

# The protection of badgers: where are we now?

DARNELL, H.

2022

© The Author. 2022. Originally published in *UK journal of animal law*, available from <https://www.alaw.org.uk/>

# The Protection of Badgers – Where are we now?

By **Hannah Darnell, Solicitor**

## Introduction

“The Wildlife and Countryside Act 1981 (“the 1981 Act”) was a fairly simple source of wildlife law in Great Britain when it was enacted [in England, Wales and Scotland] to implement the Birds Directive and Bern Convention. But the legal picture is now more complex.”<sup>1</sup>

Whilst originally enacted to make provision for the protection of wild birds and their habitats, the 1981 Act introduced the notion of species-specific legislation as it amended several key pieces of animal welfare legislation involving certain mammals including deer, seals and badgers, and set out what it considered to be protected wild animals.

Schedule 7 of the 1981 Act as originally enacted saw a slight tightening of the protections previously set out in the Badgers Act 1973 (“the 1973 Act”) together with an increase in the penalties for badger-related crime (from £100 to £1,000 for offences excluding failing to quit land on which they had been found committing an offence under the 1973 Act) and thus legal recognition to some extent that the persecution of badgers was no longer acceptable.

Following this theme, in 1992, the Protection of Badgers Act (“the 1992 Act”) received Royal Assent. The 1992 Act was viewed as a key piece of legislation in terms of badger protection law as it amalgamated the 1973 Act, the Badgers

Act 1991, and the Badgers (Further Protection) Act 1991 and introduced steeper fines and the option of imprisonment for offences involving badgers and their setts in England, Wales and Scotland.

Council Directive 92/43/EEC (“the Habitats Directive”) was also introduced in 1992 to “ensure the conservation of a wide range of rare, threatened or endemic animal and plant species”<sup>2</sup> and, although badgers did not feature therein as a specifically protected species, the Directive offered a high level of protection to natural habitats and wild fauna and flora, which meant that any activities involving badger ‘management’ had to be carefully considered as to whether such activities might impact directly or indirectly upon habitats or species areas protected by the Directive<sup>3</sup>.

The Habitats Regulations 1994 implemented the species protection requirements of the Habitats Directive in Scotland. Similar but not identical Regulations were introduced in England and Wales but not until 2017 under the Conservation of Habitats and Species Regulations.

The devolution of powers in Scotland and Wales in 1998 provided an opportunity for these jurisdictions to make changes to wildlife legislation as matters concerning the environment and animal welfare became devolved issues.

Scotland took this opportunity to make changes

---

<sup>1</sup> NATURESCOT, 2020. The Birds Directive and Wildlife and Countryside Act. [online]. Unknown: NatureScot. Available from <https://www.nature.scot/professional-advice/protected-areas-and-species/protected-species/legal-framework/birds-directive-and-wildlife-and-countryside-act-1981#:~:text=This%20Directive%20requires%20the%20classification,habitats%20within%20the%20European%20community> [Accessed 17 August 2022].

---

<sup>2</sup> EUROPEAN COMMISSION, Undated. The Habitats Directive. [online]. Unknown: European Commission. Available from [https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index\\_en.htm](https://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm) [Accessed 18 August 2022].

<sup>3</sup> FOOD AND ENVIRONMENT RESEARCH AGENCY, 2011. Evaluation of the Potential Consequences for Wildlife of a Badger Control Policy in England. [online]. London: UK Government. Available from: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/182478/badger-control-consequences.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/182478/badger-control-consequences.pdf) [Accessed 18 August 2022].

to the 1992 Act as it applied to badgers in Scotland through the Protection of Wild Mammals (Scotland) Act 2002 ("the 2002 Act"), the Nature Conservation (Scotland) Act 2004 ("2004 Act"), the Wildlife and Natural Environmental (Scotland) Act 2011 ("the 2011 Act") and more recently the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020.

The 2002 Act was designed to protect wild mammals from being hunted with dogs (and will imminently be amended by the Hunting with Dogs (Scotland) Act following a Bill introduced this year). The Act repealed Section 8(4) to (9) of the 1992 Act to remove exceptions for offenders interfering with badger setts during the course of hunting foxes with dogs.

The 2004 Act made it an offence to 'attempt' to kill, injure or take a badger under Section 1 of the 1992 Act, and added a 'cause or permit' offence to Section 3 to capture any person who knowingly causes or permits interference of a badger sett. The 2004 Act also amended the penalties available under the 1992 Act for certain cruelty and sett interference offences together with offences relating to the sale and possession of live badgers. It introduced imprisonment for a term not exceeding six months or a fine not exceeding Level 5 (unlimited) on the standard scale on summary conviction and imprisonment for a term not exceeding three years or to a fine or both on conviction on indictment.

The 2011 Act continued this theme and introduced 'cause or permit' offences under Sections 1 (taking, injuring or killing badgers), 2 (cruelty), 4 (the sale and possession of live badgers), and 5 (marking and ringing badgers) of the 1992 Act. The Act also increased penalties for certain offences under Sections 1 – 4 of the 1992 Act from six months' imprisonment to twelve and from a Level 5 fine to the statutory maximum.

The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 ("the 2020 Act") made further changes to the penalties available for offences under the 1992 Act and will be discussed in more depth below.

Conversely, England and Wales have made relatively few changes to the 1992 Act since its introduction. The Hunting Act 2004 repealed

Section 8(4) to (9), as per the changes made in Scotland (to prevent the interference of badger setts by hunting dogs), and the Natural Environment and Rural Communities Act 2006 ("the 2006 Act") made a slight amendment to the licensing provisions under Section 10, and to the time limits for the bringing of proceedings under Section 12 of the 1992 Act, but the penalties for badger-related offences under the 1992 Act have remained the same since its enactment.

This position supports the view of the 1992 Act's critics who maintain that the Act has failed to move with the progress of wider animal welfare and protection legislation, principally in England and Wales, over the proceeding thirty years.

This argument has gained traction following the enactment of the Animal Welfare (Sentience) Act 2022 (the "2022 Act") in England, Wales, Scotland, and Northern Ireland. The 2022 Act recognises animals as sentient beings and compels the respective governments to have "all due regard" to the ways in which any future policy might have an adverse effect on the welfare of animals in this context.

The Badger Trust has emerged as a particular critic of the 1992 Act following the recent launch of its 'PBA30' campaign<sup>4</sup>. The charity argues that the 1992 Act exposes badgers to weak protections and inequalities, particularly in relation to penalties for offenders, and is no longer fit for purpose.

The Trust argues that the penalties available for badger-related crime in England and Wales, considering more recent animal welfare legislation relative to domestic animals, reflect the prevailing and distinct inequality between domestic and wild animals. This will be discussed further below.

Also coming in for some criticism from commentators is the absence of a specific badger baiting offence (using dogs to fight badgers) in the 1992 Act. Rather than having all badger-related protections under one umbrella of legislation, as was originally intended for the 1992 Act, basic

---

<sup>4</sup> BADGER TRUST, 2022. Protection of Badgers Act 30 Years. [online]. Unknown: Badger Trust. Available from <https://www.badgertrust.org.uk/protection-of-badgers-act> [Accessed 12 July 2022].

badger-related offences are covered by the Act but arguably the more serious offence of badger baiting is covered under general 'animal fights' in subsequent animal welfare legislation with no link to the 1992 Act nor specifically to badgers. To assess whether this is a valid point requires consideration of the reason that sits behind the presence of a separate offence and whether the presence of a separate piece of legislation to cover general animal fights has any impact upon the protections afforded to badgers.

Of note, there appears to be a pattern emerging in recent case law in Scotland where offences involving badger baiting or related badger offences are charged under animal welfare legislation relating to the injury caused to and/or cruelty inflicted upon the domestic animals (dogs) involved in the offences rather than for any injury, cruelty or death caused to a badger. A number of recent cases will be considered to examine this point in more depth.

Furthermore, new animal welfare legislation in Scotland distinguishes between attributable penalties depending upon whether the charge(s) are to be heard on summary or solemn procedure, and there appears to be a reluctance for badger-related offences to be heard in higher courts as demonstrated by the case of Callum Muir explored below. This case indicates that badger-related crime is not deemed sufficiently serious to be heard in higher courts and this creates difficulties when it comes to the imposition of increased sentencing powers available in Scotland.

This article is not intended to be a deep dive into the 1992 Act and its purported deficiencies, but rather a glance at where badger protection now sits in the UK, a touch upon some of its main criticisms, and the identification of trends relating to badger crime in criminal practice in Scotland.

### The Current Position

Consolidating the prior badger protection legislation, the 1992 Act generally creates offences in relation to the taking, injuring or killing of badgers; badger cruelty; interfering with badger setts; selling and possessing live badgers; and marking and ringing badgers without a licence. There are a number of exceptions to the offence

and a licensing scheme exists to legitimise certain activities which would otherwise be illegal under the Act, such as taking or killing a badger or interfering with a sett for the purpose of preventing the spread of disease or serious damage to land, crops, poultry, or other property. There are, of course, opponents to these exceptions and the activities permitted to take place under licence, and it will be interesting to understand how these sit with the 2022 Act in terms of animal sentience moving forward.

### Penalties - England & Wales

Concentrating first on penalties under the 1992 Act in England and Wales, where an offence has been committed which involves the wilful killing, injuring, or taking of a badger, or being in possession or control of a dead badger, a badger cruelty offence or interfering with a badger sett, the offender may be liable to a period of imprisonment not exceeding six months or a fine not exceeding Level 5 of the standard scale (unlimited).

Imprisonment is not an optional disposal for offences relating to the sale and possession of live badgers, marking and ringing without licence, failing to comply with conditions of a granted licence or with a dog destruction or disqualification order related to badger offences, which come with a fine not exceeding Level 5 of the standard scale only. Wilfully remaining on land when asked to leave following the commission of an offence imposes a fine not exceeding Level 3 of the standard scale (£1,000).

As noted above, the Wildlife and Countryside Act 1981 ("the 1981 Act") offered some protection for badgers with a slight tightening of penalties from the 1973 Act, however, in its current form, the offences covered by the Act are narrow and only cover certain prohibited methods of killing or taking wild animals (including badgers) with restrictions on certain types of snares and traps. An offender convicted of any of these offences may be liable to a period of imprisonment not exceeding six months or to a fine not exceeding Level 5 of the standard scale (unlimited), or to both.

The Animal Welfare (Sentencing) Act 2021 ("the 2021 Act") was enacted in England and Wales in

April 2021 to make provision about the mode of trial and maximum penalties for certain offences under the Animal Welfare Act 2006 ("the 2006 Act").

The 2021 Act increased the maximum penalties for offences under Sections 4, 5, 6(1) and (2), 7 and 8 of the 2006 Act which relate to the animal welfare offences of unnecessary suffering, mutilation, tail docking, poisoning and animal fighting.

The Act increased the maximum penalties for these offences to allow for a period of imprisonment of up to five years to be imposed. This followed a number of cases related to these offences in which judges expressed a desire to impose a higher penalty than that which the 2006 Act provided for. There was a particular desire to increase the penalties available in the case of crimes that related to deliberate, calculating and sadistic behaviour.<sup>5</sup>

Whilst the 2006 Act is designed to apply to all vertebrates other than man, there is a perception that Sections 4, 5, 6(1) and (2), 7 and 8 protect only domestic (companion) animals and thus the increased penalties under the 2021 Act are not designed to protect 'all animals'.

There is some truth in this argument as Section 4 (unnecessary suffering) makes provision for a 'protected animal' under Section 4(1) and for all other animals captured by the definition (vertebrates other than man) under Section 4(2), however, the wording of Section 4(2) is such that the offender must have been 'responsible' for the animal.

Sections 5 and 7 of the 2006 Act cover mutilation and poisoning, and the same scenario applies under Sections 5(2) and 7(2) respectively that the offender must have been 'responsible' for the animal which has been mutilated or poisoned. Section 6 covers tail docking and applies only to dogs. Section 8 of the 2006 Act covers animal fights and is discussed in more depth below.

It is understood that responsibility for an animal

<sup>5</sup> LEGISLATION.GOV.UK, 2021. Animal Welfare (Sentencing) Act 2021: Policy Background. [online]. Unknown: The National Archives. Available from: [www.legislation.gov.uk/ukpga/2021/21/notes/division/3/index.htm](https://www.legislation.gov.uk/ukpga/2021/21/notes/division/3/index.htm) [Accessed 18 August 2022].

is only intended to arise where a person can be said to have assumed responsibility for its day-to-day care or for its care for a specific purpose or by virtue of owning it<sup>6</sup>, which indicates that the animal involved will be domesticated. Whilst this will include a person who assumes responsibility for the animal temporarily, which could include a wild animal, the intention for this was to cover veterinary surgeons taking responsibility for animals kept in surgeries overnight, staff at boarding premises, staff at animal sanctuaries, for example. It may be that a wild animal trapped by an offender could be in his responsibility temporarily although it does appear that the provisions of the Act were not intended to cover this particular scenario.

It is, therefore, understandable that the Badger Trust feels that there is inequality between sentencing options available for domestic and non-domestic animals, indeed, in its 'Nature recovery green paper: protected sites and species'<sup>7</sup>, DEFRA commented upon the differences in the penalties set out across various pieces of legislation and suggested that minimum penalties for wildlife and poaching offences should be harmonised across all wildlife provisions to ensure the protection of all species and "should be comparable to those recently introduced for animal welfare offences."

### Scotland

The position in Scotland in relation to penalties varies slightly following amendment by subsequent pieces of legislation as alluded to above.

The Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020 ("the 2020 Act" - enacted on 21 July 2020) amended the 1992 Act by revising the penalties for badger-related

<sup>6</sup> LEGISLATION.GOV.UK, Unknown. Animal Welfare Act 2006: Prevention of Harm. [online]. Unknown: The National Archives. Available from <https://www.legislation.gov.uk/ukpga/2006/45/notes/division/7/2/5> [Accessed 18 August 2022].

<sup>7</sup> DEPARTMENT OF ENVIRONMENT FOOD & RURAL AFFAIRS (DEFRA), 2022. Nature Recovery Green Paper: Protected Sites and Species. [online]. Unknown: DEFRA. Available from [https://consult.defra.gov.uk/nature-recovery-green-paper/nature-recovery-green-paper/supporting\\_documents/Nature%20Recovery%20Green%20Paper%20Consultation%20%20Protected%20Sites%20and%20Species.pdf](https://consult.defra.gov.uk/nature-recovery-green-paper/nature-recovery-green-paper/supporting_documents/Nature%20Recovery%20Green%20Paper%20Consultation%20%20Protected%20Sites%20and%20Species.pdf) [Accessed 18 August 2022].



crime to give courts in Scotland more options in terms of disposal.

Penalties for the cruelty offences of using a firearm to kill or take a badger (and the associated 'cause or permit' offence introduced by the Wildlife and Natural Environment (Scotland) Act 2011 ("the 2011 Act") and sett disturbance offences on summary conviction were increased from imprisonment for a term not exceeding six months or a fine not exceeding Level 5 on the standard scale (unlimited) to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both. The effect being that the specific cruelty offences and the sett disturbance offences remain triable under summary procedure only but are subject to the higher maximum penalties.

Penalties for wilfully killing, injuring or taking a badger together with the associated 'cause or permit' offence introduced by the 2011 Act, along with certain cruelty offences (cruel ill treatment, the use of badger tongs in the course of killing, taking or attempting to kill or take a badger, and digging for a badger and the associated 'cause or permit' offence) increased (from imprisonment for a term not exceeding twelve months or a fine not exceeding the statutory maximum or both and on conviction on indictment for a term not exceeding three years or to a fine or both) to imprisonment for a term not exceeding twelve months or a fine not exceeding £40,000 or both on summary conviction, and to imprisonment for a term not exceeding five years or to a fine or both on conviction on indictment. The effect being that such offences are triable under summary or solemn procedure and subject to the higher maximum penalties.

There is also some protection for badgers under Section 23 of the Animal Health and Welfare (Scotland) Act 2006, which is considered in more depth below, and the Hunting with Dogs (Scotland) Bill intends to further restrict the ability to hunt wild mammals (including badgers) using dogs. The Bill is currently at Stage 1 moving to Stage 2 within the Scottish Parliament.

### Northern Ireland

By comparison, Northern Ireland is not covered by the 1992 Act and badgers and their setts are

instead protected under the Wildlife (Northern Ireland) Order 1985 ("the 1985 Order"), as amended by the Wildlife and Natural Environment Act (Northern Ireland) 2011; the provisions of which sit on similar terms to those of the 1992 Act. Penalties for offences on summary conviction are imprisonment for a term not exceeding six months, or to a fine not exceeding Level 5 (unlimited) on the standard scale or both.

The case of DPP v Edens (Edwards) from 2014<sup>8</sup> is an interesting read as the Director of Public Prosecutions in Northern Ireland attempted to amend a charge laid under the 1992 Act to an offence under the 1985 Order in relation to an offence of sett interference seven months after being first proffered but it was felt that there was no direct Northern Ireland equivalent of the offences labelled under the 1992 Act and that, notwithstanding that the amendment fell outside of a statutory time limit for offences under the 1985 Order, it would be inappropriate to amend the charges to one under the 1985 Order in the interests of justice.

### Animal Fighting

Turning now to the absence of a specific badger baiting offence (use of dogs to fight badgers) in the 1992 Act, which has been mooted as another criticism when considering whether the Act remains fit for purpose.

The 1992 Act makes no specific provision in England, Wales or Scotland for animal fights involving badgers, referred to as 'badger baiting', yet baiting remains a significant threat to badgers across the UK. Sett interference and baiting accounted for 70.28% of all reports made to the UK Badger Persecution Priority Delivery Group (BP-PDG) in 2019/2020<sup>9</sup>. This was an increase from 2018 statistics.

Reports received by the Badger Trust<sup>10</sup> demon-

8 DPP v Edens (Edward). 2014. NICA 55.

9 NATUREWATCH FOUNDATION, 2021. What is Badger Baiting. [online]. Unknown: Naturewatch Foundation. Available from <https://naturewatch.org/campaigns/wildlife-crime/what-is-badger-baiting/> [Accessed 8 August 2022].

10 WILDLIFE AND COUNTRYSIDE LINK, 2021. Wildlife Crime in 2020: A report on the scale of wildlife crime in England and Wales. [online]. Unknown: Wildlife and Countryside Link. Available from <https://www.wcl.>



strate that there was an increase of 52% in reports of badger baiting and fighting between 2019 and 2020.

Badger crime has been a UK Wildlife Crime Priority since 2009 and featured in the NPCC Wildlife Crime Strategy 2018 – 2021. It is one of the priorities currently being considered for notifiable status by the Home Office<sup>11</sup>; a move which is supported by the Badger Trust to allow for the true level of associated crimes to be accurately assessed, reported and tackled.

As mentioned above, animal fights in England and Wales are covered under Section 8 of the Animal Welfare Act 2006 (“2006 Act”) and in Scotland under Section 23 of the Animal Health

and Welfare (Scotland) Act 2006.

In both pieces of legislation, “animal fights” are defined as “an occasion on which a protected animal is placed with an animal or with a human for the purpose of fighting, wrestling or baiting.” A protected animal includes any animal under the control of man, whether on a permanent or temporary basis. As a result, it appears that a person commits an offence in relation to an animal fight even if there is no one who is responsible for the animal or animals involved within the meaning of Section 3 of the Act (responsibility for animals)<sup>12</sup>, and this would appear to cover the eventuality of a badger being trapped by an offender temporarily in readiness to fight.

In any case, as an animal for the purposes of the 2006 Acts is defined as a vertebrate other than man, the animal that a ‘protected animal’ is

---

org.uk/docs/WCL\_Wildlife\_Crime\_Report\_Nov\_21.pdf [Accessed 18 August 2022].

11 WILDLIFE AND COUNTRYSIDE LINK, 2021. Wildlife Crime in 2020: A report on the scale of wildlife crime in England and Wales. [online]. Unknown: Wildlife and Countryside Link. Available from [https://www.wcl.org.uk/docs/WCL\\_Wildlife\\_Crime\\_Report\\_Nov\\_21.pdf](https://www.wcl.org.uk/docs/WCL_Wildlife_Crime_Report_Nov_21.pdf) [Accessed 18 August 2022].

---

12 LEGISLATION.GOV.UK, Unknown. Animal Welfare Act 2006: Prevention of Harm. [online]. Unknown: The National Archives. Available from <https://www.legislation.gov.uk/ukpga/2006/45/notes/division/7/2/5> [Accessed 18 August 2022].

forced to fight can be any vertebrate, i.e. including a badger, although this is not specified in the legislation and there is no direct link to the 1992 Act.

Both of the 2006 Acts cover the keeping or training of an animal (i.e. any vertebrate) for the purpose of animal fights and include possessing equipment designed or adapted for use at an animal fight; causing or arranging a fight; participating in making or carrying out arrangements for a fight; making or accepting a bet on the outcome of the fight; and being present at a fight without lawful authority or reasonable excuse. The Scotland Act, however, creates various offences relating to the video recording of such fights. The sections of the Act in England and Wales relating to the video recording of such fights are not currently in force.

The penalties for animal fights in Scotland under the Animal Health and Welfare (Scotland) Act 2006 were increased by the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Act 2020. Offenders can now be sentenced on summary conviction to imprisonment for a term not exceeding twelve months or to a fine not exceeding £20,000, or both, or on conviction on indictment to imprisonment for a term not exceeding five years or a fine, or both. It is interesting to note that the potential financial penalty for animal fights on summary conviction in Scotland is half of what is now available on summary conviction for most other badger-related offences under the 1992 Act.

The penalties under the Animal Welfare Act 2006 for animal fights in England and Wales are largely the same although no maximum fine upon summary conviction is given in England and Wales.

Both Welfare Acts, however, offer post-conviction deprivation and disqualification orders in respect of any animal to which the offence relates, which can be for any period as the convicting court sees fit.

On the face of it, these would appear to be useful tools in potentially preventing the reoccurrence of animal fighting offences by depriving the offender of the dog(s) used in the commission of the offences and/or disqualifying them

from owning dogs for a period of time, however, case law in England, indicates practical difficulties with the enforcement of these orders, which suggests that individuals subject to disqualification orders are still able to be in close proximity to animals which may allow them to continue offending in this manner.<sup>13</sup> See Patterson<sup>14</sup> and R v Guildford Crown Court<sup>15</sup>

It is not known how often such orders are applied in cases under the 2006 Acts, however, it is worthy of note that the legislation states where a person is convicted of a relevant offence, the convicting court “may” make an order, thus the court has some discretion as to whether they apply such an order or not. If, however, the court decides not to make an order, it must specify its reasons for reaching this decision, which adds some accountability.

By comparison, animal fights in Northern Ireland are covered under Section 8 of the Welfare of Animals Act (Northern Ireland) 2011 which includes offences relating to video recording and the possession of other imagery of animal fights.

The Welfare of Animals Act (Northern Ireland) 2011 was amended by the Justice Act (Northern Ireland) 2016 to increase the maximum penalties in Northern Ireland in respect of animal fight offences, although excluded offences relating to recording such fights. Consequently, penalties for involvement in animal fights were increased to imprisonment for a term not exceeding twelve months or to a fine not exceeding £20,000 or both on summary conviction, and to imprisonment for a term not exceeding five years or to a fine or both on conviction on indictment.

### Practical Examples

Recent cases in Scotland indicate that whilst offences involving badger baiting are being charged as animal fighting offences under the

---

<sup>13</sup> HAILS, D., 2020. A Critical Analysis and Suggested Reform of Sentencing and Disqualification Orders under the Animal Welfare Act 2006. [online]. Dissertation, Northumbria University, Newcastle. Available from: 1114-Article%20Text-3479-1-10-20210304.pdf [Accessed 18 August 2022].

<sup>14</sup> Patterson v Royal Society for the Prevention of Cruelty to Animals (RSPCA). 2013. EWHC 4531 (Admin).

<sup>15</sup> R (on the application of RSPCA) v Guildford Crown Court. 2012. EWHC 3392 (Admin).



2006 Act, there appears to be more focus upon the injury and/or cruelty to the dogs involved in the offences rather than on the injury to, cruelty of and often death caused to the badgers.

Furthermore, as penalties in Scotland distinguish between whether the charge(s) is/are to be heard on summary or solemn procedure, it appears to be the case that there is some reluctance amongst prosecutors for badger-related offences to be heard in higher courts thus diminishing the impact of increased sentencing powers.

On 1 August 2022, a gamekeeper from the Millden Estate in Glenesk in the Angus Glens was sentenced at Forfar Sheriff Court to eight months' imprisonment in connection with a series of offences which took place between January 2018 and October 2019 (pre-enactment of the 2020 Act which offers increased penalties).

Rhys Owen Davies was charged under Section 23(1) of the Animal Health and Welfare (Scotland) Act 2006 ("the 2006 Act") with keeping five dogs for the purpose of animal fights.

Davies was also charged with causing unnecessary suffering under Section 19 of the 2006 Act by failing to obtain veterinary treatment for two dogs who had been badly injured during the fights, and with separate firearms offences relating to the improper storage of firearms and ammunition<sup>16</sup>.

Despite badger DNA being found on a locator collar (indicative of badger baiting) following forensic examination and photo albums showing images linked to badger digging with the accused clearly identified therein, specific charges under the 1992 Act were not apparently brought, and the focus of the charges was upon the keeping of dogs for the purpose of animal fights and suffering to the dogs as a consequence thereof.

As in the Davies' case, in 2021 at Banff Sheriff Court, Liam Taylor was charged under the 2006 Act with causing unnecessary suffering to his dog and with offences relating to animal fights.

<sup>16</sup> STEWART, A., 2022. Wildlife Detective: Millden Estate keeper jailed – some thoughts. [online]. Unknown: Alan Stewart. Available from: <https://wildlifedetective.wordpress.com/page/2/> [Accessed 2 August 2022].

The crimes pre-dated the increased penalties for badger-related offences and the offender received a Community Payback Order requiring him to be supervised for a twelve-month period, to carry out 240 hours of unpaid work and a ten-year dog disqualification order<sup>17</sup>.

In May this year, Callum Muir was sentenced at Ayr Sheriff Court to six months' imprisonment and a disqualification order under the 2006 Act for offences relating to animal fights. Locator collars used to track dogs when underground in badger setts were seized from the offender along with nets for catching wild animals when they bolt from their den<sup>18</sup>. The evidence was analysed, and badger DNA (along with fox DNA) was found thereon.

The offences came to light in April 2021 and were described as some of the worst the Scottish SPCA had encountered, however, the increased penalties available as a consequence of the 2020 Act were restricted as the case was heard on summary procedure rather than on solemn. This meant that the Sheriff was only able to sentence a maximum of twelve months' imprisonment and was obliged to deduct a percentage of that sentence for a guilty plea. He was, however, disqualified from owning dogs for life. It is said that the matter was not raised to the higher court as the offences were not deemed to be sufficiently serious<sup>19</sup>.

This is a concerning position as there is no benchmark as to what would be considered by a Procurator Fiscal (in Scotland) to be "sufficiently serious" in order to raise the matter to a higher

<sup>17</sup> MCCARTNEY, S., 2022. Man banned from owning dogs after injured pet trained for animal fighting. [online]. Unknown: The Scotsman. Available from: <https://www.scotsman.com/news/crime/man-banned-from-owning-dogs-after-injured-pet-trained-for-animal-fighting-3444107> [Accessed 2 August 2022].

<sup>18</sup> SCOTTISH SPCA, 2022. Animal fighter who laughed as wild animals were torn apart jailed. [online]. Scotland: Publisher Scottish SPCA. Available from <https://www.scottishspca.org/news/image-warning-animal-fighter-who-laughed-as-wild-animals-were-torn-apart-jailed> [Accessed 2 August 2022].

<sup>19</sup> MCGIVERN, M., WILLIAMS, K., 2022. Sadistic badger baiter filmed dogs ripping wild animals apart in sickening videos. [online]. Unknown: The Mirror. Available from <https://www.mirror.co.uk/news/uk-news/sadistic-badger-baiter-filmed-dogs-27052964> [Accessed 2 August 2022].

court. If the Scottish SPCA believes the actions of Muir to have been some of the worst they have encountered, it is unclear what might prompt a prosecutor to view offences such as this as suitable for solemn procedure. It appears to remain the case that crimes involving human detriment continue to be prioritised over animal-related crimes, despite the well-documented link between cruelty to animals and violence towards humans<sup>20</sup>. It also causes issues in terms of the new sentencing powers under the 2020 Act as it means that the penalties available on solemn procedure are inaccessible.

The 2006 Acts are the legislation of choice for animal fighting offences not simply because they are the correct pieces of legislation for animal fights as matters currently stand but also because in animal fighting cases, there tends to be injury caused to the dog(s) involved and charges relating to the unnecessary suffering of the dogs can be brought under the same Act. As already mentioned, there are also post-conviction orders which can be considered as a means of deterrent, despite the potential inadequacies surrounding enforcement as highlighted above, but some commentators argue that badger baiting should be given recognition in its own right and should be included under the 1992 Act.

If dogs were not involved and the offences related simply to badger crime, the 1992 Act would have to be used and it appears that there may be a reluctance across England, Wales and Scotland to take on badger-related crimes where domestic animals are not involved.

Considering this point further, it is understood that in England and Wales whilst some incidents of badger crime which are referred to the police for investigation are dealt with effectively, sometimes the level of investigation fails to reach an expected reasonable standard. Additionally, there appears to be difficulties with the lack of available and rapid access to competent or expert witnesses. It is said that cases involving badger crime in England are heavily contested by defence agents with duty Crown Prosecution Service lawyers having little to no knowledge of wildlife crime.<sup>21</sup>

In Scotland, there is a team contained within the Crown Office and Procurator Fiscal Service who concentrate solely on wildlife-related crime; however, convictions rely upon the police suitably investigating and charging offenders and, despite the evolution of specialist Wildlife Crime Liaison Officers, there are still challenges in terms of resources for investigating and reporting offenders for badger-related crimes. It is understood that there is a current focus upon wildlife crime in Scotland as a consequence of its affiliations with serious and organised crime and it is hoped that this will result in more badger-related crimes reaching court, and preferably higher courts at that.

### Conclusion

At the very least, there are cross-jurisdiction irregularities in penalties available for badger-related offences under the 1992 Act and at its worst, there is something of a disconnect between the 1992 Act and subsequent animal welfare legislation, which appears to fall in favour of domestic animals.

Perhaps it is a matter of evidence as some commentators argue and it is easier to support a charge under the Welfare Acts due to the involvement of dogs, or perhaps it is a consequence of the well-documented speciesism between domestic and non-domestic animals where it is viewed by many as more shocking to see injury to a domestic animal than it is to an animal in the wild. The fact that DEFRA appears to have identified this inequality in its recent consultation (as referred to above) indicates that this is an issue which should be overturned across all animal welfare legislation, particularly in light of the Animal Welfare (Sentience) Act 2022.

Regardless of the reasoning, the facts highlight the inadequacies in badger protection legislation and the failings of the 1992 Act as the primary piece of legislation designed to offer such protection.

Having recently celebrated thirty years since its enactment, it appears that now would be a suit-

20 See <https://www.hiddeninsight.org/the-link>

21 WILDLIFE AND COUNTRYSIDE LINK, 2021. Wildlife Crime in 2020: A report on the scale of wildlife

crime in England and Wales. [online]. Unknown: Wildlife and Countryside Link. Available from [https://www.wcl.org.uk/docs/WCL\\_Wildlife\\_Crime\\_Report\\_Nov\\_21.pdf](https://www.wcl.org.uk/docs/WCL_Wildlife_Crime_Report_Nov_21.pdf) [Accessed 18 August 2022].

able time to revisit the 1992 Act to ensure that, in light of the legal recognition of animal sentience, increased penalties for domestic animals, and no sign of declining badger-related crime, this Act can still achieve its intended purpose: the protection of badgers.

**Hannah Darnell is a former Detective Constable and now a practising Scottish Solicitor and the Law Clinic Manager at Robert Gordon University, and a member of the UK Centre for Animal Law's Scottish Steering Group and Wildlife Working Group. Hannah is also the former Crime & Advocacy Advisor at Scottish Badgers.**