JUSTICE AND HOME AFFAIRS COMMITTEE

SUPPLEMENTARY PAPERS FOR MEETING ON 27 SEPTEMBER 2000

Item 3 – Protection of Wild Mammals (Scotland) Bill

Memorandum by Scottish Countryside Alliance JH/00/29/12

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27 September 2000

JH|00|29|12

Scottish Countryside Alliance

Submission to the Justice and Home Affairs Committee

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CONTENTS

Supporting Documentation

Overview

1. It is important to emphasise that this Bill removes the established fundamental rights of a substantial section of the community. It seeks to criminalise activities that have been lawful for centuries.

2. The State must justify legislation which removes fundamental rights. The Bill should be closely scrutinised to ensure that its aims and methods are justified and proportionate. Otherwise, the Bill would be oppressive.

3. The Bill restricts fundamental freedoms in a sweeping and Draconian way. In particular, far-reaching new powers are to be given to the police. These extend well beyond what is reasonably required. Substantial criminal penalties will be imposed and property will be confiscated without compensation.

4. Social inclusion means respecting the rights of all sections of Scottish society. This Bill will split urban and rural Scotland.

5. The declared aim of the Bill is to ban hunting. However, the definition of hunting given in this Bill goes far beyond this aim. It will indiscriminately outlaw many everyday countryside activities.

6. The Bill will endanger policing by consent, for example by introducing stop and search, powers of confiscation and criminalising an important aspect of countryside management.

7. It would be wrong to pass any law which may drive a long established activity underground. Regulation of hunting would then be destroyed.

8. For these reasons, we submit that this Bill is fundamentally flawed. Therefore the Committee should recommend that the Bill proceeds no further.

Introduction

The banning of hunting in Scotland would, unnecessarily, restrict the personal freedoms of a minority group. Respect for fundamental freedoms is especially necessary for the protection of those whose cause may be unpopular in some quarters or whose views may not accord with those of the majority.

The test for any democracy is whether it truly respects all such rights. This Bill does not respect the rights of country people. If this Bill is enacted, it will be contrary to the ethos of 'social inclusion' which has so frequently been presented as central to the spirit of the new Scottish democracy.

The European Convention on Human Rights (ECHR) safeguards our fundamental rights and freedoms. We have sought expert legal advice in this area, which leads us

to believe that this Bill gives rise to serious infringements of the Convention *[see supporting documentation]*.

Inadequate definitions

It is a fundamental principle of our law that criminal offences must be clearly defined.

The promoters of this Bill have stated that their aim is to ban mounted hunting.

This Bill will result in banning all forms of hunting with dogs. Yet the stated intention of the Bill is only to ban mounted hunting. The Bill will have a direct impact on a wide range of everyday rural activities.

The Bill will create serious enforcement issues. For example, a gamekeeper or labourer out with his terrier, carrying a spade and intending to repair a drain or fence could be challenged and accused of being on his way to dig out a fox.

It is instinctive for most dogs to hunt. It is important to remember that even family dogs are by nature hunters and can often revert to type. Therefore, any citizen whose dog became engaged in hunting in the countryside could fall under criminal suspicion.

Landowners who permit access to their land in good faith may also be at risk of prosecution.

It is not possible to frame a satisfactory definition of hunting.

Civil Liberties

The far-reaching powers to be conferred on the police are an extraordinary and unacceptable feature of this Bill. They are to be given new powers to arrest even before an offence is committed; new stop and search powers; new powers to seize and detain property and new power to enter land.

In addition, the burden of proving innocence is, in the case of a number of the statutory exceptions, to be imposed on the accused.

Disqualification orders can be made in relation to any dog (not just a dog proved to have been used for hunting). Such orders, including responsibility for upkeep, can run indefinitely.

These are the sort of powers that might be appropriate in the fight against terrorism or organised crime, but they are hardly appropriate in the context of a traditional countryside activity.

Importance of Community Consent

Effective policing requires the consent and co-operation of the community. The representatives of ACPOS emphasised this point, last week, before this Committee.

Bad law brings the law into disrepute.

The criminalisation of hunting will cause resentment in the rural community. Policing in the countryside is by consent. It is unfair to burden the police with a law which will undermine their good relations with the rural community.

Consequences

The banning of hunting, a regulated, and accountable activity, creates a danger that hunting with dogs will be driven underground. Hunting with dogs is currently governed by strict codes of conduct laid down by the Masters of Fox Hounds Association (MFHA), National Working Terrier Federation, the Scottish Hillpacks Association and the Association of Lurcher Clubs.

Police resources

Rural police services are a scarce resource. Enforcement will require the re-allocation of substantial additional resources. It follows that other areas of policing will suffer.

Arrangements will also have to be made to police the Scottish-English border should legislation come into force in Scotland before England. Since the border is open, participants in the Border Hunt, and the College Valley and North Northumberland Hunt (who regularly cross the border during a hunt) will be unaware that they have broken the law.

The enforcement of this legislation will increase burdens on the courts and prosecution services.

Effective laws require effective enforcement; effective enforcement means more resources.

-pre-intro of Bill

IN THE MATTER OF THE BURNS INQUIRY
INTO HUNTING WITH DOGS

A D V I C E

1. I am asked to advise on the compatibility of legislation to ban hunting with dogs with the requirements of the European Convention and in particular to consider the position under Article 1, Article 8, Article 11 and Article 14.

2. Overview

There is a strong case that a ban on hunting, backed by criminal sanctions, interferes with the right to the peaceful enjoyment of property protected by Article 1 of Protocol I; the right to respect for private life guaranteed by Article 8 of the European Convention. It may also interfere with the right to "freedom of peaceful assembly" and "freedom of association with others" guaranteed by Article 11 of the Convention. Once such an interference is established, then the state must justify the interference - though the degree of justification required varies according to the nature of the right interfered with. Thus:

(i) An interference with the "peaceful enjoyment" of possessions (including property) must be justified

by reference to some "general interest" and the jurisprudence of the court then provides for a review of the interference to determine whether the state has struck a "fair balance" between the general interests of the community and the protection of the other fundamental rights to peaceful enjoyment (Sporrong & Lonnroth v Sweden).

(ii) An interference with private life must be shown to serve one of the legitimate objectives recognised in Article 8(2), and to be necessary and proportionate. The necessity and proportionality will be judged by the exacting standard of whether a "strong and pressing social need" for the interference can be demonstrated.

(iii) Likewise if Article 11 rights can be shown to be interfered with, then such an interference must be justified by reference to one of the legitimate objectives recognised by Article 11(2), and it must be shown to be necessary and proportionate to promote those objectives.

3. It is therefore clear both that any governmental ban on hunting must be justified by reference to a legitimate objective, and proportionate. The test under Article 8 is more exacting than that under Article 1 of the First Protocol. But in either case there must be shown to be a

legitimate basis for the interference, and proportionality in the pursuit of that aim. That means that both the justification and the merits of a ban on hunting foxes or stags with hounds is something that can be inquired into by the courts - that is to say the European Court of Human Rights and, after the passage of the Human Rights Act, the Courts of England.

4. In examining this issue, it is of fundamental importance to start from the principle that, under the Convention, people have rights but animals do not. That is not to say that the control of cruelty to animals, or the infliction of unnecessary suffering on them, is not a legitimate state objective. But such a control is only legitimate under the Convention to the extent that the infliction of unnecessary suffering on animals damages human society - by provoking disorder, offending religious or other sensibilities, or endangering morals. It is not sufficient to justify the ban to argue that such a ban is necessary "for the prevention of crime" - for it is the ban itself which would criminalise hunting; and the criminalisation of hunting therefore must itself be justified by some independent criterion such as the need to prevent disorder, an offence to the sensibilities and convictions of others, or the endangerment of the morals of the participants.

5. Against the background of those general preliminary remarks, I will seek to address in turn the specific case that the proposed ban violates Article 1 of Protocol I, Article 8 of the Convention, and Article 11 of the Convention.

6. The position under Article 1 of Protocol I

Article 1 of Protocol I provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

7. Control of use and interference with substance of ownership

(i) In broad terms, a ban on hunting will interfere with the rights of those landowners who now participate in hunts over their own land, and those who permit passage over their land of the hunt, to use their land as they see fit and, to this extent, it constitutes a control on the use of their property. That is an interference with the "peaceful enjoyment of their property" guaranteed

by the first sentence of Article 1.

(ii) Secondly, a ban on hunting is an interference with the "substance of ownership" of packs of hunting hounds and is, in that sense, an interference with the "peaceful enjoyment" of those animate possessions which is guaranteed by the first sentence of Article 1. (The category of "interference with the substance of ownership" was first recognised by the European Court in Sporrong & Lonnroth v Sweden (1982) A52 para 60 and has been recently analysed by Professor David Anderson in an article on Compensation for Interference with Property in (1999) EHRLR pp 543ff). Thus, though the interferences fall short of an actual deprivation of property, they are governed by the first sentence of Article 1. They must therefore be justified by the demands of the "general interest" of the community and by the principle, first asserted in the Sporrong & Lonnroth case, that a "fair balance" should be struck between the general public interest and the fundamental rights of the individual owners of property or land.

8. "General interest" test

The "general interest" test is interpreted by the European Court with considerable latitude to national authorities. However, the relevant "general interest" of

the community must be identified so as to justify an interference with the use of property or the substance of ownership. It is questionable whether it is sufficient simply to advance as "general interest" the objective of preventing suffering to animals. It is at least necessary to go further and show how and why human society needs to prevent this particular form of suffering, i.e. whether it is to prevent disorder, or protect the sensibilities of animal lovers, or to "protect the morals" of those who participate in the infliction of such suffering. None of these societal justifications are compelling in the case of hunting with hounds so that the "general interest" served by this interference is not a vital one.

9. The fair balance test

But, assuming that the Court accepts the existence of a general interest, it would still be necessary for it to determine whether "a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights" in accordance with the test laid down in Sporrong & Lonnroth. In this regard:

(i) The Court would have to recognise the controversial and ill-defined nature of the general community interest advanced - since the ban on hunting with hounds is not necessary to protect either the basic

human rights of others, or the social or economic rights of others, nor is it clearly necessary to protect the social or economic well-being of society as a whole.

(ii) The Court would then have to balance the community interest identified against the very substantial economic loss to many individual farmers and pack-owners.

(iii) There is at least a strong likelihood that the Court will conclude that a fair balance cannot be struck without substantial economic compensation for such an interference with the substance of ownership of huntpacks, and the property rights of landowners.

(iv) There is even a possibility that the Court will find that such an interference with the property rights of individual landowners cannot be justified at all, applying the "fair balance" test.

8. I have considered so far the approach of the European Court. But, of course, the same basic approach will be applied by the English courts after the incorporation of the Convention with the coming into force of the Human Rights Act.

9. The position under Article 8 of the European Convention

Article 8 of the European Convention provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

10. Do Article 8 protections extend to hunting?

The first question is whether Article 8 protection of "private and family" life and "home" extends to protect activity such as hunting with hounds which has an underlying economic rationale (that of controlling "vermin" in the case of foxes) but takes the particular form it does for social and recreational purposes. In my view there is a strong argument that Article 8 safeguards are engaged by the activity of hunting. I so advise for the following reasons:

(i) Firstly the protection afforded "private life" by Article 8 is not restricted to activities in the "inner circle" of family and home. That this is "too restrictive" a limitation of the right to

privacy was recognised by the European Court in Niemitz v Germany A251-B (1992) para 29, and in the Commission's decision in McFeeley v UK 20 DR 44 at 91.

(ii) There is therefore a strong case for interpreting the expression "private life" in Article 8 to include a recreational activity that is strongly identified with the ethos of a local community, and in which individuals participate for social and recreational purposes either on their own land, or on the land of others by invitation of the owners.

(iii) There is, in addition, the fact that this activity takes place, at least in part, on private land. The notion of respect for one's home includes respect for the privacy of one's lands, and the recreational activity one engages in upon them. And enjoyment of one's own private space has been recognised to engage Article 8 rights in the aircraft noise cases such as Rayner v United Kingdom 47 DR 5 (1986).

11. Proposed ban an interference with Article 8 rights

The proposed ban on hunting with hounds would therefore probably constitute an interference with Article 8 rights. As such, it requires justification by reference to the test of whether it is "necessary in a democratic

society" to promote one of the listed aims in Article 8(2). It is for the state then to demonstrate a "strong and pressing need" for the interference by reference to one of the enumerated legitimate objectives. But the English and European courts are likely to proceed on the basis that, even if Article 8 is engaged by the activity of hunting with hounds, the degree of justification required is not so great in respect of an activity such as hunting as when the interference is one of the more intimate and core aspects of private and family life (such as respect for the privacy of correspondence or sexual freedom).

12. Possible legitimate aims justifying a ban

The government is likely to justify a ban on recreational hunting with dogs as necessary for the "prevention of disorder", the "protection of morals" (on the basis that cruelty to animals should not be tolerated in society), or the protection of the rights of others in the sense that their deeply held convictions or sensibilities may be offended (in the same way as the protection of the religious sensibilities of others were held to be a legitimate objective for an Article 10 interference in the Otto Preminger case). All of these justifications are questionable. The "prevention of disorder" would ignore the state's positive duty to protect a prima facie legitimate act from disruption by violent protesters - rather than to put forward anticipated protests as a

grounds for a ban. The protection of the sensibilities of others with a profound concern for the "rights" of animals is also, in my view, an objective of a very questionable nature. More formidable is the argument based on the protection of morals on the basis that cruelty to animals is immoral. But that will depend on there being some objective evidence that hunting with dogs really is cruel, in the sense that it exposes foxes (or deer) to an unnecessary and gratuitous degree of suffering. And the lack of necessity will have to be judged by reference to the level of suffering inevitably involved in other methods of killing.

13. The prevention of crime

An alternative justification that could be put forward is that "cruelty to animals" or the intentional exposure of them to unnecessary suffering is a recognised category of criminal conduct (see Section 1 of the Protection of Animals Act 1911 and the Wild Mammals (Protection) Act 1996). At present Section 2(2)(b) and (d) of the Wild Mammals (Protection) Act effectively exempts killing either by dogs in the course of hunting, or by humans who dispatch a mammal wounded or taken in the course of a hunt. The government could argue that they were simply removing a special exemption from an activity that is in itself prima facie criminal because it involves the infliction of unnecessary suffering on animals. They could therefore put forward as the legitimate aim of a

hunting ban the objective of preventing crime. In my view this justification has a questionable element of circularity about it - since the very issue is whether the activity of hunting should be made criminal. Criminality cannot be assumed. A ratio for criminality must be established in order to justify the interference, and established on the sound basis of cruelty.

14. The fact has to be confronted that the prevention of cruelty to animals (or the intentional infliction of unnecessary suffering) has generally become recognised as a legitimate state objective. This is likely to influence the courts in determining whether a ban on hunting - if it can be shown to prevent unnecessary suffering to animals - is justified by one of the legitimate objectives in Article 8(2). And for that reason the courts are likely to find that a ban on hunting could be justified by reference to the protection of morals, or possibly the prevention of crime, if the activity of hunting with dogs can be shown to expose the target animals (be they foxes or deer) to unnecessary suffering.

15. The evidential issue on cruelty

It therefore becomes crucial to determine whether the government can put forward a sound case that hunting does expose foxes or deer to unnecessary suffering. In the case of both foxes and deer, it is necessary to kill the

target animal to control the population. In the particular case of foxes, the justification is all the stronger because of their threat to livestock. Some system of killing is therefore necessary and justified. The issue then becomes whether this particular manner of killing can be shown to expose the animal to unnecessary suffering. In my view four points are important here:

(i) Ultimately the burden is on the state here, to show that this method of killing exposes the animals to an unnecessary degree of suffering.

(ii) It is not justifiable to take the physical and psychological effects of hunting on animals in isolation from those involved in alternative methods of killing. This point was clearly recognised in the Scott Henderson report. In other words, if it is necessary to kill animals by some means, the method of killing by way of hunting must be shown to be markedly more cruel than reasonably available alternatives.

(iii) The government must be able to rely on some legitimate scientific findings, or reasonable inferences from sound data, before criminalising conduct that is otherwise lawful on the basis that it inflicts significantly more suffering than the available alternative.

(iv) However the courts are likely to find that, provided there is some scientific basis for the conclusion that foxes will be exposed to a significant degree of unnecessary suffering by the choice of this particular method of control, it is not for them to conduct an in-depth review of rival scientific claims.

16. I have reviewed some of the expert evidence - including Professor Bateson's findings and the criticisms made of them. What is clear is that this is an area where any scientific certainty is wholly unachievable. The courts are likely to proceed on the basis that the "prevention of cruelty" justification cannot be discounted altogether, but that the questionable soundings of the justification put forward is a factor to be taken into account in determining whether it is necessary in a democratic society and proportionate to impose a ban on hunting in order to ensure a marginally more humane method of killing foxes.

17. Necessity and proportionality of the ban

There do appear to be very serious arguments that the necessity and proportionality of a ban could not be established by the government - given the very serious impact that such a ban will have on a traditional pastime that is part of the ethos of many rural communities, and

on the lives and livelihoods of many.

18. There is, therefore, at least a serious question-mark over the compatibility of the proposed ban with Article 8. Much may depend on the way it is framed, and on the evidential conclusions reached by the Burns inquiry. And it will be necessary to conduct a more detailed analysis by reference to the exact provisions of any proposed legislation.

19. Article 11

I am less convinced that the Article 11 right to "freedom of peaceful assembly and freedom of association" is necessarily infringed by a ban on hunting. The ban is, after all, not directed at the assembling of a hunt but at the activity engaged in by the hunt. There is complete freedom for farmers, landowners and riding enthusiasts to assemble together for a mock chase or drag hunt. What is controlled is the nature of the quarry, not the fact of association.

20. But if I am wrong and Article 11 rights are engaged, then the same issues would arise as to whether the aims pursued by this interference with the right of assembly were legitimate ones and whether the restriction was necessary and proportionate.

21. Article 14

Article 14 prohibits discrimination on grounds of "sex, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status". It would only arise if it could be shown that rural hunters, or a particular type of hunters (e.g fox hunters) had been singled out for a ban on grounds of the supposed unnecessary suffering caused by their activity whilst other comparable activities had been left untouched by government interference. It would then be necessary to show that this involved discrimination against the participators in these activities on the grounds of "social origin" or alternatively "property, birth, or other status". The question is whether there is any truly comparable activity (i.e. comparable to the recreational hunting of mammals with dogs) which has been left untouched. There do appear to be material distinctions between the shooting of game birds and angling on the one hand and the prolonged recreational hunting of foxes or deer with hounds on the other. Whilst this aspect of the proposed legislation requires further consideration, I cannot at present advise that there is any clear basis for an Article 14 challenge to it on the basis that other forms of recreational killing of animals (such as angling and shooting) have been left untouched.

22. Issues may arise both under Article 5 and under Article 14 if the issue of cruelty is, in the case of hunting with dogs, to be determined by a Parliamentary ban on all such hunting (on the basis of presumed cruelty) rather than on the basis of a jury finding of cruelty on the facts of the individual case. In other words, legislation which removed the special protection that is now afforded to hunting under the Wild Mammals Act 1996 might be more justifiable than legislation which banned hunting on the basis of presumed cruelty. It certainly could be argued that huntsmen were being singled out for special, and discriminatory, treatment if they are to be denied the opportunity to defend themselves before a jury on the basis that their activity, or that of their dogs, is not cruel. It is arguably discriminatory against the social or status group who participate in hunting to deny them the opportunity of all others accused of cruelty to mammals of defending their conduct before a jury on the basis that cruelty has not been proved by the State. So if the form the legislation takes is an outright ban on hunting with substantial criminal penalties attached, on the basis of presumed cruelty, then it does, in my view, potentially constitute an arbitrary deprivation of jury trial on the issue of cruelty (contrary to Article 5) and discrimination in an area where both Article 5 and Article 8 rights are engaged.

23. CONCLUSION

In brief, I conclude as follows:

(i) There is a serious argument that the proposed ban on hunting with dogs will violate Article 1 of Protocol I; and, unless proper provision is made for compensation, that case will become a stronger one.

(ii) There is a serious argument that the proposed ban violates Article 8 of the European Convention.

(iii) The position under Article 11 requires further consideration, as does that under Article 14.

(iv) A general ban on hunting foxes with dogs based on presumed cruelty and backed with criminal sanctions may violate both Article 5 and Article 14 in depriving hunters of the right to have cruelty proved by the prosecution, and the right to jury trial on this issue. After all, that is the general approach adopted by the State to all other citizens whose conduct is to be criminalised on the basis of alleged cruelty to animals.

Fawra Fitzgerald

EDWARD FITZGERALD Q.C.

18th February 2000

Joint Opinion of Counsel

For

The Countryside Alliance

re

Protection of Wild Mammals (Scotland) Bill

2000

PW

LEVY & McRAE

Summary Joint Opinion of Counsel

For

The Countryside Alliance

re

Protection of Wild Mammals (Scotland) Bill

1. **The following is a summary of a Joint Opinion prepared by Paul Cullen QC and David Johnston, Advocate in May 2000 for the Countryside Alliance. It deals with the question of whether the Protection of Wild Mammals (Scotland) Bill would be open to challenge in the Scottish Courts on the ground that its provisions are incompatible with the European Convention on Human Rights. The Summary has been prepared in order to assist the Justice and Home Affairs Committee of the Scottish Parliament in its consideration of the Bill. It should be read with the Advice of Edward Fitzgerald QC (of the English Bar) dated 18 February 2000 and with the critique prepared by Messrs Cullen and Johnston of the views of David Pannick QC *et al* in their Joint Note dated 19 May 2000. These documents are also being made available to the Committee.**

2. We refer to the consultation held on 5 May 2000 in Edinburgh and, as requested, now confirm our advice on the matters raised. In short we are asked to advise on the prospects of and procedures that would be involved in challenging the Protection of Wild Mammals (Scotland) Bill on the basis that if enacted, at least in its present terms, it would be incompatible with the European Convention on Human Rights.

3. *Legislative competence*. The Scottish Parliament has limited legislative competence. The limits are set out in the Scotland Act 1998 sections 29 and 30 and schedule 5. For present purposes the only issue about legislative competence which appears to arise is the compatibility or otherwise of the proposed legislation with 'Convention rights'.

4. Section 29 provides as follows: 'An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.' This would appear to mean that certain provisions or aspects of provisions contained in an Act of the Scottish Parliament can be held by the Courts to be beyond the Parliament's competence while other provisions in the same Act are saved (cf section 6(1) of the Northern Ireland Act 1998).

5. *Convention Rights*. The Opinion of Mr Fitzgerald QC deals with these extremely fully. We cannot usefully add to it and we agree that the principal lines of challenge are those based on the right to property (Article 1 of the First Protocol to the Convention) and Article 8 (respect for private and family life). We also agree that interferences with the rights of landowners and owners of dogs are the relevant issues for the purposes of the First Protocol.

We add here only a few points in relation to the particular text of this Bill, and on the question how the courts may look at it in Scotland. The parts of the Protection of Wild Mammals (Scotland) Bill that appear to be of most significance for the purposes of a challenge are the following:

(1) clause 1(1) 'A person must not hunt a wild mammal with a dog.'

This general provision is, as explained by Mr Fitzgerald QC, arguably an infringement of Article 1 of the First Protocol and Article 8. (This view of Article 1 is confirmed by a recent French case which dealt with hunting in a different context: *Chassagnou v. France*, 29 April 1999, para. 74. The European Court reiterated that a restriction on the free exercise of the right of use

undoubtedly constituted an interference with the applicants' enjoyment of their rights as the owners of property)

(2) clause 6(1): the court may make a disqualification order disqualifying the offender from having custody of any dog (or of any dog of the kind described in the order);

clause 6(2): imposition of requirements in relation to a dog in the offender's custody when the offence was committed or at any time since then; in particular delivery up to a specified person/requirement to pay for the care of the dog until permanent arrangements are made for its care or disposal;

clause 6(3): custody of a dog in contravention of a disqualification order is an offence.

These clauses go further than the straightforward ban on hunting discussed by Mr Fitzgerald QC, since they also ban certain people from having dogs in their custody at all. They do this in an extremely sweeping way, since the disqualification order may apply not only to any kind of dog (including one of no conceivable utility for hunting) but to any dog at all, including one (of any kind) which came into the offender's custody only after commission of the offence. For a person to be banned from 'custody' of any dog (a term which is undefined and potentially broad), but at the same time to be obliged to pay for its upkeep seems to go much further than is necessary for the purposes the Bill seeks to achieve and, as a corollary, represents a much grosser interference with the right to private life.

(3) There is no provision for compensation to be paid for the restriction on landowners' use of their own land or to dog owners for the reduction in the value and utility of their dogs. It is clear that deprivation of property without payment of any sum reasonably related to the value of the property normally constitutes a disproportionate interference with the right of property and therefore a violation of Article 1: *James* para. 54; *Lithgow* (1986) A. 102 para. 121; *Holy Monasteries* (1994) A. 301 para. 71. That is less obviously the case where it is not a question of expropriation but only of interference with property rights. But the lack of compensation, if it could be argued to impose a particular

burden on individuals, might support the argument that the legislation failed the proportionality test.

6. In the European Court, provisions of national legislation which were found to infringe the right to property have sometimes been held to be justified as being in the public interest. To some extent this is the result of the 'margin of appreciation' doctrine applied by the European Court, under which it defers to the national authorities' own assessment of what is in the public interest in their own countries. That doctrine is inapplicable where -as in the present case- what would be in issue in any challenge is the judgment of a Scottish court as to the compatibility of Scottish legislation with the interests of the Scottish public.

7. *Title and interest to sue.* Since the possible challenge to the legislation is founded on its (claimed) incompatibility with Convention rights, section 100 of the Scotland Act applies, according to which a person cannot bring proceedings on the ground that an 'act' (which includes the making of legislation) is incompatible with Convention rights unless he is a victim for the purposes of article 34 of the Convention.

Those who would be 'victims' and therefore have title to challenge the legislation must be primarily those whose property rights would be infringed by the legislation: landowners, owners of dogs (especially packs of dogs), and possibly those whose livelihood depends on hunting. From the Convention case law it is clear that the Countryside Alliance itself could not be regarded as a 'victim' and would not therefore have title to challenge the legislation. (The closest parallel to its position is perhaps a case in which the Commission held that trade unions were not 'victims' of measures which affected the members whose collective interests they represented: *Purcell v. Ireland* D & R 70 (1991) 262, 273).

8. As discussed at the consultation, it would be helpful to identify as soon as possible suitable candidates in whose names proceedings could be brought. What we think is needed is a number of landowners and dog owners whose rights to hunt or to permit hunting on their own land and to utilise their dogs for hunting purposes will be interfered with as a direct result of the enactment of the Bill.

9. *Procedure*. It is not self-evident that any individual is entitled to raise proceedings to challenge proposed legislation in these circumstances. Section 33 of the Scotland Act allows the Advocate General or Lord Advocate to refer the question whether a Bill is within the legislative competence of the Parliament to the Privy Council. But there is no mechanism for requiring him or her to do so. It would be open to a court to hold that Parliament intended this to be the only pre-enactment scrutiny. Since there is no authority on this question, it cannot be predicted with confidence what line the courts are likely to take. Experience from recent challenges to the Scottish Parliament in *The Scotsman* and *Whaley* cases (*Whaley and others v Lord Watson of Invergowrie* 2000 SLT 475) shows that, while the courts are somewhat reluctant to interfere in the business of the Parliament, they are willing to police the limits within which it exercises its powers. Given the general public interest in the competence of legislation, there is a good argument that those particularly affected by the proposed Bill (i.e. victims) ought to have standing to seek a ruling on its competence.

10. Owing to the terms of section 40 of the Scotland Act, the only order available against the Scottish Parliament is a declaratory one. This cannot require the Parliament to do anything, but it would in practice clearly take notice of such a declaration. There appear therefore to be three main avenues of approach:

    (1) No Bill can proceed unless the Presiding Officer certifies that it is within the legislative competence of the Parliament. The first route would

therefore be to seek a declaratory order in a petition for judicial review to the effect that, contrary to the certificate of legislative competence granted by the Presiding Officer in terms of section 31(2), the Bill would not be within the Parliament's legislative competence.

(2) The second option would be to wait until the various Parliamentary stages of considering the Bill have been completed and all that remains is for the Presiding Officer to submit the Bill for Royal Assent in terms of section 32(1) of the Scotland Act. It might be possible to seek a declarator at that stage (perhaps in a petition for judicial review) to the effect that that the Presiding Officer was not entitled to present the Bill for Royal Assent since on its being enacted it would be an Act that was not within legislative competence or at least certain of its provisions would not be. Following discussion at the consultation, we are inclined to think that this approach would not be free of complexity because of the particular terms of the definitions given to the phrase 'devolution issue' in Schedule 6 to the Scotland Act. An attempt could be made to argue that the presentation of the Bill by the Presiding Officer gave rise to a 'devolution issue' because there would be a question whether the ensuing Act (the terms of which would obviously be identical to those of the Bill) would be within legislative competence (Schedule 6 paragraph 1(a)). But this approach would run up against the language used in the sub-paragraph which reads '...whether an Act ...is within the legislative competence of the Parliament.' Another line would involve arguing that there was a question whether the presentation of the Bill by the Presiding Officer was a function exercisable within devolved competence as it is put in Schedule 6 paragraph 1(f). In this context we note that section 126(1) defines 'functions' so as to include 'powers'. This might allow it to be argued that the power to present the Bill for Royal Assent is brought within the scope of sub-paragraph 1(f) since there could be no power to present for Royal Assent a Bill that was *ultra vires*. This might be a tenable approach. On balance we have however come to the conclusion that any attempt to challenge the Bill before it is enacted, even at the latest possible stage, would run too great a risk of being defeated on the simple preliminary point that the scheme of the Scotland Act

makes it clear that a *vires* challenge can only be brought in respect of an Act as opposed to a Bill.

(3) The third option and the one we favour would be to wait until after enactment of the Bill and to seek declarator at that stage that the Act was not within legislative competence, thereby creating a straightforward 'devolution issue' in terms of Schedule 6 paragraph 1(a). That involves certain procedural differences from ordinary procedure so far as rights of appeal are concerned. We consider these below.

11. *Prematurity.* In general terms there are difficulties in seeking to challenge a Bill, at least at an early stage, since this invariably raises issues about prematurity. The reason is that it is not clear that the Bill will be enacted in the terms in which it has been introduced. The point is particularly clear in the present case, since this Bill is at the moment in the course of a consultation period which ends on 11 August 2000. At its meeting on 21 April 2000 the Rural Affairs Committee expressed the hope that its Stage 1 report would be ready by early September and that there would be a debate in the Parliament shortly afterwards. Stage 1 is the Stage at which the general principles of a Bill are considered (Standing Orders rule 9.5.1(a)). It is clear that the Parliament is not committed even to the general principles of a Bill until after its agreement to them in the Stage 1 debate (rule 9.6.4); the Bill will fall if agreement to the general principles is not forthcoming (rule 9.6.7). It is therefore not possible at this stage to be sure that the Bill accords even closely with the terms of any eventual legislation. To that extent any challenge before September 2000 would undoubtedly be premature.

(For the same reason, it seems that no objection could be taken to a petition for judicial review on the ground of delay merely because the petitioner had waited until the likely shape of the legislation had emerged in the course of parliamentary proceedings on a Bill.)

12. In a public law challenge it is good practice to send a letter before action to the public body concerned. The Alliance's response to the current consultation exercise could perform part of that function, as well (perhaps) as influencing the eventual shape of the legislation.

13. *Devolution issues: appeals and references.* Special procedural rules apply where a devolution issue arises. 'Devolution issue' is defined in Schedule 6 of the Scotland Act 1998. There are six categories. We have already discussed those that may be relevant in the present case.

Where a devolution issue arises, it has to be intimated to the Lord Advocate and the Advocate General, who may choose to take part in the proceedings (Schedule 6 paragraphs 5 and 6). The ordinary rules of procedure have to be read alongside the new rules of court dealing with procedure in cases raising devolution issues. These are set out in chapter 25A of the Rules of Court (SI 1999 no. 1345). A single judge can either determine a devolution issue or may refer it to the Inner House, the Scottish equivalent of the Court of Appeal (Scotland Act 1998 schedule 6 paragraph 7). The language of the Act in this paragraph is not mandatory, so it is not possible to insist on the court making a reference.

If the judge determines the issue, a party may appeal against his determination. The normal rules of procedure would apply here and require any appeal to be marked within 21 days of the order appealed against (RC 38.3). A motion could be made to the court for the hearing of the appeal to take place at an early date (RC 38.13 and Practice Note no. 1 of 1995). When the matter is before the Inner House on appeal, it is able to make a reference to the Judicial Committee of the Privy Council (schedule 6 paragraph 10).

If the judge does not determine the issue but makes a reference to the Inner House, the Inner House must determine the issue and may not refer it on to the Judicial Committee (schedule 6 paragraphs 10 and 12). But an appeal against the Inner House's judgment can be taken to the Judicial Committee. This must be done within six weeks in cases where no leave to appeal is required or where leave is required and is granted. In cases where leave is required -this

applies to most interlocutory judgments- and refused by the Inner House, but special leave is sought within 28 days and granted by the Privy Council itself, the appeal must be made within 14 days of the grant of special leave (schedule 6 paragraph 13(b); rules 2.12 and 5.2 of the Judicial Committee (Devolution Issues) Rules 1999 (SI 1999 no. 665)).

Where references are made, either by a single judge or by the Inner House, there are no set time limits within which this must be done. The rules of court simply provide that, when it refers a matter to the Judicial Committee, the Inner House shall give directions about the manner and time in which the reference is to be adjusted (RC 25A.8).

After all domestic rights of appeal have been exhausted there would still remain the possibility of making an application to the European Court of Human Rights in Strasbourg.

Advocates Library,
Parliament House,
Edinburgh
9 May 2000

Paul Cullen QC

David Johnston

JOINT NOTE BY COUNSEL

for

COUNTRYSIDE ALLIANCE

2000

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Since our joint Opinion dated 9 May 2000, the Opinion of Messrs Pannick, Drabble and Singh has become available. It concludes that the Wild Mammals (Hunting with Dogs) Bill, which applies to England and Wales only, is compatible with the European Convention on Human Rights. We are asked for our comments.

1. We agree in general terms with the remarks made (in paragraphs 36-47) about Articles 5, 6 and 11 and therefore confine out attention to Article 8 and Article 1 of the First Protocol.

Article 8

2. Is Article 8 engaged?

It is, as the Opinion notes, true that Article 8 does not contain a general right of liberty of action and that the interests of others may impact on the respect due to an individual's right to private life (paragraphs 7-8). But we find the approach taken in the Opinion to Article 8 rather narrow: it states that in the present context only the right to respect for private life is even potentially relevant (paragraph 5) and then sets out a number of reasons why hunting does not amount to 'private life'. What the Opinion does not do is address the fact that 'private life', as explained by Mr Fitzgerald QC in his Opinion at paragraph 12, might be regarded as extending to recreational activities. Nor does it even consider whether there might be an interference with the right to respect for the home. Since the European Court has found that the right to respect for the home extends even to business premises, in our view a case for its extending to a person's land (as well as his house) is compelling: see e.g. *Niemitz* (1992) A. 251B at paragraphs 29-30. Since no definitions are provided in Article 8, the various rights provided there cannot be clearly dissociated

from one another: we remain of the view that a good argument can be made that the Bill would infringe this Article, whether viewed as an infringement of the right to respect for private life or respect for the home.

3. Much is made in the Opinion of the fact that legislation to ban hunting, if enacted, would have proceeded upon well-informed debate and on a free vote in the House of Commons (paragraphs 11 and 12). We note in passing that nothing is said about the possibility that the proposed measure may be consistently defeated on free votes in the House of Lords with the result that the Parliament Acts may require to be invoked if the legislation is to be enacted. Such a course of events may serve to undermine the argument that a free vote in the House of Commons somehow confers a greater degree of legitimacy on a measure than it would possess if it were to be passed after a whipped vote in that chamber. The theme of deference to Parliament running through the Pannick *et al* Opinion seems to us to be given undue emphasis. We accept, of course, that the courts will not lightly declare legislation to be incompatible with Convention rights -we dealt with this point in paragraph 5 of our previous Opinion. But it is implicit in the scheme of the Scotland Act 1998 and was recognized by the Inner House of the Court of Session in the proceedings on appeal in relation to introduction of the present Bill (*Whaley v. Lord Watson of Invergowrie* 2000 SLT 475) that the courts must exercise their supervisory jurisdiction to ensure that legislation is within the legislative competence of the Scottish Parliament. To the extent that legislation infringes Convention rights, it is not. We therefore think this factor entitled to much less weight than it receives in the Opinion.

If Article 8 is engaged, can the interference be justified?

4. While the Opinion recognizes that interference with a right can be justified only if it corresponds to a pressing social need (paragraph 15), it does not appear to us that this test is adequately reflected in the arguments subsequently set out. All that is said in support of the interference is (a) reiteration of the point about due deference to the views of Parliament; (b) an assertion that the Bill meets the test of proportionality.

5. No proper consideration is given in the Opinion to the question whether cruelty to animals is actually involved in hunting and, if it is, whether that is such as to engage

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19 May 2000

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