



OFFICIAL REPORT
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DRAFT

Environment, Climate Change and Land Reform Committee

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Session 5



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Pàrlamaid na h-Alba

Tuesday 28 March 2017

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
11th Meeting 2017, Session 5

CONVENER

*Graeme Dey (Angus South) (SNP)

DEPUTY CONVENER

*Maurice Golden (West Scotland) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Alexander Burnett (Aberdeenshire West) (Con)
*Finlay Carson (Galloway and West Dumfries) (Con)
*Kate Forbes (Skye, Lochaber and Badenoch) (SNP)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Emma Harper (South Scotland) (SNP)
*Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*David Stewart (Highlands and Islands) (Lab)

*attended

THE FOLLOWING ALSO PARTICIPATED:

The Rt Hon Lord Bonomy

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 28 March 2017

[The Convener opened the meeting at 09:46]

Decision on Taking Business in Private

The Convener (Graeme Dey): Good morning and welcome to the 11th meeting in 2017 of the Environment, Climate Change and Land Reform Committee. I remind everyone present to ensure that their mobile phones are on silent for the duration of the meeting. I also remind people that they should not be taking photographs inside the committee room.

The first item on the agenda is consideration of whether to take items 5 and 6 in private. Do we agree to take those items in private?

Members *indicated agreement.*

Protection of Wild Mammals (Scotland) Act 2002 (Review Report)

09:46

The Convener: The second item on our agenda is evidence on the review of the Protection of Wild Mammals (Scotland) Act 2002. We are joined by the Rt Hon Lord Bonomy. Good morning to you.

The Rt Hon Lord Bonomy: Good morning, everyone.

The Convener: Thank you for attending. We will move directly to questions, if that is okay.

Kate Forbes (Skye, Lochaber and Badenoch) (SNP): Good morning, Lord Bonomy. Thank you for coming. The review received a high number of submissions and I understand that many people were met in the course of it. Will you comment on the strength of feeling among the public who responded to it and provide a brief summary of respondents' views?

Lord Bonomy: Now that is a big question. There was a fairly large number of people who were plainly opposed to hunting in principle and who voiced that opinion. There were a number of submissions that were one-liners from individuals who were taking advantage of the opportunity to voice a personal view, which was no doubt strongly held. On the other side, there were many submissions that made assertions that clearly went beyond the individual's personal knowledge. For instance, a supporter of hunting might express the view that no one would do X or Y because it would be out of keeping with the traditions.

In the end, it was difficult to make much of many of the submissions, but I could sense strong feelings on both sides of the argument. If anything, I suppose that the pro-hunting lobby expressed its views more logically and with a greater factual basis, but that does not mean to say that, as far as I was concerned, its views carried any more weight than the views of those who are opposed to hunting. I found it fairly easy to exclude from my mind the pro and anti-hunt lobby views and tried to concentrate on what I could make of the submissions in the sense of actual factual findings. I have made it clear that there is a bit of speculation in what I said but, as far as I could, I based it largely on submissions that were made. Of course, there was also evidence gathering in other contexts that provided factual material.

It was not really within my brief to gauge support or opposition, so I have no way to support what I say; I give you merely an impression of how material came to me. It was divided into bundles for and against, and into bundles of those dealing

with welfare and those dealing with other aspects. If you were counting up the numbers, you would see that the number of those against was probably higher than the number of those for, but that did not have any bearing on what ultimately emerged.

Kate Forbes: Did you consider the remit of the review to be appropriate? Were there aspects or views that you had to exclude because of the narrowness of the remit?

Lord Bonomy: I think that the remit was appropriate. That is not to say that the MSPs' remit should be confined to that—that is an entirely different question. I did not find myself inhibited in any way from making a proper assessment of the issues given to me because of a narrow remit. The things that were excluded were quite properly excluded.

Emma Harper (South Scotland) (SNP): Good morning, Lord Bonomy. In the constituency that I represent, a fox was killed by 10 hounds in a back garden. In the process of mounted hunts, foxes are still being killed. What measures could be put in place to eliminate that? What would be the best way to separate the sport from pest control?

Lord Bonomy: I came to broadly two conclusions at the end of the exercise. One was that the 2002 act needs a good looking at, not because there may be a great deal wrong with it, but because it was a members' bill and therefore never really had the scrutiny that most bills get from Parliamentary draftsmen. I have no doubt that the 2002 act would benefit from such scrutiny.

The other broad conclusion was that we need to find a way to be a bit more certain about what is going on. Hunting is an activity largely conducted away from the public eye, and those who engage in it have an interest in it and support it. That is where the notion of monitoring came from. I had a number of sessions, with individuals representing organisations concerned with animal welfare and those concerned with hunting, to respond to that notion. The exchanges were remarkably frank, and we also had very frank concessions from the Scottish Countryside Alliance on issues around any hunting that the police might require to be disclosed.

When we discussed the idea of monitors, at one stage someone—I cannot remember who—said that they might as well agree to monitoring; it is going on anyway covertly, so why not just do it overtly? There is not strong resistance to monitoring, and that is the only idea that I came up with as to how we might identify what is actually going wrong—if anything is going wrong.

I have stated that there are grounds for suspicion that there may be illegal hunting, but I could not make a finding on the basis of what was presented to me, and I saw a lot of film evidence.

Getting someone behind the scenes might produce a bit more material. That might be a formal role and might result in some monitors' reports becoming evidence in court, but I did not envisage that at the beginning. At the outset, monitors would need to watch what was going on and if, in fact, there was some anxiety in the mind of the monitor about the activity perhaps breaching the legislation, discussion of that would be appropriate to try to resolve the issue satisfactorily. I thought that way because there are many genuine people on both sides of the argument and, unless they are strongly against the act of hunting in principle, most would want to find a way of accommodating the interests of both sides.

Emma Harper: I offered to attend a hunt and, with my limited ability to ride a horse, even join in, but I did not get an invitation. Did you have similar challenges?

Lord Bonomy: No. I went to watch a hunt that was organised by the Duke of Buccleuch's hunt, but I was not on any vehicle other than a car to get along the road. I was able to observe the hunt freely, and I was with others who were observing. It is common practice for those who are beyond the age of participating actively, or who have simply always had an interest, to go as observers. We were able to go to the places that the hunt identified as those from which to watch what was going on.

I am slightly surprised that you did not have your offer accepted. There is an anxiety on the part of those engaged in hunting—particularly mounted hunting, which you are talking about—to appear to be as open as they can be. I would think that another request would be met with agreement.

Emma Harper: And maybe a few riding lessons as well.

Lord Bonomy: No. If you can drive a quad bike, you will be able to keep up.

The Convener: The proposal for observers would require people who were impartial but also knowledgeable. Are you confident that we could secure a sufficient pool of people from within the two camps to carry out that role effectively?

Lord Bonomy: This shows how institutionalised I am, but my immediate thoughts would be along the lines of former policemen or people of that kind. The police have quite a number of officers involved, as you will see. Shortage of police involvement is not an issue, so there are loads of police with experience, and it would not be difficult to find somebody. The observers—if it was decided to go down the road of having observers, or even to think about it a bit further—do not need to be riders, because observing can be done on a quad bike in most places now. The proposal does

not lack feasibility because of the need to be close to and involved in the activity. The difficulty is working out exactly what the role of the observer is once the activity starts and, ultimately, how they will convey the information gathered to the people who have to take the decisions.

Mark Ruskell (Mid Scotland and Fife) (Green): Good morning. Your report suggests that around 800 foxes are killed every year in Scotland, and that around one in five of those deaths is attributable to hunting with dogs. Have those figures changed since the act was introduced?

Lord Bonomy: I do not think that those are the actual figures. Thousands of foxes are killed in Scotland by various means. I thought that roughly 800 were still killed by mounted hunts and, possibly, a few less by the foot packs.

Mark Ruskell: The figure was 20 per cent.

Lord Bonomy: Is there a part in the report to which you can direct me?

Mark Ruskell: I am talking about paragraphs 6.19 and 3.8. It would be useful if you could clarify that, Lord Bonomy.

The Convener: Paragraph 3.8 of the review includes the figures from one hunt.

Mark Ruskell: It is implied in the report that 20 per cent of foxes are killed by dogs.

10:00

Lord Bonomy: That is true and it will be 20 per cent, probably, of roughly 800 foxes. In fact, another 10 per cent may well be not killed by the terriers directly but brought out by a terrier and then shot. A significant percentage of foxes are killed by dogs.

Mark Ruskell: Do you have a sense of how that proportion has changed? The purpose of the act was to prevent hunting with dogs. Has there been a change? Has the act been effective in reducing the number of foxes that are killed by dogs rather than guns?

Lord Bonomy: I do not think that I have that information. I do not think that it is possible to say. There is no information—at least, I am not aware of any information—on the number of foxes that were killed by dogs before the 2002 act came into force.

Mark Ruskell: If you have not been able to come to an opinion on that, what is your opinion on the number of foxes that are killed by dogs and hunts at the moment? Is the 20 per cent figure acceptable? Is 160 foxes killed by dogs every year acceptable, or is 50 or 10 or zero acceptable? Given the intention of the act, where would you draw the line?

Lord Bonomy: What is missing in this is a comparison with the effectiveness of the foot packs and the extent to which the dogs that are with those people on foot actually kill the foxes. I do not think that I have any of that information.

Mark Ruskell: That is flushing and using guns rather than using a dog to kill the fox—

Lord Bonomy: Yes, it is flushing to guns, but foot packs inevitably have occasions when the fox is caught by a dog. You cannot say that 100 per cent of the foxes will be shot. The likelihood is that more are shot, because more guns are deployed. That was the one thing that disturbed me about the difference in the practice—

Mark Ruskell: Lord Bonomy, I ask you to focus on the intention of the act, which is ostensibly to outlaw the hunting of foxes using dogs as the method of killing the fox. That was the original purpose of the act, so if there is a breach of that—if 20 per cent of the total number of foxes that are being killed each year are being killed by dogs rather than by guns—is that acceptable? If not, what is the acceptable level, given the original purpose of the act?

Lord Bonomy: That is not a matter for me; it is a matter for those who have to make political judgments. Sorry—it is not something that I have any views on at all.

Claudia Beamish (South Scotland) (Lab): Can I ask you for a little more detail on the issues that we have begun to explore? How much does the practice of fox hunting as carried out prior to the act differ from the practice of pest control? How does it differ from the practice of trail hunting that is used in England?

Lord Bonomy: Trail hunting, if done properly, would be called drag hunting, I think. If it was done properly, it would result in no foxes at all being chased or killed by dogs. Flushing to guns is clearly different from what went on in Scotland before the act, because guns did not usually accompany mounted hunts. The cause for concern lies in the number of guns that are deployed and whether they are likely, in general, to achieve the objective. As you know, I have views about the language about when the fox is shot, but the objective of shooting a fox is, in effect, to do so as soon as possible.

That is where I see Mr Ruskell's point, from a legal perspective. The question for me is: how effective is flushing to guns? It struck me that deploying two guns, as is the protocol for mounted hunts, would generally run the risk of the fox, once flushed, running and being chased. On the other hand, foot packs with 20 guns or whatever being deployed are more likely to reduce the chances of that. At the hunt that I observed, there were either five or six guns, so two is not the norm. I

understand that the norm for mounted hunts is higher than two, but in those circumstances there is scope for the fox to run. I did not see enough to say how regularly that might happen.

Claudia Beamish: Right. In your view, is the flushing of foxes with hounds needed—in general or in specific areas—to control foxes?

Lord Bonomy: That question is beyond my remit.

Claudia Beamish: Okay. My next question might be beyond your remit as well, but I do not want to put words into your mouth, so I will ask it anyway.

As I understand it, the Scottish Government has said that it will look at the recommendations from the review. Concerns have been expressed about that by people who have said that it would be helpful if the whole report was looked at. For example, in paragraph 7.11 of the report, part of Police Scotland's submission to the review is quoted, including this comment:

"Exceptions to the offence to 'deliberately hunt a wild mammal with a dog' are multiple and provide opportunities for exploitation by those who continually and deliberately offend."

I understand your saying that, even in view of the film that you looked at, it was difficult for you to see evidence of that. I just wonder where the concerns that Police Scotland and others expressed will sit if observations in the report are excluded.

Lord Bonomy: I gave a lot of weight to the observations by Police Scotland. Actually, I was surprised to get them in the form in which they came, bearing in mind the evidence that had previously been given to the committee. I pursued that by interviewing the assistant chief constable and Detective Chief Superintendent Sean Scott.

The problem perhaps lies in knowing whether all the references are to mounted hunts. Lots of urban crime around wildlife is just vandalism, and that falls within the language that was used. However, at the very end of Police Scotland's submission was a statement that the legislation has become almost "unworkable". I do not subscribe to that view, but you will understand that hearing that from the police gave me concern.

The Convener: Can I pick up on that? The quote in paragraph 7.11 of the report states:

"As a consequence of this lack of clarity, the Police are on occasion unable to establish the high threshold of evidence required to prove and, ultimately, report cases."

From the discussions that you had with Police Scotland, did you get a feel for the scale of the problem that that has created? Were the police able to quantify that or illustrate the types of issues that they encounter?

Lord Bonomy: In so far as I was able to form an impression and get a feel for that, I did not think that it was a large-scale problem. However, I think that the police are frustrated by the language of the legislation and feel that it is difficult to be sure that something will be proved in court, because of the various requirements that exist. The details of decisions about whether to proceed with a complaint are not recorded, so I could not get anywhere on the volume of complaints.

The very fact that an assistant chief constable for whom I think most people have high regard said such a thing makes one think twice about it, but then we hear the other side of the story, and we have to try to strike a balance. At the end of the day, I thought that there was a clear basis for legislative revisal. Whether that will achieve the objective of making proof simpler, I am not sure. I went further on that question when I suggested reversing the onus of proof. Again, that is not a legal decision but a political one.

Claudia Beamish: In paragraph 6.12, you said:

"the work of foot packs has the appearance of a diligent pest and predator control operation, whereas among mounted hunts pest control can appear to be incidental to the primary objective of exercising horse and hounds."

Will you comment on that? Coupled with the observations from Police Scotland, the comments have caused concern about whether the whole report should be considered, and not just the recommendations.

Lord Bonomy: I never observed the foot packs in operation, but I was impressed by the descriptions that were given of the way in which they operate and the fact that they take an hour to set up the guns and so on in adequate positions. That was quite different from the fairly casual appearance of the start of the hunt, which is very much a social gathering. However, in the course of the hunt that I observed, it was clear that there was a will to do the right thing and that what was happening was genuine flushing.

A fox was shot early on in the exercise. It is the moving that creates the problem; as the hunt moves through the countryside, there is a question as to whether the drive is to flush out a fox or whether the fox is actually being chased. The bigger the area that is covered, the more chance there is that the fox is being chased. I got the impression that the foot packs concentrate on a particular, identified problem and confine themselves more to an area—naturally, because they cannot travel as far.

As I made clear, I see many benefits from the sporting activity. The question is how that is maintained while protecting the fox. That is the balance that has to be struck.

I think I said at one point that, from the papers that were published before the legislation was introduced, it did not appear that everyone knew that that was how the sport would develop—that is, that it would become a pest control service. I gather from those involved that they always had that possibility in mind. To me, it looked a bit like a reaction to circumstances—people said, “Let’s see how we can maintain our sport and be consistent while remaining within the law.” Apparently, though, the pest control element was always envisaged. I do not know whether MSPs envisaged it.

There is genuine pest control—I have seen it work—but whether the activity is properly described overall as a pest control service rather than as pest control that is ancillary to sporting activity is a broader question.

10:15

Maurice Golden (West Scotland) (Con): On the prevalence of hunts in Scotland, you said in your report that

“The 2002 Act ... has had little impact on the numbers engaged in the activities of either”

mounted hunts or foot packs. Is that because fox hunting is a relatively inelastic activity in relation to tighter regulation?

Lord Bonomy: If I understand the question correctly, I think that there might be substance in the notion that there is a hunting community that wants to remain alive because it is an important social element in parts of the country, and therefore there will be a degree of inelasticity, in that change will be resisted. That is quite different from saying that the law is going to be broken. If people want to maintain the activity, the problem has to be tackled in one way or another by finding an outlet for it.

I do not know a great deal about the English system of trail hunting, but I know that there are proven examples where genuine activity was not taking place and the aim was to put the huntsmen and those following the hunt in the position of engaging in the hunting of a fox by accident, as it were. It is not as simple as saying, “Let’s change to that approach, and that will keep the social element and the other elements that we value.”

There is a provision in our 2002 act that preserves the use of a dog for hunting in connection with falconry, which specifically says that the activity is for sporting purposes. It was not beyond the wit of the drafters to recognise that hunting with a bird of prey assisted by dogs was a sporting activity that we were prepared to recognise. However, I do not think that there is a ready way of adapting the hunting of foxes with dogs in that regard.

Finlay Carson (Galloway and West Dumfries)

(Con): The fact that no mounted pack has been successfully prosecuted leads in some quarters to the conclusion that the 2002 act is not working or is difficult for the police and courts to enforce. Are you content that the organisation and resources that are in place for the police are sufficient to enable them to enforce the act? If it was amended in line with the recommendations in the review, would the current structures and resources be appropriate in that regard?

Lord Bonomy: The simple answer is yes. No evidence was tendered to me that there was a need for additional resources. More resources would be welcome, but we have to be proportionate, bear in mind what this is all about at the end of the day, and consider the other challenges for our police and public services.

The Convener: If there was the pathway that you envisage from observers to the police so that observers who were aware of the evidence base that is required could report anything untoward to the police, would the process be more successful?

Lord Bonomy: I think so, as long as there was someone to provide the evidence; if no one is there observing, the problem will remain that there are several hurdles to overcome to prove—in essence—a negative so that a prosecution can succeed.

My particular concern—it may be a bee in my bonnet—is about the word “deliberately”. That stems from my impression that it is seen as an extra hurdle, because it is a word that seldom appears in legislation.

Angus MacDonald (Falkirk East) (SNP): Good morning, Lord Bonomy. We have touched on the issue of a general lack of clarity, and the report highlights two other weaknesses in the 2002 act. You say that some words and phrases are used frequently in it, including “to hunt” and, as you just mentioned, “deliberately”. You also point out the issue of police perception and a lack of clarity in the language of the 2002 act. You state:

“The small number of prosecutions under the Act may be explained, at least in part, by the difficulties of interpretation presented to both police and prosecutors.”

Are you confident that addressing the clarity of expression in the 2002 act would increase confidence among wildlife crime investigators and lead to more prosecutions? Is any other action needed to increase confidence?

Lord Bonomy: I think that that would increase confidence. However, as we have discussed, observing would also be required, so that the basic evidence would be there. Alternatively, to increase the prospect of conviction, the onus of proof could be shifted on to the accused to show that he fell within one of the exceptions.

The very fact that there have been so few cases makes drawing conclusions difficult. Only six cases have been reported for prosecution, which is a very small number from which to draw any conclusions.

The Convener: On the same theme, recommendation 2.11 of your report is:

“The time limit for bringing prosecutions under the Act should be extended”.

Will you expand on the thinking behind that?

Lord Bonomy: Yes. That comes from the Procurator Fiscal Service. DNA now forms a part of investigation. Even in the most serious of cases in the High Court, resources are such that it is very difficult to get DNA reports in adequate time, and this type of crime would fall way down the list.

Also, because the activity is taking place out of sight, it may take a while for information to emerge about it and for a case to come to light. The six-month time limit means that it may be too late to do anything about a case.

Further, the point was made to me that expert evidence about what is actually going on, and observations of an individual's actions and whether they amount to hunting, is a common aspect of the investigation of these offences. It takes time to get expert reports. There are already provisions in other wildlife legislation for that, so it seemed sensible to me that similar provisions should apply to fox hunting. I cannot see the argument against extending the time limit.

The Convener: I will continue Angus MacDonald's theme about clarity of expression. Under “Proposals for change”, and the sub-heading “Monitoring”, you say:

“For years now animal welfare activists have endeavoured to monitor the activities of mounted hunts. For various reasons there has often been tension between those engaging in hunting and the monitors, or saboteurs as some are known.”

There is a difference between being a monitor and being a saboteur. Where, for you, is the line crossed? It is one thing to monitor to ensure compliance with the law; it is another to seek to sabotage a legally conducted practice, however much one might disapprove of it. What is your thinking about that?

Lord Bonomy: The League Against Cruel Sports, for example, which is probably one of the—if not the—most active in the field, would never, as far as I can tell, try to disrupt an activity, but it would want to get as close as possible so as to record what was going on. Other groups, which are not all that different in the sense that they have animal welfare as their objective, call themselves “hunt sabs” or “saboteurs”. For them, that is a badge of honour and it is an achievement to cause

some form of disruption. Such disruption is generally peaceful protest, but just getting in the way, for example, would be an act of sabotage in the end, and, apart from anything else, is a dangerous thing to do.

So there are those who go a bit further and are actually happy to be known by that badge, and there are responsible organisations that are monitoring at the moment, but are doing so without the approval of those they are monitoring, which makes a big difference.

Mark Ruskell: Will you give a bit more detail on why you did not recommend a restriction on the numbers of hounds that are used?

Lord Bonomy: The very fact that in England and Wales they do not flush to guns suggested to me that it was impractical. Although the research evidence was controversial, there was some that clearly indicated that it takes longer to flush foxes with two dogs than with a pack. That means that, already, there is an added element of tension within the chase at a very early stage.

I did not think that the number of dogs was the problem. I cannot think of anything to suggest that, somehow or other, reducing it to two would change the situation, other than to bring the practice of flushing to guns to an end. That change would, I think, mean the end of hunting as we see it at the moment.

Mark Ruskell: What are the views of stakeholders on that point in your report?

Lord Bonomy: Who do you mean by “stakeholders”?

Mark Ruskell: Those who have been involved in the process.

Lord Bonomy: A very large number of the submissions supported reducing the number of dogs to two, but those were largely assertions about how that would be a much more acceptable way of conducting the activity. I cannot remember any detailed argument other than the arguments between scientists over the research that had been done and the criticism of it. There are two points of view about the research that has been done on the use of two dogs, which was done fairly recently—in about 2013, I think.

Mark Ruskell: We heard earlier about the section in the report—I think that it was section 6.12—in which you described the pest control function of mounted hunts as being incidental to the need to get horses and hounds out for exercise and social reasons. Given that, would a reduction in the number of hounds actually have any impact on the pest control function of a mounted hunt? Was that a concern that you had?

Lord Bonomy: It just would not happen. Going by the English experience, flushing a fox to a gun with just two dogs would be seen as not being viable. The sorts of areas of cover that we are talking about are very large and consist of woodland. Once a hunt gets out of woodland, there is often very thick scrub, which covers very large areas of the countryside.

Mark Ruskell: How does that impact on the intention to control foxes as pests? If mounted hunts are pretty incidental to controlling foxes anyway, would there be any impact on responsible fox control in the countryside if we reduced the number of dogs that were associated with mounted hunts?

Lord Bonomy: It would probably be marginal.

10:30

Emma Harper: Mounted hunts are really important for social activity, social heritage and community in the countryside. They also support employment for saddlers, farriers and other rural industries. Would it not be less contentious to promote drag hunting and separate the pest control from the sport? Lamping—shooting a fox at night using a lamp—bags six foxes whereas a fox hunt might end with one fox being torn apart.

Lord Bonomy: Judging by the experience in England and Wales, the answer has to be no. Proportionately, the number of prosecutions there is more or less the same. The authorities are not well organised for prosecution in England. The Crown Prosecution Service does not do it all. It is divided up among different animal welfare organisations as well as the CPS, so there is a lack of clear statistical information. However, such information as I could obtain from England indicates that there is not much difference and that there are many apparent breaches of the legislation by inappropriate drag hunting, which is called trail hunting. A different material that mimics the scent of a fox is used, and inevitably in many instances where foxes are prevalent, a fox appears on the scene. Therefore, I was not convinced that just moving to drag hunting without or instead of other changes such as monitoring would make any difference.

Emma Harper: My understanding was that drag hunting involved fake scent—man scent.

Lord Bonomy: You are right, but that is not what is done. Drag hunting is an ancient activity. It is not done in Scotland but was done for a long time in England and Wales before the legislation banning fox hunting was passed. That is where the idea comes from, but, if you change what you do, carry it out in an area where there might be foxes and use the scent of fox urine, which is imported from the United States, to create the trail,

there is scope for the accidental arrival of a fox on the scene. That has given rise to a large number of prosecutions in England and Wales.

The Convener: When we are talking about pest control, we have to bear in mind the context that many of the people who want to ban fox hunting also want to ban snaring. In that case, how would we carry out the pest control of foxes?

Lord Bonomy: That is right. We have recently seen publicity about snaring as well. The issue is how it is done, not the fact that it is an essential element of pest control. Most of the foxes that are killed in Scotland—of which there are thousands, as I said—are shot, but there is still a significant number that are snared.

Finlay Carson: Were you suggesting that there is more chance of the 2002 act's aims being achieved by not banning fox hunting and that there are more problems when only drag hunting is allowed?

Lord Bonomy: To go by the English and Welsh experience, the answer is yes. However, fox hunting is an activity that has been conducted in this country for 300 or 400 years and was considered to be legitimate, and most of its elements give rise to no problem, so I have always had in my mind the notion that there must be a way of preserving it and securing the welfare of the animal at the same time. My view is couched not in the form of abolishing fox hunting but in the form of trying to find a way of maintaining it.

The Convener: Let us move on and look at licensing and penalties.

David Stewart (Highlands and Islands) (Lab): Many in the animal welfare lobby have called for a licensing scheme, but you do not recommend that in your report. Could you talk the committee through the pros and cons of the analysis that you made before reaching that conclusion?

Lord Bonomy: I was influenced first by the fact that the licensing provisions that were in the original bill were removed and that seemed to be the feeling. Secondly, I was not entirely clear about and I did not receive much in the way of submissions to indicate what any benefits might be. The one obvious benefit that I could see was that someone's licence could be taken away if they did something that was contrary to the conditions. That would be a benefit, but it would still have to be proved that they had done something contrary to the licence. The big issue for me was how we would prove that people were infringing the law, and I thought that that difficulty took priority.

I also saw a cost implication about which I had no information. I concede that I could have considered the point of principle in a bit more

detail and left the cost benefit analysis for someone else to do later, but I was not convinced that there was an obvious benefit in return for any significant expenditure on a licensing system.

David Stewart: At the end of the day, it comes down to the fundamental problem of proving what happened and when.

Lord Bonomy: That is what I see as the issue.

David Stewart: You have probably picked up from the other evidence that we have taken about animal welfare that it is a difficult area. The number of prosecutions tends to be quite small. Earlier, you suggested having what would be a professional witness to see what goes on and to verify that to the police and the courts.

Lord Bonomy: That decision might also depend to some extent on the value that those who have to make the decision place upon the activity. If the activity is not worth saving, monitors are not worth spending money on. If it is worth trying to save the activity, they are.

Alexander Burnett (Aberdeenshire West) (Con): I point out my entries in the register of members' interests regarding countryside management and agriculture.

Lord Bonomy, at the risk of challenging a judge on his legal recommendations, I wonder whether I might pose a couple of questions about reversing the burden of proof and extending the time limit.

In your discussion of reversing the burden of proof, you seem to suggest that it should be reversed only in cases in which the burden can easily be discharged. How do you see a defendant being able to provide evidence to show that a fox was flushed as soon as possible? Would you contend that that is a subjective argument? Would it result in people being open to malicious or vexatious prosecution, many of whom would not have the resources to defend their innocence against a presumption of guilt?

Lord Bonomy: I see no basis for thinking that there would be malicious prosecutions. I do not have the impression that that is a feature of what goes on here. I accept that someone might feel persecuted because somebody is filming their every activity, but filming itself is a fairly open thing.

To be clear about reversing the onus of proof, my opinion is that, as it stands, the law reverses the onus of proof. I am probably in the minority in the legal profession in thinking so, and it has not been tested. It could have been tested in the one case that we did have—*Fraser v Adams*—and indeed, at the appeal stage, the Crown considered doing so and did not. The Parliament's law officers will also probably disagree with me, in which case I see little chance of a prosecution being

conducted on that basis, which is why I made the recommendation.

I am fairly sure that if someone who had engaged in a hunt gave an account of what had happened to support the claim that the fox was shot when it was safe to do so, which is the law at the moment, they would have a good chance of their account being accepted. I do not think that that situation is peculiar. I have given many examples of how, in very technical areas, the reverse onus applies. The strongest argument against a reverse onus is that it tinkers with the notion of proof beyond reasonable doubt. Someone has to prove, on a balance of probabilities, that the defence is made out. In those circumstances, a person can end up convicted on evidence that is not proof beyond reasonable doubt but is, in effect, a balance of probabilities that the defence is not made out. That is a very powerful argument in principle against reversing the onus.

Bearing it in mind that, although people have very strong views about it, the activity that we are talking about is not life and death, I thought that my suggestion was worth making. I do not make it lightly, but I think that it is a way of redressing the balance. I think that the balance is tilted against successful prosecution because of the way that things are, just by the very nature of the activity.

Alexander Burnett: Would you say that extending the time limit could compound the possibilities of miscarriages of justice if a defendant had to produce very subjective proof three years after the event? Where there is no video evidence, we are talking about witness statements on the ground that could result in someone losing their freedom under wildlife crime legislation.

Lord Bonomy: You are correct about that. It would work against the interests of accused people to extend the time limit in that situation.

Alexander Burnett: As a sitting judge, you would not be happy with that kind of case being in front of you.

Lord Bonomy: I would be happy with it in the overall context, but I see the argument against the time limit. As I said, I am in the minority with my view, but I take your point regarding the accused being required to prove something when the time limit has been extended. If I had to choose between the two proposals, I would go for reversing the onus of proof.

The Convener: Another of your recommendations is on vicarious liability. For many, that would have its merits, especially if it sat alongside the provisions in the Land Reform (Scotland) Act 2016 around a register of land ownership. However, a legal challenge to vicarious

liability has already been mounted in another sphere, so how advantageous would it be to introduce vicarious liability?

Lord Bonomy: What sphere are you referring to, convener?

The Convener: There was a challenge to vicarious liability in a case where a gamekeeper was convicted.

Lord Bonomy: I referred to vicarious liability because the term is commonly used, but it is not actually vicarious liability, which is more like the situation that you have just described, in which the employer is liable for the activities of the gamekeeper.

We are talking about a third party being held liable for an individual's criminal activity where the third party simply allowed his or her land to be used for the activity, without the current requirement that they must knowingly allow it to be used in breach of the legislation. I entirely accept that that is going a long way and I would not be at all surprised if there is strong political antipathy to placing blame on a landlord who simply permits his ground to be used. However, overall, I think that we are looking for a way, rightly, of strengthening the law. It is another cross check. It is another hurdle that has to be overcome to be satisfied that the activity is being done legally. It would result in consideration being given by landowners to the reliability of those who will hunt over their ground.

A technical issue is that many leases in the hunting areas require the tenant to allow the hunt access to the land. That may make my proposal impracticable, but the idea is a potential hurdle and it has support.

10:45

The Convener: Paragraph 6.16 of your report refers to the suspicion that exists on either side of the argument. You say:

"Yet the experience of the Review and the interaction observed on the limited occasions opponents have met during the Review give cause for optimism that it should be possible to agree on a way of trying to verify whether the suspicion of illegal hunting is well-founded."

We have touched on common ground around monitors. Are there any other areas of common ground that you identified on which you think that progress could genuinely be made?

Lord Bonomy: Unlike opponents in some areas, these are in regular and active communication with each other. There are probably at least two separate interests represented in the public gallery behind me, and they were certainly talking when I came in this morning.

Although when they are dealt with individually their views are expressed more strongly than when they are in the company of their opponents, I found a very high degree of courtesy and consideration in all their communications with me and with each other.

I was also impressed by the Scottish Countryside Alliance's attitude to police requirements. That made me think that a monitoring system might work without legislation, if the police were willing to participate. It is their requirements that matter. We need everyone to put their heads together on this. That is the only practical example that I can think of at the moment, but you never know where talking might lead.

There will always be the difficulty, however, of those who are in principle so opposed to hunting that, no matter what agreement is reached, they will still be looking for ways of justifying the call to ban it as an activity.

The Convener: That moves us on nicely to the issue of the Scottish Government's response to the report. I know that the question of what you make of that response is a difficult one, but I will ask it anyway.

Where do you think that the Scottish Government's indication of what it will take on board will take us? Can you envisage our being in a much better place on hunting?

Lord Bonomy: I cannot answer that because I do not have the Government response. Do you have it handy? It was sent to me, but I did not look at it in preparation for today.

The Convener: In essence, the Government will invite key stakeholders to work together to develop the code of practice for hunts and explore the suggestion of a monitoring scheme. Ministers will consult on vicarious liability, the reverse burden of proof, the extension of the time limit, the removal of inconsistencies and the improvement of definitions. They have largely taken on board your recommendations and indicated that they will explore them.

Lord Bonomy: I remember now. The first part—the work on a code of conduct—is the most encouraging. The Government seems committed to that. I was not so sure about commitment to legislative changes, but considering them will inevitably lead to them being addressed, I hope, by the right people.

I do not claim to have the answer to the legislative problems. I have found from past experience doing work of a similar nature to this that your parliamentary draftsmen have minds that do not work in the same way as any of the minds round the table, and they come up with solutions

to problems that appear intractable at the outset. That sounds to be a plan that is likely to be productive.

The Convener: Members have no other questions. Is there anything that you wish to add, Lord Bonython?

Lord Bonython: I do not think so. I am grateful for the opportunity of explaining myself. I hope that it has clarified some things, at least.

The Convener: We are grateful for the opportunity to question you. It has been a very useful session. Thank you for attending

Subordinate Legislation

Protection of Seals (Designation of Haul-Out Sites) (Scotland) Amendment Order 2017 (SSI 2017/63)

10:51

The Convener: Agenda item 3 is consideration of a negative Scottish statutory instrument as listed in our papers. I refer members to the papers and I invite any comments.

As there are no comments, is the committee agreed that it does not wish to make any recommendation in relation to the order?

Members *indicated agreement.*

Petition

Game Bird Hunting (Licensing) (PE1615)

10:51

The Convener: Agenda item 4 is consideration of PE1615, by Logan Steele, on behalf of the Scottish raptor study group, on a state-regulated licensing system for game bird hunting in Scotland. I refer members to paper 4 and I seek their views on the action that they wish to take on the petition. The options include inviting the petitioner to give evidence to the committee, inviting oral evidence from a range of interested stakeholders and combining the above options into a single meeting, so that the committee would first take evidence from the petitioner before hearing from a panel of interested stakeholders such as RSPB Scotland, the Scottish Gamekeepers Association and Scottish Land & Estates. The committee could then agree to any subsequent action. Do members have thoughts?

Claudia Beamish: I am keen on the third option that you highlighted, convener, with the petitioner being given a choice as to whether to give evidence. That may help the committee's deliberations.

The Convener: Okay. We have a proposal. Does anyone else want to comment?

Mark Ruskell: I am happy to back that, convener, and I request that we also invite Scottish Natural Heritage to speak to its reports on international comparisons of game bird licensing systems. That would be very useful. I hope that our consideration of the petition will not just relate to issues of wildlife crime but look at the totality of game bird management systems in place in Scotland. In particular there is the issue of muirburn, which we have seen signs of in the skies around the east coast of Scotland in the past few weeks, but there are other environmental considerations as well.

The Convener: Do you see SNH being part of the second panel?

Mark Ruskell: I would leave it to your discretion to decide where it would fit in best. It could be part of the second panel or it could be in a panel on its own.

The Convener: Are there any other views?

Angus MacDonald: I concur with Mark Ruskell. I, too, am keen to hear SNH speak to the evidence that it has found on operations in other countries.

The Convener: Given that there is pressure on our time because we have so much to deal with, I suggest that it would be sensible to include SNH in

the second panel that I proposed. Thereafter, we will be able to take whatever decisions we wish to take. Are we content with that approach?

Members *indicated agreement.*

The Convener: Thank you, that is useful.

The committee's first meeting after the Easter recess is expected to be on 18 April. As agreed earlier, we will move into private session. I ask that the public gallery be cleared.

10:55

Meeting continued in private until 12:46.

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