NSW Animal Welfare Reform Discussion Paper

Submission by the
Invasive Species Council

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About the Invasive Species Council

The Invasive Species Council was formed in 2002 to advocate for stronger laws, policies and programs to keep Australian biodiversity safe from weeds, feral animals, exotic pathogens and other invaders. It is a not-for-profit charitable organisation, funded predominantly by donations from supporters and philanthropic organisations.

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Contents

1. Introduction

The Invasive Species Council is an advocacy organisation focused on strengthening protection for Australian biodiversity from harmful introduced species. We also think animal welfare is important – for both introduced and native species – because of an ethical imperative to try to avoid inflicting harm on sentient animals and because it is important for maintaining the 'social licence' of conservation managers to manage invasive animals. However, there is inevitably some conflict between nature conservation and animal welfare, because of the necessity to kill invasive animals to protect rare native animals.

Conflict is particularly evident with the use of 1080, which is likely to cause suffering[1]. However, in the absence of effective alternative methods of large-scale control, and taking into account the animal suffering caused by invasive species, the use of 1080 is overall likely to reduce animal suffering as well as prevent biodiversity loss[2]. We recommend research to develop more-humane and effective ways of controlling harmful introduced animals and the design of control programs that in the long-term minimise the overall extent of killing of introduced animals. Animal welfare laws could play a role by requiring the use of best-practice control methods (including for animal welfare).

The Invasive Species Council supports applying a high standard of animal welfare to biosecurity activities, although it should not impede people's ability to effectively control invasive species for conservation (with animal welfare benefits for beneficiary native animals). With the current limited methods available, some infliction of harm is unavoidable. We understand that the NSW Government accepts that and intends to ensure that best practice control of invasive animals is not impeded.

2. Defining 'unnecessary harm' for biosecurity activities

2.1 Defences to cruelty for biosecurity

Proposal 8 in the discussion paper – *providing certainty for lawful activities* – specifies that the government intends to retain 'defence' provisions in the new legislation to 'clearly communicate the circumstances in which those [lawful] activities are permissible'. One of the proposed defences is specific to biosecurity (underlining added):

- *destroying an animal or preparing an animal for destruction in accordance with a duty or power established by another law, as long as doing so causes <u>no unnecessary harm</u> (e.g. destroying a pest animal in accordance with a standard operating procedure, in compliance with the general biosecurity duty under the Biosecurity Act 2015)*

This defence already exists in the *Prevention of Cruelty to Animals Act 1979* (although the biosecurity example is not mentioned). The discussion paper further clarifies that the proposed offence of administering poisons is not intended to apply when invasive animals are poisoned 'in accordance with the general biosecurity duty' and when the method 'causes no unnecessary harm'.

2.2 The meaning of 'unnecessary harm'

The concept of 'unnecessary harm' is very broad, which is helpful for enabling it to cover a broad spectrum of scenarios but which could also result in inconsistent interpretation by those to whom it

applies and by those who enforce the law. Because there is little 'higher court jurisprudence on animal cruelty offences' (most matters go no further than the Magistrates Court), there is a lack of binding precedents and a risk of variable interpretations[3]. As far as we have been able to ascertain, no one has been prosecuted under animal welfare laws in Australia for actions performed for biosecurity reasons. We agree with the RSPCA that 'it is important that the legislation provide guidance to the judiciary in determining when harm to an animal can be deemed unnecessary and what kinds of acts or omissions amount to animal cruelty'[4]. It is also essential for biosecurity practitioners to be able to clearly distinguish lawful from unlawful activities.

Distinguishing between 'necessary' and 'unnecessary' harm in biosecurity may be challenging at times, requiring case-specific judgements about the circumstances under which the control of invasive species is 'necessary', whether the methods used are justified and whether those methods are applied with sufficient regard for animal welfare. We support the proposed reliance on standard operating procedures as a substantial source of guidance for the biosecurity defence. If they are to serve as the legal basis for a defence to cruelty offences, their development and revision will need to be subject to specified consultation processes to satisfy stakeholders that the procedures are soundly based. The existing procedures do not cover all invasive species, methods and circumstances, so cannot constitute the entirety of guidance for the defence. Filling any gaps in standard operating procedures and regularly reviewing them should be a high priority.

The RSPCA has recommended codifying certain considerations to provide the court with guidance on how to determine whether harm is necessary, including[4]:

1. the necessity of the intended purpose of the act or omission, which caused, or was likely to cause, the harm
2. the necessity of the severity and duration of the harm caused
3. the availability and accessibility of less or non-harm-causing alternatives
4. whether in all the circumstances the degree of harm caused was proportionate to the purpose of the act or omission concerned.

These are appropriate considerations, but it is important that point 3 be qualified in the following way:

- the availability and accessibility of less or non-harm-causing alternatives, <u>provided they are of equivalent or greater efficacy and feasibility</u>.

Ground shooting is likely to cause less harm to targeted invasive animals than 1080, but is not an effective alternative for large-scale control. Until there are effective alternatives, the use of 1080 should be permitted when it is justified and effective for biosecurity as long as it is applied in accordance with best practice guidelines.

Given the considerably uncertainties about what constitutes unnecessary harm, we recommend extensive consultation with biosecurity experts and practitioners to develop clear guidelines about what constitutes unnecessary harm in biosecurity. These guidelines should take into account the importance of controlling invasive species for nature conservation (as well as human wellbeing and agriculture) and the welfare benefits for native animals of effective management of invasive species. When biosecurity control programs are effective, they are likely to result in net benefits for animal welfare because the native animals that suffer from the impacts of invasive species (for example, due to predation, trampling, food shortages or loss of shelter) are far more numerous than the targeted invasive animals.

2.3 People covered under the biosecurity defence

In the proposed defence citing biosecurity, the text in brackets specifies that the defence applies to people complying with the general biosecurity duty:

> *(e.g. destroying a pest animal in accordance with a standard operating procedure, in compliance with the general biosecurity duty under the Biosecurity Act 2015)*

We recommend changing this wording to acknowledge that biosecurity functions are performed by others than those that are subject to the biosecurity duty – for example, volunteer shooters who assist landholders to control invasive species but are not themselves subject to the biosecurity duty to prevent, eliminate or minimise the biosecurity risk of these particular animals.

3. Defining 'unnecessary harm' for recreational activities

The discussion paper proposes another defence that presumably can also apply to some biosecurity activities:

- *anything done for the purpose of hunting, shooting, snaring, trapping, catching or capturing an animal, as long as doing so causes no unnecessary harm*

This could apply, for example, where recreational shooters assist farmers or conservation land managers to control invasive animals.

However, there is a potential conflict between this and the defence that relies on the Biosecurity Act. This defence does not refer to any particular standards. It is therefore possible that different and lesser standards would apply to, say, recreational shooting of foxes than to the same actions performed for biosecurity purposes under the standard operating procedure for shooting foxes[5]. This is not justified.

As with the biosecurity defence, it is important to develop guidelines about what constitutes necessary and unnecessary harm for recreation. While there is an obvious justification for permitting some harm to invasive animals for biosecurity purposes when there are no feasible and effective alternatives, including for biosecurity contributions by recreational hunters, there do not appear to be any robust justifications to permit cruelty for recreational purposes only.

Any legal guidance about how to determine whether harm is necessary, such as the considerations proposed by the RSPCA (section 2.2) and a reliance on standard operating procedures to specify best or acceptable practices, should apply to all defences. Extensive consultation is needed to develop clear guidelines for the defence applying to recreational activities, including where they intersect with activities for biosecurity purposes.

4. Consultation and community education

The issues raised by the reform of animal welfare laws – including the intersection between animal welfare, nature conservation and farming – are of profound importance to many different stakeholders and members of the public. They warrant deep consideration, particularly where there are conflicts, such as about aerial shooting of feral horses and the use of 1080. The public debate about issues such as these often focuses too narrowly on the welfare consequences for targeted

animals to the exclusion of the conservation and welfare benefits for native animals of effective biosecurity activities.

We recommend extensive consultation to develop guidelines for defences relevant to biosecurity. To help inform this consultation, we also recommend that the government commission a review of relevant issues, including the animal welfare consequences of biosecurity activities – for both the targeted invasive animals and the beneficiary native animals (and livestock in the case of agriculture) – potential barriers and incentives for effective biosecurity from an animal welfare perspective and priorities for improved practices or technologies from an animal welfare perspective.

We also recommend the development of an educational program about animal welfare as it applies to biosecurity practices. This will be essential for ensuring that practitioners understand how they can comply with the law and for promoting best practice control methods.

Finally, regarding 'scope and definitions' (section 1), it is important to make clear the circumstances when animal welfare laws apply to actions affecting wild animals. We are aware there are varying opinions about the extent of responsibility, for example, of national park managers for animal welfare in national parks. The current definition that imposes obligations on people 'in charge' of animals needs to clarify that this obligation does not apply to national park managers in relation to animals in the national park (and other conservation reserves) that are not being actively managed.

5. Recommendations

Defining 'unnecessary harm' for biosecurity activities

1. In consultation with biosecurity experts and practitioners as well as animal welfare experts, and taking into account the importance of controlling invasive species for nature conservation (as well as human wellbeing and agriculture) and the benefits for native animal welfare of doing so, develop clear guidelines about what constitutes unnecessary harm in biosecurity.
2. As a basis for consultation, commission a review of the issues arising from the intersection of animal welfare and biosecurity, including the welfare consequences of biosecurity for all animals (not just the targeted animals), barriers and incentives for effective and humane biosecurity practices, and animal welfare priorities for improved practices and technologies.
3. Specify that compliance with standard operating procedures for control of invasive species is one defence to cruelty offences, but not that they are the only defence (in recognition that they may not cover all circumstances or considerations).
4. Ensure that any codification of considerations for determining whether harm is necessary recognises the importance of efficacy and feasibility of invasive species control methods in any consideration of whether there are more-humane alternatives.
5. Specify that the biosecurity defence applies not only to people complying with their biosecurity obligation but also to those assisting with this (employees may be subject to the duty, but presumably not volunteers).

Defining 'unnecessary harm' for recreational activities

6. Ensure that any recreational hunting of invasive species is required to comply with, at a minimum, standards of animal welfare that are equivalent to those required for biosecurity

(eg as specified in standard operating procedures). Clearly cruel practices should not be permitted for recreational purposes.

Consultation and community education

7. Give high priority to an educational program to promote an understanding of what counts as lawful or unlawful biosecurity practices and best practice for optimising both animal welfare and biosecurity effectiveness.
8. Clarify the circumstances when animal welfare laws apply to actions affecting wild animals

6. References

1. Landcare Research (2010) How humane are our pest control tools?, MAF Biosecurity New Zealand.
2. Invasive Species Council (2020) 1080: A weighty ethical dilemma.
3. White S (2003) Legislating for animal welfare: Making the interests of animals count. *Alternative Law Journal* 28: 277–281.
4. RSPCA (2021) Animal Welfare Legislation. Position paper GP1.
5. Sharp T (2016) Pestsmart, Ground shooting of foxes. Standard Operating Procedure – FOX003, 2016. Available from: https://pestsmart.org.au/toolkit-resource/ground-shooting-of-foxes/.