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

**21 November 2016**

* **Summary**

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.

1.10 …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**…

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.**

* **Recommendations**

1. **Amend the Drafting of the Act**

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…

1. **Hunt Monitors**

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…

1. **Code of Practice**

2.7 The existing Scottish Mounted Foxhound Packs Fox Control Protocol 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…

1. **Definition of Offence – Recklessness**

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).

1. **Vicarious Liability**

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…

1. **Reverse Burden of Proof**

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).

1. **Time Limit on Prosecutions**

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

* **Fox Control/Management**

3.9 …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.

* **Enforcement and Prosecutions**

4.15 …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…

4.17 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 2016, 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.

* **Intention and Recklessness**

5.21 …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 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.**

* **Drafting**

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…**

* **Injured Animals and Orphaned Cubs**

5.36… 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.**

* **Flushing – Video Evidence**

6.1 …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.

* **Number of Guns**

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**.

6.12 …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.**

* **Rural Community**

6.13 …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….**

* **Allegations of Illegal Hunting**

6.14 …**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.**

* **Public Confidence and Accountability**

6.16 …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…

* **Terriers**

6.20 …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.**

6.22…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 … **The fox can cause considerable 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.**

6.26 …**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 fox. **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 Report 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.**

* **Monitors and Code of Practice**
  1. …While, if necessary, provision could be made in the Act for appointing, and regulating the role and functions of, monitors, 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. 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.
* **Fox Control Protocol – New Code of Practice**

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…**

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.

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

* **Definition of Offence of Hunting**

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.

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 …”

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.

[5.21 …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 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.]

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 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 1981 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…**

* **Number of Dogs**

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 …**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 Knott (taking full account of its limitations and the criticisms made of it) , 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.**

* **Reverse Burden of Proof**

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, i.e 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…

* **Penalties for Offences**

7.41 Little was said in submissions about the penalties available…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 Limits for Prosecutions**

7.43 A number of statues 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 102; Protection of Badgers Act 1992, section 12A; Nature Conservation (Scotland) Act 2004, section 46; and Wildlife and Countryside Act 1981, section 22). **Both the police and the Crown would welcome amendment of section 5 to extend the time bar in that way.**