



BIOSECURITY BILL 2015 (NSW)—COMMENTS

ANIMAL DEFENDERS OFFICE

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Introduction

The Biosecurity Bill 2015 (NSW) (the Bill) raises a number of concerns that should be addressed before the Bill is next considered by Parliament. The Bill:

- trespasses on personal rights and liberties;
- proposes compliance and enforcement measures that are disproportionate to the stated aims of the Bill;
- inappropriately delegates legislative power;
- is uncertain in its operation and scope; and
- does not provide adequate protections for animals potentially affected by measures contained in the Bill.

It is clear that the scope of the Bill is broader than existing legislation. This is emphasised in the Minister's Second Reading Speech (2RS): 'the new Biosecurity Act will expand the scope of our existing legislation to include protection of the economy, environment and community' (p8).

This expanded scope is illustrated by the Bill's reliance on extremely broad concepts such as 'carrier' which means:

any thing (whether alive, dead or inanimate, and **including a human**) that has, or is capable of having, any biosecurity matter on it, attached to it or contained in it (s11; emphasis added).

Such a broad definition means that the scope of the Bill itself, and the meaning of the actual terms, are uncertain. Uncertainty is generally undesirable in law, and particularly in this law which proposes far-reaching powers of government officials as well as harsh offences and penalties.

Much detail is left out of the Bill and would be contained in delegated legislation. This makes it difficult to assess the Bill itself as the details are not available. It is also a concern that important matters such as 'mandatory measures' (s42) will be contained in delegated legislation, given the reduced level of parliamentary scrutiny to which such legislation is subjected.

The broad scope of the Bill, and the uncertainty surrounding its 'reach', are illustrated by the Bill's definition of the term 'biosecurity impact' (s13(1)):

A **biosecurity impact** means an adverse effect on the economy, the environment or the community that arises, or has the potential to arise, from biosecurity matter, a carrier or dealing with biosecurity matter or a carrier, being an adverse effect that is related to:

- (a) the introduction, presence, spread or increase of a disease or disease agent into or within the State or any part of the State, ...

It is reasonable to suggest that almost anything in any situation would fall under this definition.

Duties under the Bill

Part 3 of the proposed Bill prescribes a ‘general biosecurity duty’. The definition of this duty is extremely broad:

22 Biosecurity duty—dealings with biosecurity matter and carriers

Any person who deals with biosecurity matter or a carrier and who knows, or ought reasonably to know, the biosecurity risk posed or likely to be posed by the biosecurity matter, carrier or dealing has a biosecurity duty to ensure that, so far as is reasonably practicable, the biosecurity risk is prevented, eliminated or minimised.

Under section 23 of the Bill, it would be an offence to fail to discharge a person’s biosecurity duty.

Given that this duty is imposed on ‘any person who deals with biosecurity matter or a carrier’, and that a ‘carrier’ can be ‘any thing...including a human’ (s11), it is difficult to assess who would actually have a duty under this proposed provision, and what the duty would consist of. Given the harsh penalties for committing such an offence (up to \$1,100,000 or imprisonment for 3 years, or both, for an individual: s276), this level of uncertainty in the Bill is unacceptable.

According to the Bill, the (proposed) regulations will set out measures that a person may have to take ‘to prevent, eliminate or minimise a biosecurity risk posed or likely to be posed by the biosecurity matter, carrier or dealing’ (s24). As the details regarding these measures are not yet drafted, it is impossible to assess the impact of this requirement, and the associated offence of non-compliance (s25).

Division 5 of Part 4 of the Bill sets out a duty to notify biosecurity events. The definition of ‘biosecurity event’ is again extremely broad in that it covers ‘something’ that may only be ‘likely to occur’ and ‘likely to have’ a significant biosecurity impact. It also includes matters *yet to be specified* in delegated legislation:

39 Biosecurity event—meaning

- (1) A **biosecurity event** means something that has occurred, is occurring or is likely to occur and that has had, is having, or is likely to have, a significant biosecurity impact, other than a prohibited matter event.
- (2) A **biosecurity event** includes anything declared by the regulations to be a biosecurity event.

The duty to notify a biosecurity event even applies to a person who merely ‘suspects’ the existence of a biosecurity event (s38(1)).

Given the broad scope of both the duty and definition of ‘biosecurity event’, it is not clear how this provision may affect ‘third parties’ such as community groups, media organisations, or journalists who become aware of the possibility of a biosecurity event occurring. If such parties are covered by the duty, and by extension the associated offence of failing to discharge the duty (s40), the question remains as to whether this is justified on policy grounds as necessary to achieve the purported objects of the Bill (s3). It is also not clear whether such parties would be protected against self-incrimination, given the admissibility of further information that is based on information from persons who are required to give information under the Bill (but who would themselves be protected against self-incrimination: s42(1)).

Powers of authorised officers

The Bill confers broad powers on ‘authorised officers’.

While the 2RS states that ‘there are clear limitations prescribed in the bill when powers can be exercised’ (p5), it is not clear that this is the case when looking at the Bill itself.

By way of example, Division 2 in Part 8 of the Bill sets out broad information gathering powers, including the powers to require information and records and to require answers to questions (ss90 and 91). The ‘authorised purposes’ for which these powers may be exercised are very broad (s86), and as such do not provide adequate limitations on the scope or reach of the information gathering powers in sections 90 and 91. For example, is it the intention that a community association, media organisation or journalist may be required to provide information or records to an officer if these entities may have received information about an agricultural enterprise from a third party? If so, is this broad effect justifiable in a Bill purporting to provide (merely) for ‘the prevention, elimination, minimisation and management of biosecurity risks’?

Section 95 of the Bill allows an officer to enter any premises at any reasonable time, with or without a search warrant, and even with force. The only limitation on this extraordinarily broad and invasive power seems to be in section 96, which requires either consent or a warrant before purely residential premises may be entered.

The effect of section 95 would seem to be that an officer may enter the premises of a media or community organisation at any ‘reasonable time’ (which is not further clarified or defined) without a search warrant for any of the vague and ill-defined purposes set out in section 86. Similarly, once on the premises, an officer has a broad power to take, move, seize or destroy almost anything (‘things’, s99).

The Bill also allows authorised officers to exercise a function in the case of an emergency merely on a ‘reasonable suspicion’ that a biosecurity emergency is ‘imminent’ (s88). This is an extremely subjective and vague criterion for the basis of an officer’s discretion, and may make rights and liberties unduly dependent of insufficiently defined administrative and discretionary powers.

Again these far-reaching and vague powers would not appear to be justified by the object of the Act.

Restrictions on human rights and freedoms

In light of the concerns raised above, the Bill may be considered to trespass unduly on personal rights and liberties in breach of s8A(1)(b)(i) of the *Legislation Review Act 1987* (NSW).

For example, the Bill may engage the right to freedom of movement in that it potentially limits or regulates use of public places such as roads and streets in certain circumstances, and restricts the movement of persons under control orders and biosecurity directions (s131).

It may also infringe a person's privacy in that it would:

- involve the collection of personal information (Division 2 of Part 8);
- authorise powers of entry to premises or search of persons or premises (Part 8);
- potentially authorise surveillance (for instance by devices installed at premises, s99(2)(i)); and
- provide for compulsory physical inspection of a person (s132).

The Bill may engage the right to security of the person in that it allows a public authority to prohibit, regulate or control entry to or exit from areas and control movements within them (Part 5, esp. s52).

The Bill may also infringe minimum guarantees in criminal proceedings, in that the Bill affects the law relating to self-incrimination (ss34(2) and 42(2)). For example, Part 4 of the Bill sets out various biosecurity duties related to 'prohibited matter'. Division 3 of Part 4 includes a duty 'to notify presence of prohibited matter'. Division 3 provides immediate protection against self-incrimination in relation to information given by a person in compliance with the Division (s34). This protection does not, however, apply to further information obtained as a result of 'information furnished or an answer given in compliance' with such a requirement (s34(2)).

Finally the Bill may be seen to infringe the general prohibition on inhuman or degrading treatment or punishment in that it:

- creates new powers for authorised officials;
- affects the conditions under which persons may be investigated for offences, including powers of search; and
- introduces new types of penalties.

The potential infringements of personal rights outlined above may be justified if it could be shown they are for a valid purpose—for example, protecting people, animals and ecosystems from outbreaks of contagious diseases—and if the means of achieving the stated purpose are proportional.

However neither the 2RS nor the Bill and its explanatory notes provide a clear policy justification for the broad powers given to officials, or for the consequential incursions on human rights and freedoms.

For example, the 2RS refers to various disease outbreaks affecting livestock (equine influenza in 2007 and avian influenza in 2014; p1). It does not cite a cause of the equine influenza, and refers only to a 'likely' cause of the avian influenza, being wild birds. Humans are not cited as the 'cause' of either outbreak. Therefore the potentially severe restrictions on human rights and freedoms where an officer claims to suspect that a human (ie a 'carrier') may cause a biosecurity event do not appear to be proportional to the Bill's aim.

Again, the 2RS claims that the Bill 'will help NSW maintain its enviable market access and reputation' (p2). This is not a sufficient justification for trespassing on personal rights and liberties, and for imposing potentially significant obligations, duties and offences on third parties such as media or community organisations.

Furthermore, while it might be possible to show that the Bill would achieve its purpose in its current form, it may be difficult to demonstrate that there is no obviously less intrusive way of achieving its purpose effectively. For example, the explanatory material should clearly set out why existing disease minimisation and control measures are not sufficient.

Finally, to justify the potential intrusions on personal rights and liberties, the proposed law must be 'certain'. That is, its operation must be foreseeable. Using vague concepts can undermine certainty in law, and especially in a law that creates offences. In this case, the authorised purposes underpinning the broad powers conferred on officers are too vague (s86). For example, will it be clear if a person 'dealing' with a carrier of biosecurity matter (eg a human) may be contravening 'mandatory measures' (to be defined in regulations) that apply to the carrier and therefore risking committing an offence (s25)? Also, what is meant by 'at any reasonable time' in which an authorised officer may enter premises without a search warrant?

Moreover clarifying concepts and setting out obligations in regulations may be seen to be an inappropriate delegation of legislative power, and therefore a matter of concern for the Legislation Review Committee. Such matters include:

- mandatory measures that a person must take to prevent, eliminate or minimise a biosecurity risk (s24(1));
- matters declared to be a biosecurity event (s39(2));
- requirements in relation to notifications of biosecurity events (s43(d)).

Impact on animals

There are a number of powers in the proposed law that would have an impact on animals, including the power to 'destroy' them under an emergency order (s55). Presumably large numbers of animals could be affected. The Bill should specify detailed welfare and monitoring requirements for animals affected by the Bill's provisions. These requirements should then be required to be taken into account not only in decisions as to whether or not to destroy an animal for welfare reasons (s55(1)), but in the destruction process itself.

The 2RS does not refer to any animal welfare organisations or experts being consulted during the development of the Bill. This is a concern given the potentially large numbers of animals who may be affected by the powers and requirements contained in the Bill.

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