

Date: 30 March 2016

Our Ref:

2002 Act Review
Wildlife Management Team
Natural Resources Division
Directorate for Environment and
Forestry
The Scottish Government
1-C North
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Edinburgh
EH6 6QQ

Chief Constable
Philip Gormley QPM



Telephone No: 101



Dear Lord Bonomy

PROTECTION OF WILD MAMMALS (SCOTLAND) ACT 2002

I write with reference to your call for evidence as part of the review of the above act.

Having canvassed the opinions of officers directly involved with the enforcement of this legislation I now submit a corporate response on behalf of Police Scotland (Annex A). I understand that this evidence is to be made publicly available and this has been taken into account when compiling the attached.

Could I ask that should your team seek further clarification on this correspondence it liaises with Sgt Andrew Mavin, Scottish Wildlife Crime Coordinator, [REDACTED] in the first instance.

Yours sincerely,

A handwritten signature in blue ink that reads "Malcolm Graham".

Malcolm Graham
Assistant Chief Constable Major Crime and Public Protection

ANNEX A

Protection of Wild Mammals (Scotland) Act 2002

It is an offence under the Protection of Wild Mammals (Scotland) Act 2002 (hereafter referred to as PWM(S)A 2002) to hunt a wild mammal with a dog and it was originally enacted to counter illegal coursing and hunting with dogs.

The Act creates a specific offence "to hunt a wild mammal with a dog", although the hunting of rabbits or rodents is an exception, provided that permission has been obtained from the owner or tenant of the land. The legislation is complex and the Wildlife and Countryside Act 1981 now offers alternative legislation to cover many poaching offences. As such, it is rare for the PWM(S)A 2002 to be used for anything other than illegal fox hunting.

The fluid nature of "The Hunt" or "Pest Control" of foxes can create issues in determining when an offence is being committed. The legislation includes terminology such as "stalking", "searching" or "flushing" without these being defined within the Act, and this has resulted in significant analysis and to a certain degree a level of confusion which can deflect from the original intention (or spirit) of the legislation. 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 animal 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.

In many incidents, the only way to establish intent behind an offence is for the suspect to explain their actions during Police interview. The precedents from "Cadder" and the use of "No Comment" interviews provided to Police by suspects (and on occasion witnesses) have made it more difficult to clarify the 'intent' of an individual who is suspected of involvement in an offence under the PWM(S)A 2002. Expert testimony to try to anticipate an offender's intent will always be contested with an equal counter-claim and this becomes an unreliable risk in court. Consequently, it becomes extremely difficult to provide sufficiency of evidence to submit cases under the PWM(S)A 2002 to the Crown Office and Procurator Fiscal Service because "deliberately" requires proving the intent of the individual concerned.

If the original intention of the PWM(S)A 2002 was for dogs to be used *only* for the purpose of searching to flush a mammal from cover to guns, then the legislation needs to reflect this rigorously. Section 2(1) states:

"Once the target mammal is found or emerges from cover it should be shot"

However, where those carrying out this form of "Pest Control" only have 2 guns out on the day (both a common occurrence and acceptable legal practice) and the fox subsequently emerges from a separate area and cannot be shot then it can result in the fox being stalked (this will include being followed by dogs). The legislation was designed to ensure the fox is humanely dispatched as it emerges rather than being stalked but this clearly isn't necessarily the case. A similar situation can occur where 'Terrier Men' are used once a fox has been trapped underground. If the exits available to the fox are not covered by netting or the available guns, there is a significant chance that the fox will escape. In this example, it would seem sensible to ensure legally that adequate netting is a requirement to ensure a reasonable expectation that a fox cannot escape from underground and that it can only emerge to where a waiting shotgun is available. It is suggested that the legislation would

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serve its purpose better if it allowed for specific requirements placed on those undertaking this form of pest control. This would clarify the actions to be taken and allow those enforcing the legislation to identify whether any transgression had taken place (it would also hopefully allow for increased instances of the fox being humanely dispatched at the earliest opportunity). It must be borne in mind that there are occasions of course where it is extremely difficult to have guns in place as soon as a fox is located. This can be for a variety of reasons including the unpredictability of wild mammals' movements as well as health and safety of the participants (whether people or dogs). The current lack of clarity in the legislation can lead to allegations by those opposed to this form of pest control that "guns were not in place" and this presents significant issues for those undertaking a lawful act, as well as those investigating alleged illegal activity.

The legislation currently places the onus of responsibility on a person to keep their dog(s) under control and within the constraints of legislation. From a fox control (or hunting) perspective, the burden of accountability would tend to lie solely with the individual who controls and directs the pack of hounds. It is that individual's responsibility to ensure all conditions have been adhered to prior to releasing the dogs and that a lawful activity therefore ensues. While this might seem appropriate, the question must also be asked whether it is in fact reasonable to expect that one individual can actually be held accountable for over 30 dogs, a number of guns, mounted riders and others participating in the event? It may be appropriate for this Review to consider such aspects of the legislation that would make specific requirements with regards to the ratio of dogs to persons on the day or on the number of guns required?

A further consideration could be given towards placing greater accountability and responsibility on the person who leads the hunt on the day to ensure lawful practice. While this is arguably covered by Section 1(3) of the act:

"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"

Vicarious Liability has been introduced to the Wildlife & Countryside Act 1981 to address illegal raptor persecution and perhaps the principle could be carried over to the PWM(S)A 2002 to ensure stricter compliance with law.

Strict liability legislation from Europe whereby suspects are required to provide explanations to the satisfaction of a court has been adopted in some wildlife legislation (Conservation (Natural Habitats, &c.) Regulations 1994 regarding bat roost disturbance, COTES Regulations 1997 Reg 8) and would go some way to overcoming the difficulties in proving intent. There is often considerable difficulty in identifying who is responsible for key functions (e.g. Who is leading the hunt? Who are the guns? etc.) on the day of a hunt because legally there is no requirement to record and make available such information (although best practice may determine that this is already available and Police Scotland is already working with Partners to establish a voluntary code of practice). If the legislation necessitated the nomination of certain individuals with strict liability for particular actions on the day and created an absolute offence to "hunt a wild mammal with a dog", with the burden of proof on the suspect to show that person was acting in accordance with one of the current exemptions, this would undoubtedly strengthen the legislation and restore its 'fitness for purpose.' Those participating in any lawful activity would know exactly what they were (and consequently weren't) responsible for and what actions can be carried out on both an individual and corporate basis. It is perhaps at this point also worth suggesting that to ensure that

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individuals were in no doubt around what a dog can do, the definition of "to hunt" should also include pursuing and chasing.

Possible amendments to the current legislation

Whilst issues of terminology, accountability and strict liability have been highlighted above, it is suggested that without the need for considerable change to the legislation, significant improvement could be made through only minor amendment to that which already exists. The following is therefore suggested in respect of **Sections 1(1), 2(1) and 10(1) of the PWM(S)A 2002**:

- **Section 1(1)** - A person who (~~delete DELIBERATELY~~) **HAS POSSESSION OR CONTROL OF A DOG THAT** hunts a wild mammal commits an offence.
- **Section 2(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) **IF THAT PERSON CAN PROVE TO THE SATISFACTION OF A COURT THAT** 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, **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.
- **Section 10(1)** - "to hunt" includes to search for, course, **CHASE OR PURSUE**

By amending the above existing legislation it would ensure that those responsible for dogs used in pest control keep those dogs under control and are accountable should their dogs chase or kill wild mammals. Further, it would ensure that legitimate hunting or "pest control" is tightly controlled with no allowance for perceived cruel or illegal practices or activities. Finally, it would create workable legislation from a criminal investigation perspective to allow for enhanced law enforcement opportunities.

Conclusion

The current legislation has become somewhat unworkable due to the exceptions available, the lack of clarity over key terminology and the lack of individual accountability. It is therefore suggested that the Review takes cognisance of the above in any subsequent recommendations made to the Scottish Parliament recognising that change must provide clarity to those undertaking legitimate pest control as well as those engaged in investigating illegal hunting. However, the aim of any amendments to existing legislation must be the

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absolute necessity to ensure that the welfare of the mammal involved is the primary concern on all occasions. Through clear explanation and direction of what can and cannot be undertaken by this legislation the welfare aspect will hopefully be secured.

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