

CLOSE SEASONS



**A consultation by the
Deer Commission for Scotland**

DEER
COMMISSION
for SCOTLAND

Economy • Welfare • Management



**CLOSE SEASONS: A CONSULTATION BY
THE DEER COMMISSION FOR SCOTLAND**

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Introduction from the Chairman

Discussion on close seasons for deer has always elicited considerable debate. Much of this debate originally centred around an occupier's right to shoot deer on land without hindrance. Sportsmen from the first quarter of the 19th century contested their right to build up stocks of deer to levels that ensured an ample supply of trophy stags. Farmers, crofters and woodland owners countered that their livelihood should be protected from the damage caused by deer populations.

It was not until 1948 that the first effective deer control measures were introduced under the auspices of the Agriculture (Scotland) Act. This allowed the occupier of agricultural land and enclosed woodland to kill deer found on that land and dispose of the carcasses. Over the next couple of years an argument developed that deer required a close season to protect them from over-exploitation brought on by the introduction of the Agriculture Act and continued post-war rationing.

The Maconochie Committee was set up in 1952 to consider the desirability of introducing a close season for deer in Scotland but failed to reach agreement; the majority of the committee being in favour of the introduc-

tion of close seasons provided there were safeguards to protect agricultural land. The minority farming interests insisted that close seasons should not be introduced until the red deer numbers were reduced to satisfactory levels and marauding deer were 'exterminated'. Despite these disagreements the Deer (Scotland) Act was passed in 1959 creating the Red Deer Commission and providing for the setting of close seasons. The implementation of these close seasons was, however, delayed and came into force only in 1962. Although the debate that preceded the implementation of the close seasons was wide-ranging, it centred on the requirement to protect pregnant hinds and protect stags while they were on their wintering grounds.

In the proceeding years close seasons have been introduced for all wild deer species in Scotland and have continued to be modified as society's expectations for the management of wild animals have developed. Undoubtedly the tensions that drove earlier legislation do still exist. Thinking on the responsibility required of managers when culling these wild animals has, however, moved on from the post-war period when production and self-sufficiency, and hence crop protection were primary.

Deer welfare – ensuring no unnecessary suffering – has now become a central theme.


There is also an increased requirement for transparency in the actions taken by those who manage wild animals. This requirement is driven by the need to meet a greater range of land use objectives. It has become increasingly difficult for the deer sector to operate in isolation and hence contemporary debate on close seasons must engage a wider audience.

Thus the Deer Commission for Scotland (DCS) has been asked by Scottish Ministers to undertake a consultation on the current close seasons for deer in Scotland and to report back on the results of that consultation by

March 2005. On receipt, Scottish Ministers will take into account the results of the consultation and any advice provided by DCS before considering whether to make a new Order setting change to the close seasons.

I thank you in advance for your contribution in fully exploring the principles and issues that will guide decisions on the setting of close seasons for wild deer in Scotland.

Andrew Raven
Chairman

A handwritten signature in blue ink, appearing to read 'Andrew Raven', with a stylized flourish above the name.

I. A Background to the Issues of Close Seasons

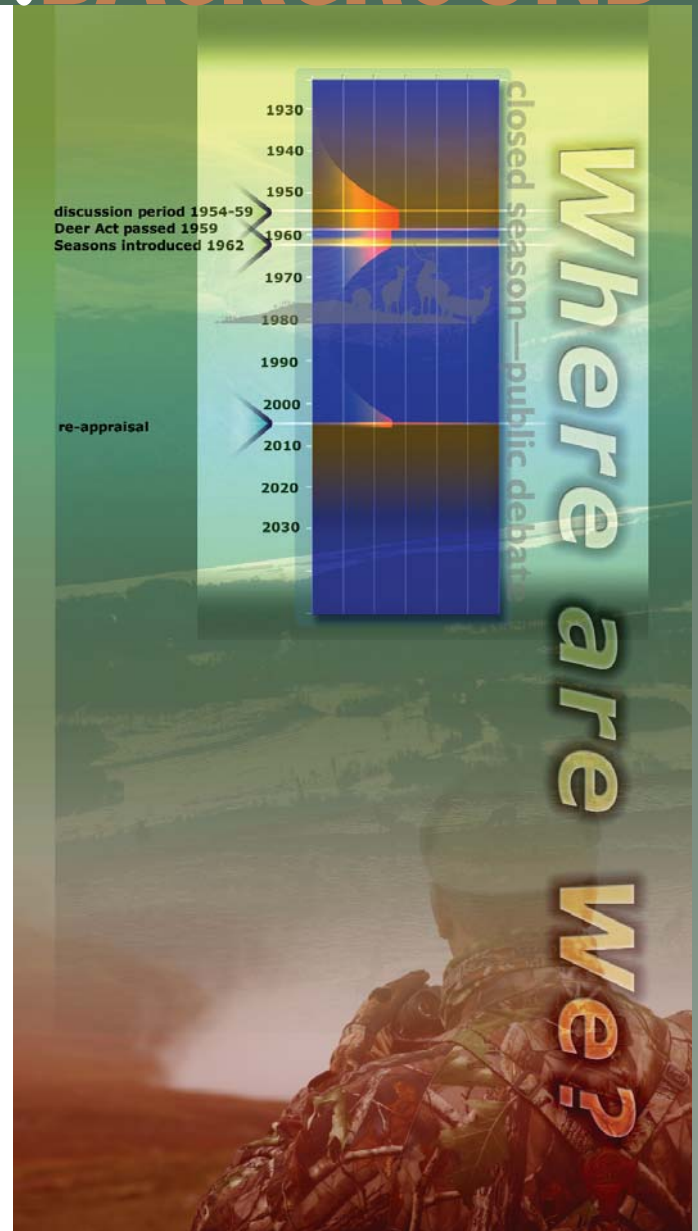
Close seasons are currently prescribed by the Scottish Ministers in Orders made under s.5 of the Deer (Scotland) Act 1996. The Act allows for deer to be shot during close seasons under certain circumstances:

- ◆ Occupiers have the ability to protect property when serious damage is being or is likely to occur. These individuals do not require authorisation from DCS. (see 5.1)
- ◆ When individuals are authorised to do so by DCS to prevent serious damage or potential danger to public safety. (See 5.1)
- ◆ To prevent unnecessary suffering of deer.

This consultation seeks views on the concepts and issues behind the need for close seasons rather than seeking to concentrate on specific dates. The results of the consultation will allow DCS to provide Scottish Ministers with the best information available when deciding whether any changes should be made to the deer close seasons. However, as welfare is such a key component in the seasons debate, this consultation takes the opportunity to first

consider the degree of responsibility practitioners have when managing and killing wild deer.

When DCS authorises the culling of deer in close seasons (under sections 5(6) & 5(7)) and approves culling under 26(2d) of the Act, individuals authorised must be deemed fit and competent by the DCS. Owners, occupiers and employees shooting during the close season to prevent, however, do not require to be assessed as fit and competent as no DCS authorisation is required. There is therefore no explicit consideration by a third party of that individual's fitness nor competence to cull deer in the close season.



DCS, in its Report to Scottish Ministers On A Review Of Deer Legislation, has previously questioned the validity of this approach. In recognising the right of individuals to protect property, DCS remains of the opinion that any protective action should be proportionate not just to the damage experienced or the threat of such, but also to the impact on animal welfare. Further, DCS believes that all who shoot deer must in addition to being fit and competent in culling, have the necessary knowledge of deer life cycles to avoid compromising welfare.

The consultation paper takes the form of a further five Chapters:

2 Welfare Responsibilities explores the basic tenet that welfare is the foundation upon which decisions, relating to how society deals with wild deer, are taken. The opportunity is taken to discuss how this principle should be realised in practice.

3 The Reason and Purpose For Close Seasons explores whether there should be close seasons for deer in the first place, and if there should be, then what can the seasons be seeking to protect and how.

4 If There Are Close Seasons Under What Circumstances Can Deer Be Culled During Them? seeks to discuss and identify whether there are occasions during a close season that deer could be killed, for example to protect property or in the interests of public safety.

5 How Should Those Taking or Killing Deer Within Any Close Season Be Regulated? explores whether there is a requirement to monitor and regulate those who kill deer during the close season and, if there is, how this should be done.

6 How to Respond simply sets out how you should respond.

Within each point a number of questions are posed. Each question has an initial heading that is expanded upon and the specific points on which the consultation is seeking your comments, are highlighted in the text box.

A summary of the questions is provided at the end of the consultation. It is requested that you use this to provide a summary of your responses to each of the questions posed.

The deer sector, as with any specialist sector, has developed its own language and terminology. This consultation paper has, as far as possible, attempted to present the issues in a manner that makes them as accessible to as wide an audience as possible. The consultation is, however, about a specific issue and as such some prior knowledge of the deer sector has had to be assumed.

DCS had previously commissioned a number of reviews to help inform the consultation. These being:

- ◆ RP43 Seasons: Calving and independence dates
- ◆ RP44 Seasons: Review of prevention of damage in closed seasons from other countries and their reasons for seasons
- ◆ RP45 Seasons: Reasons behind 1959 and subsequent legislation
- ◆ RP50 Seasons: 'Mental well being' issues
- ◆ RP53 Seasons: Recreational access

Summaries of these Reviews are available at: <http://www.dcs.gov.uk>

2:WELFARE RESPONSIBILITIES

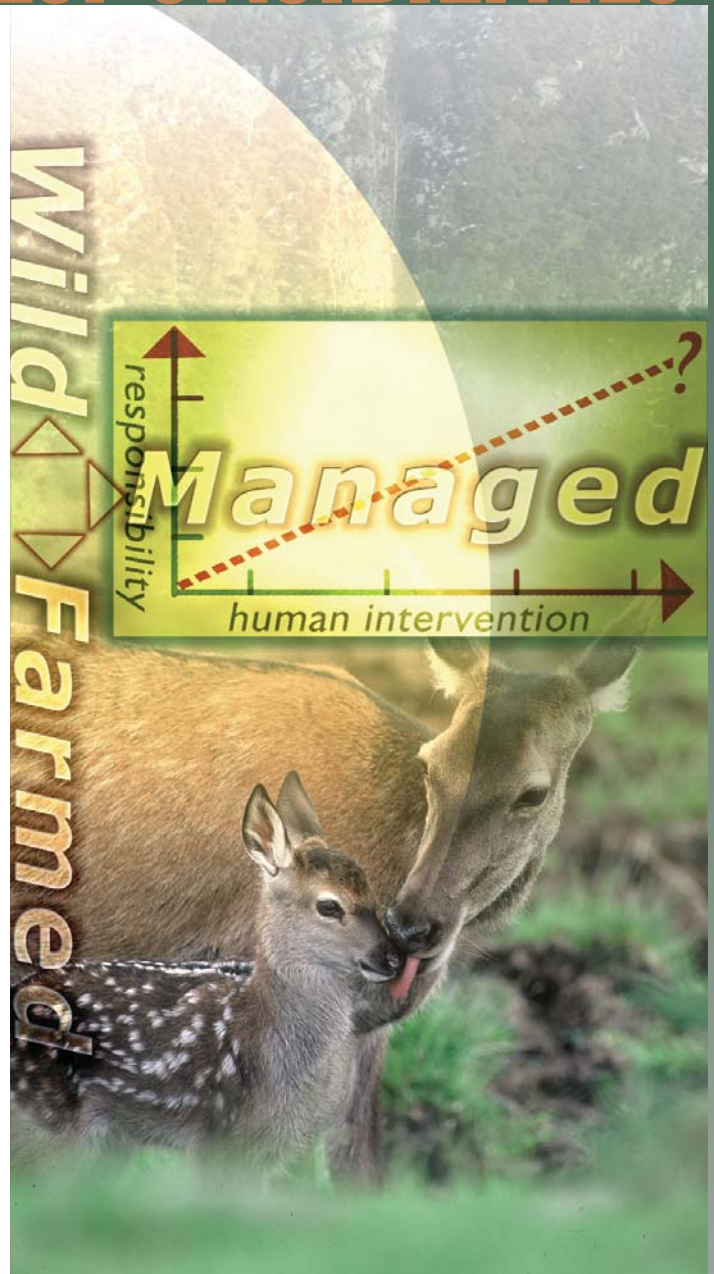
2.1 Should there be a legal duty of care for those who manage deer?

Wild deer populations when managed arguably fall between farmed livestock (for which rigorous welfare legislation applies) and wild mammals (for which minimal welfare legislation applies).

A DCS organised deer welfare workshop held in October 2003 (and attended by representatives from animal welfare organisations, veterinary associations, deer management organisations and public bodies), produced a draft of possible Best Practice Guidance on 'Welfare: definition and assessment' which states:

"With rights go responsibilities... deer managers have some moral responsibility for wild deer because they are managed and exploited for human benefit." and "... the greater the level of intervention, and the greater that the intervention is for the benefit of man, the greater the moral responsibility for those involved. Examples of such intervention which may have an impact in relation to deer include: fencing, e.g. removal of access to wintering ground or shelter; supplementary feeding or sudden withdrawal of the same; culling...; disease control measures."

A SEERAD deer welfare workshop held in June 2004 explored the concept behind the provision of Codes of Practice establishing duties of care for those who manage deer. Such Codes would imply a move towards placing a legal as opposed to a moral responsibility on those who manage deer along the lines outlined above.



It has been suggested that these Codes could be used to define what types of action, behaviour and obligation those involved in managing deer would be expected to adhere to. The Codes would, therefore, be used much in the same way as the Highway Code is presently used or in the manner that the forthcoming Access Code further guides what responsible access should mean in practice.



2.1 Should there be a duty of care, prescribed in legislation, on those who manage deer? If so, why and how? Alternatively should Codes be introduced?

2.2 Should all those killing deer be expected to demonstrate a degree of competency?

Currently under the Deer Scotland Act 1996, DCS is able to grant an authorisation or approval to take or kill in the close season under Section 5(6), for scientific purposes under Section 5(7), for emergency measures under Section 10(4), for culling at night under Section 18(2), using vehicles to drive deer under Section 19(2) and to a controller nominated by an occupier of enclosed land under Section 26(2), if satisfied that the controller is 'fit and competent'.

From a welfare perspective this is interpreted as meaning fit to cull deer competently, i.e. able to cull deer safely and in as humane a fashion as possible. Currently 'fit and competent' is assessed for the purposes of authorisations through the holding of a valid firearms certificate and the applicants voluntary description of experience (usually expressed in terms of the number of years of stalking experience) and qualifications (eg Deer Stalking Certificates Level 1 & Level 2).

This assessment of 'fit and competent' applies only to those seeking authorisation under the provisions outlined above. For large numbers of deer shot both in and out of season, there may be no check as to whether those responsible for their culling would be able to meet minimum standards of competency and what those should be. (see Table 1 for breakdown of how deer are culled out of season).

It could be argued that any requirement to demonstrate fit and competence should be linked to the granting of a Firearms Certificate for deer stalking. An other approach could involve the implementation of a unified system similar to North America and Northern European countries where all deer culled are identified with a tag only issued to those who have demonstrated their fitness and competence through a formalised assessment process.



2.2 Should all those who kill deer at anytime, including sporting clients and first time shooters, be required to demonstrate that they are able to meet minimum standards of competency? If so, how?

Year 2003/2004 figures	Number	% of deer culled out of season
shot under occupier rights. No assessment of fit and competence by DCS	10,968	67%
Shot under 26(2) approval. DCS assess fit and competence of controller	3,305	20%
Shot under Authorisations issued by DCS. DCS assess fit and competence of controller	2,101	13%
TOTAL	16,374	100%

Table 1: Showing the number of deer shot, during the close season, by those deemed to be fit and competent and those not subject to any approval process. The total number of deer culled during 2003/2004, including those in season, was 96,156 animals.

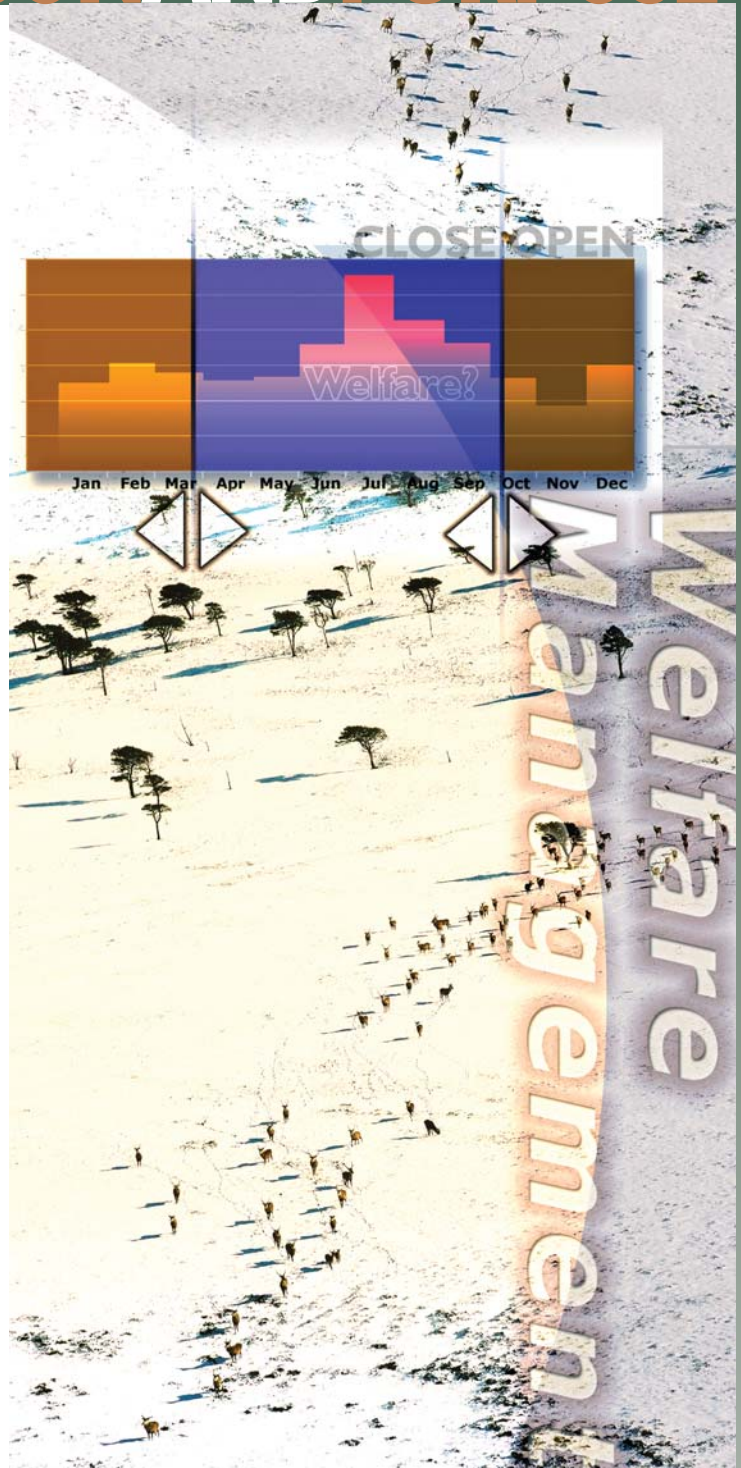
3: THE REASON AND PURPOSE

3.1 Should deer have a close season?

Only certain mammals that are legally taken or killed in Scotland have a close season. For example, wild deer in Scotland are protected while foxes are not. This dichotomy in attitude to different animals has numerous and complex origins. One of the main drivers in how seasons have developed has been a sporting interest in the species concerned. For deer the interest was to enforce protection, at certain times of year, to maximise a stock of game.

The arguments rehearsed in the late 1950's, when the implementation of seasons were first seriously debated, encompassed welfare, deer population management and agriculture. The welfare arguments related to the protection of pregnant females and dependent calves as well as concern over shooting animals in poor condition. Population management arguments sought to halt the assumed decline in red deer numbers relative to the early 1930's. In effect, close seasons were viewed as a mechanism to protect and enhance a resource as described above. The agricultural lobby opposed any close season mainly on the grounds that damage was deemed greatest when the proposed close season would be in place.

Internationally there is a clear emphasis on the use of open season hunting as the main tool to successfully manage and sustain viable and healthy deer populations and, whether explicitly or implicitly, to minimise damage to crops, planted and natural forests and the



numbers of vehicle accidents. The close season is not the primary focus of policy and regulation.

In the United Kingdom culling and the use of fencing have historically been accepted as the most reasonable mechanisms of control within the close season. In Europe emphasis is placed on preventative measures and awareness raising campaigns rather than providing mechanisms to cull during the close season. In

general within North America, there are few – if any – specific measures to minimise damage in the close season, though fencing and habitat enhancement are recognised as key elements of game management. The maintenance of culturally-acceptable levels of deer populations (often including their increase), and the minimisation of vehicle accidents, tend to be the key issues.

Ultimately it could be argued society has a moral responsibility for the welfare of all animals whose populations it seeks to manage. Discussions, based on welfare considerations take the view that the greater the level of human intervention in a species' management then the greater the level of moral responsibility must be assumed for the welfare of that species.



3.1 Under current deer legislation, there is a requirement for a close season to be set for females. A close season for males is discretionary. Are there moral reasons for deer of all species and both sexes having a close season?

3.2 Should the close seasons be voluntary or be defined in legislation?

The benefits arising from the use of close seasons could be encouraged by using Codes of Practice and education rather than by legislation. Such an approach would negate the requirement for a government body to manage an authorisation process and would place the ethical responsibility squarely with the practitioner.

As will be discussed in later questions, owners and occupiers already exercise this option under their owner/occupier rights. It could be argued that this balancing act between the exercise of responsibilities and the need for action is already implemented by a section of practitioners.

Those involved with deer management, however, have to take into account an increasing range of land use objectives. In some cases public money is invested to help secure these wider objectives. There is an argument therefore that the deer sector must become more transparent and accountable and that this can only be achieved through third party intervention, not self-regulation.



3.2 Are there legitimate concerns arising from deer management /control during the close season that can be met through practitioners following Best Practice and voluntary codes of practice? Under what circumstance do you think that these decisions should be moderated by Government?

3.3 Is there a case to be made for varying seasons by species?

The current close seasons for deer in Scotland vary depending on the species and the sex. Figure 1 outlines these various dates.

In theory these close seasons would be expected to be based on biological differences between the species. Figure 2 outlines some aspects of the annual life cycle for red, roe, sika and fallow deer.

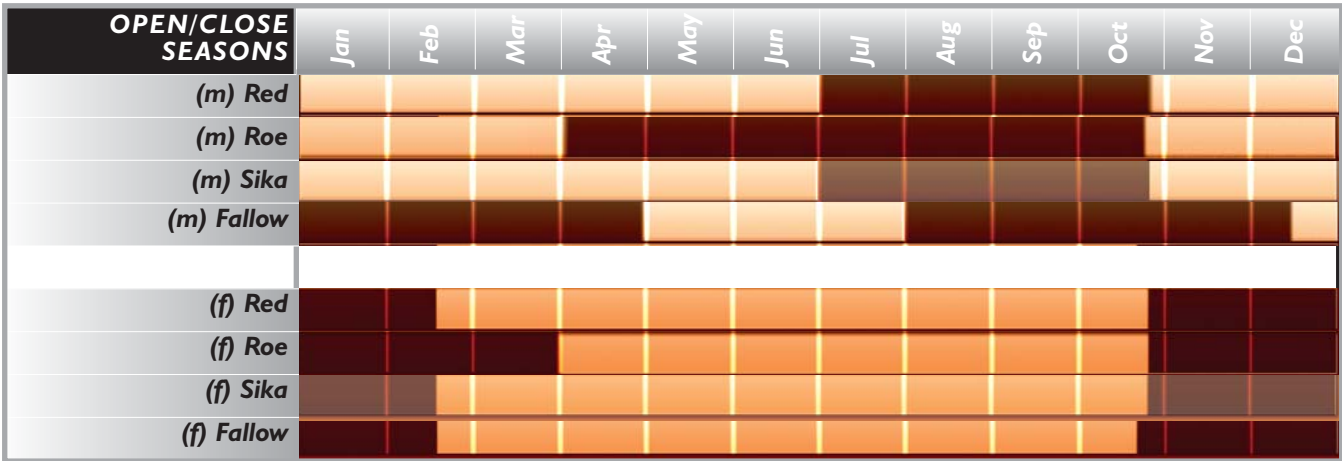


Figure 1: Close Season dates ■ denotes 'open season', ■ denotes 'close season'

In comparing the close season dates and the species life cycles, the seasons for females may well be associated with calf dependency. However other management objectives have had greater influence on the present dates adopted. These other objectives will be discussed over the following questions.



3.3 Should seasons vary by species?

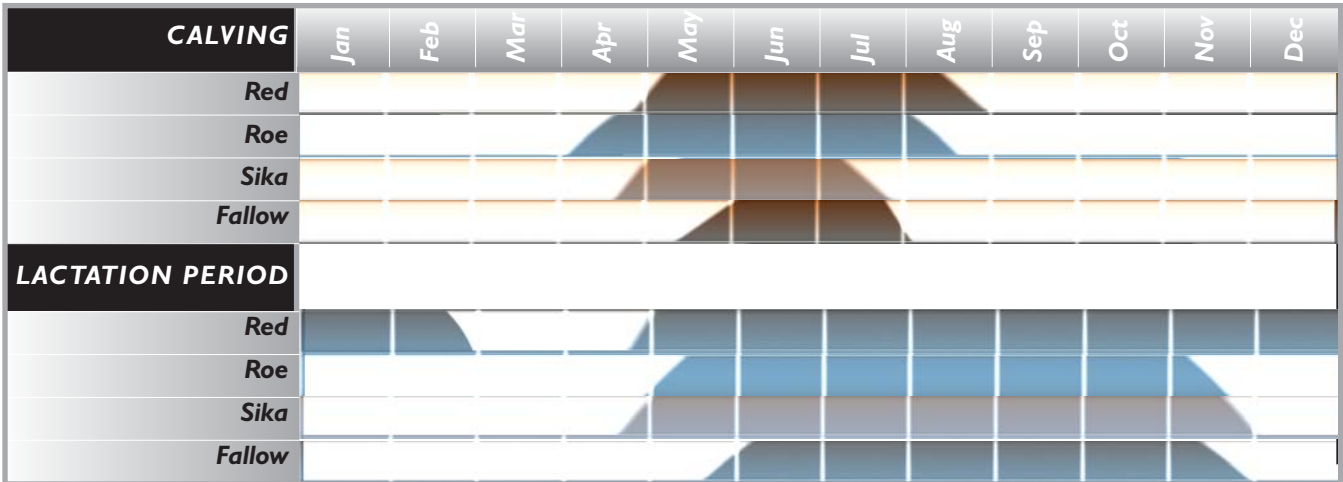


Figure 2: Aspects of Annual cycle ■ denotes relevant period
 (these are further described in the Ecology & Behaviour guides, published in Best Practice Guidance.)

3.4 Should seasons be set to encompass variations in habitat?

The quality of the habitat and living environment largely dictates how wild deer populations perform. For example red deer living in woodland are generally larger, calve earlier and breed more frequently than their open range counterparts. In the prelude to close seasons for deer being defined in 1959, a number of arguments were put forward to support the necessity to vary the seasons according to geographical and climatic conditions, despite the inherent administrative and enforcement difficulties.

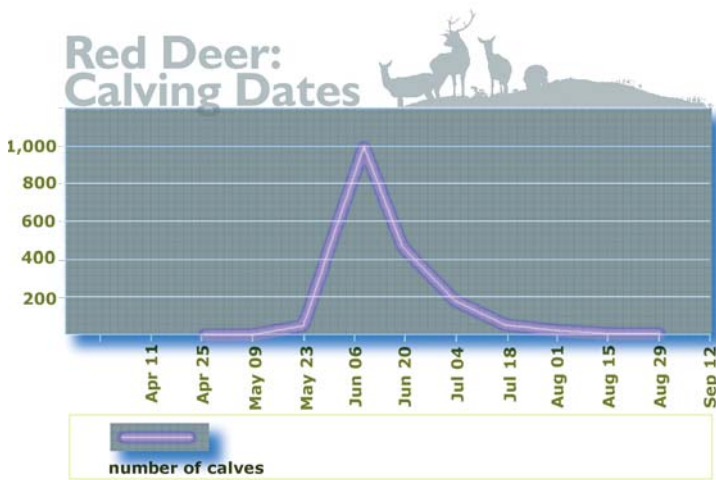
Variations in weather and habitat quality can

also affect calving dates. For red deer, while the majority of calves are born within a 30 day period, variation in dates of 100 days have been recorded in long term studies on Rum, from the Scottish Deer Centre, Cupar, Fife and from predicted calving dates from Forestry Commission, Scotland data (see *Graphs 1, 2 and 3*).

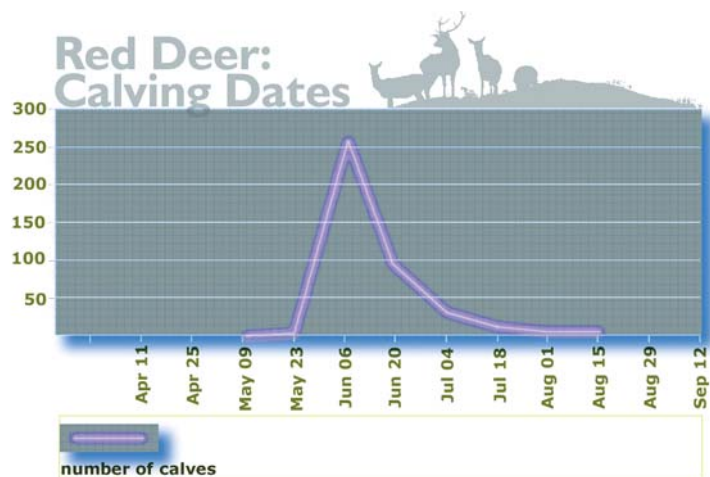
A similar comparison could be made for open range red stags living on wet heath habitats in the North West Scotland as opposed to counterparts on the dry heaths of North East Scotland. The energy demands of surviving the wet and windy winters of the west being markedly different from the drier east.

Factors influencing environmental differences found within the same or similar broad habitats range from the effects of climate and shelter to the more subtle effects such as underlying geology and soils. In considering suitable close seasons on welfare grounds should these environmental differences be considered nationally, by broad habitat types, or at a local level?

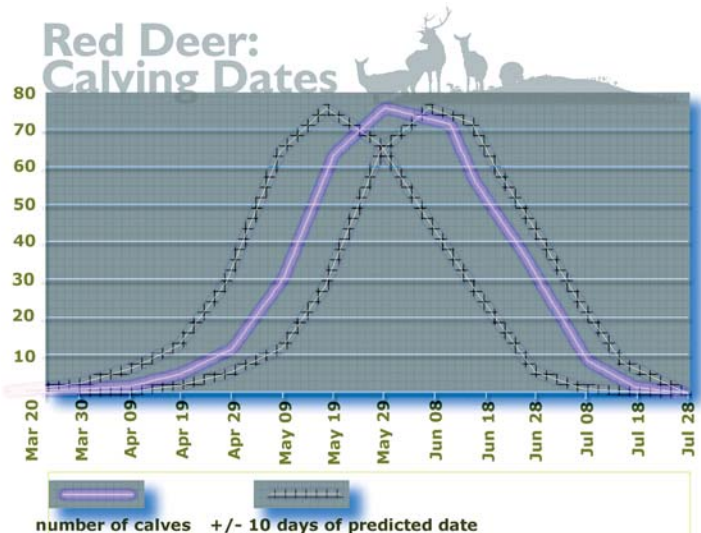
For instance female roe deer living in woodland adjoining fertile farmland in



Graph 1: Calving dates for red deer on Rum from 1971-76



Graph 2: Calving dates of red deer at the Scottish Deer Centre 1992-2003



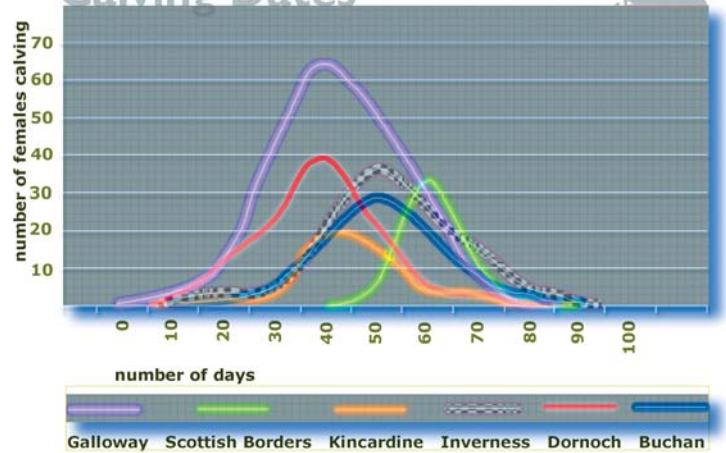
Graph 3: Predictions from foetal measurements of the calving dates of red deer in woodlands

Berwickshire may generally give birth earlier than a neighbouring population residing in a large upland commercial conifer plantation just a few miles away. Even within woodland the range of predicted calving dates across the country is varied (see *Graph4 and Fig2*), with again a spread in dates of approximately 100 days.



3.4 The relationships between climate, habitat and human management objectives are complex. Should seasons vary to take account of either geographical or habitat considerations and, if so, how could this be practically achieved and enforced?

Roe Deer: Calving Dates



Graph 4: Distribution of predicted calving dates of roe deer from foetal measurements

3.5 Is shooting pregnant females a welfare or an ethical issue?

The majority of adult female deer currently culled in Scotland are pregnant but many stalkers express distaste at culling “heavily” pregnant females, i.e. at the latter stages of pregnancy.

Recent research suggests that prior to birth the brain of the ruminant foetus does not receive sufficient oxygen to allow it to function fully. Although physical activity can be observed, the foetal brain is incapable of supporting awareness and therefore the foetus is unlikely to experience suffering. There is therefore no evidence to suggest that culling pregnant females is a welfare issue for the foetus particularly if the foetus is left *in utero* after the mother is shot. The livestock industry slaughters significant numbers of pregnant sheep and cattle annually in the UK.



3.5 Should seasons take account of the stage of pregnancy?

3.6 When are juveniles no longer dependent on their mothers?

Culling females carries the risk of orphaning juveniles. The severity of the welfare implication on the juvenile relates to the degree of dependency on its mother. There is no direct scientific data on how dependent juveniles are on their mothers either physically or mentally. For example, juveniles may rely on their mothers for developing grazing behaviour, or their mother’s dominance may affect the habitat quality that they have access to.

The only measure available that may indicate physical dependence is lactation length. A recent analysis conducted for DCS of cull data

from Forestry Commission, Scotland districts indicated that for all species nearly 10% of females were still lactating from their previous calf one year after giving birth. The rate of decline in the percentage of deer lactating from the calving period varied by district, species and year (e.g. for red deer the decline was faster in Galloway than the rest of the country, while for roe deer the decline was faster in Inverness than in Buchan).

However, the fact that a female is lactating does not indicate the degree of physical dependency of the juvenile on that female. For example a juvenile may be relying on milk for only 5% of its nutritional requirements while relying on grazing for the other 95%.



3.6 When are juveniles no longer dependent on their mothers to the extent that there are no welfare implications?

3.7 Do Juveniles require a Close Season on Welfare Grounds?

A number of practitioners would argue that the ability to cull juvenile deer would increase deer culling efficiency significantly. Juveniles have no dependents and, therefore, any welfare impacts associated with culling them will relate to the psychological impact on the mother. As there can be naturally high mortality among juveniles, this is considered by some to be insignificant.

It is acknowledged that there is an issue relating to female yearlings. Distinguishing between sub-adult and young adult females can sometimes prove difficult. Pregnant yearlings have been recorded, particularly in roe, sika and fallow. There is a possible risk that an adult female with dependent young could be shot under the mistaken belief that she was a yearling with no dependent young.

Thus a female, dropping a calf early in her second summer, could be shot by an individual who would not expect a dependent calf, if there were no seasons for juveniles.



3.7 Do juveniles require a close season?

3.8 Do Males require a Close Season on Welfare Grounds?

Males of all age classes have no dependents and, therefore, there are no associated welfare concerns when culling them. As a result, DCS has never refused to issue an authorisation to shoot red deer stags during the close season when causing damage.

Some practitioners believe that, as open-range red stags have reduced fat reserves post-rut, an extended open season could affect non-target males by reducing available feeding time and using up diminishing energy reserves, particularly if they were subjected to significant disturbance. Control methods used can, however, be implemented in a pulsed rather than continual manner, thus reducing the disturbance impact.

Other practitioners argue that post-rutting open-range stags are already subject to disturbance from hind culling and that the key element relates to management of the habitat through changing the grazing regime to allow adequate winter feeding and shelter. It can also be argued that the main driver for protection of stags post-rut emanate solely from sporting concerns. Concerns are less based on animal welfare than on a wish to protect a commodity when stags move away onto another person's landholding.



3.8 Do males require a close season?

3.9 To what extent should venison quality, sporting objectives, damage control, cull effectiveness, access or other issues influence seasons?

There is a body of opinion that the main driver in the setting of close seasons for deer must be welfare considerations. It is recognised, however, that seasons can impact on a number of other areas central to the management of deer in Scotland. The main areas can be identified as venison quality, sporting objectives, damage control and cull effectiveness, and access.

Venison quality:

While it is accepted that taste in venison is a matter of personal choice, in general the quality of the venison can be related to body condition. The seasonal variation in body condition is shown here for red and roe deer (in Figure 3).

Using these general criteria, the best quality venison for male deer could be expected through the July-August period. These months may not offer the best opportunities for culling and in addition there are problems

associated with ensuring carcasses are quickly brought down to the optimal temperature.

It is estimated that 30% of the total red deer throughput (by weight) occurs in the last week of September and the first three weeks of October. Extending the open the season for males may provide a more consistent supply.

Sporting objectives:

Sporting objectives generally demand the production of males in hard horn; these periods are highlighted here for red and roe deer, (Figure 4).

The close season for red and sika stags runs from the 21 October–30 June. Consequently some practitioners argue that the current close season for the larger species (red, sika and fallow deer) is restricting their ability to utilise stags as a sporting resource without just cause.

The close season for male roe deer covers the period 21 October to 31 March. Consequently this close season would appear to offer protection to bucks whilst growing new antlers and allow full utilisation of those in hard horn.

The close season for fallow bucks is different to red and sika covering the period 1 May – 31 July. Mature bucks cast their antlers during

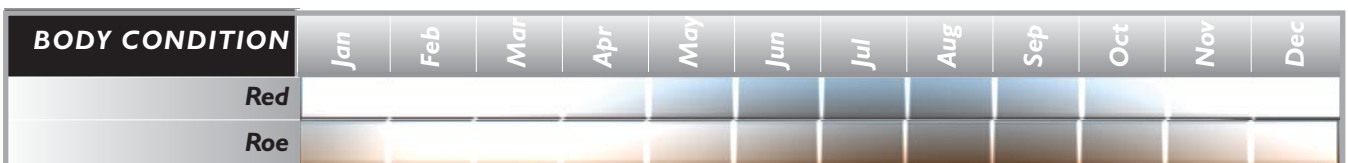


figure 3: Seasonal variation in body condition

■ denotes 'good condition'



figure 4: Seasonal antler development

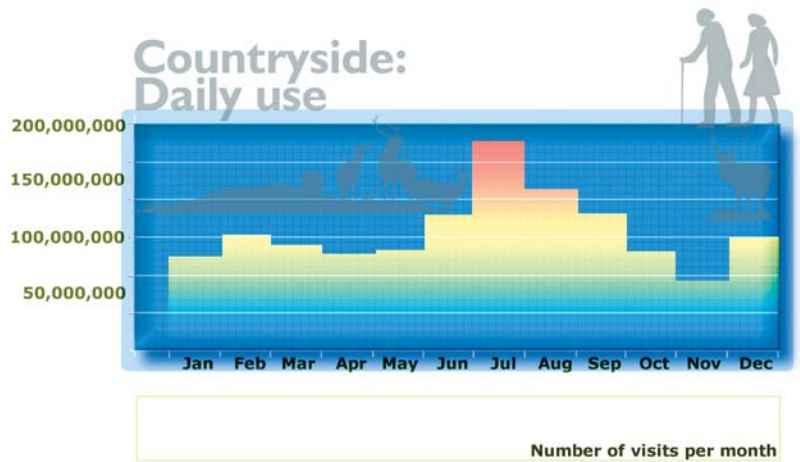
■ denotes 'hard antler' ■ denotes 'antler in growth'

April/May each year, grow them during the summer and clean their new sets in August/September. This close season does not fully protect males during the antler growing cycle but does allow full utilisation of hard antlered males.

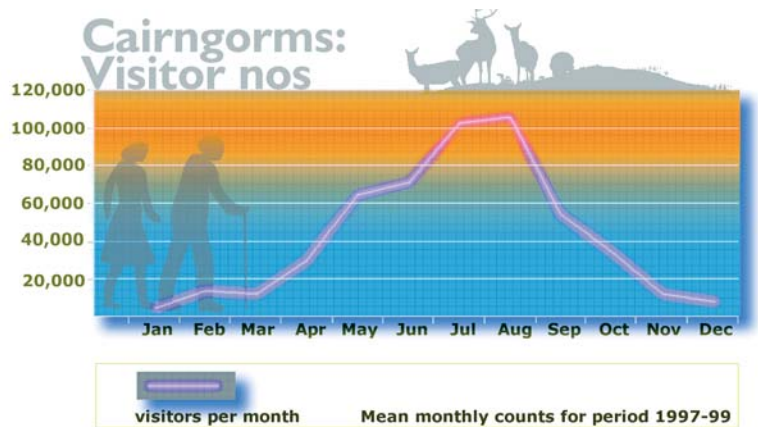
Damage control and cull effectiveness:

Where practitioners are not concerned with sporting objectives or are culling animals as part of a management cull or control policy,

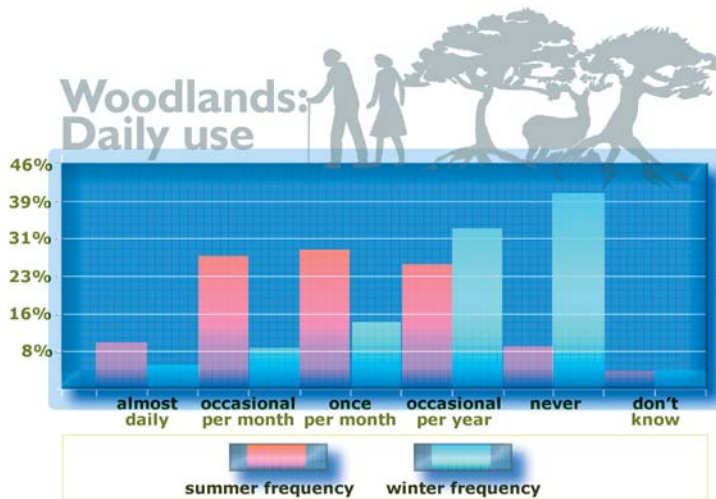
difficulty can be experienced due to the height of vegetation or the location of animals in the summer months. For hill deer, stags tend to be on higher ground during the summer months and in the woodland, males of all species tend to be more active during March to May. The period from June through to August tends to be unproductive months in terms of cull effort. A less restrictive close season could allow any management/control cull to be more spread out and better targeted.



graph 5: Estimated number of visits made to the countryside in Scotland in 2002- 2003



graph 6: Visitors to the Cairngorms



graph 7: Use of woodlands by visitors in summer and winter

Access:

Public access taken on the open hill peaks during the early part of the red stag open season, tailing off after the autumn (see *Graphs 5 & 6*). Further, around 40% of the total yearly usage of 'Hillphones' is accounted for during September. Some practitioners would argue that the present close seasons further restrict culls from being taken outwith the main hillwalking period.

In assessing the access data, it is difficult to determine if deer seasons have an effect on whether individuals take to the hill and walk in woodland or not. While the hillwalking community are aware of stalking requirements and may modify routes taken, circumstantial evidence would tend to indicate that general patterns are dictated more by daylight and weather conditions than by the date of a close season.

Within woodlands, visits are more evenly spread throughout the year but the summer months do show higher visitation rates than in the winter (see *Graph 7*). Again the open season for males coincides with the periods of greatest use.

Other issues

There may be other issues, including employment considerations, that respondents consider relevant in establishing close seasons.



3.9 Should seasons be based purely on welfare or should they also take account of other factors such as venison quality, sporting objectives, damage control, cull effectiveness, access or other issues?

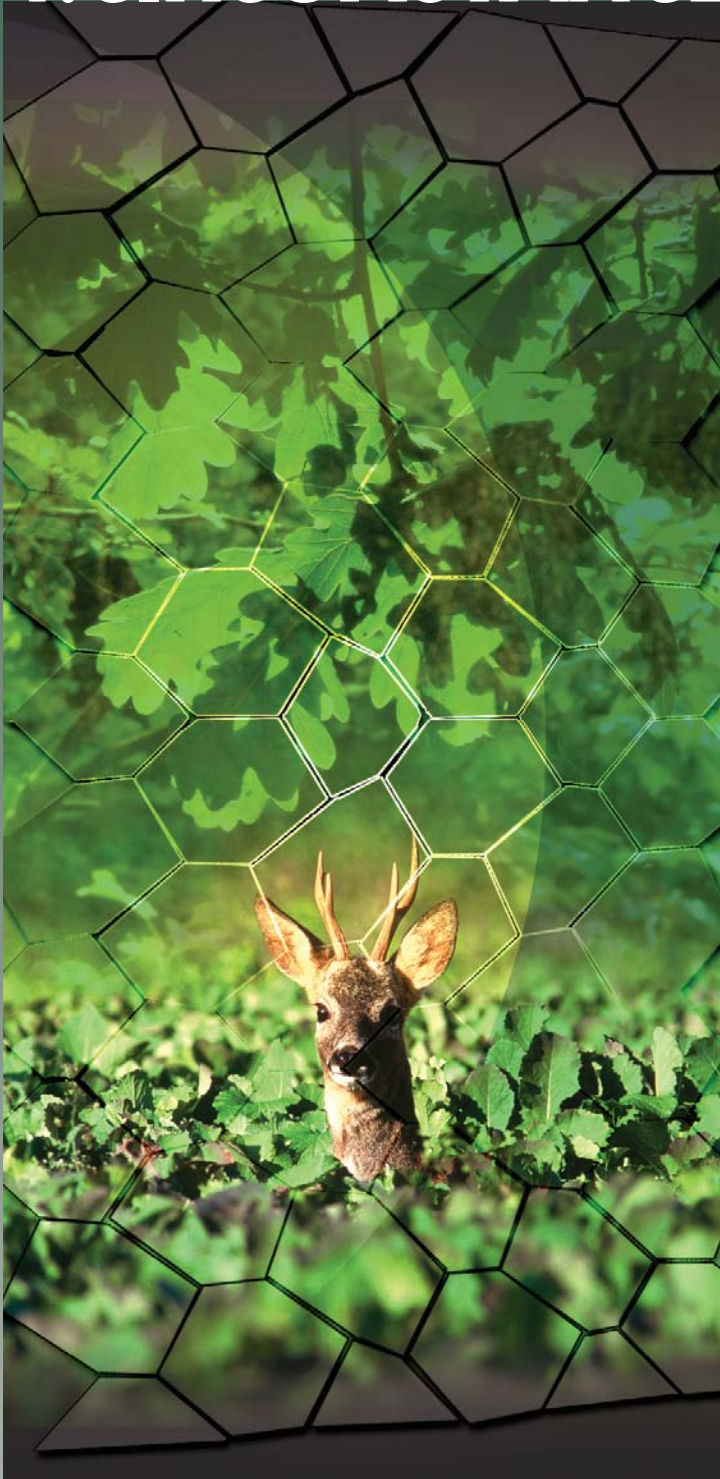
3.10 What dates would you set as Close Seasons for each species and sex of Wild Deer in Scotland?



3.10 Based on your responses provided in Point 3, please provide any suggestions for the dates that you should set as the close season for all four species of wild deer in Scotland, split by sex. In addition please provide a brief rationale for each of those dates.

4: CIRCUMSTANCES THAT ALLOW CULLING

4 : If there are Seasons, under what circumstances can Deer be Culled during them?



4.1 When should the right to protect property allow the taking/ shooting of deer within the close season?

Article I of Protocol I of the European Convention on Human Rights aims to ensure that a person's possessions are not unfairly interfered with by the state. Possessions are things of economic value. They include goods, shares, rights under contracts (including leases), land, rights to run a business, goodwill and damages or other sums awarded by a court or tribunal. The term has a very wide meaning, but it covers only existing possessions and existing legal rights.

In any dispute as to the competence of particular provisions or measures taken by the Scottish Ministers, it would fall to the Scottish Courts to decide whether interference with property rights is justified in the public or general interest. The European Court of Human Rights has held that states have a degree of flexibility when acting in the general interest. Even so, any measure or law that interferes with property rights must strike a fair balance between the demands of the community or society and the need to protect the individual's fundamental rights.

The range of economic interests protected under the European Convention on Human Rights has been interpreted broadly. Whilst wild deer are *res nullius* (belonging to no one), land owners could be considered to acquire possession (i.e. ownership) of wild deer where they are confined on their land. It may be argued, therefore, that, while wild deer are present on a landowner's land, they are

effectively the landowner's property. Farmed deer will be considered as the property of their owner. Therefore, in the case of wild deer present on a landowner's land, it is likely that the deer would be considered as falling within the definition of property for the purposes of the European Convention on Human Rights.

The second paragraph of Article 1 of the 1st Protocol to the European Convention on Human Rights specifically recognises that the state is entitled to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose. The setting of a close season is likely to be seen as a control of use for the purposes of Article 1, Protocol 1. It is likely that the setting of close seasons, which is intended to contribute to the conservation, control and sustainable management of deer, would be regarded as a measure taken by the state in the general interest and as a measure which is proportionate to the aim the state seeks to achieve.

Any assessment of the balance between the demands of society and that of the individual will require discussion on the appropriate balance between public interest, deer welfare and private objectives. Generally, current legislation deals with this by allowing action to be taken to prevent damage by deer, although under section 26 of the Deer (Scotland) Act 1996 which permits owners to take or kill deer during the close season, this must relate to serious damage caused to crops, pasture or human or animal foodstuffs on agricultural land or to woodland. This legislation does not, however, define serious damage.

One definition of serious damage could require the showing of an intention to harvest and make gain from the crop being damaged. This would include grazings and felling of timber. A form of 'means testing' could then be applied to measure the significance of the damage in relation to the anticipated gain. This

approach does not work where the damage occurring is to non-harvestable benefits, such as wild bird cover options, oats to encourage black grouse and conservation headlands when all are planted and funded under agri-environment schemes.

Another approach could require balancing the degree of welfare being compromised relative to the significance of the damage being experienced. This would yet again require the development of a form of 'means testing'.



4.1 When should the protection of property allow the taking or killing of deer once a close season has been set, and how should this be tested?

4.2 When should animal welfare issues allow deer to be shot during a close season?

The present legislation (Section 25 of the Deer (Scotland) Act 1996) allows a calf to be shot, irrespective of sex, that is deprived or about to be deprived of its mother.

Additionally deer can be shot at any time if it is to prevent suffering by an injured or diseased deer. Such exemptions work well when applied on an individual basis.

There is less clarity on the legislative competence of these exemptions when applied to healthy animals being culled in an attempt to restrict the spread through the wild deer population of a contagious disease. This becomes further confused if deer are to be culled when they simply act as a carrier of a disease that does not adversely compromise their own welfare but has serious consequences for other species.

Practical land management operations may at times precipitate welfare issues that could require the culling of deer in the close season. An example could be an area that is newly planted and requires a deer fence erected for forest protection. In the process, however, a

group of deer are deprived of essential winter forage or shelter. In some circumstances the affected deer that need to be culled to compensate for the loss of that range can only be targeted in the close season.

There is an argument that, as welfare of deer should be central, the mechanism to deal with the scenarios described above could be addressed by expanding Section 25 of the Deer (Scotland) Act 1996 to include any action taken in the interest of deer welfare.



4.2 Do you agree that Section 25 of the Deer (Scotland) Act 1996 should be expanded in terms of deer welfare to include disease and starvation? Do you have any you would wish to add?

4.3 In principle when should public safety interests allow the taking/shooting within the close season?

Under present deer legislation, DCS can issue an authorisation to take or kill deer in the close season in the interests of public safety (Section 5(6) of the Deer (Scotland) Act 1996). The term ‘in the interest of public safety’ is not defined. While one deer in the wrong place at the wrong time could very well cause fatal consequences, it could be argued, for example that it is not appropriate to issue authorisations for every deer that is found close to a public road. One approach would be to view public safety interests in terms of a serious threat to human life beyond that which could be reasonably expected.

Further obligations are placed on DCS in that other means of control must be deemed to be inadequate. Mitigation measures for the prevention of road traffic accidents can be varied and may be untested.



4.3 In the interests of public safety, when might deer be taken or killed in the close season?

4.4 In principle when should the protection of the natural heritage allow deer to be shot in the close season?

Under present deer legislation, DCS can issue an authorisation to take or kill deer in the close season to prevent serious damage, whether direct or indirect, to the natural heritage. As in 4.3 above, obligations are placed on DCS to show that other means of control must be deemed to be inadequate.

As for agriculture and woodlands discussed in 4.1, the present legislation does not define serious damage, Guidance on this specific subject simply states that natural heritage includes flora and fauna, geological and physiographical features and the natural beauty and amenity of the countryside.

The discussion on how to define serious damage expressed in 4.1 is relevant to natural heritage discussions. In addition the practical interpretation of natural heritage is also unclear. For example, legal advice has indicated that the present legislation could not be used to shoot deer during the present close season to protect grouse stocks.



4.4 To protect the natural heritage, should the taking or killing of deer be allowed once a close season has been set?

4.5 How can any such exceptions be prevented from being abused?

With any exceptions to general rules, there is always a possibility of the exception becoming the norm, so undermining the rationale and effectiveness of close seasons. To counter this, the regulatory authority would need to encourage maximum cull efforts in season, and have means to verify this.



4.5 What means are there to prevent exceptions to close seasons being over-used?

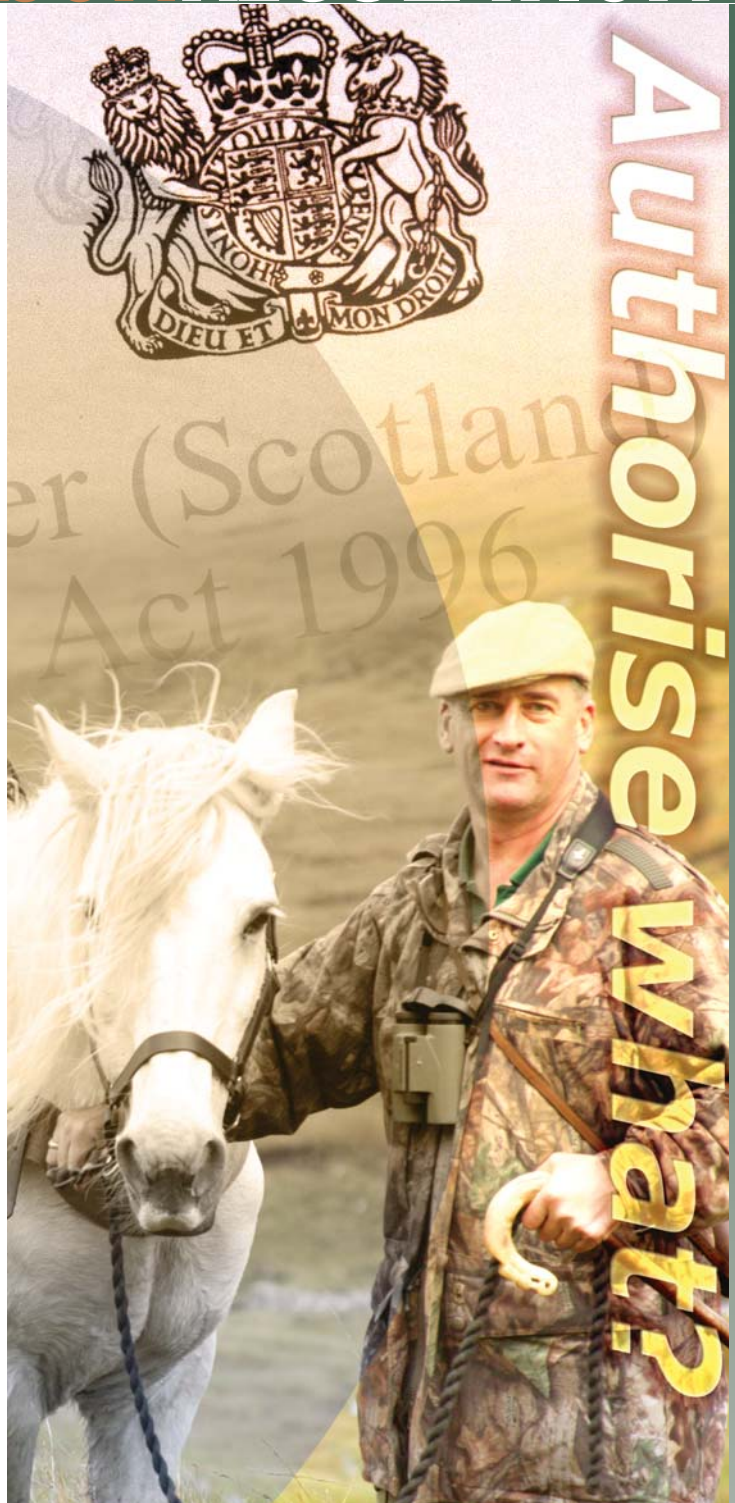
5: CLOSE SEASON REGULATION

5.1 Should all shooting/taking of deer in the closed season be authorised by DCS?

Presently under The Deer (Scotland) Act 1996 DCS can authorise individuals to take or kill deer in the close seasons under section 5(6) and 5(7) (i.e. to prevent serious damage to unenclosed woodland or the natural heritage, or in the interest of public safety or for scientific purpose). In issuing these authorisations, DCS must not only, under section 37 of the Act, ensure that the person authorised is fit and competent but also under Section 5(6)(b) of the Act, that no other reasonable means of control would be adequate. DCS is in effect ensuring the action is reasonable and appropriate, particularly in relation to any possible compromise of welfare issues.

In addition DCS can approve individuals to take or kill deer in the close season under Section 26(2d) (ie to prevent serious damage to crops, enclosed woodland). In this approval process, DCS can make no judgement on the appropriateness of the action, merely ensuring that the individual nominated to take or kill during the close season is deemed to be 'fit and competent'.

Owners, occupiers and employees on the other hand, currently have the right to shoot any deer at any time of year on land enclosed by a stock-proof barrier (not necessarily a



deer fence) without the requirement to seek approval or authorisation from DCS where they believe that there will be serious damage to crops, pasture, human or animal foodstuffs if the deer are not taken or killed.. Currently 67% of deer culled in the close season are culled under owner / occupier rights.

Changes to the rights of owner / occupiers to shoot in the close season would have

5 : How should those taking or killing deer within any Close Season be regulated?

implications for the regulatory burden faced by the private sector. If all those shooting in the close season required to be authorised then the regulatory burden on them would increase. If, however, close season dates were altered and the period for which it was necessary to be authorised changed, then the regulatory burden on those currently requiring authorisation would be altered. Any changes would also have consequences for the regulatory authority, and thus potentially for public expenditure.



5.1 Should all who take or kill deer during the close seasons be subject to the same authorisation process?

5.2 Should the owner/occupier have the facility to take or kill deer immediately in an emergency?

Currently when an owner or occupier shoots deer during the close season under section 26 of the Deer (Scotland) Act 1996, it is justified on the basis of the conditions set out in that section as outlined previously, although there is no requirement to obtain prior

authorisation from DCS. In practice this justification is rarely challenged. In order to address this issue an argument was discussed in Chapter 4 suggesting that, when shooting during the close season (when welfare may be compromised), DCS should substantiate the proposed action. It is recognised, however, that this does not address a situation where an owner or occupier needs to take action immediately to prevent unexpected damage that is occurring there and then.

We seek your views on whether a mechanism should be developed that allows such taking or killing, but that requires notification to be made to DCS within say 48 hours? DCS would then be required to assess whether the action was reasonable, appropriate and followed Best Practice Guidance. If the action was found to be wanting then criminal proceedings would be instigated. While this approach allows for emergency action, it firmly places on the owner or occupier the obligation to ensure the action taken was appropriate.



5.2 How should owner/occupiers deal with an emergency situation within a closed season?



HOW TO RESPOND

This consultation paper seeks views on these issues in this document. Specific questions on which comments are sought are highlighted within the points. However, you may comment on any related issues.

Respondents should provide a summary of their response in the Summary of Questions booklet provided.

The consultation period ends on 4 February 2005 and all responses must be received by then. Responses to this consultation should be sent to :

**Seasons Consultation
Deer Commission for Scotland
Alpha Centre
Unit 11
Stirling University Innovation Park
Stirling
FK9 4NF**



Alternatively responses can be emailed to:
seasonsconsultation@deercom.com

The consultation is available in electronic format at: <http://www.dcs.gov.uk>

Responses will be acknowledged. Respondents should also indicate clearly where they are responding on behalf of a group or organisation, and should include a summary of its aims.

All views and comments received on this consultation will be made available for public examination. We will assume that you are content for us to do this, and that, if you are replying by email, your consent overrides any confidentiality disclaimer generated by your organisation's IT system, unless you specifically include a request to the contrary in the main text of your submission.

DCS will publish a summary of responses. This summary will be available from:
<http://www.dcs.gov.uk>

The consultation is being conducted in accordance with the Scottish Executive's Consultation Good Practice Guidance.

ACKNOWLEDEMENTS: all photographs of deer © Neil McIntyre • photo of stalker & pony and stalker & rifle are courtesy of Graham Downing 2004 • design by Simon Fraser • printed by Compass Print, Aberdeen



CLOSE SEASONS

SUMMARY OF QUESTIONS

please express your views in the white boxes below

NAME: _____

DAYTIME TEL: _____

E-MAIL: _____

ADDRESS: _____

*note: where insufficient space entails over-run, please use separate sheet as explained in General Notes

Q 2.1 Should there be a duty of care, prescribed in legislation, on those who manage deer? If so, why and how? Alternatively should Codes be introduced?

A

Q 2.2 Should all those who kill deer, including sporting clients and first time shooters, be required to demonstrate that they are able to meet minimum standards of competence? If so, how?

A

Q

A



DEER
COMMISSION
for SCOTLAND