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12 May 2022

Dear Beatrice,

Thank you for your letter of 5 April 2022 to Michael Matheson, Cabinet Secretary for Net Zero, Energy and Transport, regarding the Hunting with Dogs (Scotland) Bill. I am responding in my capacity as lead minister for this Bill.

**Ambiguities and inconsistencies in the Protection of Wild Mammals (Scotland) Act 2002 (the “2002 Act”)**

In your letter you asked for *“more detailed information about the number and nature of these ambiguities and inconsistencies in the 2002 Act.”*

The Bonomy Report discussed a number of inconsistencies and ambiguities in the language used in the 2002 Act. Lord Bonomy’s commentary in section 5 of the Report formed the basis of my initial consideration of the ways in which the law on hunting wild mammals with dogs could be improved. Section 5 of the Report sets out a detailed analysis of the language issues in the 2002 Act. As well as the examples set out in the policy note accompanying the Bill, I have provided a summary of these main points in Annex A. I would also highlight Lord Bonomy’s general comment that: *“Sections 1 and 2 [of the 2002 Act] lack clarity and are unduly complicated.”*

In addition, over the course of the Bill’s development, I took the opportunity to undertake further scrutiny of the 2002 Act, taking account of Lord Bonomy’s observation that: *“Because it started life as a Member’s Bill, the Act has never been subject to the scrutiny of parliamentary draftsmen from which it would undoubtedly benefit.”*

Through the course of instructing and drafting the Hunting with Dogs (Scotland) Bill, my officials identified further issues with the language used in the 2002 Act, in addition to those highlighted by Lord Bonomy. The issues include, for example, inconsistencies with the terminology used throughout the 2002 Act, outdated language and lack of clarity in the use of certain key terms such as “cover”. I have also provided a summary of the key issues identified in Annex A.

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Initially, I considered simply amending the 2002 Act. However, it became clear there were inherent difficulties with this approach because of the number of amendments that would be required to correct the deficiencies, create a clear and logical structure and introduce new policy such as the two dog limit and associated licensing scheme. It seemed likely that an amending approach would result in a Bill that was confusing and difficult to read, and that would in any event need to substitute entirely significant sections of the 2002 Act. I therefore concluded that the best way to ensure that we have legislation which is clear and workable would be to repeal and replace the 2002 Act.

I believe that the Hunting with Dogs (Scotland) Bill, in contrast to the 2002 Act, delivers legislation that clearly reflects the policy intention and is unambiguous and understandable for stakeholders and the public.

### **Vicarious liability and Burden of Proof**

You also asked for further information on why I made the decision not to introduce vicarious liability or reverse the burden of proof in the Hunting with Dogs (Scotland) Bill. While I gave careful consideration to both of these possibilities, I felt that such an approach was not necessary or proportionate, and that the underlying issues that led to Lord Bonomy suggesting the Government consider them, i.e. the difficulties of detecting, investigating and prosecuting offences under the 2002 Act, could better be addressed through other means.

By addressing the inconsistencies and ambiguities in the 2002 Act, this Bill will make the law easier to understand and therefore easier to enforce. I expect that, should this Bill be passed, 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. Therefore I do not think it is necessary or justifiable to introduce vicarious liability or reverse the burden of proof.

### **Reverse burden**

With regards to the reversal of the burden of proof, it may also be helpful to clarify that Lord Bonomy's recommendation would impose on the accused a legal burden of proof. This would mean that the onus is placed on the accused to prove, on the balance of probabilities, that their actions fell within one of the legal exceptions set out in the Bill. However, Lord Bonomy himself acknowledged in his report: "*the issue is a controversial one likely to give rise to legal dispute*".

A balance has to be struck between the public interest and the protection of the fundamental rights of the individual. Reversing the burden of proof would be a departure from the fundamental principle in Scots law that the burden of proof lies with the prosecution. Whether a reverse burden is compatible with the presumption of innocence and the right to a fair trial under Article 6 of the ECHR is not straightforward and requires consideration of a number of complex issues.

By repealing the 2002 Act and replacing it with a Bill which uses consistent language, includes new definitions and contains clear offences and exceptions, the Bill addresses the underlying issues identified by Lord Bonomy which contributed to his recommendation to reverse the burden of proof. In light of that, I do not believe that there is adequate justification for a departure from the fundamental principles in Scots law that the burden of proof lies with the prosecution and that an accused person is innocent until proven guilty.

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## Vicarious liability

Vicarious liability is the liability of one party for the actions or omissions of another party. It can apply whether or not the person said to be vicariously liable was aware of the unlawful actions. Vicarious liability is usually applied in situations where the person who is held liable has power to control the actions of the person who committed the offence. For example, in wildlife legislation, it has been applied where there is an employer/employee relationship such as the relationship between landowners and gamekeepers. This helps to ensure that landowners take full responsibility for conduct that takes place on their land, and prevents any collusion or "turning a blind eye" by landowners

While I am aware that illegal hunting using dogs is still being carried out in Scotland, I have seen no evidence to suggest that there is collusion between landowners and managers, and their employees in the execution of hunting with dogs offences. In fact, we know when it comes to illegal hunting, particularly in the case of hare coursing, it is often the landowners who report suspected offences to the police.

Vicarious liability offences apply whether or not the person held vicariously liable had knowledge that the offence was committed. It would be a significant step to open up vicarious liability to offences committed under the Hunting with Dogs (Scotland) Bill. I believe that we should not introduce legislation to criminalise behaviour when we do not have clear evidence to show that such behaviour is taking place.

However, while the Bill does not introduce vicarious liability, it retains the ancillary offences under the 2002 Act which make it an offence for a person to knowingly cause or permit their land or dogs to be used for illegal hunting. This means that should an employer or land manager instruct an employee to carry out illegal hunting, or allow them to do so, they will commit an offence.

I hope you find this information helpful and I look forward to discussing the Bill further with the RAINE Committee in due course.



**MAIRI MCCALLAN**

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## Section 5 of the Bonomy Report: “Language”

- **Section 1:** The addition 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.
- **Section 2(1):** “searching” is not mentioned in the operative provision of section 2(1). It does not appear in the section 2 heading either, and it is uncertain whether “searching” was deliberately omitted from the subsection or not.
- **Section 2:** Section 2(1) stipulates what must be done “once the target wild mammal is found”; section 2(3)(b) stipulates what must be done after the “fox or mink” is located.
- **Section 2:** It seems clear that “searching” was included in section 2(1) by design and that further reference to it in the third line of the sub-section was inadvertently omitted.
- **Section 2:** Section 2(1) appears to relate to any stalking or flushing above ground, while section 2(3) appears to relate to both flushing from below ground or flushing cover above ground where the wild mammal is a fox or mink.
- **Section 2:** In relation to the timing of the shooting of the flushed mammal, there are differences between section 2(1) and section 2(3) and section 3.
- **Section 2(3) and section 3:** The treatment of firearms and shotguns in section 2(3) differs from section 3 and it is not clear whether shotgun is intended to fall within the meaning of firearm. Additionally there are varying references to “shotgun permits” and “shotgun certificates”.
- **Section 2:** It is not obvious why there is reference in sub-section (2) to killing “by lawful means”. What these are is not specified.

## Further examples of drafting inconsistencies and ambiguities within the provisions of the 2002 Act

- **Section 1:** In the ancillary offences in sections 1(2) and (3) it is unclear what the phrase “knowingly to permit” is conditioning: it could mean either that person A is knowingly permitting person B to enter the land/use a dog, or that person A is permitting person B to enter the land/use the dog where person A knows that hunting will take place.
- **Section 2:** Section 2 of the 2002 Act refers to the “owner or lawful occupier” however, section 1 refers to “owner or occupier” and sections 3 and 5 refer to the “occupier”.
- **Section 2:** Section 2(1) refers to cover including an enclosed space within rocks or other “secure cover”, which is a somewhat circular definition. It is unclear the words “above ground” form part of the meaning of cover or are another concept. In section 2(2) the phrase “from cover or from below ground” appears which might suggest that cover is never below ground, but section 3 says “cover above ground” which suggests cover can be either above or below ground. Section 2(3) uses most of the same words as in section 2(1) to describe “cover” but without using the word “cover” to introduce the phrase (and without parentheses).
- **Section 2:** It is unclear how using a dog to stalk or flush (or search for) a wild mammal in itself protects or prevents the things mentioned in section 2(1). It’s the killing of the wild mammal which does that, but section 2(1) links the purpose to the stalking / flushing / searching.

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- **Section 2:** The comma after “wild mammal” in line 4 of section 2(1) makes it unclear whether the purposes listed in section 2(1) apply to stalking and flushing, or just to flushing.
- **Section 2:** In the last 2 lines of section 2(1) it is not clear if the words “only” and “once the target wild animal is found” mean that the exception cannot apply if no animal/s are found during the course of the hunting.
- **Section 2:** Both section 2(1) and (3) require that a person has the permission of the owner or occupier of the land, however, there is no reference to the owner or occupier in section 2(2).
- **Section 2:** It is not clear what is meant by “in connection with the despatch of a wild mammal” in section 2(2). In particular, it is not clear how this test fits with the mention of “intention” in the second line, or whether “despatch” is something different from “killing” or is just being used as euphemism here.
- **Section 2:** Section 2(2) provides that a person does not commit an offence under section 1(1) by virtue of the dog killing the wild mammal. It is not clear what happens if the dog does not kill the wild mammal and whether that means an offence is committed or whether it is outwith the scope of hunting altogether. A dog killing a wild mammal is not an offence so it is not clear why this subsection is necessary.
- **Section 2:** In section 2(3) it is assumed that the person with the dog is also the person with the firearm, however, this may not always be the case e.g. in the case of a foot pack the person/s operating the gun/s may not necessarily own any of the dogs used for hunting.
- **Section 2:** Section 2(3)(b) only allows the fox or mink to be shot, whereas sections 2(1) and (3) allow the animal to be shot or killed by a bird of prey.
- **Section 2:** Section 2(3)(c) introduces a further alternative test of “as soon as practicable” for when something must be done.
- **Section 2:** None of the section 2 exceptions provide for a wild mammal which has been shot and injured to be humanely killed, whereas section 3(c) does. It is not clear why this should only apply in falconry and shooting.
- **Section 3:** The concept of sport in this section is obviously intended to be game shooting and falconry but the wording of the section is somewhat indirect as it refers to using a bird of prey or a firearm or shotgun for the purpose of sport.
- **Section 5:** Section 5(1)(b) refers to the mammal being shot “once it is located” – another different formulation to those mentioned in the Bonomy report of “once it is safe to do so” or “as soon as possible / reasonably possible”.
- **Section 5:** In section 5(1)(c) it is not clear why the words “in order to relieve its suffering” are necessary or why they do not appear in section 3(c) and 5(3) which also refer to killing as humanely as possible.
- **Section 5:** The interaction between subsections (1) and (3) is unclear and there appears to be significant overlap. Subsection (1) is not limited to using a dog above ground, or to occupiers, or to foxes, so it is unclear why the narrower wording in subsection (3) is needed instead of just relying on subsection (1). If it is needed, it is not clear why it is worded differently to subsection (1)(c) – take reasonable steps vs act to ensure; captured, treated or killed as humanely as possible vs despatched by a single dog or otherwise killed as humanely as possible. It is not clear why a person would need to capture or treat the animal under subsection (1)(c) but not subsection (3). Perhaps subsection (3) implies that subsection (1)(c) applies only to wild mammals other than foxes but that is not expressly stated.

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- **Section 8:** It is not clear why the defence under subsection (6) only applies to section 5(1), and how that interacts with the fact that section 5(1) doesn't require the permission of the owner or occupier (but neither does section 2(2)).
- **Section 9:** Section 9 uses the test of "having custody" of a dog whereas section 1(3) talks about owning or having responsibility for a dog.
- **Section 10:** The definition of "orphaned" only applies to foxes, but other orphaned wild mammals are referred to in section 5(1)(c).

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