



## **The Hunting Act 2004: Implications for badger conservation and welfare in England and Wales**

### **1.0 Introduction**

Fox hunting with hounds and the use of terriers below ground has for many years caused serious and widespread problems for badgers:

- Fox hunting has involved the blocking (or 'stopping up') of badger sett entrances. Although this is an offence under the Protection of Badgers Act 1992 (PBA 1992), fox hunts were allowed to block setts (provided that certain conditions were met) by virtue of a special exception within the PBA 1992. The harmful effects of this activity are described in our report (NFBG, 2002); and
- The PBA 1992 makes it an offence to interfere with a badger sett (including damaging or destroying a sett, digging a sett and entering a dog into a sett). However, many of those who have been prosecuted for these offences have claimed that they were legally using their dogs to hunt for foxes or rabbits. This loophole has allowed badger abuse to continue.

The Hunting Act 2004 (HA 2004) has outlawed the practice of hunting with dogs, with some exceptions. It has also brought about changes to the PBA 1992. The main benefits for badgers are that, as from 18 February 2005:

- The exception in the PBA 1992 which allowed fox hunts to block badger setts has been repealed. *It is now illegal for hunts to block a badger sett;* and
- Some restrictions have been placed on the use of dogs below ground.

However, significant problems remain as discussed below. In particular, since the use of dogs below ground has not been completely banned, badger diggers caught with a dog in a badger sett may continue to claim that their actions are legal.

### **2.0 Interference with badger setts**

Under section 3 of the PBA 1992, a person is guilty of an offence if they interfere with a badger sett, by doing (either intentionally or recklessly) any of the following things:

- (a) **Damage** a badger sett or any part of it;
- (b) **Destroying** a badger sett;
- (c) **Obstruct** access to, or any entrance of, a badger sett;

- (d) Cause a **dog** to enter a badger sett; or
- (e) **Disturb** a badger when it is occupying a badger sett

However, the PBA 1992 allows a person to claim exemptions from the offences listed at (a) to (e) above. It also allows licences to be issued to carry out the actions at (a) to (e) above. Specifically, a person is not guilty of an offence by way of interfering with a badger sett under any of the following circumstances:

- (1) If the person has obtained a **licence** under Section 10 of the PBA 1992, and the interference is permitted under that licence, and has been carried out in accordance with the conditions specified in that licence;
- (2) If the person can show that the interference was necessary to **prevent serious damage** to land, crops, poultry or other property. (However, this defence does not apply if the threat to land, crops, poultry or property was known about in advance and either a licence under Section 10 of the PBA 1992 was not applied for as soon as was reasonably possible afterwards, or such a licence had been applied for but the application had been refused.) [Sections 8(1) and (2)]; and
- (3) If the person can show that the interference was the **incidental result of a lawful action** and could not reasonably have been avoided. [Section 8(3)].

*The offences and exceptions detailed above are unchanged by the HA 2004.*

### **3.0 Interference with setts by fox hunts**

Prior to the introduction of the HA 2004, the PBA allowed two additional exemptions whereby a person was not guilty of an offence by way of interfering with a badger sett:

- (1) If the person **obstructed** ('blocked') the entrances of a badger sett for the purpose of hunting foxes with hounds, in accordance with the conditions laid down in Sections 8(4) to 8(6) of the PBA 1992; and
- (2) If their hounds '**marked**' at a badger sett (but only if the interference was limited to damaging a sett or any part of it; obstructing access to, or any entrance of, a badger sett; or disturbing a badger when it is occupying a badger sett AND if the hounds are withdrawn as soon as reasonably practicable).

However, the HA 2004 repeals those sections of the PBA 1992 which relate to exceptions (1) and (2) above. The repealed sections of the PBA 1992 are Sections 8(4) to 8(9).

*Therefore, from 18 February 2005 it has been illegal to:*

- *Block a badger sett for the purpose of hunting foxes with hounds; and*
- *Allow hounds to mark at a badger sett.*

*From 18 February 2005, it has only been lawful to:*

- *Interfere with a badger sett in the circumstances set out in (1) to (3) under Section 2.0 above.*

#### **WHAT ACTION CAN YOU TAKE?**

Members of the public should look out for evidence of illegal blocking of sett entrances or other interference. For any suspected interference, if the people involved are still there, do not approach them as they may be dangerous but make notes of what you have seen, from a safe distance, and call the police on

999, requesting immediate assistance. If the people are not there, you should report the interference to the police immediately. A report should also be made to Badger Trust so that we can monitor the situation.

## 4.0 Using dogs underground

Unfortunately for badgers, although the HA 2004 outlaws all hunting with dogs, it does permit 'exempt hunting'. Badger Trust is concerned that this may allow those who abuse badgers to claim a legitimate excuse for entering dogs into a badger sett or for digging into a badger sett.

'Exempt hunting; includes hunting for rabbits or rats, and the "*use of dogs below ground to protect birds for shooting*" (Schedule 1, paragraph 2). Under the latter exemption, a dog may be used below ground in the course of stalking or flushing out, but only in certain circumstances (see Appendix I).

The use of dogs below ground is subject to a code and a guide. The **Code of Practice** for the Use of Dogs Below Ground, which is legally binding, and the **Good Practice Guide** for the use of dogs below ground, which is not legally binding. Both can be downloaded from: [www.defra.gov.uk/rural/hunting/basc-code.pdf](http://www.defra.gov.uk/rural/hunting/basc-code.pdf). The Code and the Guide were produced by the British Association for Shooting and Conservation (BASC) following consultation with shooting and animal welfare interests. We responded to the consultation in January 2005 (NFBG, 2005) but Badger Trust has two remaining concerns.

### 4.1 Licences to control foxes

Section 10(3) of the PBA 1992 provides for the issue of licences permitting persons to interfere with badger setts "for the purpose of controlling foxes in order to protect livestock, game or wild life". Such licences may be issued by the statutory nature conservation agencies and the agricultural departments of England and Wales (Natural England and DEFRA in England, and the Countryside Council for Wales and National Assembly for Wales Agriculture Department in Wales).

These provisions are unchanged by the HA 2004. However, the restrictions brought in by the HA 2004 on the use of dogs below ground, mean that certain actions which could previously be authorised by a licence under section 10(3) of the PBA 1992 were not licensable from 18 February 2005. We have sought clarification from DEFRA, who told us that: "The only circumstances in which a dog may be used below ground to flush out a wild mammal are those set out in the 'gamekeepers exemption' in paragraph 2 of Schedule 1 to the HA 2004. Therefore, it follows that any licence that might now be granted which would allow a dog to be put down a badger sett to flush out a fox must now comply with all the requirements of the gamekeepers' exemption. DEFRA will not issue licences under section 10(3) of the PBA 1992 which would purport to permit actions involving dogs which are prohibited by the HA 2004."

### 4.2 Rescuing trapped dogs

The Code of Practice for the Use of a Dog Underground states that six principles must be observed when a dog is used below ground to stalk or flush out a wild mammal (see Appendix II). The Badger Trust is concerned over the sixth and final point that: "once it is determined that a terrier has become trapped assistance must be given to release it".

Should a dog become trapped in the course of stalking or flushing out a wild mammal below ground, the Code of Practice legally obliges the person using the dog to take steps to 'release' it as soon as they become aware that it is trapped. However, if the dog is trapped in a badger sett, and a person attempts to release the dog by digging into it without first having obtained a licence from the relevant agricultural department, they will commit an offence under the PBA 1992. This is not made clear in the Code.

Badger Trust therefore considers that the Code should provide more detail on the legal implications of dealing with a dog trapped in a badger sett, as outlined in our response to the consultation on the draft Code. As it stands, this clause of the Code allows badger diggers to claim to be rescuing their dog. It is

also likely that innocent members of the public, who lose their dogs in a sett while out walking, may attempt to dig the dog out of the sett, ignorant of the fact that this is an offence without a licence.

We have raised our concerns with DEFRA and have been advised to submit our recommendations when the Code is next reviewed.

#### **4.3 Dogs in badger setts**

Apart from the apparent conflict described above, **nothing in the HA 2004 makes the entering or use of a dog or dogs in a badger sett legal.**

*Therefore, from 18 February 2005:*

- Anybody caught with one or more dogs in a badger sett, who does not have a licence permitting this, will still have to show that they were not committing an offence under the PBA 1992;*
- Anybody caught digging into a badger sett, whether to recover a trapped dog or otherwise, will still have to show that they were not committing an offence under the PBA 1992;and*
- In addition, if they claim that they were legally attempting to hunt for rabbits, or to flush a fox from below ground, they will also need to show that their hunting is exempt hunting under the HA 2004 as set out above.*

#### **WHAT ACTION CAN YOU TAKE?**

Members of the public should look out for people digging into badger setts, or with dogs in badger setts. If you see any such activity and the people involved are still there, do not approach them as they may be dangerous. Make notes of what you have seen, in particular note the registration number, colour and make of any vehicle from a safe distance. Then call the police on 999, requesting immediate assistance. If they have left, you should report to the Police immediately. Also inform Badger Trust so we can monitor the situation.

#### **4.0 References**

DEFRA (2005). Code of Practice for the Use of a Dog Underground.  
[www.defra.gov.uk/rural/hunting/basc-code.pdf](http://www.defra.gov.uk/rural/hunting/basc-code.pdf)

NFBG (2002). The effect on badgers of hunting with dogs. March 2002.  
[www.badgertrust.org.uk/action/HuntingWithDogsReport.pdf](http://www.badgertrust.org.uk/action/HuntingWithDogsReport.pdf)

NFBG (2005). Letter to DEFRA, 14 January 2005, regarding BASC draft code of conduct for the use of a dog below ground in England and Wales. [www.badgertrust.org.uk/action/basc-code-comments.pdf](http://www.badgertrust.org.uk/action/basc-code-comments.pdf)

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## 5.0 Appendices

### Appendix I

While the Hunting Act 2004 (HA 2004) outlaws all hunting with dogs, it permits the exception of ‘exempt hunting’. ‘Exempt hunting’ includes hunting for rabbits or rats, and the “*use of dogs below ground to protect birds for shooting*” (Schedule 1, paragraph 2). Under the latter exemption, a dog may be used below ground in the course of stalking or flushing out, but only in the following circumstances:

- the stalking or flushing out must be undertaken for the purpose of preventing or reducing **serious damage** to game birds or wild birds which a person is keeping or preserving for the purpose of their being shot;
- the person doing the stalking or flushing out must have with them, **written evidence** that they own the land on which they are stalking or flushing out, or that they have permission to use the land for that purpose from the landowner or occupier, and must produce this evidence to a police constable immediately upon request;
- the stalking or flushing out **must not involve the use of more than one dog below ground at any one time**; and
- reasonable steps must be taken to ensure that:
  - (a) the wild animal is **flushed from below ground as soon as possible**;
  - (b) the wild mammal is shot dead by a **competent person as soon as possible** after being flushed out;
  - (c) the dog is brought under **sufficiently close control** to ensure that it does not prevent or obstruct the shooting of the wild mammal as set out in (b) above;
  - (d) the dog does not become **injured**; and
  - (e) the manner in which the dog is used complies with any **code of practice** which is issued or approved for the purpose of Schedule 1, paragraph 2 of the HA 2004 by the Secretary of State.

## Appendix II

The Code of Practice for the Use of a Dog Underground states that the following six principles must be observed when a dog is used below ground to stalk or flush out a wild mammal:

- The terrier's role must be to locate the wild mammal underground and cause it to 'bolt' (leave the earth or den) as soon as possible so that it can be shot by a competent person and humanely dispatched. It should not be intended that a terrier will fight the wild mammal;
- Only terriers that are 'soft' (those that habitually stand off and bark at the wild mammal) must be used. Terriers that are 'hard' (those that habitually fight) must not be used;
- Care must always be taken to ensure the safety of those involved and to minimise the risk of injury to either the wild mammal or terrier during the bolting process;
- The terrier's time underground should be kept as short as possible so as to minimise any potential distress to the wild mammal;
- The terrier being used must always be fitted with an electronic locator so that its exact position underground can be tracked; and
- Once it is determined that a terrier has become trapped assistance must be given to release it.