erroneously) for New Zealand's biosecurity. CANs are a key tool to control the spread of a pest or unwanted organism. Compliance with them is quite important. Many of the offences in the Biosecurity Act (including the status quo offence for CANs) are strict liability offences for this reason. Laws involving the environment are generally aimed at protecting the public interest, improves the long-term and prevents harm to people or the environment. The focus of these laws, including the Biosecurity Act, is on prevention and the role others play to achieve biosecurity outcomes.

198. The infringement offence captures low-level breaches. We are less clear on whether this meets the proportionate criterion. Infringement penalties are targeted towards minor offending that is high-volume and easy to identify, with a corresponding low financial penalty and no criminal conviction. It is not clear whether a breach of a CAN could ever be so low-level that a minor $400 fee would be a proportionate penalty. We also currently lack data to understand if low-level breaches of CANs is occurring at high-volumes and if these breaches involve simple facts where it is clear there has been non-compliance. Given that a breach of a CAN could result in imprisonment currently, this indicates that an infringement penalty is not proportionate.

199. Moreover, the offences also cover any "breach of a rule or procedure set out in a CAN". The generality risks disproportionate penalties for certain behaviours (potentially too high for some and too low for others). Offences that are more specific about the behaviour being captured (e.g. anchoring in a CAN, moving an unwanted organism outside of a controlled area) with a penalty created specific to each offence, may be the more proportionate approach. However, that would impose significant administrative complexity as each CAN is different for each specific use-case.

Cost benefit analysis

200. Option 2 would create a new strict liability offence and new infringement offence for breaches of CANs. From retrospective analysis, most people choose to comply after being warned or provided information on their behaviour. Therefore, the number of infringement notices issued is likely to not be administratively burdensome.

Table 3 - Cost benefit impact table for Option 2

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the option compared to taking no action			
Offenders	Would now have to pay the new infringement fee (if they are issued an infringement notice) or the new fine (if they are prosecuted under the new strict liability offence). For the new mens rea offence, there is no change on impact as the penalty stays the same.	$400 for an individual or $800 for a corporation, multiplied by the number of offenders (which we do not have evidence on) $5000 for an individual or $15,000 for a corporation, multiplied by the number of successful prosecutions undertaken by MPI	Low
Business	No change – CANs will be issued regardless and the cost on business is not because of a result of this proposal for a new infringement.	None	High
Government	No additional marginal costs.[16]	Low	Low
Total monetised costs		Unknown	Medium
Non-monetised costs		None	High

[16] While expected to be minimal, any additional training needs during implementation and updates to procedures may raise internal costs in the short-term.

Additional benefits of the option compared to taking no action			
Offenders	No benefits – the option is not intended to deliver benefits to offenders.	None	High
Businesses	Enhanced enforcement of CANs makes CANs more effective. This would help reduce the spread of a pest or unwanted organism which could better protect businesses from an incursion.	Low	Low
Government	May incentivise compliance with biosecurity requirements. Deliver benefits over time through less instances of offending.	Low	High
Total monetised benefits		None	High
Non-monetised benefits		Low	High

Preferred option

201. Our preferred option is Option 2 because it meets the criteria and delivers on the objectives of the Bill.

Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – enhancing compliance tools to deal with non-compliance of CANs
Effective	0	0 Option 2 may minorly impact the level of effectiveness of the Bill. Enhanced compliance tools in the Act could lead to greater compliance with CANs and could prevent adverse biosecurity outcomes as a result of non-compliance with CANs. However, this is uncertain.
Adaptable	0	+ Option 2 will introduce additional levers to the Act's toolbox to deal with non-compliance with CANs.
Efficient	0	+ Option 2 makes enforcement for medium to low-level breaches of CANs more efficient with the availability of infringement fees. There may be minor inefficiencies as a result of the proposal where individuals seek to appeal their infringement fees.
Clarity	0	0 Option 2 will make the Act clearer on the compliance tools available to MPI to deal with types of non-compliance with CANs. The Act would provide clarity on how MPI enforces against serious intentional breaches, medium level breaches, and minor contraventions of CANs. However, equally, this creates uncertainty for enforcement officers and those captured by the regime. This lack of distinction might also lead to inconsistent application within a certain region or across regions. We are uncertain at this stage if the overall impact is better or worse than the status quo.
Proportionate	0	0 There are aspects to Option 2 that are more proportionate than the status quo, and less proportionate that the status quo. It is finely balanced, and we will need further assessment following public consultation.
Overall rating	0	+ Option 2 would help remove the gap in compliance tools available to deal with medium to low-level offending in the Act. It should make it easier for MPI to combat medium to low-level breaches of CANs.

6.6. Stronger compliance options for places of first arrivals

Background

202. Places of first arrival (PoFAs) are ports that are approved by the Director-General under section 37 of the Act to receive goods, craft, and passengers as they first arrive into New Zealand. Craft entering New Zealand must arrive at a PoFA. Ports are approved for specific types of craft, passenger numbers, and types of goods. Ports must have the arrangements, facilities, and systems to manage biosecurity risk.

203. To be approved as a PoFA, a port must comply with the requirements in section 37 and the requirements of a PoFA Standard set by the Director-General. The Director-General may suspend or revoke a PoFA's approval if satisfied that the facility is no longer meeting the requirements of section 37 or the PoFA Standard.

204. Under section 154H, the Act allows pecuniary penalties if a person or organisation fails to comply with certain requirements specified in the Act. Pecuniary penalties are not available for breaches of PoFA requirements.

205. Pecuniary penalties are monetary penalties sought through the High Court. These aim to deter serious regulatory breaches without criminalising the offender (because non-compliance does not justify imprisonment or criminal conviction). They can still have serious reputational and financial effects on a person or entity, and so have usually been implemented to target commercial behaviour where there is potential for commercial gain from non-compliance.

206. Under section 154J, the maximum amount of pecuniary penalty that a Court may order for an organisation is:

- where the commercial gain produced by the non-compliance can be ascertained, $10,000,000 or three times the value of the commercial gain resulting from the non-compliance, whichever is greater; or
- where the commercial gain produced by the non-compliance cannot be readily ascertained, $10,000,000 or 10% of the turnover of the body corporate and all its interconnected bodies corporate, whichever is greater.

Problem

207. Revoking or suspending a PoFA approval is not always a viable compliance option. Take an example of a strategic port that is authorised as a PoFA to receive 1000 passengers an hour. Due to craft volume and frequency, the number of passengers arriving frequently exceeds the limit. In this instance, revoking or suspending the port as a PoFA would cause significant passenger and freight disruptions and have disproportionate economic and societal impacts.

208. However, if the port continues to exceed this approved volume (whether deliberately or otherwise), it increases biosecurity risk to New Zealand. It places systems and processes under pressure, increasing the risk of a biosecurity risk good entering New Zealand, as well as potential health and safety risks for both passengers and staff.

Options

209. **Option 1** is the **status quo**. Under this option, MPI lacks tools to effectively enforce PoFA requirements for some non-compliant operations (for instance, key airports).

210. **Option 2 enables pecuniary penalties for breaches of PoFA requirements**. This option proposes to amend section 154H(2) of the Act to include breaches of PoFA requirements as actionable for a pecuniary penalty. Under section 154J, the maximum amount of pecuniary penalty that a Court may order is:

- where the commercial gain produced by the non-compliance can be ascertained, $10,000,000 or three times the value of the commercial gain resulting from the non-compliance, whichever is greater; or
- where the commercial gain produced by the non-compliance cannot be readily ascertained, $10,000,000 or 10% of the turnover of the body corporate and all its interconnected bodies corporate, whichever is greater.

211. **Option 3** would **create a new offence for breaching PoFA conditions of approval with a fine of up to $200,000 and a continuing penalty of $10,000 each day**. This option looks at establishing an additional offence under the Act, for contravention of section 37 (in relation to the conditions of approval a PoFA must adhere to). This will carry a fine upon conviction and a further fine for every day or part of a day that offending has occurred. The proposed offence is intended to be used in instances where a PoFA has an area of non-compliance, but where the area of non-compliance is not likely to impact the PoFAs wider ability to fulfil their conditions of approval.

212. These figures were reached through comparison with a similar use of continuing penalties in the Dairy Industry Restructuring Act 2001. This Act is also administered by MPI and addresses commercial gain that may result from ongoing non-compliance. Like dairy companies governed by the Dairy Industry Restructuring Act, PoFAs are often large, sophisticated commercial entities that can incur the existing penalties as a cost of doing business. A continuing penalty could be more proportional to the commercial gain that may result from ongoing non-compliance with approval requirements.

Assessment

213. The options are assessed against the following criteria:

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy? How will the option affect incentives to manage biosecurity risk?
Adaptable	Does the option provide a modern toolbox to users of the Act?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties? How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?

214. Option 2 (enable pecuniary penalties for breaches of PoFA requirements) meets most of the criteria. Pecuniary penalties already exist for non-compliance in other sections of the Act. These sections span many aspects of the biosecurity system, including (but not limited to) the importation system, and the clearance of risk goods. Similar to PoFAs, these aspects of the biosecurity system manage biosecurity risk at the border.

Specifically, section 154H establishes a pecuniary penalty for non-compliance with section 40(6), which requires transitional facility[17] operators to comply with all conditions of a transitional facilities approval.

215. We consider non-compliance with a PoFA's conditions of approval to present a similar level of biosecurity risk as non-compliance with the sections of the Act that are already listed in section 154H, particularly section 40(6). We also consider PoFA non-compliance to be consistent with the use of pecuniary penalties as part of a regulatory regime targeting commercial behaviour, as outlined in Chapter 26 of the Legislation Design and Advisory Committee's guidelines.[18]

216. Some opponents of pecuniary penalties argue that they are criminal sanctions in disguise.[19] Opponents suggest that severe penalties should remain solely within criminal law with the benefit of its procedural safeguards (e.g. criminal prosecutions require a high burden of proof - beyond a reasonable doubt whereas civil cases have a lower burden of proof).[20]

217. Ultimately, we consider that Option 2 is effective by providing stronger enforcement of PoFA requirements which improves New Zealand's border protections. Option 2 is adaptable by providing MPI with practical tools to target commercial behaviour. However, notably, MPI has never used pecuniary penalties so this option may not be providing MPI with the most relevant tools. Option 2, however, would be less efficient than the status quo because it requires a judicial process to access.

218. Option 3 (create a new offence for breaching PoFA conditions of approval with a fine of up to $200,000 and a continuing penalty of $10,000 each day) meets some of the criteria. The proposed penalty could enable the enforcement objective of preventing long-term non-compliance with section 37. However, it is likely to result in significant uncapped maximum penalties which may be inequitable.

219. Option 3, like Option 2, is effective by providing stronger enforcement of PoFA non-compliance. However, we expect that Option 3 would meet the criteria to a greater extent than Option 2 due to the larger penalties that could provide stronger incentives for commercial entities to comply.

220. Continuing penalties do not currently exist in the Act but do exist in other MPI legislation. The Dairy Industry Restructuring Act 2001 addresses commercial gain from ongoing non-compliance by dairy companies which, like PoFAs are often large, sophisticated commercial entities that can incur the existing penalties as a cost of doing business. Option 3 would enable this completely new penalty and provides MPI with a greater range of tools to address non-compliance of PoFAs. The law would also

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[17] A transitional facility are facilities that receive containers and goods that are considered risks to biosecurity. At the border, MPI verifies that import requirements have been met once risk goods arrive in New Zealand. On arrival, cargo moves to an MPI approved and audited transitional facility for inspection and clearance.

[18] The Legislation Guidelines are a guide to making good legislation that has been endorsed by Cabinet as the Government's key point of reference for assessing whether draft legislation conforms to accepted legal and constitutional principles. They are developed by the Legislation Design and Advisory Committee whose membership includes experienced government officials with backgrounds in law, policy and economics, experienced legal practitioners, academics, and regulators.

[19] Ministry of Economic Development Reform of Securities Trading Law: Volume Three: Penalties, Remedies and the Application of Securities Trading Law Discussion Document (May 2002) at [281].

[20] See R M White "It's Not a Criminal Offence–Or Is It? Thornton's Analysis of 'Penal Provisions' and the drafting of 'Civil Penalties'" (2011) 32(1) Statutes LR 17.

be clearer as it communicates how serious the PoFA requirements are and the seriousness of non-compliance.

221. Option 3, like Option 2, is less efficient than the status quo. A continuing penalty would be more resource intensive than the status quo to pursue as it requires a judicial process to access. Further, continuing penalties do not currently exist in the Act. It is relatively controversial and could face significant scrutiny during the legislative process.

Cost benefit analysis

222. For Options 2 and 3, it is about finding the balance between setting the appropriate penalty level so that it encourages compliance, and not going too far in trading off opportunity costs of addressing non-compliance. In other words, if a PoFA faces too high a penalty, the PoFA spends funds to pay penalties rather than investing in their facilities.

Table 4 - Cost benefit impact table for Option 2

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the option compared to taking no action			
PoFAs	Costs of challenging breach allegations. Monetary cost of paying a pecuniary penalty which can lead to very high fines. Reputational risks from recurring enforcement action.	High	Medium
Government	Higher monetary cost of pursuing greater number of civil charges to deter non-compliance. Resource and time investment in prosecuting for greater number of civil charges.	Medium	Medium
Total monetised costs		Unknown	Low
Non-monetised costs		Medium	Low
Additional benefits of the option compared to taking no action			
PoFAs	Provides an avenue for addressing non-compliance that is less severe than closure of the PoFA. Incentives to meet compliance requirements to avoid costs or mitigate non-compliance risks.	High	Medium
Government	Provides an avenue for addressing non-compliance that is less severe than closure of the PoFA. Efficiencies gained over time from adding to the graduation of sanctions within the enforcement toolkit.	High	Medium
Total monetised benefits		Unknown	Low
Non-monetised benefits		High	Medium

Table 5 - Cost benefit impact table for Option 3

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the option compared to taking no action			
PoFAs	Defence cost against charges. Monetary cost of paying potential pecuniary penalty. Reputational risks from recurring enforcement action. Opportunity costs from paying ongoing non-compliance fees that could be otherwise invested into facility.	High	Medium
Government	Resource and time-intensive processes may require focus on most severe non-compliance – may lead to trade-off in forgoing action toward less severe offending.	High	Medium
Total monetised costs		Unknown	Low
Non-monetised costs		Low	Low
Additional benefits of the option compared to taking no action			
PoFAs	Efficiency over time gained from overall reduction of congestion in PoFAs when they become compliant (e.g. for PoFAs that are taking on too many passengers beyond their approval).	Medium	Medium
Government	Efficiency gains over time if POFAs have greater compliance. Better biosecurity outcomes from less congestion in control areas at the airport, allowing better investigation and detection of biosecurity risks.	Low to Medium	Medium
Total monetised benefits		Unknown	Low
Non-monetised benefits		Medium	Medium

Preferred option

223. MPI prefers either option for change compared with the status quo. However, of those options, we do not have a preferred option. We are interested in getting feedback on how these new penalties would affect PoFAs before we can fully assess which option is preferred.

Multi-criteria analysis

++	Significantly better than the status quo
+	Better than the status quo
0	No better or worse than the status quo
-	Worse than the status quo
- -	Significantly worse than the status quo

	Option 1 – status quo	Option 2 – enable pecuniary penalty for PoFA non-compliance	Option 3 – introduce continuing penalty for PoFA non-compliance
Effective	0	+ Practical tools to enforce PoFA requirements delivers better biosecurity protection and incentivises PoFAs's to comply with requirements.	+ + Like Option 2 but to a greater extent due to larger penalties that could provide stronger incentives for commercial entities to comply.
Adaptable	0	+ Pecuniary penalties already exist in the Act. Option 2 extends it to PoFA non-compliance and enables a penalty that is used to target commercial behaviour. However, notably, MPI has never used pecuniary penalties so it may not be the most relevant tool.	+ Continuing penalties do not currently exist in the Act. Enabling this completely new penalty provides MPI with a greater range of tools to address non-compliance of PoFAs.
Efficient	0	- The penalty requires a judicial process to access.	- - The penalty requires a judicial process to access. Further, continuing penalties are not currently in the Act. They are relatively controversial and could face significant scrutiny during the legislative process.

	Option 1 – status quo	Option 2 – enable pecuniary penalty for PoFA non-compliance	Option 3 – introduce continuing penalty for PoFA non-compliance
Clarity	0	+ Communicates clearly how serious the PoFA requirements are and the seriousness of non-compliance.	0 Similar to Option 2, this option communicates the seriousness of the PoFA requirements. However, the nature of continuing penalties means there is no way of knowing the final financial penalty, and this reduces clarity for those who are non-compliant. This also increases the risk of a disproportionate penalty being applied.
Overall rating	0	+ The use of pecuniary penalties as part of a regulatory regime targeting commercial behaviour for non-compliant PoFAs, is consistent with the purpose of the enforcement tool and is precisely what it is used for.	+ While we expect this would deliver better biosecurity outcomes, the tool could be controversial and could lead to severe penalties.

7. Sentencing

7.1. Background

224. The Biosecurity Act sets out offences that involve prosecution through the courts and the maximum penalties that can be imposed if an offender is successfully convicted. Where an offender is prosecuted, judges look at the specific facts of the case to consider the appropriate sentence to deal with the offending. In making this decision, judges rely on the maximum penalties set out in the Biosecurity Act, the guidance, principles and purposes in the Sentencing Act 2002, and any relevant case law. The maximum sentence is usually given only in the most serious cases.

225. Deterrence plays a critical role in maintaining compliance with the Biosecurity Act. The severity of penalties issued by the courts is one source of deterrence against non-compliance with the Biosecurity Act.

226. Some statutes contain provisions to guide the decision-making of the courts during sentencing. For example, of the Acts that MPI administers, the Fisheries Act 1996 and the Food Act 2014 contain provisions that provide additional considerations for courts to consider during sentencing. Section 274(4) of the Food Act 2014 requires judges to consider factors such as how likely a person would be harmed from the offence and the potential or actual implications of the offending on trade. Similarly, section 254 of the Fisheries Act 1996 requires judges to consider the inherent difficulty in detecting fisheries offences and the need to maintain adequate deterrence against offending.

227. The courts have also developed their own sentencing criteria for biosecurity offences through case law. The criteria include a range of aggravating factors including offending for commercial gain, offending associated with the international wildlife trade, high biosecurity risks with potential significant economic consequences, repeat offending, and extensive premeditation and planning.

228. Biosecurity offending is not as clear about risk and who the victim is compared to other offending. For example, the risk associated with an assault case is clear as the harm either did or did not happen. There is also a clear victim. For biosecurity offences, risk is a question of yes – a threat to biosecurity was introduced, or no – a threat to biosecurity was not introduced but it could have caused a catastrophic outcome if it had been. This ambiguity around risk can make the decision to issue a penalty for an offence difficult and unclear.

229. Judges are not always willing to increase penalties beyond what has been imposed previously unless the situation is clearly a serious departure from offending in analogous cases. This stems from the doctrine of precedent where courts look to rules established in prior cases to inform cases where similar facts or points of law are being decided.

230. High penalties are rarely imposed in biosecurity cases. However, even one non-compliant action has the potential to cause serious social, economic, environmental and health implications.

231. Two factors may contribute to this:

- Most biosecurity offenders are first-time offenders. Courts tend to reserve harsher penalties for repeat offenders.

- Most biosecurity offenders plead guilty. Under section 9 of the Sentencing Act, a guilty plea is a mitigating factor in sentencing decisions.

232. This creates a base of case law weighted towards the lower range of possible penalties.

7.2. Problem or opportunity

233. The Biosecurity Act establishes a range of duties, offences and penalties which are applied by the courts. The Biosecurity Act does not contain any guidance to assist the courts in their application of the compliance regime in the Biosecurity Act. Experience with other Acts has shown that sentencing guidance can offer greater clarity and consistency into the sentencing process. High penalties for biosecurity offending are also rare. There is an opportunity through the Bill to provide clarity and additional factors for judges to consider during their sentencing decisions. These factors could go above what the courts currently consider and enable sentencing that better reflects the biosecurity risk associated with offending.

7.3. Options

234. **Option 1** would maintain the **status quo**. There would continue to be a lack of sentencing guidance in the Biosecurity Act.

235. **Option 2** would **introduce sentencing guidance into the Act**. This would set out principles or factors for judges to consider during their sentencing decision-making. It is our expectation that the sentencing guidance will go beyond what the courts have already developed and would aim to facilitate the courts to impose greater sentences.

236. Sentencing guidance under Option 2 would be modelled off sentencing guidance set out in other Acts that MPI administers, such as the Food Act 2014 and the Fisheries Act 1996. This guidance could include factors that outline aspects of biosecurity offending that we assess as particularly harmful (similar to the Food Act) or factors that reflect the unique nature of biosecurity compliance and deterrence (similar to the Fisheries Act).

237. We would like to consult the public on their appetite for sentencing criteria in the Biosecurity Act before finalising what specific guidance might look like.

7.4. Assessment

238. The options are assessed against the following criteria:

Effective	Does the option better protect New Zealand from biosecurity risk, while supporting our economy?
Adaptable	Does the option deliver a modern legislation that is future-proof and enabling?
Efficient	How will the option address the administrative burden on regulators, and/or the compliance burden on regulated parties? How complex is the option to implement?
Clarity	Is the option logical, consistent, easy to understand, and provides sufficient certainty?

239. Under Option 1, there would be no changes to how sentencing works under the Biosecurity Act. The courts would continue to deliver penalties without additional sentencing guidance in the Act. Option 1 would not advance either the effective or adaptable criterion.

240. Option 2 (introduce sentencing guidance) is effective as a vehicle to better protect New Zealand from biosecurity risk by strengthening the role of penalties and sentencing in deterring non-compliance with biosecurity law. Non-compliance with biosecurity law exposes New Zealand to risk of incursion and the further spread of pests and diseases. The level of penalties imposed against an offender, steered by sentencing guidance, can influence the level of deterrence against non-compliance.

241. Option 2 is adaptable as it introduces a tool for Parliament to convey its intentions with respect to sentencing under the Biosecurity Act. Other than the setting of maximum sentences, there is no avenue for this currently. The introduction of sentencing guidance would create a vehicle for Parliament to establish what considerations judges should draw their minds to during sentencing.

242. Option 2 would introduce more clarity and transparency around how the Act's compliance regime operates. Clarity is improved because factors introduced through sentencing guidance could help mitigate the ambiguity that surrounds levels of biosecurity risk stemming from offending. Transparency is improved because the considerations being assessed by the courts as they apply the Act's compliance regime would be clearly laid out in legislation. This is useful for ensuring greater access to law for the public and those who interact with the Act's compliance regime.

7.5. Cost benefit analysis

243. This set of proposals is not expected to have cost or impacts with fiscal measures. Their consideration and implementation are a part of the regular work of government.

244. We analysed the options using multi-criteria analysis.

7.6. Preferred option

245. Our initial preferred option is to introduce sentencing guidance under Option 2. However, the final details of what sentencing guidance might look like is still subject to further policy analysis. This will be guided by feedback we receive during public consultation. We are interested in hearing what New Zealanders' appetite is for sentencing guidance in legislation and what factors they deem particularly important to consider during sentencing. These factors might be specific biosecurity risks or aspects of the biosecurity system which ought to be taken into account during a judge's decision-making.

7.7. Multi-criteria analysis

++ Significantly better than the status quo

\+ Better than the status quo

0 No better or worse than the status quo

\- Worse than the status quo

\- - Significantly worse than the status quo

	Option 1 – status quo	Option 2 – introduce sentencing guidance
Effective	0	+ Sentencing guidance could provide a vehicle for greater levels of deterrence against non-compliance with biosecurity law. The sentencing guidance developed should go above and beyond the criteria currently used by the courts for biosecurity offending. This should facilitate the courts to impose harsher sentences that should lead to greater levels of deterrence.
Adaptable	0	+ Sentencing guidance could be used to provide the courts an update on Parliament's intention with respect to current and future biosecurity risks.
Efficient	0	0 The introduction of sentencing guidance will not necessarily make the Act more or less efficient. Sentencing guidance could be used to reduce administrative burden by reducing non-compliance with biosecurity law through increased deterrence.
Clarity	0	+ + The introduction of sentencing guidance would provide greater clarity to the courts on what factors to consider during the sentencing process. Sentencing guidance would also provide more transparency generally on the factors being considered during sentencing.
Overall rating	0	+ Regardless of what guidance is introduced, the introduction of sentencing criteria would significantly increase the level of clarity to judges on what to consider in the course of their sentencing decisions. We expect the sentencing guidance developed would go above and beyond the criteria currently used by the courts for biosecurity offending, leading to courts imposing greater sentences and therefore greater deterrence against non-compliance.