

*This document relates to the Protection of Wild Mammals (Scotland) Bill (SP Bill 10)  
as introduced in the Scottish Parliament on 1 March 2000*

# **PROTECTION OF WILD MAMMALS (SCOTLAND) BILL**

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## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

### **CONTENTS**

1. The following documents are published to accompany the Protection of Wild Mammals (Scotland) Bill introduced in the Scottish Parliament on 1 March 2000:

- Explanatory Notes;
- a Financial Memorandum; and
- the Presiding Officer's Statement on Legislative Competence.

The Financial Memorandum and Presiding Officer's statement are required under Rule 9.3 of the Parliament's Standing Orders.

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

2. These Explanatory Notes have been prepared by the Member in charge of the Bill (Mike Watson) in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

4. The Bill's purpose is to protect wild mammals from being hunted with dogs. It does that by prohibiting such hunting, subject to exceptions, and making it a summary offence to contravene the prohibition or to facilitate its contravention in certain ways.

5. The exceptions relate to:

- organised activity for controlling pests or mammal populations (the Bill creates a licensing scheme for this kind of activity);
- pest control activity by individual occupiers of land; and
- certain activity in the nature of retrieval, location or rescue of wild mammals.

6. The Bill makes ancillary provision about enforcement, legal proceedings and the powers of courts dealing with offenders. Those powers include disqualifying a person convicted of an offence under the Bill from having custody of a dog. The Bill also makes consequential changes to existing legislation applicable in Scotland.

### **COMMENTARY ON SECTIONS**

#### **Section 1**

##### ***The prohibition***

7. Section 1(1) states the basic prohibition of hunting a wild mammal with a dog. The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379) ("the

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Interpretation Order") provides that words in the singular generally include the plural (paragraph 3(c) of Schedule 1 to the Order).

### ***Offences***

8. Section 1(2) creates the Bill's principal offence of contravening the prohibition. In proceedings for that offence, the prosecution will be required to prove that the contravention was deliberate.

9. Subsections (3) to (5) create specific offences in relation to facilitation of hunting. Subsections (3) and (4) apply to persons who permit their land or dogs to be used by another person to hunt in contravention of the prohibition. Subsection (5) applies to intended hunting by the owners or keepers of dogs as well as to their intended use for hunting by others.

10. On ordinary criminal law principles, the prosecution must show that a person charged with "permitting" another's act (subsections (3) and (4)) knew of and agreed to the intended act. A charge under subsection (5) will require the prosecution to prove the necessary intent.

### **Section 2**

11. The exceptions set out in sections 2 and 3 permit certain activities which would otherwise amount to hunting a wild mammal with a dog and which would therefore contravene section 1(1).

12. Section 2 creates two discrete exceptions. The first (subsections (1) to (6)) enables individuals to participate in organised activity covered by a licence issued by the Executive. The second (subsection (7)) enables an occupier of land to carry out certain activity without a licence. Subsection (8) is relevant to both exceptions.

### ***Licensed activity***

13. Subsections (1) to (6), read with subsection (8), permit the licensed use of dogs under close control to stalk a wild mammal, or flush it from surface cover, to swift despatch by gun.

14. A person may claim the benefit of this exception if he or she is one of the individuals identified in a licence issued by the Executive and currently in force. The licence will specify the purpose for which it is issued (which may be either or both of those defined in paragraphs (a) and (b) of subsection (2)) and will contain the further information about that purpose required by the relevant paragraph. The licence may also contain conditions (subsection (3)).

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15. Activity is "in accordance with" the licence (as required by subsection (1)) if carried out for the precise purpose stated in the licence and in conformity with the conditions.

16. A licensed club or group will generally include individuals playing separate dog handling and marksman roles. Subsection (8) therefore requires that members of the group collectively "act to ensure" that the quarry is shot promptly once discovered; it does not impose an obligation to shoot on each individual.

#### ***Licensing: administrative provisions***

17. Subsection (4), supplemented by subsection (5), makes provision about the licence application procedure. Subsection 4(b) provides for an application fee and requires the Executive to seek to match fee income, over time, with expenditure on the licensing scheme. Subsection 4(d) sets out the criteria to be met for the grant of a licence. A successful application will result in a licence valid for up to a year at a time, subject to a power of revocation if the criteria for grant are no longer met (subsection (6)).

18. In exercising their powers under these provisions, the Executive will be subject to the usual constraints of administrative law. Paragraph 4 of Schedule 1 to the Interpretation Order makes provision about the time when the giving of a notice by post is to be treated as effective.

#### ***Pest control by occupier***

19. Subsection (7), read with subsection (8), permits the occupier of land, or an employee of the occupier, to engage in two kinds of activity with the object of protecting livestock, fowl, game birds or crops on that land from pests. The activities are:

- hunting a rabbit or rodent (whether or not with guns);
- stalking a fox or hare, or flushing it from surface cover, to swift despatch by gun.

20. In either case, activity falls within the exception only if carried out using a single dog. That will not prevent more than one individual carrying out pest control simultaneously on larger areas of land provided each, as a matter of fact, acts separately with a single dog. Subsection (7) does not permit the use of dogs in packs: that will require a licence.

21. The activity need not be confined to the occupier's land provided it is carried out for the purpose of protecting stock, etc. on that land. So activity around the margins of that land may fall within the exception.

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### **Section 3**

22. Section 3(1) provides an exception for three kinds of activity concerned with retrieval or location of mammals. Paragraph (a) is confined to a rabbit or hare. Paragraph (b) concerns wild mammals other than those specified in subsection (2). Paragraph (c) applies in relation to all wild mammals.

### **Section 4**

23. Section 4(1) enables a constable to exercise powers of arrest, search and seizure in relation to a suspected offence under the Bill. The section provides on-the-spot powers applicable only where the constable's suspicion relates to an offence in the immediate past, present or future. It does not affect the general powers of the police under the Criminal Procedure (Scotland) Act 1995 to facilitate the subsequent investigation of offences, nor powers exercisable under warrant.

24. Part II of the Proceeds of Crime (Scotland) Act 1995, referred to in subsection (1)(d), empowers a criminal court to order confiscation of items (including vehicles and animals) used in connection with the commission of an offence.

25. In accordance with Schedule 2 to the Interpretation Order, "land" in section 4(2) of the Bill includes buildings or other structures, but the section expressly excludes dwellings from the power to enter without warrant.

### **Section 5**

26. Subsection (1) fixes the maximum sentence for an offence under the Bill. Level 5 on the standard scale is currently £5,000.

27. Subsections (2) to (4) deal with the circumstances in which an officer (including, by subsection (3), a shadow officer) of a body corporate may be dealt with in relation to an offence committed by the body. An example would be where a body corporate is the owner of land or dogs the subject of an offence under section 1(3) or (4). Subsection (5) makes similar provision for a partnership which has legal capacity under Scots law.

28. Subsections (6) and (7) deal with the burden of proof in relation to the exceptions created by sections 2 and 3.

29. Under the general law, a person charged with an offence who wishes to rely on an "exception or proviso" bears the burden of proving that he or she falls within it. Subsection (6) expressly applies that principle in relation to a person charged with deliberate contravention of the prohibition (section 1(2)). The prosecution bears the

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burden of proving beyond reasonable doubt that the accused deliberately hunted a wild mammal with a dog. The accused need only establish an exception on the balance of probabilities.

30. Subsection (7) provides a special defence for a person charged with a "facilitating" offence under section 1(3), (4) or (5). The person charged with the offence need not be taking part in, or proposing to take part in, the act of hunting, and may therefore lack personal knowledge of the facts which would determine whether or not the hunting is covered by an exception. It is therefore sufficient for the accused to show, on the balance of probabilities, that he or she reasonably believed that the hunting he or she permitted or intended fell within an exception. The burden remains on the prosecution to prove beyond reasonable doubt that the accused did indeed permit or intend the land or dogs to be used to hunt.

## **Section 6**

31. This section enables a court which convicts a person of an offence under section 1 of the Bill to make a disqualification order. The effect of the order, and the additional provision it may contain, are described in subsections (1) and (2). Subsection (3) makes contravention of, or failure to comply with, an order an offence (to which the provisions of section 5(1) to (5) will apply).

32. Subsections (4) and (5) make provision for subsequent review of a disqualification order by the court which made it. Subsections (6) and (7) provide an appeal route for a non-offender who is the owner of a dog the subject of provision under subsection (2). The expression "High Court" in subsections (6) and (7) is the Interpretation Order's abbreviation for the High Court of Justiciary. Under the general law that Court will also be the forum for appeals by offenders.

## **Section 7**

33. "To hunt" is expressly made to include "to search for" and "to course". This makes it clear that to use a dog to pursue a wild mammal (by sight, scent or otherwise) amounts to hunting whether or not the dog goes on to catch or kill the quarry.

34. Schedule 2 to the Interpretation Order defines "land" as including "any right or interest in or over land". Hence an owner of land, for the purposes of the Bill, includes the owner of a right or interest. Section 7 excludes persons whose only interest is as secured lender, unless they have enforced their security by taking possession of the security subjects.

35. "Wild mammal" is defined so as to include a mammal which was a captive or domestic animal before being hunted.

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## **The schedule**

36. The schedule makes alterations to existing legislation to accommodate the change in the law brought about by the Bill. Where an Act of Parliament applies to parts of the United Kingdom other than Scotland, the change is confined to the Act as it applies to Scotland.

37. Paragraphs 4 and 6 insert the expression "lawful" into certain existing provisions. In applying those provisions as amended by the Bill, activity that entails the hunting of a wild mammal with a dog will be lawful only if it falls within one of the Bill's exceptions.

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## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

38. This Memorandum is prepared in accordance with Rule 9.3 of the Standing Orders of the Scottish Parliament, and sets out best estimates of the costs and savings to which the provisions of the Protection of Wild Mammals (Scotland) Bill may give rise.

39. The Bill prohibits the hunting of wild mammals with dogs, subject to exceptions permitting the continued use of dogs to seek and flush wild mammals for certain purposes including pest control and the location and retrieval of escaped or injured mammals.

40. The exceptions will in particular enable fox control clubs to carry out licensed activities for those who currently engage their services, and will enable farmers and other occupiers of land to continue to conduct proper pest control activity themselves. The Bill has no effect on the hunting (mounted or otherwise) with dogs of quarry other than a wild mammal.

41. The principal costs flowing from the Bill will be those associated with the licensing of organised pest control. Certain other costs and savings may also arise.

## **COSTS ON THE SCOTTISH ADMINISTRATION**

### ***The licensing scheme***

42. The Executive will be responsible for operation of the licensing scheme. The Bill envisages a single licence for each group or club, in effect renewable annually. The Executive will establish guidance as to the form and content of applications and will check whether each application satisfies the criteria for grant of a licence. The Executive will also have a limited monitoring function.

43. The costs associated with these functions will be met from the fees payable by applicants for licences. The Bill requires the Executive to fix fees at a level which matches fee income to the expense arising from the licensing scheme. The Scottish Ministers have power to fix fee levels "from time to time", enabling fees to be reviewed and adjusted so as to ensure the scheme's fiscal neutrality over time.

44. If the Scottish Ministers were unlawfully to refuse or revoke a licence, that decision could be challenged by a petition to the Court of Session for judicial review. The cost of proceedings on a petition might in a lengthy contested case reach some £10,000. If a challenge were unsuccessful, the Scottish Ministers would be entitled to recoup their legal expenses from the petitioner. Since the Bill expressly defines the scope of Ministers' powers, the risk of an error of law in reaching a decision — and therefore the risk of a successful petition for judicial review — is small.

45. The Scottish Ministers currently pay grant aid to members of the Scottish Hill Packs Association and fox destruction clubs for a four-month period each spring. That aid is paid under the Agriculture (Scotland) Act 1948 as amended by the Pests Act 1954. The terms of the grant aid scheme are a matter for the Scottish Ministers acting under that legislation (to which the Bill proposes no change). The current scheme provides for grants of up to 50% of eligible costs. The demand for pest control services, and therefore the overall numbers of claimants of grant aid, is unlikely to change significantly as a result of the Bill.

46. The Bill will, however, require certain alterations in the methods currently adopted by pest control groups; in particular, the use of dogs (principally terriers) below ground will cease. It is therefore probable that grant aid currently paid specifically in respect of terriers, estimated at some £15,000 per year, will come to an end. However, whether or not that would result in a net saving cannot reliably be predicted, since the groups in question may well switch to permitted methods of flushing using other animals or equipment eligible for grant aid.

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### ***Costs of enforcement and legal proceedings***

47. The Executive will not be a party to proceedings under the Bill's enforcement provisions. The devotion of resources to the detection, investigation and prosecution of offences will be matters for the judgment of the relevant chief constable and the procurator fiscal in the ordinary way, within existing budgets. The Bill envisages no overall increase in central or local funding for those functions.

48. The provision of prosecutorial and judicial time and (where applicable) the grant of legal aid in relation to proceedings under the Bill, whether at first instance or on appeal, will likewise be a matter of allocation of existing resources.

49. The Bill may produce a modest saving in relation to policing. At present some resources are devoted to preservation of order between supporters and opponents of mounted hunts, a problem likely to fall away once the prohibition takes effect.

### **COSTS ON LOCAL AUTHORITIES**

50. The Bill will impose no additional costs on local authorities.

### **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

#### ***Organised pest control***

51. Clubs and groups providing pest control services will be responsible for meeting annual licence fees. The level of fees will be for the Scottish Ministers to determine. At the time of introduction of the Bill, insufficient information is available about likely administrative arrangements to enable a reliable prediction to be made of the initial level of fees. It is intended to remedy that as early as possible in the proceedings on the Bill.

52. Liability for fees will form an additional operating overhead for a club or group, likely to be passed on to its customers. The most probable financial effect of licensing on agricultural business is therefore a marginal increase in the cost of engaging pest control services. That will form part of the overheads of those businesses, which they may elect to pass on to their buyers.

53. The conditions which the Bill envisages as applicable to licensed activity are intended to ensure humane best practice among persons conducting organised pest control. Those clubs and groups whose practices currently fall below those standards will need to bring themselves into compliance. They will, for example, be obliged to ensure that marksmen participating in licensed activity have the requisite training. The group may choose either to bear the resulting cost as an expense (and pass it on)

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or to require participating individuals themselves to be responsible for acquiring and retaining the necessary skill levels.

54. There may be a saving for groups currently incurring the cost of housing and feeding dogs for use underground. But that is subject (as mentioned above) to the possible balancing cost of changing to a substitute method, and in any event eligibility for grant aid may result in there being no net gain or loss to the individuals concerned as a result of the change.

#### ***Pest control by individual occupiers***

55. The Bill permits an occupier of land (or an employee of the occupier) to hunt rabbits and rodents, and to flush other mammals to guns, outside the licensing scheme provided this is done for pest control purposes in relation to that land. The Bill therefore avoids imposing the fee and compliance costs of licensing on land users who choose to carry out their own pest control.

56. There may be a marginal compliance cost in relation to those occupiers whose current practice is to use a dog to inflict fatal injuries on an animal. Except in relation to rabbits and rodents, those persons will be required instead to shoot the animal once found or flushed from cover.

#### ***Mounted Hunts***

57. There are currently 10 mounted hunts in Scotland which employ staff on a full- or part-time basis. On average these hunts each employ 2.5 full-time equivalents. They also provide a service of collection and disposal of fallen stock.

58. Mounted hunting of non-mammalian quarry falls entirely outside the Bill. The sport of drag hunting (mounted following of an artificial scent with hounds) is therefore unaffected. Those hunts which choose to move to drag hunting will be able to continue to sport. The shift to a pastime unstigmatised by the charge of cruelty may well result in hunts attracting additional support and hence sustaining additional employment.

59. Those hunts which decide to stop hunting rather than to convert to drag hunting would be liable to make redundancy payments to their employees. The amounts will depend on the contractual arrangements with each employee and are likely to be based on each employee's length of service and final salary. But there will be balancing savings (and possibly a net saving overall) from cessation of the operating costs of the hunt.

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***Legal proceedings***

60. Persons prosecuted for offences under the Act will be responsible for their own legal expenses in the usual way. Persons of limited means will be eligible to seek legal aid.

61. It is envisaged that the voluntary sector will take responsibility for the welfare and disposal of dogs whose owners are made the subject of disqualification orders if no other suitable keeper can be found. The court will have a discretion to order a dog to be delivered up to a voluntary organisation which is willing to assist, and may also order the offender to make payments to defray the expense.

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**PRESIDING OFFICER'S STATEMENT ON LEGISLATIVE  
COMPETENCE**

62. On 2 December 1999, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Protection of Wild Mammals (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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