



Law Society
of Scotland

Consultation Response

Improving the Protection of Wild Mammals in Scotland

31 January 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Improving the Protection of Wild Mammals. The committee has the following comments to put forward for consideration with regard to the specific questions which have been posed.

1. Features of Language in the Act

The questions in this section all concern the terminology used in The Protection of Wild Mammals (Scotland) Act 2002 (2002 Act). These relate to the absence of definitions, complexity and lack of clarity. The 2002 Act¹ made a number of changes to protect wild mammals and set out an offence of 'hunting'.² Where anyone is accused of that offence, if they can show that one of the exceptions³ applies, they would fall to be acquitted of any offence. Only one case has been reported to date that clarifies the interpretation of section 1⁴ which relates to the prosecution of a traditional fox hunt. This case resulted in an acquittal, as it concluded that the accused's behaviour fell within the exception concluding that '*the purpose of the Act was to protect wild mammals from being hunted with dogs but to allow the humane dispatch of pest species by shooting*'.

Though the 2002 Act made a start in banning hunting with dogs, it has subsequently faced a number of criticisms which have been identified in Lord Bonomy's review of the operation of the 2002 Act. This review is highly technical as it identifies, discusses and makes recommendations in relation to a number of legal, procedural and evidential difficulties with the 2002 Act. There is little more that we would seek to add.

¹ An Act of the Scottish Parliament to protect wild mammals from being hunted with dogs; and for connected purposes.

² Section 1 of 202 Act

³ Section 2 of the 202 Act

⁴ *Fraser v Adams* 2005 SCCR 54

We do fully agree that uncertainty as to if and when exactly any offence is committed is not desirable. That seems to be a constant thread in Lord Bonomy's review. That is compounded by the inevitable evidential problems in being able to establish by sufficient corroborated reliable and admissible evidence that a crime has actually been committed, given the remoteness of the location of such offences and the type of evidence that may be required. We note that is echoed at paragraph 6.15 where it states:

'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.....'

Opportunities may arise for clarification through judicial case decisions if problems arise with interpretation of any aspects of the 2002 Act. That seems to us not to present the best approach to adopt as there may be a substantial period of time, if ever, before the relevant circumstances of a case arise in which the legislation can be tested. That may be seen by the *Fraser* case being the only reported case to date in relation to section 1. Any interpretation may also be very case specific and not comprehensive and will not help in relation to the future consideration of other cases. This fully reflects fully Lord Bonomoy's views at paragraph 5.37.

1.1. Do you think the definition of 'to hunt' as provided in the 2002 Act should be more specifically defined?

Yes. We agree with the reasoning set out by Lord Bonomy that there appear to be a number of difficulties within the 2002 Act. With this opportunity to review the legislation, this provides an opportunity for the relevant amendments to be considered so that clarity and consistency can be achieved for those involved either when considering prosecution or advising accused in relation to their position in relation to a criminal offence. What the offence of *'hunting'* actually means lies at the core of the legislation and is central to any successful operation of the 2002 Act.

The problems with the interpretation of 'to hunt' have been outlined fully in Lord Bonomy's review which we fully support.

We were interested to understand the discussion as the meaning of *'hunting'* differs Scotland and England. Exactly what *'to hunt'* should mean is best addressed by those who are familiar with the practices adopted in the respective countries in *'hunting'*. Amendments in the light of the evidence presented at Lord Bonomy's review would seem to be well supported.

1.2. Do you agree with Lord Bonomy's suggestion that the word 'deliberately' in section 1(1) serves no useful purpose?

Yes. We would agree that the incorporation of an additional word tends to create an impression that the offence requires a higher standard of proof otherwise the inclusion of such a word seems to be redundant.

We do not consider that it is necessary to include any specific statement regarding criminal intention as it is difficult to understand when the actual activities comprising '*hunting*' under section 1 would arise accidentally. The potential defences to the actual activities are fully covered by the exceptions outlined in section 2. We note that an example has been included where someone's dog could accidentally go onto land and chase foxes which would not fall under the exceptions in section 2. We would stress the accidental aspect. Crimes do not arise accidentally.

Were any alternative wording to be considered instead of the use of 'deliberately', we would refer to the terminology used in relation to vandalism. There, there is reference to 'without reasonable excuse' and 'wilfully or recklessly'⁵ in relation to the destruction or damage of property belonging to another.

1.3. Do you think the Act would be clearer if 'searching' was included alongside 'stalking' and 'flushing' in section 2(1)?

Yes. We would refer to our answer at Question 1.1.

1.4. Is searching relevant to any other subsections?

Yes. We would refer to our answer at Question 1.1.

1.5. Do you think the Act would be improved if it included definitions of 'to stalk' 'to search' and 'to flush'?

Yes. What we would stress is that this consultation provides a chance to review the current legislation and how it is working.

Lord Bonomy's review does identify a number of issues whereby defining terms would bring clarity to the legislation. This helps those who need to be aware when behaviour is offending but also when considering whether the facts and circumstances justify prosecution.

Whether all these definitions need to be amended is a matter for those responsible for drafting the relevant legislation.

Certainly, the term 'to search' does seem to be especially problematic. Removing inconsistencies is to be welcomed.

⁵ Section 52(1) of the Criminal Law (Consolidation) (Scotland) Act 1995

1.6 What elements would you wish to see included in these definitions?

We would refer to paragraphs 5.23-5.36 of Lord Bonomy's review where there is a detailed analysis of what might be included within the definition.

1.7 Do you think section 2(3) should be framed more narrowly to remove any overlap with section 2(110) 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?

Yes. We support Lord Bonomy's position.

1.8. Do you think that the various areas of overlap and inconsistency between sections 2(1), 2(3), 3 (a) and 5 of the Act should be addressed in the manner suggested?

Yes. The areas of overlap and inconsistency are fully addressed by Lord Bonomy. We have nothing more to add.

1.9. Do you think the lawful means mentioned in section 2(2) should be specified?

Yes. There is a need to clarify what this means. Section 2(2) refers to the use of a dog in connection with the despatch of a wild mammal when flushed from cover or from below ground in order that it may be shot of '*killed by lawful means*'. Any method by which the wild mammal can be killed other than being shot should be specifically stated.

1.10 Do you think that there are any other inconsistent, inappropriate or unnecessary features in the Act which could be improved or do you think there are any terms in the Act which have not been covered above and should be addressed or have been omitted from the Act and should be included? Please identify them and suggest ways that they might be addressed?

We would reiterate our support for clarification of the relevant law.

Terriers

2.1. Do you agree with Lord Bonomy’s suggestion that the legislation should impose a restriction in line with the Code of Conduct of the National Working Terrier Federation that, wherever possible and practical only one terrier should be entered to ground at a time?

We have noted that the use of terriers can be ancillary to fox control using packs of hounds or other dogs. The acceptable and humane practice seems to be to allow only one terrier to enter the ground. That would seem to be the correct approach. Lord Bonomy’s review refers to a number of stakeholders who are best placed to advise following the development of any relevant Codes of Conduct referred to above.

We also note the suggestion at paragraph 6.30 of the consultation, to imposing a requirement to attach a purse net to any hole from which the fox might bolt which would restrain the fox and enable it to be immediately shot. Should that requirement be included?

3. Mental State required for Illegal Hunting

3.1. Do you agree with Lord Bonomy’s suggestions which seek to provide clarity on the questions of whether someone is hunting illegally (by finding ways to clarify the element of intent)?

We refer to our answer to question 1.1 above. We agree with the policy intention that ‘deliberately’ seems to infer a higher standard of proof.

We note the reference to similar wildlife protection legislation⁶ where the mental state required reflects the offence of ‘*knowingly causing and permitting*’. There are benefits in having consistency in practices across the wildlife policy areas.

4.1 Do you agree that we should explore a new vicarious liability provision whereby a landowner who permits a person or persons to deploy dogs to stalk search for and flush wild mammals over their land is guilty of an offence in the event that someone involved in such an activity commits an offence?

Should anyone other than the person charged with the relevant offence be prosecuted for an offence arising under the 2002 Act? We understand the comparison that has been made to vicarious liability⁷

⁶ section 21 and 33 of the Wildlife and Natural Environment (Scotland) Act 2011 and section 5(1)(f) of the Wildlife and Countryside Act 1981.

⁷ sections 18A and 18B of the Wildlife and Countryside Act 1981 (inserted by section 24 of the Wildlife and Natural Environment (Scotland) Act 2011)

offences created in relation to certain offences committed by an employee or agent. There seems to be a relevant argument to be made that a similar approach should be adopted here. There are some issues to be considered:

we do not know how many actual prosecutions have been undertaken in relation to either of these sections. Is it workable in practice? Has it made the employer more accountable?

how practical it would be to institute proceedings against the landowner will depend on the normal employment type relationships between the parties. Would it be likely that the relationship between the landowner and the accused would be able to establish the necessary close connection? What are the usual working employment arrangements between the landowner and the accused? Who would commonly be accused of offences under the 2002 Act? Are they actually an employee?

If the connection and duties between the accused and the landowner cannot be established, any landowner will be able to avail themselves of the due diligence statutory defence (paragraph 7.24 of the consultation).

Overall, there does seem to be merit in considering the creation of such an offence if it can be shown that any conviction of a landowner would endorse the policy intentions of the 2002 Act with regard to protecting wild mammals.

5. Burden of proof

5.1 Do you agree with the proposition that the onus should lie upon an accused to establish their conduct falls within one of the exceptions provided in the 2002 Act?

The Crown requires to prove the offence against the accused beyond reasonable doubt. The accused is innocent until proved guilty. This question is asking about the requirement for the accused to bring evidence forward to establish that his conduct falls within one of the exceptions provided for in the 2002 Act.

This should only impose an evidential as compared to a legal burden on the accused. Much of the behaviour falling into the category of one of the exceptions will tend to be led as part of the Crown case. It will be the accused's explanation of his conduct that will fall within one of the exception that will be pertinent to the defence. Such evidence should require to be uncorroborated and the standard of proof to be on the balance of probabilities.

We do not consider that the onus should present a legal burden on the accused. The burden of proving the case remains with the Crown. This position seems to be supported in the case of *Fraser* above.

Time Limit for prosecution

6.1 Do you agree with Lord Bony's recommendation that the time limit for prosecution under the 2002 Act should be extended and harmonised with other statutes which create wildlife offences?

We have no comment to make in relation to the extension and harmonisations of the 2002 Act with other wildlife crime. We can understand the arguments put forward by the Crown and Police Scotland. Prosecutions of any offences should be carried expeditiously where possible, having due regard for the interests of the accused and being brought to trial as soon as possible.

7. Any other comments

We have no other comments to make.



For further information, please contact:

Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 01314768206
gillianmawdsley@lawscot.org.uk