

Report of the Review of the Protection of Wild Mammals (Scotland) Act 2002

November 2016

**REPORT
OF THE
REVIEW OF
THE
PROTECTION OF WILD MAMMALS
(SCOTLAND) ACT 2002**

The Right Hon Lord Bonomy

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1.

INTRODUCTION

History

1.1 The Protection of Wild Mammals (Scotland) Act 2002 (“the 2002 Act” or “the Act”) started life as a Member’s Bill introduced to the reinstated Scottish Parliament on 4 April 2000. After detailed consideration by the Parliament it was approved on 13 February 2002 and received the Royal assent on 15 March 2002. It came into effect on 1 August 2002. It did not ban hunting with dogs but placed major restrictions on doing so. The Act is reproduced at Appendix 1.

1.2 The measure was controversial, particularly because of the changes it would impose on the practice of hunting foxes. The Bill¹ in its original form would have outlawed not only traditional fox-hunting as sport but also the use of a pack of dogs for pest control of wild mammals including foxes and hares. The parliamentary debates^{2,3} were wide-ranging, lively and well-informed, addressing all relevant issues from the ethics of hunting wild mammals for sport and the scientific case for doing so as a means of controlling the growth in the numbers of a species, to the anticipated practical consequences for farmers, businesses, communities and people in general. Members of the Parliament actively involved in the debate represented constituents with

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[http://www.parliament.scot/S1_Bills/Protection%20of%20Wild%20Mammals%20\(Scotland\)%20Bill/b10s1.pdf](http://www.parliament.scot/S1_Bills/Protection%20of%20Wild%20Mammals%20(Scotland)%20Bill/b10s1.pdf)

2 <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4323&i=29755>

3

[http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4357&i=0&c=0&s=!protectio n%2520of%2520wild%2520mammals%2520\(scotland\)%2520bill](http://www.parliament.scot/parliamentarybusiness/report.aspx?r=4357&i=0&c=0&s=!protectio n%2520of%2520wild%2520mammals%2520(scotland)%2520bill)

opposing views and had themselves in some instances strong views on some of the issues.

1.3 At Stage 1 the Rural Affairs (subsequently Rural Development) Committee heard evidence from a number of groups and considered written submissions and expert material. The debate was also informed by what is probably the most authoritative inquiry to date into the subject, the Report of the Committee of Inquiry into Hunting with Dogs in England and Wales, published on 9 June 2000, very shortly after the introduction of the Bill to Parliament. The Report is generally referred to as “the Burns Report”⁴, after the Chairman, Lord Burns. At both Stage 2 and Stage 3 of the parliamentary process, the Bill was heavily amended. Many of the amendments were contentious.

Remit

1.4 In December 2015 I agreed to undertake a Review of the operation of the Act to ascertain whether it is providing a sufficient level of protection for wild mammals, while at the same time allowing effective and humane control of animals, such as foxes, where necessary, and report. The remit⁵ included an invitation to make recommendations where appropriate.

1.5 Excluded from the remit were the following three matters:

- Whether predator control is necessary to protect livestock or wildlife;

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<http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm>

⁵ <http://www.gov.scot/About/Review/protection-wild-mammals/remit>

- The operation of other wildlife legislation unless it has a direct bearing on the operation of the 2002 Act;
- Other types of predator or pest control.

The remit also provided that the Review should not take a view on any particular incident or allegation. As a result this Review has addressed a much narrower range of issues than were considered during the passage of the Bill.

Methodology

1.6 A notice was posted on the Scottish Government website inviting the public in general to submit evidence, in the form of written submissions⁶, to the Review between 1 February and 31 March 2016. A total of 291 were received.

1.7 Secretarial support was provided by the Natural Resources Division of the Scottish Government. I was also assisted by Mr Norman Dowie, formerly Deputy Principal Clerk of Justiciary, who carried out a number of interviews and enquiries on my behalf. For the rest, the Review has been conducted by: studying the detail of the legislation and its passage through Parliament; considering the terms and impact of similar legislation relating to England and Wales⁷; digesting a large volume of readily accessible background material including the Burns Report and the report from the Macaulay Land Use Research Institute (MLURI) on the Economic Impacts of a Ban on Hunting

⁶ <http://www.gov.scot/Publications/2016/10/4011>

⁷ <http://www.legislation.gov.uk/ukpga/2004/37/contents>

with Dogs in Scotland⁸ commissioned by the Scottish Executive and published in June 2000; making various enquiries to obtain relevant factual information; considering the written submissions and other documentary material referred to therein; meeting with a number of the groups who made submissions to obtain their responses to material submitted by others holding opposing views on the principles and details of the legislation and to clarify and amplify aspects of their written submissions; speaking with individuals who made submissions or are involved in organisations which did; and meeting with specialist wildlife prosecutors of the Crown Office Procurator Fiscal Service and the Crown Prosecution Service in London and with Police Scotland.

1.8 It was particularly helpful to view some of the activities engaged in by hunts recorded on film and forming part of submissions, particularly those recorded by investigators of the League Against Cruel Sports, and to attend a demonstration of some of the practices of a mounted hunt arranged by the Scottish Countryside Alliance.

1.9 Whatever the outcome of this Review, wild mammals will continue to be killed for pest control and other reasons. Sentiment has no part to play in evaluating the material presented to and gathered in the course of the Review. Conclusions have to be based on evidence. The Review has been greatly assisted by many of the written submissions. However, it has at times been difficult to reach firm conclusions on matters of fact relevant to the

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<https://web.archive.org/web/20000928194054/http://www.scotland.gov.uk/library2/doc16/bhw-d-00.asp>

Review. Many of the submissions address issues debated in the course of the passage of the Bill which are beyond the scope of this Review. Some have used the opportunity of making a submission simply to assert an opinion or point of view. A number of the substantial submissions from people with a wealth of relevant knowledge and experience are expressed in terms which appear coloured by their support for the position on one side or the other of what is at times a quite polarised debate. On occasion assertions are made which may or may not be accurate but plainly go beyond the personal knowledge of the persons making the submissions. As a result, it has proved difficult to make firm factual findings. Some conclusions are, therefore, statements of the impression formed from reading, listening to and viewing the evidence, and then weighing and assessing it.

Wild Mammals to which the Act Applies

1.10 A number of wild mammals are protected in Scotland by a range of legislative measures, in particular badgers, bats, deer, dolphins and whales and porpoises, hares (including rabbits), otters, pine martens, seals, squirrels, shrews and voles, and wildcats. In theory the Act applies to all of those but rabbits; in practice it has no application to most, e.g. because they live in the sea, or because prosecution would proceed under other legislation applying to the mammal, such as a badgers⁹ or deer¹⁰, or simply because the wild mammal is unlikely to be the subject of hunting using a dog. The Act does not apply to rabbits or rodents, but does apply to a wild mammal that has been

⁹ <http://www.legislation.gov.uk/ukpga/1992/51/contents>
¹⁰ <http://www.legislation.gov.uk/ukpga/1996/58/contents>

released or has escaped from captivity. Although the above list of protected mammals does not mention foxes or mink, both are specifically mentioned in the Act. The aim of the Bill as introduced was to bring an end to what was perceived to be the cruelty associated with the use of dogs in hunting wild mammals, particularly the chase and the kill, and set out to achieve that by targeting mounted fox-hunting, hare coursing and fox-baiting with terriers¹¹. The focus of the Act as passed is the protection of foxes and hares. Little has been said in submissions to the Review on the subject of any mammal other than the fox which was referred to in every submission. The Review has as a result been concentrated largely on the use of dogs in hunting foxes.

¹¹ <http://archive.scottish.parliament.uk/business/committees/historic/x-rural/reports-01/rar01-10-vol01-01.htm> see paras 67 to 78

2. EXECUTIVE SUMMARY AND RECOMMENDATIONS

2.1 The remit of the Review posed a question in two parts, viz whether the Act is providing a sufficient level of protection for wild mammals, while at the same time allowing effective and humane control of wild mammals. In the course of the Review the question has turned out to be more specifically whether the Act has resulted in the elimination so far as possible of the chase and kill by hounds or other dogs of traditional fox-hunting, while allowing effective and humane control of foxes by flushing to guns by a pack of hounds or an unspecified number of dogs.

2.2 To neither part of the question is it possible to give a clear yes/no answer. There are reasons to be concerned in relation to both aspects. On the other hand, revising and amending the terms of the Act, and introducing measures aimed at making the actions of hunts more transparent and accountable, could over time lead to a situation where a positive answer can be given to both.

2.3 The following paragraphs discuss changes in hunting practices following the legislation in 2002, the statistics for reports of offending and prosecutions, significant features of the legislation, and the practice of flushing to guns and the different perspectives on its effectiveness in achieving a satisfactory outcome on both aspects of the question. The final chapter looks at various proposals for change.

2.4 The Review has led to two broad conclusions: in the first place, that there are aspects and features of the legislation which complicate unduly the detection, investigation and prosecution of alleged offences; secondly, that

there is a basis for suspecting that there may be occasions when hunting, which does not fall within one of the exceptions, does take place and that the grounds for that suspicion should be addressed. These conclusions have in turn led to the following recommendations.

2.5 The language of the Act should be reviewed with a view to removing inconsistencies and inappropriate and unnecessary expressions and introducing greater consistency and clarity of expression (paragraph 5.38). That review should extend to considering whether section 2(3) should provide that only one dog should be used underground as in section 5(3) (paragraph 6.29).

2.6 Consideration should be given to the appointment of part-time, independent hunt monitors to observe on a random basis the activities of hunts using packs of hounds. While it is conceivable that such an arrangement could be provided for in legislation, there is reason to believe that it should be possible to develop a voluntary Protocol or Code of Practice to regulate this through discussions in which Police Scotland should be involved. It is envisaged that the monitors would be engaged by an appropriate agency of the Scottish Ministers to whom they would submit a report of their observations. An annual summary of their observations could be included in the Wildlife Crime in Scotland Annual Report. It is also envisaged that the monitors' observations would in principle be admissible evidence in court (paragraphs 7.2 and 7.3).

2.7 The existing Scottish Mounted Foxhound Packs Fox Control Protocol¹² should form the starting point for the development of a separate Code of Practice for the conduct of hunt activities, including requirements for notification to the police in advance of the hunt of the identities of those responsible for the activities of the hunt, the number of hounds to be used, the identities of the guns and other information, and also provisions about the conduct of those participating in the activities of the hunt. The material should be recorded in the form of a log or register which would form the basis for an annual report by Police Scotland to Scottish Ministers with a view to relevant parts being incorporated into the Wildlife Crime in Scotland Annual Report (paragraphs 7.7 to 7.10).

2.8 Consideration should be given to amending section 1 of the Act in one of the following ways: either to provide that a person who “intentionally or recklessly hunts” a wild mammal with a dog commits an offence, or alternatively to provide that a person who “uses, or causes or permits, a dog to hunt” a wild mammal commits an offence (paragraphs 5.22 and 7.15 to 7.22).

2.9 Consideration should be given to providing that the landowner who permits the hunt to carry out their activities over his land would be guilty of an offence in the event that someone involved in the hunt commits an offence, *i.e.* would be liable vicariously in the sense in which that term is used in this debate (paragraph 7.24).

¹² see Appendix 2

2.10 The Act should be amended to provide that the onus of establishing that conduct fell within one of the exceptions lies upon the accused (paragraph 7.27).

2.11 The time limit for bringing prosecutions under the Act should be extended (paragraph 7.43).

3. FOX-HUNTING BEFORE AND AFTER THE ACT

Prior to 2002

3.1 Some of Scotland's mounted hunts can trace their history back to the 18th century. Throughout the 18th, 19th and 20th centuries and into the 21st century they hunted with packs of hounds which chased, caught and killed the fox. Scottish hill packs, *i.e.* packs of hounds controlled by a huntsman on foot accompanied by colleagues acting as beaters, can trace their origins back to the 17th century when groups of men with dogs were engaged to root out foxes. The modern day hill packs emerged from the 1960s onwards in response to major changes in the landscape, particularly large tracts of forest planting providing a haven for foxes. They generally teamed up with groups of gamekeepers, farmers and others usually engaged in land management, with shotguns or rifles with which they shot foxes flushed from cover by the pack of hounds. In Caithness there was also a terrier pack. Many gamekeepers, farmers, landowners and estate managers also carried out fox control on their own land using a handful of dogs of a variety of breeds to flush the fox to be shot. A number of foxes would be killed by the hounds or another dog.

3.2 The mounted hunts operated as sporting societies controlled by a committee elected by subscribers who followed the hunt on horseback or on foot and were joined by casual followers as it suited them. Ownership of the pack might be independent of the hunt. The huntsman, whipper-in and kennel-man were likely to be engaged as paid employees. The member organisations of the Scottish Hill Packs Fox Control Association, formerly the Scottish Hill Packs Association, each had a membership comprising farmers

and landowners who paid a subscription and used the services of the pack for pest control. The pack could also be hired by non-members on payment of a fee.

Changes in Number of Hunts and Packs Post-2002

3.3 The 2002 Act does not distinguish between mounted hunts and foot packs. It has had little impact on the numbers engaged in the activities of either. They are constituted as before.

3.4 Before the Act came into force there were ten mounted hunts based in Scotland. The Eglinton Hunt has since been incorporated into the Lanarkshire and Renfrewshire Hunt. Those currently in existence are:

The Berwickshire

The Duke of Buccleuch's

The Dumfriesshire and Stewartry (formed post-2002 and filling the gap left

by the demise of The Dumfriesshire)

The Fife

The Jedforest

The Lanarkshire and Renfrewshire

The Lauderdale

The Liddesdale

The Kincardineshire (formerly The Grampian)

The Border and the College Valley and North Northumberland cross-border packs are based in England but carry on their activities at times in Scotland. The Liddesdale no longer hunts on horseback but on motorcycles, quad-bikes and foot. Other hunts also operate at times on foot. The Masters of Foxhounds Association (MFHA) is the governing body of fox-hunting and represents 176 packs of foxhounds that hunt in England and Wales. All of the Scottish mounted foxhound packs and their huntmasters are members of the Association. The MFHA oversees the operation of all registered packs and its members are bound by its rules.

3.5 The Scottish Hill Packs Fox Control Association, which has been an active participant in the debate both now and in 2000-2002, now has three member packs, *viz*:

The Lochaber and Sunart Fox Control Association, Strontian

The Atholl and Breadalbane Fox Control Association, Pitlochry

The Three Straths Fox Control Association, Tomatin

Two of the member packs at the time the Act was passed have since ceased to operate for personal reasons associated with their huntsmen. In Perthshire the Strathappin Foxhounds, which hunt on foot to marksmen, has since been formed and has since 2009 been registered with the MFHA. There are no minkhound packs based in Scotland, but packs based in other parts of the United Kingdom do visit Scotland occasionally as requested.

3.6 Outwith these formal organisations there are packs of hounds of varying sizes privately owned by individual owners who are engaged by farmers and landowners for pest control purposes. Their own dogs are also routinely and widely used by farmers, gamekeepers, estate managers and

landowners in their pest control activities as they were prior to 2002. The fact that the Scottish Gamekeepers Association has over 5000 members gives some indication of the extent of this activity.

3.7 The Macaulay Land Use Research Institute (MLURI) report¹³ indicated that, prior to 2002, about 18,000 foxes were killed each year by the various fox control methods employed in Scotland. Other research¹⁴ indicated that the total fox population was viewed as stable at around 23,000 in spite of an annual birth-rate of over 41,000, of which another 20,000 perished from other causes, largely road-kill. There is no suggestion of an increase in the fox population. In fact there is material¹⁵ before the Review to indicate a reduction since 2002 for reasons unrelated to the subject of this Review.

3.8 The MLURI report estimated that mounted hunts, which at that time did not use firearms, accounted for about 543 foxes each year and the hill packs about 850. There is no central record kept. Anecdotal information allows only a vague overall estimate to be made. There may now be more killed by the guns accompanying the mounted hunts, but no reason to think that the total is more than 800. The 2015/2016 Season Summary produced by one mounted hunt¹⁶ records 100 foxes being roused and 94 shots fired. The statistics recorded are that 54% were killed by the guns, 19% by the pack and 27% were dug out.

¹³

<https://web.archive.org/web/20000928194054/http://www.scotland.gov.uk/library2/doc16/bhwd-00.asp> (para 6.3)

¹⁴ http://jncc.defra.gov.uk/pdf/pub03_areviewofbritishmammalsall.pdf

¹⁵ <http://www.gov.scot/Resource/0050/00508039.pdf>

¹⁶ <http://www.gov.scot/Resource/0050/00507893.pdf> (see last page)

3.9 Enquiries made of the Scottish Hill Packs Fox Control Association indicate that they now account for fewer foxes than prior to 2002. Since 1978 a fox control scheme designed to address the predation of lambs has provided financial support to fox control clubs which have the object of systematic control of foxes in a conveniently workable area of adequate size during the spring control period from 1 February to 30 June. The returns for 2015 record that 717 foxes and 685 cubs were killed in connection with claims under the scheme submitted by 15 of the 19 clubs currently recognised under the scheme. All three hill packs take part in the scheme. The majority of foxes killed by the clubs are shot. Over the country as a whole a large majority of foxes killed are shot, e.g. by lamping, by individual landowners, estate managers, farmers and gamekeepers without the assistance of a pack of hounds, and far fewer are snared. Nevertheless the use of packs of hounds to flush out foxes to be shot remains a significant pest control measure, both to control the general level of foxes in an area as well as to address particular problems affecting a farm or estate.

Changes in Practice Post-2002

3.10 The 2002 Act was followed in 2004 by not dissimilar legislation enacted by the United Kingdom Parliament to apply to England and Wales, the Hunting Act 2004 (“the 2004 Act”). Both Acts led to changes in the practices followed by mounted hunts. Both Acts create an offence of hunting a wild mammal with a dog. The 2002 Act then spells out in sections 2 to 6 a number of exceptions, that is situations in which there is no offence. In the English and Welsh legislation these are referred to as “exemptions” and set out a bit

differently in Schedule 1. Under both Acts one of the exceptions/exemptions permits a person, for certain specified purposes, to use dogs to stalk or flush out the wild mammal to be shot. In Scotland the whole pack may be used; in England and Wales, no more than two dogs may be used.

3.11 The purposes for which this can be done in each jurisdiction are again similar but expressed differently. In Scotland they include “controlling the number of a pest species” and “protecting livestock, ground-nesting birds, timber, fowl (including wild fowl), game birds or crops from attack by wild mammals”. Since the Act came into force, it is the practice of mounted hunts in Scotland to offer farmers, landowners and estate managers a pest/fox control service using the pack of hounds to flush out a fox or foxes to be shot by strategically placed guns, a practice that was not followed by any of the mounted hunts prior to 2002. The fox-hunts on which they engaged two or three times a week from autumn to spring, and often beyond, which involved the use of the pack of hounds to locate, chase, catch and kill foxes, have now been replaced by pest/control activities under the above exceptions. The potential for this development was not addressed specifically in the debates on the Bill. If it was a development that the mounted hunts had in mind at the time, neither the police nor the Crown as prosecuting authority envisaged it happening.

3.12 In contrast to what has happened in Scotland, the exemption in the 2004 Act, Schedule 1, paragraph 1(2)(a), which provides that stalking or flushing out a wild mammal for the purpose of preventing or reducing serious damage which a wild mammal would otherwise cause to livestock, game birds, crops, etc, has not led to hunts in England and Wales offering to

provide a pest/fox control service, principally because of the limitation to two dogs. Instead, hunts in England and Wales engage with a pack of hounds in an exercise known as “trail hunting”, developed following the implementation of the 2004 Act and designed to provide an activity for packs of hounds that will ensure their continued existence as working packs. Trail hunting involves the hunting of a scent laid manually in such a way as best to simulate traditional mounted hunting activity. The trail is laid along the line a fox might take when moving across the countryside. Trail hunters use animal-based scent, primarily fox urine, a scent with which the hounds are familiar and with which it is intended they should remain familiar. That combination of circumstances is claimed by animal welfare campaigners to lead on occasion to the pack encountering a fox and the fox being hunted in contravention of the Act. In some circumstances the defence advanced has been that that the encounter was accidental and that hunting was not intended¹⁷. Trail hunting has the incidental benefit that packs of hounds are ready for action should the 2004 Act ultimately be repealed, as many involved in hunting hope.

3.13 Trail hunting resembles a long-standing practice known as “drag hunting” in which a pack of hounds is used to follow a man-made artificially laid, but chemically-based, scent over a predetermined route. The quarry of the drag hounds is a “drag”, *i.e.* a piece of absorbent material to which the scent is applied and laid across the ground by a rider or runner. The scent is repeatedly applied to the drag *en route*. The scent is unrelated to the scent of a wild mammal. Drag hunting continues to be widely practised in England. It has occasionally been practised in Scotland in the past. In a similar vein

¹⁷ <http://www.ifaw.org/united-kingdom/resource-centre/2015-ifaw-trail-lies-report>

bloodhound packs hunt human scent in hunts organised in a way that closely resembles drag hunting. Drag hunting differs from traditional mounted fox-hunting in respect that it involves riding at speed in pursuit of the obvious drag rather than the slow and often laborious search for the scent of a fox.

3.14 Against that background, it has proved difficult to make meaningful comparison between the situation in Scotland and that in England and Wales. However, it is worthy of note that the way in which some mounted hunts now operate in Scotland and the practice by mounted hunts of trail hunting in England and Wales have both given rise to suspicion that organised mounted hunts have continued to hunt foxes with a pack of hounds in contravention of the legislation. The former allegation is addressed later. I have described the practice of trail hunting in a little detail since that could be introduced in Scotland were the number of dogs that may be used to be reduced to two as has been proposed in many of the submissions.

3.15 In relation to foot packs, there is no evidence to indicate that their practices have changed significantly and no allegations of illegal hunting have been presented to the Review.

4.

POLICING THE ACT

Police Resources

4.1 Prior to the amalgamation of Scotland's eight police forces and the creation of Police Scotland, each force had a designated wildlife crime co-ordinator. When originally created, Police Scotland consisted of 14 territorial divisions. In keeping with their emphasis on local policing as key to the structure and strategy of the Force, each of these divisions had a wildlife crime liaison officer. Although the number of divisions has since been reduced to 13, the number of liaison officers remains at 14; six are full-time while eight are part-time. These officers liaise with persons in the area involved in wildlife management and control, including farmers, gamekeepers and hunt participants. Each liaison officer reports ultimately to the local policing commander.

4.2 There are also two officers within the specialist crime division with oversight and co-ordination responsibilities. A national "portfolio lead" at Chief Superintendent level maintains oversight of strategic developments and requirements relating to wildlife crime, while a full-time national co-ordinator at Sergeant level is tasked with enhancing standardisation of policies, procedures and training across the country to ensure a consistent provision to the communities of Scotland. The appointment of a senior officer and the placing of national co-ordination in the specialist crime division reflect the recognition by Police Scotland of the serious impact wildlife crime can have on Scotland's valuable natural heritage.

4.3 The National Wildlife Crime Unit provides a specialist service to all police forces in the United Kingdom. The Chief Inspector who heads it spends two days each week in Scotland. There he is supported full-time by a seconded Police Scotland officer. The Unit gathers and analyses intelligence relating to wildlife crime for the whole of the United Kingdom. It also provides investigative support to forces, including on technical wildlife issues.

4.4 In addition to the above, the liaison officers are supported by over 90 part-time wildlife crime officers who undertake many local operational enquiries in addition to their core role. More recently a “lead” responsibility for delivery of wildlife police services within each of the policing divisions has been identified at Superintendent or Chief Inspector level. The overall aim is to ensure the better detection and reporting of criminal activity as well as to maximise the opportunity to engage with the local community and build effective related partnerships. Police Scotland, particularly through the national co-ordinator, work closely with the Crown Office Procurator Fiscal Service (COPFS) Wildlife and Environmental Crime Unit.

4.5 The allocation of police resources has not been the subject of adverse comment to the Review.

COPFS Resources

4.6 The Wildlife and Environmental Crime Unit deals with prosecution of a wide range of wildlife offences including contraventions of the 2002 Act. It is overseen by the assistant procurator fiscal for specialist casework in Crown Office. The Unit consists of four procurators fiscal. Their time is fully committed to the work of the Unit. That is on the face of it reasonable

provision and has not been the subject of any criticism raised in the course of the Review.

Partnership For Action Against Wildlife Crime In Scotland (PAWS)

4.7 Police Scotland and COPFS are also constituent parts of the Partnership for Action Against Wildlife Crime in Scotland (PAWS)¹⁸ which includes wildlife and animal welfare charities, land management organisations and Government agencies, all working together to fight wildlife crime. An Executive Group, comprising representatives of selected members, oversees the work of PAWS. However a wider Plenary Group, made up of representatives of all member organisations, meets once a year to give an opportunity to all members to comment on PAWS projects and raise any wildlife crime issues. The operation of the Act has not been raised as a topic in this forum. The Scottish Government Wildlife Crime in Scotland Annual Report for 2014¹⁹ provides more information about the constituent parts of PAWS.

Reports and Proceedings under the Act

4.8 That Report also provides statistics for wildlife crime recorded by the police between 2009 and 2014 (see Appendix 3, Table 1) and for cases prosecuted during the same period (see Appendix 3, Table 2). In the five years between 2009 and 2014 the annual figure for wildlife crimes of all kinds reported to the police varied between 255 and 355. In respect of section 1 of the Act, principally recorded under the heading “Hunting with dogs” in the

¹⁸ <http://www.gov.scot/Topics/Environment/Wildlife-Habitats/paw-scotland>

¹⁹ <http://www.gov.scot/Publications/2015/09/6676>

table, the total has varied little – between 29 and 37. There may also be some case involving dogs recorded under a different heading, e.g. cruelty to wild animals. Although it is not possible from these tables to identify the particular mammals involved, Police Scotland advise that in the vast majority of cases, the mammal involved was the brown hare.

Prosecutions

4.9 Over that period of five years a total of 44 cases were prosecuted. The report records the conviction rate as 50%, the lowest for any category of wildlife crime. COPFS records show that between 2002 and June 2016 there have been 156 reports to COPFS of contraventions of the Act. Many of the cases have involved more than one accused. No proceedings were taken in some and in others proceedings were discontinued. There were three prosecutions, but no convictions, in cases involving badgers, a handful of cases, including convictions, relating to deer, and slightly more involving fox-hunting. The vast majority were in respect of hares. The overall conviction rate is similar to that recorded for the period 2009-2014.

4.10 The position in relation to fox-hunting from the commencement of the Act is set out at Appendix 3, Table 3, which lists all cases involving fox-hunting allegations reported to COPFS between 2002 and 2014.

4.11 In the course of the Review it was possible to update these figures. To date there have been 14 cases (including one pending) involving allegations of fox-hunting against 22 persons.

4.12 Of the 14 cases, eight involved non-mounted hunting: no action was taken in two cases; three trials resulted in conviction; and in the other three

cases there were guilty pleas. In the 2007-2008 case one accused pled guilty to a charge under the Wild Mammals (Protection) Act 1996 and pleas of not guilty to a charge under the 2002 Act were accepted from him and a co-accused. The Crown papers indicate that the majority of the non-mounted cases were in urban areas.

4.13 Of the six cases involving mounted fox-hunting, proceedings were taken in only two. The accused were acquitted in both. The 2002-2003 case is the case in which the Sheriff issued a written judgment, reported as *Fraser v Adams* 2005 SCCR 54²⁰ and referred to in chapter 5. The case in 2013-2014 included charges under the Animal Health and Welfare (Scotland) Act 2006²¹ as well as contravention of section 1(1) of the 2002 Act. It related to the release of a fox from a bag to waiting hounds. There was insufficient evidence of identification. The pending case involves an allegation against two accused in respect of the activities of an organised mounted hunt in 2016. It is the only case reported to the Crown since 2014.

4.14 The 2015 Report will show that in 2014-2015 six cases of contraventions of the Act were reported to COPFS, all relating to hare coursing. The outcomes were as follows:

no action was taken in two;

two cases were discontinued after proceedings were raised;

two cases resulted in convictions, both accused being fined.

²⁰ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=6af686a6-8980-69d2-b500-ff0000d74aa7>

²¹ <http://www.legislation.gov.uk/asp/2006/11/contents>

A seventh case involving a hare contained a poaching charge. It was conjoined with 2002 Act charges reported in 2013-2014 and resulted in a conviction and fine. Five cases reported in 2014-2015 fell into the “Deer (S) Offences” category for record purposes. Two involved dogs attacking deer. One included a charge under section 17(3) of the Deer (Scotland) Act 1996 but was prosecuted under the Dangerous Dogs Act. In the other, which was reported under section 17(1), there was insufficient evidence for prosecution.

England and Wales

4.15 Accurate statistical information for England and Wales is difficult to obtain because prosecutions in England and Wales are conducted by a variety of bodies. Only a small proportion have to date been conducted by the Crown Prosecution Service. A high proportion were until recently conducted by the Royal Society for the Prevention of Cruelty to Animals^{22,23}. Other animal welfare organisations such as the League against Cruel Sports also conduct prosecutions. In the end it appears that there have been proportionately no more prosecutions in England and Wales than in Scotland, bearing in mind that there are 17 times as many organised hunts in England and Wales. The best information made available to the Review is that compiled by the Scottish Countryside Alliance from records of the Ministry of Justice showing the numbers proceeded against and found guilty. The figures outwith brackets in Appendix 3, Table 4 relate to persons involved in activities

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<https://www.rspca.org.uk/webContent/staticImages/Downloads/WoolerReviewFinalSept2014.pdf>

23

<https://www.rspca.org.uk/webContent/staticImages/Downloads/RSPCAResponseToWoolerReview.pdf>

associated with organised Hunts. The figures in brackets are the overall total of prosecutions and convictions.

Conclusions

4.16 The statistics suggest that the Act enables prosecution of offences relating to hares. When there is sufficient evidence, coursing appears to be prosecuted. There is nothing before the Review to suggest that the exceptions under which hares could be shot or taken by a bird of prey are relied on as cover for illegal coursing. In the case of badgers and deer, prosecution is generally brought under different legislation which applies specifically to that wild mammal. The fact that there have been so few cases under the 2002 Act in relation to these wild mammals appears to be of no significance.

4.17 However, it is not possible to draw firm conclusions about the effectiveness of the Act in relation to foxes on the basis of the statistics alone. Some tentative conclusions can be drawn. “Non-mounted” cases arise in urban settings and can involve cruelty for the sake of personal gratification. In relation to “mounted” cases a number of submissions have relied upon the fact that no one has been convicted in the 14 years of the operation of the Act as proof that no illegal hunting has taken place. Standing the very small number of reports to the police and prosecutions, and having regard to the material submitted to the Review on the basis of which the contrary is claimed, it would be premature to accept that point of view on the basis of the figures alone. Various matters have to be addressed further. Although the Police Scotland portfolio lead on wildlife crime, Chief Superintendent

Sean Scott, did say, in answer to a question posed by a member of the Rural Affairs, Climate Change and Environment Committee at their meeting on 13 January 2016²⁴, that there is no evidence to suggest that the mounted fox hunts that exist are acting outwith the legislation that is in place at the moment, that answer should not be regarded as a statement that Police Scotland consider that the Act works effectively to provide adequate protection for foxes.

²⁴ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10314&mode=pdf>
(page 22)

5.

THE LEGISLATION

5.1 Although some submissions reflect a fairly widespread belief that Police Scotland are happy in general that the terms of the Act enable steps to be taken to ensure adequate protection of wild mammals, that is not borne out by the submission by Police Scotland to the Review. That submission points to what are said to be a number of weaknesses in the Act, including the absence of definition of certain expressions such as “stalking”, “searching”, “flushing”, the number and complexity of the exceptions to the offence of “deliberately hunting a wild animal with a dog” and a general consequent lack of clarity in the legislation. It is claimed that as a result it becomes extremely difficult to obtain sufficient evidence to prove the basic offence of deliberately hunting a wild mammal with a dog. The legislation is said to be complex and to need to be simplified to make it more effective. It is also said in the Police Scotland submission that the fluid nature of the activities of a mounted hunt can create issues in determining when an offence is being committed.

5.2 It may be that the police perception of a lack of clarity in the language of the Act, combined with the general difficulty they have in identifying when the bounds of an exception have been exceeded in practice, *e.g.* when flushing has been completed and chasing has begun, are reflected in a general lack of confidence among wildlife crime investigators in the soundness of their judgment on the sufficiency and strength of the evidence apparently supporting allegations of contraventions of the Act. The small number of prosecutions under the Act may be explained, at least in part, by the difficulties of interpretation presented to both police and prosecutors.

5.3 The format of the Act is clear and simple. The core offence of hunting a wild mammal with a dog is set out in section 1(1). Section 1(2) and (3) deal with ancillary offences where land and dog owners knowingly permit a person to use land or a dog to commit an offence under section 1(1)). Thereafter sections 2 to 6 set out “exceptions”, *i.e.* circumstances in which a person doing something which could conceivably amount to an offence under section 1(1) “does not commit an offence”. Sections 1 and 2 lack clarity and are unduly complicated. There are also inconsistencies and at least one omission in the language used to define the exceptional circumstances to which section 2 applies. The language of section 3 is relevant to the way in which section 2 is expressed²⁵. Where there is no obvious reason for differences in expression at different points in a piece of legislation, the resultant inconsistency can give rise to uncertainty in the minds of those charged with giving effect to it and thus present an obstacle to enforcement of the legislation. These features of the Act are highlighted and discussed further in this chapter to encourage consideration of amendment with a view to presenting investigators with a clear and consistent statement of the law to be applied.

5.4 No submission was critical of the operation of sections 4 or 6. There were, however, a number of submissions about the exception in section 5 which relates to the dispatch of injured mammals or orphaned cubs.

²⁵ None of the mounted hunts uses a bird of prey

5.5 Before addressing the various concerns that arise about the language used to express the exceptions in section 2, it is appropriate to deal first of all with the language of section 1(1).

“Hunts”

5.6 The first thing to be determined in a prosecution is likely to be whether the accused is shown to have acted in a way that *prima facie* falls within the definition of hunting. It is only where that appears to be the case that the question arises whether one of the exceptions applies.

5.7 Determining what exactly is meant by “hunts” in section 1(1) is in itself difficult on account of the limited extent to which it is defined. That difficulty is compounded by the addition of the adverb “deliberately”.

5.8 Section 10 simply provides that “‘to hunt’ includes to search for or course”. “Coursing” is generally understood as chasing or pursuing, and indeed catching, a running mammal, principally a hare, but can also relate to a fox, usually in a gambling context. Its inclusion in the definition of “to hunt” and the absence of any reference to it in any exception is consistent with the purpose of the Bill to eliminate the cruelty associated with the chase and the kill. Coursing can never be legal. The position in relation to “to search for” is different. Since there is provision for “searching” in the exception in section 2, searching as part of hunting is legal if conducted in accordance with the specified conditions set out in section 2. It is only an offence to search for a wild mammal with a dog if the conditions of section 2 are not complied with.

5.9 There is no assistance to be derived from definitions in other legislation. The only legislative definitions of “hunting” that have been traced

are in Disease Control Orders during an outbreak of foot and mouth disease, where “hunting” is defined as “the use of hounds, beagles or other dogs for the purpose of hunting or coursing any deer, fox, mink, [hare] or rabbit or for hunting any drag or other trail”.^{26,27}

5.10 The inclusion of “to search for” within the definition is also entirely consistent with the ordinary meaning of “to hunt”. Although the Oxford English Dictionary lays emphasis on the element of pursuit or chase for food or sport, it also includes “to search, seek (after or for anything), especially with eagerness and exertion” and “to endeavour to capture, obtain, or find”. It is interesting to note that the Scottish Contemporary Judicial Dictionary includes the following:

“Hunting. By Act of 1621, it was enacted that no person shall hunt or hawk who has not a plough-gate of land in heritage. An accused person charged under the 1621 Act contended that the hunting prohibited by the Act did not comprehend shooting. The court rejected this contention and delivered the following judgment: ‘Finds that the term hunting is a generic word, comprehending every mode of finding and following game with dogs, and is used in that comprehension in other Act of Parliament in Scotland, particularly the Act of 1707, cap.13.’

It is clear that “searching” is an important element of hunting in Scotland, but one that can be done legally using dogs.

5.11 The matter arose in the one Scottish prosecution for a contravention of section 1(1) in which the Court issued a written judgment, *Fraser v Adams* 2005 SCCR 54²⁸. There the Sheriff accepted a submission from the

²⁶ <http://www.legislation.gov.uk/cy/uksi/2002/242/made>

²⁷ <http://www.legislation.gov.uk/uksi/2002/2152/made>

²⁸ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=6af686a6-8980-69d2-b500-ff0000d74aa7>

procurator fiscal that it was not necessary that any animal be located or killed for hunting to take place and defined searching as “going about in order to find or ascertain the presence of a thing.”

5.12 In England the position is different. “Searching” *per se* is no part of hunting; it precedes hunting. The Hunting Act 2004 section 11(2) provides:

“For the purpose of this Act a reference to a person hunting a wild mammal with a dog includes, in particular, any case where –

- (a) a person engages or participates in the pursuit of a wild animal, and
- (b) one or more dogs are employed in that pursuit (whether or not by him and whether or not under his control or direction).”

In *DPP v Wright* [2009] EWHC 105 (Admin)²⁹ [2010 1 QB 224] the Divisional Court stated:

“In our judgment.....the term ‘hunts’ a wild mammal with a dog, as used in section 1 of the Hunting Act 2004, does not include the mere searching for an unidentified wild mammal for the purpose of stalking or flushing it. That said, the question of whether a person ‘hunts’ a wild mammal is heavily fact specific, and we do not attempt to define by reference to particular hypothetical factual circumstances when hunting takes place for the purpose of the 2004 Act and when it does not.”

The Court was very clear that any search prior to the dogs flushing or stalking a wild mammal is no part of hunting.

²⁹ <http://www.bailii.org/ew/cases/EWHC/Admin/2009/105.html>

5.13 In the course of the Review the opinion was expressed that the Divisional Court were correct and that the 2002 Act goes too far by including “searching” within the definition of hunting. However, the notion that a person searching for a wild mammal with a dog may be said to be hunting a wild mammal even though no wild mammal is found is entirely consistent with the ordinary day to day use of the verb “to hunt”. Hunting for Easter eggs or hunting for an item that is lost, or indeed hunting for something to wear on a special occasion, all involve searching for something that has not at that time been located, and two of these examples involve as yet unidentified objects.

5.14 A separate question arises about the way in which section 2(1) refers to “searching”. I shall deal with the confusion introduced by that when I address the “exceptions” below.

5.15 Should it be decided that “to hunt” should be more specifically defined, that would no doubt be a matter on which the views of parliamentary draftsmen would be sought. The difference between the definition in Scotland and in England and Wales suggests that it is likely to be difficult, if not impossible, to fashion a satisfactory comprehensive definition. The difficulty is illustrated by one definition proposed to the Review:

“To use one or more dogs to find the scent or sight of a live quarry, locate the actual quarry and then pursue it, until the dogs catch it and kill it, or the hunter shoots it or kills it with other means.”

The problems of interpretation that could result from the omission or inclusion of relevant elements are obvious. For example, that suggested definition does not refer specifically to the elements of flushing or stalking that may be elements of hunting that are permitted exceptions. Nor does it make clear

whether a foray into cover that locates nothing amounts to hunting. It would be more satisfactory to build on the existing provision by setting out more fully, but not exhaustively, what is included in the expression “to hunt”. One suggestion made, which avoids the risk of not being able to adapt the definition to unusual or unforeseen circumstances is: “includes to search for, stalk, flush, chase, pursue or course.”

“Deliberately”

5.16 The inclusion of the adverb “deliberately” before “hunts” is unusual. If someone does something “deliberately”, he means to do it. Equally, if a person is said to “hunt” without any qualification of the verb, then that also is something he means to do. The state of mind involved appears to be addressed twice.

5.17 While it is unusual, it does occur, but usually where the proscribed conduct could, unlike hunting, be done other than deliberately. Examples can be found in the definition of “genocide” in article 6 of Schedule 1 of the International Criminal Court (Scotland) Act 2001³⁰ and in section 1(1) of the Breastfeeding etc (Scotland) Act 2005³¹. It is used in the Criminal Procedure (Scotland) Act 1995 section 90A(2)³² to (4) and section 156(2)³³ to (4) provisions relating to the issuing of a warrant to apprehend a witness who “deliberately and obstructively” fails to attend court or who is being “deliberately obstructive” and is unlikely to attend court. A person who fails to

³⁰ <http://www.legislation.gov.uk/asp/2001/13/schedule/1/part/1>

³¹ <http://www.legislation.gov.uk/asp/2005/1/section/1>

³² <http://www.legislation.gov.uk/ukpga/1995/46/section/90A>

³³ <http://www.legislation.gov.uk/ukpga/1995/46/section/156>

appear at a diet of the court, having been duly cited is presumed to have so failed “deliberately and obstructively”. The net result is that traditional language used to express the demanding test to be satisfied by a prosecutor seeking a warrant is redefined as established by mere failure to attend.

5.18 “Deliberately” also appears as part of the definition of offences relating to the alteration or concealment of documents sought by a tribunal as in section 36(1)(c) of the Lobbying (Scotland) Act 2016³⁴ and para 18(1)(b) of Schedule 8 of the Tribunals (Scotland) Act 2014³⁵. It may also occur where the legislation provides specifically that there is more than one mental state in which something can be done, such as permitting a supplementary assessment to be made only where something has been brought about “carelessly or deliberately” under sections 102 to 14 of the Revenue Scotland and Tax Powers Act 2014³⁶. In that situation, however, where the definition of a crime is involved, it is more common for the alternatives to be stated as “intentionally or” some other standard such as “recklessly”. A good example is in section 1 of the Wildlife and Countryside Act 1981³⁷ which provides that it is an offence to “intentionally or recklessly” take, kill or injure any wild bird.

5.19 In a number of submissions it has been suggested that the test for the mental element of the offence in section 1(1) should be expanded to include “recklessly” in addition to “deliberately”, which would best be written

³⁴ <http://www.legislation.gov.uk/asp/2016/16/section/36/enacted>

³⁵ <http://www.legislation.gov.uk/asp/2014/10/schedule/8/enacted>

³⁶ <http://www.legislation.gov.uk/asp/2014/16/contents>

³⁷ <http://www.legislation.gov.uk/ukpga/1981/69/contents>

“intentionally or recklessly” in keeping with the other wildlife legislation referred to above.

5.20 In the 2004 Act applying to England and Wales “hunts” is unqualified.

The offence is stated in section 1 in simple terms:

“A person commits an offence if he hunts a wild mammal with a dog, unless his hunting is exempt.”

In *DPP v Wright* the Divisional Court described hunting as “by definition intentional”, something that can only be done intentionally or deliberately.

Under the 2004 Act a person commits an offence in England and Wales if he hunts a wild mammal with a dog. Yet the way in which the offence is stated in the 2002 Act, where “hunts” is qualified by “deliberately”, suggests that some additional particular mental requirement must be proved to show that an offence has been committed.

5.21 In Scotland the final form of section 1(1) was the result of amendment³⁸. However, the word “deliberately” was already present in the Bill as introduced in section 1(2) which provided:

“A person who deliberately contravenes sub-section (1) commits an offence.”

Section 1(1) provided that a person must not hunt a wild mammal with a dog. The debates on the Bill and the material before the Review indicate that it was thought important to retain “deliberately” to ensure that a dog-walker on the

³⁸ <http://archive.scottish.parliament.uk/business/committees/historic/x-rural/or-01/ra01-2302.htm#Col2274> (see Murray Tosh col 2300) also <http://archive.scottish.parliament.uk/business/committees/historic/x-rural/or-01/ra01-2502.htm#Col2358> (see Murray Tosh col 2383)

moors would not be prosecuted simply because the dog or dogs ran off unexpectedly in pursuit of a wild mammal that suddenly appeared. If that is why “deliberately” is there, then it is unnecessary since the foregoing scenario would not involve intentional conduct. Equally it would not amount to acting recklessly. To act recklessly one must display gross negligence. Mere carelessness is insufficient.

5.22 The point to be stressed is that the inclusion of “deliberately” has set the test for proof of an offence under section 1(1) very high, or at the very least complicated the interpretation of the test unduly, by creating the impression that something more than evidence of the hounds apparently acting under the control and direction of the huntsman when they run in a line chasing a fox is required to provide sufficient evidence of the commission of an offence under section 1(1). Is the huntsman who acts on the basis of a misinterpretation of a complicated exception, *e.g.* who places the guns 500 yards from the cover because he wrongly considers an intervening area to be cover, hunting deliberately in contravention of section 1(1)? That question is more difficult to answer than the question whether he is “hunting”, which he would appear to be doing, subject to what might be said in mitigation in the circumstances. Consideration should be given to deleting “deliberately” from section 1(1).

Clarity of Expression of Exceptions

5.23 The element of uncertainty that exists about what falls within the expression “to hunt”, together with concern about proving that the hunting is

“deliberate”, are compounded by the inconsistency and the lack of clarity in the way in which the exceptions are expressed.

5.24 Section 2 relates to flushing a wild mammal from cover to be shot or killed by a bird of prey. It also covers stalking and searching. The expression “searching” is, unlike stalking and flushing, not specifically mentioned again in the section; its inclusion was thought by the procurator fiscal in *Fraser v Adams* to be an oversight; the Sheriff disagreed. There are what might be thought to be two indirect references to searching in section 2. Section 2(1) stipulates what must be done “once the target wild mammal is found”; section 2(3)(b) stipulates what must be done after the “fox or mink” is located.

5.25 It seems clear that “searching” was included in section 2(1) by design and that further reference to it in the third line of the sub-section was inadvertently omitted. “To search” is an expression that may need no further definition. In *Fraser v Adams* the Sheriff proceeded on the basis that “searching” meant “going about in order to find or ascertain the presence of a thing”.

5.26 The ordinary meaning of “to stalk” in the context of the Act is “to follow or track a quarry stealthily”. That has little application to fox-hunting and is more relevant to the hunting of deer in respect of which the use of a dog to kill is outlawed completely³⁹. The ordinary meaning of “to flush” is “to drive out” or “to force out of concealment or into the open”. It may be further definition of these two expressions along these lines would be helpful to those considering whether an offence has been committed.

³⁹ <http://www.legislation.gov.uk/ukpga/1996/58>

5.27 Section 2(1) appears to relate to any stalking or flushing above ground and refers in particular to flushing any wild mammal “from cover (including an enclosed space within rocks, or other secure cover) above ground” for any one of six purposes. Section 2(3) relates to using a dog “to flush a fox or mink from below ground or ... to flush a fox from an enclosed space within rocks or other secure cover above ground” for any one of the same six purposes. On the face of it, so far as foxes above ground are concerned, action can be taken to flush the mammal to be shot under Section 2(1) or 2(3).

5.28 The suggestion in the Annotations to the Act in Current Law Statutes that section 2(1) is assumed not to apply where the quarry is fox or mink because they are specifically dealt with in section 2(3) is not consistent with the unqualified application of section 2(1) to all wild mammals as defined in section 10. Both sub-sections appear to apply to fox and mink.

5.29 Those who have to interpret the Act in their daily work tend to regard section 2(3) as applying to the use of terriers to flush a fox or mink that is below ground or goes to ground. If that is so, then it is not clear why that sub-section also refers to flushing a fox “from an enclosed space within rocks or other secure cover above ground”. It may well be that section 2(3) was intended to be restricted to flushing from below ground, since there is no provision for the use of a bird of prey and there is a requirement in section 2(3)(c) to take all reasonable steps to prevent injury to the dog which is likely in that situation to be in greater danger from the proximity of dog, fox and gun. Consideration should be given to framing section 2(3) more

narrowly by removing reference to using a dog under control to flush a fox from an enclosed space within rocks or other secure cover above ground.

5.30 In relation to the timing of the shooting of the flushed mammal, there are differences between section 2(1) on the one hand and section 2(3) and section 3 on the other. Section 2(1) requires the person flushing to “act...to ensure” that ,“once the target mammal is found or emerges from cover” it is shot or killed by a bird of prey “once it is safe to do so”. Section 2(3)(b) requires the person flushing to take “reasonable steps to ensure that the fox or mink is flushed as soon as reasonably possible after it is located and shot as soon as possible after it is flushed”. In section 3(a) relating to the use of a dog in connection with falconry and shooting, the requirement is that the person using a dog to stalk a wild mammal or flush it from cover above ground for the purpose of providing quarry for sport must “act... to ensure” that, once a wild mammal is found or emerges from cover, it is shot, or killed by a bird of prey, “as soon as possible”.

5.31 There is no obvious explanation for section 2(1) requiring that the wild mammal should be shot “once it is safe to do so”, whereas section 2(3) and section 3 require that the mammal should be shot “as soon as possible”. The expression in section 2(1) “once it is safe to do so” is the least demanding of these expressions. It is subjective and less peremptory than the others. It leaves scope for a chase to begin. It also defines the point of shooting by reference to safety, which common sense would suggest is implied in the requirement that the mammal should be shot “as soon as possible”. Any court would inevitably read that requirement as subject to it being safe to shoot.

5.32 There is also no obvious reason why in section 2(1) the person doing the flushing is required to “act... to ensure” that the mammal is shot or killed by a bird of prey, as in section 3, whereas in section 2(3) the requirement is that the person using the dog should “take(s) reasonable steps to ensure that the fox or mink is flushed as soon as reasonably possible after it is located and shot as soon as possible after it is flushed” and in section 5(3) the requirement is to “take... reasonable steps to ensure that” an orphaned fox once located is despatched by a single dog. Consideration should be given to amending sections 2 and 5 by bringing consistency to the requirements by aligning them with those of section 3.

5.33 If for some reason it were to be thought essential to retain the qualification “once it is safe to do so”, then the aim of preventing the chase could be expressed in terms of the duty of the huntsman as follows: “but only if that person acts to ensure that, once the target wild mammal is found or emerges from cover, the dog does not continue to hunt the wild mammal and the wild mammal is shot, or killed by a bird of prey, once it is safe to do so”.

5.34 Section 2(1) makes no mention of any person involved in flushing to guns or associated shooting holding a firearms or shotgun certificate. That is probably because it goes without saying that any person carrying and using a firearm must hold appropriate certification. In both section 2(3) and section 3 reference is made to the person using the dog holding a firearms or shotgun certificate. The language used in each of these sections is different, but apparently to the same effect. Neither provision appears to allow for the possibility that the person or persons with the dog might not be the person or persons with the firearm(s). Consideration should be given to whether the

apparently unduly restrictive provisions of sections 2(3) and 3 should be amended.

5.35 A separate issue arises in relation to section 2(2), which is in the following terms:

“Where a person is using a dog in connection with the despatch of a wild mammal, being of a pest species, with the intention of flushing the wild mammal from cover or from below ground in order that it may be shot or killed by lawful means, that person does not commit an offence under section 1(1) by virtue of the dog killing that wild mammal in the course of that activity”.

It is not obvious why there is reference in this sub-section to killing “by lawful means”. What these are is not specified. That should be clarified.

5.36 That sub-section is said by some of the submissions to permit the continuation of the “cruel” practice of dogs killing a wild mammal. A similar point is made about the provisions in section 5(1)(c) and (3) permitting the killing or despatch of seriously injured or orphaned mammals and in section 5(3) the killing of orphaned fox cubs following the shooting of the mother. The practice of using dogs or a single dog to dispatch another injured animal or orphaned cubs may seem to many distasteful. The same may be said of the sight of the breaking up of the carcass of a fox. However, the weight of the evidence, as noted in the Burns Report at paragraph 6.48, is that in the vast majority of cases the time to insensibility and death in these situations is no more than a few seconds. These provisions were enacted in the knowledge of the terms of the Burns Report. No evidence has been presented to this Review to indicate the abuse of these provisions by using dogs to despatch seriously injured or orphaned wild mammals.

5.37 This analysis of the language used in prescribing the circumstances where no offence is committed has identified examples of expressions which may be adding unnecessary complications into fairly detailed provisions. Uncertainty, vagueness or lack of clarity in any statutory provision is often resolved by judicial interpretation in the context of cases brought to court. To date there has been only one case in which the interpretation of the Act has been addressed in a written judgment. While that has provided some clarity in relation to certain issues, it neither was nor was intended to be comprehensive.

5.38 The various features of the language of the Act discussed in this chapter should be reviewed with a view to removing inconsistencies and inappropriate and unnecessary expressions and introducing greater consistency and clarity of expression. Because it started life as a Member's Bill, the Act has never been subject to the scrutiny of parliamentary draftsmen from which it would undoubtedly benefit.

6.

FLUSHING TO GUNS

Hounds

6.1 The most controversial issue in the Review has been whether and to what extent the mounted hunts operating in Scotland engage in activities which constitute illegal hunting. Those are activities which, if done deliberately by a huntsman, could result in conviction under Section 1(1) of the Act. The submissions made to the Review include a number of pieces of video, a few of which depict events from which it might be concluded that either a scent or a fox was being chased by the pack. Some written submissions contain accounts of activities that could have been part of a chase of a fox by hounds. These include individual personal experiences as well as accounts of monitoring by animal welfare organisations. Animal welfare organisations have made submissions on the basis of intelligence, observation and film to the effect that these packs continue to engage in hunting in the sense of using hounds to chase and kill foxes. On the other hand none of the submissions contain evidence of hounds actually killing a fox. In contrast to those submissions, many other submissions make the point that the mounted hunts have altered their practices to provide a pest/fox control service which is welcomed by farmers, estate managers and landowners, and assert that that service is carried out in strict compliance with the terms of the Act.

6.2 While the mounted packs can point to the paucity of criminal proceedings to support their contention that illegal hunting is not taking place, the difficulty of proving an allegation of illegal hunting when a hunt operates

over a wide area, and in particular identifying the huntsman and his control of the pack as “deliberately” hunting a wild mammal with the pack, should be borne in mind. In a number of the examples of the activities of mounted hunts filmed and presented to the Review by the League against Cruel Sports, hounds were present with a view to flushing out a fox or foxes and could in some instances be seen working their way through gorse and undergrowth. In carrying out their activities the hunts rely on the exception under section 2(1) of the Act which permits the use of the pack to flush a fox from cover to be shot.

6.3 The League placed emphasis on the apparent absence of any guns located at points where it might be expected a fox would emerge, or in some instances the apparent absence of any guns at all. They also highlighted film of hounds in a line in open countryside apparently following a scent, as well as hounds apparently chasing foxes. Other video material portrayed hounds engaging in a chase in open country but with no quarry in sight.

Representatives of the Scottish Countryside Alliance and the Scottish Gamekeepers Association were invited to comment on these films. In some instances that produced an explanation of what was happening that could be consistent with there being no offence, including indications that firearms might be there, hidden from view in a quad-bike, or that the “guns” would be in a place of concealment to avoid detection by a fox.

6.4 It is said that the camera never lies. However the way in which film is presented does not always show the whole picture. A full account of the circumstances may provide a complete answer to any suggestion of illegal hunting. That is not to suggest that film material was presented in a way

designed deliberately to mislead the Review, as has been observed in the course of the Review. In some instances it remains distinctly possible that the video is sufficiently complete to show that there is a case to answer. It is not appropriate to try to make a final determination on any individual case.

6.5 What can be said is that it is possible that the way in which the exemption of flushing to guns is applied in practice, and the view that those who participate in the activities of mounted hunts have of what constitutes flushing, may well have resulted in hounds on occasion engaging in chasing a fox after it has been flushed from cover.

6.6 Quite apart from what may be seen on, and inferred from, the video material, evidence from the Scottish Countryside Alliance and the Scottish Gamekeepers Association highlighted an apparent difference in approach to the deployment of guns by mounted hunts on the one hand and foot packs on the other. Mounted hunts conduct activities in accordance with a voluntary fox control protocol which includes co-operation with the police. That protocol specifies that in providing a fox control service to farmers and landowners using hounds “a minimum of two guns should be available”. Apart from the fact that that minimum number is not stated in mandatory terms, the evidence presented to the Review suggests that, where a full pack of hounds are being used, there are few circumstances in which two guns would be adequate to ensure that a flushed fox would be shot.

6.7 Hunting takes place over variable terrain. Searching and flushing above ground in relation to foxes occur in areas of cover. Once a fox breaks from cover and is out in the open, the flushing is over. There may be

circumstances where there is a short break between areas of cover and it may be said that the fox moving from one area to the next one has not been flushed out into the open. Determining when flushing is complete and the fox is out in the open will in many cases be dependent on an interpretation of the whole circumstances. The flushing to guns exemption in section 2(1) requires the huntsman to “act(s) to ensure” that once the wild mammal is found or emerges from cover it is shot “once it is safe to do so”. That imposes a requirement on the huntsman to plan ahead and deploy his guns in appropriate locations to achieve the objective of a safe kill. The material recorded on film, seen by witnesses and set out in submissions indicates that there may be circumstances in which flushing develops into a chase because the area through which the search and flush is taking place is so far from the location of the limited number of guns available.

6.8 Although it was said in a number of submissions that foxes follow routes that are familiar to them and the experienced huntsman or marksman is aware of them and takes up position having regard to his experience of the locality, just as many stressed the unpredictability of the exit point. In response to one enquiry about the number of guns used when searching and flushing through an extensive area, one comment made was that you can never have too many guns.

6.9 If the explanation for the remote location of the guns is that deploying them closer to the likely exit points from cover would make it unsafe to shoot, then the search and flushing location chosen may not be a suitable one for the use of the section 2 exception for pest control.

6.10 The practice with foot packs is quite different. The Scottish Hill Packs Association submission to the Rural Affairs Committee on the Bill stated that their members used foxhounds and terriers to flush foxes from cover to where they could be shot by experienced marksmen. Their practice does not appear to have changed. Up to 40 guns may be placed strategically around the point in an area of the cover it is intended to use the hounds to try to press the fox towards. Depending upon the nature of the cover, somewhere between 10 and 20 guns would routinely be deployed to ensure that all escape routes are covered. The very act of positioning the guns can take anything up to an hour to complete with the assistance of radio communication. Only when the guns are in position is the area of cover drawn. The evidence presented by both the Scottish Countryside Alliance and the Scottish Gamekeepers Association painted a consistent picture of a determined effort to despatch the fox as quickly, and within as limited an area, as possible.

6.11 The Lanarkshire and Renfrewshire Hunt also carry out pest control work on foot. In contrast to their mounted pest control work when two or three guns are used, there may be up to twenty guns when they work on foot. In *Fraser v Adams* at paragraph 53 the Sheriff said this in relation to the deployment of guns:

“It appears to me, therefore, that while Parliament, in terms of the Act, has recognised that there is certain limited and defined scope for the legitimate use of dogs in activities which are specified in each of the sections which I have mentioned, namely and broadly speaking, stalking, searching and flushing, that activity will require to be accompanied by realistic and, one would expect, effective arrangements for the shooting of pest species. The use of what might be termed ‘token guns’, or what was described by the Crown as paying lip service to the legislation, is not available by virtue of sections 2(2) and 5(3) as a justification for the continuation of what was referred to in the evidence before me as traditional fox hunting.”

6.12 That distinction between the activities of foot packs and those of mounted packs reflects their respective histories. The former were created as a means of addressing the need for pest or predator control and that continues to be their function; the latter were essentially sporting societies which have tried to adapt to the environment where using a pack of hounds to chase and kill a fox has been outlawed. That may also explain why the work of foot packs has the appearance of a diligent pest and predator control operation, whereas among mounted hunts pest control can appear to be incidental to the primary objective of exercising horse and hounds. It is difficult to view the deployment of two or three guns in fairly open countryside, where a full pack of hounds are being used and there is a wide range of escape routes for a flushed fox, as complying with the obligation of the flusher to “act...to ensure” that it is shot.

6.13 The activities of a mounted hunt engaged in flushing to guns bear many similarities to the hunt’s pre-2002 activities. Those participating in and following the hunt gather at a suitable point of departure where they meet and greet their friends and are briefed by the huntsman. The mounted followers have the opportunity to ride out over beautiful countryside to which they would not otherwise have access and occasionally take up a position to divert a running fox from its escape route back to the guns. The foot followers can travel by vehicle to suitable vantage points from which they can observe the huntsman control the pack. A wide range of members of the rural community of all ages engage with the hunt in these ways. Other related activities foster further social interaction. The hunts continue to make a major contribution to

the social cohesion and community spirit of the locality and to highly valued features of rural life. All involved enjoy watching the hounds work under the control of the huntsman and those assisting him to find and flush the fox.

6.14 The major change is that the hunt is now accompanied by guns to shoot the fox to avoid the chase and kill by the hounds. However, submissions and evidence presented challenge the claim by the mounted hunts that the chase has been eliminated and that their kills are achieved exclusively by activity that falls within the exception in section 2 of the Act. There is before the Review material on the basis of which an impartial observer would be entitled to suspect that there are occasions when the packs of mounted hunts engage in chasing foxes when on the face of it the huntsman is in control of the pack. The evidence is not conclusive, but equally the suspicion that it gives rise to cannot be dismissed as groundless.

6.15 There is a considerable degree of scepticism, certainly among opponents of hunting and there are many of them, that the changes made in the practices of the mounted hunts to provide a pest control service do not go far enough to ensure the elimination of the chase and the kill elements of traditional fox-hunting. There is a danger that the inevitable mystery that surrounds the activities of hunts, because their activities tend to be conducted away from the public gaze in remote parts of the countryside, simply adds fuel to that suspicion. Ideally the grounds for that suspicion should be addressed. Clearly suspicion of illegal activity is not an adequate basis for deciding that the Act is not working as it was intended to or condemning the hunts or outlawing a practice that has been changed with a view to complying with the law. It is, however, a basis for considering whether reasonable measures can

be put in place to determine whether the suspicion is well-founded and, if so, steps can be taken to ensure that it is eliminated.

6.16 Some participants in mounted hunts harbour a grievance that their activities are unfairly singled out in the debate on account of a perception of privilege. Many on both sides of the debate are deeply suspicious of those on the other side. Yet the experience of the Review and the interaction observed on the limited occasions opponents have met during the Review give cause for optimism that it should be possible to agree on a way of trying to verify whether the suspicion of illegal hunting is well-founded. The strong feelings that exist on both sides of the debate have been taken into account in making that assessment. It is important that public confidence in the effectiveness of the legislation is maintained. An essential element in achieving that may lie in demonstrating that mounted hunts provide a genuine and effective pest control service that eliminates the chase and the kill. That is addressed further in the next chapter.

6.17 There are occasions in the course of the work of both mounted and foot packs when a fox is caught and killed by the hounds before it can be flushed from cover into the open and when a fox is wounded by the guns when it emerges from cover and is killed by the hounds. In addition, a fox which goes to ground may on occasion be killed by the terrier which is placed into the hole to flush it out or keep it at bay pending its being dug out. The Act recognises the likelihood of these events occurring by providing in section 2(2) that where the dog is being used “with the intention of” flushing the wild mammal from cover or from below ground to be shot, there is no offence where the dog kills the fox “in the course of that activity”.

6.18 Section 5(1)(c) providing for the retrieval or location and thereafter the capture, treatment or humane killing of a wild mammal, which is reasonably believed to be seriously injured or orphaned, is understood by hunts to authorise the use of the pack to chase after an injured fox to catch and kill it. Some of the film material presented to the Review shows hounds apparently in pursuit of a fox which those involved in hunting considered, on viewing the film, was “seriously injured”, albeit the fox continued to run.

6.19 The material before the Review suggests that more foxes are killed by hounds in the course of flushing or further to being wounded than are killed by terriers in the course of flushing from below ground. Purely on the basis of anecdotal evidence, it appears that in general 20% or more of foxes disturbed by hunts are killed in this way by hounds.

Terriers

6.20 Terriers come into play when the fox goes to ground⁴⁰. That may be seen as an escape route by either a fully fit fox or one that has been seriously injured. In the former case section 2(2) would apply and in the latter section 5(1)(c). A terrier is then used to locate the fox underground, to bark at it continuously, and to either cause it to leave the earth or alternatively to indicate where in the earth it is located so that it can be dug out by the terrierman and despatched. Before the terrier is put into the hole a radio transmitter device is attached to it so that it can be located for that purpose should there be any material delay in the fox and the terrier emerging from the

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<http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm> (para 2.23)

hole. The Code of Conduct of the National Working Terrier Federation (NWTF) recommends that, wherever possible and practical, only one terrier should be entered to ground at a time. The legislation does not impose such a restriction. It seems sensible that it should.

6.21 Again the information available to the Review about the extent to which terriers are deployed in these circumstances is anecdotal. However it does indicate that hunts involving packs of dogs are routinely accompanied by terriermen with terriers which are often required. As an example, the annual summary report from one hunt referred to earlier⁴¹ recorded the deployment of terriers on 27% of the occasions when the fox was killed.

6.22 While it is acknowledged that on occasion the terrier may kill a fox in that situation, that is said to occur infrequently. Very strong representations about the importance of the use of terriers below ground have been made to the Review. Were the use of terriers below ground to be prohibited, then a significant proportion of the fox control work of mounted and foot hunts would be wasted effort. The fox having been located, the terrier is seen as part of the team to be deployed when otherwise the fox would escape to cause more damage.

6.23 There is a great deal involved in mounting a hunt. Hounds and, if mounted, horses have to be taken to the areas of cover to be drawn. The guns, who are usually experienced shots, have to take time out from their other activities. Where the landowner is not an affiliate or supporter of the pack, there is a not insignificant fee to pay. The fox can cause considerable

⁴¹ <http://www.gov.scot/Resource/0050/00507893.pdf> (see last page)

loss to country enterprises through predation on poultry, game and livestock, particularly lambs. There is a powerful argument for completing the fox control exercise by digging out the fox once it has been located.

6.24 To be set against that is the nature of this element of hunting. It does involve a standoff between fox and terrier and occasional encounters between the two. Some would probably find film of a fox being held by a terrier as both are removed from the hole following digging out to be distasteful. The digging out itself can take some time to complete. Powerful submissions to the Review favoured ending the practice.

6.25 It was strongly represented that the last thing a terrierman wants is an encounter between his terrier and the fox with the risk of injury and incapacity that that carries. The terrierman's livelihood depends on a fit terrier. In the case of each of the mounted hunts it is a requirement that the terrierman is a member of the NWTF, adheres to their Code of Conduct and holds a firearms certificate. The NWTF Code of Conduct has been adopted by the Scottish Hillpacks Fox Control Association and is endorsed by the Scottish Gamekeepers Association.

6.26 The Burns Report reflected concern about terrier work and at paragraph 9.20 listed a number of possible approaches, which included making different provision for different parts of the country depending on the perceived needs of the area. In Scotland, however, the use of terriers appears to be spread over the country and the extent to which they are required to be dependent on the nature of the terrain. A clear difference in the

requirement for terriers according to the area of the country has not emerged in the course of the Review.

6.27 The material presented to the Review is persuasive of the need for the use of terriers to ensure the despatch of a fox gone to ground. The principal issue is ensuring that the practice is used humanely and not abused. The rules of the MFHA require that the huntmaster or someone of authority personally appointed by him should supervise the terrierman's operation.

6.28 Parliament legislated to allow flushing from below ground in the full knowledge of the possibility that the digging-out process, combined with the fact that the fox is prevented from escaping may cause serious distress to the fox⁴². As was the case at that time, there is no firm scientific evidence of the extent of the impact on the fox. Indeed it was observed in the Burns Report⁴³ that the banning of hunting could have an adverse effect on the welfare of foxes in upland areas unless dogs could be used at least to flush foxes from cover. The same would apply in the case of young cubs orphaned below ground in a den.

6.29 In the event that it is accepted that the use of terriers is a necessary ancillary to fox control using packs of hounds or other dogs, then it would be appropriate to specify clearly that only one dog should be used below ground. Public confidence in the activities of terriermen could be enhanced if all

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<http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm> (para 6.52)

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<http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm> (para 6.61)

undertaking that activity were committed to adherence to an enhanced Code of Conduct drafted by the NWTF, following consultation with the principal bodies involved in terrier work in Scotland such as the MFHA, the Scottish Hillpacks Fox Control Association and the Scottish Gamekeepers Association, and designed to reflect the position in Scotland in the light of any changes that result from this Review.

6.30 An example of a provision which might be included in any Code of Conduct would be a requirement to attach to any hole from which the fox might bolt a purse net which would restrain the fox and enable it to be immediately shot. There could also be provision for the hounds to be removed from the proximity of any possible bolthole to ensure that no chase takes place.

7. PROPOSALS FOR CHANGE

Monitoring

7.1 For years now animal welfare activists have endeavoured to monitor the activities of mounted hunts. For various reasons there has often been tension between those engaging in hunting and the monitors, or saboteurs as some are known. Much of the monitoring that is done is carried out covertly. Although it is asserted by supporters of hunting that their activities are open, public and accountable, these activities are not readily open to public scrutiny⁴⁴. On account of the remoteness of the locations where hunting takes place as well as the nature of the terrain, it is well-nigh impossible to monitor comprehensively the bulk of any day's hunting. Nevertheless, monitoring is probably the only way to get close to establishing how a hunt is being conducted⁴⁵.

7.2 In discussions with persons involved in hunting, there was a recognition that, because there is such a level of public interest in the activities of mounted hunts and yet much of their activity is hidden from public view, there was something to be said for making their activity more transparent. At a meeting with four of the groups which made submissions to the Review, the Scottish Countryside Alliance, the Scottish Gamekeepers Association, OneKind and the League Against Cruel Sports, the possibility of overt monitoring by an official monitor was raised. All could see practical

⁴⁴ As was recognised in the Burns Report at paragraph 90 see <http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm>

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<http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm> (para 9.10)

difficulties in viewing hunt activities comprehensively, but none dismissed the idea out of hand. In particular, the Scottish Countryside Alliance, of which all the mounted hunts are members, expressed willingness to participate in such an arrangement. The proposal was that an individual, officially appointed monitor would attend random hunts without notice and compile a report on the day's activities. While, if necessary, provision could be made in the Act for appointing, and regulating the role and functions of, monitors⁴⁶, it should be possible to introduce a scheme by voluntary arrangement governed by a Code of Practice. Any discussions on a voluntary scheme should involve Police Scotland. How much would require to be the subject of statutory regulation would depend on the success of efforts to reach agreement on a voluntary scheme. The Burns Report in discussing a similar idea suggested appointment of monitors by "a reputable, independent body"⁴⁷. That could be an appropriate agency of the Scottish Government. Were it necessary to provide by legislation for the appointment of the monitors, further legislation could be confined to providing for regulation of the scheme by a Code of Practice.

7.3 Such a scheme could lead to the compilation of reliable independent information about hunt activities to enable well-informed decisions to be made about the need, if any, for changes in the provisions regulating hunting with dogs. Provision could be made for the monitor to discuss with hunt officials any concerns about the conduct of the hunt. The monitors' observations

⁴⁶ <http://www.legislation.gov.uk/ukpga/1981/69/section/19ZC>

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<http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm> (para 9.10)

should in principle be admissible evidence in court. An annual summary of their observations could be included in the Wildlife Crime in Scotland Annual Report, including details of any breaches of the Code and the parties responsible.

7.4 The cautious approval given to this idea took into account the obvious possibility that behaviour might be altered in response to the attendance of a monitor. There was a view that it was possible that, given time, an accurate picture would emerge.

Fox Control Protocol

7.5 When the Act was passed the mounted packs signed up to the Scottish Mounted Foxhound Packs Fox Control Protocol. The original version was issued in September 2002 and the latest revision made in November 2015. The Protocol provides that the relevant foxhound pack will keep the police informed of their whereabouts and operations “as requested”. Some notify the police routinely; others do not, but are committed to doing so if requested. Those who do so routinely telephone the police giving information for a hunt that day or the following day. The police open an incident log in which the location and hunting boundaries for the day are noted. Any changes should thereafter be notified by telephone. At the end of the day a phone call is made to the police to intimate the conclusion of the day’s activity and requesting closure of the incident log.

7.6 The protocol provides specifically that the hounds will be used to flush out foxes from cover and the packs will act to ensure that foxes are shot as

soon as it is safe to do so. The packs also undertake to use experienced individuals with shotguns and to deploy an appropriate number of guns dependent upon terrain and location as a safety measure. A number of other provisions declare a commitment to acting within the law. There are also a number of “operational recommendations” stated in commendably peremptory terms.

7.7 That is an indication of an intent on the part of mounted packs to be open about their activities and provides a basis for the development of an arrangement under which the mounted hunts make a commitment to provide advance notice of the information which the police wish and which will help to provide reassurance that the flushing to guns exception requirements are being met. Providing the following information would make the task of investigating any allegation easier and quicker. The crucial details which should be relayed to the police in advance of the hunt include:

The identities of the huntsman and any assistants and any other personnel with a role in that day’s hunt;

The identity of the fieldmaster;

The location and hunting boundaries for that day;

The number and type of guns to be deployed, and the identities of those carrying the guns;

The number of hounds to be used;

The identity of any terriermen;

The modes of transport to be used by the huntsman, assistants, terriermen, guns and field, if not horse.

In addition, when intimating the conclusion of the day's activity, the number of foxes or other wild mammals roused, injured and killed and the means by which they were injured and killed should be intimated along with the number of shots discharged. The details intimated before and after the hunt should be intimated simultaneously to the hunt monitors.

7.8 It is envisaged that Police Scotland would record the information in a log or register which would form the basis for an annual report to Scottish Ministers with a view to relevant parts being incorporated into the Wildlife Crime in Scotland Annual Report. Each hunt should keep a record of all of the foregoing information. At present, for example, at least one hunt publishes a "Season Summary" stating the number of days hunted and recording the total guns present over the season, the number of foxes roused, the number of shots fired, the proportion of foxes killed that were despatched by guns, the average number of foxes roused per hunting day and the average number of guns present on the average hunting day.

7.9 Commitment by the hunts to provide this information would be a major step towards bringing increased transparency to their activities and ensuring that those with the principal responsibilities for the activities of the hunt that day are clearly identified. A typical hunt is organised, run and operated by the following personnel. The affairs of the hunt are overseen by a committee elected by the subscribers. The committee in turn recommend the appointment of the huntmaster or huntmasters for approval by members at

the AGM. The masters of foxhounds are responsible for running the country, *i.e.* the area over which the hunt operates, for liaising with landowners and farmers and managing the hounds, hunt staff and kennels. The huntsman will either be one of the masters or a professional member of the hunt staff, and is responsible for directing the hounds using both horn and voice. The huntsman may be assisted by one or more whippers-in whose main job is to help keep the pack all together. The fieldmaster, who will usually be one of the masters, will be appointed to act for that day to direct the mounted followers. Those carrying firearms are generally referred to as the “guns”. Most hunts will employ a terrierman whose job is to control the terrier or terriers which may be used underground to corner or flush the fox. They and the “guns” often ride quad-bikes. The terriermen operating with the mounted packs in Scotland require to be licensed by the MFHA, the licence being renewed annually. That is an example of further information that might be required to be intimated in advance of the hunt. In some packs one individual will fill multiple roles, *e.g.* master, huntsman and kennelman. The kennelman looks after hounds in kennels and may double up as a whipper-in at the hunt. In the absence of clear notification of responsibilities on the day, the potential for misunderstanding and uncertainty is clear.

7.10 Similar requirements could be made of foot packs, should that be thought necessary.

Legislative Change

7.11 Pointing to the lack of clarity in the terminology of the Act, Police

Scotland make the following submission:

“To make this legislation more effective and workable, offences need to be simplified and terms expanded. Exceptions to the offence to ‘deliberately hunt a wild mammal with a dog’ are multiple and provide opportunities for exploitation by those who continually and deliberately offend. As a consequence of this lack of clarity, the Police are on occasion unable to establish the high threshold of evidence required to prove and, ultimately, report cases.”

They point to the need in certain cases for expert testimony to prove “intent”.

7.12 Noting that the principal situation in which hunts will deal with foxes is to search for and flush them from cover to guns, Police Scotland suggest that the legislation needs to reflect this rigorously with emphasis on immediate despatch. Their submission goes so far as to state that the legislation “has become somewhat unworkable due to the exceptions available, the lack of clarity over key terminology and the lack of individual accountability.” They suggest that the Review should take cognisance of this in any subsequent recommendations, recognising that change must provide clarity to those undertaking legitimate pest control as well as those engaged in investigating illegal hunting. At the same time the police acknowledge that the aim of any amendments to existing legislation must be the absolute necessity to ensure that the welfare of the mammal involved is the primary concern on all occasions. The submission ends with these words:

“Through clear explanation and direction of what can and cannot be undertaken by this legislation the welfare aspect will hopefully be secured”.

7.13 They refer also to the “common occurrence” that hunts only have two guns out on the day when, as a result, a fox cannot be shot, resulting in the fox being stalked, a situation which the Act was intended to avoid.

7.14 A number of proposals have been made to the Review to change the law in order to provide greater protection for the mammal without significantly impairing the use of dogs for the purposes enumerated in section 2(1). These are in addition to the comments in Chapter 4 about reviewing the language of the Act and the suggestions made there.

Mental State required for Illegal Hunting

7.15 It has been suggested that the element of intent required by section 1(1) is not clearly expressed and on the face of it too demanding, and that it should be an offence to hunt “recklessly”. It is said that that would better reflect the relationship between huntsman and hounds. It is the responsibility of the huntsman throughout the hunt to control the hounds. They may number in excess of 35. They may be drawing cover a considerable distance from the huntsman. Material presented to the Review has indicated occasions when it has appeared unlikely that the huntsman would be aware of the position of the hounds in light of the nature of the terrain. Gross failure to exercise the appropriate degree of care to control the hounds is proposed as an appropriate *mens rea* standard.

7.16 That is a possibility. However, bearing in mind what was said in *DPP v Wright* about hunting being by definition intentional, it would be sensible to

state clearly that the offence is committed when a person “intentionally or recklessly”⁴⁸ hunts a wild mammal with a dog.

7.17 Another proposal is to simply delete “deliberately” which would have the effect of removing what is seen as an additional hurdle to be negotiated to prove a breach of section 1(1).

7.18 It has been suggested by Police Scotland that “deliberately” could be replaced by “has possession or control of a dog that”. That reflects the reality that it is the dog which does the hunting. Possession and control might be established through a requirement that the identity of the huntsman and the responsibilities of others involved in the hunt should be intimated to the police in advance of the hunt taking place. However, it is doubtful whether possession would cover a situation that would not be adequately covered by “control”. Indeed proof of “possession” usually requires two elements, *viz* knowledge and control.

7.19 Another way of expressing the mental state required and reflecting the fact that it is the dog which does the hunting would be “knowingly causes or permits a dog to hunt a wild mammal”. That would mirror the requirement in a number of pieces of wildlife protection legislation, *e.g.* section 21⁴⁹ of the Wildlife and Natural Environment (Scotland) Act 2011, section 33 of the same Act and section 5(1)(f) of the Wildlife and Countryside Act 1981.

⁴⁸ an example of the use of that expression can be found in Section 9(1) of Wildlife and Countryside Act 1981

⁴⁹ <http://www.legislation.gov.uk/asp/2011/6/section/21/enacted>

7.20 The separate approaches of focusing attention on the actions of the hunter on the one hand and the actions of the dog on the other could be achieved by “uses, or causes or permits, a dog ...”⁵⁰

7.21 These suggestions may give rise to concern about the risk that setting a lower standard might lead to allegations against moorland dog-walkers whose pets set off unexpectedly in pursuit of a fox. As stated above at paragraph 5.21, that concern is misplaced.

7.22 Each of the foregoing mental state tests is clearer than that which exists at present in section 1(1) and would fit well into a scheme in which the offence is clearly stated in section 1(1) and the exceptions are stated with greater clarity than at present.

Vicarious Liability

7.23 Some submissions favour the introduction of vicarious liability on the part of the person in overall charge of the hunt. For this to work in practice it would be necessary to identify that person. That may be a decision to be made by the hunt *ad hoc* for each event, and could in principle be a requirement. The fieldmaster has the responsibility of directing the followers who should have little, if any, interaction with the hounds. The person in overall charge of the hounds is the huntsman. He is the one most likely to be responsible for any breach of section 1(1). A vicarious liability provision is unlikely to make any difference to his position. He does have some assistance from a whipper-in. However the only situation in which vicarious

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<http://webarchive.nationalarchives.gov.uk/20100512151544/http://www.huntinginquiry.gov.uk/mainsections/huntingreport.htm> (para 10.24)

liability would add protection would be one where a whipper-in acted in some way to take control of the pack from the huntsman. There are other possible approaches to vicarious liability.

7.24 There may be merit in providing that the owner who gives the hunt permission to hunt over the land would be guilty of an offence in the event that someone involved in the hunt commits an offence. Similar provisions were introduced into the Wildlife and Countryside Act 1981⁵¹ by section 24 of the Wildlife and Natural Environment (Scotland) Act 2011. They provide that a person who has a legal right to kill or take a wild bird on or over land or manages or controls the exercise of that right is guilty of an offence where his employee or agent or an independent contractor engaged by him commits an offence. It is a defence for the landowner to show that he took all reasonable steps and exercised all due diligence to prevent the offence being committed. Those making the submission consider that the landowner engaging a hunt to perform pest control services would take a close interest in the arrangements being made to satisfy the requirements of section 2. Were this approach to be followed, the offence currently set out in section 1(2) would be unnecessary. No submission critical of the terms in which that and section 1(3) are currently stated has been made to the Review. However, as these provisions stand, any contravention would be difficult to prove.

7.25 One possible obstacle to giving effect to vicarious liability of an owner of land should be noted. There are circumstances where the absence of clear information identifying who holds formal title or right to the land may hinder investigations. It is to be hoped that it is not an issue likely to affect many

investigations and that Government land reform legislation will eliminate it in any event⁵².

Restrictions on the Hounds

7.26 Other suggestions for amendment of the legislation with considerable support among those making submissions to the Review are (1) limiting the number of dogs that may be used by hunts to two and (2) requiring the dogs to be muzzled. I am persuaded by the submissions and such other evidence as there is, in particular that of the experience of those who work with packs, the scientific study paper by Naylor and Knott⁵³ (taking full account of its limitations and the criticisms made of it⁵⁴), and the fact that in England and Wales hunts do not generally flush to guns using two dogs, not only that searching and flushing by two dogs would not be as effective as that done by a full pack of hounds, but also that imposing such a restriction could seriously compromise effective pest control in the country, particularly on rough and hilly ground and in extensive areas of dense cover such as conifer woodlands. In relation to muzzles, there are submissions from people with experience of working with hounds that muzzled hounds are exposed to a risk of injury through the muzzle being caught or entangled in undergrowth, and are less able to cry or bark clearly to alert the huntsman to the discovery of a scent or quarry. A muzzled terrier sent underground would also face the risk of attack against which it might have no defence.

⁵¹ see sections 18A and 18B

⁵² <http://www.gov.scot/Resource/0050/00507843.pdf>

⁵³ <http://fedwfp.co.uk/wordpress/wp-content/uploads/2013/10/research-flushing.pdf>

⁵⁴ <http://www.nfws.org.uk/The%20utility%20of%20killing%20foxes%20in%20Scotland.pdf>

Burden of Proof

7.27 It has also been proposed that the burden of proving the application of one of the exceptions should fall upon the accused. Whether such a provision is consistent with Article 6 of the European Convention on Human Rights depends on a number of considerations. In a not dissimilar situation in *DPP v Wright*, however, the Divisional Court in England took the view that imposing a legal burden of proof on the defendant would be an oppressive, disproportionate, unfair, and in particular unnecessary intrusion upon the presumption of innocence in Article 6 of the Convention. The issue is a controversial one likely to give rise to legal dispute.

7.28 The 2004 Act says nothing about the burden of proof. However, the Divisional Court was faced with the question whether the very fact that an accused relied on one of the exemptions under the Act imposed any onus of proof on the accused. In both England and Wales and Scotland, the basic rule is that the prosecution must prove the case against the accused beyond reasonable doubt. That routinely extends to the prosecution having to exclude any defence raised beyond reasonable doubt. In both jurisdictions there are exceptions to that general rule. Where the law does impose the burden of proving the defence on an accused, it is for the accused to discharge that burden on the balance of probabilities.

7.29 In both jurisdictions there are rules relating to the proof of exceptions or exemptions. In England and Wales, section 101 of the Magistrates' Courts Act 1980 provides:

“Where the defendant to an information or complaint relies for his defence on any exception, exemption, proviso, excuse or qualification,

whether or not it accompanies the description of the offence on matter of complaint in the enactment creating the offence or on which the complaint is founded, the burden of proving the exception, exemption, proviso, excuse or qualification shall be on him; and this notwithstanding that the information or complaint contains an allegation negating the exception, exemption, proviso, excuse or qualification.”

For Scotland Schedule 3, paragraph 16 of the Criminal Procedure (Scotland)

Act 1995 provides:

“Where, in relation to an offence created by or under an enactment any exception, exemption, proviso, excuse, or qualification, is expressed to have effect whether by the same or any other enactment, the exception, exemption, proviso, excuse, or qualification need not be specified or negative in the indictment or complaint, and the prosecution is not required to prove it, but the accused may do so.”

The bulk of the judgment of the Divisional Court is taken up with determining whether relying on an exemption in Schedule 1 of the 2004 Act placed either an evidential burden or alternatively a legal or persuasive burden on the defendant. An evidential burden is a burden to raise the point as an issue in the course of the evidence, whereupon the burden falls on the prosecution to prove beyond reasonable doubt that the exemption does not apply. A legal or persuasive burden is a burden placed on the defendant or accused to prove on the balance of probabilities that his conduct fell within the exemption.

7.30 The Divisional Court reviewed the authorities, most of which are cases decided after the enactment of the Scotland Act which requires that legislation must be read and given effect to, so far as it is possible to do so, in a way which is compatible with Article 6 of the European Convention on Human Rights. Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The Divisional Court engaged in detailed analysis of these authorities and reached

the conclusion noted above. The test the Court applied was the risk of miscarriage of justice in the event that the onus of proof was transferred, particularly because of the potential difficulty for the defendant of proving certain aspects of the defence. Reference was made in particular to it being difficult for the defendant to prove the fifth condition applying to stalking and flushing out in terms of paragraph 1(7) of the Schedule to the 2004 Act, *viz* that he had taken reasonable steps for the purpose of ensuring that as soon as possible after being found or flushed out the wild mammal was shot dead by a competent person and that each dog used in the stalking or flushing out was kept under sufficiently close control to ensure that it did not prevent or obstruct achievement of that objective. The Court considered that the burden imposed was merely the evidential burden of raising the point as an issue.

The Court concluded:

“We consider that many prosecutions would be unfairly unbalanced if section 1 and Schedule 1 placed a legal burden on the defendant. Where, for instance, a defendant intended that his hunting was exempt under paragraph 1, he would have to prove the substantial issues in the case, once the prosecution had established a *prima facie* case that he was in pursuit of a wild mammal with a dog.”

7.31 The Divisional Court referred to what was, prior to the introduction of the requirement of compatibility with Article 6 of the European Convention on Human Rights, one of the leading Scottish cases on this issue, albeit in a civil context, *vis Nimmo v Alexander Cowan & Sons Ltd* 1967 SC(HL) 79, [1968] AC 107. The orthodox principle applied in that case was, in the words of Lord Wilberforce, “that exceptions, *etc* are to be set up by those who rely on them”. In *Nimmo* it was held that the burden of proving that it was not reasonably practicable to make and keep a place of work safe rested upon

the responsible employer. If an exception was to be established, it was for the party claiming the exception to establish it. A majority of the Court expressed the opinion that where a linguistic construction of the statute did not clearly indicate upon whom the burden should lie, the Court should look to other considerations to determine the intention of Parliament, such as the mischief at which the Act was aimed and practical considerations affecting the burden of proof and, in particular, the ease or difficulty that the respected parties would encounter in discharging the burden. Since *Nimmo* the courts have tended to emphasise the significance of the difficulty of proof in determining where the burden lies. It may be simple for a person to prove that he has permission or holds a licence to do something, but other matters may be much more difficult to establish. In analysing *Nimmo* in the later case of *R v Hunt* [1987] 1 AC 352 Lord Griffiths said:

“When all the cases are analysed, those in which the courts have held that the burden lies on the defendant are cases in which the burden can be easily discharged.”

However it is not immediately obvious that what had to be proved in *Nimmo* could be more easily established than the terms of the flushing exemption under paragraph 1 of the Schedule to the Hunting Act 2004. Much might be said on both sides, and it is not appropriate to try to give a definitive interpretation in the contest of this Review.

7.32 In *Fraser v Adams* 2005 SCCR 54 the Crown do not appear to have suggested that the onus of proof fell upon the accused, and the Sheriff at paragraph 4 emphasised the burden on the Crown to prove the case. However, recent Opinions of the Court of Criminal Appeal indicate a possibility that that Court could interpret Schedule 3, paragraph 16, of the

1995 Act as applying to transfer the legal or persuasive burden of proof of each of the exceptions under the 2002 Act to the accused.

7.33 In *Doonin Plant Ltd v HM Advocate* [2014] HCJAC 26, 2014

SCCR 234⁵⁵ the Court decided that, where a company was charged with a contravention of section 33(1)(b) of the Environmental Pollution Act 1990 prohibiting the storage of waste except under and in accordance with a waste licence, but Regulation 17 of the Waste Management Licensing Regulations 1994 disapplied these provisions in relation to activities exempted under paragraph 13 or Schedule 3 to the Regulations, including the storage of a limited quantity of specified types of waste at a place where certain specified products are to be manufactured from it, the question whether the company was operating within a paragraph 13 exemption was clearly a matter within their knowledge and that it was for them to prove that they came within the exemption.

7.34 In *Cunningham v HM Advocate* [2012] HCJAC 90, 2012 SCCR 605⁵⁶ paragraph 16 of Schedule 3 was held to apply where the accused was made the subject of an order by the Chancery Division of the High Court in England prohibiting him from being a director of or being concerned in the management of a company “without leave of the court” and that it was for him to prove that he had the leave of the court to act.

⁵⁵ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=a8a38aa6-8980-69d2-b500-ff0000d74aa7>

⁵⁶ <http://www.scotcourts.gov.uk/search-judgments/judgment?id=d0a686a6-8980-69d2-b500-ff0000d74aa7>

7.35 In *McMurdo v HM Advocate* [2015] HCJAC 37, 2015 SCCR 271⁵⁷ the issue arose in the context of the interpretation of section 52 of the Civic Government (Scotland) Act 1982 which makes it an offence to have any indecent photographs of children in one's possession. Section 52(2)(b) provides that it shall be a defence for the accused to prove that he had not himself seen the photograph and did not know that it was indecent. In deciding that the onus of proving that defence lay on the accused, the Court said this:

“Whether a statutory defence carries with it a legal (reverse) onus or only an evidential burden depends upon an interpretation of the particular provision, the activity prohibited and whether a departure from the normal incidence of the presumption of innocence is justified, balancing the interests of the public with the rights of the individual.”

7.36 The Court founded upon the analysis of the subject recently carried out in *Adam v HM Advocate* [2013] HCJAC 14, 2013 SCCR 209⁵⁸. That case related to section 3(2) of the Dangerous Dogs Act 1991 which provides that it shall be a defence for the owner of a dog who is charged with an offence under section 3(1) because the dog was dangerously out of control to prove that the dog was at the material time in the charge of a person he reasonably believed to be a fit and proper person to be in charge of it. Following an analysis of the issue under reference to many of the cases considered by the Divisional Court in *DPP v Wright*, the Court held that the 1991 Act was enacted to deal with what was perceived to be a serious problem of dogs attacking particularly children (as in fact happened in this case), that one of

⁵⁷ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=d621d4a6-8980-69d2-b500-ff0000d74aa7>

⁵⁸ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=8fb886a6-8980-69d2-b500-ff0000d74aa7>

the purposes of the Act was accordingly to prevent a serious danger to the public; that in light of this legitimate object there was nothing objectionable in a requirement on a person accused of an offence under section 3(1) to discharge the legal burden imposed by section 3(2); that in all the circumstances, balancing the interests of the public and the appellant's fundamental rights, the imposition of a legal burden in section 3(2) of the 1991 Act was not unacceptable, unreasonable or disproportionate.

7.37 In light of the opinions expressed in these cases, it is far from clear that the Court of Criminal Appeal in Scotland would reach the same conclusion as the Divisional Court in England on the question whether an exception to the offence of hunting a wild mammal with a dog is for the accused to prove or the Crown to exclude should the accused raise it. The lack of prosecutions in Scotland has meant that the Court of Criminal Appeal has had no opportunity to interpret any of the provisions of the 2002 Act and give guidance on their application. I have addressed them in some detail because there is considerable public interest in the matter; the aim of the legislation was to bring an end to the chase and the kill by dogs and yet there remains widespread suspicion that the chase and possibly even the kill continue to occur; the exceptions were intended to allow the use of dogs in connection with genuinely necessary activities and, in limited circumstances, certain sporting activities; there is a view, for which there is some supporting evidence, that the flushing from cover for pest control exception is a decoy for the continuation of some traditional hunting practices; observation and investigation of any offending is very difficult because the activity is conducted over a wide area of often remote countryside; and because taken together

these may amount to circumstances justifying a decision by Parliament to provide specifically in the Act that the onus of proof of compliance with an exception lies on the accused. It should be sufficient for the prosecutor to show that a person is using dogs to carry out acts which are generally part of hunting of a wild mammal in circumstances where there are no firearms and no potential “guns” to be seen. That should be sufficient to prove illegal hunting in the absence of other evidence to indicate a genuine activity falling within an exception.

7.38 If the onus on the accused is simply an evidential burden, ie to raise the exception under which he was acting as an issue, the task on the Crown of proving beyond reasonable doubt that he was not acting in accordance with the exception is an extremely difficult one. First of all, it involves proving a negative. It also involves obtaining evidence about events that occurred in remote areas far from the public gaze where the loyalties of those who are most likely to have had the best view of what happened may make investigation difficult. Police Scotland have encountered unwillingness on the part of hunt participants, and also on the part of estate staff in relation to other wildlife crime ,to give witness statements to investigating officers “on legal advice”, and on at least one occasion witness statements noted verbatim by a solicitor were read out in response to police enquiries. Legal advisers for insurers have also apparently given advice that hunt participants should not give witness statements to the police without legal representation.

7.39 I note that at Stage 1 of the passage of the Bill the Justice and Home Affairs Committee opposed placing the onus of proof of an exception on the accused.

Licensing

7.40 The existence of hunting licence schemes in a number of jurisdictions in mainland Europe was noted by the Burns Report. A scheme of licensing to enable pest control activities to proceed was also envisaged in the Bill as originally drafted. The licensing provisions were removed in the course of the passage of the Bill. While greater transparency by way of advanced notification of certain information about the activity of hunts has been proposed in submissions and addressed above, it is not clear that establishing a formal system of licensing would do more for the protection of wild mammals than amending the legislation would. The same difficulties of proof and enforcement would remain. The bureaucracy and expense involved are unlikely to be adequately reflected in resultant benefit. That is a very broad assessment based on an overview of the material gathered by the Review. In the absence of any details submission about the benefits of licensing, it is not possible to explore the matter in more detail. The one obvious gain would be the possibility of licence revocation in the event of non-compliance. However the difficulty of proof of non-compliance would remain.

Penalties for Offending

7.41 Little was said in submissions about the penalties available to the courts in the event of conviction. They have not been highlighted as inadequate in any respect. It is in any event not long since the penalties for wildlife crime in general were reviewed by the Wildlife Crime Penalties Review Group.

Time Limit for Prosecution

7.42 The time limit for completing an investigation into an alleged offence and instituting the prosecution has given rise to problems for both the police and the Crown. Section 5(1) of the Act provides for prosecution of an offence under the Act as a summary offence. Section 136 of the Criminal Procedure (Scotland) Act 1995 sets the general limit for bringing summary prosecutions as within six months after the contravention occurred or, in the case of a continuous contravention, within six months after the last date of such contravention. That limit does not apply where the enactment creating the offence fixes a different time limit. The reporting of one case two weeks before the expiry of that period made proper investigation impossible. Increasingly wildlife offences are the subject of forensic science investigation and post-mortem examination which often take time. Where skilled opinion evidence is required, obtaining a fully researched expert report may also take time. In addition enquiries can be delayed by unwillingness of witnesses to give statements.

7.43 A number of statutes which create wildlife offences provide for summary prosecution but with an extended time limit, which is six months from the date on which sufficient evidence came to the knowledge of the prosecutor, but no more than three years from the date of the offence. (See Conservation (Natural Habitats, &c) Regulations 1994, regulation 102⁵⁹; Protection of Badgers Act 1992, section 12A⁶⁰; Nature Conservation (Scotland) Act 2004,

⁵⁹ <http://www.legislation.gov.uk/uksi/1994/2716/regulation/102/made>

⁶⁰ <http://www.legislation.gov.uk/ukpga/1992/51/section/12A>

section 46⁶¹; and Wildlife and Countryside Act 1981, section 22⁶²). Both the police and the Crown would welcome amendment of section 5 to extend the time bar in that way.

⁶¹ <http://www.legislation.gov.uk/asp/2004/6/section/46>

⁶² <http://www.legislation.gov.uk/ukpga/1981/69/section/22>

Protection of Wild Mammals (Scotland) Act 2002

1 Offences

- (1) A person who deliberately hunts a wild mammal with a dog commits an offence.
- (2) It is an offence for an owner or occupier of land knowingly to permit another person to enter or use it to commit an offence under subsection (1).
- (3) It is an offence for an owner of, or person having responsibility for, a dog knowingly to permit another person to use it to commit an offence under subsection (1).

2 Exception: stalking and flushing from cover

- (1) A person who is, or who has the permission of, the owner or lawful occupier of the land on which the stalking, searching or flushing referred to in this subsection takes place does not commit an offence under section 1(1) by using a dog under control to stalk a wild mammal, or flush it from cover (including an enclosed space within rocks, or other secure cover) above ground for the purpose of—
 - (a) protecting livestock, ground-nesting birds, timber, fowl (including wild fowl), game birds or crops from attack by wild mammals;
 - (b) providing food for consumption by a living creature, including a person;
 - (c) protecting human health;
 - (d) preventing the spread of disease;
 - (e) controlling the number of a pest species; or
 - (f) controlling the number of a particular species to safeguard the welfare of that species,but only if that person acts to ensure that, once the target wild mammal is found or emerges from cover, it is shot, or killed by a bird of prey, once it is safe to do so.
- (2) Where a person is using a dog in connection with the despatch of a wild mammal, being of a pest species, with the intention of flushing the wild mammal from cover or from below ground in order that it may be shot or killed by lawful means, that person does not commit an offence under section 1(1) by virtue of the dog killing that wild mammal in the course of that activity.
- (3) A person does not commit an offence under section 1(1) by using a dog under control to flush a fox or mink from below ground or by using a dog under control to flush a fox from an enclosed space within rocks or other secure cover above ground, but only if that person—

- (a) does so for one or more of the purposes specified in paragraphs (a) to (f) of subsection (1);
- (b) takes reasonable steps to ensure that the fox or mink is flushed as soon as reasonably possible after it is located and shot as soon as possible after it is flushed;
- (c) takes all reasonable steps to prevent injury to the dog including steps to prevent the dog becoming trapped underground and, if it does become trapped underground, steps to ensure it is rescued as soon as is practicable;
- (d) is in possession of a firearm for which the person holds a valid firearms or shotgun certificate; and
- (e) either—
 - (i) is the owner or lawful occupier of the land on which the activity takes place; or
 - (ii) has the permission of the owner or lawful occupier of that land to undertake that activity.

3 Exception: use of a dog in connection with falconry and shooting

Where an occupier of land (or a person acting with the occupier's permission) is using a bird of prey, or a firearm or shotgun, for the purpose of sport, that person does not commit an offence under section 1(1) by using a dog under control to stalk a wild mammal, or flush it from cover above ground, for the purpose of providing quarry for the sport, but only if—

- (a) that person acts to ensure that, once a wild mammal is found or emerges from cover, it is shot, or killed by a bird of prey, as soon as possible;
- (b) where a firearm or shotgun is used, that person holds a valid firearms or shotgun certificate or a valid visitor's firearm or shotgun permit; and
- (c) where a wild mammal is shot and injured, that person takes all reasonable steps to retrieve it and, once retrieved, to kill it as humanely as possible.

4 Exception: search by authorised person

- (1) An authorised person does not commit an offence under section 1(1) by using a dog to search for, or catch, a wild mammal if that person does so with no intention of harming the wild mammal.
- (2) In subsection (1) "authorised person" means—

- (a) an officer of a local authority acting in pursuance of any function of the local authority;
- (b) any person authorised by such an officer to search for, or catch, a wild mammal; and
- (c) a constable.

5 Exception: retrieval and location

- (1) A person does not commit an offence under section 1(1) by using a dog under control in order to—
- (a) retrieve a hare which has been shot;
 - (b) locate a wild mammal which has escaped, or been released, from captivity (but only if that person acts to ensure that the mammal is captured or shot once it is located); or
 - (c) retrieve or locate a wild mammal which that person reasonably believes is seriously injured or orphaned (but only if that person acts to ensure that the mammal, once located, is captured, treated or killed as humanely as possible in order to relieve its suffering).
- (2) Subsection (1)(b) does not apply if the mammal—
- (a) is a fox or hare;
 - (b) is a deer, boar or mink, unless it has escaped from a farm or zoo; or
 - (c) has been raised or released for the purpose of being hunted.
- (3) A person who is an occupier of land (or is acting with the occupier's permission) does not commit an offence under section 1(1) by using a dog under control below ground on that land in order to locate a fox which that person reasonably believes is orphaned, but only if that person takes reasonable steps to ensure that the fox, once located, is despatched by a single dog or otherwise killed as humanely as possible.

6 Excepted activities

- (1) A person does not commit an offence under section 1(1) by participating in an excepted activity.
- (2) For the purposes of subsection (1), an “excepted activity” is an activity excepted under any provision of this Act, and such other activity as the Scottish Ministers may, by order made by statutory instrument, specify.
- (3) No order is to be made under subsection (2) unless it has been laid in draft before, and approved by resolution of, the Scottish Parliament.

- (4) Before laying a draft order before the Parliament under subsection (3), the Scottish Ministers must—
- (a) lay the proposed draft order before the Parliament and make it publicly available for consultation for a period (“the consultation period”) of at least 12 weeks;
 - (b) during the consultation period, consult such persons and bodies as they consider likely to be affected by, or otherwise to have an interest in, the proposed draft order; and
 - (c) take into account any comments on the proposed draft order expressed during the consultation period and make such changes to the draft order as they consider appropriate.

7 Arrest, search and seizure

- (1) A constable who suspects with reasonable cause that a person has committed or is committing an offence under this Act may without warrant—
- (a) arrest that person;
 - (b) stop and search that person, if the constable suspects with reasonable cause that evidence in connection with the offence is to be found on that person;
 - (c) search or examine a vehicle, animal or article which appears to belong to, or be in the possession or control of, that person, if the constable suspects with reasonable cause that evidence in connection with the offence is to be found in or on it;
 - (d) seize and detain for the purpose of proceedings under this Act a vehicle, animal or article which may be evidence in connection with the offence or which may be made the subject of an order under Part II of the Proceeds of Crime (Scotland) Act 1995 (c.43).
- (2) A vehicle, animal or article seized under subsection (1)(d) above shall be returned to the person from whom it was seized as soon as any proceedings under this Act are concluded without the conviction of the person accused.
- (3) A constable may enter land (but not a dwelling house) in order to exercise a power given by subsection (1).

8 Proceedings and penalties

- (1) A person guilty of an offence under this Act is liable on summary conviction to imprisonment for up to 6 months or a fine of up to level 5 on the standard scale or both.

APPENDIX 1 (cont.)

- (2) If an offence by a body corporate is proved to have been committed with the consent or connivance of, or as a result of neglect by, an officer of the body, the officer as well as the body is guilty of the offence.
- (3) “Officer” means a director, manager, secretary or other similar officer, and includes a person purporting to act in that capacity or in accordance with whose directions or instructions the officers of the body are accustomed to act.
- (4) Where the affairs of a body corporate are managed by its members, subsection (2) applies to the conduct of a member in connection with the member’s functions of management as if the member were an officer.
- (5) If an offence committed by a partnership is proved to have been committed with the consent or connivance of, or as a result of neglect by, a partner, the partner as well as the partnership is guilty of the offence.
- (6) In proceedings for an offence under section 1(2) or (3), it is a defence for the person charged to prove that at the time of the alleged offence such person reasonably believed that section 5(1) applied (or would apply) to the hunting in question.

9 Disqualification orders

- (1) The court convicting a person of an offence under section 1 may, in addition to dealing with the offender in any other way, make either or both of the following orders (“disqualification orders”)—
 - (a) an order for the care or disposal of a dog which was in the offender’s custody when the offence was committed or which has been in the offender’s custody at any time since then;
 - (b) an order disqualifying the offender, for such period as it thinks fit, from having custody of any dog.
- (2) Where the court makes an order under subsection (1)(a) above, it may—
 - (a) require any person who has custody of the dog to deliver it up to a specified person;
 - (b) require the offender to pay specified amounts to specified persons for the care of the dog from the time it is delivered up (or detained under section 7(1)(d)) until permanent arrangements are made for its care or disposal.
- (3) A disqualification order shall not deprive a dog’s owner of custody of that dog where that dog was used by another person in the

APPENDIX 1 (cont.)

commission of an offence under section 1, unless the owner knowingly permitted the use of that dog contrary to that section.

- (4) A person who—
- (a) has custody of a dog in contravention of a disqualification order; or
 - (b) fails to comply with a requirement imposed on that person under subsection (2),
- commits an offence.
- (5) A dog shall not be disposed of pursuant to an order under subsection (1)(a) above—
- (a) until the end of the period within which notice of appeal to the court against the order can be given; and
 - (b) if notice of appeal is given in that period, until the appeal is determined or withdrawn,
- unless the owner of the dog gives notice to the court which made the order of the owner's intention not to appeal against it.
- (6) A person against whom an order under subsection (1)(b) above has been made may, no earlier than one year after the date of the order, apply to the court which made the order for a direction ending the disqualification from such date as the court thinks appropriate; and if the application is refused, no further application in relation to that order may be made earlier than one year after the date of the refusal.
- (7) In considering an application under subsection (6), the court must take account of all the circumstances including the applicant's character and the applicant's conduct since the order was made.
- (8) If a disqualification order imposes a requirement in relation to a dog not owned by the offender, the owner may appeal to the **[F1**Sheriff Appeal Court] against that requirement.
- (9) An appeal under subsection (8) is competent only if lodged within 7 days of the date of the order (or such longer period as the **[F2**Sheriff Appeal Court] thinks just, taking particular account of the date on which the order came to the owner's attention).

Annotations:

Amendments (Textual)

F1Words in s. 9(8) substituted (22.9.2015) by [The Courts Reform \(Scotland\) Act 2014 \(Consequential Provisions No. 2\) Order 2015 \(S.S.I. 2015/338\)](#), art. 1, **Sch. 2 para. 6** (with art. 4)

F2Words in s. 9(9) substituted (22.9.2015) by [The Courts Reform \(Scotland\) Act 2014 \(Consequential Provisions No. 2\) Order 2015 \(S.S.I. 2015/338\)](#), art. 1, **Sch. 2 para. 6** (with art. 4)

10 Meaning of expressions

(1) In this Act—

“to hunt” includes to search for or course;

“occupier” includes any person who has control of land;

an “orphaned” fox means a fox, the mother of which is dead, which is too young to survive on its own;

“owner” (of land) does not include a creditor in a heritable security who is not in possession of the security subjects;

“pest species” means foxes, hares, mink, stoats and weasels;

“wild mammal”—

(a) includes a wild mammal which has escaped, or been released, from captivity, and any mammal which is living wild;

(b) does not include a rabbit;

(c) does not include a rodent;

and references to hunting with, or the use of, “a dog” are to be interpreted as also applying to hunting with, or (as the case may be) the use of, two or more dogs.

(2) The Scottish Ministers may, by order made by statutory instrument, modify the definition of “pest species” in subsection (1) so as to add to, or remove from, the species which that definition comprehends such species as they think fit.

(3) A statutory instrument containing an order under subsection (2) above is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(4) For the purposes of this Act, a dog is “under control” if—

(a) the person responsible for the dog is able to direct the dog’s activity by physical contact or verbal or audible command; or

(b) the dog is carrying out a series of actions appropriate to the activity undertaken, having been trained to do so.

11 Consequential amendments and repeals

The consequential amendments and repeals set out in the schedule have effect.

12 Short title and commencement

(1) This Act may be cited as the Protection of Wild Mammals (Scotland) Act 2002.

(2) The preceding sections of this Act come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.

(3) Different days may be so appointed for different purposes.

Annotations:

Subordinate Legislation Made

P1S. 12(2) power fully exercised: 1.8.2002 appointed by [S.S.I. 2002/181](#), [art. 2](#)



SCOTTISH MOUNTED FOXHOUND PACKS

Original version
issued September
2002 Revised
September 2004
Revised September
2015
Further Revised
November 2015

FOX CONTROL PROTOCOL

"The Scottish Mounted Foxhound Packs will continue to offer a fox control service to farmers and landowners using hounds. This will involve the use of guns and within the bounds of the law."

General

They will offer a fox control service to farmers and landowners operating within the bounds of the Protection of Wild Mammals (Scotland) Act 2002 ("the Act").

They will operate only with permission from the farmers and landowners.

They will keep the Police informed of their whereabouts and operations, as requested.

They will ensure that safety issues are paramount.

Operating within the Act

They will not deliberately hunt a fox as defined within the Act.

They will use their hounds to flush out foxes from covert.

They will act to ensure that foxes are shot as soon as it is safe to do so.

APPENDIX 2 (cont.)

They will use experienced individuals with shotguns.

They will use an appropriate number of guns dependent on terrain and location as a safety measure.

They will use assistants (either mounted or on foot) to turn foxes towards the guns, away from roads, dwellings etc and the sides of a covert where it is unsafe/difficult to shoot and for safety reasons.

They will ensure that their operations comply with one of the six purposes listed in the Act, principally

- 2 (1) (a) protecting livestock, ground nesting birds.....fowl (including wild fowl), game birds...from attack by wild mammals;
- (b) preventing the spread of disease
 - (c) controlling the number of pest species; or
 - (d) controlling the number of a particular species to safeguard the welfare of that species.

Operational recommendations

Farmers/Landowners

- permission to undertake fox control must be granted
- one of the six purposes should be identified, e.g. protect livestock or ground nesting birds, control of pest species

Huntsmen

- may only search for a fox in covert in order to flush to guns
- may not lay hounds on out of covert or go to a view unless he believes the fox is diseased or wounded
- may regard "covert" as meaning any natural growth in or under which a fox can hide, e.g. gorse, bracken, heather as well as woodland
- identifying dress should be considered.

Guns

- a valid shotgun certificate (and evidence of insurance should be carried)
- a minimum of two guns should be available
- shotguns preferred with No. 4 shot or less
- guns should be in radio contact with the Huntsman
- guidance to guns will be issued
- experienced guns to be used

Mounted assistants

- mounted assistants will be appointed at the discretion of the Master in charge
- they should be used to control hounds, to turn foxes towards guns, to limit the number of guns that would otherwise be required and for safety reasons, e.g. roads

APPENDIX 2 (cont.)

- numbers of assistants will depend on location, type of country, proximity of habitation, etc
- other spectators must be kept at a safe distance

Motorised vehicles

- owned or supplied by the Hunt, e.g. quad bikes, motorbikes
- users of such vehicles must be covered by suitable insurance
- if such vehicles are to be used on public roads, they should be equipped for road use, e.g. lights, indicators, etc
- passengers should not be allowed unless insurance cover specifically permits
- crash helmets must be made available to users of such vehicles.

Terrier work

- terriermen must be licensed by MFHA and operate under the code of the National Working Terrier Association
- a fox may be bolted to be shot
- a fox may be bolted in covert and, if unsafe to shoot, subsequently flushed from covert to be shot
- all reasonable steps must be taken to avoid injury to the terrier (1A 2(b))
- hounds must be available at all times in case of wounding.

APPENDIX 3

Table 1

| Offences relating to: | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 |
|---------------------------------------|----------------|----------------|----------------|----------------|----------------|
| Badgers | 11 | 20 | 11 | 1 | 7 |
| Birds | 40 | 59 | 55 | 64 | 53 |
| Cruelty to wild animals | 27 | 40 | 26 | 27 | 22 |
| Deer | 20 | 33 | 47 | 33 | 20 |
| Hunting with dogs | 37 | 31 | 31 | 32 | 29 |
| Poaching and game laws | 17 | 16 | 15 | 1 | 4 |
| Fish poaching | 67 | 85 | 104 | 135 | 90 |
| Conservation (protected sites) | 3 | 2 | 1 | 0 | 1 |
| Other wildlife offences | 41 | 69 | 17 | 26 | 29 |
| Totals | 264 | 355 | 307 | 319 | 255 |

Table 2

| Offences relating to: | 2009-10 | 2010-11 | 2011-12 | 2012-13 | 2013-14 | Total proceedings | Overall % guilty |
|---------------------------------------|----------------|----------------|----------------|----------------|----------------|--------------------------|-------------------------|
| Badgers | 2 | 3 | 2 | 0 | 0 | 7 | 86% |
| Birds | 7 | 6 | 15 | 19 | 10 | 57 | 77% |
| Cruelty to wild animals | 4 | 2 | 4 | 9 | 4 | 23 | 74% |
| Deer | 0 | 3 | 8 | 3 | 5 | 19 | 68% |
| Hunting with dogs | 10 | 9 | 5 | 11 | 9 | 44 | 50% |
| Poaching and game laws | 4 | 8 | 8 | 1 | 0 | 21 | 62% |
| Fish poaching | 3 | 22 | 18 | 23 | 43 | 109 | 78% |
| Conservation (protected sites) | 1 | 0 | 1 | 0 | 0 | 2 | 100% |
| Other wildlife offences | 1 | 0 | 10 | 11 | 9 | 31 | 74% |
| Totals | 32 | 53 | 71 | 77 | 80 | 313 | 67% |
| % guilty | 75% | 77% | 56% | 62% | 70% | | |
| Total number of offences | 49 | 49 | 70 | 75 | 100 | | |

APPENDIX 3 (cont.)

Table 3

| Year | Total cases reported | Cases marked no action | Prosecutions discontinued | Prosecutions resulting in an acquittal | Prosecutions resulting in a conviction |
|--------------|----------------------|------------------------|---------------------------|--|--|
| 2002-03 | 3 (2*) | 1* | | 1* | 1 |
| 2003-04 | 2 (1*) | | 1* | | 1 |
| 2004-05 | | | | | |
| 2005-06 | 1* | 1* | | | |
| 2006-07 | | | | | |
| 2007-08 | 1 | | | 1* | |
| 2008-09 | 1 | | | 1 | |
| 2009-10 | | | | | |
| 2010-11 | 1 | | | | 1 |
| 2011-12 | | | | | |
| 2012-13 | | | | | |
| 2013-14 | 1* | | | 1* | |
| Total | 10 (5*) | 2* | 1* | 4 (2*) | 3 |

(An asterisk indicates activity associated with a mounted hunt)

Table 4

| | Cautioned | Proceeded against | Found guilty |
|--------------|--------------|-------------------|----------------|
| 2005 | 0(1) | 0(2) | 0(2) |
| 2006 | 0(0) | 0(11) | 0(5) |
| 2007 | 0(8) | 4(62) | 3(48) |
| 2008 | 0(4) | 3(44) | 2(33) |
| 2009 | 1(8) | 11(92) | 0(57) |
| 2010 | 0(11) | 4(49) | 1(36) |
| 2011 | 0(1) | 2(72) | 2(56) |
| 2012 | 0(1) | 11(84) | 7(48) |
| 2013 | 0(2) | 16(110) | 6(56) |
| 2014 | | 16(110) | 3(35) |
| TOTAL | 1(36) | 80(590) | 24(376) |



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