

HUNTING WITH DOGS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Hunting with Dogs (Scotland) Bill introduced in the Scottish Parliament on 24 February 2022.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 12–EN);
 - a Financial Memorandum (SP Bill 12–FM);
 - a Delegated Powers Memorandum (SP Bill 12–DPM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 12–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

POLICY OBJECTIVES OF THE BILL

4. The Hunting with Dogs (Scotland) Bill (“the Bill”) will repeal and replace the Protection of Wild Mammals (Scotland) Act 2002 (“the 2002 Act”) which makes it an offence to hunt a wild mammal using a dog in Scotland except in limited specified circumstances.
5. The Bill is being introduced to address widespread concerns that foxes and other wild mammals are being hunted (and killed) by dogs in contravention of the intention of the 2002 Act. It therefore seeks to minimise the risk of wild mammals being caught and killed by dogs in the course of hunting by placing restrictions on their use.
6. The Bill will broadly replicate the core provisions of the 2002 Act but will address the inconsistencies and ambiguities in the language of the 2002 Act to make the law easier to understand and to enforce. The use of dogs to hunt wild mammals in Scotland will continue to be banned except in limited, specified circumstances and for certain permitted activities. Those activities do not include using a dog to chase or kill a wild mammal. Therefore, as was the position under the 2002 Act, it will be an offence to chase and/or kill a wild mammal using a dog.

7. In addition, the Bill will introduce new measures to:

- Limit the number of dogs that can be used to search for, stalk or flush wild mammals from cover above ground to two.
- Introduce a licensing regime for the use of more than two dogs to search for, stalk or flush wild mammals above ground in certain limited circumstances.
- Limit the number of dogs that can be used to search for or flush foxes or mink from cover below ground to one.
- Prohibit the activity known as trail hunting (the activity of directing a dog to find and follow an animal-based scent).

8. The Bill only makes provision in relation to the use of dogs to hunt wild mammals. It does not include provisions on other methods of hunting or controlling wild mammals. Certain species are protected by law, however the Bill does not contain provisions concerning species protection. The law regulating protected species, such as legislation which makes it an offence to kill, injure or capture certain species where they are of threatened conservation status, is contained in various other pieces of wildlife legislation, such as the Wildlife and Countryside Act 1981, and the Conservation (Natural Habitats, &c.) Regulations 1994. The Bill does not make provision to regulate the welfare of domesticated mammals: domestic animals are protected under the Animal Health and Welfare (Scotland) Act 2006.

9. The Scottish Government's Programme for Government 2017-18 contained a commitment to '*progress Lord Bonyon's recommendations to strengthen the law on foxhunting*', however the need for Parliamentary time to debate and implement emergency Covid-19 legislation meant that this Bill was not introduced in the last Parliamentary term.

10. The 2021-22 Programme for Government restated the commitment to introduce a Bill to strengthen the law relating to the use of dogs to hunt foxes and other wild mammals in the current Parliamentary session, including the introduction of further measures such as preventing trail hunting.

Legislation to be replaced

The Protection of Wild Mammals (Scotland) Act 2002

11. Wild animals in Scotland are protected by several different pieces of legislation. This allows the Scottish Government to meet national and international obligations to conserve rare and vulnerable species by:

- Making sure they are protected and managed in a fair and humane way,
- Addressing wildlife crime through co-ordinated enforcement,
- Managing conflicts between mankind and wildlife where they arise,
- Protecting wildlife from cruel or inappropriate management activities.

12. The 2002 Act was an important landmark for wildlife protection in Scotland and was the first piece of legislation in the UK to ban traditional foxhunting and hare coursing. The 2002 Act governs the use of dogs to hunt certain wild mammals. It protects wild mammals in Scotland from being chased and killed by dogs. The Act states that:

- A person who deliberately hunts a wild mammal with a dog commits an offence,
- It is an offence for an owner or occupier of land to knowingly permit another person to enter or use it to commit any such offence, and
- It is also an offence for an owner of, or person having responsibility for, a dog to knowingly permit another person to use it to commit any such offence.

13. However, the 2002 Act provides a number of exceptions to the offence of hunting. It allows a person to use dogs to stalk, search for and flush wild mammals in certain specified circumstances, for example to assist with predator control in order to protect livestock, provided that the target animal, once flushed by dogs, is shot (or killed by a bird of prey) once safe to do so.

14. The 2002 Act also contains ancillary provisions about enforcement, legal proceedings and the powers of courts dealing with offenders.

15. Where hunting is permitted, the 2002 Act does not place any limit on the number of dogs that can be used to flush wild mammals nor does it place any prohibitions on the practice of trail hunting.

16. In 2020, the 2002 Act was amended by the Animal and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 which increased the maximum penalty for the offence of hunting a wild mammal with a dog to five years and/or an unlimited fine, and removed the time bar for bringing forward cases for prosecution to allow enforcement authorities more time to collect sufficient evidence.

Concerns with the 2002 Act

17. Since the 2002 Act came into force, the Scottish Government has continued to hear concerns from stakeholder organisations and the public about hunting with dogs. The legislation has been criticised for being complex, and needs to have greater clarity to make it more effective.

18. In particular, Police Scotland identified weaknesses in the 2002 Act, including the absence of definition of certain expressions, the number and complexity of the overlapping exceptions to the offence of “deliberately hunting a wild animal with a dog” and a general consequent lack of clarity in the legislation. As a result of these issues, they explained that obtaining sufficient evidence to prove the principal offence of deliberately hunting a wild mammal with a dog was extremely difficult.

19. Animal Welfare stakeholders such as the League of Cruel Sports also offered the view that the low number of successful prosecutions under the 2002 Act may be explained in part by the difficulties of interpretation presented to both police and prosecutors.

20. In order to address these concerns, in 2015 the Scottish Government appointed Lord Bonomy to undertake a review of the 2002 Act to consider whether it provided the necessary level of protection for foxes and other wild mammals, while at the same time allowing effective and humane control of those animals where needed.

21. Lord Bonomy's report¹ to the Scottish Government (the "Bonomy Report") made a number of recommendations, and he noted that "*there are occasions ... 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*" and that "*in general 20% or more of foxes disturbed by hunts are killed in this way by hounds*".

22. Lord Bonomy noted that there were legitimate grounds for suspicion that the present arrangements were providing cover for the unlawful use of dogs, contrary to the intention of the 2002 Act, and that such illegality raised concerns about the welfare of foxes and other wildlife.

23. The Bonomy Report also highlighted that the 2002 Act contains inconsistencies and ambiguities in language that unduly complicate the detection, investigation and prosecution of alleged offences, and Lord Bonomy recommended that it be amended to provide greater consistency and clarity. For example in chapter 5 of his report Lord Bonomy notes that:

"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."

24. He goes on provide some examples of where those consistencies arise such as:

"There is no obvious explanation for section 2(1) [of the Protection of Wild Mammals (Scotland) Act 2002] 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." And:

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."

25. The Scottish Government accepted the majority of Lord Bonomy's recommendations for legislative reform with particular regard given to the issues raised with the interpretation and enforcement of the 2002 Act. However, Lord Bonomy's recommendations that consideration be given to the introduction of vicarious liability and reverse burden of proof have not been taken forward.

26. While careful consideration was given to both of these recommendations it was felt that such an approach was not necessary and that the underlying issues (i.e. the difficulties of detecting, investigating and prosecuting offences under the Act) that informed these recommendations could better be addressed through other means. We comment further on this below in our consideration of alternative approaches.

¹ [Report of the Review of the Protection of Wild Mammals \(Scotland\) Act 2002](#)

Changes being made by the Bill

27. The Bill will broadly replicate the provisions of the 2002 Act but will make certain modifications to further limit the circumstances in which it is permitted to search for, stalk or flush a wild mammal using a dog.

28. The Bill addresses the language issues identified by Lord Bonomy, closes loopholes in the existing legislation, facilitates the effective detection and prosecution of wildlife crimes and enhances the welfare of wild mammals by bringing in additional measures to reduce the risk of wild mammals being killed by dogs.

29. The Bill will also, subject to certain modifications, broadly replicate the provisions of the 2002 Act which provide for powers of entry, search and seizure in relation to the investigation of offences, and allow courts to disqualify a person convicted of an offence from owning or keeping a dog.

Limit of two dogs above ground

30. In his review of the 2002 Act, while Lord Bonomy did not recommend a limit on the number of dogs allowed to flush a fox from cover, he did conclude that there is a basis for suspecting illegal hunting with dogs does take place and that, further, in around a fifth of cases where dogs are used to hunt foxes, the foxes are killed by the dogs.

31. In England and Wales, the Hunting Act 2004 also prohibits the use dogs to hunt wild mammals, unless the hunting is exempt, and limits the number of dogs allowed to be used to flush wild mammals from cover to be shot to two.

32. The focus of the Bill is to enhance the protection for wild mammals and to significantly reduce the risk of wild mammals being killed by dogs. By limiting the number of dogs allowed to search for, stalk or flush a wild mammal from cover to two, the Bill will mitigate the risk of a person losing control of one or more dogs within a larger pack. This will, in turn, limit the risk of a wild mammal being caught and killed by a pack of dogs, and address concerns about the effectiveness of the 2002 Act.

33. The Bill contains a limited number of exceptions to the offence of hunting a wild mammal using a dog. The exceptions only apply where a person is using a dog to search for, stalk or flush from cover a wild mammal for the specific purposes set out below. In addition specific conditions must also be met for the exception to apply.

Exception: management of wild mammals above ground

34. This exception applies if a person is using a dog to search for, stalk or flush from cover a wild mammal for the following purposes:

- Preventing serious damage to livestock, woodland or crops.

35. This would allow, for example, a person to use up to two dogs to search for and flush a fox from cover, so that it could be shot in order to protect lambs or other farmed animals from predation.

- Preventing the spread of disease

36. This would allow, for example, the use of up to two dogs to locate a wild mammal infected with a transmittable disease, so that it can be shot, in order to prevent it from spreading that disease to other wild mammals.

- Protecting human health

37. This would allow, for example the use of up to two dogs to locate a wild mammal which is posing a risk to human health so that it can be shot.

38. The exception also applies if a person is using a dog to search for and retrieve a wild mammal which has been killed as a result of the activity mentioned above.

39. In addition certain conditions must be met in order to rely on this exception: no more than two dogs are used; the dog must be under control; reasonable steps are taken to ensure that any dog used in the activity does not.

40. join with others to form a pack; permission for the activity has been given by the owner of the land; the wild mammal must be humanely killed as soon as reasonably possible. These conditions seek to minimise the suffering of wild mammals which need to be killed for the purposes mentioned above.

Exception: falconry, game shooting and deer stalking

41. This exception relates to field sports and related pursuits, and applies if a person is using a dog to search for, stalk or flush from cover a wild mammal with the intention of providing quarry for falconry, game shooting or deer stalking, or to search for and retrieve a wild mammal which has been killed as a result of those activities, and certain conditions are met. For example, this would permit the use of a dog to locate a deer that has been shot and wounded so that it can be humanely despatched or to flush a wild mammal so that it can be killed by a bird of prey.

42. In order to reduce the risk of a wild mammal being chased and killed by a dog the exception will only apply if certain conditions are met: no more than two dogs are used; the dog must be under control; reasonable steps are taken to ensure that any dog used in the activity does not join with others to form a pack; permission for the activity has been given by the owner of the land; and, the wild mammal must be humanely killed as soon as reasonably possible.

43. In addition to the purposes above, the Scottish Government also recognises that dogs are used to search for and flush wild mammals for purposes that provide an environmental benefit as set out in the purposes below.

Exception: environmental benefit

44. This exception applies if a person is using a dog to search for, stalk or flush from cover a wild mammal, with the intention of killing, capturing or observing it as part of a scheme for one or more of the following purposes:

- Preserving, protecting or restoring a particular species

45. This would allow, for example, the use of up to two dogs to search for, stalk or flush wild mammals so that they can be shot, in order to protect a species with a low or declining population, for example birds such as lapwings and curlews.

- Preserving, protecting or restoring the diversity of animal or plant life

46. This would allow, for example, the use of up to two dogs to stalk deer that are causing unsustainable damage to native woodland, or the use of up to two dogs to flush wild mammals from cover so that they can be counted as part of a census and then released without harm.

- Eradicating an invasive non-native species of wild mammal from an area

47. This would allow, for example, the use of up to two dogs to search for hedgehogs on Uist so that they can be captured and relocated to the mainland in order to protect species native to that island.

48. This exception also applies if the person is using a dog to search for and retrieve a wild mammal which has been killed as a result of the activity referred to above.

49. In order to reduce the risk of a wild mammal being chased and killed by a dog, the environmental benefit exception will only apply if certain conditions are met: no more than two dogs are used; the dog must be under control; reasonable steps are taken to ensure that any dog used in the activity does not join with others to form a pack; permission for the activity has been given by the owner of the land; the wild mammal must be either captured, observed and released, or humanely killed as soon as reasonably possible.

Licensing regime

50. The Bill will also allow NatureScot to issue licences for the use of more than two dogs in very limited circumstances for the wildlife management above ground and environmental purposes listed above, but not for the exceptions relating to falconry, game shooting and deer stalking or management of foxes and mink below ground.

51. In his review of the 2002 Act, Lord Bonomy commented on the restriction of using only two dogs, “...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.”. This point was supported by several stakeholders, including the Scottish

Gamekeepers Association, the Scottish Countryside Alliance and members of the public who responded to the consultation on this issue in 2021.

52. Acknowledging that in some circumstances such as those noted by Lord Bonomy above, it may not always be possible to effectively flush wild mammals from cover using only two dogs, the Bill will introduce the availability of licences to use more than two dogs for the following purposes.

Licences for wildlife management

53. A person can apply for a licence permitting the use of more than two dogs to search for, stalk or flush from cover a wild mammal with the intention of killing it for one or more of the following purposes:

- Preventing serious damage to livestock, woodland or crops
- Preventing the spread of disease
- Protecting human health

54. The licence will also include the ability to use the dogs to search for and retrieve a wild mammal which has been killed as a result of the activity described above.

55. For all of the above purposes, an applicant must be able to demonstrate that there is no other solution which would be effective in achieving the purpose in relation to which the application for a licence is being made. For example, a person applying for a licence to use more than two dogs to protect poultry from fox predation would have to demonstrate why other lethal solutions would not be effective, such as lamping or the use of two dogs to search for, stalk or flush from cover a wild mammal, and also demonstrate that they have considered non-lethal solutions which could include reinforced fencing or cooping the poultry at night.

56. In addition, NatureScot will only permit the use of the minimum number of dogs which they are satisfied would be effective in achieving the purpose in relation to which the application for a licence is being made. This condition recognises that the use of larger packs of dogs increases the risk of a wild mammal being chased and killed, but also recognises the increased risk of disturbance and harm to other wildlife, including birds and protected wild mammals.

57. The Bill will provide that licences can be granted for a maximum period of 14 days. Those days have to be within a period of 14 consecutive days but do not themselves have to be consecutive. For example, a licence could allow the use of more than two dogs for one of the purposes for any three days between 1st and 14th February. The number of days that a licence will be valid for, within the 14 days, will be left to the discretion of NatureScot. This allows NatureScot to only issue licences that are necessary to achieve the required purpose, but to allow the applicant some flexibility in the execution of the licensable activity, for example to account for adverse weather conditions.

Licences for environmental benefit

58. A person can apply for a licence permitting the use of more than two dogs to search for, stalk or flush from cover a wild mammal with the intention of killing, capturing or observing it as part of a scheme for one or more of the following purposes:

- Preserving, protecting or restoring a particular species
- Preserving, protecting or restoring the diversity of animal or plant life
- Eradicating an invasive non-native species of wild mammal from an area

59. The licence will also include the ability to use the dogs to search for and retrieve a wild mammal which has been killed as a result of the activity described above.

60. For all of the above purposes an applicant must be able to demonstrate that the killing, capturing or observing the wild mammal will contribute towards a significant or long-term environmental benefit, and that there is no other solution which would be effective in achieving the purpose in relation to which the application for a licence is being made. Therefore an applicant must satisfy an additional test for the grant of licences for an environmental benefit purpose as compared to licences for a wildlife management purpose.

61. Licences under this exception can be granted for a maximum of two years. However, as with licences for wildlife management purposes, NatureScot has the discretion to limit the number of days such a licence will be valid for and they will only issue licences for the period of time that is necessary to achieve the purpose.

62. As with licences for wildlife management above ground, NatureScot will only permit the use of the minimum number of dogs which they are satisfied would be effective in achieving the purpose in relation to which the application for a licence is being made.

63. This type of licence would allow conservation bodies to undertake longer term wildlife management projects that require the use of more than two dogs to search for, stalk or flush wild mammals from cover, for example, in the search for hedgehogs on Uist, so that they can be trapped and returned to the mainland in order to protect the eggs of ground nesting birds on the island.

64. The licensing provisions in the Bill closely mirror the established and well-understood approaches to licensing of wildlife management operations set out in the Wildlife and Countryside Act 1981 and the Conservation (Natural Habitats, &c.) Regulations 1994.

65. These operations will be managed by NatureScot on behalf of the Scottish Government.

66. As with other licensing regimes, NatureScot will issue detailed guidance that outlines the evidence that an applicant must submit when applying for a licence. NatureScot will consult with stakeholders as part of the development of that guidance.

67. NatureScot do not charge the applicant for licences relating to wildlife management, as the vast majority of purposes for which licences can be issued reflect a need to act for a public interest,

such as licences to survey for protected species, or control of one species to protect another. In keeping with this approach this Bill does not mandate charges for licences issued under the provisions of this Bill.

68. However, although NatureScot does not currently operate licences on a cost recoverable basis, the Scottish Government/Scottish Green Party Shared Policy Programme contains the commitment to review the wider species licensing system and assess the potential to apply the principle of full cost recovery to species licensing. The Bill will therefore allow for the possible introduction of charges for licences issued under these provisions at a later date, by providing that the licensing authority may charge a reasonable fee.

Limit of one dog below ground

69. When a wild mammal, typically a fox, goes to ground, terriers are commonly used to locate the fox underground or 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 terrier man and despatched.

70. The Code of Conduct of the National Working Terrier Foundation (NWTF) recommends that, wherever possible and practical, only one terrier should be entered to the ground at a time.

71. In England and Wales, the Hunting Act 2004 provides that a dog can be used below ground, as long as the stalking or flushing out does not involve the use of more than one dog below ground at any one time.

72. In his review of the 2002 Act, Lord Bonyon noted that the current legislation does not impose a restriction on the number of dogs that can be used below ground to flush foxes or mink and that “*it seems sensible that it should*”.

73. Lord Bonyon also goes on to discuss the importance of allowing dogs to be used below ground, “*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.*”

74. However, whilst there are justifications for continuing the use of terriers or other dogs underground to flush fox or mink, the Scottish Government’s intention is to ensure that the practice is carried out humanely and is not abused. As such, the Bill will introduce new provisions which limit the use of dogs below ground to one in order to limit, as far as possible, the risk of harm and potential for animals getting injured or trapped below ground. The Bill will therefore allow an exception relating to the management of foxes and mink below ground. This exception applies if a person is using a dog to search for or flush a fox or mink from below ground with the intention of killing it for one or more of the following purposes:

- preventing serious damage to livestock, woodland or crops,
- preventing the spread of disease,

- protecting human health,
- relieving the suffering of an injured or dependent fox or mink.

75. In addition certain conditions must be met in order to rely on this exception: no more than one dog is used; the dog must be under control; permission for the activity has been given by the owner of the land; if the fox or mink is found or emerges from below ground it is humanely killed as soon as reasonably possible.

Prohibition of trail hunting

76. In his review of the 2002 Act, Lord Bonomy described trail hunting as “...*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.*”

77. In England and Wales, trail hunting became more widely established following the prohibition of hunting wild mammals with more than two dogs by the Hunting Act 2004. There have been occasions where packs hunting a trail have encountered a fox and the fox has been hunted in contravention of English law.

78. This situation was acknowledged by Lord Bonomy: “*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.*”

79. In England in 2021, a person was convicted of an offence as a result of that person encouraging others to hide the illegal hunting of live foxes with dogs by using trail hunting as a ‘cover’. Prior to this, in 2020, Forestry England pre-emptively suspended all licences for trail hunting in the forests they manage in response to confirmation that the police were investigating that case. Following the conviction, the National Trust announced the charity will no longer issue licences for trail hunting on Trust land, and Natural Resources Wales announced it will also no longer allow trail hunting to take place on its land.

80. The provisions in the Bill will take pre-emptive action to prevent trail hunting becoming established in Scotland. This is in order to address the risk of a pack of dogs being used for trail hunting accidentally picking up a natural trail which could result in them chasing a wild mammal, and to avoid the activity being used as a cover for illegal hunting, following the introduction of a two dog limit.

81. However, in the course of the public and stakeholder consultation on this issue, it became clear that there are many reasons that a person may wish to lay a trail of an animal-based scent other than for the purpose of trail hunting e.g. to train dogs to locate injured deer or to find invasive stoats or hedgehogs as part of the conservation projects discussed above. These activities are undertaken by a wide range of people including enforcement agencies, professional dog training groups, and recreational deer stalkers.

82. The Bill will therefore make it an offence to engage or participate in trail hunting, that is the activity where a dog is directed to find and follow an animal-based scent which has been laid for that purpose. The Bill will include an exception to the offence where a person directs a dog to find and follow an animal-based scent which has been laid for that purpose, or lays an animal-based scent for a dog to find and follow, in order to train a dog or dogs for a lawful purpose, for example to train a dog for the purposes of locating non-native invasive species, and provided certain conditions are met. These conditions are that no more than two dogs are used, that any dogs are under control, that reasonable steps are taken to ensure that the dogs do not join up with any other dogs to form a pack, that permission to use the land for this activity has been given by the owner of the land, and that steps are taken to ensure that no wild mammal is pursued, injured or killed.

83. The limit of two dogs, along with the other conditions, will provide a balance between preventing trail hunting with packs of dogs and allowing the legitimate training of dogs using animal-based scents. Limiting the number of dogs that can find and follow an animal-based scent to two will mitigate the accidental risk of wild mammals being killed by dogs during training activities, and ensure that trail hunting cannot be used as a cover for illegal hunting as seen in England and Wales.

Clarification of language

84. In addition to the new provisions above, the Bill will also aid the detection of crime, and enforcement of the legislation, by clarifying the language and including definitions of the terms used where appropriate.

85. The Bill defines “hunting” as including, in particular, searching for and coursing (and related expressions are to be construed accordingly). However, the exceptions to the offence of hunting a wild mammal using a dog only permit a person to use a dog to search for, stalk or flush from cover a wild mammal for particular purposes as set out above.

86. The Bill defines a “wild mammal” as any mammal (other than a human) which is living in a wild state, is of a species recognised as living in a wild state in the British Islands (as defined in schedule 1 of the Interpretation Act 1978), or has been deliberately released from temporary or permanent human control. However, a rat, a mouse, or a mammal living under temporary or permanent human control does not fall within the definition of “wild mammal”.

87. The stakeholder and public consultation on the definition of “wild mammal” highlighted that those who are suspected of undertaking hare coursing, an illegal activity under the 2002 Act, frequently use the cover that they are legally using dogs to hunt rabbits. Including rabbits in the definition of wild mammal will aid in the detection and enforcement of hare coursing offences by removing this activity as a potential cover.

Disqualification and deprivation orders

88. The 2002 Act currently makes provision for disqualification orders to be made where a person is convicted of an offence relating to hunting a wild mammal with a dog. This allows the

court to make an order in relation to the care or disposal of an offender's dog or disqualify the offender, for such period as it thinks fit, from having custody of any dog.

89. The Bill makes similar provision to the existing disqualification orders under the 2002 Act but provides greater transparency in relation to the orders, and greater clarity in relation to the process of seizure of animals where a person breaches such an order and the process by which an individual can appeal against such an order.

90. The Bill also includes new provisions for deprivation orders to be made in relation to any dogs or horses used in the commission of an offence under the Bill.

91. The ability to issue a deprivation and/or disqualification order will provide the courts with greater flexibility in the range of penalties available to them where a person is convicted of such an offence. This will allow a court to take full account of all the facts of a case and the penalties awarded to more closely reflect the nature and impact of any specific offence.

92. For example, a deprivation order may be imposed upon a person convicted of hunting a wild mammal using a dog, so that they must relinquish possession or ownership of a dog or horse used in the commission of the crime. The activity of trail hunting is usually undertaken by persons participating on horseback. While hunting with dogs, in particular fox hunting, can be carried out by persons on foot, it can also be undertaken by persons participating in organised mounted hunts in Scotland. The policy rationale behind this provision is to ensure that anyone convicted of a relevant offence is deprived of the "tools" used in the commission of that offence. The intention is to limit the ability to reoffend. The person subject to a deprivation order may also be liable for any costs incurred in the carrying out of the order, or those that arise from the care of the dog or the horse.

93. The courts will also be able to impose disqualification orders, in addition to any other penalties or deprivation orders, that prevent a person convicted of such an offence from owning, keeping, or working with dogs for a specified period of time.

Penalties

94. For existing offences such as hunting a wild mammal using a dog and the ancillary offences related to that principal offence, the penalties will remain as introduced in the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020. The principal offence of hunting a wild mammal using a dog may attract a maximum of five years imprisonment and/or an unlimited fine on conviction on indictment. The principal offence on summary conviction and the ancillary offences of allowing a dog or land to be used in commission of an offence will attract a maximum of twelve months imprisonment and/or a £40,000 fine.

95. The new offence of engaging or participating in trail hunting and the associated ancillary offences will attract a maximum penalty of twelve months imprisonment and/or a £40,000 fine.

96. The Scottish Sentencing Council has indicated its intention to develop sentencing guidelines on environmental and wildlife offences. The likely timescale for this work, which will

depend in part on any relevant legislative changes which may be made, will be announced by the Council in due course.

ALTERNATIVE APPROACHES

97. The main alternative approach considered was to not amend or replace the 2002 Act. This would be significantly at odds with the findings of Lord Bonomy's review of the 2002 Act, and the views expressed in response to Scottish Government consultations which clearly signal the public's growing concerns regarding animal welfare and in particular the use of dogs to hunt wild mammals. This approach would also not address the need to clarify the language of the Act in order to clear up the ambiguities and close the loopholes in the existing legislation.

98. Retaining the 2002 Act is not considered an appropriate approach as the legislation will continue to unduly complicate the investigation and prosecution of hunting with dogs offences and pose difficulties in ensuring illegal hunting is effectively addressed. It would also not address the risk of wild mammals being accidentally killed by a pack of dogs during the course of permitted hunting activities.

99. Consideration was given to Lord Bonomy's recommendations on reverse burden of proof and vicarious liability, however, these have not been taken forward for the reasons set out below.

Vicarious liability

100. In his review of the 2002 Act, Lord Bonomy discussed the option of including vicarious liability in the legislation recommending that:

'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.'

101. The inclusion of such an offence would make it possible for managers or employers to be prosecuted for offences relating to hunting with dogs committed by their employees or agents.

102. Vicarious liability requires an employee/agent relationship to be in place or a situation where services are contracted out. In our stakeholder and wider consultations, we have not seen any evidence to suggest that such a relationship or situation is being abused to encourage illegal hunting with dogs.

103. While the Bill does not introduce vicarious liability, it contains ancillary offences to the principal offence and the offence of trail hunting, which are similar to those in the 2002 Act. The ancillary offences make it an offence for a person to knowingly cause or permit their land or dogs to be used for illegal hunting or trail hunting.

104. As a result of the implementation of the majority of Lord Bonomy's recommendations, in addition to the removal of inconsistencies and ambiguities, the law will be easier to understand and therefore easier to enforce. As such, it is not considered necessary or justifiable to introduce vicarious liability.

Reverse burden of proof

105. Lord Bonomy also discussed a reversal of the burden of proof, recommending that ‘*The Act should be amended to provide that the onus of establishing that conduct fell within one of the exceptions lies upon the accused*’.

106. He outlines the issues surrounding the reversal of the burden of proof in his review of the 2002 Act. In this context, the proposal to reverse the burden of proof would place the imposition on the accused of a legal/persuasive burden of proof to show that their actions fell within one of the legal exceptions. This would be a departure from the principle in Scots law that the burden of proof lies with the prosecution.

107. Lord Bonomy acknowledged in paragraph 7.27 of his report “[t]he issue is a controversial one likely to give rise to legal dispute”. Article 6(2) of the European Convention on Human Rights (ECHR) provides that ‘everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’.. The Scottish Government does not believe that there is adequate justification for a departure from this key principle of criminal law.

108. As a result of the implementation of the majority of Lord Bonomy’s recommendations, in addition to the removal of inconsistencies and ambiguities, the law will be easier to understand and therefore easier to enforce. It is anticipated that the hunting of wild mammals with dogs will be regulated in a far more efficient and effective manner making prosecutions more likely for those who break the law. As such, it is not considered necessary or justifiable to introduce a reverse burden of proof.

Complete ban on the use of dogs to hunt wild mammals

109. While there is evidence to suggest that dogs are being used to illegally hunt wild mammals in Scotland, and that this needs to be addressed, dogs play an important role in wildlife control. A complete ban on the use of dogs to search for, stalk or flush wild mammals could have unintended detrimental impacts. For example, it could impact on the ability of land managers and deer stalkers to locate injured deer, particularly at night, resulting in poorer outcomes for deer welfare. It could also reduce the effectiveness of programmes to eradicate non-native species which need to be controlled to protect biodiversity. Therefore a complete ban on the use of dogs was not one of the options considered in this Bill.

Limit on the number of dogs used to hunt wild mammals

110. The majority of individuals who responded to the consultation (73.5%) were in favour of a strict two dog limit (as is the case in England and Wales). This was supported by some stakeholders including OneKind and the League Against Cruel Sports. Reasons given for this position included views that where dogs are being used, a maximum of two dogs is sufficient. Concerns were raised that a licensing regime could create a loophole by which illegal hunting could continue and that the use of more than two dogs carried a higher welfare risk to wild mammals.

111. By contrast, in his report Lord Bonomy concluded that –

‘I am persuaded by the submissions and such other evidence as there is...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’

112. This view was shared by a number of stakeholders representing those involved in the management of predators such as the Scottish Countryside Alliance.

113. The approach taken in this Bill to introduce a two dog limit, with a licensing regime to allow for the use of more than two dogs in certain limited circumstances, was felt to provide a balanced approach that would meet the objective of the Bill. The objective is to improve the welfare of wild mammals by reducing the instances of dogs being hunted and killed, whether accidentally or otherwise by dogs, while at the same time ensuring that effective predator control can continue to be undertaken.

114. There was no consensus amongst respondents or stakeholders on what the maximum number of dogs used to hunt wild mammals should be, with a range of numbers from 3 to 100 being suggested.

115. Some suggestions will also put forward that the number of dogs permitted should be based on the type or size of the territory over which the wild mammals were being flushed.

116. Reflecting on this, the approach taken in this Bill is that rather than specify a maximum number of dogs that can be used, the licensing authority will only be able to grant a licence for the minimum number of dogs necessary to undertake the purpose for which the licence has been granted.

Maximum length of licence

117. While the licences granted for most of the purposes set out within the Bill will be restricted to a maximum of 14 days, the licensing authority will have the power to consider issuing licences granted under the environmental purpose for a longer period of up to two years. This is to reflect the fact some of the activities for which this licence can be granted, such as the eradication of non-native species, may be being undertaken as part of an established long-term project and that therefore it may not always be practical to issue a new licence every 14 days for these activities.

Trail hunting

118. While introducing a full ban on the laying of any animal-based trail for any purpose was considered during the early stages of the policy development, evidence from stakeholders and from respondents to the consultation demonstrated that there was a need to make provision to allow trails to be laid for certain purposes such as the training of police dogs or dogs used to locate injured deer.

Benefits of proposed amendments

119. The key benefit of the amendments made by the Bill is that:

- the risk of wild mammals being chased and killed by dogs should be significantly reduced, while allowing wildlife management to continue,
- the prohibition of trail hunting will pre-emptively close a potential loophole as seen in England and Wales, and
- the clarity in the language used, and definition of appropriate terms will remove the complexity that Police Scotland and the Crown Office and Procurator Fiscal Service currently face when investigating and prosecuting offences under the 2002 Act.

CONSULTATION

120. A public consultation on the proposals relating to Lord Bonomy's recommendations was undertaken in 2018² and a second consultation relating to the proposals announced in Parliament in 2019 was undertaken in 2021³.

121. The 2021 consultation received over 10,000 responses, the majority of which agreed with the principles of the Bill. Full analysis of the responses is still to be undertaken and will be published later in the year.

122. As well as formal public consultations, the Scottish Government has had various discussions with those who have an interest in the Bill either because they might be affected by it or because they have an interest in the welfare of wild mammals.

123. The responses to both consultations and the stakeholder discussions informed the provisions in the Bill and some examples of this consideration are provided in the section 'Alternative Approaches'.

Consultation on Lord Bonomy's recommendations

124. The public consultation on Lord Bonomy's suggested reforms to the 2002 Act took place between 6 October 2017 and 31 January 2018, and received 18,792 responses.⁴ These included 295 substantive (i.e. personalised) submissions and 18,497 responses submitted through five different campaigns. The 295 substantive responses were submitted by 25 organisations and 265 individuals. All but two of the organisational respondents fell into one of two categories: (i) those with an interest in countryside management and countryside sporting (13) and (ii) animal welfare charities and campaign groups (10). A full list of the organisations who responded is set out in Annex 2 of the consultation analysis report. The vast majority of respondents took advantage of a "free-text" comments facility in the consultation to say that they were in favour of further restrictions with a particular focus on securing an end to mounted fox hunting.

² [Improving the Protection of Wild Mammals in Scotland: consultation](#)

³ [Use of dogs to control foxes and other wild mammals: consultation](#)

⁴ [Improving the Protection of Wild Mammals: consultation analysis](#)

125. Full analysis of this consultation can be found on the Scottish Government website.

126. The majority of respondents agreed that the 2002 Act would be improved if it included clearer language, including:

- the legislation should specify a maximum number of dogs allowed to be used in flushing activities,
- there should be a limit of one dog underground set out in legislation,
- providing a definition of cover

127. Animal welfare charities, campaign groups and their supporters, who were among the individual and campaign respondents, expressed support for Lord Bonyon's proposals. They expressed the view that a lack of clarity and inconsistency in the legislation was hindering enforcement and prosecution and they called for certain aspects of the 2002 Act to be strengthened to remove perceived loopholes and reduce the likelihood of a wild mammal being killed by dogs.

128. However, countryside management and sporting groups and their supporters thought that the current legislation was already clear and working well. With a few exceptions, they were generally opposed to amending the 2002 Act.

The use of dogs to control foxes and other wild mammals in Scotland

129. The Scottish Government public consultation on the Use of Dogs to Control Foxes and other Wild Mammals in Scotland ran from 29 October 2021 to 15 December 2021. Overall the consultation received close to 11,000 responses, 10,417 of which were received through the online consultation platform. Detailed analysis of the consultation responses is due to be published later in 2022; a preliminary overview of responses received through the online platform is provided below.

130. The majority of respondents agreed that the Scottish Government should limit the number of dogs allowed to search for or flush a wild mammal from cover to two, and that trail hunting should be prohibited.

Overview of responses

131. Question 1: In situations where the use of dogs is permitted, including searching for or flushing a wild mammal to waiting guns, do you think the Scottish Government should limit the number of dogs that can be used to two?

Yes - 67% No - 31% Don't know - 1% Not Answered - 1%

132. While some respondents who answered no to this question disagreed with the two dog limit on the basis that there should be no limit to the number of dogs that can be used to hunt wild mammals, others put forward the view that any use of dogs to hunt wild mammals should not be permitted.

133. Question 2: If a two dog limit were to be introduced, should the Scottish Government introduce licensing arrangements to allow the use of more than two dogs in certain circumstances?

Yes - 24% No - 73.5% Don't Know - 1.5% Not Answered - 1%

134. Question 3: If licensing arrangements to permit more than two dogs in certain circumstances were to be introduced, should there be a limit to the number of dogs that could be used? E.g. no more than four dogs, six dogs etc.

No limit - 28% Don't know - 6% Not Answered - 66%

135. Amongst the respondents who thought there should be a maximum number of dogs permitted, there was no general consensus on what that maximum number should be, with a wide range of suggestions from 3 to 100 dogs being provided.

136. Question 4: Do you agree that the Scottish Government should ban trail hunting?

Yes - 70% No - 29% Don't know - 1%

137. Question 5: Other than for the purpose of laying a trail for sport as outlined in question 4, are you aware of any other activities or circumstances which may necessitate the setting of an animal-based or artificial scent for dogs to follow?

Yes - 15% No - 73% Don't know - 9% Not Answered - 3%

138. A number of activities and circumstances which may necessitate the setting of an animal-based or artificial scent for dogs to follow were put forward by respondents (for example to train dogs to track wounded deer or to locate invasive non-native species). Detailed analysis of the response provided here will be published in later in 2022.

139. Question 6: For the purposes of this Bill do you agree with the current definition of wild mammal?

Yes - 31% No - 68% Don't know - 1%

140. The 2002 Act defines a wild mammal as including '*a wild mammal which has escaped, or been released, from captivity, and any mammal which is living wild*'. However, rabbits and rodents are excluded from this definition. This means that this Act does not prohibit the use of a dog or dogs to hunt and kill a rabbit/s or rodent/s. However, some species of rodents such as beavers and red squirrels are afforded certain protections within other wildlife legislation.

141. Question 7: If you answered no to question 6, do you think that: Rabbits should be included in this definition, all species of rodent should be included in this definition, some but not all species of rodent should be included in this definition, none of the mammals listed should be included in this definition?

Rabbits should be included in this definition - 48%

All species of rodent should be included in this definition - 45%

Some but not all species of rodents should be included in this definition - 10%

None of the mammals listed should be included in the definition - 9%

Not Answered - 32%

142. Question 8: For the purposes of this Bill, do you agree that a person should be allowed to use dogs to stalk, search and flush wild mammals for the purpose of controlling the number of a 'pest' species?

Yes - 31% No - 68% Don't know - 1%

143. Question 9: For the purposes of this Bill do you agree with this definition of pest species? The 2002 Act defines "pest species" as foxes, hares, mink, stoats and weasels.

Yes - 28% No - 69% Don't know - 2% Not Answered - 1%

144. Question 10: If you answered no to question 9, do you think that: Hares should be included in the definition of pest species, stoats should be included in definition of pest species, mink should be included in the definition of pest species, weasels should be included in the definition of pest species, none of the mammals listed should be included in the definition of pest species

Hares should be included in the definition of pest species - 5%

Stoats should be included in definition of pest species - 7%

Mink should be included in the definition of pest species - 12%

Weasels should be included in the definition of pest species - 6%

None of the mammals listed should be included in the definition of pest species - 60%

Not Answered - 28%

145. Question 11: Do you think the current legislation provides sufficient protection in order to tackle hare coursing in Scotland?

Yes - 19% No - 66% Don't know - 14% Not Answered - 1%

146. Question 12: If you have any other comments on the proposals we have set out in sections one to four of this consultation or if there are any further measures relating to the hunting of wild mammals with dogs that you think we should consider please provide them here (max 350 words).

147. A number of respondents provided additional comments on the proposals under question 12. Detailed analysis of the response provided here will be published in later in 2022.

Stakeholder engagement

148. As well as the public consultation, the Scottish Government's Wildlife Legislation team met with the following stakeholders to discuss the consultation proposals in more depth:

- Game and Wildlife Conservation Trust
- British Association of Shooting and Conservation

- Scottish Gamekeepers Association
- Scottish Society for the Protection of Animals
- National Farmers Union Scotland
- OneKind
- Scottish Countryside Alliance
- League Against Cruel Sports
- International Association for Falconry
- Royal Society for the Protection of Birds
- National Sheep Association

149. A short summary of the main issues raised by stakeholders is provided below. A more detailed analysis of the stakeholder discussions will be included alongside the full analysis of the Use of Dogs to Control Foxes and other Wild Mammals in Scotland consultation and will be published later in 2022.

150. Key animal welfare stakeholders agree that there is a need to revise the 2002 Act, and are generally supportive of the measures in the Bill, in particular, placing a limit on the number of dogs allowed to flush a wild mammal from cover, and the pre-emptive ban of trail hunting. However, some call for a full ban on the use of dogs to hunt wild mammals, specifically foxes, above and below ground.

151. Key land management stakeholders have reiterated that predator control using dogs is essential to protect livestock, especially when farm land is adjacent to dense forestry blocks. In particular, farmers are concerned that the limit of two dogs to flush a wild mammal from cover will interfere with predator control, stating that in certain circumstances, the only way to carry this out is by flushing a fox with a pack of dogs. Hunt supporters generally oppose any limit placed on the number of dogs allowed to flush foxes from cover.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

152. An Equality Impact Assessment (EQIA) has been carried out and a summary of its findings is provided below. The full EQIA will be available to view on the publication area of the Scottish Government website.

153. The EQIA did not demonstrate any particular positive or negative impact with regards to any of the protected characteristics and did not highlight any equality issues that needed to be mitigated against.

154. The Bill will affect those who wish to lawfully use dogs to hunt wild mammals within the terms of the permitted exceptions; those who commit offences under the Bill and those who have a role in enforcing the legislation.

155. The creation of new offences relating to hunting wild mammals with dogs has relevance to all protected characteristics as the penalties for those offences will apply equally across all protected groups.

156. However, they will only affect those convicted of one or more of the offences set out in the Bill. Therefore, the impact of these provisions is limited and does not impose any additional impacts on any individuals falling within any of the current protected characteristics when compared to the existing legislation.

Human rights

157. The Bill is compliant with the European Convention on Human Rights (ECHR).

158. The provisions in relation to the offence of hunting, the ancillary offences, the exceptions to the offence (including the creation of the licensing regime) and the offence in relation to trail hunting may fall within the ambit of Article 1 Protocol 1 (A1P1) to the ECHR (right to peaceful enjoyment of possessions) as regards property rights of dog owners, landowners/lessors of land and the marketable goodwill of predator control businesses. The protection of property rights under A1P1 is not absolute, and restrictions on these rights may be permitted provided they have a legitimate aim and are proportionate to that aim. The provisions of the Bill respect these principles in view of the aims of furthering animal welfare and prevention of cruelty to animals.

159. The prevention of cruelty to animals is a legitimate purpose for the proposed legislation (as it was with the 2002 Act) and as such the proposals strike a fair balance between those whose possessions are affected by the two dog limit, and the wider general interest of prevention of cruelty to animals.

160. The Bill includes powers of entry, search and seizure for constables where there are reasonable grounds for believing that an offence has been or is being committed. The powers relate to the investigation and prosecution of an offence with the legitimate aim of the prevention of disorder or crime. The powers are subject to a number of safeguards, including provision for warrants to be granted, that private dwellings cannot be entered without a warrant, and that the power of entry must be exercised at a reasonable time. Other safeguards include that a constable must, if required, produce evidence of their authority to exercise a relevant power and that a warrant granted under the Bill expires when it is no longer required for the purpose for which it was granted. It is considered that these safeguards are sufficient to ensure compatibility with Article 8.

161. The provisions in relation to deprivation, disqualification and seizure orders may come within the ambit of A1P1 as an interference of property rights of those against whom the orders are made. The orders are considered justifiable for the purpose of A1P1 compliance as the deprivation and disqualification orders can only be granted when a person is convicted of the offences in relation to hunting with dogs or trail hunting. Seizure orders can only be granted upon

the breach of a disqualification order. These orders can be appealed to the Sheriff Appeal Court. Disqualification orders can be the subject of a review by the Court which granted them after a minimum period of 1 year has elapsed.

162. The provisions of the Bill include a licensing regime to permit the use of more than two dogs to search for, stalk or flush a wild mammal in certain circumstances. Licences may be issued by the “relevant authority” being the Scottish Ministers or NatureScot. Given the administrative nature of the decision making, the availability to request NatureScot carry out an internal review of a licensing decision and the specialist subject matter knowledge held by NatureScot together with the availability of judicial review it is considered that the licensing process provides sufficiency of review and is therefore compatible with Article 6 of the ECHR.

Island communities

163. During the course of the policy development for the bill and the subsequent stakeholder and public consultations, no issues were identified that would have an effect (either positive or negative) on an island community which is significantly different from the effect on other communities. Where hunting with dogs is undertaken by members of Island Communities, it is generally done for the same purposes as it is done by people in mainland communities e.g. protection of livestock or wildlife and the impacts of the Bill will apply equally to both communities. It was therefore not considered necessary to conduct an Islands Impact Assessment.

Local government

164. The investigation of wildlife crime, and therefore offences relating to the hunting of wild mammals with dogs, falls to Police Scotland and local authorities do not enforce any wildlife legislation. The Bill provisions will not introduce any new responsibilities for local authorities and as such will not result in any impact to local authorities.

Sustainable development

165. As the purpose of the Bill is to regulate the use of dogs to hunt wild mammals a strategic environmental assessment was not considered necessary as the impact of the Bill provisions on the environment is minimal. The Bill does not regulate the management of certain species, only the method by which those animals are managed. However, while the direct environmental impacts of this Bill are limited, allowing the use of dogs to control wild mammals for the purposes set out in the Bill, which include preserving, protecting or restoring the diversity of animal or plant life, will ensure that those undertaking the management of wild mammals will continue to have recourse to a range of methods and will be able to choose the most effective approach to take depending on the particular circumstances.

This document relates to the Hunting with Dogs (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 24 February 2022

HUNTING WITH DOGS (SCOTLAND) BILL

POLICY MEMORANDUM

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